A PENOLOGICAL CRITIQUE OF CHRISTIAN AND ISLAMIC
JUSTIFICATIONS OF CAPITAL PUNISHMENT.

A thesis submitted for the degree of Doctor of Philosophy

by
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Abstract.

This thesis provides a critique of the penology of capital punishment from the perspectives of Christianity and Islam.

In order to ascertain the basic theological approaches of both religions towards capital punishment, Chapters 2 and 3 examine the core Scriptural texts, laws and traditions of both Christianity and Islam respectively. These chapters reveal how different methods of Scriptural interpretation and differences in religious practice, within each faith, have led to divergent opinions regarding the legitimacy and acceptability of capital punishment.

Chapters 4 and 5 examine two of the primary penological justifications for the death penalty; retributivism and deterrence. It is demonstrated how they can be used, within secular and religious frameworks, to both condemn and condone the use of the punishment.

Chapter 6 considers a variety of contemporary methods used to execute offenders and asks whether the methods used have any effect on the religious acceptance or rejection of the penalty.

Finally, Chapter 7 presents one of the most controversial aspects of the contemporary death penalty debate, namely the unequal application of the penalty as it pertains particularly to black offenders, indigent offenders and mentally ill offenders. This serious criticism of the death penalty is considered first in general secular terms and then in light of the teachings of both religions and it is asked how the religious arguments in favour of the death penalty stand in light of such serious violations of human rights and justice.

The thesis concludes with the assertion that, while a strong case can be made from within both religions for the use of capital punishment in principle, in practice given current practices of criminal justice systems worldwide there is a strong case to be made, if not for abolition, then at least for a drastic curtailment of the practice and a long-term moratorium on capital punishment on religious grounds.
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<table>
<thead>
<tr>
<th>Arabic Word</th>
<th>English Translation</th>
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<tbody>
<tr>
<td>Ayah</td>
<td>A verse of the Quran.</td>
</tr>
<tr>
<td>Diya</td>
<td>The financial compensation given to the family of homicide victims in exchange for sparing the life of the killer.</td>
</tr>
<tr>
<td>Fiqh</td>
<td>Islamic jurisprudence; Knowledge of the Shariah.</td>
</tr>
<tr>
<td>Haad</td>
<td>The singular for hudud.</td>
</tr>
<tr>
<td>Hadith</td>
<td>The record of the Prophet’s Sunnah (A recorded action, saying or tacit approval of the Prophet Muhammad {peace be upon him.})</td>
</tr>
<tr>
<td>Huduud</td>
<td>Mandatory punishments prescribed by the Quran or Sunnah in Islamic law.</td>
</tr>
<tr>
<td>Ijma</td>
<td>Consensus legal opinion.</td>
</tr>
<tr>
<td>Ijtihada</td>
<td>The independent reasoning of Islamic scholars.</td>
</tr>
<tr>
<td>Qisas</td>
<td>Retaliation for the loss of life or limb. The Law of Equality. (Lex Talionis).</td>
</tr>
<tr>
<td>Qiyas</td>
<td>Analogical deduction in the formulation of Islamic law.</td>
</tr>
<tr>
<td>Sahaba</td>
<td>Companions of the Prophet Muhammad (peace be upon him.)</td>
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<tr>
<td>Shahaha</td>
<td>The Islamic declaration of faith which states: “I bear witness that there is no God but Allah, and I bear witness that Muhammad is the Messenger of Allah.”</td>
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<tr>
<td>Shariah</td>
<td>Islamic law.</td>
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<tr>
<td>Sunnah</td>
<td>The acts, words and tacit approvals made by the Prophet Muhammad (peace be upon him.)</td>
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<tr>
<td>Surah</td>
<td>Chapter of the Quran.</td>
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<tr>
<td>Tafsir</td>
<td>Commentary on the Quran.</td>
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<tr>
<td>Tazir</td>
<td>Discretionary penalties prescribed by a judge in situations where there is no mandatory penalty established in the existing Islamic law.</td>
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<tr>
<td>Ulmaa</td>
<td>Islamic scholars.</td>
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<tr>
<td>Ummah</td>
<td>Islamic community.</td>
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<tr>
<td>Zina</td>
<td>Illicit sexual intercourse.</td>
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## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ABA</td>
<td>American Bar Association.</td>
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<tr>
<td>ACLU</td>
<td>American Civil Liberties Union.</td>
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<tr>
<td>A.H.</td>
<td><em>After Hijrah</em> (the date of the Muslim migration from Mecca to Medina) – The date from which the Islamic calendar begins. Year 1 A.H. starts in year 622 AD (<em>Anno Domini</em>).</td>
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<tr>
<td>A.I.</td>
<td>Amnesty International.</td>
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<tr>
<td>AMA</td>
<td>American Medical Association.</td>
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<tr>
<td>CACP</td>
<td>Catholics Against Capital Punishment.</td>
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<tr>
<td>D.A.</td>
<td>District Attorney.</td>
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<tr>
<td>DPIC</td>
<td>Death Penalty Information Center.</td>
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<tr>
<td>HRW</td>
<td>Human Rights Watch.</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights.</td>
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<tr>
<td>MVFR</td>
<td>Murder Victims’ Families for Reconciliation.</td>
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<tr>
<td>NAACP</td>
<td>National Association for the Advancement of Coloured People.</td>
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<tr>
<td>Pbuh</td>
<td><em>Peace be upon him.</em> (A prayer said after mentioning the Prophet Muhammad’s name (pbuh)).</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights.</td>
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<tr>
<td>U.S.</td>
<td>United States.</td>
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<tr>
<td>USCCB</td>
<td>United States Conference of Catholic Bishops.</td>
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<tr>
<td>U.S. DoJ</td>
<td>United States Department of Justice.</td>
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Introduction.

1- The significance of this study - The importance of researching capital punishment.

In the time it will have taken to complete this thesis,1 thousands of people worldwide will have lost their lives as a result of the legal practice of state-sanctioned executions. It is impossible to predict the death toll in precise figures however, as the number of those executed fluctuates dramatically from year to year. According to figures compiled by Amnesty International, for instance, in the years 2000 - 2005 the number of people officially recorded as having been executed worldwide were: 1,457, 3,048, 1,526, 1,146, 3,797 and 2,148 respectively.2

It is important to note however, that while these statistics may purport to represent the official number of annual executions, the true figure is undoubtedly many times higher. It was estimated, for instance, by a delegate at the Chinese National People’s Congress in 2004, that in reality nearly 8,000 people are executed in China every year. This is a far cry from the 1,770 that Amnesty International had initially estimated.3 Underreporting is a consequence of factors such as international pressure to reduce the number of executions carried out, brought to bear on retentionist nations by human rights organisations such as Amnesty International, Human Rights Watch and the United Nations, as well as the insistence by many governments, such as the Chinese, that the official national statistics regarding their executions remain classified as a state secret.4

In that same time, thousands of people will also have been judicially sentenced to death around the world. Again the exact figure is unpredictable. Amnesty International estimate that in the years 2000 - 2005 the number of people sentenced to death around the world were: 3,058, 5,265, 3,248, 2,756, 7,3955 and 5,186 respectively. Human

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2 These are the most recent annual execution statistics published by Amnesty International (Al). These and all other Al statistics and reports quoted throughout this thesis can be found on Al’s official website at: www.amnesty.org.uk For the latest figures as quoted above, which are correct as of Summer 2006, also see: “Facts and figures on the death penalty” at: http://web.amnesty.org/web/web.nsf/print/0F97867C9B88D6C88025704C003AFF41
3 See the Amnesty International facts and figures website cited above for both estimates.
4 The difficulty obtaining accurate official statistics on the number of national executions carried out worldwide is examined further in Part 7 below.
rights researcher Mark Warren has estimated\(^6\) that the number of people currently awaiting their executions on death rows worldwide is somewhere in the region of 19,474 and 24,546.\(^7\)

Countless other individuals will have spent that time languishing in isolation in death rows cells scattered around the globe where they will have endured deprivation of the most basic of human wants, including their freedom, autonomy and ultimately their lives. In America, death row inmates will typically spend 23 hours a day confined to their death row cells, which measure approximately 6 foot by 9 foot,\(^8\) but at least they can expect three square meals a day and have access to a lawyer. Others around the world, however, are not so lucky and will await their execution, (a period that can run into decades),\(^9\) while suffering from enduring mental, physical\(^10\) and emotional torture, deprivation of food, sunlight, warmth and in many cases where solitary confinement is the norm, human contact.

One of the oldest punishments known to man, the death penalty has always been a controversial subject and millennia of practice have not made it any less contentious. Despite several serious human rights scandals to have reverberated around the globe in the last few years,\(^11\) we are nonetheless still currently living in an era that prides itself in putting the issue of human rights at the forefront of national and international political and social agendas. Nevertheless, despite the popularity of humanitarian, libertarian and egalitarian rhetoric, the practice of capital punishment is, perhaps today more than ever, subject to a vast host of serious and well-founded criticisms.

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\(^6\) Again Al point out that the true figure is probably much higher.

\(^7\) The estimate for 2005 as well as the global estimate made by Mark Warren can be found on the second Al website cited in footnote 2 above.

\(^8\) The dimensions of a cell will naturally vary from prison to prison and state to state. However, 6 foot by 9 is a fairly typical cell size and is the standard dimension of a death row cell in Florida for instance. See Robert Johnson, (1998), *Death Work – A Study in the Modern Execution Process*, (Second edition.) West Wadsworth Publishers, p72.

\(^9\) In America in 2000, Gary Graham was executed after spending 19 years on death row. Similarly, there are cases in Japan where men have been on death row for over 30 years. For this and other such examples see: Roger Hood, (2002) *The Death Penalty – A Worldwide Perspective*, Oxford University Press, p107-111.

\(^10\) This includes some convicts in China having been handcuffed and shackled from the time that they were sentenced until their execution. See *Ibid*, Hood, (2002) p111.

\(^11\) This includes outcries surrounding the treatment of detainees at Guantanamo Bay and Abu Ghraib prison following the latest U.S. led invasion of Iraq in 2003. Nevertheless, despite these scandals, America and the rest of the Western world are still considered to be global leaders in the championing of human rights issues.
In addition to criticisms surrounding the inherent brutality and immorality of punishing with death itself, critiques of the punishment range from substantiated allegations of blatant racial discrimination at every stage of the criminal justice process, to outcries at the disproportionate application of the penalty to the poor; from the unethical execution of juveniles and mentally ill offenders, to the immoral execution of those who have later been proven to have been innocent of the crimes for which they were convicted and killed. In addition to this, the various methods of execution utilised have also been condemned as unethical, inhumane and torturous, delivering death in a manner that contravenes the most fundamental and basic human rights, including the right not to be subjected to cruel and unusual punishments. These are only a few of the more pertinent and resonating critiques of the penalty that will be addressed in this thesis with a primary focus on whether or not they are justified and how they are perceived from a religious perspective.

These facts alone make the study of capital punishment a critical and worthy endeavour and by no means a purely academic, theoretical or abstract one. Literally a matter of life and death, capital punishment is a process that allows for the legal killing of innumerable people every year, often in very dubious circumstances. It is, as such, a very real concern not only to those currently residing on death row but also to their families, their victims’ families and to society as a whole. It is for these reasons that I chose to study the issue of capital punishment.

2- The formulation of the research question and establishing a theoretical framework.

The death penalty is a vast and many-faceted subject, one that can, and has, been considered from a variety of academic perspectives over the years including from the perspectives of history, international law, philosophy, social science and many

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12 This includes cases where the standard and quality of legal representation is severely lacking, and cases in which the racial biases of jury members have been shown to have adversely influenced the deliberation process and their sentencing recommendations. These are just two of the issues examined in Chapter 7 below.


others. Each of these branches of potential analysis involves consideration of a huge host of divergent issues and entails a diverse spectrum of methodological techniques and, as such, has understandably resulted in manifestly different conclusions. However, given that one of the academic disciplines most closely associated with the study of capital punishment is that of penology ("the study of the punishment of crime") and given that I came to this subject with an academic background and interest in the study of penology, I ultimately chose to research capital punishment from a primarily penological perspective.

However, even within a penological framework a number of different approaches can be taken to the issue of capital punishment. There is, for instance, the approach of "sociological penology", which is concerned with investigating issues such as, "the relationship between the ways in which societies are organised – the economic system, the social stratification system – and the kinds of penal system they develop." Alternatively, the issue can be considered from the perspective of a historical penological analysis, which would focus more on the historical development of capital punishment over time emphasising shifts and trends in its use and acceptance. Similarly, a feminist approach can be taken which would investigate an aspect of the punishment as it pertains specifically to women and their treatment within a male-dominated penal system.

17 This includes, for instance, perspectives of criminology, ethics, cultural studies, sociology, anthropology and so on.
19 Following my honours degree in law in 2000, I was awarded my Masters degree in Criminal Justice in 2002, both of which had an emphasis on penology. I also taught Criminal Law in Brunel University for a year.
21 This could be approached in a similar vein to books such as Norval Morris and David Rothman, (1995) The Oxford History of the Prison (Oxford University Press), in which the focus is primarily on the historical development of the prison as a tool of punishment.
Of all of the various approaches that could be taken however, I found myself repeatedly
drawn to, what is to me, one of the most intrinsically interesting positions from which
to study the issue, namely from the position of religious deliberation. The approach I
decided to adopt was one of theological enquiry set within a penological framework. After considering several possible approaches within this context, the title decided on was, "A penological critique of Christian and Islamic justifications of
capital punishment."

However, even when studying theology, there are several different areas for potential
emphasis. Frank Whaling, in his article "Theological Approaches", identifies several
different traditions of theological inquiry including "spiritual theology", "scriptural
theology", "political theology", "social theology" and "practical theology." Further
still, each of these traditions can simultaneously engage in "descriptive or historical
theology", "philosophical theology" or a "theology of dialogue."

My methodology however, as it pertains to the theological aspect of this study, is a
combination of several of the above approaches. It comprises first of identifying the
primary Scriptural texts and authoritative religious traditions within both faiths and then
isolating their key teachings relating to any aspect of capital punishment. This is
followed by a discussion of these teachings in light of theological considerations such
as exegesis (explanation of Scriptural texts), hermeneutics (the theory and practice of
interpretation whereby the reader aims to reconstruct and analyse the original intent of
the author), and the general interpretation of traditional religious texts in relation to
historical, contemporary, political and social contexts. These teachings are then used

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22 The reason for including the word "penological" in the title is that the question specifically relates to
the penal element of the death penalty. Without specifying the word "penological" the question leaves
the focus too wide and may include any number of other elements of punishment from a religious
perspective, such as the history of religion and capital punishment, debates surrounding its ethical and
moral implications, its psychological and spiritual effect on death row convicts and so on. Instead, this
thesis focuses more specifically on religious perceptions of penological issues such as the use of
deterrence and retribution as justifications for capital punishment, and on issues such as the practical
method of carrying out an execution.


24 Ibid. p236.

25 Ibid. pp239-240. While Whaling does not elaborate on these categories much, this reference
nevertheless demonstrates the diversity of approaches available.

26 This is the predominant approach used particularly in relation to Chapters 2 and 3.
to address several different questions in light of the broader death penalty debate, including:

- How is the use of capital punishment justified, if at all, by religious teachings?
- Why are there so many different approaches to the issue of capital punishment from within the same religion?
- How is it possible that one verse or teaching relating to the death penalty can be interpreted in so many different ways, and how is it possible that so many of the standard arguments used by religious abolitionists against capital punishment are based on precisely the same religious ideologies, principles and Scriptural passages that are simultaneously used by retentionists to endorse the punishment?
- How are some of the standard classical penal justifications of punishment, such as retributivism and deterrence, used within Christianity and Islam to condemn or justify capital punishment?27
- Which methods of capital punishment, if any, do these religions prohibit or endorse? And finally:
- How do these religious arguments fare in light of some of the most serious penological criticisms of capital punishment today, such as allegations of its arbitrary administration and accusations of sentencing discrimination?

Having chosen to approach this subject from a theoretical framework of combined penology and theology, and after having identified some of the key areas for investigation, there were still a number of very specific theoretical approaches that could have been utilised. One option, for instance, was to adopt a critical radical approach whereby the focus would be on the religious arguments surrounding a specific issue such as racial inequality within the various retentionist penal systems worldwide, thereafter challenging the current practices of capital punishment and actively inciting practical changes in the capital punishment process at governmental policy levels.

27 When considering the issue of penology from any religious perspective, a variety of important issues will inevitably arise, such as the broad questions of, what is the practical role of religion in society? How does religion affect the law? Should religion affect the law? As well as many other questions relating to the division of Church and State. However, it is not within the remit of this thesis to consider the wider questions of the role of religion in society and the effect that it may, or may not, have on penal policies or the problems with applying these perspectives to the practice of punishment. The focus is purely on what these religions actually teach with regards to capital punishment, regardless of whether on not those teachings translate into policy. Nevertheless, in the course of addressing the primary question, inevitably some of these wider issues will be touched upon in passing.
Nevertheless, despite the potentially resonating echoes of a critical radical approach, (in the sense that I hope that my work will uncover some of the myths and distortions surrounding the issue of capital punishment and religion), the approach is not really “critical” or “radical” in so far as it is not intended to contribute to any active campaign for changes to penal policy, nor is it intended to “disrupt and challenge the status quo” which is a consistent feature of this branch of social scientific research. However, it is “critical” in so far as it challenges traditional notions that either religion is immutably for or against the punishment by demonstrating the complexity of religious doctrines surrounding this issue and showing that, although the official line of both religions may at one time have been overt support for the death penalty, there are a number of significant qualifications that must be borne in mind which, in the current climate of the debate, preclude such over-simplistic observations being entirely valid today.

In addition to providing a critique of Christian and Islamic justifications for capital punishment, this is also intended to be an objective observation, a qualitative study in which the main mode of research undertaken is principally what Victor Jupp refers to as “theoretical research”, in the sense that the “primary aim is knowledge accumulation” as opposed to, for instance, “policy related research” or “intervention based research.” The key research aim of this thesis is therefore to investigate the validity and viability of capital punishment from the perspectives of religious teachings, taking into account a plurality of religious approaches and interpretations, as well as a number of serious religious, humanitarian and social challenges to the death penalty in practice.

3- Why study capital punishment with an emphasis on religious perspectives?

In order to ensure its worthiness, before embarking on any long-term investigation it must be asked whether, in addition to its innate fascination, there is actually any benefit in studying the issue of capital punishment from a theological perspective? I would argue that there are numerous justifications for this type of enquiry. For instance, whether or not one personally holds any religious beliefs or gives any credence to those

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29 See Part 6 of this chapter for more on the qualitative nature of this study

who do, a deeper understanding of the religious beliefs of others on the subject can only serve to broaden our own understanding of the world around us in a variety of ways, in so far as religion may affect social outcomes. Studying capital punishment from a religious perspective, for instance, serves an interesting sociological function by explaining the geographical incidence of capital punishment in certain regions in terms of regional religious affiliations. This thesis points, for example, to the importance of Islamic law (Shariah) in Muslim regions of the world which practice capital punishment, and it shows how these countries, rightly or wrongly, have used religion to form the bedrock of their justifications for their retention of the punishment.

Furthermore, from a point of historical interest, a religious approach to the death penalty can also help to explain why during certain eras, capital punishment has been particularly prevalent, whereas at other times its practice has declined or has halted altogether.31

Knowledge of the religious arguments surrounding the death penalty is also an invaluable resource for organisations and individuals actively involved in campaigning either for or against capital punishment. This is because an understanding of the religious views of the “other side” helps campaigners to “speak the same language” and therefore be more persuasive to the people they are trying to convince.

Furthermore, this type of religious investigation also serves to simultaneously enrich both the realms of religious dialogue and that of the capital punishment debate, and this is one of the primary aims of this thesis. For researchers immersed in the study of either theology or penology it becomes immediately apparent that there is much similarity between the language used in religious discourse and the discourse surrounding the capital punishment debate. The death penalty debate is deluged in rhetoric surrounding the twin issues of right and wrong; good and evil; life and death; punishment and reward; retribution and mercy. These dichotomies relate to competing themes which are prevalent in both the death penalty debate and many topics of religious discourse. This similarity between the two fields of research offers a fascinating opportunity for a greater understanding of both subjects, and there are many questions that permeate the

death penalty debate that are particularly pertinent to religious bodies, organisations and adherents. For instance, if a religious adherent proclaims their favour of capital punishment on the grounds of retribution, it is only natural to then ask how they reconcile that position with their religion’s views relating to teachings of mercy and forgiveness. Similar questions arise as to how one balances the concepts of a loving and merciful God with that of Divine retribution? Arguments in favour of discipline and punishment are similarly countered by teachings relating to the sanctity of life, and so on. Conversely, if a religious body or adherent protests that their religion is opposed to the practice, it naturally follows to ask how this can be reconciled with a history replete with examples of their religion sanctioning the execution of criminals, if that is indeed shown to be the case. These are just a few questions that all religious adherents are faced with when dissecting either their own religious beliefs or the religious beliefs of others, and these are just some of the issues that will be addressed throughout this thesis.

However, reflection on the religious positions on capital punishment, instead of quelling the maelstrom of passion surrounding this subject, in many cases only serves to exacerbate and inflame the controversial nature of this ever-raging debate. Nevertheless, despite the added fervour that a religious analysis ultimately brings to the discussion, it does have its advantages. For instance, it almost always entails a consideration of the moral and ethical dimensions of the issue, which is an aspect which is sometimes lost in the quagmire of a strictly legal or political analysis of the subject. It also brings an element of humanity and compassion to a subject that is too often viewed in terms of stark statistical data instead of in terms of the very real lives potentially at risk. Although objectivity and dispassionate dissociation are hallmarks of much good research in many fields of legal and penal investigation, there are some topics in which a reminder of the human cost is important. Being an issue that revolves so intimately and intrinsically around life and death, capital punishment is one such topic and it is the field of religious argumentation that is so often responsible for bringing that reality back into focus.

32 The issue of objectivity will be further discussed in Part 9 of this chapter.
Unlike a multitude of modern ethical dilemmas, such as cloning, stem cell research and In Vitro Fertilisation, the issue of capital punishment is by no means a new area for theological consideration. In Christianity, for instance, commentaries on capital punishment date back as far as the second century A.D. and ever since then Christian theology has been a primary tool of debate used by both retentionists and abolitionists to support their various positions. Again however, despite millennia of contemplation, rhetoric and studious analysis, the issue today remains as divided and unresolved as ever. While on the one side there exists a host of Christian leaders, lobbyists, spokespersons and organisations all arguing that Christianity is pro-life and therefore intrinsically opposed to capital punishment, there are conversely equally well informed Christians at the other end of the spectrum who argue just as vehemently and legitimately that capital punishment is a practice accepted, and indeed in some cases demanded by Divine decree. This has understandably led to some confusion about what the teachings are with regard to the death penalty from a Christian theological point of view.

33 Theologian James Megivern cites a number of Second Century Christian’s who wrote early commentaries touching on capital punishment, including Athenagorus of Athens, Tertullian of Carthage, Clement of Alexandria, and Origen. See Megivern, (1997) The Death Penalty – An Historical and Theological Survey, Paulist Press, pp20-24. Megivern explains that there are no records of any earlier Christian commentaries on the death penalty as, “struggling minorities in any age are not often in a position to have their story well preserved for transmission to later generations, the early Christians were no exception.” Ibid. p20.

34 Among this increasingly influential and vocal movement of Christian organisations speaking out against the practice of capital punishment are groups such as:

- “Catholics Against Capital Punishment” (CACP). Who can be found at: http://www.cacp.org/pages/585136/index.htm
- “Pax Christi USA” also known as “The National (U.S) Catholic Movement for Peace.” For more on this organisation see Part One (1) (A) of Chapter 2 or see their website: http://www.paxchristiusa.org/index.html
- “Unitarian Universalists Against the Death Penalty” (UUADP).
- Many Christian groups have also officially become active affiliated members of other non-religious organisations such as the “National Coalition for the Abolition of Capital Punishment” (NCACP) including the following Christian organisations: Catholic Committee on Urban Ministry; Committee of Southern Church Men; Episcopal Church; Lutheran Church in America (Division for Mission in North America); American Baptist Church in the USA; Southern Christian Leadership Conference; United Church of Christ; United Methodist Church; United Presbyterian Church; U.S. Jesuit Conference, and so on. These are only a few among many other religious groups affiliated with the NCACP. See Herbert Haines, (1996) Against Capital Punishment – The Anti-Death Penalty Movement in America 1972-1994, Oxford University Press, p203 n12.

- In addition to this are many campaigns such as the one year long “Light the Torch of Conscience” campaign, which aimed to increase death penalty awareness and activity in religious circles and was supported by approximately twenty-four religious bodies, including The American Baptist Churches, the Presbyterian Church USA, the Church of Brethren, the Mennonite Central Committee U.S. and the United Methodist Council of Bishops among many others. Ibid. Herbert Haines (1996) p105.

35 See, for instance, Part 2 (1) (a-b) of Chapter 2 below for a discussion of some Christian pro-capital punishment statements.
The main aim of this study is thus to contribute to the ever-expanding debate by ascertaining and critiquing some of the central arguments surrounding the death penalty, both secular and religious, and then examining and critiquing them from the theological perspectives of both Christianity and Islam. While this thesis aims to demonstrate some of the breadth and diversity of opinion on this subject, in the course of the analysis, it also seeks to remove some of the misconceptions surrounding the teachings of these religions on the death penalty from an objective standpoint.

4- Why focus on the perspectives of Christianity and Islam?

Of the various religions that could have been researched, I opted to study Christianity and Islam for the following reasons:

First is the obvious point that they are the two largest religions in the world today. Christianity has a following of approximately 2 billion adherents worldwide while Islam has an estimated 1.3 billion\textsuperscript{36} followers around the globe. Each religion's perspective on capital punishment is therefore of vital importance as it has the potential to have a profound influence on a huge section of global public opinion;\textsuperscript{37} public opinion that in turn may potentially have a very profound effect on the continued practice or abolition of capital punishment.

Secondly, both religions also play a major role when it comes to the formulation of laws and policies relating to capital punishment in countries that, either directly or indirectly, invoke religion as a basis for their society's way of life. A country such as Saudi Arabia, for instance, follows Islamic law (\textit{Shariah}) as a basis for their legal and social systems and, as such, the Islamic position on capital punishment will be, in theory at least, represented in the laws of that nation. It is important therefore to understand the theoretical religious positions on capital punishment in order to understand and if necessary modify the implementation of the punishment in practice. It is also important to understand religious teachings on the issue even in the context of seemingly more secular states, as the prevailing religion may nevertheless still retain some degree of influence on the state's choice of punishments. In June 2006, for

\textsuperscript{36} See Appendix A for a pie chart showing the major religions of the world.

\textsuperscript{37} In addition to influencing their own religious adherents, countless numbers of non-adherents who simply appreciate the fundamental messages of both faiths are also affected by the teachings of these two religions.
instance, it was announced that the Philippines’ President Gloria Arroyo had signed legislation abolishing capital punishment.38 While the reasons for her decision were manifold, one of the prevailing ones was the fact that she and her Congress had “been under pressure from the influential Roman Catholic Church to scrap capital punishment”39 and in fact, it was reported that the signing came as she prepared “to head to Rome for an audience with Pope Benedict XVI.”40 In a recent speech she highlighted the religious motivation behind her decision when she said, “We yield to the high moral imperative dictated by God to walk away from capital punishment.”41

Thirdly, Christianity and Islam are also the two main religions of the world’s foremost retentionist countries. America, for instance, is a predominately Christian nation in addition to being one of the world’s leading retentionist nations (it ranks as the fourth most prolific executioner in the world.)42 Iran and Saudi Arabia are conversely another two leading retentionist countries, (in 2005 they ranked both second and third respectively), both of who have majority Muslim populations. Understanding their religious positions on the issue of the death penalty may help explain why these countries view and practice capital punishment in the way that they do.

In addition, from a position of comparison both are also monotheistic religions that have much in common at their core theological level including teachings that elevate the sanctity of life; teachings promoting good and forbidding evil, as well as teachings pertaining to life after death in Heaven or Hell. Both religions also share beliefs in many of the same prophets and religious stories including, among many others, those of Adam, Abraham, David, Job, Jonah, Moses and Solomon. Both also claim that their religious laws are inspired, or dictated, directly or indirectly, by God and, for religious adherents at least, this gives their arguments a similarity and weight lacking in many other secular arguments for and against the penalty.

38 This was a decision which has resulted in the immediate commutation of 1,200 death sentences to sentences of life imprisonment.
Arroyo’s presidential predecessor, President Joseph Estrada, had in 2000 yielded to similar pressure and had “ordered a moratorium after strong lobbying by the church” as well as by the European Union and human rights organisations. See Ibid. p1.
40 Ibid. p1. The Philippines is a majority Catholic country.
41 Ibid. p1.
42 See Appendix B for a chart ranking the top six retentionist nations in the world.
Furthermore, religion has long been exploited by proponents as well as opponents of capital punishment. Both sides frequently resort to religious pronouncements and teachings, interpreting them in a way that best reflects their own personal beliefs about the death penalty. Verses of Biblical and Quranic Scripture are a standard weapon in the arsenal of both abolitionists and retentionists and are frequently utilised by both prosecutors and defence attorneys in the summing up of many capital trials. It is therefore important for anyone embarking on a discussion of the death penalty to be familiar with the standard religious expositions raised. Regardless of which position one may personally advocate, it is vital to understand and scrutinise the basis of these religious decrees on capital punishment if they are to be competently debated and either shown to have some merit or shown to be flawed.

Finally, as a British Muslim living in a predominately Christian society, I also have the added advantage of writing from a position of understanding and insight into both religions.

5- Identifying and addressing an imbalance in the capital punishment research currently available.

The market relating to capital punishment is undeniably saturated with a wealth of information. Books, articles, journals, reports, films, and documentaries are just some of the mediums through which the debate has been disseminated. Studies over the years have included comprehensive analyses of the pros and cons of the death penalty (Pojman and Reiman 1998); comparisons of its practical implementation from country to country (Hood 2002; Schabas 2002); comparisons of its practice from time to time (Banner 2002; Gatrell 1994); considerations of its moral implications

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43 See the quote by Gary Simpson and Stephen Garvey in Part 1 G of Chapter 7 below.
44 These range from the classic 1957 film “12 Angry Men”, to the relatively modern (1995) death penalty classic, the Oscar winning “Dead Man Walking.”
46 Roger Hood, (2002) The Death Penalty – A Worldwide Perspective, Oxford University Press, (3rd edition). This is a particularly useful book in terms of its comparative analysis of capital punishment on a global level. It is referred to several times throughout this thesis.
(Sorell 1988)\(^5\); investigations into its deterrent effect (Bailey and Peterson 1998)\(^5\) and so on, with each adopting a slightly different approach to the debate. However, I feel that this thesis has something entirely new to contribute as, although there is material available on different religious perspectives on capital punishment, while conducting my literature survey I found several gaps in the information available. Some of the key areas that seem to be lacking and which I hope to address in this thesis include the following:

1- When considering religious perspectives on the issue of capital punishment many authors seem to confine their investigations to a defence of their own positions and they either explain how their religion is in favour of or opposed to capital punishment.\(^5\) It is much less frequent that authors will canvass both sides of the theological debate with impartial objectivity. I plan however, to address both sides in this thesis. I will outline some of the primary teachings of both Christianity and Islam that can legitimately be used to support capital punishment as well as canvassing those, equally legitimate religious arguments used to reject and condemn it. By “legitimate”, or valid, I mean that these arguments can be supported with reference to authoritative sources of religious Scripture or law and not simply expositions based on faith with no sound documentary basis.

2- Another major gap that seems to exist in this particular field of research relates to the Islamic perspective on capital punishment. Considering the number of Muslim countries worldwide advocating the death penalty on religious grounds, it is perhaps surprising that not more information is available in legal journals to explain why this is so. Of those studies that have delved into the Islamic penal system and its teachings

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relating to the punishment, very few have been carried out in English. My literature survey revealed that, although there are countless numbers of books written in Arabic on all aspects of Islamic law and jurisprudence relating to the death penalty, very few of these books have actually been translated and published in English. Again, this is perhaps surprising considering the amount of interest to have developed in recent years with regards to Islamic law, and particularly considering the current political climate which has certainly led to an increase in the amount of open discussion, debate and interest in many aspects of Islam and its teachings.

Of those studies that have been written in or translated into English, they generally seem to focus on the practice of Muslim countries instead of focusing on what Islam as a religion teaches. As it is quite plausible to argue that the practices of many Muslim countries today are in fact un-Islamic, this approach has led to much misinformation and misunderstanding of Islam’s actual teachings on the subject. These studies also generally do not address the fundamental penological and theological principles underpinning Islamic law, nor do they examine the primary sources of Islamic law themselves. As such, numerous misconceptions have arisen, many of which could be easily cleared up with a little clarity and insight, and this is one of the goals I hope to achieve over the course of the forthcoming chapters.

3- While much research examines capital punishment from the perspective of either Christianity (Megivern 1997), or Islam (Schabas 2000), I know of none that focus on the teachings of both religions simultaneously. As both religions are, at their core very similar, this is again perhaps rather surprising.


54 See Chapter 3, Part 1(2), for a discussion on the distinction between a Muslim country and an Islamic one and why looking to the practices of a Muslim country can be a false indicator of the teachings of Islam.


A literature survey on this subject has led me to conclude that the issue of the death penalty is an area of great uncertainty in many religious circles. When the average person is asked what their religion teaches on the issue of capital punishment the answers frequently seem to be ambiguous and non-committal. Conversely, when statements of any conviction are forthcoming, if one religious leader or representative says that their religion is in favour of capital punishment, another invariably declares that it is not, even if they belong to exactly the same denomination. Capital punishment is a major area of debate and the approaches of religious communities to it are, in many cases, no more unified than a secular approach.

It is for these reasons that I hope that this thesis will add a new dimension to the debate by presenting more than one side of the argument and by looking directly at the sources of religious edicts on the death penalty, instead of simply focusing on the dubious practices of some of its followers. This will mainly be done by reference to the primary sources of the religions’ teachings as contained in the Bible and Quran,57 and by looking directly to the lessons imparted by recognised authoritative religious leaders such as Popes, Bishops, Imams, and other learned theologians and scholars. These religious perspectives will then be expanded and examined in light of some of the major criticisms of capital punishment including its unequal application and its frequently torturous nature.

6- Methods of research and primary sources of reference.

A- Deciding on a methodological approach.

Having decided on the research question and settled on a theoretical framework, the next step was to decide on a methodological approach. This thesis had the potential to take many different forms and a variety of methods could have been employed in order to ascertain what both religions teach with regards to capital punishment. The first and most obvious decision was to decide between undertaking a primarily quantitative or qualitative study. I quickly discounted a quantitative study, although that would have enabled the investigation to employ a range of statistical data gathering techniques such as large scale surveys which could have been used to ascertain, for instance, the

57 In the case of Islam, the Hadith (recorded sayings and teachings of the Prophet Muhammad {Peace be upon him}), which is the second source of Islamic law, will also be looked at for reasons explained in Chapter 3.
public’s views on religion and capital punishment. However, I chose not to utilise these methods, because I wanted to objectively analyse the texts of the religions themselves and examine what they teach, and not what their followers subjectively think or believe that their religion teaches. For the same reasons, I chose not to utilise certain qualitative methodological techniques such as life-histories, case-studies or any form of ethnographic study. Although these methods of studying death-row inmates would have been a fascinating endeavour and although of definite value for studying numerous aspects of capital punishment, it was not suited to the specific purposes of this thesis.

Having decided on a qualitative study of the texts and teachings of both religions I began my search for research material in the library. The primary source materials I used to study this subject were the two Holy texts of both religions, the Bible, (comprising of both the Old and New Testaments) for the study of Christianity, and the Quran for the study of the Islamic teachings on the issue. I read through both texts several times highlighting any verses or passages relating, either directly or indirectly, to capital punishment. This gave an immediate overview of the general approach of both religions towards the death penalty, with several verses immediately standing out either clearly in favour of or clearly against the death penalty. For the purposes of elucidation and elaboration and in order to help come to terms with the various ways that these verses are interpreted by religious scholars, as well as laypersons, I then turned to the next key resource material, namely Scriptural Commentaries. I read several different Biblical and Quranic commentaries for each of the verses that I had already highlighted as being relevant to the issue of capital punishment in religious contexts. This served to clarify why so many believers from both faiths hold such staunch views, one way or the other, on the issue of the death penalty.

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58 It would be a particularly useful method to employ for an investigation into what has come to be known as the “death row phenomenon”, for instance. “Death row phenomenon” is a term used to explain the effect on inmates of prolonged periods of confinement and isolation on death row. This may include bouts of depression, delusion and suicidal tendencies. For more on this “phenomenon”, see Hood, (op. cit. note 9) (2002) pp111-113.

59 Again, this is because I wanted the study to be based primarily on documentary research, and in order for the study to remain as objective and informed as possible I wanted to base it on the texts and practices of the faiths themselves and not on an individual layman’s opinion or interpretation of their faith; particularly one whose opinion on the subject may very well have been tempered by their experiences and direct involvement with the capital punishment process.

60 In Arabic a Quranic commentary is known as a *tafsir*. 
Having looked at the primary textual sources of both religions, I then turned to some secondary sources for an understanding of the religious teachings on this issue. In the context of Christian perspectives I turned to the highest source of tradition and interpretive authority in the form of the teachings of past and present Popes, Bishops and leaders of the Church. This entailed looking at several Catholic Catechisms which make reference to the death penalty, as well as various statements by religious leaders on the subject, much of which can be found by a simple search on-line. For the purposes of the Islamic teachings on this subject my secondary source of reference were the teachings of Prophet Muhammad (peace be upon him) in the form of hadith, books of which can be found in any Islamic bookshop.

My third source of reference for developing my understanding of the religious perspectives on the death penalty was to turn to the scholars and theologians of both religions who have taught on this subject. This simply entailed a literature survey undertaken in various libraries for the key texts on the subject and reading through them for the most relevant commentaries.

In addition to the continued reference to doctrinal sources of religious authority, throughout this thesis one of the most vital components of the research undertaken is a qualitative review of numerous human rights reports compiled by independent non-governmental organisations, such as Amnesty International (AI), Human Rights Watch (HRW) and the American Civil Liberties Union (ACLU). Reports published by these and numerous other organisations help to highlight and explain the current most salient concerns regarding the implementation of capital punishment around the world as well as keeping the status of many pending trials and executions as up to date as possible, so that emphasis can be placed on the most important concerns as they currently exist on a global scale.

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61 The meaning and importance of hadith to Muslims is explained in Chapter 3 Part 5 B below.
62 Specifically the Bible, the Quran and the hadith.
63 The approach taken to the documentary analysis is simply to highlight and discuss some of the numerous human rights reports to have emerged over the last few years. I selected my sample of documentary research from those cases and reports highlighted by organisations such as Amnesty International, as being particularly pertinent or groundbreaking and relating as closely as possible to the themes dealt with in this thesis.
Also of value have been several International Human Rights Doctrines and Conventions, such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). Legal cases relating to capital punishment also have a considerable bearing on this subject and are therefore referred to throughout, particularly a number of key U.S. Supreme Court Cases.\textsuperscript{64}

One important point that emerged early on was that America would be an ideal case study for examining the practices and problems of capital punishment throughout this thesis. This is not only because it is one of the world’s leading retentionist nations, but also because, due to their open and largely transparent nature, much about the inner workings of the U.S. penal system is available through governmental reports and can easily be found in journals and articles as well as on the internet where the information is open to public scrutiny and debate. In contrast:

\begin{quote}
"It is virtually impossible to easily glean such comprehensive statistics about other parts of the world... An attempt to redress the balance involves an immense amount of research and inevitably some reliance on less comprehensive primary resources."\textsuperscript{65}
\end{quote}

Britain is also frequently referred to throughout for the same reasons of accessibility of information, but also often simply to draw a contrast with America’s penal status. Britain’s status as an abolitionist nation serves to show how two countries of similar historical roots, sharing similar economic and social backgrounds, and more pertinently similar religious traditions, can occupy such different positions in relation to the issue of the death penalty.

\textbf{B- An outline of the content and methodological approaches of the forthcoming chapters.}

Having decided that the aim of this thesis was to produce a qualitative investigation of the approaches of two religions towards capital punishment, I found that, due to the wide range of issues to be examined and in order to examine the topic as fully as

\textsuperscript{64} The main body of these cases are considered in Chapter 7.

\textsuperscript{65} See “Methodological Problems of Death Penalty Research” which can be found on the University of Westminster’s Centre for Capital Punishment Studies website at: http://wwwwmin.ac.uk/law/page-160. Also see Part 7 below for a fuller version of this quote and for some of the reasons why access of information from other parts of the world is often problematic.
possible, it was desirable to adopt more than one research method. As the research evolved, I found that the most convenient and satisfying style to emerge was to allow each chapter to adopt a methodology adapted to suit its own particular focus. So while one chapter focuses on the variety of qualitative exegetical methods by which a text of Holy Scripture may be interpreted, another focuses primarily on quantitative governmental statistics indicating, for instance, racial disparities on death row.\textsuperscript{66}

In order to clarify the methods and approaches used throughout this thesis what follows is a brief chapter outline and summary.

SECTION ONE.

CAPITAL PUNISHMENT IN A HISTORICAL CONTEXT.

\textbf{Chapter 1 – Capital punishment in a historical context.}

The first chapter of this thesis begins by providing a brief historical overview of the death penalty as an ancient tool of punishment and social control. The chapter then traces the development of capital punishment over several seminal eras, including the American Colonial period and the eighteenth century Era of Enlightenment. It then goes on to examine, in brief, some of the major events and turning points in the capital punishment chronology to have occurred throughout the nineteenth and twentieth centuries. This includes reference to the emergence and evolution of the abolitionist movement as well as the development of new execution techniques. The chapter then concludes by bringing the issue of capital punishment into the present day by summarising the current status of capital punishment worldwide.

The methodology of this chapter is documentary based in the sense that it seeks to, albeit superficially, chart the development of capital punishment solely by reference to historical records and documented ancient and contemporary capital cases and death penalty legislation. Beginning this thesis by placing the punishment in a chronological context serves the purpose of facilitating a framework from which to begin an assessment of some of the main developments that have been made with regards to both the practice and abolition of capital punishment.

\textsuperscript{66} This applies respectively to Chapter 2 and Chapter 7.
SECTION TWO.
RELIGIOUS PERSPECTIVES ON CAPITAL PUNISHMENT.

Having traced the history of capital punishment from its earliest documented historical roots to its modern day usage, the central theme of this thesis is addressed in the following two chapters, namely, the main religious perceptions of capital punishment from the perspectives of both Christianity and Islam.

**Chapter 2 - Christianity and capital punishment.**

Chapter 2 assesses the position of Christianity with regards to capital punishment. Its primary aim is to examine the question, “What exactly does Christianity teach on the subject of the death penalty?” This inevitably leads to a discussion of several fundamental issues that are key to the very essence of the Christian religion and its core teachings; including a discussion on the relationship between the Old and New Testaments, methods of Biblical interpretation, the teachings of Jesus, the relationship between the state and the individual and many others.

In Part one, after addressing the basic but necessary question of what is Christianity and who are Christians, an argument is set forth for using Catholicism as the main case study for addressing the Christian position on this subject. The chapter then moves on to analyse the issue in a historical context by identifying the classical position of the early Fathers of the Catholic Church. This is followed by an in depth examination of the primary sources of religious authority, including an examination of what the Popes, Catechisms and Bishops traditionally taught, and continue to teach, on the death penalty from a Catholic perspective.

Part two briefly considers some of the other Christian denominations and their respective teachings on capital punishment. As an acknowledgement of the plurality of opinions and approaches within Christianity, a few official religious statements are examined from the pro-death penalty tradition, including that of the American Southern Baptists, as well as from the abolitionist tradition, including that of the Quakers.

Part three explores the inevitable and intrinsically linked question of what Jesus Christ taught with regard to the death penalty. The primary methodological approach here is a
qualitative examination of the Bible as the core Holy Scripture of Christianity. After discussing its origin, various written styles and its numerous versions, the issue of interpreting Biblical Scripture in terms of exegesis and hermeneutics is outlined. This is followed by a textual examination of the main teachings on capital punishment as taught by both the Old and New Testaments. This entails an overview of some of the key passages relating to capital punishment, including an assessment of some of the various ways that both abolitionists and retentionists from within the same religion can legitimately adopt standpoints on opposite sides of the death penalty debate, despite the fact that they read the same Bible and may even refer to the same verses to back up their respectively opposed opinions.

Chapter 3 - Islam and capital punishment.
The focus of this chapter follows that for Christianity, namely to ask what this religion, Islam, teaches with regards to capital punishment. It begins by outlining the major doctrinal sources of Islamic Law (Shariah) including the Quran and the traditions of Prophet Muhammad (peace be upon him). It explains the nature, authority and religious importance of each source followed by their bearing on capital punishment. In each context the types of crimes for which the death penalty may be made available is discussed. Next follows a discussion on the legal conditions and safeguards related to the implementation of the death penalty, including procedural checks and balances; rules relating to the number of witnesses required for a successful conviction; evidentiary requirements and issues related to the due process of law.

Islamic alternatives to capital punishment are then discussed and related to the position of offenders, victims, the families of both victim and offender and to society as a whole, before ending with the chapter’s concluding statements which summarise the key findings.

67 The reason that I am emphasising the qualitative nature of this methodology is that this aspect of the subject could just as easily have been approached by a quantitative method such as content analysis. However, I did not choose to adopt this type of methodology as in a religious debate such as this, it is a case of the quality and not quantity of Biblical verses that decides the issue. To most Christians, it is the belief and conviction they have in a particular verse as opposed to the number of times it is repeated that has the biggest impact. Even fifty pro-death penalty statements may be less convincing than one anti-death penalty verse. This may be because that one verse abrogates fifty others by virtue of its historical context, or by virtue of who the verse is attributed to, or for any number of other reasons.
SECTION 3.

PENOLOGICAL THEORIES AND PHILOSOPHICAL JUSTIFICATIONS RELATED TO CAPITAL PUNISHMENT.

Before moving on to a discussion of the practical methods of implementing capital punishment, the following two chapters consider some of the primary penological and philosophical justifications for imposing the penalty. These are then critiqued, first from a secular and then from a religious perspective.

**Chapter 4 - Retributivism, religion and capital punishment.**

Chapter four considers one of the most frequently cited penal philosophies in the capital punishment debate, namely that of retributivism. After explaining its basic tenets, the chapter turns to address some of the standard criticisms of the retributive philosophy. It then goes on to consider the main retributive arguments as they pertain to the capital punishment debate. Finally, the concept of retributivism is considered in light of both Christianity and Islam respectively.

**Chapter 5 - Deterrence and capital punishment.**

The potential deterrent effect of capital punishment is another frequently cited justification for its continued use. This chapter asks whether the death penalty really does deter serious crime and if it does, does it have a uniquely deterrent effect. In order to answer this question the chapter considers some of the most prominent studies to have investigated the issue in recent years as well as demonstrating how various research methodologies have been utilised by both abolitionists and retentionists to bolster their own positions. The chapter ends with a religious commentary on the role that the general concept of deterrence plays in both Christian and Islamic teachings.

SECTION 4.

THE PRACTICAL IMPLEMENTATION OF CAPITAL PUNISHMENT.

**Chapter 6 - Methods of capital punishment.**

No thorough or fully comprehensive examination of capital punishment would be complete if it merely discussed the issue of taking a life in the abstract and did not consider the graphic realities of the implementation of the punishment in practice. This chapter therefore describes in some detail the history and development of some of the
various methods of execution utilised worldwide, as well as discussing the actual process of execution in some depth.

After outlining some of the execution methods utilised in times gone by, the five primary methods of execution that are currently used in America are examined next, namely lethal injection, the electric chair, the gas chamber, death by firing squad and death by hanging. For each of these methods the key areas discussed include a history of the development of that method; its current usage; the procedural intricacies of that execution technique and finally particular issues of concern related to each particular execution style, including concerns of the medical community as well as concerns voiced by various human rights organisations.

The chapter ends by asking what Christianity and Islam respectively teach with regards to the method of execution. It asks whether they endorse the use of a particular method while prohibiting another. It also asks what they teach, if anything, about the currently used methods of execution. The purpose of this is to really challenge the religious proponents on all sides and take the discussion to its uppermost limits. When a retentionist argues, for instance, that executions should be swift and humane, you ask them how, when presented with evidence that it is neither of those things, that alters their opinion, if at all? Similarly, how are their religion’s teachings of love and mercy compatible with grim reality of how brutal executions are in practice? In some cases the religious adherent may even be forced to tailor their arguments in light of the method being used. They may be able to justify a beheading for instance, arguing that it is swift and humane, but may not be able to justify a more prolonged, torturous method. 68

Chapter 7 - The unequal application of capital punishment.
The primary purpose of this chapter is to evaluate some of the evidence of discrimination 69 in the capital punishment process and to question how fairly the death penalty is utilised in practice. Breaking slightly with the purely qualitative nature of the previous chapters a slightly different approach is taken here. Although not a strictly

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68 See, for instance, Chapter 6, Part 6, in which it is argued that, in Islam although a beheading may be considered to be an acceptable method of execution by some Muslims, electrocution is less acceptable given its likelihood to burn the flesh and its torturous potential.

69 This includes a discussion of racial disparities on death row, economic disadvantages and geographical sentencing discrepancies among other factors.
quantitative study, an inevitable part of the discussion and analysis of this area requires a discussion of several official government statistics and reports. As such, this section entails greater reference to quantitative data than the preceding chapters.

This area of investigation is vital from a theological viewpoint, as even if a religion ostensibly supports the practice of capital punishment for a certain category of crime, it is reasonable to ask whether or not that position changes if it can be proven that, in practice, a number of innocent people have been killed, or that people are being sentenced to death while they are mentally ill, juveniles or unable to pay for adequate legal representation. The issues of racial inequality, indigent offenders and mentally ill offenders are examined from secular, Christian and Islamic perspectives. The chapter concludes with a brief commentary on the travesty of wrongful convictions and asks how the prospect of executing an innocent person impacts upon religious considerations of the death penalty.

SECTION FIVE.
CONCLUSION.

Chapter 8 - Conclusion.
The quest to understand the teachings of Christianity and Islam as they pertain to the death penalty concludes with a brief summary of the main findings.

The research showed that despite the insistence of both pro and anti-death penalty protagonists that their positions are more religiously legitimated than their opponents, neither position is, in fact, necessarily more religiously "correct" than the other. The research revealed a host of legitimate theological grounds in both religions for advocating both positions. While, both religions in principle provide some religious grounds that can be used to support capital punishment as a legitimate penal sanction, they also conversely contain many teachings in their Holy texts and traditions that make the practical implementation of capital punishment a near impossibility. In addition to this, many argue that the modern alternatives to capital punishment make it, in many

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70 In this context I found the governmental statistics, particularly those provided by the U.S. Department of Justice, to be an invaluable resource, especially in relation to issues such as the annual number of executions carried out, the racial composition of death row and so on.

71 Where relevant, graphs, charts, tables, photographs and even maps have been reproduced and included in the appendices in order to help consolidate and clarify the information compiled.
instances, inappropriate to use, even in instances where it may have been supported in the past.

So whilst both religions may have grounds on which they may be seen to support capital punishment *in principle, in practice* however, capital punishment can only be sanctioned as a religiously justifiable penalty in extremely rare cases, if ever.

7 - Obstacles encountered in the course of research.

An investigation this broad and controversial inevitably came across a few research difficulties and although each obstacle was to a large degree overcome, it is worth pointing them out in order to help shed some light on the course these chapters took and in order to aid any future researchers in this field.

The primary difficulty was lack of access to certain types of information. This is a problem that many academics and organisations have come across particularly in this area of research. For instance, ascertaining accurate statistics relating to the number of executions carried out annually is a virtual impossibility in some cases. As Roger Hood says in his book, *The Death Penalty – A Worldwide Perspective*:

"Several of the retentionist countries publish no regular official statistical returns of death sentences or executions, or even if they do they may be unobtainable outside the country in question... This is especially a problem in relation to China, where statistics on any aspect of capital punishment are still regarded as a state secret... It will be impossible to present an accurate picture of capital punishment until all states take seriously their obligations to collect systematically statistical data on this subject and to report their practice, as requested, to the United Nations."

These sentiments are further echoed by the University of Westminster’s Centre for Capital Punishment Studies who say on their website that:

"One of the greatest difficulties of researching in this area is access to accurate raw data. While a quick Google search will provide a host of

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72 As Roger Hood points out, this reluctance remains despite the existence of Article 212 of China’s Criminal Procedural Law of 1997, which requires the publication of all execution details.

sites (some governmental) providing information about the death penalty in the US, it is virtually impossible to easily glean such comprehensive statistics about other parts of the world. Consequently, much of the literature necessary revolves around the US. An attempt to redress the balance involves an immense amount of research and inevitably some reliance on less comprehensive primary resources."

Nevertheless, I have tried to ensure that as far as possible the figures quoted throughout this thesis are the most up to date official statistics available, (as of Summer 2006) compiled and published by well-respected organisations such as Amnesty International, the United Nations and the Death Penalty Information Centre.

Lack of information was also a slight hindrance when it came to researching the Islamic position on capital punishment. This is because, as previously mentioned, although an abundance of material on general aspects of Islamic Jurisprudence is widely available in Arabic, relatively little has been translated into English and the material that has is, in many cases, slightly outdated. Even less seems to have been published on the specific issue of capital punishment. This may be because, unlike in countries such as America, most African and Middle-Eastern Muslim countries do not seem to engage in as much active and open debate on the issue and, for the most part, people seem to accept the official state position on the subject. Although in some cases this may be due to general apathy, in others this lack of debate may be due to genuine religious or moral conviction in favour of the penalty. At the other extreme still, there are many instances in which censorship and restrictions on the freedom of speech are major factors responsible for curbing the amount of public debate and suppressing any substantial opposition to the status quo.

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74 See "Methodological Problems of Death Penalty Research" which can be found at: http://wwwmin.ac.uk/law/page-160. This article further advises that, "to give just an idea of the problems involved, one need only look at the response to the last survey of the UN on capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the penalty. This survey, initiated in 1973, is sent to all UN member states every five years. Only 63 governments replied to the last survey and only 13 replies were from countries retaining the death penalty. Some surveys were returned incomplete."

75 See Part 5 (2) above.

76 This was a definite drawback for my research as, although I speak Arabic at a basic conversational level, my grasp of the language is not one that enables me to read the Arabic literature that would have been necessary for a proper understanding of this subject and I was therefore unable to utilise the wealth of Arabic material that is available.

77 This lack of the freedom of expression has been reported by Amnesty International as a problem in Sudan, for instance, (See "Sudan: Government trying to gag those who tell the world about human rights abuses." Also see A1 Index: AFR 54/101/2004 25/Aug/2004.) Iran has also been accused of using "arbitrary arrest" to curtail the rights of journalists and other civil society activists to report on human
One of the most obvious alternative approaches I could have taken to this thesis is to have restricted the study to that of one religion alone. Although this would certainly have simplified matters and would have allowed for a deeper analysis of one faith, I truly yearned for a deeper understanding of what both religions teach and was fascinated by the thought of studying them both side by side. I found this dual task to be an intriguing exercise and in many cases it served to show how, at their cores, both religions are ultimately very similar. Both are simultaneously concerned with notions of forgiveness and love; and justice and retribution, and although at times these concepts may seem diametrically opposed, both religions, in their own ways, try to account for the differences, allowing for a balance between both justice and mercy.

Ideally, if I had had more resources at my disposal I would have liked to have tried several different approaches to this investigation. For instance, I would have welcomed, for example, the opportunity to interview some Christian and Muslim death row inmates in order to have documented some of their various opinions, particularly on how they feel about their crimes and the punishment the law has deemed fit to give them from their religious perspectives.

Another way I could have prepared for this research would have been to travel to a retentionist country and witness an execution first hand. This would have been particularly easy to arrange in one of the many Muslim countries which execute in public arenas in front of crowds of thousands on a regular basis. However, although this would have served several functions, including putting me in a position where I could personally gauge public reactions for the purposes of the deterrence versus brutalisation theory, I did not feel that such an experience would really have added anything substantial to the thesis and if anything it would probably have affected my ability to remain impartial.

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71 This is an issue examined in Chapter 5.
78 Watching an execution may either have had a desensitising effect, although that is unlikely to occur after watching only one execution, or alternatively it may have made the subject more emotive and personal and thus have impeded my ability to remain detached and objective.
79 These are only two of many examples of countries in which censorship exists to a degree that makes protest a dangerous, if not deadly affair.
Nevertheless, despite the minor obstacles faced in the course of this research, and in spite of the limited resources available, I still had an abundance of documentary and textual material, from a variety of sources, which ensured that the information in this thesis is as relevant, up to date and accurate as possible.

8- Validity, reliability and generalisability.

Validity, reliability and generalisability are touchstone standards of much good academic research and are therefore basic concepts that every researcher must constantly revisit in relation to their work throughout the course of their investigations. In relation to this study, I began in the hopes that if I adopted a sound methodological approach and focused on an examination of authoritative documentary evidence and valid Scriptural authority, I would be able to find one more or less definitive answer to the question, what do these religions teach with regards to capital punishment?

However, I came to realise that, although the research process that I selected can itself be readily and reliably replicated by anyone using the same resource materials and while it would be hard to dispute the facts as gathered by this thesis, it is to be expected and indeed welcomed, that its readers may well differ on their interpretation of those facts. I do not feel, however, that this in any way diminishes the validity or reliability of this thesis. Differences in conclusions drawn, in fact, goes to the very heart of this critique, which is to demonstrate the plurality of approaches to this issue and the multitude of opinions formed as a result of historical and contemporary shifts in political thinking, public opinion and, of course, religious discourse regarding the interpretation of religious texts and teachings. It in no way claims to be representative of “the truth.” It is simply one version or interpretation of the truth relating to the practice of capital punishment from various religious perspectives based on sound documentary evidence.

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80 The issue of generalisability is addressed throughout. For instance, in Chapter 2 I argue that there is not one single, unified, generalisable Christian approach to this issue, but there are a number of diverse approaches which depend on variables such as the denomination being adhered to, the version of Bible being read and so on.

81 This is simply because, as far as possible, I have ensured that the facts provided are from reliable, authoritative sources on the issue, such as religious Scripture, the UN, Amnesty International and so on.

82 This contrasts with a scientific, quantitative study in which it may be hard to argue that there is more than one interpretation of the results thus leaving room for only one dominant conclusion.
9- Objectivity.

The issue of objectivity is important to all forms of research and is particularly relevant in a thesis involving two subjects of such extreme sensitivity and over which many people hold very strong views. It would be extremely easy to allow a thesis to simply become a platform for airing one's own personally held beliefs and convictions.

I came to this topic however, not setting out to defend or prove any theological position one way or another but simply due to an innate fascination as to what the religious positions on this topic are and in an effort to understand how ostensibly the same religious texts and teachings, in both Christianity and Islam, could be used to support both sides of the death penalty debate. However, in much the same way that a female feminist researcher may be criticised for being unable to operate free of the biases that her gender seemingly requires her to bring to her subject, a researcher with religious beliefs may similarly be challenged as unable to shed their religious convictions long enough to engage in an impartial, objective study of a religious matter. However, to that charge I would raise the same defence that an able feminist researcher would raise, namely, that;

"Bias is a misplaced term. To the contrary, these are resources and, if the researcher is sufficiently reflexive about her project, she can evoke these as resources to guide data gathering or creating and for understanding and her own interpretations and behaviour in the research..."^83

In the same way, although this subject can certainly be studied by a person having no religious convictions at all, I believe that as a British Muslim my own beliefs did not impinge this investigation or affect its validity in any way, but on the contrary served only to enhance the depth and hopefully the quality of analysis. It helped that I was already familiar with religious concepts and premises that a non-religious researcher may have been unfamiliar with and may therefore have been distracted by, leading to a shift of focus off the central issue of concern, the death penalty.

I have tried to remain as objective as possible throughout and have used a wide range of divergent sources to investigate each aspect of the debate. It may reasonably be asked, however, how I have managed to keep my own religious beliefs or my own views

regarding capital punishment in check and how, if at all, I have attempted to stop these beliefs from influencing my research.

The answer is that, realistically, it is virtually impossible in a qualitative study of this type to remain entirely objective. Every researcher comes to their study with a set of pre-conceived notions and opinions of which they need to be aware and address upfront. In fact, I initially came to this research as a vehemently staunch pro-death penalty advocate dismayed by the level of violence in the world and disheartened by the seeming inability of the law to deter and in many cases adequately punish criminals.

However, over the course of my studies, faced with the stark reality of death row and the disproportionate representation of the indigent, uneducated and ethnic minorities on death row and faced with the graphic horrors of the too frequent phenomenon of botched executions, I have tempered my views somewhat. In fact, the conclusion of this thesis has come to represent not only what I believe to be a fair representation of the religious approaches, but it has also come to be representative of my own approach to the issue. Namely, that in principle the death penalty can be made to sound acceptable, even desirable, but in light of the way that it is currently administered worldwide, I would very much oppose the death penalty as it is carried out today, except for in the most exceptional circumstances.

As such, I feel that my views have been flexible and I have allowed them to grow with the development of this thesis. I have, as far as possible, allowed my findings to influence my personal opinion and not the other way around.\(^{84}\)

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\(^{84}\) One factor that had the potential to seriously impede my objectivity was the sad news that, unfortunately, in early 2005 my cousin and aunt were murdered in Egypt. Their killer was apprehended and is currently awaiting trial on what are capital charges. However, my opinion on the death penalty has not been tempered by these events and, in any case, as the vast majority of this thesis was completed before that time, it has had no real bearing on the progression of these chapters. It has however reaffirmed in my mind the importance of such debates and the importance of the need for a just punishment as well as the imperativeness of affirming guilt beyond all reasonable doubt before the passing of extreme penal sanctions.
Chapter 1.
Capital punishment in a historical context

1- Introduction.
The focus of this chapter is to set the existence and practice of capital punishment into a historical context, charting the main developments and events in the capital punishment chronology. Given the scope and magnitude of the subject however, it is a practical impossibility to chart the entire history of capital punishment in a single chapter. The trends, practices and policies that have evolved over the years relating to the penalty are far too vast and various to catalogue thoroughly. It is possible however, to briefly and selectively cover some of the major shifts and changes that it has undergone over the years. This chapter therefore, provides a brief timeline of some of the main developments and turning points in the use of capital punishment over the centuries. It outlines some of the major trends relating to the use of the punishment and describes some of the main cycles of the abolitionist movement that gradually took hold, to varying degrees, on both sides of the Atlantic. As is the case for the vast majority of this thesis, this brief synopsis of the history of capital punishment is primarily confined to Britain and America, although where necessary, references and comparisons are also made, in passing, to other countries as well.

2- Ancient capital punishment laws.
Capital punishment is by no means an invention of the modern criminal justice system. It is, in fact, probably one of the oldest punishments known to man. When attempting to assess the historical status of the penalty, it becomes immediately apparent that there is no one defining moment in history that one can point to and say, “that is when capital punishment began.” It is a practice that, more than likely, pre-dates recorded history. It is, in fact, very likely that since time immemorial, most societies around the world will have, at one point or another, employed capital punishment as the ultimate penal sanction for those offenders deemed to be deserving of death.

The earliest historically documented reference to capital punishment is found in the eighteenth century BC Babylonian Code of Hammurabi (1750 BC). Another

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1 A summarised version of this timeline has been reproduced in table form in Appendix A.
2 This is with the exception of Chapter 3 below which focuses on Muslim countries.
3 See Chapter 4 Part 1 below for more on this Code.
historically verifiable record can be found in the seventh century BC Draconian Code of Athens (621 BC), a code that apparently made capital punishment the only penalty available for punishing all offences, including transgressions as minor as stealing an apple or even idleness! There are also records of capital punishment being used in the fifth century BC in the context of the Roman Law of Twelve Tables (451-450 BC). Under this codification, death penalty offences included perjury, causing disturbances in the city at night, and the publication of insulting songs.4

One of the most comprehensive and interesting sources of reference demonstrating the use of capital punishment in an ancient society is, in fact, the Old Testament. This Scripture refers in abundance to capital punishment as the religiously and legally sanctioned punishment for numerous offences in ancient Hebrew society thousands of years ago.5 Although historians have dated some of the older sections of the Old Testament back as far as the ninth and tenth centuries BC, most theologians acknowledge the final version to have been fully compiled by around 1 AD.6

The Imperial Age of Rome (AD 14-337) is another ancient society that is known to have employed capital punishment on a spectacular and often mass scale. So much so, that it has become historically infamous, in this context, for its use of grandiose Roman amphitheatres as a stage on which it set the gruesome spectacle of public executions. It was a spectacle that frequently took the brutal form of, literally, feeding criminals to the lions or setting offender against offender in a grim and perilous fight to the death.

3- Early capital punishment laws in England.

England is one of the most interesting case studies to observe in terms of its changing acceptance of, and relationship with, the death penalty over the years. Although abolitionist today, traditionally England was very much in favour of, and familiar with, the death penalty. As far back as the tenth century AD, hanging was a standard form of punishment in Britain. Although it went through a period of drastic decline during the reign of William The Conqueror (1027-1087), who only allowed for the use of capital punishment during times of war, it was back in common usage by the time of King

5 See Chapter 2 below for an examination of Biblical teachings relating to capital punishment.
6 A.D is the abbreviated form of Anno Domini for the Christian era.
Henry VIII (1491-1547) in the sixteenth century, under whose reign it has been estimated that some 70,000\(^7\) people died for offences such as theft, heresy and treason.

By the early eighteenth century, a compilation of legislation existed in England that designated approximately 200\(^8\) offences as capital crimes, most of which were property related. The Waltham Black Act of 1723,\(^9\) which comprised just one part of what was known as England’s “Bloody Code”, made it, to cite just a few examples:

> "An offence punishable by death for a man, woman or child to steal turnips, shoot a rabbit, pick a pocket, damage a fish-pond, cut down an ornamental tree, set fire to a haystack, consort with gypsies, write a threatening letter, impersonate a pensioner of Greenwich Hospital, or appear on a public highway with a sooty face. Such crimes were punished with a barbarism unparalleled in the history not only of England but of the whole civilised world."\(^{10}\)

In the words of Douglas Hay, “This flood of legislation is one of the great facts of the eighteenth century."\(^{11}\) But what was the reason for this deluge of ruthless laws? There are several social, economic and political developments that occurred throughout the eighteenth century that may help to account for the unprecedented rise in capital offences in England at a time when the rest of Europe was witnessing a gradual decline in the use of the penalty. One such reason was that during the early stages of the Industrial Revolution there was a marked change in economic standards and pressures.

As Arthur Koestler notes in his book *Reflections on Hanging*:

> “The spreading of extreme poverty with its concomitants of prostitution, child labour, drunkenness and lawlessness, coincided with an unprecedented accumulation of wealth as an additional incentive to crime. All foreign visitors agreed that never before had the world seen such riches and splendour as displayed in London residences and shops – nor so many pickpockets, burglars and highwaymen... It was this general feeling of insecurity, often verging on panic, which led to the

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\(^7\) Despite the frequency with which this figure of 70,000 is cited, not everyone agrees with its accuracy. J. A. Sharpe, for instance, has suggested that this traditionally cited estimate is a “gross exaggeration.” See J. A. Sharpe, (1990) *Judicial Punishment in England*. Faber and Faber, p29.


\(^9\) See Appendix B for a section of the 1723 Waltham Black Act.


enactment, by the dozen, of capital statutes, making any offence from poaching punishable by death. And each statute branched out like a tree to cover any similar or related offences."

As a result of such laws, there are innumerable historically sound accounts of people receiving sentences of death under early English law for the most minor of offences. In 1790, for instance, there was a good example of:

"The sheer idiocy of imposing the death penalty for crimes against property. A man named Williams was arrested for stabbing a girl named Anne Porter. His knife wounded but did not kill her. He was charged with wounding and with the capital offence of 'unlawfully, wilfully and maliciously spoiling, tearing, cutting and defacing the cloak, gown, petticoat and shift' of his victim and pronounced guilty by the jury."

Despite the criticism of such laws and their blatant disregard for human life, similar instances continued over the years. "To give just one example, in 1833, a boy of only nine years old was sentenced to the ultimate punishment of death for stealing just two pennies worth of paint."14

In light of the huge number of capital offences created in this era, it is perhaps surprising that the death toll was not considerably higher than it was. It is estimated that between the years 1827-1830, although 451 death sentences were passed, only 55 offenders were actually executed.15 Although Douglas Hay contends that "we have yet to explain the co-existence of bloodier laws and increased convictions with a declining proportion of death sentences that were actually carried out"16, there are, nevertheless, a number of factors that can be seen to have contributed to the relatively low rates of execution over the years. Many executions were avoided, for instance, as a result of the jury’s reluctance to convict petty thieves and small-time criminals of capital offences. Similarly, the royal pardon17 and the benefit of clergy18 also helped to reduce the

13 Bailey, (op cit. note 12) (1989) p41. On appeal however the verdict was eventually overturned.
15 These figures are taken from John Laurence, (op. cit. note 4) (1960), p14.
17 The royal pardon could have the effect, for instance, of substituting a sentence of hanging for one of transportation. See Hay, (op. cit. note 11) (1988) p22.
number of executions actually carried out. Nevertheless, generally speaking it is evident that in the eighteenth century, England, and indeed much of Western Europe, was still very much in favour of capital punishment.

4- The American Colonial Period.
America, one of the world’s foremost retentionist nations today, has been familiar with capital punishment since its very early Colonial Period. Early English and European settlers brought the practice to the “New World” with them, and over the years each American colony came to adopt its own individualised compilation of capital punishment laws. The first recorded execution to have taken place in the USA was that of Captain George Kendall, who was convicted of spying for Spain and was executed in 1608. Soon after, capital punishment was to become the norm for punishing a huge array of offences and it came to be viewed in much the same way that prison is viewed today in terms of its common usage and widespread acceptance.\(^ {19}\)

Appalled by the rapid growth of this penal sanction on the American shores however, abolitionist opposition took hold very early on. Particularly consistent in their vehement opposition to the death penalty were dedicated pacifist and religious groups such as the Quakers. However, in those harsh, early Colonial days there was very little hope of their campaign being much success, particularly as there was no real alternative to capital punishment in an era that pre-dated the prison!

5- The eighteenth century Era of Enlightenment.
In a period epitomised by writers such as Voltaire (1694-1778), Diderot (1713-1784) and Jean-Jacques Rousseau (1712-1778), as well as renowned reformers such as Beccaria (1738-1794) and Bentham (1748-1832), the Enlightenment Era was a period which saw a concerted move away from superstition, religion and the previously dominant role of the church, towards what was perceived to be more scientific and reason based thinking. It was seen as a period bringing the light of humanity, logic and reason to a previously dark period of savage brutality and mystery. Church teachings on

\(^{18}\) Established in 1350, the benefit of clergy was essentially a test that ensured that a literate person could have their life spared. Literacy was usually tested by asking the accused to read a passage from the 51st Psalm. Many illiterate people however, managed to subvert this test by committing the psalm to memory before their sentence was passed.

issues such as life after death were re-examined and challenged. As such, one important penal effect of the Enlightenment Era was a shift away from capital and corporal punishments and a move towards more humane treatment of criminals.

However, it was only in the post-American Revolution (1776-1783) era that the abolitionist cause really began to gain momentum. Many of the great European writers of this age were directly responsible for spreading the abolitionist ethos and many had a major influence on the early American Colonialists. The works of Montesquieu (1689-1755), Voltaire, and Bentham, had a particularly significant effect. However, the writer who is generally credited with having had the most influence in spreading the abolitionist movement to America, and indeed to the world, is Cesare Beccaria (1738-1794). His 1767 essay “Dei delitti e delle pene” (On Crimes and Punishments) was a scathing criticism of the penalty, in which he condemned “the example of savagery it gives to men”\(^{20}\), as well as questioning, “By what right can men presume to slaughter their fellows?”\(^{21}\) It is this work in particular that is acknowledged to have had a profound effect on many high profile and influential American politicians, including Benjamin Rush (1745-1813) and Thomas Jefferson (1743-1826), both of whom were signatories to the U.S. Declaration of Independence. Benjamin Rush, for instance, in his quest to develop the foetal Republican system of post-revolutionary America, argued strenuously against capital punishment.\(^{22}\) He saw it as a by-product of a brutal monarchical government. He thus called for every state to abolish the penalty altogether and to search for and actively employ more palatable alternatives.

Nevertheless, regardless of any theoretical “enlightenment” and despite the growing respectability and influence of the abolitionist cause, that was by no means the end of the death penalty. In Britain, for instance, capital punishment was still a common feature of British life, and well into the late-eighteenth century there were still approximately 200 capital offences on the statute books in England.


\(^{21}\) Ibid. p66.

\(^{22}\) See Banner (op. cit. note 19) (2002) p109 for more on this position.
6. The nineteenth century and capital punishment.

The early to mid-nineteenth century was an important time for the abolitionist movement in England. The previously popular practice of Transportation\(^{23}\) was coming to an end and there was a concerted move to reduce the number of capital offences on the statute books. Sir Robert Peel, influenced by reformers such as Sir Samuel Romilly, reviewed the criminal code and his work subsequently contributed to a reduction in the number of capital crimes. By 1849 only eight offences remained legally designated as capital crimes.

The period between the 1830’s and 1850’s was also an important time for the American abolitionist movement. By the mid-nineteenth century, the number of statutory capital offences had greatly diminished and this was, in part, due to the advance of a new alternative to capital punishment; the penitentiary, which had started to develop in the 1780’s-1790’s. It was hoped, by many, that this alternative would provide offenders with an opportunity to reflect on their mistakes and offer them a chance of repentance, an opportunity that death would not avail them. In light of this aspiration, the penitentiary was widely referred to in terms of its role to aid penance. “Reformers called this new facility a ‘house of repentance’, a ‘house of amendment’ or even a ‘school of reformation.’”\(^{24}\)

Consequently, the hangings that had begun to trouble many Americans began to take place in private in the 1830’s. In 1834 Pennsylvania passed laws that made capital punishment an affair that no longer took place in public and in 1846-7 Michigan became the first state to abolish capital punishment altogether. Rhode Island and Wisconsin were next to follow suit and both had abolished capital punishment completely by 1853.

A number of factors were behind this historic move to execute offenders behind prison walls. These factors included fears regarding the desensitisation of the viewing public; concerns relating to the increasingly loutish behaviour that had become commonplace.

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\(^{23}\) Following the “Transportation Act” of 1717 the British often sent offenders to the United States. However after U.S. Independence in 1776, transportation took convicts to Australia instead. This practice ended in 1857.

at public executions; and even, in a minor part, as a result of economic concerns regarding the loss of earnings made on hanging day.\textsuperscript{25}

Another major driving force behind this sudden interest in abolition was the evolution of a large number of formal organisations and reform societies\textsuperscript{26} that were opposed to capital punishment. This included amongst its ranks organisations such as: The New York Society for the Abolition of Capital Punishment and The Massachusetts Society. In furtherance of their cause, these groups were largely aided in their anti-capital punishment mission by the "revolution in print and communication technology"\textsuperscript{27} which made the debate accessible to a much wider audience.

During the American Civil War (1861-1865) the debate over capital punishment subsided somewhat as the issue of slavery took the forefront. As one activist reportedly said of his inactivity on the anti-capital punishment front during the Civil War period; "I am quietly resting on my oars waiting for the American conflict to cease that I may resume my labours on penal reform... It is useless to talk of saving life when we are killing by thousands. Can't elevate mankind when government is debasing them."\textsuperscript{28}

It took a while for the issue of capital punishment to fully come back onto the agenda, but by the last few years of the nineteenth century the anti-death penalty movement was reaffirming itself once again.

At the same time however, one of the most important developments in the modernisation of the capital punishment process was to occur. That was the 1888 American invention of the electric chair. Introduced as an allegedly more humane alternative to hanging, 1890 saw the electrocution of the chair's first victim, axe-murderer William Kemmler.

\textsuperscript{25} See, \textit{Ibid.} p102, for more details on this point of economic concern.
\textsuperscript{26} See, \textit{Ibid.} p119, for more details on these and other abolitionist organisations.
\textsuperscript{27} \textit{Ibid.} p118.
\textsuperscript{28} \textit{Ibid.} p160. Quoting Marvin Bovee.
7- Capital punishment in the twentieth century.

A- 1900-1930's.

Known as the “Progressive Era”, the first few decades of the twentieth century saw the short-term abolition of capital punishment in several U.S. states. Between 1907-1917, nine states abolished, or at least drastically curtailed, their use of capital punishment.29

However, despite a promising start, the 1920’s-1940’s saw a decline in the power and influence of the abolitionist movement that had looked so promising at the start of the century and capital punishment had in fact been re-instated by many previously abolitionist regions by the 1920’s. This reversal of fortunes for the abolitionists was, in part, a result of World War I and the public’s growing fear of Communism and foreigners in general. The Prohibition Period (1916-1932) and the Great Depression (1929-1940) also served to increase the call for law and order, and with it capital punishment. The situation changed so much in fact, that capital punishment reached an all time high in the 1930’s.30 At its peak there was an average of 167 executions per year.

Another major development of the 1920’s was the introduction of the gas chamber in 1924, which both modernised and allegedly humanised the death taking process.

B- 1940-50-60’s.

In the 1940, 1950 and 1960’s the abolitionist movement was once again on the rise. The issue of human rights was brought into the public eye with the adoption of the Universal Declaration of Human Rights (UDHR) by the UN General Assembly on 10th December 1948. While the Declaration did not specifically prohibit capital punishment, it did state that: “Everyone has the right to life, liberty and security of person”31 as well as stating that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”32

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29 These states and their respective years of abolition were: Kansas (1907), Minnesota (1911), Washington (1913), Oregon (1914), North and South Dakota (1915), Tennessee (1915), Arizona (1916) and Missouri (1917).
30 See Appendix C for two graphs illustrating the number of executions carried out in America between 1608-2000 and 1930-2005 respectively.
31 Article 3 of the UDHR.
32 Article 5 of the UDHR.
It is perhaps not surprising that in the aftermath of decades of bloodshed and “in the wake of World War Two, the atomic bomb and the Holocaust, the vogue for public executions finally came to an end.” By 1966 Gallup poll figures show that public opinion regarding capital punishment was at an all time low with only 42% in favour of the penalty. Gallup poll figures also indicate that this decline in public support was simultaneously accompanied by a rapid decline in the use of the punishment. Whereas in the 1940’s there had been 1,289 executions, there were only 715 in the 1950’s and only 191 between 1960 and 1976.

In addition to this general reluctance to support or sanction more killings, a new and increasingly prominent movement had also begun to take hold, one that helped to pave the path towards abolition, namely the emergence of the Civil Rights Movement. The U.S. Civil Rights Movement of the 1950’s and 1960’s certainly helped to draw attention to the plight of ethnic minorities on death row and as more civil rights organisations became established, more knowledge was disseminated regarding the racial and economic disparities that were prevalent on death row. This new, heightened awareness of the racial and economic realities of the capital process was undoubtedly a valuable contributing factor in the reduction of public support for the penalty.

The abolitionist movement was also strengthened in these decades by a renewed interest and commitment to the idea of rehabilitation, a penal philosophy that most proponents naturally saw as being completely incompatible with the irreversible nature of the death penalty.

This period also saw much de-facto abolition in many European states, including Hungary (1956) and Monaco (1962). Further afield Australia also carried out its last executions in the 1960’s.

34 See Appendix D for a graph representing public opinion about the death penalty.
35 See: http://deathpenaltyinfo.msu.edu/c/about/history/history.4.htm.
36 Most notably this includes organisations such as The National Association for the Advancement of Coloured People (NAACP) and its Legal Defence Fund, as well as the American Civil Liberties Union (ACLU). Although many of these groups had been around for decades, such as the NAACP which was founded in 1909, during these decades they became particularly high profile and outspoken on the issue of capital punishment.
The 1950’s and 1960’s were also an important time in Britain’s gradual move towards abolition. In 1953 the publication of the *Royal Commission Report on Capital Punishment*\(^{37}\) signalled the final death knell of the death penalty in Britain. 1957 subsequently saw the passing of the *Homicide Act*, which created a legal distinction between capital and non-capital murder, thus further reducing the number and scope of capital crimes. Later, in 1965, a Bill known as the “Silverman Bill” received its Royal Assent, culminating in the *Murder (Abolition of Death Penalty) Act* of 1965 which essentially suspended the death penalty for murder for a period of 5 years. Although capital punishment was not to be permanently abolished until some decades later, the last British executions took place in 1964.

C- 1970’s.

The 1970’s was a particularly astounding decade for landmark legal judgements relating to the death penalty in America. One of the most important judicial cases of that era was the groundbreaking 1972 Supreme Court decision *Furman v Georgia*, 408 U.S. 238 (1972).\(^{38}\) In a majority decision, the U.S. Supreme Court effectively struck down all then-existing death penalty legislation, primarily on the grounds that the death penalty had been shown to have been applied in an arbitrary and capricious fashion. It was held that sentencing discretion was too wide and unguided and that there was no adequate explanation available as for why, of thousands of criminals who came before the U.S. courts each year who could potentially have received death sentences, only a handful in fact did. On what grounds were the death sentences meted out to some offenders and not to others? In his famous analogy Justice Potter Stewart likened the chances of receiving a death sentence for murder with the likelihood and arbitrariness of “being struck by lightning.” The Justices conceded that part of the reason for the randomness of the penalty’s application was probably due to elements of the justice process being tainted by unacceptable extra-judicial factors including elements of racism and discrimination.\(^{39}\) It was thus held that, although capital punishment itself was not unconstitutional *per se*, nevertheless because of the “uniqueness of the death penalty... it could not be imposed under sentencing procedures that created a


\(^{38}\) See Chapter 7, Part 1 D (i), below for more on the facts and findings of this case.

\(^{39}\) See Chapter 7, Part 1 and Part 2, below for more on racial and economic discrimination.
substantial risk that it would be inflicted in an arbitrary and capricious manner. It was thus held that until a degree of regulation and control was imposed on the judicial process, capital punishment was not to be utilised. As a result of this momentous decision a moratorium was effectively instigated suspending the death penalty and halting all executions.

The abolitionist victory was short lived however and in 1976 the U.S. Supreme Court in the case Gregg v Georgia, 428 U.S. 153 (1976), effectively re-instated the punishment. It was held by the Justices in this case that the intervening years, (between 1972-1976) had seen enough legislative reform to remove many of the concerns voiced in Furman. Two main reforms had taken place within the legal system that were later cited in Gregg as huge improvements on the previously unacceptable system. The first was the reduction of the number of crimes for which the death penalty was available. Many statutes had been re-written to the effect that now primarily only homicide related offences would be eligible for the death penalty and many cases established the ruling that several previously non-fatal capital crimes, such as rape, could no longer be categorised as capital offences.

The second major reform was the creation of bifurcated trials according to which:

"Death penalty trials would begin to proceed in two distinct phases. At the first stage, the jury would determine whether the defendant did what the state accused him of doing; this is known as the guilt-innocence phase. At the second stage the jury, assuming it found the defendant guilty, would decide on punishment."  

This modification was hailed as an improvement that would increase the reliability and regularity of sentencing procedures. Executions under the new system of revised guidelines thus resumed and on 17th January 1977 double-murderer Gary Gilmore was

40 Per Mr Justice Stewart in Gregg v Georgia 428 U.S. 153 (1976).
41 See Chapter 7, Part 1D (ii), below for more on the facts and findings of this case, as well as some of the legal effects of this judgement.
42 In the case Coker v Georgia 433 U.S. 584 (1977) it was held that the penalty of death for rape was no longer constitutionally acceptable. Similarly the case Woodson v North Carolina 428 U.S. 280 (1976) established the fact that mandatory death sentences were no longer constitutional.
the first man to be executed since the moratorium was issued. He died in front of a Utah firing squad.

It was also in 1976 that Canada finally abolished capital punishment.

D- 1980's.

One of the most important modern day death penalty innovations was the introduction of the lethal injection in 1982.

E- 1990's.

Despite the fact that the last British execution took place in 1964, it took until 1998 to officially and formally abolish capital punishment in Britain. One of the final steps was the passing of the 1998 Crime and Disorder Act, Section 36 of which abolished capital punishment for the longstanding crimes of piracy and treason.

The nineties was also an interesting decade for the American capital punishment system. While the number of executions rose almost fivefold and while the death row population soared from just over 2,000 in 1990 to 3,500 in 2000, the controversy and disenchantment with the system seemed to rise with it. According to Professor Franklin Zimring, "the death penalty system that was operating in the 1990's had no friends and no defenders... The law-and-order lobby led a crusade to stop executions in several states while the error-prone machinery of justice was subjected to sustained scrutiny." 44

Part of this increased dissatisfaction seems to have stemmed from a number of high profile scandals in which seemingly innocent people had been wrongfully convicted and sentenced to death. 45 Many of these mistaken convictions were brought to light following a surge in the use and accepted reliability of DNA testing 46, a science that began to establish itself in the early to mid 1990's and which, although by no means

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45 See Appendix E for the number of exonerations by state from 1973 until 9/2/2005. Appendix F shows the number of exonerations by year from 1973-2004. Also see Chapter 7 below for more on this issue.
46 This includes the case of Nicholas Yarris who on 16th January 2004 was released from death row in Pennsylvania, where he had spend more than half of his life for a crime that DNA evidence proved he did not commit. See Associated Press, January 17th 2004 or the Death Penalty Information Centre under the heading "Innocence."
inviolable, has gone on to attain considerable credibility in both the scientific and legal communities.

F- The worldwide status of capital punishment at the dawn of the new millennium.

On a global scale the prominence and practice of the death penalty has visibly reduced over the years. Due to a combination of both historical and contemporary factors, the number of states practising capital punishment worldwide has followed a gradual downward trend. According to Amnesty International:

“The world continued to move closer to the universal abolition of capital punishment during 2005. By the end of the year 86 countries had abolished the death penalty for all crimes... A further 11 countries had abolished it for all but exceptional crimes, such as wartime crimes. At least 25 countries were abolitionist in practice: they had not carried out any executions for the previous 10 years or more and were either believed to have an established practice of not carrying out executions or had made an international commitment not to do so. Seventy-four other countries and territories retained the death penalty, but not all of them passed death sentences and most did not carry out executions during the year.”

This push towards abolitionism has been greatly aided over the years by organisations such as the United Nations (UN), Amnesty International and Human Rights Watch, each of whom have had major roles to play in bringing the issue of international human rights, as well as many flagrant violations of those rights, to the attention of the world. They have each contributed, in their own ways, to raising awareness of the realities of capital punishment and have been a driving force behind the growing global trend of abolitionism, or at the very least towards the quest for greater regulation of the death penalty.

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48 See Chapter 7 below for more on those exonerated through DNA testing.
49 “Death Penalty Developments in 2005 – Amnesty International.” This quote can be found at: http://web.amnesty.org/pages/deathpenalty-developments2005-eng
Also see Appendix G for a list of retentionist and abolitionist countries; Appendix H for a map illustrating the current status of the death penalty worldwide; Appendix I for a table showing the number of abolitionist countries at year end (1981-2005), as well as a bar chart showing this information (1984-2005).
50 As part of the UN effort to restrict capital punishment, see, for instance, The Resolution of the U.N. Commission on Human Rights, April 28th 1999 as reproduced in Appendix J.
A number of international treaties and conventions have also had an important role to
play in attempting to regulate the frequency and manner in which executions take place.
Currently, at least four international Human Rights documents are leading the call for
the abolition of capital punishment. They include, Protocol 6 and 13 to the European
Convention for the Protection of Human Rights51; the Second Optional Protocol to the
International Covenant on Civil and Political Rights (ICCPR)52 and the Protocol to the
American Convention on Human Rights to Abolish the Death Penalty.53 Another
important human rights document is the UN Convention on the Rights of the Child,
Article 37 of which specifically prohibits the execution of offenders under the age of
18.54

At the end of 2000, another influential voice was publicly added to the long list of those
aiming for abolition when UN Secretary-General Kofi Annan, "stated his support for a
worldwide moratorium on executions when he accepted from Sister Helen Prejean and
others, a moratorium petition signed by 3.2 million people."55

It is important to note however, that just because the trend worldwide seems to be
towards abolition, it does not necessarily follow that the actual number of executions
has fallen over the years. It only requires a few countries to execute a huge number in
order to result in an upward trend of executions, despite a general move towards
abolition. This is evidenced by the fact that, "In 2005, 94% of all known executions
took place in China, Iran, Saudi Arabia and the USA."56

With regards to America, despite the fact that the USA has clearly become one of the
world's leading retentionist nations, and is notably the only Western nation to retain the
penalty,57 it too has taken some interesting steps towards reducing its number of

51 See Appendix K for Protocol 6 and Appendix L for Protocol 13.
52 See Appendix M.
53 See Appendix N.
54 See Appendix O.
55 Jeffrey, L, Kirchmeier, (2002) "Another Place Beyond Here: The Death Penalty Moratorium
56 See "Amnesty International – Facts and Figures on the Death Penalty." This can be found at:
http://web.amnesty.org/web/web.nsf/print/0F97867C9B88D6C88025704C003AFF41
57 This is an observation made by David Garland, who points out that while the USA is not the only
democratic retentionist nation, (India, the world's largest democracy is also retentionist,) nor is it the
world's only fully developed industrialised retentionist nation (Japan is also retentionist), it is however,
the world's only retentionist Western Nation. See: David Garland, (2005) "Capital Punishment and
executions or at least towards humanising the way that those executions are carried out. One of the most interesting developments to have occurred in recent years was the surprise moratorium issued by Governor George Ryan of Illinois on 1st January 2003. A mere three days before leaving office, he announced that he was commuting all 167 of Illinois’ death sentences.\(^58\) In a speech delivered at Northwestern University, College of Law on 11th January 2003, Governor Ryan cited a host of reasons for his decision which included, among others, concerns relating to the immoral conviction of juveniles and mentally ill offenders, and concerns relating to the role that race and poverty\(^59\) play both in the pre-trial and post-trial capital punishment process. He also expressed concern over the potential innocence of current, and future, death row inmates. He concluded with the words, “Our capital system is haunted by the demon of error - error in determining guilt, and error in determining who among the guilty deserves to die.” In unapologetic unambiguous terms he further stated, “To say it plainly one more time... the Illinois capital punishment system is broken.”\(^60\)

A further development occurred on March 2nd 2005 when in *Roper v Simmons*, 543 U.S. (2005), (a decision that has saved the lives of 72 juveniles offenders on death row,\(^61\)) the U.S. Supreme Court passed a long awaited ruling\(^62\) abolishing the death penalty for juvenile offenders.\(^63\) This was a major legal breakthrough\(^64\) as, until that

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\(^54\) While some have openly condemned his decision, others have received it extremely well. So much so, in fact, that some have gone so far as to campaign for his nomination for a Nobel Peace Prize. For a site dedicated to campaigning for his nomination see: http://www.stopcapitalpunishment.org/supporters.html

\(^59\) See Chapter 7 below for more on the role of race and poverty in the capital process.

\(^60\) For a transcript of his speech see: CNN.com/us Saturday/Jan/11/2003.

\(^61\) As of December 31st 2004 there were 72 people on death row for crimes committed while they were juveniles. This constituted 2% of a total death row population of 3471. This is according to Professor Victor Streib “The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes - Jan. 1st 1973-Dec. 31st 2004.” See: http://www.law.onu.edu/faculty/streib Their sentences have now been commuted to life imprisonment.

\(^62\) This was a 5:4 opinion made in the case of Christopher Simmons. This overrules previous case law that had confirmed that the Eighth Amendment did not prohibit the execution of those convicted of committing capital crimes when they were 16 or 17. See, for instance, *Stanford v Kentucky* 492 U.S. 361 (1989).

\(^63\) Juvenile here refers to those under the age of 18 when they committed their offence.

\(^64\) This was a predicable decision however, in light of the Supreme Court’s decision last June to halt the execution of mentally retarded offenders, and in which the Justices did give some indication that the executions of juveniles may soon follow into the abyss. See David G. Savage, *Los Angeles Times*, August 30, 2002. Even more encouraging perhaps was the direct opposition to the execution of juveniles voiced by four U.S. Supreme Court Justices in October 2002. Justice John Stevens, supported by Justices David Souter, Ruth Ginsburg and Stephen Breyer stated that, “The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilised society... We should put an end to this shameful practice.” See: “Supreme Court split, allows execution of man who
point, America had been the country singly responsible for the greatest number of executions of child offenders since 1990. 65 With twenty-two out of thirty-eight U.S. retentionist states permitting for such executions, the U.S. is believed to have been responsible for at least half of the legal killings of juvenile offenders around the world. 66 This is despite the fact that the execution of those who were under the age of 18 at the time of committing their offence is prohibited under several international treaties, including *The International Covenant on Civil and Political Rights*, 67 *The United Nations Convention on the Rights of the Child* 68 and *The American Convention on Human Rights*. 69

Nevertheless, despite some positive changes in the death penalty's status and practice, 70 and despite claims that the history of the USA "strongly suggests that it is on the same abolitionist trajectory as other western nations," 71 as of the Spring of 2006, 3,370 72 inmates in America still call death row their home 73 and the death penalty still remains one of the most charged and tempestuous areas of controversy and debate in the world today.

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66 Most recently this includes the execution of Scott Allen Hain (executed on 3/4/2003) Gerald Mitchell (executed 22/8/2001); Napoleon Beazley (executed in May 2002); T.J. Jones (executed on 8/8/2002) and Toronto Patterson (executed in Texas on 28/8/2002).

67 Article 6 (5) ICCPR. See Appendix P.

68 Article 37 (A) Refer back to Appendix O.

69 Article 4 (5). This is in addition to other articles such as the 4th Geneva Convention (Article 68) regarding "Protection of Civilian Persons in Time of War" of 12/18/49. See Appendix Q for a list of countries that have ratified the main international treaties providing for the abolition of capital punishment.

70 This includes changes relating to the execution of mentally ill offenders, an issue that will be examined further in Part 3 of Chapter 7 below.


72 This is the latest figure according to the "Quarterly Report by the Criminal Justice Project of the NAACP Legal Defence and Educational Fund, Inc." This can be found at: [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Spring_2006.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Spring_2006.pdf)

73 See Appendix R for a graph and table representing the number of prisoners on death row in America in 2005. These are the latest figures available as of Winter 2006.
Chapter 2.

Christianity and capital punishment.

1- Introduction - Categorising Christianity.

Of thousands of religions worldwide, Christianity is by far the largest. With an estimated following of approximately 2 billion people, Christians make up approximately 33% of the world’s total population.¹ Under the umbrella of Christianity there are thousands of groups and denominations, each of which follows a slightly different version of Christianity. In fact, it has been estimated by some, that there are around 34,000 different Christian denominational groups in the world today.² These include: Catholics, Protestants,³ Quakers, Mennonites, Jehovah Witnesses, Baptists, Episcopalians, Lutherans, members of the Church of Latter Day Saints, Pentecostals and Orthodox Coptics to name but a few; in addition to which are a large number of sects and cults which, although rejected by most mainstream Christians, frequently claim to be within the fringes of Christianity.

Given the large number of denominations that exist under the auspices of Christianity, it is not surprising that there are many different views as to what constitutes “the Christian” stance on capital punishment and it goes some way to explain why there is no single, unified position on the issue. It also explains, to some degree, how it is that the Christian position can vary so dramatically between passionate anti-death penalty sentiments at one end of the spectrum to vehement pro-death penalty declarations at the other.

This huge and divergent spectrum of denominational groupings poses an immediate problem when researching the question, “what is the Christian position regarding the death penalty?” Namely, that each groups’ stance on the issue will be influenced by a large range of unique factors relating to the history and origin of their specific group, as well as their particular church politics, the authority vested in their various spiritual

¹ See Appendix A of the Introduction for a chart of the major religions of the world ranked by the number of adherents. Also see Appendix A of this chapter for a map of the world showing the global distribution of the Christian religion.
² This was an estimate made by David Barrett, (2001) World Christian Encyclopedia – A Comparative Study of Churches and Religions AD 30 to AD 2200. Oxford University Press.
³ Protestantism is a generic term that includes a large number of traditions under its auspices including Lutherans, Calvinists and Anglicans among many others.
teachers and leaders, and the particular version of the Bible they adhere to and how they read and interpret it. Each group will therefore be approaching the issue from a slightly different perspective and within a slightly different context and, as such, the Christian stance relating to capital punishment will vary greatly according to which denomination is being asked. An investigation of the Quaker approach, for instance, will yield very different results to an investigation of the Baptist approach for example.

As a result of the complex and potentially divergent nature of the Christian faith, it is therefore essential when investigating the Christian stance on capital punishment to define which denomination of Christianity one is referring to. For the purposes of this thesis, research will centre primarily on the current Catholic approach, as with an estimated following of over 1 billion, this is by far the largest Christian denomination in the world, constituting approximately 17.4% of the world’s total population. However, this is by no means meant to imply that the views of other denominations are in any way less valid, it is simply a matter of practical methodological expedience to focus on one view in detail. Nevertheless, in order to demonstrate the breadth of views on this subject from within Christianity, this chapter will also briefly address a few of the various approaches that other Christian denominations also take towards the death penalty.

Part one of this chapter begins, therefore, with an assessment of the traditional Catholic approach to the issue of capital punishment, including a historical analysis of views expounded by some of the classical Doctors of Christian theology, the early popes, and the early catholic catechisms. This is then followed by an examination of the contemporary approach of the Catholic Church towards capital punishment, including an analysis of the modern Catholic catechisms, as well as statements made by various

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4 This was found to be a very influential factor in the 2003 “Notre Dame Study of Catholic Parish Life”, which revealed that, “support for the death penalty among Catholics is strongly shaped by the opinion of their parish priest.” See the Notre Dame Magazine, Summer 2003. Alternatively see the Death Penalty information Centre website under: “Recent Study Reveals Priests Shape Catholic Opinion on the Death Penalty.” Available at: http://deathpenaltyinfo.org/article.php?scid=23&did=210

5 It is worth noting however, that in America, Protestantism is the largest denomination with approximately 52% of the followers, while Catholicism is the denomination with the second highest membership with an estimated 24%. This translates as approximately 63.4 million American Catholics. See Appendix B. The information presented in this appendix is provided by Adherents.com. The U.S. Census Bureau does not collate information regarding religion and refers researchers to this organisation.

6 The Catholic Catechism is a manual that sets out some of the basic principles of Catholicism in the form of questions and answers.
Popes and Bishops on this issue. Part two briefly looks at the official stances of a few other Christian denominations on this subject, both in favour of and against the death penalty.

Part three consists of an examination of the Bible itself in terms of its general form, structure and content. It also considers some of the Bible’s diverse literary styles, as well as some of the various methods of Biblical interpretation, exegesis and hermeneutics to have developed over the years. This is then followed by an examination of some of the most prominent passages of Biblical Scripture, as contained in both the Old and New Testaments, which have been used by both pro and anti-death penalty Christians to support their various positions. The chapter then concludes with a brief summary of the main findings relating to the Christian stance on capital punishment.

**PART ONE.**

**The Catholic Approach.**

1- Catholicism and capital punishment.

In the quest to ascertain the Catholic approach to capital punishment, there are two obvious avenues open for investigation. One is to examine the opinion of practising, or at least self-proclaimed, Catholics to see if there is any correlation between religious belief and opinion on the death penalty. The other is to assess the official Catholic Church’s stance on the issue. Both shall be examined here in turn.

A- Catholic individuals.

The most obvious way to assess Catholic opinion on any issue would be to look at some of the numerous opinion polls and surveys that have been carried out over the years. However, such an approach, although able to give a very general impression of trends in popular Catholic thought, can be highly misleading for a number of reasons.

First is the fact that, of those surveys and studies that considers public opinion on the death penalty, most “have essentially ignored the role of religion in shaping attitudes
towards capital punishment.” Of those that do take religious affiliation into account, many do so fleetingly, and simply ask which religious group the respondent belongs to. Many polls go no further and do not generally ask whether the participant is active in the practising of their faith. This is a considerable omission however, as it has been suggested by studies that do take this issue into account, such as the (2003) Notre Dame Study of Catholic Parish Life, that “Parishioners who were devout and active in parish life were more likely to oppose the death penalty.” A similar observation was made in a 2004 Gallup poll study which showed that, “Practising Catholics, or those who attend church on a weekly or near weekly basis, are less likely to support capital punishment than are non-practising Catholics.” These findings are also mirrored in a 2005 Zogby poll which found that, “Regular churchgoers are less likely to support the death penalty than those who attend infrequently.”

As such, by not taking into account the respondent’s degree of religious practice, polls run the risk that a large number of non-practising Catholics participating in the study, may profess an opinion on capital punishment which has nothing to do with Catholicism but which may, nevertheless, be taken as representative of the beliefs of Catholics in general. As such, a poll seemingly indicating a trend related to religious belief and claiming to demonstrate the representative view of Catholics as a whole, may in fact be completely unrelated to religious tenets.

A further omission of many polls and studies is the failure to take into account the diverse spectrum of beliefs and convictions inherent within each denomination. By this I refer to elements of religious fundamentalism, conservatism, liberalism and evangelism, which are active elements within most denominations and each of which may have a considerable bearing on an individual Christian’s views on the death

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8 This quote is from the Death Penalty Information Center (DPIC) summary of the Notre Dame Study as published in the Notre Dame Magazine, Summer 2003. It can be found at: http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#ND2003Sum


Also see Appendix C. This study’s findings are based on the aggregate results of nine Gallup poll surveys conducted between 2001-2004.

penalty. Traditionally for instance, elements of fundamentalist Christianity have typically been associated with “conservative religious beliefs such as Biblical literalism, having a harsh, hierarchical image of God, and support for capital punishment.” Conversely, tendencies towards evangelism have been more closely associated with opposition to the death penalty, an association which “supports an interpretation of evangelism as a manifestation of... compassion and concern for the fate of others.” Other factors such as the race and geographical location of the Christian respondents have also been highlighted as potentially influential variables colouring the respondents’ views on capital punishment.

Nevertheless, keeping these methodological critiques in mind, of those polls that do consider the Christian attitude towards capital punishment they generally seem to attest to the fact that the vast majority of Catholics are in favour of the penalty. In her book *Dead Man Walking*, Sister Helen Prejean, a staunch death penalty abolitionist nun, observes that, “surveys of public opinion show that those who profess Christianity tend to favour capital punishment slightly more than the overall population – Catholics more than Protestants.” According to a speech given by Cardinal Roger Mahoney, Archbishop of LA, it is estimated that approximately 70% of Catholics in America support capital punishment. While this figure obviously varies somewhat from poll to poll as a result of methodological differences, such as sample size, the specific wording

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11 The definition of a “Fundamental” Christian has itself been subject to much criticism. As Young points out, fundamentalism does not have a widely accepted meaning among researchers and indeed, “sociologists of religion have been inconsistent using these terms.” Young, (op. cit. note 7) (1992) p76. However, it can be characterised by factors such as Biblical literalism, born-again experiences and the tendency to proselytise.

12 James Unnever and Francis Cullen, “Christian Fundamentalism and Support for Capital Punishment.” (2006) Journal of Research in Crime and Delinquency, 43, pp169-197 at p173. This perception is challenged however by Unnever and Cullen who assert that Christian Fundamentalists are not more likely to support capital punishment because, their “intense religious practice tends to instil religious and secular beliefs that moderate an individual’s support for the death penalty. More specifically... forgiveness and compassion were positively associated with religious salience, which in turn negatively predicated support for capital punishment.” p172.


14 See, for instance, “Religion and Politics: Contention and Consensus.” (July 24th 2003) Pew Forum on Religion and Public Life. In this report the differing levels of support for capital punishment among white and African-American Catholics, is discussed, with support among African-Americans being consistently lower. See: http://www.pewforum.org/docs/index.php?DocID=29 at p19. Also see Appendix D.

15 Sister Helen Prejean, (1996) *Dead Man Walking*. Fount, p158. The assertion that Protestants are more likely to endorse capital punishment than Catholics is also supported by recent Gallup polls. See Appendix E.

of the questions asked, regions polled and so on, 70%, until very recently, had been a fairly consistent estimate of many polls. In 2005, however, a Zogby International poll showed that “support for capital punishment has declined dramatically in recent years.” The poll revealed that “only 48% of Catholics now support the death penalty.” This is a dramatic drop from polls which “had registered a 68% support among Catholics in 2001.”

Organised Catholic groups also seem to be divided on the issue, with affiliations representing both sides of the debate. One the one hand, in accordance with the traditional support for capital punishment among Catholic individuals, there are a number of organisations that argue that Catholicism clearly favours the use of capital punishment. There are conversely however, a large number of organisations, founded and administered by Catholics, who take a firm and unwavering abolitionist approach. These organisations include, Catholics Against Capital Punishment (CACP) and Pax Christi USA both of which assert that the correct Catholic position is one of unequivocal opposition to the death penalty.

It is clearly problematic therefore to ascertain the Catholic position by looking only to the followers of the faith, because, naturally, each may have their own slightly different interpretation of their religion’s teachings on the issue. Their responses will also differ according to whether you are asking them for their own subjective opinion or their objective understanding of what their religion teaches. Similarly, a person’s individual responses will be influenced by a vast range of non-religious factors including potentially: race, gender, occupation, area of residence, political affiliations, personal experience of the criminal justice system and so on, each of which may affect their perception about how their religion views the death penalty.

17 See for instance, Catholics Against Capital Punishment, (CACP) which can be found at: http://www.cacp.org/pages/585136/index.htm
19 Ibid.
20 Probe Ministries, for instance, while not a focus group for capital punishment, is a Christian organisation which advances the views of their President, Kerby Anderson, whose leading article justifies the death penalty from a Christian perspective. While they do exist, there are certainly fewer Christian pro-death penalty organisations than there are abolitionist ones.
21 Pax Christi, also known as, The National Catholic Movement for Peace can be found at: http://www.paxchristiusa.org/index.html
Therefore, in terms of ascertaining and understanding the official Catholic position with regards to capital punishment, the situation should be clarified if we turn instead to the highest authoritative sources of official Catholic teachings, namely the early fathers of Catholicism, the popes, and the catechisms of the Catholic Church.

The methodological approach adopted next is primarily one of historical and descriptive analysis, whereby several early statements, teachings and catechisms related to capital punishment are read and discussed in a historical context. A few examples of how those teachings were traditionally put into practice are then briefly examined in the context of the Crusades and Inquisitions. This is then followed by a qualitative examination and explanation of the more contemporary approach to the issue in terms of the more recent statements and appeals of the Catholic Church on the subject in light of modern developments in penal practices and Catholic theology.

**B- The classical Catholic position on capital punishment.**

**i- Classical Doctors of Catholic Theology.**

For theological guidance on many contentious issues of debate, believers often turn to the early theologians of Christianity for their interpretations and teachings on the Christian faith. The same is true of the capital punishment controversy and consequently many people turn to the early theologians for clarification and insight into the origin and format of Christian teachings on capital punishment. Two of the most important, influential and oft-cited classical Doctors of Catholic theology are, St. Augustine of Hippo (354-430) and St. Thomas Aquinas (1225-1274).

**a- St. Augustine.**

Although the works of St. Augustine are frequently cited by proponents on both sides of the death penalty debate, it is the general consensus that ultimately, particularly in the latter part of his life, he explicitly defended the use of capital punishment. Augustine asserted that there were indeed a few specific exceptions to the Biblical law against killing, capital punishment being one of them. In his book *The City of God Against the Pagans*, he responds to those who claim that the Bible forbids all forms of killing by saying that:

“The divine authority itself has made certain exceptions to the rule that it is not lawful to kill men. These exceptions, however, include only those
whom God commands to be slain, either by a general law, or by an express command applying to a certain person at a certain time. Moreover, he who is commanded to perform this ministry does not himself slay. Rather, he is like a sword which is the instrument of its user.”

It is for this reason, Augustine argues, that the commandment against killing is not broken during times of wars waged with God’s authority. Similarly, he contends that the commandment is not broken by those who, “bearing the public power in their own person, have punished the wicked by death according to His laws, that is, by His most just authority: these have in no way acted against that commandment which says, ‘Thou shalt not kill.’” Augustine goes on to cite the example of the Prophet Abraham who was “not only exonerated from the guilt of cruelty, but was even praised in the name of piety; for, in resolving to slay his son, he acted not in the least wickedly, but in obedience to a command.”

Retentionist Christians frequently cite these statements by Augustine as evidence of the Catholic acceptance of the death penalty. In fact, even dedicated Christian abolitionists such as Sister Helen Prejean concede to the fact that Augustine did clearly speak in favour of the death penalty. In her world-renowned book Dead Man Walking, Sister Prejean writes that St. Augustine postulated that:

“External control over peoples’ lives was necessary and justified. The "wicked" might be "coerced by the sword" to "protect the innocent," Augustine taught. And thus was legitimated for Christians the authority of secular government to "control" its subjects by coercive and violent means – even punishment by death.”

b- St. Thomas Aquinas.

In his seminal work Summa Theologica, St. Thomas Aquinas set forth one of the most prominent and well-known early Roman Catholic defences of capital punishment. He

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23 Ibid. p33. Note: As Protestants, Catholics and Jews divide the commandments in different manners, this commandment against killing is sometimes referred to as the fifth commandment (Catholics) and sometimes the sixth (Protestants and Jews). Its numbering essentially depends upon which religion and denomination one belongs to.
24 Ibid. p33. The story to which Augustine is referring, in which Prophet Abraham demonstrated his willingness to sacrifice his son on God’s command, can be found in Genesis (22).
26 The first complete edition of Summa Theologica was printed in 1485.
acknowledged that capital punishment was within the legitimate remit of the governing authority when he unequivocally stated the utilitarian position that:

"If a man is a danger to the community, threatening it with disintegration by some wrongdoing of his, then his execution for the healing and preservation of the general good is to be commended... But the care of the whole community is entrusted to those exercising public authority, and so only they, not private persons, may licitly execute malefactors."\(^{27}\)

With regard to the execution of heretics, which was a particularly pertinent topic at the time in which he was writing, and which will be considered in greater detail in the following section,\(^{28}\) Aquinas postulated that:

"Wherefore, if forgers of money and other evil-doers are forewith condemned to death by the secular authority, much more reason is there for heretics, as soon as they are convicted of heresy, to be not only excommunicated, but even put to death."\(^{29}\)

However, he does add the general pre-condition that capital punishment should not be utilised in instances where the innocent may suffer adverse consequences. He wrote, "Wherefore Our Lord teaches that we should rather allow the wicked to live, and that vengeance is to be delayed until the last judgement, rather than that the good be put to death together with the wicked."\(^{30}\)

Similar views were also held by Clement of Alexandria (A.D.150-211), Origen (A.D. 185-254) and many others.\(^{31}\) In fact most theologians concede that;

"It is nearly the unanimous opinion of the Fathers and Doctors of the Church that the death penalty is morally licit, and the teaching of past popes (and numerous catechisms) that this penalty is essentially just, (and even that its validity is not subject to cultural variation.)."\(^{32}\)


\(^{28}\) See section ii (a) below.

\(^{29}\) *Ibid*. *Summa Theologica*. II-II, q. 11, a. 3

\(^{30}\) *Ibid*. *Summa Theologica*. II-II, q.64, a2, ad.1. Note that this can presumably be utilised as an argument against capital punishment in a modern context in which there is a legitimate fear that innocent people have been wrongfully convicted and may be wrongfully executed.

\(^{31}\) This was also the view, for instance, of many Sixteenth Century Protestant reformers such as Martin Luther and John Calvin. For more on their views see Robert Crawford (2001) *Can We Ever Kill?: An Ethical Enquiry*, Harper Collins Religious, p102.

These evidences are not determinative of the issue however. Abolitionists such as Aharon Zorea argue that the early fathers of the church did not so much advocate as “tolerate” the punishment and that “in no way should this toleration of death be interpreted as an endorsement. It was an evil in the same order as war, which the Church Fathers prayed for an end to. It would be folly for us to see in this a germ for modern day support of capital punishment.”\(^{33}\)

**ii- The classical position of popes on capital punishment.**

The Pope’s view is of vital importance to Conservative Catholics who look to him as their spiritual guide and turn to him for moral and religious direction on issues such as capital punishment. As shall be shown in the next section, there is no doubt that traditionally Catholicism was very much in favour of capital punishment. There is much historical evidence to attest to this fact, including the papal instigation of numerous Crusades\(^{34}\) and Inquisitions\(^{35}\) that sanctioned the mass execution of heretics without compunction. Evidence is also available in the form of the official church catechisms that, until recently, were unequivocal in their support for the death penalty. In addition to this, not only did popes allow for capital punishment, but many even had their own private executioners, one of the most infamous being Giovanni Battista Buggatti who, while on the pontifical payroll, was responsible for over 516 executions resulting from papal decree which he carried out between 1796-1861.\(^{36}\)

**a- Crusades, Inquisitions and the execution of heretics and witches.**

There is no doubt that historically the Catholic popes have supported capital punishment. The Crusades are just one manifestation of that support. Although probably falling under the domain of war rather than capital punishment, the principle is fundamentally the same in that an official papal order called for the blood of a particular group to be spilt as a result of their non-conformity to the prescribed norm

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\(^{34}\) This includes, for example, the First Crusade called for by Pope Urban II on November 1095. For more information on this Crusade see James J. Megivern, (1997) *The Death Penalty - An Historical and Theological Survey.* Paulist Press, p64.

\(^{35}\) Such as the Spanish Inquisition which received papal approval in 1478. See Megivern *ibid.,* p136.

due to their adherence to another faith. They were political and religious campaigns frequently instigated in direct response to papal decree.

It was on the instruction of Pope Urban II, for instance, that men were recruited and encouraged to kill in the First Crusade of 1095. During this Crusade, "it is estimated that between 30,000 and 40,000 Jews and Moslems were killed in two days." These executions were carried out in the name of Christianity and with the Pope’s blessing. As one Christian Knight, Count Raymond of Aguilers is reported to have written:

"Wonderful sights were to be seen... Piles of heads, hands and feet were to be seen in the streets of the city... Not one of them was allowed to live. They did not spare the women or the children. The horses waded in blood up to their knees, nay up to the bridle. It was a just and wonderful judgement of God."38

The Inquisitions were also established directly by the papacy in order to tackle the perceived threat of heresy, which was being increasingly viewed as a spreading cancer. It was a procedure set up specifically to seek out, charge, sentence and punish heretics in a process that frequently culminated in capital punishment. Although the inquisitors could not themselves perform an execution, as the maximum sentence they could hand out was restricted to life imprisonment, when they handed a person over to the civil authorities it was, in practice, synonymous with an appeal for that person’s execution.

In 1231 it was Pope Gregory IX who set up the infamous Papal Inquisition in which untold numbers were tried without recourse to the standard rules of courtly procedure, and then imprisoned, tortured and executed. Thousands more heretics were to be killed during the Spanish Inquisition, which was blessed by Pope Sixtus IV in 1484.

Over the centuries, many non-Catholic groups were targeted for their alleged heresy, including Waldensians, the Knights Templars (1307-1312)39 and at times even Quakers.40 In addition to these mass scale executions, the early church also frequently

38 Ibid. Ludovic Kennedy, p113.
sanctioned capital punishment for the execution of individual heretics such as Joan of Arc (1431). It was not only the popes who sanctioned the execution of heretics but other powerful leaders interested in spreading Catholicism also interpreted the Bible as demanding that heretics should be put to death. For example, Queen Mary I of England, reigning between 1553-8, sought a restoration of Catholicism that entailed the widespread use of death for non-conformists. History has come to know her as “Bloody Mary”, a nickname she earned partly in attestation to the blood that was shed of almost 300 people as a direct result of her heresy trials.

Another category of offender for whom the Church infamously sanctioned execution on a large scale, was for those who practised sorcery. In accordance with the Biblical command in Exodus (22: 18), which states, “Do not allow a sorceress to live”, in 1252 Pope Innocent IV gave papal permission to persecute and torture suspected heretic witches, a practice that would frequently culminate in their execution. This persecution of suspected witches was taken to extremes in Europe during the late Middle-Ages, during which time many women were alleged to be in league with the devil and subsequently executed. Estimates as to the number of people who were executed for witchcraft in Europe range from the almost certainly exaggerated nine million to the more modest estimate of Brian Levack who postulates that the number of executions was probably closer to 60,000. The publication of Malleus Maleficarum (The Hammer of Witches) in 1486-7, as well as the Papal Bull “Summis Desiderates” issued by Pope Innocent VIII on December 5th 1484, also heightened the religious fervour

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41 Known as the “Maiden of France” 19 year old Joan was burned at the stake on 30th May 1431 in Rouen, France, on charges of heresy for claiming that she was responsible directly to God rather than to the Roman Catholic Church. It is interesting to note, however, that approximately 20-25 years after her execution the church declared her to be innocent and almost 500 years later, in 1920, she was canonised as a Saint by Pope Benedict XV. This serves to demonstrate how the religious perception of the same issue can change so dramatically in just a few decades.


43 Written by Jacob Sprenger and Heinrich Kramer, this Catholic text was used throughout Europe as an aid in the identification, capture and torture of suspected witches.
against witchcraft. Witchcraft was equated with Satanism, diabolism, and heresy and thus became a legitimate target during the Inquisitions.

Many other offences have also been targeted as legitimate capital offences by the Church. In more recent times for instance, it was actually an official part of the Vatican State penal code (between 1929-1969) that the death penalty could be prescribed for anyone attempting to assassinate the Pope.

It should be clear from this brief look at the classical approach of the church to capital punishment that traditionally, it had always been a supporter of the death penalty. Today however, the official Catholic position with regards to the religious legitimacy of capital punishment is much less easy to discern, particularly as there have been several major changes in the position of the popes, catechisms and Bishops in recent years with regards to the penalty.

C. The contemporary Catholic position on capital punishment.

i- Popes and catechisms on capital punishment.

Officially and technically it seems that on Biblical grounds, at the theoretical level at least, the Catholic Church today does still support capital punishment in some instances. It accepts that there are some exceptions to the Biblical commandment, “Thou shall not kill.” Those exceptions include, war in God’s name, self-defence (see footnote 179 below) and in some instances capital punishment. However, despite the acceptance of the penalty in principle, the late Pope John Paul II made it increasingly clear in his last years that he considered it to be an unnecessary practice and he increasingly came to adopt an anti-death penalty stance, which is perhaps surprising considering the pro-death penalty position of most of his predecessors. As we shall see, this shift in the papal position has developed quite dramatically over a number of recent years.


46 See Part 3 (E) of this chapter for 24 examples of offences for which the Old Testament prescribes the use of capital punishment. Also see Part 4 (C) of this chapter for a discussion of pro-capital punishment arguments made within the context of the New Testament.

47 Ex. (20:13).
The Catholic catechism, which is a book setting out some of the basic principles of Catholicism, has traditionally accepted the use of capital punishment, a position which can be seen as far back as the *1566 Catechism of the Council of Trent*. In this catechism state executions were highlighted as one of the legitimate exceptions to the Biblical prohibition against killing. It said, "Another kind of lawful slaying belongs to the civil authorities, to whom is entrusted power of life and death, by the legal and judicious exercise of which they punish the guilty and protect the innocent."\(^{48}\)

Recently however, several important changes have been made to the Catholic catechism. The 1992 catechism of the Catholic Church quite clearly outlined the right of the state to use capital punishment in Article 2266 which stated that:

"The traditional teaching of the Church has acknowledged as well founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty."

However, the Vatican subsequently modified the catechism on September 8th 1997. These changes were made partly in order to incorporate the Pope’s sentiments regarding the death penalty as expressed in his 1995 *Evangelium Vitae*. In Article 57 of his *Evangelium Vitae, The Gospel of Life*, Pope John Paul II stated his position that:

"The deliberate decision to deprive an innocent human being of his life is always morally evil and can never be licit either as an end in itself or as a means to a good end. It is in fact a grave act of disobedience to the moral law and indeed to God himself, the author and guarantor of that law."\(^{49}\)

The Pope’s sentiments regarding capital punishment were subsequently incorporated into the new 1997 catechism which is worth quoting here at length as it forms the foundation of the official Catholic position on capital punishment today. Article 2267 states that:

"Assuming that the guilty party’s identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.

\(^{48}\) Part II A. i. b of the *1566 Council of Trent Roman Catechism.*

If, however, non-lethal means are sufficient to defend and protect people’s safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.

Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offence incapable of doing harm - without definitively taking away from him the possibility of redeeming himself - the cases in which the execution of the offender is an absolute necessity, are rare, if not practically non-existent."^50

There have been mixed reactions to the amendments however, with some blatantly rejecting the Pope’s apparently anti-death penalty sentiments. For example, in a debate in 2002 on, Religion, Politics and the Death Penalty, U.S. Supreme Court Justice Antonin Scalia, a self-proclaimed Catholic said, “I do not agree with the Evangelium Vitae and the new Catholic catechism… that the death penalty can only be imposed to protect rather than avenge and that since it is, in most modern societies, not necessary for the former purpose, it is wrong.”^51

Others welcomed the changes to the catechism. Sister Helen Prejean, for instance, had previously been very critical of the Pontiff’s tenuous and vaguely ambiguous stance on the penalty. She had publicly lamented in frustration and expressed the view that she wished the Pope had taken a clearer and firmer anti-death penalty stance, even writing to the Pope asking him to clarify his position on the issue. She wrote, “What side are you on? Are you for life or are you for death? Are you for compassion or are you for vengeance?”^52 She later welcomed the amendments stating, “When my eyes first see the words of the revised text of the Catechism, my heart leaps. At last the river bends… At last my church upholds a moral position on the death penalty I can embrace.”^53

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^50 The 1997 Catholic catechism can be found at: http://usccb.org/sdwp/national/criminal/catechism.htm Or at: http://www.cacp.org/pages587878/index.htm. (Please note that italicising is my own emphasis.)

^51 Transcript of Session 3 of “Religion, politics and the death penalty” conference held on January 5th 2002, which can be found at: http://pewforum.org/deathpenalty/resources/transcript3.php3

^52 Sister Helen Prejean - Keynote address, 1st National Meeting on “Care of the dying in prisons and jails.” (Nov. 16th 1998.) See Project on Death in American Culture—Transforming the Culture of Dying, which can be found at: http://www.soros.org/death/sisterhelen.htm

Worded as it is, the catechism has been used by both anti and pro-death penalty groups to further their arguments. While the anti-death penalty lobby point to the limitations and restrictions put on its use, the pro-death penalty supporters simultaneously point to the fact that in no verse does the Pontiff expressly forbid the use of capital punishment or deny that it is within the legitimate remit of the state to execute offenders. Furthermore some retentionists point to the fact that in his Evangelium Vitae, the Pope condemned the killing of “innocent” human beings. They argue therefore that his condemnation does not extend to the legal execution of convicted, and therefore “guilty”, human beings.

However, despite the fact that the Pope has never denied the Biblical right of the state to practice capital punishment, he clearly was an abolitionist at heart. On many occasions Pope John Paul II very publicly appealed to various state governors for the clemency of death row convicts. In January 1999, for instance, he succeeded in convincing Mel Carnahan, the Missouri State Governor at that time, to commute the execution of triple murderer Darrell Mease.54 He also petitioned, unsuccessfully, for clemency towards Oklahoma City Bomber Timothy McVeigh, among many others.55

With regards to the current Pope, Pope Benedict XVI, since his appointment as the 265th Pope, he has yet to make any particularly notable statements56 with regards to capital punishment. However, unless provided with evidence to the contrary, he can be expected to continue in the footsteps of his predecessor, Pope John Paul II.

ii- Bishops.

Despite the fact that the catechisms do not rule out capital punishment altogether, following in the pontiff’s footsteps, an increasing number of Catholic bishops have spoken out against the punishment.

54 See, for instance, Religion Today, “Catholics and Jews Unite Against Death Penalty.” (08/09/2001.)
55 Many other appeals have also been made on the Pope’s behalf to spare the lives of death row convicts, including, Larry Robinson, Scotty Moore, Victor Kennedy, Mark Gardner and Alan Willet in 1999 alone. For more examples see: http://www.usccb.org/com/archives/1999/99-016.htm
56 Pope Benedict XVI did, however, recently welcome the abolition of capital punishment in the Philippines, saying “well done” to Philippines President Arroyo when they met in Vatican City on Monday 26th June 2006. See: “Pope welcomes the abolition of the death penalty in RP.” (RP stands for the Republic of the Philippines.) At: http://www.gov.ph/news/?i=15511 Article dated Tuesday June 27, 2006.
In 1980 the *United States Catholic Bishops’ Statement on Capital Punishment* confirmed that the strictly theological Catholic position was one that permitted capital punishment. They affirmed that the desire to retain capital punishment was not a “position incompatible with Catholic tradition.” However they then went on to assert their abolitionist position when they stated that: “We maintain that abolition of the death penalty would promote values that are important to us as citizens and as Christians” and “we believe that abolition of the death penalty is most consonant with the example of Jesus.”

The *United States Conference of Catholic Bishops* also summarised the church’s present day abolitionist stance by saying that;

“While the church continues to maintain that legitimate state authorities have an obligation to protect society from aggressors, including the use of capital punishment, other options make the carrying out of such a punishment “rare if practically non-existent.”

In 2005 the Catholic Bishops renewed their 25 year old statement which had called for an end to the death penalty. In *A Culture of Life and the Penalty of Death* they stated, “We reaffirm our common judgement that the use of the death penalty is unnecessary and unjustified in our time and circumstance.”

Countless other bishops around the world have also gone on record to express their opposition to capital punishment and have been campaigning tirelessly in the name of Catholicism to abolish it. One of the most important pronouncements on the issue in recent years was the 1999 *Good Friday Appeal to End the Death Penalty*. In *A Statement of the Administrative Board of the United States Conference of Catholic Bishops*, delivered on April 2nd 1999, the bishops issued a joint statement confirming their abolitionist position by stating that, “We urge all people of good will, particularly Catholics, to work to end the use of capital punishment.” They also said, “We must

57 “The U. S. Catholic Bishops’ Statement on Capital Punishment” (November 1980) can be found at: http://www.osjspm.org/cappun.htm
58 See “The Death Penalty and the Catechism.” At: http://usccb.org/sdwp/national/criminal/catechism.htm
commit ourselves to a persistent and principled witness against the death penalty, against a culture of death and for the Gospel of Life."\(^6^1\)

Bishops around the world have also joined many campaigns and appeals to presidents, state leaders and governors urging them to grant clemency to death row inmates around the globe.\(^6^2\)

There is no doubt that in recent years, anti-death penalty voices emanating from within the Church have become louder and more prominent but, as Brendan Soane argues in his book *Capital Punishment – What Does the Church Teach?:*

"It remains to be seen whether the Church will ever condemn it outright," as "to do so would require that she repudiate much of her former thinking and practice and might take out of the hands of the State an instrument necessary in exceptional circumstances for protecting society."\(^6^3\)

**D- The Catholic position in conclusion.**

The first part of this chapter clearly established that, without a doubt, capital punishment was traditionally very much an accepted part of Catholic life. So much so in fact that, according to theologian James Megivern, by the beginning of the twelfth century:

"The death penalty had become a major instrument for maintaining religious uniformity; it had been officially embraced as appropriate and integrated into both theory and practice of church life. Voices of disapproval had fallen silent, and the scaffold and stake became more and more entrenched as unquestionably appropriate, standard features of a "Christian culture," a normal part of the status quo."\(^6^4\)

This consensus in favour of capital punishment was not to last indefinitely however, and as Christian Brugger explains:

"From its earliest days, up to and including the first half of the twentieth century, it [the Catholic Church] has maintained a relatively confident, consistent, and coordinated defence of the right of the state to kill criminals. Visible signs of change in this regard can be seen as early as the 1950's, when mainstream Catholic writers and individual members

\(^6^1\) This statement can be found at: http://www.usccb.org/sdwp/national/criminal/appeal.htm

\(^6^2\) See footnote 55 above for some examples of these appeals.


of the hierarchy began to take public stands in opposition to the death penalty. The momentum increased – albeit gradually – in the 1960’s. And in the 1970’s the floodgates burst. Since then, literally hundreds of public statements opposing the death penalty... have been published by members of the Catholic hierarchy on a local, national and international level.”

As to the position of the Church as it stands on the issue as of 2006, capital punishment remains a complex subject. It is too simple to either say that the Catholic Church is completely against or completely in favour of the punishment. Temporarily leaving aside specific Biblical pronouncements, (which will be considered in Part 3 below) several general points of observation can be made with regards to the basic Catholic approach to the issue today. The main conclusion that I have drawn from my brief analysis of the Catholic position on capital punishment is twofold:

1- Both the traditional and contemporary view of the upper echelons of the Catholic hierarchy, the pope, bishops, and much of the Catholic clergy in general, essentially confirm that in principle the Catholic Church’s official position is one of acceptance of capital punishment based upon Biblical reasoning and teachings. The Church has never explicitly denied the right of the state to utilise capital punishment.

2- In practice however, as in our contemporary society there exist other non-lethal means by which the state can protect the public, the prevailing view of most of the echelons of the official Catholic hierarchy, is that capital punishment should be utilised only in exceedingly rare cases, if ever, and alternatives to capital punishment, such as life imprisonment, are ultimately to be preferred.

An eclectic variety of words have been used to describe the Catholic Church’s changing position on the issue of capital punishment over the years. Everything from “reversing” and “backtracking”, to “evolving” and “developing.” Many have defended the changing position of the church as developing in line with society’s changing morals and sensibilities. For instance, in 1996 when announcing the changes to the catechism at a press conference, “Cardinal Ratzinger, now Pope Benedict XVI, used the phrase ‘A

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66 See Part 3 of this chapter for some of the specific Biblical passages used to support this view.

67 Specifically the use of imprisonment to permanently incarcerate dangerous offenders.
development of doctrine' to describe how the death penalty was being perceived in
eRome." 68 Similarly, according to Cardinal Avery Dulles, for instance, the Catholic
teachings on capital punishment “Ought to be understood, if possible, in continuity with
the tradition rather than as a reversal.” 69 Others however, have been more challenging
of the Church’s seemingly inconsistent stance. According to John Allen Jr. for instance,
“For a church that thinks in centuries… the word “development” hardly does justice to
such a breathtakingly rapid change. It is more akin to a doctrinal revolution.” 70

It is evident that the church’s changing stance, or what Megivern calls a “conversion”,
has left many people bewildered. As Megivern explains:

“The wholesale turnaround of the leadership of the Roman Catholic
Church from the traditional position of being among the most ardent
supporters of the death penalty to the stance of radical opposition, all in
a few short years, was unanticipated and a cause of considerable
confusion.” 71

PART TWO.

Other Christian approaches to capital punishment.

It is evident that there is not one unified Christian approach to the issue of capital
punishment. Various denominations adopt various approaches and as we have just seen,
even the approach of one specific group may be one that evolves and changes over
time. This shift in approach may be due to a variety of factors including a development
in Biblical interpretations, 72 or a change in political or social contexts. As previously
mentioned, Catholicism is only one denomination among tens of thousands. As such it
cannot be taken as indicative of Christianity as a whole, although naturally given its
vast size and influence it is representative of a large section of the faith. Nevertheless,
there are many other approaches to capital punishment that are inherent within the
official boundaries of Christianity. A few of these approaches will be looked at briefly

69 From the speech of Avery Cardinal Dulles on “A call for reckoning: Religion and the death penalty.”
Delivered on Jan. 25th 2002, a transcript of which can be found at:
http://pewforum.org/deathpenalty/resources/transcript1.php3
Capital Punishment - Strategies for Abolition, Peter Hodgkinson and William A. Schabas, (eds.)
Cambridge University Press, pp116-142 at p125.
72 See Part 3 (E) of this chapter for more on the matter of Biblical interpretation.
next in order to demonstrate the breadth and diversity of thought on this subject. First are two official statements issued by Christian denominations that are in favour of capital punishment, followed by a few examples of denominations that are firmly against the penalty.

1- Pro-capital punishment statements.

a- Southern Baptists.

In the year 2000, The U.S. Southern Baptists Convention (SBC) passed a resolution stating their belief that:

“God authorised capital punishment for murder after the Noahic Flood, validating its legitimacy in human society... (Delegates of the SBC) support the fair and equitable use of capital punishment by civil magistrates as a legitimate form of punishment for those guilty of murder or treasonous acts that result in death.”

Southern Baptists have always overwhelmingly supported capital punishment. According to Barrett Duke (Vice president of the Ethics and Religious Liberty Commission):

“Historically Southern Baptists have supported capital punishment in our rank and file. There were some attempts in the late '60s to have Southern Baptists actually go on record opposed to capital punishment... Southern Baptists rank and file rejected that as an option.” He said, that support for the death penalty “is a biblical position. And we do believe that the Bible continues to be relevant for life today.”

This resolution is one which has a wide base of support in America. As Dale Recinella explains, “With 16 million members and 42,000 congregations, the Southern Baptist Convention is now the largest Christian non-Catholic denomination in America. It is the second largest religious denomination in the United Stated.” Furthermore, “The Southern Baptist Convention exerts a tremendous influence on the thinking and beliefs of many of the smaller fundamentalist and evangelical denominations in the Bible Belt, even though such groups are not formally associated with the convention.”

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73 See “Policies of Religious Groups Towards the Death Penalty”, published by the Religious Tolerance Organisation, which can be found at: http://www.religioustolerance.org/execut7.htm
74 Tom Strods, (June 8th 2001) “Southern Baptist Commission support for death penalty based on Bible, Duke says.” This can be found at The Baptist Press News website at: www.BPnews.net or at: http://www.religioustolerance.org/execut7.htm
76 Ibid. p8.
b- The American National Association of Evangelicals.

“In the 1970’s the National Association of Evangelicals (NAE) – representing more than 10 million Conservative Christians and 47 different denominations – and the Moral Majority were among the Christian groups supporting the death penalty. So does its successor, the Christian Coalition; according to the executive director Robert E. Reed Jr., ‘The Christian Coalition does support the death penalty in capital murder cases as well as other cases involving gross brutality.’” 77

2- Anti-capital punishment statements.

a- Friends Committee on National Legislation (FCNL) - Statement of Legislative Policy, 1994.

“We seek the abolition of the death penalty because it denies the sacredness of human life and violates our belief in the human capacity for change. This irreversible punishment cannot be applied equitably and without error. Use of the death penalty by the state powerfully re-enforces the idea that killing can be a proper way of responding to those who have wronged us. We believe that re-enforcement of the idea cannot lead to healthier and safer communities.” 78

b- The (American) United Methodist Church.

According to The United Methodist News Service:

“The church’s General Conference, a delegated body representing members around the world, meets every four years and is the only entity that can take official positions for the denomination. Those statements are included in the church’s Book of Discipline and Book of Resolutions.” 79

According to the most recent statement adopted by the General Conference in 2000 entitled, In Opposition to Capital Punishment, it was said that, “The United Methodist Church declares its opposition to the retention and use of capital punishment and urges its abolition.” 80

This statement now also appears in the Book of Resolutions, which further states that:

"The United Methodist Church cannot accept retribution or social vengeance as a reason for taking human life. It violates our deepest belief in God as the Creator and Redeemer of humankind. In this respect, there can be no assertion that human life can be taken by the state. Indeed, in the long run, the use of the death penalty by the state will increase the acceptance of revenge in our society and will give official sanction to a climate of violence."\(^81\)

Although the official position of The United Methodist Church is clearly currently one of opposition to the penalty, as with all religious groups, the adherents of the faith in many instances adopt wildly differing stances. High-profile American Methodists who have adopted anti-death penalty stances, for instance, include the late U.S. Supreme Court Justice Harry Blackman as well as Former Governor of Illinois George Ryan, while at the opposite end of the spectrum is death penalty advocate U.S. President George W. Bush.

c- The Church of England.

According to the Church of England website:

"In July 1983 the General Synod debated capital punishment and the following motion was carried: That this synod would deplore the re-introduction of capital punishment into the UK sentencing policy. The subject has not been debated by Synod since 1983."

Having now acknowledged the vastly differing positions of various Christian denominations\(^82\) on this issue, it is important to also acknowledge the most salient common denominators uniting these groups. It is evident, for instance, that regardless of which position any particular denomination adopts, there are a few factors which most mainstream Christians, whether lay or professional, have in common and to which they will refer when formulating a faith based opinion on capital punishment. The two most important and fundamental strands that particularly unite most denominations of Christianity are the core beliefs in Jesus Christ and the Bible. Both are hugely important elements exerting a powerful influence in the shaping of the capital punishment debate. It is therefore these two great beacons of Christianity that will be examined next in terms of the role they play in the death penalty debate.

\(^81\) Ibid. Book of Resolutions.

\(^82\) See Appendix F for a table indicating the “Policies of religious groups towards the death penalty”, as published by the “Religious Tolerance” organisation. This table can also be found at: http://www.religionstolerance.org/execut7.htm
PART THREE.

Jesus, the Bible and capital punishment.

1-Would Jesus support capital punishment?

The teachings and example of Jesus are frequently invoked, by Christians of all denominations, for use as a religious and moral template in both spiritual and worldly affairs. The death penalty is one such matter and many Christians look directly to the teachings of Jesus for moral guidance on whether to condone or condemn capital punishment. But what did Jesus actually teach with regards to the death penalty? This is an important question as if it could be shown that Jesus indisputably condemned capital punishment then there would be very little room for debate and many Christians would have to concede that capital punishment is an “un-Christian” act, thus adding to the abolitionist arsenal. Conversely, if it could be proven that Jesus definitively spoke out in favour of capital punishment, abolitionist groups would lose many of their present grounds of objection and perhaps many more Christian countries would begin to employ the penalty.

In order to find out, therefore, from a Christian perspective what Jesus may have said, done or taught in any context, including that of capital punishment, one must go to the core theological source of Christian doctrine, the main Holy book of the faith, namely, the Bible.

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83 At the outset it is worth acknowledging some of the various and extremely diverse ways in which Jesus is perceived by many people around the world. Some of the most obvious and common perceptions include the following: Some Christians revere Jesus as the Son of God sent down to atone for man’s sins and act as the salvation for all those who embrace his message and teachings. Other Christians, such as Unitarians, regard Jesus as God himself and reject the concept of the Trinity (which teaches the union of three Divine figures, the Father, the Son, and the Holy Ghost). Others still, such as Muslims, consider him to be a noble and greatly respected Prophet sent down by God to guide mankind to the path of monotheism but to be by no means a Divine being. In fact, according to Graham Stanton, Professor of New Testament Studies at Kings College, London, even Jesus himself, “believed that he had been sent by God as a prophet to declare authoritatively the will of God for his people.” (See Graham N. Stanton, (1989) The Gospels and Jesus. The Oxford Bible Series. Oxford University Press, p274.) To others he is considered to have probably existed but just as an ordinary man, one to whom mythical and spiritual status has been attributed without just or reasonable cause. To some, Jesus is not considered to be a real historical figure at all. He is not considered to have ever really existed. He is merely thought to be a figment of myth, fiction, and imagination. (Nevertheless, even many people of this mindset are content to view stories about him and his teachings as a source of inspiration for general values and morals. See Ibid. Stanton p3.) In our present context however we are considering the impact of the teachings of Jesus from the perspective of mainstream Christian belief.

84 To find out what Jesus taught from a Muslim perspective, for instance, one would turn to the Quran, in which Jesus holds an honoured position as one of Islam’s most noble Prophets.
2- The Bible.

A- A complex and diverse text.

The Bible, comprised of both the Old Testament and the New Testament, is the most widely distributed book in the world. It has dominated numerous bestseller lists for decades and it has been translated into every known language in the world. It is a book of mass appeal, one that has entranced and intrigued academics, historians, theologians and laymen alike for centuries. For questions regarding any subject, issue or dilemma and the Christian stance on it, the Bible is the first, most obvious and most important port of call.

With the Bible as a guide, one may expect the quest to discern the Christian approach to the issue of capital punishment to be a fairly simple and straightforward one. It is not however. The Bible is not a single book with a single author. It was not written at one time, nor was it written in one language. Instead, it is an eclectic mixture of authorship, language, style, form, structure and content. It is a text that has undergone innumerable changes and revisions. It has been added to, subtracted from, developed, amended and altered in a process that has taken place over hundreds of years and one that is still ongoing today. While this constant state of flux and renewal culminates in a unique book and may add to its interest and diversity, it also has the effect complicating many seemingly straightforward matters as instead of giving one answer to a question, in many cases it provides scope for multiple opposing positions.

B- Bible versions.

In addition to this is the problem that there are so many different versions and translations\textsuperscript{85} of the Bible, that it is difficult to know which to look to in order to get the closest understanding of the original teachings of Jesus. Different Bibles include The Revised Standard Version, The King James Version, The Jerusalem Bible, The New English Bible, The Revised English Bible, The Good News Bible, The New International Bible, The New American Standard Version, The Living Bible, The New Jewish Bible and so on. For the purposes of this thesis I shall refer primarily to the New International

\textsuperscript{85} As David Stacey argues, "All translation means interpretation, and where the gap of culture, time and language is great, the element of interpretation may be considerable." David Stacey, (1983) Interpreting the Bible. Sheldon Press, p5.
Version\textsuperscript{86} for quotes and Biblical references as I have been advised that this is one of the most widely used and widely accepted versions.\textsuperscript{87}

C- Style.
Adding to its complexity is the diverse nature of the Biblical content. Parts of it are composed of historically verifiable accounts, such as the names of rulers, references to historical events, and other details that seem to have been recorded for purposes of posterity, such as pages of genealogy and lineage reports. Many other sections are not historically verifiable accounts however, such as the existence of Adam and Eve, or the story of Noah’s Ark and the great flood.

The Bible is a composite of a variety of styles including parables, fables, allegories and other such diverse stylistic methods of writing. Its variety of styles, authors and so on, while aesthetically pleasing and interesting, runs the risk of inconsistency, mistake and contradiction,\textsuperscript{88} and while its synthesis of styles gives the Bible a unique sense of diversity and intrigue for the casual reader, it can be somewhat frustrating and problematic when the Bible is being looked to as the authoritative source from which one can grasp the official position of Jesus and Christianity on an issue as important, sensitive and complex as the death penalty.

D- Authenticity.
In addition to this, although believed by some to be Divinely inspired, the fact is that the New Testament, for example, was written by a number of men decades\textsuperscript{89} after the death of Jesus by people who had never even met him. It is obvious therefore that as the Bible was not written in Jesus’ presence or with his acquiescence or approval, it is difficult to know if he has been misquoted or misrepresented.

\textsuperscript{87}It is important to use a widely accepted version, as opposed to a lesser known more obscure translation, as I am trying to get an overall picture of the Christian position and a lesser known text would potentially be more controversial and may not be accepted by the wider Christian community. It is also important to refer to one version consistently as one word translated differently in two different versions may lead to an entirely different conclusion on the same issue.
\textsuperscript{89}See J. Barr, (1998) Holy Scripture – Canon, Authority and Criticism, Oxford University Press, p3. Also see Part 4 A below.
Nevertheless, the Bible still remains one of the most popular, researched and widely read books in the world and it is the closest text to be able to tell us, from a Christian perspective, whether or not Jesus would have advocated capital punishment and therefore it is to the New Testament which we shall shortly turn.

First, however, it is important to say a few words on the practice of biblical interpretation in order to better understand how it is that the biblical texts are understood and construed.

**E- Interpreting Biblical Scripture – Exegesis, Hermeneutics and Authority.**

An inherent by-product of the complex nature of the Biblical structure and content is that one passage or verse can be read a dozen times and yet each time the reader can come away with an entirely different understanding of the text. This multi-dimensional nature of Biblical verses is one of the primary concerns of Biblical interpretation, a practice that has developed into an increasingly sophisticated discipline over the centuries. In order to aid the understanding of the Biblical message, Biblical exegesis, the process of critical interpretation, has evolved to include many forms of Biblical analysis. Exegetical methods used to understand the meaning of the Scriptures include for instance, literary criticism, form criticism and traditional criticism to name but a few, each of which lend a different focus to the understanding of Biblical passages. Historical criticism, for instance, places the individual writings in their historical context and helps the modern reader to comprehend how various passages would have been interpreted at the time that the writings were first read by its then contemporary readers.

Biblical hermeneutics, or “the study and establishment of the principles by which it is to be interpreted”\(^90\) have also developed to aid the understanding of the Bible. Forms of Biblical hermeneutics include placing an emphasis on the moral interpretation, literal interpretation and analogical interpretation of the texts.\(^91\) In order to clarify the difference between exegesis and hermeneutics, David Stacey describes exegesis as a technique concerned with “original meaning” and hermeneutics with “present

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meaning.” To elaborate he gives the example that our understanding and appreciation of Chaucer is enhanced by an exegetical knowledge provided by footnotes explaining terms and customs of fourteenth century England. Hermeneutics or interpretation on the other hand would be the application of the original text to the modern world.92

Many different schools of thought also exist as to the best way to read, interpret and understand the Bible. There is, for example, the *Antiochene* school of thought, which places the primary emphasis on the historical context and content of the Bible.93 Or there is, for instance, the *Alexandrian* school of thought, developed largely by the philosopher Philo (c30BCE-c45CE), according to which the Scriptures should be read with the main focus being on the hidden message behind the allegories. As David Stone explains, “Rather than be content with what can be discerned from a literal reading of a passage, allegorical interpretation seeks to go deeper and discover the hidden meaning behind the surface.”94 This approach is fairly common and, as Harvard Professor James Kugel writes, when it comes to Scriptural interpretation:

“All interpreters are fond of maintaining that although Scripture may appear to be saying X, what it really means is Y, or that while Y is not openly said by Scripture, it is somehow implied or hinted at in X.”95

However, as Kugel observes, this focus on the cryptic or esoteric as a way of viewing texts is “hardly a natural thing. Whether we are reading a history book or a newspaper editorial or a rousing hymn, we generally assume that what the words seem to say is what they mean to say.”96

Other interpreters stress the importance of a diverse range of interpretive methodological approaches. St. Augustine of Hippo (345-430), for instance, expounded the view that, “Some passages were to be interpreted in a literal and historical sense, while others were better understood in terms of an allegorical and spiritual sense.”97

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Taking the art of interpretation even further in the Middle Ages;

"Biblical scholars... maintained this distinction between the literal and non-literal means of interpreting Scripture, further subdividing the latter into three senses: the allegorical (defining what Christians are to believe), the tropological or moral (defining how Christians are to behave) and the anagogical (defining what Christians are to look forward to in the future.)."

Having considered some of the various methods of Biblical interpretation it is evident that the method of interpretation utilised will play a central role in how the death penalty is perceived by Christians. If a literal approach is taken for instance, verses such as “Whoever sheds the blood of man, by man shall his blood be shed” can clearly be taken as a Divine command ordaining the death penalty for murder. If it is interpreted as a prophecy however, it may be read, not as a command but as a warning.

Interpretation will similarly affect the meaning of a number of other capital punishment verses. The verse in Romans (13:4), for instance, which states that the governing authority “does not bear the sword for nothing”, may be understood both literally, indicating that the state is a legitimate purveyor of capital punishment; or in the figurative sense, indicating only the symbolic power of the state. Either way, it is obvious that the method of interpretation chosen will heavily influence the conclusions drawn.

This clearly confounds the issue, as one comment or story about capital punishment, for instance, can lead to many different interpretations. However, in general terms the primary tool for understanding the Bible seems to be the literal one. To avoid eisegesis, whereby everyone can interpret what they read in their own unique way;

"Martin Luther established the principle that no non-literal sense can be justified unless that same truth is explicitly stated literally somewhere else. Otherwise Scripture would become a laughing matter... The

98 Stone (op. cit. note 93) (1996) p171. For instance, the author gives the example that a Biblical reference to water could refer to water literally or to baptism or to the water of life and so on.
99 Gen. (9:6).
100 See Part 4 C (iii) below for more on this verse and Part 3 F (ii) below for more on the literal approach to Scripture.
101 This individualised method of interpretation is encouraged by the postmodernist movement who argue that, “all writings of whatever kind have multiple meanings, depending on the setting and perspective of the persons who are reading the particular text.” James E. Davison, (2001) This Book We Call The Bible. Geneva Press, p88.
Protestant reformers insisted that interpretation of the Bible should begin with the plain and literal sense of Scripture.\textsuperscript{102}

For the purposes of this thesis, this literal, textual or plain meaning approach is the primary one that I shall be adopting while reviewing the Biblical pronouncements related to the death penalty.

One final point to make on the matter of interpretation is that there is often a distinct difference between the ways in which the various denominations rely on Biblical texts and this usually correlates with the amount of authority that they vest in the Bible. Protestants, for instance, tend to hold firm to the notion that "people need nothing at all beyond their Bibles"\textsuperscript{103} and that "Scripture alone"\textsuperscript{104} is authoritative, whereas "within Catholic theology, tradition\textsuperscript{105} continues to be viewed as the authoritative interpretation of Scripture"\textsuperscript{106} and it is tradition, as opposed to individual interpretation, that is usually considered to be the final authority.


The Bible comprises two Testaments; the Old and the New, each of which consists of numerous individual books. Whether a Christian supports or rejects capital punishment, on religious grounds, seems to be largely dependent on which Testament they primarily adhere to. In general terms, it seems that adherents of the Old Testament support capital punishment more so than those who primarily follow the New Testament. For instance, "Fundamentalist and Pentecostal churches as well as the Church of Jesus Christ of Latter Day Saints (Mormons) typically support the death penalty on Old Testament Biblical grounds."\textsuperscript{107} As we shall see in the next section, the Old Testament makes it very clear that the death penalty is to be adopted as the punishment for certain crimes, whereas this is not as blatant in the case of the New Testament.

Ultimately however, most Christians consider both Scriptures to be authoritative. Whereas the Old Testament is generally thought of as the book of Moses and contains

\textsuperscript{102} Stone (op. cit. note 93) (1996) p172.
\textsuperscript{103} Davison, (op. cit. note 101) (2001) p68.
\textsuperscript{104} See Stacey, (op. cit. note 85) p84, for more on this point.
\textsuperscript{105} Tradition, in this context, is taken to include the formal teachings of the church including the "oral teachings of the apostles" and Popes. See, \textit{ibid.}, p66.
\textsuperscript{106} \textit{Ibid.}, p68.
\textsuperscript{107} Hugo Adam Bedau (op. cit. note 77) (1997) p411.
the lessons and teachings of many past Prophets, the New Testament is thought of as the book of Jesus, containing words and teachings attributed to him. Although some followers discount one Testament in favour of the other, others see the two as complementary halves of one whole. According to this way of thinking one Testament does not necessarily repeal the other and one should be read in light of the other. This approach is certainly compatible with the teachings of Jesus himself who clearly attests to the fact that he did not come to replace or abolish the Old Testament. In Matthew (5:17-18) Jesus unequivocally states:

“Do not think that I have come to abolish the Law or the Prophets; I have not come to abolish them but to fulfil them, I tell you the truth, until heaven and earth disappear, not the smallest letter, not the least stroke of a pen, will by any means disappear from the Law, until everything is accomplished.”

Similarly, Jesus himself encouraged the carrying out of the laws of the Old Testament when he addressed the Jews in John (10:35) saying “and the Scripture cannot be broken...” As such, it is important that the Bible as a whole, the Old Testament and the New, is considered in order to ascertain the range of Christian teachings regarding capital punishment.

3- The Old Testament.

A- The Old Testament.

Written centuries before Jesus was even born, the Old Testament obviously does not contain any quotes or teachings directly attributable to him. Nevertheless, it does contain many of the core principles and tenets of Christianity that it is said that Jesus was sent to enforce. So in order to deduce the stance which Jesus himself would most likely take regarding the death penalty debate, it is a logical and valid starting point to look at the Old Testament first before turning to the New.

B- What is the Old Testament?

To the Jews it is known as the Hebrew Bible or TANAK. To Christians it is known as the Old Testament, (the term “Testament” being taken to refer to the covenant established between God and man.) According to most Christians, Moses brought the old covenant to mankind and this was followed centuries later by a renewed covenant
that was brought about by the coming of Jesus Christ and the eventual compilation of the New Testament.

The Old Testament is not a single book but an amalgamation of at least 39 books, most originally written in Hebrew and a few in Aramaic. It is normally divided into three or four sections, depending on which religious group you adhere to as this table shows:

<table>
<thead>
<tr>
<th>Jewish Bible</th>
<th>Roman Catholic Bible</th>
<th>Protestant Bible.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-The Law /Torah.</td>
<td>1-The Pentateuch</td>
<td>1-The Pentateuch.</td>
</tr>
<tr>
<td>2-The Prophets</td>
<td>2-The Historical Books</td>
<td>2-The Historical Books.</td>
</tr>
<tr>
<td>3-The Writings</td>
<td>3-The Wisdom Books</td>
<td>3-The Poetical Books.</td>
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<td></td>
<td>4-The Prophetical Books</td>
<td>4-Prophetical Books.</td>
</tr>
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</table>

C- Who wrote the Old Testament?

According to author John Bailey:

"Apart from the books of the Prophets almost all the other books of the Old Testament are anonymous... Tradition speaks of the "five books of Moses", the "Proverbs of Solomon" and the "Psalms of David" but the Bible itself nowhere says that these books were actually composed by the people named. It is more a question of associating certain kinds of people with certain types of writing."

The Old Testament is understood to include the Law revealed to Prophet Moses while on Mount Sinai. Orthodox Christians and Jews believe that "the Torah was literally dictated by God to Moses." However, many critics doubt this or at least doubt that the Old Testament that we have today is an accurate rendition of the original revelation. This is because, for example, of the various repetitions and variations in style throughout the Old Testament which make it infinitely unlikely that it was written by the same author. Similarly, "inconsistency in style... showed them that different sources

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108 See Appendix G for a list of the books of the Bible referred to in this thesis and a key to the abbreviations used.
109 This table is extracted from Encarta (1996) under the heading "Books of the Bible."
110 The Roman Catholics also include an additional seven books in the Old Testament that neither Jews nor Protestants refer to; the Apocrypha.
lay behind the present form of text.\textsuperscript{113} In addition to this is the fact that in Deuteronomy the death of Moses is recounted, in which case how could it have been written by him?\textsuperscript{114}

The general consensus therefore seems to be that the Old Testament is a compilation of various works by different people. It comprises assorted styles of writing such as poetry, prophecy, speeches, narratives, proverbs and hymns among others. It took over a thousand years\textsuperscript{115} to evolve, and would have been known orally for generations before storytellers, editors and authors finally brought them all together in written form.

The age of the various sections of the book have been roughly dated by historians and theologians to range between 1200BC and 100BC at which point the final version was probably established.\textsuperscript{116}

D- The Old Testament and capital punishment.
There is a profusion of strict Biblical prohibitions against crime in the Old Testament, some of the most familiar being those contained in the Ten Commandments. Some of the commandments are negative, in the sense that they order humans to refrain from certain acts such as the commandment, “thou shall not kill”, while others enforce positive behaviour and actions such as the commandments to keep the Sabbath or the commandment to honour thy father and thy mother. From a criminological and legal point of view, however, one of the most striking features of the Old Testament is that not only does it outlaw certain behaviours but it also subsequently specifies the punishments for breaching those commandments, including many verses which specifically prescribe capital punishment. The Old Testament is replete with passages advocating the use of capital punishment and the list of crimes for which the death penalty is the appropriate biblical sanction can be found in abundance throughout the Old Testament.

\textsuperscript{114}See Deut. (34:5-8).
\textsuperscript{115} This is an estimate made by Harvard Professor J. Kugel among many others. Kugel, (op. cit note 95) (1997) pXIII.
\textsuperscript{116} These are the estimates according to the Encyclopedia Britannica which can be found on-line at: \url{http://www.britanicca.com/ebc/article-9373984?query=old%20testament&ct=}
What follows in the next section is a list of just some of the crimes that the Old Testament deems as offences deserving of death.

E- Old Testament list of capital crimes.

Altogether there are approximately 36 capital offences laid down in the Old Testament. Here are some of the more prominent ones:

1-Murder.
2-Abuse of father or mother.
3-Kidnapping.
4-Cursing one's parents.
5-Causing a miscarriage.
6- Owning a habitually dangerous animal that kills a person.
7-Witchcraft.
8-Bestiality.
9-Worshipping other gods.

117 They are written in the order in which they appear in the Old Testament.
118 Please note that for the crime of murder I shall cite several examples of verses in which the death penalty is prescribed as the correct sanction in order to demonstrate the different ways that the issue is worded throughout the Old Testament. After that however, for purposes of expediency I shall quote only one Biblical reference for each capital crime although there are often several references. Also please note that any underlining is my own emphasis.

- (Gen. 9:6) “Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man.”
- (Ex. 21:12) “Anyone who strikes a man and kills him shall surely be put to death. However, if he does not do it intentionally, but God lets it happen, he is to flee to a place I will designate. But if a man schemes and kills another man deliberately, take him away from my altar and put him to death.”
- (Lev. 24:17-23) “If anyone takes the life of a human being, he must be put to death.”...
- (Nu. 35:16-21) “If a man strikes someone with an iron object so that he dies, he is a murderer; the murderer shall be put to death. Or if anyone has a stone in his hand that could kill and he strikes someone so that he dies, he is a murderer; the murderer shall be put to death…”

119 (Ex. 21:15) “Anyone who attacks his father or his mother must be put to death.”

119 (Ex. 21:16) “Anyone who kidnaps another and either sells him or still has him when he is caught must be put to death.”

120 (Ex. 21:17) “Anyone who curses his father or mother must be put to death.” And Lev. (20:9).

121 (Ex. 22:22-23) “If men who are fighting hit a pregnant woman and she gives birth prematurely but there is no serious injury, the offender must be fined whatever the woman’s husband demands and the court allows. But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.”

122 (Ex. 21:29) “If, however, the bull has had the habit of goring and the owner has been warned but has not kept it penned up and it kills a man or woman, the bull must be stoned and the owner must also be put to death.” Note that the penalty of death for this crime can be redeemed for a price (blood money) see (Ex. 21:30-31).

123 (Ex. 22:18) “Do not allow a sorceress to live.”

124 (Ex. 22:19) “Anyone who has sexual relations with an animal must be put to death.” (Lev. 20:15-16).
10-Breaking the Sabbath. 127
11-Adultery. 128
12-Adultery and incest. 129
13-Homosexuality. 130
14-Being a medium. 131
15-Prostitution by a priest’s daughter. 132
16-Blasphemy. 133
17-Claiming to be a Prophet or dreamer. 134
18-Contempt of court. 135
19-False prophethood. 136
20-False and malicious witness. 137
21-Being a rebellious son. 138
22-A woman engaging in pre-marital sex. 139
23-Having sexual intercourse with a person who is already engaged. 140
24-The rape of an engaged woman. 141

126 (Ex. 22: 20) “Whoever sacrifices to any God other than the LORD must be destroyed.”
127 (Ex. 31: 14) “Observe the Sabbath because it is holy to you. Anyone who desecrates it must be put to death.” Also Num. (15: 35).
128 (Lev. 20: 10) “If a man commits adultery with another man’s wife – with the wife of his neighbour – both the adulterer and the adulteress must be put to death.”
129 (Lev. 20: 11) “If a man sleeps with his father’s wife he has dishonoured his father. Both the man and the woman must be put to death; their blood will be on their own heads…”
130 (Lev. 20: 13). “If a man with a man as one lies with a woman, both of them have done what is detestable. They must be put to death; their blood will be on their own heads.”
131 (Lev. 20: 27) “A man or woman who is a medium or spiritist among you must be put to death. You are to stone them; their blood will be on their own heads.”
132 (Lev. 21: 9) “If a Priest’s daughter defiles herself by becoming a prostitute, she disgraces her father; she must be burned in the fire.”
133 (Lev. 4:15) “Say to the Israelites If anyone curses his God, he will be held responsible, anyone who blasphemes the name of the LORD must be put to death. The entire assembly must stone him.”
134 (Deut. 13: 1-5) “That Prophet or dreamer must be put to death, because he preached rebellion against the LORD your God.”
135 (Deut. 17: 12) “The man who shows contempt for the judge or for the priest who stands ministering there to the LORD your God must be put to death. You must purge the evil from Israel.”
136 (Deut. 18: 20) “But a prophet who presumes to speak in my name anything I have not commanded him to say, or a prophet who speaks in the name of other gods must be put to death.”
137 (Deut. 19: 18-21) “...and if the witness proves to be a liar giving false testimony against his brother...show no pity: life for life…”
138 (Deut. 21: 18-21) “If a man has a stubborn and rebellious son who does not obey his father and mother and will not listen to them when they discipline him, his father and mother shall take hold of him and bring him to the elders at the gate of his town... Then all the men of his town shall stone him to death…”
139 (Deut. 22: 20) “If, however, the charge is true and no proof of the girl’s virginity can be found, she shall be brought to the door of her father’s house and there the men of her town shall stone her to death.”
140 (Deut. 22: 23) “You shall take both of them to the gate of that town and stone them to death.”
141 (Deut. 22: 25) “Only the man who has done this shall die.”
F- Retentionist arguments.

i- A virtual catalogue of capital offences and other pro-death penalty pronouncements.

As can be seen from the examples cited above, there is an extensive and comprehensive range of crimes for which the Old Testament clearly prescribes the death penalty. For many retentionists, this alone is enough to establish without question the validity of capital punishment as a penalty compatible with Christianity.

In addition to this lengthy Biblical catalogue of capital offences, several other more general Old Testament verses are frequently cited by retentionists in support of their position. For instance, one of the most oft quoted verses referred to as a justification for the death penalty is found in Genesis (9: 6) which says, God said to Prophet Noah: “Whosoever sheds the blood of man, by man shall his blood be shed, for in the image of God, has God made man…” The retentionist interpretation of this verse is that man is required by God to enforce the death penalty for murder.

Another equally prominent pro-death penalty pronouncement is the Biblical exhortation: “Do not accept a ransom for the life of a murderer, who deserves to die. He must surely be put to death.” (Nu. 35:31)

A further favoured passage of retentionists is the oft-quoted Biblical verse regarding the ancient retributive principle of Lex Talionis. Namely, “But if there is serious injury you are to take life for life, eye for eye; tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.” (Ex. 21:23-25).\(^{142}\) Although many abolitionists\(^ {143}\) argue that the purpose of this verse was to reduce the number of ancient blood feuds that riddled the land by limiting the amount of punishment that the offended tribe could visit on the offending tribe, (i.e., only one life for one life)\(^ {144}\) the fact still remains that it allows for the retaliation of murder by means of the death penalty as a proportionately retributivist response.

\(^{142}\) Also see Deut. (19:21) “Show no pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.”


\(^{144}\) See Chapter 4, Part 5 A (c) (ii), for an in depth examination of “Lex talionis – A Divine demand for proportionality or a law of restraint? A socio-historical context.”
Nevertheless, despite these and many other clear proofs from within the Old Testament that capital punishment is the mandatory penalty for certain crimes according to God’s own law as described in the Noachian Covenant and the Mosaic Covenant, many Christians still reject these evidences and interpret them in their own way according to their individual understanding of Christianity.

**ii- A literal interpretation.**

For many who interpret the Old Testament literally, there is no doubt that the death penalty is a Divine directive that must be followed. In fact, for some, this literal interpretation can and should be taken to extremes. According to James J. Megivern, for instance:

“There are numerous varieties of Protestant evangelicalism that take the Pentateuchal texts as eternal and immutable mandates of God, just as much in force for obedient Christians of modern secular society as they are presumed to have been for ancient Israelites and all the ages in between. One group arguing in this fashion is the Theonomist or Christian Reconstructionist School”, a representative of whom has argued that, “murder requires the death penalty whether the offender is an animal, an ‘insane’ man, a child, or a feeble minded person.”

According to the organisation Religious Tolerance, if Christian Reconstructionists:

“Gained control of the U.S. or Canadian federal governments... the use of the death penalty would be greatly expanded, when the Hebrew Scriptures’ laws are reapplied. People will be executed for adultery, blasphemy, heresy, homosexual behaviour, idolatry, prostitution, evil sorcery (some translations say Witchcraft), etc... The Bible requires those found guilty of these “crimes” to be either stoned to death or burned alive. Reconstructionists are divided on the execution method used.”

This is, however, certainly a minority view and most contemporary Christians would not agree with taking Biblical interpretation this literally or this far.

It is also important to note, that other extremely literal Biblical interpretations can, in fact, lead to an extremely different understandings of the same texts. One denomination

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145 See for instance Lev. (20:16) or Ex. (21:28).
that takes a very literal approach to the Bible is that of the Quakers. However, the Quakers are so literal in their approach that they take Biblical verses such as “Do not swear at all”\textsuperscript{148} and “Do not resist an evil person...”\textsuperscript{149} to their literal extremes and completely oppose all forms of hostility and violence; a pacifism that certainly extends towards the death penalty.\textsuperscript{150}

iii- "Thou shall not kill."\textsuperscript{151}

One of the core arguments used by many Christians who are against capital punishment is the Biblical injunction “thou shall not kill.” This is often interpreted very literally and is frequently put forward as one of the core Scriptural arguments against the death penalty. The interpretation of this commandment is often taken to the extreme of forbidding all forms of killing, including capital punishment.\textsuperscript{152}

However, although many of the more traditional Biblical versions\textsuperscript{153} translate this commandment as “thou shall not kill”, many of the more modern or “New” versions\textsuperscript{154} translate it more specifically as “thou shall not murder.” As Bible Commentator David Noel Freedman explains, “This prohibition has a far more restrictive meaning than simply forbidding the taking of another’s life.”\textsuperscript{155} Worded as such, the injunction no longer refers to all forms of killing but only to unjustifiable premeditated murder.\textsuperscript{156} As, such, it can subsequently be argued that there are circumstances in which the taking of a life is permissible. This would include times of war and self-defence.\textsuperscript{157} Furthermore, many commentaries on this verse argue that, “Another type of killing that does not fall under the category of murder is capital punishment... the individual who carries out the death penalty does not violate the commandment prohibiting homicide.”\textsuperscript{158}

\textsuperscript{148} (Matt. 5:34)
\textsuperscript{149} (Matt. 5:39)
\textsuperscript{150} See Part 2 (2) (a) of this chapter above for an official statement on the Quaker position on capital punishment as published by the \textit{Friends Committee on National Legislation.}
\textsuperscript{151} (Ex. 29:13)
\textsuperscript{152} This is the approach of the Quakers, for instance.
\textsuperscript{153} This includes the King James Version.
\textsuperscript{154} This includes the New International Version.
\textsuperscript{156} Including abortion and euthanasia, according to Part 3 of the Evangelium Vitae.
\textsuperscript{157} This is compatible with the Catholic teachings as contained in the Pope’s Evangelium Vitae, Part 3 (s55) of which confirms that war and self-defence are deemed to be situations in which killing can be considered as morally justifiable. Also see Articles 2263-2265 of the Catholic Catechism.
\textsuperscript{158} Freedman (op. cit. note 155) (2000) p112.
This more restrictive interpretation would also seem more in line with the fact that the death penalty is clearly prescribed so many times throughout the Old Testament. How else can one reconcile the fact that God so clearly allows for capital punishment in dozens of passages but then contradicts Himself by saying "You shall not kill." This creates an impossible paradox as, by His very definition, God, as the only omnipotent and omniscient being in the universe, is beyond making mistakes. Therefore if you say that there are mistakes in the Bible we must concede that, either it is not written by God or that his word has been adulterated by human error over the years.

Alternatively there is the view that God did not contradict Himself at all and that both Testaments are compatible and phrases such as "you shall not kill" were not intended to outlaw all forms of killing and do not refer to capital punishment but are meant in reference to murder between individuals. This is also compatible with the line of argument that the Ten Commandments were sent down as a guide for individuals and not to regulate the conduct of the ruling authorities. As such, this teaching would mean that although individuals do not have the moral authority to kill, the state, acting in the capacity as an agent of God, would not be precluded from punishing wrongdoers via the capital punishment process. As David Anderson explains in his book The Death Penalty - A Defence:

"Throughout Christian history, the fifth commandment has never been considered as aimed at the courts or the judicial system. Neither has it been considered aimed at any nation's defensive forces. This commandment, like the others, is aimed at man as a regular citizen of the society. And the simple meaning of the fifth commandment is that no man is allowed to take the life of another man. Other verses of the Bible say that if this happens, the man who has taken the life of another must be punished by death."\(^{159}\)

G- Abolitionist arguments.

i- Theory vs. Practice.

One abolitionist approach is to agree that in theory the Old Testament does endorse capital punishment in no uncertain terms but to then point out that in practice however, it is virtually impossible to implement. Even "Jewish scholars, who might be expected to support the death penalty for Scriptural reasons, generally have stressed how Jewish

\(^{159}\) David Anderson, (2005) "The Death Penalty and The Bible." The Death Penalty – A Defence. Chapter five, Part one, p11. This can be found at: http://w1.155.telia.com/~u155091109/ny_sida_6.htm
law *in practice* placed so many procedural limitations on capital punishment as to virtually abolish it."\(^{160}\) Some of the practical restrictions put on the use of capital punishment include the following:

**a- The number of witnesses.**

One key provision restricting the ease with which a capital charge can be brought about are the rules relating to the number of witnesses required to participate in a capital trial. *Numbers* (*35:30*), for instance, states that, “Anyone who kills a person is to be put to death as a murderer only on the testimony of witnesses. But no-one is to be put to death on the testimony of only one witness.” Again it is stated in *Deuteronomy* (*17:6*) that “On the testimony of two or three witnesses a man shall be put to death, but no-one shall be put to death on the testimony of only one witness.” Yet again *Deuteronomy* (*19:15*) determines that, “One witness is not enough to convict a man accused of any crime or offence he may have committed. A matter must be established by the testimony of two or three witnesses.”

**b- The witnesses as the executioners.**

Another provision severely curtailing the practicability of enacting the Biblical provisions of capital punishment is the requirement that the witnesses to the crime take part in the physical act of execution. *Deuteronomy* (*17:7*), for instance, provides that, “the hands of the witnesses must be the first in putting him to death, and then the hands of all the people.”

In fact, at different points throughout the Bible, depending on the crime, different people are called upon to take on the role of executioner. Some verses, for instance, require the witnesses themselves to serve as the chief executioners, whereas other verses require that the “avenger of blood shall put the murderer to death when he meets him.”\(^{161}\) Others still require that, “all the men of his town”\(^{162}\) should partake in the physical act of execution.

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\(^{161}\) *Num. (35:21).* It is implied that the “avenger of blood” refers to an offended party and not an official executioner. *Deut. (19:6)*, for instance, refers to the “avenger of blood” pursuing a runaway killer while “in a rage.”

\(^{162}\) *Deut. (21:21).*
c- Death for false witnesses.
A potentially even more effective provision restricting the number of capital cases is the Biblical ruling that a false witness should suffer the same fate as the person they had accused, namely, in a capital case, death. *Deuteronomy (19:18-19)* states that, “the judges must make a thorough investigation, and if the witness proves to be a liar, giving false testimony against his brother, then do to him as he intended to do to his brother.”

d- Cities of refuge.
A further provision limiting the potential number of executions carried out is the requirement related to “cities of refuge” which are intended to serve as, “places of refuge from the avenger, so that a person accused of murder may not die before he stands trial before the assembly.”\(^{163}\) Essentially therefore it is a place in which the accused killer should be granted sanctuary and in which they should be free from the fear of avenging families while their cases can be further investigated.\(^{164}\)

It is a result of provisions such as the above which restrict the practicalities of executions and which have led a number of Jewish and Christian organisations to make abolitionist statements condemning the practice of capital punishment and proclaiming it to be impracticable in reality.\(^{165}\)

**ii- Dead letter law.**
Contrary to popular belief, even in the time of Ancient Israel, capital punishment was frowned upon, despite a wealth of capital punishment laws. A famous rabbinical conversation recorded in the *Mishna*\(^ {166} \) espoused the view that a Sanhedrin (the High Rabbinical Court) that executed “more than one person in 70 years... (would be denoted as a murderous court.)”\(^ {167} \) From this approach, it seems that the dictates

\(^ {163} \) Num. (35:12).
\(^ {164} \) Num. (35:22-28) and Deut. (19:14-13). An analogy could possibly be drawn here between modern prison systems in which the accused is held until their case has been decided by the courts, and the Biblical cities of refuge.
\(^ {165} \) This includes abolitionist statements made by: The Union of American Hebrew Congregations; The National Jewish Community Relations Council; The Central Conference of American Rabbis and The Synagogue Council of America.
\(^ {166} \) The *Mishna* is a codification of Jewish laws that can be found in the first part of the Talmud.
\(^ {167} \) Nathan J. Diament (2002) “Judaism and the death penalty – Of two minds but of one heart.” Available at: http://shma.com/oct02/nathan.htm
demanding capital punishment were interpreted more as a warning emphasising the gravity of the misdeed, as opposed to a literal demand for the blood of wrongdoers.

There is similarly no evidence that Ancient Israel ever enforced the Old Testament laws on capital punishment on the scale that one might expect, as if they did there would have been enough blood shed to end society as they knew it. Even in modern times, Israel has only enforced the death penalty once in the last fifty or so years and that was for the execution of Adolf Eichmann, a convicted Nazi war criminal.

**iii- An arbitrarily selected model for capital punishment?**

Another challenge to the retentionist stance is the abolitionist argument that, in addition to invoking the death penalty for the few capital crimes that a pro-death penalty supporter would want today, such as murder, the Old Testament also clearly ordains the use of capital punishment for religious offences which most people today would not want to be regulated by fear of death. Offences such as cursing one’s parents or working on the Sabbath may clearly violate moral or religious principles, but in Christian or secular societies today which are not regulated by religious edicts, it seems inappropriate to enforce religious punishments for such crimes. The question for a retentionist then becomes, according to what criteria do you enforce some Biblical rules and not others? The issue thus becomes problematic because someone who uses the Old Testament to support capital punishment for murder, for example, has then to explain why they do not support capital punishment for the other Biblical offences listed as capital crimes. They could say, for instance, that the list is outdated and not relevant to today’s societies or that it was not intended to be taken literally by its authors but in either of these cases they weaken their argument for making murder and other such crimes capital offences.

**iv- An outdated penal system.**

One of the most common arguments used by abolitionists is to say that the Old Testament rules were valid only in a specific historical context and therefore generally do not apply to today’s modern societies. They argue that although they were relevant at the time of Moses, when they were originally sent down, the rules contained in the Old Testament were modified, and in some cases completely abrogated by the new messages of hope and mercy that Jesus brought to the world.
In order to look more closely at this line of argument we will now turn to look at the message and text of the New Testament.

4- The New Testament.

A- What is the New Testament?

The New Testament is comprised of 27 different books, including the four Gospels of Matthew, Mark, Luke and John. Again multiple authors are believed to be responsible for the entire product which was written primarily in Greek. The “completed scripture was something that was not there until a long time after the central events... for the New Testament, one or two generations”¹⁶⁸ roughly between 50-150AD.¹⁶⁹ This Testament too consists of a combination of styles and a variety of languages. It largely comprises the teachings and stories of the life and message of Jesus Christ and it is therefore to the New Testament that most Christians will turn to ascertain specifically what Jesus would have preached on any particular issue, including capital punishment.

B- What does the New Testament say regarding capital punishment?

While the Old Testament is clearly fertile ground for retentionist arguments, the New Testament is less so. There are far fewer references to the death penalty per se and of those passages that do refer to it they can be legitimately interpreted in numerous ways, both in favour of and against the punishment. Some of these interpretations are examined next.

C- Retentionist arguments.

i- Not sent to abolish the old laws.

Despite the fact that the New Testament tends to be cited more by anti-death penalty lobbyists, it can also be used by retentionists to support their position. A retentionist would argue, for example, first and foremost, that the New Testament and the message of Jesus was in no way sent to replace the Law of Moses.¹⁷⁰ Both Testaments are

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¹⁶⁹ The estimates differ however. According to Andrew Cockburn, writing for the National Geographic Magazine, the Gospels of Matthew, Mark, Luke and John were probably written between 65-95 AD, while they were only recognised as authoritative Gospels between 150-200 AD. See “The Judas Gospel.” (May 2006) National Geographic, pp78-95 at p88.
¹⁷⁰ There are however a few notable exceptions to this in which Jesus specifically set aside some of the rules of the Old Testament for his followers, including commandments related to sacrifice, circumcision, ceremony and food.
believed to contain the laws of the same Almighty God, despite being sent down at
different times and to different people, and the basic principles and fundamental
commandments are essentially the same in both. Jesus did not intend to invent a new
religion, but came to strengthen the religion already preached by Prophet Moses to his
people. Jesus himself clearly attests to this fact in *Matthew (5:17-18)* where he says:

"Do not think that I have come to abolish the Law or the Prophets; I
have not come to abolish them but to fulfil them, I tell you the truth,
until heaven and earth disappear, not the smallest letter, not the least
stroke of a pen, will by any means disappear from the Law, until
everything is accomplished."

Theologian William Loader describes this passage by saying:

"One could hardly have a clearer statement about Jesus' attitude towards
the law than what we find here in 5:17-20. They appear to be stating that
the entire Torah, inclusive of ritual ceremonial, food, circumcision laws
is to be continued until the end of time."

Taking this into account and given the general consensus that capital punishment is
endorsed in the Old Testament, how can it be argued that it is prohibited in the New?
Why would God contradict himself and allow the death penalty for one generation of
people and not for another? Should not the rules regulating human nature and
interaction be more universal? One would expect therefore that, unless otherwise
specified, any message in the New Testament should be taken to support and bolster the
message of Moses and not abrogate or replace it. As Kerby Anderson argues:

"Capital punishment is never specifically removed or replaced in the
Bible. While some would argue that the New Testament ethic replaces
the Old Testament ethic, there is no instance in which a replacement
ethic is introduced... Jesus and the disciples never disturb the Old
Testament standards of capital punishment."

**ii- Jesus never forbade capital punishment.**

Similarly, retentionists have often resorted to one very simple line of argument, namely
that there is not one single line in the entire New Testament where Jesus specifically
forbids capital punishment *per se*. This is despite several opportunities where one

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171 *Luke (16:17)* furthermore says: "It is easier for heaven and earth to disappear than for the least stroke
of the pen to drop out of the law."

Siebeck publications, p171.

173 Kerby Anderson, (2003) "Capital Punishment." Published by Probe Ministries, at:
http://www.leaderu.com/orgs/probe/docs/cap-pun.html
would have expected him to do so if capital punishment is so abhorrent. Even when faced with his own execution neither Jesus nor any of his followers spoke out in his defence or proclaimed that the practice of capital punishment was contrary in any way to Christianity and should therefore be abolished. Why did he not use this opportunity to condemn the practice of capital punishment? He did not even question the authority of Pontius Pilate to execute him but simply attributed his power to God when he said: “You would have no power over me if it were not given to you from above.”174 If capital punishment is such a heinous practice, why did Jesus not speak out and tell the people that they were making a mistake. According to Luke (23:34), at his execution he merely prayed to God and said, “…forgive them, for they do not know what they are doing.”

Whereas abolitionists interpret these words, in part, to mean that the people did not know that they were wrong for using the tool of capital punishment, retentionists take this statement to mean that they did not know that he, Jesus, was innocent of the charges they were making against him and that therefore they should be forgiven for executing an innocent man! As such, some supporters of capital punishment interpret this passivity about his death sentence as an implied acceptance that the governing authorities have a right to implement the death penalty against their subjects.

Similarly, there is no evidence that Jesus ever spoke out against capital punishment in any other context. Even if he was willing to die on the cross himself, as many Christians believe, in order to save humanity and as a form of salvation for his followers, why did he not rule on the issue of public executions at any other time during his life? Given the fact that capital punishment was a very common and public form of punishment in the Roman Empire at that time, many retentionists have interpreted his lack of condemnation of the status quo as a subtle form of implied acceptance of the death penalty. They argue that if Jesus felt that capital punishment was so contrary to the spirit of Christianity, he would have simply said so; and yet he never did speak out, even when face to face with its victims. According to Luke (23:41-43), for instance, when Jesus was being hung on the cross, a criminal who was being crucified to one side of him said to a criminal being crucified on his other side, “We are punished justly, for

174 Jn. (19:11)
we are getting what our deeds deserve. But this man has done nothing wrong.” Jesus did not argue that the criminals did not deserve to die, he simply said, “I tell you the truth, today you will be with me in paradise.”

To further their argument, some retentionists \(^{175}\) also point to the fact that even the apostles did not condemn the practice of capital punishment and in fact some can be shown to have made statements seemingly affirming its viability. Paul for example, is reported to have said, “If, however, I am guilty of doing anything deserving death, I do not refuse to die.”\(^ {176}\) As such, according to Kerby Anderson, “capital punishment is taught in both the Old and New Testaments.”\(^ {177}\)

**iii- The state as the bearer of the sword.**\(^ {178}\)

In addition to these general arguments, there are also many specific verses that are used to explicitly elucidate upon the issue. For example, in defence of the death penalty, one of the most frequently cited New Testament verses is that relating to the authority of the state rulers to bear arms. In Romans (13:1-6) submission to the authorities and subsequently to their punishments are discussed where it says that:

> “Everyone must submit himself to the governing authorities, for there is no authority except that which God has established... For he is God’s servant to do you good. But if you do wrong, be afraid for he does not bear the sword for nothing. He is God’s servant, an agent of wrath to bring punishment on the wrongdoer.”\(^ {179}\) Therefore it is necessary to submit to the authorities...”

By these verses it is generally conceded that, “Paul probably\(^ {180}\) gives backing to the institution of capital punishment when he speaks of the governing authority who “does not bear the sword in vain...”\(^ {181}\)

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\(^ {175}\) See, for instance, Kerby Anderson (op. cit. note 173) (2003).

\(^ {176}\) Acts (25:11).


\(^ {178}\) Thomas Schreiner explains that “the term ‘sword’ is not necessarily a technical term for capital punishment... but that the reference includes capital punishment is rightly maintained.” Thomas R. Schreiner, (1998) Romans – Baker Exegetical Commentary on the New Testament. Baker Book House, p684.

\(^ {179}\) Italics are my own emphasis.


\(^ {181}\) Higginson’s own italics.
As Biblical commentator Thomas Schreiner explains, the reference to the “state not bearing the sword in vain” refers to the:

“Broader judicial function of the state, particularly its right to deprive of life those who had committed crimes worthy of death. Paul would not have flinched in endorsing the right of the ruling authorities to practice capital punishment since Gen. 9.6 supports it by appealing to the fact that human beings are made in God’s image. Precisely because human beings are so valuable as God’s image bearers, it follows that one who intentionally takes the life of another should be deprived of his or her own. The government’s function is to inflict wrath, to vindicate justice… in the case of one who flouts the law and does what is evil.”

iv- He that is without sin...

Even New Testament passages that may, at first, seem to support abolitionism can also be interpreted by retentionists in a way that supports the death penalty. One such interpretation relates to the well-known story in John (8), in which Jesus was consulted as to the punishment for a woman who was said to be guilty of committing adultery. As the story goes, he was essentially asked whether the Old Testament law of stoning the adulterer to death should be enforced in the case before him. But as John (8:3-9) attests, the question posed to Jesus was not one seeking sincere guidance, but a trap:

“The teachers of the law and the Pharisees brought in a woman caught in adultery. They made her stand before the group and said to Jesus; “Teacher, this woman was caught in the act of adultery. In the Law Moses commanded us to stone such women. Now what do you say? They were using this question as a trap, in order to have a basis for accusing him… When they kept on questioning him, he straightened up and said to them, “If any one of you is without sin, let him be the first to throw a stone at her… At this, those who heard began to go away one at a time, the older ones first until only Jesus was left, with the woman standing there.”

Abolitionist Christians interpret his words, “He that is without sin among you, let him first cast a stone at her,” to be a wholesale prohibition of the death penalty as, after all, who has a clean slate, particularly among law makers and politicians today who are currently the ones responsible for the administration of justice. Naturally, abolitionists argue that this verse is clear testimony that the death penalty should not be

183 This is not the only instance when a trap was laid for Jesus. As it says in Matthew “the Pharisees… laid plans to trap him in his words… Jesus, knowing their evil intent, said, ‘You hypocrites, why are you trying to trap me?’” Mat. (22:15-18).
184 See, for example: http://www.probe.org/docs/cap-pun.html 08/09/2001
185 John (8:7).
utilised, even if specified in the Old Testament, because if death was the correct punishment, then Jesus would have had no compunction to have simply said so in this case, thus clarifying the issue for all Christians, for all time.

However, according to the retentionist interpretation Jesus only refrained from passing a sentence of death on the adulteress because he knew that he was being tricked. He did not deny that the Law of Moses was the correct law nor did he explicitly say that capital punishment was wrong, although this would have been the perfect opportunity to do so. According to the retentionist interpretation, his reluctance to condemn her included the following reasons:

Firstly, Jesus had no legal authority under Roman law to order a death sentence to be passed and, as the New Testament itself attests, no one but the government has the moral or God given authority to enforce punishments on society.

Secondly, it was clear that he was being intentionally trapped between Mosaic Law and Roman law. As adultery was not a crime punishable by death under Roman law, if he endorsed Mosaic Law over Roman law he would look like a traitor to the Roman Empire, a crime for which he could subsequently be executed. Conversely, if he contradicted Mosaic Law by saying that the adulteress standing before him should not be stoned, then he would have broken the very Mosaic Code that he proclaimed to have come to fulfil. To circumvent this quandary and avoid this trap, his answer was both clever and diplomatic and one that avoided conflict. However, his response may be seen as context specific and not one to have been referring to all capital crimes, or indeed any other type of crime and their lesser forms of punishment, as if his statement is understood in that broader literal sense it would mean that no one could ever be punished by someone who is them self a sinner. In this event no crime would ever go punished and society would be rampant with criminals who would roam free, unpunished for their offences. This would lead to anarchy whereby everyone could commit the most heinous of crimes again and again and no one would ever have the power or authority to stop them. This would certainly lead to a most "un-Christian"
state of affairs and is thus an unacceptable interpretation of this story in *John* (8) according to the retentionist viewpoint.\(^{186}\)

In conclusion, retentionists find no explicit evidence in the New Testament to abrogate from the clear message in the Old Testament, which is one of unequivocal support for capital punishment. Furthermore, they often, in fact, infer from the absence of evidence only implied permission for it.

**D- Abolitionist arguments.**

**i- Love vs. justice.**

One of the most fundamental abolitionist arguments is that essentially only one Christian ethos can ultimately dominate. That being either the New Testament philosophies of love and mercy, or the Old Testament lessons of harsh justice and vengeance. They subsequently argue that the message of love and forgiveness found in the New Testament, as being the more recent of the two, necessarily overrides the message of harsh justice as contained in the Old Testament. To support the primacy accorded to love and forgiveness as the primary principles of Christianity, abolitionists frequently quote biblical passages such as “…I tell you, love your enemies and pray for those who persecute you, that you may be sons of your Father in heaven”\(^{187}\) or “If someone strikes you on the right cheek, turn to him the other also.”\(^{188}\) To the Christian abolitionist, this elemental tenet of compassion alone is enough to provide definitive proof for them against the death penalty.

However, to the retentionist, these verses are by no means insurmountable obstacles. Retentionists simply argue that New Testament messages such as “turn the other cheek” are there to be acted upon by individuals and not governmental organisations.\(^{189}\) This seems to be a logical interpretation, as if the authorities were also to “turn the other cheek”, crimes would spread rampant throughout the world like a plague. There would be no means of public protection if we were not able to, either defend ourselves or let the governing authorities defend us. What would stop people from raping, murdering, kidnapping and terrorising over and over, again? Nothing. The most widely

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\(^{186}\) See, for instance, the argument proffered by Anderson, (op. cit. note 159) (2005), point 5, p14.

\(^{187}\) *Mat.* (5:44-45)

\(^{188}\) *Mat.* (5:39)

\(^{189}\) See, for instance: http://www.prodeathpenalty.com/DP.html
accepted and practical interpretation of teachings such as “turn the other cheek”, therefore, seems to be not that the authorities should not punish, but that individuals should aim to be better than their enemies. According to this view, even standard abolitionist arguments against the death penalty do not necessarily exclude the implementation of capital punishment by the state as a means to protect society.\textsuperscript{190}

Furthermore, as theologian Douglas Moo explains, “Love is the greatest commandment, but it is not the \textit{only} one; and the validity and applicability of other commandments can not be decided by appeal to its paramount demand.”\textsuperscript{191} He gives an analogy whereby, “The role of the love commandment... has been compared to the hinges of a door or the nail from which objects are suspended. According to this analogy, the love commandment is set apart from all others as the most basic demand of the law, but does not displace any other commandments.”\textsuperscript{192}

Nevertheless, despite this retentionist rationale, abolitionists still vigorously maintain the primacy of the New Testament ethos. This seeming paradox of love vs. justice is epitomised in a very concise statement made by Gardner C. Hanks in his book \textit{Against the Death Penalty – Christian and Secular Arguments Against Capital Punishment}. He says: “Since killing and revenge are incompatible with love, it should be obvious that capital punishment cannot be part of the reign of God inaugurated through Jesus Christ.”\textsuperscript{193}

\textbf{5- Overall conclusion.}

It is clear from this brief assessment of the Christian position on the death penalty that myriad complex and competing arguments exist to support both sides of the debate. The disunity of Christian voices on this issue is clearly not attributable to any one particular factor, but is instead the result of a diverse multitude of intricate variables. This includes differences inherent within the fundamental belief systems of the thousands of different denominations that exist. It also includes differences in the teachings of individual Popes, Bishops, Priests and theologians, each of whom may

\textsuperscript{190} See Chapter 4, Part 5 B (i), below for an in-depth examination as to how and why these exhortations are generally understood to apply to individuals and not to the agency of the governing authorities.
\textsuperscript{192} \textit{Ibid.} p5.
preach positions and deliver sermons which are influenced, not only by the time and place in which they live but also, by their own personal views and interpretations of their faith. Reliance on different Biblical versions and translations, different methods of Biblical exegesis and different hermeneutical methods of interpretation also clearly add to the number of approaches that prevail. Furthermore, as we have seen, the position of the church also changes over time\textsuperscript{194} as a result of the shifting social and political landscape, and this fluctuation in the churches’ teachings is one further factor that has contributed to the splintered and disharmonious Christian perspective on this issue.

As a result, of all of these factors, and many more besides, a huge number of equally valid theological arguments exist which seem to support both sides of the debate. According to Jack Reese, for instance, Dean of the College of Biblical Studies at Abilene Christian University, “One can use legitimate Christian perspectives on both sides of the issue of capital punishment.”\textsuperscript{195}

This leads to the inevitable concession that there may, in fact, be no one correct answer to the question, “What is the Christian position with regards to capital punishment?” The resolution of this question depends, not only upon one’s denomination and approach to Biblical interpretation, but also upon one’s individual faith and conscience and one’s beliefs regarding morality and ethics.

From my investigation into the issue however, I would certainly argue that the most prevalent stance, and the interpretation that seems to stand up most robustly to criticism, is the view that asserts that capital punishment is ultimately acceptable within Christianity at the theoretical level, based on both the Bible and tradition, but is neither practicable nor necessary in practice today. This is also the line of thought currently adopted and promoted by the modern Catholic Church.

An understanding of the theological approaches of Christians towards capital punishment is vital for both abolitionists and retentionists. Religious expositions, in many cases, form the bedrock of support for the continued use of the penalty. As Dale

\textsuperscript{194} This is not only the case with capital punishment but is also the case with regards to issues such as divorce, abortion, euthanasia, homosexuality, witchcraft, women in the clergy and so on.

\textsuperscript{195} Steve Ray and Dan Carnavale, “Execution exposes split among Christians on support of death penalty.” Corpus Christi Caller Times. Available at: http://www.caller.com/texas/tex10505.html
Recinella says in *The Biblical Truth About America's Death Penalty*: "The death penalty, as practiced in America today, is a Bible Belt phenomenon. Almost 90 percent of executions in America during the last five years have taken place in the Bible Belt."¹⁹⁶ While this geographical phenomenon may be attributable to a number of factors, one of the primary ones is certainly that of religious influence. As Recinella states, "Anyone who does not think that American support for the death penalty is critically connected to Americans’ understanding of the scripture in Torah/Pentateuch just hasn’t been paying attention."¹⁹⁷ Generally, Christians in "the Bible belt believe that the death penalty is mandated by the Hebrew scriptures, is not prohibited by the Gospels, and seems supported by the Epistles in the Christian scriptures."¹⁹⁸ Understanding the influence of Biblical scripture and the way it is interpreted is therefore vital for both retentionists and abolitionists alike if they are to persuade the opposing side that they are the ones who are truly adhering to the way and will of God, as it pertains to the death penalty.

¹⁹⁶ Recinella (op. cit. note 75) (2004) p10. Also see Appendix H for a table showing the percentages of executions to have taken place in the Bible belt. The Bible belt includes Texas, Florida, Georgia, Tennessee and Louisiana. This also explains why the “Bible belt” is also known as the “Death belt.”
¹⁹⁷ Ibid. p52.
¹⁹⁸ Ibid. p9.
Chapter 3.
Islam and capital punishment.

1- Introduction.
The focus of this chapter is to assess the basic Islamic position on capital punishment.

Part one begins by drawing attention to the important distinction between the principles and teachings of Islam as a religion, and the way in which those principles are sometimes distorted and misapplied by Muslim countries and adherents in practice. This leads to the recommendation that one should not look to the practices of Muslim countries to ascertain what Islam says about capital punishment, or any other penal practice for that matter, but one should look instead to the theological and jurisprudential sources of Islam and Islamic law for the most comprehensive and accurate understanding of Islamic penal policies.

Part two consequently outlines the primary sources of Islamic law (Shariah) and explains the various categories of crime and punishment set forth therein. This section also goes into detail about how each source of Islamic law specifically addresses the issue of capital punishment, drawing distinctions between mandatory and discretionary capital sentences and the various crimes for which they are available.

Part three describes some of the standard conditions and safeguards relating to the implementation of the death penalty which act as pre-requisites to passing a capital sentence under Islamic law. This includes examining potentially mitigating factors in addition to looking at some of the Islamic legal defences available for capital crimes.

Part four discusses one of the most unique alternatives to capital punishment available for crimes of murder and manslaughter in Islam, namely the provision of Diya, or financial compensation for unlawful homicide.

1 When I refer to a distortion or misapplication of Islamic teachings, I refer to what is considered to be a misapplication from the perspectives of the majority of mainstream Muslims or from the perspective of the majority of mainstream Ulamaa (Islamic scholars). The chapter goes on to explain that these distortions may be due to lack of religious knowledge, political machinations in which religion is used for political ends, or other advertent or inadvertent reasons, some of which are briefly discussed in Part One, 2 (C) and (D) of this chapter.

2 While the term Diya is frequently translated as “blood money”, this translation has been criticised by some Islamic legal scholars. See the text at footnote 179 below for more on this issue.
Part five then summarises the chapter’s main points in a brief conclusion outlining the basic position of Islam on capital punishment and discussing both pro and anti-death penalty positions from various Muslim perspectives.

**PART ONE.**

2- The difference between Islam and Muslims. - A point of clarification.

Before addressing the core question of what Islam teaches on the issue of capital punishment, a very important observation must first be made, namely the innate difference between Islam as a religion, and Muslims as its adherents. It is important that these two are clearly distinguished as, although in theory the one should obviously reflect the other and they should be intrinsically linked, in practice that is obviously not always going to be the case. The vital distinction between what a religion teaches and how its adherents interpret and enact those teachings is not uniquely applicable to Islam alone. The same distinction is important when discussing any religion and is an objective way to avoid stereotyping a faith based on the observations made of its followers. It would be wholly unfair, for instance, to brand all Christians as racist simply on the grounds that the Ku Klux Klan based many of their views and practices on Biblical Scripture. It would similarly be illogical to brand all Catholics as terrorists just because of the practices of the IRA. Nor are the practices of a Christian country necessarily reflective of what Christianity teaches. In the same way, the practices of Muslim individuals, organisations and even countries are not always the best indicator of what Islam teaches, particularly on an issue as controversial and multi-faceted as the death penalty. In order to elucidate this point further a brief discussion on the difference between Islam and Muslims follows.

A- Islam.

Although it hardly does any world faith justice to try and sum it up in a few words, it does seem necessary and appropriate to start this chapter with a brief look at the central principles and teachings of Islam before moving on to explain what it teaches about capital punishment.

The word Islam derives from the Arabic word *salaam* which means both peace and submission (to God). Islam itself is a very simple and universally accessible religion,
open to people of all races and nations. It is currently estimated to have a following of approximately 1.3 billion adherents worldwide. It is a monotheistic religion which has at its core the belief that there is only one God, Allah. Together, seven articles of faith form the foundation of the Islamic belief system. They are, to believe in:

1- Allah as the one true God. (The Quran describes the nature of God in a few words in Surah Al-Ikhlas {the chapter entitled, “Purity of Faith”} where it says, “Say: He is Allah, The One. The Eternal, Absolute. He begets not, nor is He begotten and there is none like unto Him.”

2- The Angels of Allah.

3- The Books of Allah. (These include the Psalms of David (Zabur), the Gospels of Jesus (Injil), the Torah of Moses (Tawrat) and the Quran as revealed to Prophet Muhammad, peace be upon him (pbuh).)

4- The Messengers of Allah. (These include, among countless others, Prophets Adam, Noah, Abraham, Lot, Solomon, Moses, John, Jesus and Muhammad {peace be upon them all}).

5- The Day of Judgement.

6- Pre-Destimation.

7- Life after death.

There are also five basic pillars or duties in Islam that all Muslims must perform. They are:

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3 This contrasts with religions such as Judaism, for instance, which are traditionally associated with racial/ethnic identity.

4 See Appendix A for a map of the world indicating countries with the highest Muslim populations and a graph ranking the world’s most populous Muslim nations.

5 The Quran. (112:1-4), (The first number in this and forthcoming Quranic references refers to the chapter (surah) and the second number to the verse (ayah).) There are many English translations of the Holy Quran. The one I shall be referring to throughout is the (1990) English translation of the meanings and commentary, revised and edited by the Presidency of Islamic Researches, Ifta, Call and Guidance. Printed at the Saudi Arabia - King Fahd Holy Printing Complex, Al-Madinah, Al-Munawarah.

6 This includes the Angels Gabriel, Michael and innumerable, unknowable others.

7 It is out of respect that Muslim’s utter the benediction “peace be upon him” after mentioning Prophet Muhammad’s (pbuh) name. Henceforth I shall use the abbreviation (pbuh).

8 Concessions are made in Islam for the non-performance of certain religious duties in the cases of children, the mentally ill, the physically disabled, the poor, pregnant women, menstruating women and so on.
1. The Shahada. This is known as the “Declaration of faith” in which a Muslim proclaims: “I bear witness that there is no God but Allah; and I bear witness that Muhammad is the Messenger of Allah.”\(^9\) This is the basis of Islamic belief and its heartfelt enunciation is how one becomes a Muslim.

2. Salah, or prayer, which Muslims perform five times a day.

3. Zakah, which is a form of annual charity paid by those who can afford it.

4. Siyam, or fasting, which takes place between the hours of dawn until sunset during the Holy month of Ramadan.

5. Hajj. This is an annual pilgrimage to the city of Mecca in Saudi Arabia, which should be performed by every Muslim at least once in his or her lifetime, provided they can afford it and are in good health.

In addition to the above pillars, Islam sets forth much guidance for a complete way of life including teachings pertaining to issues of both this world and the hereafter. It lays down guidance on worldly issues as diverse as, among others, marriage, divorce, childcare, politics, economics, business, etiquette, criminal law, animal welfare, and environmental protection.

Its basic tenets are exceedingly clear and are founded on the fundamental principles of endorsing good and forbidding evil. Like many other religions around the globe, Islam teaches that humankind should pursue and enjoy the moral and righteous pleasures of life, while avoiding the pursuit of negative and immoral worldly distractions at all costs. Among many of its other basic teachings, Islam encourages good deeds, words and intentions. Promoting family values and community ties, it teaches the importance of charity, respect for parents, the elderly, children, animals, the natural world and so on. Deeply concerned with issues pertaining to the promotion of human welfare, Islam lays down guidelines that endorse such fundamental human rights as: the right to life\(^{10}\); the right to respect\(^{11}\); the right to privacy\(^{12}\); freedom of religion\(^{13}\) and the freedom to

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\(^9\) In transliteration this would read as: “Ashhadu an la ilaha illallah, Wa ashhadu ana Muhammadan Rasul Allah.”

\(^{10}\) The Quran (5:151).

\(^{11}\) The Quran (49:11-12).

\(^{12}\) The Quran (24:27-28).

\(^{13}\) The Quran (18:29).
seek an education. It also teaches that every human has the right to a life free from fear of oppression and tyranny.¹⁴

Islam as a religion and a way of life is considered by most Muslims to be perfect,¹⁵ providing nourishment and sustenance for the mind, body and soul. It is the adherents that are, however, not always so perfect.

B- Muslims.

Muslims themselves are, quite simply, adherents of Islam and, as with all religions, some are better at understanding and implementing the teachings of their faith than others. It is the Muslims who deviate from its teachings however, who often give Islam a bad name by taking its practice to one extreme or the other. Many go either to the extreme of fundamentalism and fanaticism at one end of the spectrum or to the polar opposite of complete religious laxity at the other. This is despite the fact that Islam clearly teaches that the middle road is the best. Islam favours moderation and balance over excessiveness. Allah says in the Quran, “Thus We have made of you an Umma justly balanced.”¹⁷ This means that Muslims should always endeavour to act in a manner that is moderate and balanced, avoiding all extremes and extravagances.

Islam teaches Muslims not to divide their religion into groups or sects but to remain as one unified Ummah or community. However, over the years, usually as a result of cultural differences and political turmoil, sectarian groups, such as the Shia, have emerged. However, for the purposes of this thesis I shall be primarily considering the teachings and perspectives of Sunni Muslims, as Sunnis are the mainstream religious body constituting approximately 85-90% of the world’s 1.3 billion Muslims.¹⁸

¹⁴ For more on the issue of Islam and human rights see, for instance: Hassan, R., (1996) “Religious Human Rights and the Quran”, which can be found at: http://www.law.emory.edu/EILR/volumes/spring96/hassan.html
¹⁵ In the Quran Allah in fact says, “…This day, I have perfected your religion for you, have completed My Favour upon you, and have chosen for you Islam as your religion.” The Quran (5:3).
¹⁶ Umma can be translated as community, nation or people.
¹⁷ The Quran (2:143).
¹⁸ Akbar Ahmed, for instance, estimates that Sunnis constitute 90% and Shias (who are most populous in Iran and some areas of South East Asia) 10%. See, Akbar S. Ahmed, (2001) Islam Today – A Short Introduction to the Muslim World. I. B. Tauris, p43. Nevertheless, it is worth briefly noting that even minority Muslim groups generally agree with the Sunni majority that capital punishment is acceptable in Islam in certain circumstances.
It is also worth mentioning here that there are four main schools of Islamic legal thought that are very influential in the field of interpreting and applying Islamic laws. The four schools are named after their founders, Imam Abu Hanafi (80-150AH\(^{19}\)), Imam Malik (93-179AH), Imam Shafi (150-240AH) and Imam Ibn-Hanbal (164-241AH). However, despite their different interpretations regarding some of the more complex aspects of issues such as capital punishment, they differ slightly on the exact age of criminal responsibility for instance\(^{20}\) they do agree on the most fundamental principles and aspects of Islamic law, including the basic premise that capital punishment itself is certainly prescribed for certain crimes in Islam.

C- Muslim countries.

The above consideration of the difference between Islam and Muslims consequently leads to a related observation. That is the difference between a truly Islamic state, {such as the society which existed under the leadership of Prophet Muhammad (peace be upon him) in the 7\(^{th}\) century C.E.,} and a Muslim state. In my mind, a truly Islamic state would be one that implements as far as possible the teachings of Islam, whereas a Muslim state is one which just so happens to have a Muslim ruler or a large Muslim population but does not necessarily follow the complete Islamic way of life.\(^{21}\) According to this crude distinction, although it has been estimated that currently “there are about 50 Muslim nations”\(^{22}\), such as Egypt, Syria, Malaysia and so on, in practice however no truly Islamic state exists in the world today.

Again this is an important distinction to make because there are many instances in which practices occurring within a Muslim country may be taken by non-Muslims as representative of Islam, when in fact they have nothing whatsoever to do with what Islam actually teaches.\(^{23}\) Consequently, the criticisms levelled against a Muslim

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\(^{19}\) A.H. stands for “After Hijrah” which is the date from which the Islamic calendar commences, in commemoration of the date that the Prophet Muhammad (pbuh) and his followers migrated from Mecca to Medina as a result of their persecution by the pagan Meccans.

\(^{20}\) For more on the similarities and differences between the four schools of thought, see Weiss, B. G., (1998) *The Spirit of Islamic Law*, University of Georgia Press, pp16-17.

\(^{21}\) This distinction between an Islamic state and a Muslim state is my own way of distinguishing between a country that takes on all the attributes of Islam and one that does not. It is not however a technical or official definition from an Islamic perspective or necessarily a sociological one.


\(^{23}\) Examples include a number of practices that adversely affect women including, among many others, the practices of female genital mutilation (FGM) {particularly prevalent in countries such as Somalia}, forced marriages, so-called “honour killings” {both common practices in Pakistan} and confining women
country's practice of capital punishment may be deserved by that individual country's
government and rulers, but those practices may not necessarily be fairly attributable to
what Islam actually teaches and, in fact, in many cases may directly contravene the
teachings found within Islam.\textsuperscript{24}

**D- Islam and capital punishment.**

As for the question as to whether or not Islam permits the use of capital punishment, the
answer is categorically that, yes, \textit{in theory}, Islam does permit the use of the death
penalty, but only in very few, specific circumstances, a fact that the vast majority of
Muslims accept, regardless of the group or school of thought to which they belong.

As such, the practice of capital punishment is fairly widespread throughout the Muslim
world and although some majority Muslim countries are abolitionist for all crimes, such
as Senegal\textsuperscript{25} and Bosnia and Herzegovina,\textsuperscript{26} most Muslim countries do allow for the
use of capital punishment. This includes: Egypt, Jordan, Syria, Lebanon, Pakistan,
Oman, Qatar, The United Arab Emirates, Morocco, Iran, Iraq, Saudi Arabia and many
others. The rates of execution vary regionally. Lebanon, for instance, only carried out a
However, none have been performed since President Emile Lahoud came to power in
November 1998\textsuperscript{27} and Lahoud has since promised to place a moratorium on all
executions during his time in office.\textsuperscript{28} Conversely, in Egypt 17 executions are reported

to the home \{which is a standard practice in many areas of Afghanistan and Saudi Arabia\}. Despite the
prevalence of these practices in some Muslim countries they are however, completely unacceptable from
an Islamic perspective and there is no religious foundation or basis for them whatsoever. On the contrary,
Islam is a religion that holds women in the highest esteem and teaches that women, as well as men,
should be treated with the utmost respect and honour. These misogynistic practices are mainly predicated
on social, cultural and traditional phenomenon and not on the teachings of Islam. For more on the
explanation of the ideal role and status of women in Islam see a book such as that by Muhammad Ali Al-
Hashimi, (2003) \textit{The Ideal Muslimah – The True Islamic Personality of the Muslim Woman as Defined
\textsuperscript{24} A case in point is the common criticism levelled against some Muslim Arab and African retentionist
nations, which is that they apply the death penalty disproportionately against women. However, an
investigation into the issue will reveal that Islam makes no distinction between men and women in terms of
moral culpability and consequently punishment and reward, a premise that will be revisited throughout
this thesis.

\textsuperscript{25} Senegal became abolitionist for all crimes in 2004.
\textsuperscript{26} Bosnia and Herzegovina became abolitionist for all crimes in 2001.
\textsuperscript{28} See Roger Hood, (2002) \textit{The Death Penalty – A Worldwide Perspective}, (3\textsuperscript{rd} edition) Oxford
University Press, p36.
to have been carried out in 2002 alone,\textsuperscript{29} while in 2005 Saudi Arabia and Iran, the Muslim world’s most prolific executioners, executed at least 86 and 94 offenders respectively.\textsuperscript{30}

The crimes for which the penalty is available also vary regionally, ranging from relatively contemporary offences such as terrorism and drug dealing, to ancient Biblical\textsuperscript{31} offences such as sodomy.\textsuperscript{32} The execution methods utilised also vary regionally. Countries such as Iran and Sudan, for instance, employ stoning, hanging and shooting, whereas Saudi Arabia and Yemen most often execute with the sword.\textsuperscript{33}

In practice however, the overuse and general misuse of the death penalty in some Muslim states, often as a tool of political and social oppression, makes it seem that Islam is permitting executions in circumstances where in fact no such act is sanctioned. There are many examples of how Islamic law is abused for political purposes,\textsuperscript{34} and many examples whereby ostensibly Muslim regimes have been unjustly “using Islam to justify authoritarian rule, suppress political parties, and impose censorship.”\textsuperscript{35} For example, it has been suggested by some commentators that in recent years, the Iranian judiciary had been implementing harsh penalties in order to undermine the credibility of the reformist president Mohammed Khatami in the period running up to the presidential elections. BBC Correspondent Jim Muir suggests that, “by reasserting the hard line at home, they hope to damage the president’s image and credentials abroad.”\textsuperscript{36} Conversely, in Malaysia, analysts had suggested that by supporting harsh penal laws, “the main opposition party in Malaysia – is using the Islamic law as a way to try to win

\textsuperscript{29} “Egypt: The Death Penalty”, (March 31\textsuperscript{st} 2003), Amnesty International Report. See AI website.
\textsuperscript{30} See the Amnesty International website for all of these figures and for executions rates of all other retentionist nations.
\textsuperscript{31} See, for instance, the Old Testament prohibition in Lev. (18: 22).
\textsuperscript{32} This has recently been declared to be a capital crime in Saudi Arabia, Sudan and Pakistan. See Hood, (op. cit note 28) (2002) p84. In other Muslim countries where homosexuality is not specified as a capital offence it may nevertheless still be punishable under the category of unlawful (i.e, extra marital) sexual relations.
\textsuperscript{33} See Chapter 6 below for more on each of these methods of execution.
\textsuperscript{34} The interaction between religion and politics is such a vast topic that there is only space to include a few examples in this chapter. Nevertheless, it is important not to underestimate the role that politics often plays in justifying practices such as capital punishment, whether rightly or wrongly, in the name of religion.
\textsuperscript{36} “Iranian adulteress stoned to death.” (Dec. 27\textsuperscript{th} 2002) BBC News article. See: http://news.bbc.co.uk/1/hi/world/middle_east/1435760.stm
the support of the country's Muslims ahead of general elections due in 2004."\(^{37}\) It is important that the role of non-religious agendas should be borne in mind when considering the application of Islamic law in contemporary Muslim countries, particularly in the context of capital punishment, as these cases frequently provide an opportunity for people unfamiliar with Islam to criticise it as they are under the false impression that such acts are legitimately endorsed in Islam, when in fact they are not.\(^{38}\)

As previously mentioned, it is my contention that in the world today there is no single country that implements the laws and teachings of Islam in a manner that earns them the right to call themselves a truly "Islamic state." As such, there is no country in the world which implements capital punishment in exactly the way that Islam prescribes it. Mine is not a unique opinion nor is it probably a minority one. For example, in their book *Muhammad for Beginners*, Sardar and Malik say in no uncertain terms that:

"In recent times, a number of Muslim countries declared themselves to be Islamic States and ostensibly established the Shariah (Islamic Law). But what is actually put into practice is a small number of juristic rulings concerning punishments, status of women and other spectacular aspects of classical jurisprudence. Thus a great show is made of "Islamic Punishments" or *huddud* laws and floggings and amputations are advertised. These are in fact "outer limit" laws to be carried out only under extreme conditions and after certain basic requirements of social justice, distribution of wealth, responsibilities of the state towards its citizens, mercy and compassion are fulfilled. What we thus get is an austere state operating on the basis of obscurantist and extremist law, behaving totally contrary to the teachings of the Quran and spirit of Islam, yet justifying its oppression in the name of Islam! The self-declared Islamic states are thus nothing more than cynical instruments to justify the rule of a particular class, family or the military."\(^{39}\)

In an attempt to objectively shed any misconceptions about Islam that have arisen as a result of the practice of any particular Muslim country, it is important to therefore look towards the unadulterated and unambiguous sources of Islamic law regarding the issue of capital punishment, rather than looking towards any one Muslim country as a model of Islamic law and its approach to the death penalty.\(^{40}\) To do this we must first go to the

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\(^{37}\) "Malaysian state passes Islamic law." At: http://news.bbc.co.uk/1/hi/world/asia-pacific/2116032.stm

\(^{38}\) In addition to this, many Muslim countries do not actively employ all of the safeguards required by the Shariah. See Part 3 of this chapter for a discussion on some of these safeguards.


\(^{40}\) This is the same approach used to examine the Christian perspective on capital punishment in this thesis. It was the core Holy texts and teachings that were analysed as opposed to the practices of any one country which calls itself Christian, although of course that is also looked at in passing too.
original sources of Islamic law which came into existence over fourteen hundred years ago and which are still followed, to varying degrees and with varying success, around the world today. Each source of Islamic law is considered as valid and applicable today as it was when it was first revealed centuries ago and it is to these sources to which we shall now turn.

PART TWO.

3- The sources of Islamic law.

For any country professing to follow Islamic law (Shariah) there are several different sources from which they will draw any legal principles, precedents or opinions. There are four main sources of Islamic law. They are:

A- The Quran, (The Holy Book of Islam.)
B- The Sunnah, (example and traditions of Prophet Muhammad, {pbuh.})
C- Ijma (consensus opinion of legal scholars.)
D- Qiyas (judicial reasoning by analogy.)

Section five will describe each of the above in greater detail as well as describing how each relates directly to the practice of capital punishment.

4- Categories of crime and punishment in Islamic law.

Before going on to explain each of the above and how they relate to the death penalty, it is worth pausing here to first briefly explain the main categories of crime and punishment in Islamic law. There are three basic classifications; Hudud, (offences for which there are fixed punishments); Qisas, (the Law of Equality/Retaliation) and Tazir (offences for which there are discretionary punishments). Capital punishment is a sanction potentially available under each classification. The categories distinguish however, between when capital punishment is a mandatory sentence and when it is available at the discretion of the victim’s family or the lawmakers and judges.

41 The word Shariah “is an Arabic word meaning the path to be followed. Literally it means ‘the way to a watering place.’” See Abdur Rahman 1. Doi, (1997), Shariah: The Islamic Law. Ta Ha Publishers: London, p2. I have italicised most Arabic words in this thesis, at least the first time they are mentioned, followed by the English translation or explanation in brackets where appropriate, or vice versa.
A- Hudnud (Mandatory punishments.)

Hudnud crimes are defined as such in the Quran and are generally accompanied by a punishment that is specified in the Quranic text or sunnah. Comparable to determinative sentencing in the U.S or U.K, these punishments are deemed as fixed and mandatory penalties. This is because they are deemed to be penalties prescribed by the word of God Himself, and therefore as long as all of the relevant prerequisites are met, the punishment must be meted out. Haad crimes are generally considered to be “serious threats to the social fabric of the Islamic state. One who commits such a crime is considered to be overturning, or at least challenging the moral order of the Islamic state and subverting God and His will.”

Scholars differ as to the exact number of Haad (singular for hudnud) offences but they generally range between four to six, among which are: murder committed during the commission of Al-Hiraba (armed robbery), theft, false accusations of un-chastity, and adultery. These each have mandatory punishments that are prescribed in the Quran and Sunnah but they are not all capital offences.

However, as will be explained in Part 5 (iv) (b) below, although differences of opinion do exist, the majority opinion is that only one mandatory capital offence is definitively found in the Quran and that is for the crime of murder committed during the commission of Al-Hiraba which is most often translated as highwaymaship or armed robbery.

B- Qisas (The Law of Equality).

Qisas, also known as the Law of Equality, is the Islamic law of retaliation for both fatal and non-fatal physical injuries. It determines that in cases of bodily harm or death, a punishment equal to the offence is to be meted out. Embodying the ancient principle of lex talionis, qisas takes the meaning of “a life for a life” to its natural and practical

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44 See Part 5 A (iv) (b) below for an explanation of this Quranic offence.
45 See The Quran (5:38).
46 See The Quran (24:4).
47 See The Quran (24:2). Some also include drinking alcohol as a haad offence but nowhere is a punishment specified in the Quran.
48 See Part 5 A (iv) (b) below, for more on the nature of this offence.
49 See Chapter 4, Part 5 A (iii) (b) below for a more in depth examination of this subject.
conclusion and allows for capital punishment to be utilised in cases of murder. However, unlike a hudud crime, under this category, death is not a mandatory punishment for murder. This is because Qisas crimes are deemed to be private in nature as they are offences against the individual and not the state. As such, the offender can be forgiven completely by the offended party’s family. Alternatively they may escape from a penalty of death for murder if they agree to pay Diya, (financial compensation for murder or manslaughter) to the victim’s family.50

C- Tazir (Discretionary punishments).

Tazir offences are generally considered to be the least serious and are the most flexible in relation to their prescribed penalties. Offences under this category can be developed by the ruling authorities provided that they are in accord with the basic principles and practices of Islamic law. This category may therefore include offences that are not found in traditional Islamic scripture, such as criminal activities ranging anywhere from drug-dealing to traffic violations. Under this category the judge or legislator is free to fix the penalty that they feel fits the crime. Their discretion is, however, not unfettered and it must be guided by the basic principles of Islamic law.51 Among numerous other penal options, such as fines, imprisonment, boycotts or even a simple reprimand, this tazir category may also include recourse to capital punishment. It is important to note however, that the death penalty for this category of offences is only supposed to be used in exceptional circumstances, “it is therefore to be applied to the minimum possible number of cases, i.e., only when made necessary either by the criminal’s character or by the nature of the offence.”52

Having summarised the basic categories of crime and punishment in Islam we can now move on to a more detailed explanation of the main sources of Islamic law.

50 See Part 4 below for more on Diya as an alternative to capital punishment.
51 For a discussion on some of the necessary qualifications and responsibilities of the judge (Qadi) in the Shariah see, Abdur Rahman I. Doi, (op. cit. note 41.) (1997), p11-15.
5- The sources of Islamic law and their pronouncements regarding capital punishment.

A- The Quran.

The Quran is the primary and ultimate source of Islamic law and is the first port of call for any questions regarding any aspect of Islam. As such, the nature and revelation of the Quran shall be looked at first, before discussing the Quran’s position on capital punishment.

i- The nature and revelation of the Quran.

In the same way that the Bible is the Holy book of Christianity and the Torah is the Holy book of Judaism, most people know that the Quran is the Holy book of Islam. But what exactly is the Quran?

The Quran is a book that Muslims believe to be the direct and unadulterated word of God. Unlike the Bible, of which there are many versions, there is only one single version of the Quran. It is not a book that was inspired to different men over the years, as the Bible was, but it is a book believed to have been sent by Divine revelation to one man alone. That man was Muhammad (pbuh) and Muslims believe that he is the final Prophet that God will send to mankind.

Muhammad (pbuh) was born in the city of Mecca in Saudi Arabia in approximately 570C.E. As a young man Muhammad (pbuh) was, as in the tradition of many great Prophets, a shepherd and as he got older he became a skilled and trusted tradesman. Well known and respected for his virtuous and pious character he was widely admired for his qualities of honesty and justice, traits even his worst enemies accredited him with.

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53 Although that one version has been translated into every known language in the world, it is acknowledged that Allah chose to reveal the Quran in Arabic and therefore although translations help non-Arabic speakers to understand the Quran, they in no way replace the Arabic text. It is also for this reason that the five daily prayers are read in Arabic by all Muslims around the world. Whether a Muslim is from Malaysia, Indonesia, India or England the prayer and the Quran is memorised and recited in Arabic.

54 C.E. stands for the common era of the Christian calendar.

55 The Prophet’s nickname was in fact Al-Ameen which means The Trustworthy. This is considered to be very telling, as in Arabia at that time nicknames were not used necessarily as terms of endearment but were bestowed on a person as a means of describing a prominent characteristic inherent in the possessor. The Prophet’s nickname was used even by those who rejected his message of Prophethood.
Muhammad (pbuh) frequently used to retire to pray in isolation in a mountainside cave known as Hira. It was here one evening in the month of Ramadan 610C.E\textsuperscript{56} that Muhammad (pbuh), through the angel Gibreel (Gabriel) received the first of a series of revelations that in compilation make up the Holy Quran.

At the time of the first revelation, which was also simultaneously when he received his Prophethood, Muhammad (pbuh) is believed to have been approximately forty years old. The revelation of the entire Quran took place gradually over the length of Muhammad’s (pbuh) prophethood, which was a period of roughly 23 years, and ended when the Prophet died at approximately 63 years of age.\textsuperscript{57} Each revelation was precisely memorised and impeccably recorded by his followers and they have been precisely preserved ever since.\textsuperscript{58} In total the Quran is made up of 114 chapters (surahs) with each chapter varying in length from anywhere between 3 verses (ayahs) to 286.

\textbf{ii- A miraculous text.}

Muslims consider the very existence of the Quran itself to be a miracle. Not only is it believed to be the direct word of God but it was also revealed to a man who was undoubtedly illiterate and yet was able to produce a book in the most exquisite classical Arabic and of the finest poetic and literal syntax. Even today the Quran astounds scientists with the fact that it contains countless of the most accurate scientific pronouncements which were unknown and unknowable by scientists living at the time in which it was revealed.\textsuperscript{59}

\textsuperscript{56} For more on this period of Revelation see, for instance, S. R. Mubarakpuri (1998) \textit{When the Moon Split – A Biography of the Prophet Muhammad}, Darusallam Publishers, p32. This is only one of thousands of books on this subject.


\textsuperscript{58} In elucidation of this point, Sayyid Abdu A’la Mawdudi writes that, “The Quran that we possess today corresponds exactly to the edition which was prepared on the orders of Abu Bakr (the first man to become Khalifah [Head of the Islamic community] after the death of the Prophet)… Several copies of this original edition of the Quran still exist today. Anyone who entertains any doubt as to the authenticity of the Quran can satisfy himself by obtaining a copy of the Quran from any bookseller… and then have a hafiz (memoriser of the Quran) recite it from memory, compare the two and then compare these with the copies of the Quran published through the centuries… If he detects any discrepancy, even a single letter or syllable, he should inform the whole world of his great discovery!” Sayyid Abdu A’la Mawdudi, (1988) \textit{Towards Understanding the Quran}. Vol. 1, Surahs 1-3. Translated and edited by Zafar Ishaq Ansari, The Islamic Foundation, pp20-21.

\textsuperscript{59} This includes issues as diverse as descriptions of the orbit of planets in our solar system and the expanding nature of the universe, to detailed descriptions of microscopic embryological development, in addition to many other natural and biological phenomena. For more on this subject see: Dr Zaghloul An-Najjar, (2005) \textit{Wonderful Scientific Signs in the Quran}, Al-Firdous: London. Or see: Gary Miller, (1992) \textit{The Amazing Quran}, Abul-Qasim Publishing House, to name only two of many books on this subject.
Islam is also a religion in a unique position regarding the preservation of its Holy book. Muslims maintain that the Quran which exists today, and which can be found on millions of bookshelves worldwide, is a precisely preserved version of that which was revealed to Prophet Muhammad (pbuh) in the Arabian Desert over fourteen hundred years ago. No derivations of word or letter have ever been found to exist and the Quran remains in precisely the same classical Arabic\(^{60}\) text now as it did when it was originally revealed.

The fact that only one “version” of the Quran exists indelibly serves to strengthen the Muslim consensus on many issues of Quranic interpretation and, although there are many commentaries (Tafsir)\(^{61}\) on the Quran, its singular nature leaves relatively little scope for misinterpretation and doubt surrounding its general meaning and direction.

As John Barton says in his book “What is the Bible?” the impeccable preservation of the Holy Quran makes it evident that “Islam is perhaps the purest case of a religion of the book.” In this sense, “the Quran is thus in every way a perfect and perfectly divine document.”\(^{62}\) No other religion has preserved the word of their Holy book with such tenacity and care. In contrast, Barton elaborates, it is:

> “Freely acknowledged that Judaism is a developing phenomenon. It must always remain rooted in Scripture, but successive generations of authoritative interpreters of this Scripture share in the authority of the text they interpret. Scripture is thus a dynamic, growing phenomenon, not a static entity... it also means the accumulated decisions of rabbinic authorities in expounding scriptural texts.”\(^{63}\)

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\(^{60}\) Although countless translations exist for the benefit of non-Arabic speakers, the version that all Muslims memorise is in Arabic. Unlike the Bible, the Quran has not been changed or updated to include modern day vernacular, slang or colloquialisms and still remains today in the classical Arabic in which it was originally revealed.

\(^{61}\) The science of Quranic interpretation is one of the most prolific areas of writing in traditional and contemporary Islamic studies. It is universally understood however, that Quranic commentaries in no way replace the Quranic text, they are simply human efforts to explain certain elements or aspects of the Quran. In addition to straightforward linguistic translations many exegetical translations include footnotes to illuminate historical and geographical facts, cultural expressions, cryptic letters, metaphors, parables, euphemisms, religious concepts, jurisprudential theories and so on. Many commentaries (tafsir) of the Quran exist, including among the most well known exegetes, Al-Tabari, Ibn Al-Jawzi, Ibn Atiyah, Al-Qurtubi, Ibn Kathir, and others. Each provide their own exegesis ranging from the thirty volume works of Al-Tabari to the four volume work of Sayyid Qub (In the Shade of the Quran) and each place their own emphasis on different aspects of the Quran ranging from its jurisprudential dimensions to its poetry. For more on the matter of Quranic exegesis and exegetes see, for instance, Hussein Abdul Raol, (2001) Quran Translation – Discourse, Textures and Exegesis. Curzon Press, pp175-178.


\(^{63}\) Ibid. J, Barton, p60-61.
Despite the profound and deeply complex nature of many aspects of the Quran it nevertheless remains widely accessible. While on the one hand there are intricate facets of it over which learned scholars have spent entire lifetimes examining and trying to comprehend, on the other there are also many aspects of it which are easily understood by even the most unscholarly layman and which are easily grasped by adults and children alike. This general accessibility is important as it would be rather redundant to have a Holy Book purporting to be of Divine Guidance that was so profound that no one could understand it!

With regards to penal and legal issues, the Quran, unlike the Torah, is not simply, or even primarily, a book of laws, despite the fact that it is the core foundation from which all Islamic laws are derived. In fact, it is estimated by Dr Yusuf Al-Quaradawi that “the legislative verses are less than a tenth of the Quran.” It can be seen, in a way, as a lifestyle, as opposed to strictly legal, manual providing guidance on every aspect of a Muslim’s life including, among others, religious issues, social issues, and financial issues, as well as legal issues and issues pertaining to punishment and penology, such as those regulating the use of capital punishment.

iii- Penal laws in Islam.

Given that Islam teaches belief in a hereafter and in the existence of Heaven and Hell, the Quran subsequently deals with issues of crime and punishment on two levels. One level relates to the Divine laws prescribed by God and the other relates to man-made laws. Correspondingly, one level refers to the punishments potentially forthcoming in the hereafter for those who ignore the commandments of God, whereas the other discusses the punishments that should be meted out in this life by worldly authorities for crimes and wrongdoings. This includes punishments such as warnings, reprimands, corporal punishment and, in some instances, capital punishment.

64 The debating and interpreting of the subtleties and nuances of the different shades of meanings of individual words and letters used in the text and the true meaning behind them is often found to be beyond the understanding of even the most devoted and brilliant scholars and they have had to concede that there are aspects of the Quran which are unknowable. See, for instance, any commentary on The Quran (2:1).


66 The issue of reward for good deeds in this life and in Heaven is also a major part of Islam. However, as the focal point of this thesis is crime and punishment the discussion shall be confined to sanctions as opposed to rewards.
As in Christianity and Judaism, Islam does not teach that just because there is to be a judgement in the Hereafter that that means humankind should sit back passively until then leaving humans, in the meantime, to wreak havoc on earth unrestrained and unchecked by human agency, social standards and restrictions of law and order. On the contrary, Muslims are taught that, although the final and ultimate judge is Allah, until the time to meet God arrives, humankind should follow His rules and live according to a system of moral conduct, and law and order on earth in order to avoid chaos, corruption and anarchy. As such, not only does Islam provide a blueprint for a way of life that incorporates elements of crime prevention through teaching the importance of prayer, strong family bonds and community care,67 (among other things), but it also provides solutions for when a crime has been perpetrated. This includes a system of laws and punishments which Muslim governments are encouraged to enact in order to maintain a safe, positive and productive society and, on some occasions, this does include recourse to the death penalty as the rest of this chapter will show.

iv- Does the Quran permit for capital punishment?

a- Islam and the intrinsic value of human life.

Ultimately the Quran does allow for the use of the death penalty. However, there are only very few instances in which it can be utilised and before the sentence can be meted out a number of judicial conditions and safeguards must be adhered to.68

Nevertheless, as the Quran does not expressly forbid capital punishment this leaves it open to a standard criticism of death penalty abolitionists. Namely, that one cannot claim to respect the value of human life while simultaneously supporting capital punishment. However, Muslim retentionists would refute this allegation much in the same way that a Christian retentionist would; that is by asserting that although human life is to be valued and protected and while everyone has a fundamental right to life, that right is not absolute and there are exceptional circumstances wherein that right can be forfeited.69

67 It was under Islamic rule that one of the earliest welfare states was established. One of the first public treasuries (Bait al-mal) was established under the guidance of the second Khalifa of Islam, Umar Ibn-Khattab who was martyred in 23 AH (according to the Islamic calendar) (which is 644 C.E.)
68 These conditions shall be examined in Part 3 of this chapter.
69 This is a common retentionist assertion. Utilitarian John Stuart Mill (1806-1873), for instance, a prominent supporter of the death penalty, vehemently defended capital punishment in 1868 when, in response to the abolitionist accusation that death penalty supporters disregard the sanctity of human life,
In Islam, in fact, the importance of each individual human life is so highly regarded that the Quran attributes the killing or saving of one life to the equivalent of killing or saving the life of the entire human race. The Quran says:

"On that account: We ordained for the Children of Israel that if anyone slew a person - unless it be for murder or for spreading mischief in the land - it would be as if he slew the whole people: And if anyone saved a life, it would be as if he saved the life of the whole people."\(^{70}\)

This demonstrates the fact that each and every life is as important as the next and that life is seen as intrinsically invaluable. Every life is to be treasured regardless of social status, gender, race or any other factor. However, although seen as precious, it is not deemed to be sacrosanct or sacred, at least not in the sense that it is an inviolable right and, as such, there are instances in which Islam permits the taking of a human life. In the case of murder for instance, it is precisely because of the high value placed on human life that the crime of murder is seen as deserving the ultimate penal sanction of death.

b- Crimes for which the Quran allows the death penalty.

Of those very few instances in which the taking of a life is justified in Islam, each is viewed as being for the betterment of the community as a whole as well as for the individuals who make up that community.

The first instance in which the intentional taking of a life is deemed to be a necessary evil is during the course of a just war, and even then restraint is to be exercised. Even during battle Prophet Muhammad (pbuh) is reported to have disapproved, for instance, of the killing of women, children and even plants.\(^{71}\) In addition to this, rules of conduct also dictate that prisoners of war should be treated in a just and humane manner.

The second occasion in which the taking of a life is permitted is in cases of legally sanctioned capital punishment. The Quran says "...Take not life, which Allah hath

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Footnotes:

70 The Quran (2:32). Please note that italicising is my own emphasis.

71 Sahih Al-Bukhari, Vol. 4, Chapter 147, No. 257, p159.
made sacred, except\textsuperscript{72} by way of justice and law...\textsuperscript{73} However, as previously mentioned\textsuperscript{74} the Quran itself only prescribes a mandatory penalty of death for one huduud\textsuperscript{75} crime; that is for highway (or armed) robbery resulting in murder.\textsuperscript{76}

According to Abdur Rahman Doi, \textit{Al-Hiraba}, may be described as the actions of:

\begin{quote}
A group of armed or a single person who may attack travellers or wayfarers on the highway or any other place depriving them of their property through the use force in the circumstances when the victims are away from receiving any immediate help... The Holy Quran calls it ‘a war against Allah and His Messenger’ and an attempt to spread mischief in the world.’\textsuperscript{77}
\end{quote}

This offence is considered to come under the remit of the Quranic verse which says: “The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed...”\textsuperscript{77}\textsuperscript{8} The unanimous opinion of the scholars is that the death penalty is only given for the robbers who kill and not for those who leave their victims alive and unharmed.\textsuperscript{79}

Although there is some debate among Islamic scholars as to whether or not apostasy (\textit{irtidad}),\textsuperscript{80} (where a Muslim abandons Islam), also constitutes a Huduud offence,\textsuperscript{81} it seems that the majority of contemporary scholars reject this notion because there is no specific mention of a punishment for it in the Quran. Subsequently, as “none of the Quranic verses impose an earthly punishment upon the apostate who leaves Islam quietly”\textsuperscript{82} most Muslims today do not consider it a capital crime. The Quran clearly states that there is to be “No compulsion in religion”\textsuperscript{83} and that what is in a person’s

\begin{flushleft}
\textsuperscript{72} Italicising is my own emphasis.  
\textsuperscript{73} The Quran (6:151)  
\textsuperscript{74} See Section 4 (A) above.  
\textsuperscript{75} See Section 4 (A) of this chapter above for a discussion of Huduud offences.  
\textsuperscript{76} For more on this offence, see, for instance, Muhammad Iqbal Siddiqi, (1985), The Penal Law of Islam, Kazi Publications, p141.  
\textsuperscript{77} Doi, (op. cit. note 41) (1997) p250.  
\textsuperscript{78} The Quran (5:32). There are differences of opinion as to the nature of the punishment for this offence and it includes variations of execution, crucifixion, hand and feet being cut off from opposite sides and exile. See for instance, Doi. (op. cit. note 41) (1997) pp251-253.  
\textsuperscript{79} See Doi, (op. cit. note 41) (1997) p253, where he discusses the opinions of the scholars on this issue. Offenders of non-fatal offences will, however, be subject to other extremely severe punishments.  
\textsuperscript{80}  \textit{Irtidad} literally means “turning back”, and an apostate is known as a \textit{Murtadd}. The offence of apostasy will be considered further in Part B (iii) (c) below.  
\textsuperscript{81} This was an issue that received much media attention several years ago following Salman Rushdie’s publication of a book (\textit{The Satanic Verses}) that was considered to be heretical and insulting to Islam and Muslims.  
\textsuperscript{82} Anver M. Emon (op. cit. note 43) (1994) p34.  
\textsuperscript{83} The Quran, (2:256).
\end{flushleft}
heart is between them and God alone and to Him alone will they be held accountable. In fact, despite the fact that apostasy is mentioned 13 times throughout the Quran the punishment of apostates is talked about only in terms of the hereafter. No worldly punishment is prescribed. As Mohamed EI-Awa notes, “in the Quran the apostate is threatened with punishment in the next world only.”

So there are no Quranic grounds on which to justify the execution of apostates, and yet some countries still persist with designating apostasy as a capital offence. Some of the reasons for this will be considered below in the context of the hadith and non-mandatory capital offences.

With regards to the Quran however, the general consensus among most mainstream Muslims and scholars therefore seems to be that the Quran allows for the mandatory use of capital punishment as a sanction for only one offence, murder committed during the course of Al-Hiraba.

**B- The Hadith.**

i- What are the hadith?

Before discussing what the hadith teach about capital punishment in Islam, it is important to explain what the hadith are.

The hadith are the second sources to which a Muslim, layperson or scholar, will turn in order to understand any aspect of Islamic teachings or law. They are essentially a compilation of the teachings of Prophet Muhammad (pbuh). The example set by the Prophet is known as his sunnah. His sunnah includes his actions, words and tacit approvals, and the hadith are the records of his sunnah. The hadith are a compilation of various sayings and actions of the Prophet Muhammad (pbuh) as recorded by his companions and followers and transmitted over the years both orally and in writing. The various events that occurred during his prophethood and the way in which he subsequently responded to them are recounted by well-respected, honest individuals

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84 See for instance, The Quran (16:106) and (3:86-91).
86 See Part 5 B (iii) (c) below.
close to the Prophet including his wives, his closest companions, and his most loyal followers.

The hadith are the main source used to clarify, elucidate and elaborate upon how the Quranic teachings can be interpreted and implemented in practice. For instance, the Quran says that Muslims should pray but it does not say how to pray. It is in the teachings of Prophet Muhammad (pbuh), as contained in the hadith, that details of the prayer rituals can be found.

However, whereas the Quran is believed to be the Divine word of God, the hadith are not as such. The Prophet’s actions and words are believed to have been inspired by God but they are not the direct word of God in the same way that the Quran is believed to be. As such, the hadith are not intended to supplant any aspect of the Quran but they are there to complement it.

Muslims are taught in the Quran to follow the example set by Prophet Muhammad (pbuh). Allah says in the Quran, “So take what the Prophet gives you and refrain from what he prohibits you.”

In the same way that Christians look to Jesus as an example of excellent morality and sublime humanity, Prophet Muhammad (pbuh) is considered by all Muslims to be the best possible example of human behaviour. However, Muslims do not look to him as a Divine being or worship him in any way. Muhammad (pbuh) was only a man, a Messenger of God like many others before him. In addition to his status as a Prophet, he is well known for his compassion as a father and husband, his greatness as a leader, his skill as a military strategist, his honesty and his courage as a human being. These are only a few of the many virtuous qualities for which he is admired, loved and respected by billions of Muslims, and countless non-Muslims worldwide.

87 The Quran (53: 3-4).
88 There is however also an additional collection of hadith known as Hadith Qudsi which are records of some of the things God said to His Prophet Muhammad (pbuh).
89 The Quran (59:7).
90 It would in fact be considered as heretical for a Muslim to attribute any Divine status to him. He was a man who lived, loved, starved, fought and died as a man, albeit he is considered to be the most perfect example for humankind, but he was a man nevertheless.
91 Michael A. Hart, for instance, ranked Prophet Muhammad (pbuh) as the most influential man in history in terms of his achievements at both secular and religious levels. He ranked Jesus as third. Hart
Prophet Muhammad (pbuh) is believed by all Muslims to be the final Prophet that God will send to mankind. Muslims look to Prophet Muhammad (pbuh) as the ultimate example of how to lead a pious, upright and moral life and they ideally seek to incorporate his habits, actions and teachings into their everyday lives as far as possible. His life is one of the most thoroughly documented in history and authentic reports exist covering issues as diverse as the way he used to greet people by saying “Asalaam wa alaykum” (“Peace be upon you”) to the way he brushed his teeth! From the way he prescribed the giving of charity and ordered care for the community to the way he instigated the first Islamic penal system. He set the most perfect example for humankind, one that every Muslim ideally strives to emulate as far as possible, and following his teachings and example makes up one of the most awesome and worthy challenges in every Muslim’s life.

For a lawyer or penologist studying any aspect of Islamic law it is important to understand the value and importance of hadith to Muslims and the impact that they have on the Muslim legal system and way of life. Hadith are not merely a collection of stories of events that happened to people in a time gone by. They are not stories told for entertainment value but they are one of the key foundations of Islamic law and society. They are based not on events that allegedly happened to a fictional character, but are widely acknowledged to be events that truly transpired. There is no doubt that any of the battles waged or people mentioned in the hadith really existed as there is enough evidential documentation to prove that they did exist. Similarly, Muhammad (pbuh) is himself acknowledged by historians to have been a real person and not fictional or mythological in the same way that some critics suggest that Jesus may have been.

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92 Interestingly enough this is an identical greeting to the one given by Jesus in the Bible. It is reported in Luke (24:36) that when Jesus appeared to the Disciples for the first time after they believed him to have been executed, he appeared among them and startled them saying “Peace be with you.” For a Muslim this common greeting would only be one further indication of the common message and bond of brotherhood linking all Prophets.

93 See, for instance, the statement made by Bertrand Russell in which he said, “Historically, it is quite doubtful whether Christ ever existed at all.” For this and other similar quotes see: “Did Jesus of Nazareth Actually Exists? At: http://www.religioustolerance.org/chr_jcen.htm This is not, however, something said by Muslims who believe unquestionably in the existence of Jesus as a great and respected Prophet.
ii- Authenticity of the hadith.

One problem that theologians and historians have faced over the years in the context of hadith is that the sources of many reported hadith obviously vary in their reliability. When faced with a hadith reporting that the Prophet said or did something, how are we to know that what the person reported the Prophet to have said or done really ever took place? A false hadith would be the ideal way to slander the Prophet, and Muslims may end up supporting a practice under the mistaken belief that it was endorsed by the Prophet when in fact it was not. Therefore establishing authenticity has long been a concern and practice of Islamic scholars and they have worked tirelessly to develop methods to grade the reliability and subsequent authenticity of hadith.

One method of preventing forgeries was instigated when “Muslim scholars introduced the system of the Isnad, the chain of authorities reaching back to the Prophet which shows the historical status of a report.”

As Daniel Brown explains in his book, *The Rethinking of Tradition in Modern Islamic Thought*:

“...The criteria for judging the authenticity of hadith grew into a mature system with the emergence of the great compilations of hadith in the third century A.H. Compilers of hadith assembled the available data on the character of transmitters and the continuity of transmission and based on this data they gave each tradition a general rating. The most reliable traditions were designated sound (sahih). Reports that fell short of some of the standards for sound tradition were designated fair (hasan) and those with serious defects were labelled weak (daif). Spurious hadith were dismissed as fabricated (mawdu). The result was sophisticated and, given the assumption upon which it was grounded, an eminently coherent system for testing the authenticity of hadith.”

As such, most Sunni Muslims generally dismiss all but the genuinely approved and authenticated hadith. One of the most widely acknowledged dependable sources of authentic hadith was compiled by one of Islam’s greatest scholars, a man called Imam Al-Bukhari (194-256 A.H.). Bukharhi memorised and recorded hundreds of thousands

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of hadith throughout his lifetime. He meticulously recorded, with the exact chain of narration, thousands of reliable hadith and it is from his compilation, known as Bukhari’s Hadith Sahih, to which most Muslims turn. It is also therefore the Bukhari Hadith to which I shall primarily refer throughout.

iii- What do the hadith say about capital punishment?
The hadith lay down a few examples of when the death penalty is allowed, when it should be disallowed and other such related issues. Again there are only a few offences for which the hadith ascribe the death penalty. They are for murder, adultery and in certain cases apostasy. The main source for this claim is found in the hadith which says:

Narrated by Abdullah: “Allah’s Messenger (peace be upon him) said, “The blood of a Muslim who confesses that none has the right to be worshipped but Allah and that I am his Messenger, cannot be shed except in three cases: in Qisas for murder, a married person who commits illegal sexual intercourse and the one who reverts from Islam (apostate) and leaves the Muslims.”

As previously mentioned however, these crimes do not necessarily receive mandatory death sentences and there are several stringent safeguards and defences for each, (some of which shall be discussed in part 3 below.)

I shall now elaborate on the hadith which allow for the death penalty for each of the three above offences as well as discussing some brief examples of how, when and why the death penalty may be implemented or relinquished.

a- Murder.
On a scale of seriousness, murder is almost universally acknowledged to be one of the most serious crimes known to man. Islam also acknowledges the seriousness of murder and, as has been the practice of countless societies over time, it has consequently been accorded one of the most severe punishments known to man, the death penalty. However, although Islam permits for the use of capital punishment for murder, it is not

96 Bukhari’s techniques for selecting hadith were meticulous and as such, while he examined around 600,000 different hadith traditions, he only included 7,397 in his final collection.
97 Other well known collections of hadith include The Sahih of Muslim; The Sunan of Ibn Majah; The Jami of Tirmidhi and the Sunan of Abu-Dawud.
98 Qisas means proportional retribution. See Part 4B above for an explanation of Qisas.
99 Sahih Al-Bukhari Volume 9, Chapter 6, No. 17, pp10-11.
a mandatory punishment. Instead, Islam sets out several defences and alternatives to execution, such as that of financial compensation for the victim’s family.  

In addition to this, although capital punishment is clearly a penal option in cases of cold-blooded murder, the same is not true of all forms of killing, and the hadith elucidate upon which types of killing are not considered to warrant capital punishment. For instance, the death penalty cannot be used in response to manslaughter, but only as a punishment for cases of intentional homicide. Some Muslim scholars have delineated a distinction between five different classifications of killing out of which only one is a suitable candidate for being designated as a hudud capital offence under the rules of Islamic law. The Hanafi School, for example, distinguishes between five types of homicide, namely: “deliberate (‘amd), quasi deliberate (shabah al-‘amd), accidental (khata), equivalent to accidental (jari majra al-khata) and indirect (bisaba).”101 Some of the other schools of thought use fewer divisions and simply divide homicide into deliberate and accidental. However the vast majority of Muslims, regardless of which school of thought they belong to, agree that capital punishment, according to Islamic law, is only available for the first type of homicide, namely, murder, and even then there are circumstances where intentional homicide may be justified. Examples of justified homicide would include: self-defence, killing in the course of a just war, and the intentional abortion of a foetus in a situation where the mother’s life was at risk.

In cases of manslaughter, alternative forms of repentance and compensation are prescribed, but no capital punishment as such. The Quran says, for example:

“Never should a Believer kill a Believer; except by mistake102 and whoever kills a Believer by mistake it is ordained that he should free a Believing slave and pay blood-money to the deceased’s family unless they remit it freely. If the deceased belonged to a people at war with you and he was a Believer, the freeing of a Believing slave (is enough). If he belonged to a people with whom ye have a treaty of mutual alliance blood-money should be paid to his family and a believing slave should be freed. For those who find this beyond their means (is prescribed) a fast for two months running: by way of repentance to Allah: for Allah hath all knowledge and all wisdom.”103

100 See Part 4 of this chapter for more details on the matter of financial compensation.
102 All italicising is my own emphasis.
103 The Quran (4:92).
This verse clearly shows that a killer is required to take responsibility even for an accidental killing, and that part of that responsibility entails trying to make some form of reparation in the form of financial compensation to the victim’s family. For those who are unable to afford it however, at least some form of spiritual repentance is required in the form of a fast from dawn until dusk for a continuous period of two months. This also serves to show the importance of the niya (intention) behind a good or bad act in the sense that capital punishment is only available to those whom the court deems to have intended to cause death, but it is not available to those whom the judge deems not to have had the requisite mens rea (guilty mind).

**b- Adultery.**

The death penalty as a punishment for adultery is prescribed in the Holy Books of Christianity, Judaism and Islam, and is one of the most controversial capital offences found in any religious tradition. It is important to note, however, that in this context Islam is only referring to married adulterers, it does not refer those who engage in pre-marital sex and, although this too is considered to be a grave sin subject to severe penalties, it is not punishable by death.

Over the years many arguments have been put forward in an attempt to justify the harshness of this penalty for what is, to many, a seemingly innocuous offence. These arguments tend to emphasize the serious consequences of this “transgression” including the social, familial, health and spiritual implications of the act of adultery.\(^{105}\)

However, regardless of the practical arguments for and against the severity of the penalty, it remains the case that adultery is considered to be an offence deserving of capital punishment in several religions and, for many, God’s decree on this issue is enough of a justification for its application.

There is evidence within the hadith that the death penalty, was indeed on rare occasions practiced at the time of the Prophet Muhammad (peace be upon him) and it is therefore seen by most Muslims as a theoretically legitimate and morally justifiable punishment.

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\(^{104}\) See for instance, Sahih Al-Bukhari Vol. 8, No. 818, p544-5 or The Quran (24:2).

\(^{105}\) For some examples of arguments put forward in these contexts, see for instance, Maulana Abdullah Nana, (2005) *Stoning to death in Islam*, Zam Zam Publishers, pp71-80.
In the following hadith for example, it was recorded as having been used in a case where a man confessed to adultery.

“Narrated by Jabir: A man from the tribe of Aslam came to the Prophet (peace be upon him, {pbuh}) and confessed that he had committed illegal sexual intercourse. The Prophet (pbuh) turned his face away from him till the man bore witness against himself four times. The Prophet (pbuh) said to him, “Are you mad?” He said “No”. Then the Prophet (pbuh) ordered that he be stoned to death... The Prophet (pbuh) spoke well of him and offered his funeral prayer.”

This hadith shows first, that the offender must be sane before an execution can be ordered and second that we should not speak ill of a person who has confessed and stepped forward to take responsibility for his actions and sins. The fact that the Prophet spoke well of the man in this hadith and led his funeral prayer is also considered to be a great honour and confirms that capital punishment, as with every other form of punishment and suffering, is a form of expiation of sins.

The following hadith also attests to the fact that capital punishment is a legitimate Islamic punishment and, as such, was carried out, on rare occasion, by Prophet Muhammad’s (pbuh) Calipha, after his death.

“Narrated Ibn Abbas: “Umar said, “I am afraid that after a long time has passed, people may say, “We do not find the Verses of the rajam (stoning to death) in the Holy Book”, and consequently they may go astray by leaving an obligation that Allah has revealed. Lo! I confirm that the penalty of rajam be inflicted on him who commits illegal sexual intercourse if he is already married and the crime is proved by witness or pregnancy or confession.” Sufyan added, “I have memorised this narration in this way.” Umar added, “Surely Allah’s Messenger (pbuh) carried out the penalty of Rajam, and so did we after him.”

As such, as Abdullah Nana has affirmed, “We can say with certainty that stoning to death is an integral part of Islam which Rasullullah (the Prophet Muhammad {pbuh})

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106 Sahih Al-Bukhari, Vol. 8, No. 810, p 531.
107 Islam teaches that all pain and suffering endured during a person’s lifetime, including illness, hardship and even pain as small as a thorn prick can serve to expiate a person’s sins. The concept of punishment as an expiation of sins is considered further in Chapter 4, Part 5 A (i) (b).
108 The word Caliph (or Khalifa) literally means either successor or deputy.
109 See Part 3 (6) (C) (i) of this chapter for more on the issue of pregnancy and how it may, or may not, be used as evidence of adultery.
his Sahaba (Companions {peace be upon them}) and all the scholars of Islam accepted.'''

Nevertheless, although prescribed in principle, stoning is rarely utilised in practice. In a country such as Nigeria, for instance, although sentences of death have been passed for adultery, they have then either been quashed or overturned, as in the case of Amina Lawal. As such, no stonings have occurred in Nigeria since Shariah law was introduced in 1999.

In other Muslim countries, although a few cases have been reported over the years, including the stoning of a woman in Iran in 2001, (for the crime of “adultery and corruption on earth”, which took the form of acting in a pornographic film), nevertheless, the verifiable incidence of actual stonings are very few. This is partly due to the fact that, in practice, as a result of the rules of evidence and procedure surrounding it, as well as the number of Islamic restrictions and defences in place to mitigate and exonerate, execution for adultery is a punishment that can only be utilised very rarely, if ever. A capital conviction for adultery, for instance, would require either a freely given confession by the adulterer and a request to be punished, as in the aforementioned hadith of the prophet, which in this day and age is not very likely, or alternatively, it must have been such a public act of indecency that it was witnessed by four, honest and respected men of the community who are willing to openly testify to what they saw.

On the one hand, as Abdullah Nana explains:

112 As in the case of the mentally ill child rapist Mr Samiru. See Part 3 (6) (A) below on Islam’s pre-condition of sanity before punishment.
113 Originally sentenced to death by stoning for adultery, Amina’s sentence was overturned by a Nigerian Shariah Court of Appeal on September 25^{th} 2003.
114 Iran has since claimed to have ended the practice of stoning. See, for instance, “Iran stops stoning of women adulterers.” BBC News (Friday, Dec. 22^{nd} 2002), on the BBC website. See footnote 125 below.
116 See Part 3 (6) (C) (ii) of this chapter for more on the issue of confessions and their role in convictions.
"If the act was accomplished in the presence of four witnesses, the judgement is that public order has been seriously offended. Whether legitimate or not, it is always improper for the sexual act to take place in public. This is why Islam reveals the most severe attitude against offenders of public order and morality."\(^{118}\)

On the other hand however, charges brought about on the testimony of four witnesses is unlikely to ever be a common occurrence as in such cases it may reasonably be asked how four respectable and honest individuals could reconcile their pious characters with being in a position that enabled them to witness the actual act of penetration during the copulation between two adulterers? Furthermore, in testament to the rarity of this occurrence it is notable that, "During the whole life of the Prophet not one single case of adultery was established by the evidence of four eye-witnesses."\(^{119}\)

In addition to this, allegations are rare as there are severe sanctions prescribed within Islamic law for false witness and malicious testimony. This means that unless the witness is confident that they can prove their case and is willing to openly testify, they probably won’t risk making an accusation. Their allegation must correspond exactly to the testimony of the other three credible witnesses. If their testimonies do not tally, they themselves are at risk of punishment. Additionally “the punishment of stoning to death will be dismissed if any of the witnesses retract before the stoning can take place.”\(^{120}\)

Another factor to consider is that the besmirching of the reputation of a chaste woman is considered to be a grave sin in and of itself and therefore any allegations made have to be certain and not frivolous or baseless as, if they are deemed as such, a heavy penalty may be incurred by the accusers themselves.\(^{121}\)

One final method of bringing about a charge of adultery is for a husband to accuse his wife without evidence and without witnesses. However, this is easily rebutted by the wife. The Quran says:

\(^{118}\) Nana (op. cit. note 105) (2005) p91.
\(^{119}\) Nana (op. cit. note 105) (2005) p92.
\(^{120}\) Nana (op. cit. note 105) (2005) p88.
\(^{121}\) See The Quran (24:4) but note that while “flogging is specified as the penalty for a number of offences... the law does not specify what instrument is to be used, and in the early days of Islam it was often nothing more damaging than a light sandal or the hem of a garment; this was still technically a ‘flogging’, the point was made and the law was upheld.” Gai Eaton, (1998) Islam and the Destiny of Man. Islamic Texts Society, p185.
"And for those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testifies four times) by Allah that he is one of those who speak the truth. And the fifth (testimony should be) the invoking of the Curse of Allah on him if he be of those who tell a lie (against her). But it shall avert the punishment (of stoning to death) from her, if she bears witness four times by Allah, that he (her husband) is telling a lie. And the fifth testimony should be that the wrath of Allah be upon her if he (her husband) speaks the truth."\textsuperscript{122}

As such, stoning although allowed in theory is almost, but not completely, impossible in practice. Cases of adultery may therefore, on rare occasions, come to court but are then likely to fail on one of the standards of evidence and be subsequently dismissed. In any case very few Muslim countries actively endorse the punishment of stoning in practice,\textsuperscript{123} and those that do seem to implement it very infrequently,\textsuperscript{124} while others still are moving towards its full abolition.\textsuperscript{125}

c- Apostasy and heresy.

Two related but distinct issues will be discussed next, that of heresy and that of apostasy. With regards to heresy, as the previous chapter on Christianity demonstrated,\textsuperscript{126} the execution of heretics has long been a subject of controversy and contention in religious circles. Over the centuries the blood of hundreds of thousands of people has been shed as a result of religious persecution. Heretics, (defined by the Universal Dictionary as “a person who holds controversial or unorthodox opinions in

\textsuperscript{122} The Quran (24:6-8). Bracketed words are part of the Quranic exegesis.
\textsuperscript{123} See Appendix S of Chapter 6 for a table representing the various methods of execution, including stonings, and the number of countries practicing that particular method.
\textsuperscript{124} As explained in the introduction to this thesis, in practice it is very difficult to know how many executions by stoning take place as the few countries (estimated to be six by Amnesty International), which do employ this method often do not record the number of executions carried out, or if they do, they do not make those figures known to the public at large.
\textsuperscript{125} Recently Iran, for instance, which had previously been one of the very few countries to implement the stoning of adulterers, has declared that it is to halt the practice. This is largely because a number of “women members of the Iranian parliament have been actively campaigning to have the practice removed from the law books, arguing that it is not a clear-cut Koranic prescription.” This is according to Jim Muir, BBC Correspondent in Tehran, (Dec. 27th 2002.) “Iran stops stoning of women adulterers.” At: http://news.bbc.co.uk/1/hi/world/middle_east/2609597.stm
\textsuperscript{126} Heresy, as the previous chapter attests, is an offence for which the Old Testament demands the death penalty in several verses. Among those verses are those which call for the capital punishment of those engaged in the religious crimes of: Blasphemy (Lev.24:15); Prophets or dreamers who lead people astray, (Deut.13:1-5); Worshipping other gods, (Ex.22:20), and False prophets, (Deut. 18:20).
any area; especially, one who publicly dissents from the officially accepted dogma of religion”), have historically been among the primary victims of public executions.

However, as previously mentioned, contrary to what may be believed as a result of distortions of Islamic teachings, the Quran does not allow for the indiscriminate persecution or execution of people who are non-Muslim (heretics), nor does it allow for the execution of those who quietly choose to abandon their religion (peaceful apostates).

For the purposes of elaboration, I have discerned three categories of non-Muslims. The first are those who are not and never have been Muslim and either adhere to another faith or have no religious affiliations at all. The second is an apostate who makes the decision to quietly and peacefully leave Islam; and the third is a Muslim who leaves his religion and then rebels against it in a way that is considered to be harmful to the rest of the community. I shall briefly discuss each in turn in the context of capital punishment.

1- Non-Muslims.

With regards to the first category, Muslims are taught to live in peace with their non-Muslim neighbours and are to accord them respect and security from harm. The Quran clearly teaches that: “Allah forbids you not, with regards to those who fight you not for (your) faith nor drive you from your homes, from dealing kindly and justly with them: For Allah loveth those who are just.” Not only should Muslims live in harmony with non-believers, but nor should a non-Muslim in a Muslim land be forced to accept Islam as their own faith. They can only be invited and encouraged to understand Islam through the positive example and words of the Muslims around them.

128 See Part 5 A (iv) (b) above.
129 These are simply three categories I have used to serve as aids in the examination of this issue. They are neither officially recognised religious or sociological categories and there may be many different alternative ways to categorise these groups.
130 The Quran (60:8).
131 This method of “inviting” or calling non-Muslims to explore or learn about Islam is called Daawah in Arabic. At its most formal and organised level, its Christian equivalent may be a missionary call (this may include the provision of literature, organising public talks, debates and so on…) At its least formal and most basic level, a simple form of Daawah may be to simply set an example of good Muslim
Islam teaches that God has accorded all humans free will, and that freedom extends to the freedom for a person to choose their own religion or faith. The Quran says: “Say: The Truth is from your Lord. Let him who will, believe, and let him who will, reject it.” A further Quranic verse illustrating the fact that each person is to be left to their own religion without coercion or intimidation is found in Surah Al-Kafirun which says:

“Say: Ó ye that reject Faith! I worship not that which ye worship, Nor will ye worship that which I worship, And I will not worship that which ye have been wont to worship, Nor will ye worship that which I worship. To you be your way, and to me mine.”

This ethos of freedom of religion is one that has helped non-Muslims live in Muslim lands for centuries without fear of persecution or harm. In the cases where trouble has ensued, this is usually during times of political instability and upheaval or during times of war or, most importantly, when the society being discussed is not fully adhering to the teachings of Islam.

2- Peaceful Muslim apostates.

The second category is apostasy, according to which a Muslim chooses to abandon his or her faith. In this case, although apostasy is undoubtedly viewed as a major sin, as previously mentioned, the Quran does not specify any particular punishment for it and accordingly capital punishment is not a mandatory penalty. However, some hadith have led some Muslims to call for the capital punishment of apostates on a tazir (discretionary) basis. This includes a hadith which says that a Muslim who changes his religion should be killed.

behaviour by interacting with Muslim and non-Muslim members of society in the best way possible and exemplifying the teaching of Islamic morality and conduct based on example.

132 The Quran (18:29).
133 The Quran. (109)
134 If they were following Islamic law in the prescribed manner they would not be able to justify abusive or coercive behaviour towards religious minorities in their lands. To further demonstrate the relationship of compassion that is encouraged between Muslims and non-Muslims, it is interesting to note that one of the wives of the Prophet Muhammad (pbuh) had in fact been a Christian woman known as Maria the Copt. It is also subsequently permissible for Muslim men, living at any time and in any society, to marry non-Muslim (Jewish or Christian) women. The persecution of non-Muslims by Muslims in a time of peace is therefore not a practice condoned by Islam and any instances of Muslims fighting or persecuting non-Muslims for their faith in times of peace has no foundation in Islamic tradition or law.

135 Ridda is the Arabic word for apostasy. It literally means “turning back.”

136 See Part 5 (iv) b above.
137 See Abu Bakr Jabir Al-Jazairy, (2001) Minhaj Al-Muslim, (Vol. 2), Darussalam Publishing, p523. Also see the Sahih Al-Bukhari, Vol. 9, Chapter 6, No. 17, pp10-11, which has already been referred to in part (iii) above.
However, it has been suggested that these hadith should not be acted upon unless the historical contexts in which the Prophet said them are fully known and understood as many hadith are, for instance, the Prophet’s response to a direct question or query or in regard to a specific case or circumstance. As such, Chief Justice of Pakistan R. A. Rahman has said:

“The Sunnah when subjected to critical examination in the light of history does not fortify the stand of those who seek to establish that a Muslim who commits apostasy must be condemned to death for a change of his beliefs alone. In instances in which apparently such a punishment was inflicted, other factors have been found to co-exist, which would have justified action in the interest of collective security.”

It is furthermore pointed out that despite the fact that many people left the folds of Islam during his life time, “the Prophet never sentenced a man to death for it.” As Islamic Scholar Dr Jamal Badawi has said, “The preponderance of evidence from both the Quran and Sunnah indicates that there is no firm ground for the claim that apostasy is in itself a mandatory fixed punishment (haad), namely capital punishment.” These factors have led many Muslims to consider private apostasy as an issue for which the punishment, if any is deemed as necessary, should be left to the authorities of the day.

In practice however, there have been cases in recent years where Muslim countries have passed sentences of death on those who have converted away from Islam. Most recently (February, 2006) was the highly publicised case of Abdul Rahman, a man in Afghanistan who converted from Islam to Christianity. This was the first case of its kind in Afghanistan and while he escaped his sentence, on the grounds that he was insane and thus unfit to stand trial, (a judgement most likely to have been arrived at as a result of the heavy international pressure brought to bear on the country’s leaders and judiciary), the fact that the sentence was even considered has been criticised by many Muslim scholars.

139 Such as Mohamed El-Awa, (op. cit. note 52) (1982) p56.
140 Jamal Badawi, (2006) “Is apostasy a capital crime in Islam?” Speech delivered on April 26th 2006. A transcript of this speech can be found at:
http://www.islamonline.net/English/contemporary/2006/04/article02.shtml
In April 2006, Professor of Law and UN Consultant Cherif Bassiouni stated in the Chicago Tribune that, “Leaving Islam is not a capital crime.” He asserted that “A Muslim’s conversion to Christianity is not a crime punishable by death under Islamic law, contrary to the case of Abdul Rahman in Afghanistan.”\[141\] This is a view shared by many Muslims, including those Muslim countries that do not make apostasy a capital offence, including: “Algeria, Egypt, Indonesia, Jordan, Lebanon, Malaysia, Morocco, Syria, Tunisia and Turkey.”\[142\]

3- Apostates who rebel and cause harm.

The third and most serious category is that of a Muslim who abandons his religion and at the same time chooses to make trouble for the Muslim community by waging war or starting a rebellion against them.\[143\] According to the Universal Dictionary\[144\] the word apostate derives from the Greek word “apostates” which means “deserter” or “rebel.” In this context it is argued by some that, “apostasy from Islam after willingly accepting it and subsequently declaring an open revolt against it in such a manner which threatens the solidarity of the Muslim community is a crime punishable by death.”\[145\] This is because “the apostate who leaves Islam and outwardly challenges God, the Islamic state and the Islamic religion becomes an enemy to the state.”\[146\] Understood from this perspective, “In his book *The Religion of Islam*, Muhammad Ali defended the view that Islam knows of no death penalty for apostasy unless the apostate joins forces with the enemies of Islam in a state of actual war, in which case he is not killed because of his apostasy but simply like any other fighter against Islam.”\[147\]

On the whole however, most mainstream Muslims interpret even this category as fairly restricted in light of the aforementioned Quranic teachings, such as the verse stating

\[142\] This list can be found in Bassiouni’s article, *(ibid.)* This contrasts with those who do which are, “Iran, Nigeria, Pakistan, Saudi-Arabia and Sudan.” *Ibid.* Bassiouni.
\[143\] This is the category that led to the high profile debate within Islamic circles a few years ago surrounding the Salman Rushdie affair.
\[144\] The Universal Dictionary, (op. cit. note 127) (1994).
\[146\] El-Awa, (op. cit. note 52) (1982) p52.
\[147\] El-Awa, (op. cit. note 52) (1982) p52.
that there is, “No compulsion in religion”\textsuperscript{148} as well as the verse which reads; “Let him who will believe, and let him who will, reject it.”\textsuperscript{149}

Having now considered capital punishment from the perspective of the hadith, a brief consideration of the next two sources of Islamic law will follow, namely, consensus opinion among Muslim scholars and that of judicial reasoning by analogy.

\textbf{C- Consensus opinion among Muslim scholars. (Ijma)}

As we have seen, Muslims believe the Quran to be the literal word of God and therefore unanimously agree that once a Quranic decree has been established no amount of debate or discussion can change it. As Abdur Rahman Doi says in his book, \textit{Shariah: the Islamic Law}:

“Every Muslim who is capable and qualified to give sound opinion on matters of Shariah, is entitled to interpret the law of Allah when such interpretation becomes necessary. In this sense Islamic policy is a democracy. But where an explicit command of Allah or his Prophet already exists, no Muslim leader or legislature, or any religious scholar can form an independent judgement; not even all the Muslims of the world put together have any right to make the least alteration in it.”\textsuperscript{150}

However, there is also scope and indeed a requirement in Islamic law that provides that bodies of learned scholars should meet to discuss issues of law and society whenever the need arises. This is because, while the Quran itself is deemed to be timeless and universal, it is inevitable that in every age and in every society there will be new issues which arise that require a fresh look at the interpretation of specific Quranic passages to see how they apply to modern dilemmas.\textsuperscript{151} It is then the role of the learned scholars of Islam to use their theological knowledge to apply the \textit{Shariah} (Islamic law) to modern situations. This is known as \textit{Fiqh} or Islamic jurisprudence. Under this category, if a problem is not addressed specifically by name in the Quran, such as the problem of drug trafficking or credit card fraud, then the scholars will try to find some general principle that can lead to an acceptable way to handle the problem within the guidelines set down in the Quran. In these circumstances:

\textsuperscript{148} The Quran (2:256).
\textsuperscript{149} The Quran (18:29).
\textsuperscript{150} See, Doi (op. cit. note 41) (1997) p5.
\textsuperscript{151} This in no way means that the old interpretations change or are rendered invalid, but only that new previously un-thought of analogies or explanations may also be found to be applicable.
“Muslims can consult each other about matters in the Shariah regarding the correct meaning of a particular clause and correct observance of it in order to fulfil its purposes; but they cannot confer together with the purpose of replacing or altering in any manner the ruling or decision of Allah and His Prophet by their own conclusions.”

This process of Shurah or consultation is accepted and encouraged in Islam and, in fact:

“We know that the Prophet (peace be upon him) continually practiced concertation with his Companions, and the traditions which report this are numerous. Whenever a situation, about which no revelation had intervened, presented itself, the Prophet (peace be upon him) used to listen to those around him and consequently take decisions.”

**D- Judicial reasoning and understanding by legal analogy. (Qiyas.)**

One key exegetical method utilised by some Islamic jurists is that of analogical deduction or reasoning, whereby a principle or ruling in the Quran is extended beyond the immediately apparent. This principle is known as Qiyas and may be defined as: “A legal analogy, by which a law is extended from a case mentioned in a text of the Quran or Sunnah to a case for which there is no specific text on the basis of the same effective clause for the law in both cases.”

As Islamic studies lecturer Dr Robert Gleave succinctly explains, this principle of “analogical reasoning first proceeded by identifying the ratio (al-illa) behind a Divine command found in the Quran. Once discovered, the ruling is thereby transferred to all occasions when the ratio is present.”

An example of such reasoning might be the extension of the prohibition of grape wine, due to its intoxicating qualities, to the prohibition of all intoxicating substances. This extension may therefore be taken to include recreational drugs which, under the category of intoxicants combined with principles of public protection, may, by analogy, be legitimately deemed as criminal offences. It is as a result of the debate and consensus of Islamic scholars on lines of reasoning such as this that has led countries such as Egypt and Saudi Arabia to implement harsh punishments, including the death penalty, for some drug-related offences.

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153 Tariq Ramadan, (2001) Islam, the West and the Challenges of Modernity. The Islamic Foundation, p82. For more on the criterion for Shura see Ibid, Ramadan, pp81-97.
156 The consumption of alcohol is not however a capital offence although it is strictly forbidden.
Recourse to analogical deduction is not unfettered however and jurists have laid down conditions for its use. According to Abdur Rahman Doi, for instance, among these conditions are the following:

“A) That the Qiyas must be applied only when there is no solution to the matter in the Quran or in the Hadith. B) That al-Qiyas must not go against the principles of Islam. C) That al-Qiyas must not go against the contents of the Quran neither must it be in conflict with the traditions of the Prophet. D) That it must be a strict Qiyas, based on either the Quran, the Hadith or the Ijma.”¹⁵⁷

However, if no analogy or ruling can be found that directly addresses the facts of the case at hand then the judge is free to use his own reasoning to apply the law as closely and fairly as possible to the spirit of Islamic law.¹⁵⁸

Judges hold a respected position in Islamic law but one that comes with a great responsibility, for Allah warns judges in the Quran that they should be fair in their rulings because He is the final judge and He will ultimately judge them. One verse for instance, says, “And if any fail to judge by what Allah hath revealed they are wrong-doers.”¹⁵⁹

Many verses in the Quran are concerned with promoting honesty and justice. One example is the verse that reads:

“O ye who believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah. For Allah is acquainted with all that ye do.”¹⁶⁰

¹⁵⁸ It should be noted, however, that “Analogical deduction is based on very strict, logical and systematic principles and is not to be misconstrued as mere fancies and imaginations of men.” See Doi, (op. cit. note 41) (1997) p8. Individual judgements will only have validity as long as they are in accordance with the Quran and Sunnah. For some of the rules and principles surrounding the role and duties of a judge in Islamic Law, including prohibitions on discrimination, see Abu Bakr Jabir Al-Jazairy, (op. cit. note 137) (2001) pp532-542.
¹⁵⁹ The Quran (5:45).
¹⁶⁰ The Quran (5:8).
In another concise yet profound statement the Quran says: "Allah doth command you... when ye judge between people, that ye judge with justice. Verily how excellent is the teaching which He giveth you."\(^{161}\)

In any event, the principle of Qiyas may be fairly restricted in its application to Islamic law as, after a certain point, "If the criminal law and crimes are permitted to be extended through analogy it will violate the principle of legality, which states that there can be no crime and no penalty without prior legislation."\(^{162}\)

A further secondary source of influence in Islamic law is that of public interest (Istihsan). This is why, as we shall see later, a punishment such as that for theft could be set aside during a time of famine or social need.

**PART 3.**

**6- Conditions and safeguards relating to the implementation of the death penalty in Islamic law.**

Even when a crime, on the face of it, seems to qualify as a capital offence under Islamic law, there are several procedural safeguards or checks and balances (dhawabit) which act as pre-requisites to the passing of a capital sentence. These safeguards must be addressed before a judge can impose the death penalty.

These include issues relating to the number of witnesses, the quality of witness testimony; rules around the viability of confessions and the withdrawal of confessions; rulings related to the admissibility of circumstantial evidence and other potentially mitigating factors. In addition to this are safeguards related more specifically to the accused themselves. For instance, before a capital sentence can be passed it must be established that the accused is sound of mind and was old enough, at the time of the commission of the alleged offence, to have understood the consequences of their actions. Furthermore, it must be clear that they acted freely and not out of coercion, fear or mistake. Each of these pre-requisites shall be discussed in the forthcoming sections.

\(^{161}\) The Quran (4:58).

A- The accused must be sound of mind.

One of the most basic pre-requisites to passing a sentence of death for any offence in Islam is that the accused must be judged to be sane. Any mental aberrations which render them unaware of their actions nullifies the requisite mental element (mens rea) of the crime and they are thus to be shielded from being punished for a crime that they either did not intend to commit or did not fully understand. The authority for this defence from the death penalty can be found in the following hadith:

“And Ali said to Umar, “Don’t you know that no deed, good or evil are recorded for the following and they are not responsible for what they do: (1) An insane person until he becomes sane, (2) and a child till he grows to the age of puberty, (3) and a sleeping person till he wakes up.”"163

It is this Islamic rule that recently saved a 55 year old peasant farmer from the death penalty in Nigeria. After confessing to the rape of a nine year-old girl, he was sentenced to be stoned to death. However, that decision was quashed on August 19th 2003 by an Islamic Court of Appeal. In accordance with Islamic law, Judge Mohammed Inuwa said that, “Since we are convinced that Samiru is an insane man, his conviction is not valid… All Islamic scholars agree the confession of an insane man is not valid and he is immune from prosecution.”164

In addition to this, even in the case of a sane person, the accused must have been fully conscious and aware of their actions. They must be judged to have acted according to their own volition and not under duress, mistake or compulsion. In some instances, for example, ignorance of the law may be an excuse, such as in the case of a revert to Islam who was not fully aware of the Islamic customs and rules.

B- Maturity.

According to the aforementioned hadith, the second pre-requisite which must be met before a death sentence can be passed is that the perpetrator of the crime must have been at, or past, the age of maturity at the time of the commission of the offence. In Islam, the age of responsibility generally depends upon the individual’s stage of physical maturation and development.

C- The meeting of high evidentiary standards.

i- Circumstantial evidence and elements of doubt.

Circumstantial evidence alone is not necessarily enough to secure a conviction. In the case of adultery for instance, pregnancy alone will not always be enough to prove an allegation of adultery, as it could be the product of rape, coercion, legitimate marital relations, artificial insemination and so on.165

Furthermore, as Abdullah Nana explains:

“There is a general principle in Islamic law that a divine punishment will not be applied with the presence of even the smallest doubt. Thus great effort is made to avoid prescribing the punishment if there is scope to do so and no room is left for error. The spirit of Islamic law shows that the benefit of doubt is given to the offender, even if it is very slight.”166

ii- Confession.

In cases where a person confesses to a capital crime, it must be shown that the confessor fully comprehended the weight of their confession and it must be ascertained, as far as possible, that they were under no duress or pressure to make such a confession. It is also the teaching of some schools of Islamic thought that a withdrawn confession may result in full exoneration, as it may be enough to cast doubt over a person’s guilt. Part of the reasoning behind this rule is that if the confessor lied to start with, his word cannot be trusted and his witness against himself is of no value. Alternatively if he was telling the truth and he is considered to be honest there is now doubt as to his guilt as he has withdrawn his word. It also provides the offender with an opportunity to reconsider a confession that he may have made in the heat of the moment or without fully considering the consequences of his words.

As mentioned in part (i) above, this issue of doubt is very important, as it is a well-established principle of Islamic law that in cases of doubt the judge must err on the side of forgiveness (idra’u al-hudud bi al-shubuhat) rather than risk executing an innocent person.

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165 See for instance the article “Islamic Legal Analysis of the Zina Punishment.” Asifa Quraishi which can be found at: http://www.islamfortoday.com/zinanigeria.htm

In addition to this, some schools of thought, (namely the Hanafi and Hanbali schools) say that in some cases (such as those of adultery) a confession should be repeated four times to ensure the conviction of the confessor in wanting to be punished. Other schools however, (namely the Maliki and Shafi schools) say that once is enough.

A further principle surrounding confession is provided by a hadith which suggests that if a person confesses to committing a sin and asks to be punished but has not specified his offence, he should be dissuaded from confessing further. 167

“Narrated Anas bin Malik: “While I was with the Prophet (peace be upon him) a man came and said, “O Allah’s Messenger I have committed a legally punishable sin; please inflict the legal punishment on me.” The Prophet (peace be upon him) did not ask him what he had done. Then the time for the prayer became due and the man offered prayer along with the prophet (peace be upon him) and when the Prophet (peace be upon him) had finished his prayer, the man got up and said, “O Allah’s Messenger! I have committed a legally punishable sin; please inflict the punishment on me according to Allah’s Laws.” The Prophet (peace be upon him) said, “Haven’t you prayed with us? He said “Yes.” The Prophet (peace be upon him) said, “Allah has forgiven your sin” or said “…your legally punishable sin.” 168

iii- Numerous credible witnesses of good character and honesty.

In cases where no confession is made, an alternative way to bring about a prosecution is through the witness of several reliable and honest members of the community. The number of witnesses required varies according to the crime committed. 169

Witnesses are also reminded in the Quran to be honest and unbiased in their testimony. For instance, one surah says: “Whenever ye speak, speak justly even if a near relative is concerned.” 170 Another says:

167 This is particularly relevant in cases of adultery or drinking alcohol where the matter is private and has remained hidden with no tangible loss or harm to others.
168 Sahih Al-Bukhari, Vol. 8, No. 812, p535. However, this type of mercy is obviously not exercised on a regular basis as, unlike the Prophet, we are not able to judge a person’s repentance and decide whether or not God may or may not have forgiven them, but it does show that the Prophet was not keen to punish and that just because a person’s conscience may bother them enough to the point of confession does not mean that the authorities should seize the opportunity to hound and lambaste them, but on the contrary their confession should be gently dissuaded. It also serves to show that punishment alone is not always the ultimate goal but responsibility and repentance is.
169 As already mentioned in Part 5 B (iii) (b) above in the case of adultery, for instance, a condition of prosecution is that there must be either a confession from one of the adulterous parties or alternatively there must be four male witnesses who are known as reliable and honest people. For more on the conditions of the witness see, for instance, Al-Jaza’iry, (op. cit. note 137) (2001) pp543-545.
170 The Quran (6:152).
"O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be against rich or poor; for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do."\(^{171}\)

In addition to this, the laws surrounding false evidence are very harsh under Islamic law and entail a potentially severe punishment for those guilty of giving false witness and bearing false testimony. This also helps to restrict the number of false, malicious and unfounded accusations being brought before the courts.

**D- Due process of law.**

These are just some examples of the checks and balances in place in Islamic law established to restrict the use of capital punishment in practice. It also goes without saying that capital punishment cannot be used “unless due process has been observed in a fair trial and extenuating circumstances were fully considered.”\(^{172}\) In addition to this, individuals may never take matters of retaliation into their own hands and they can only be involved if the judge has sanctioned their involvement.

Furthermore there are several restrictions on the conduct of the judges themselves. For instance, there are hadith that say that “a judge should not judge between two persons while he is in an angry mood.”\(^{173}\) Similarly, Imam Bukhari wrote that a judge must make his judgement in accordance with the principles and guidance of Islamic law for, “if a judge passes an unjust judgement or a judgement which differs from that of learned religious men, such a judgement is to be rejected.”\(^{174}\)

It is only once all of the conditions are met in relation to the commission of the crime and with respect to the perpetrator of the crime, and only once all other alternative avenues are exhausted that the death penalty becomes, as a last resort, a suitable if not mandatory punishment.

\(^{171}\) The Quran (4:135).


\(^{173}\) Sahih Al-Bukhari, Vol. 9, No. 272, p201.

\(^{174}\) Commentary by Bukhari in his Sahih Hadith collection. Vol. 9, Chapter 36, p226.
An additional point for consideration is that it is an essential component of the concept of punishment in Islam that all of the surrounding circumstances should be borne in mind when a judge assesses the nature of a crime. It is well known for instance that:

"The Caliph Umar, who is admired by many Muslims as the great exemplar of justice after the Prophet,\textsuperscript{175} suspended the punishment of undoubted thieves caught during famine, when the public storehouses were empty. He judged that if a community cannot adequately provide for its members, it has no right to impose sanctions upon them.\textsuperscript{176}"

A further example of a situation in which the prescribed punishments can be postponed if not completely set aside is when the offender is pregnant. In cases of adultery for instance, amnesty may be granted to pregnant women and women with very young children. This is according to the hadith, "She should not be killed until she delivers that which is in her womb if she is pregnant, and until she takes care of her child (i.e., she nurses and weans it.).\textsuperscript{177} The child is considered to be an innocent third party and should not be made to suffer for the sins of its parents. This clause was put into practice in the recent Nigerian case of Amina Lawal who, before winning her appeal and having her sentence overturned on grounds of procedural error,\textsuperscript{178} was granted a few years temporary reprieve to fully wean her child by a Nigerian Shariah court.

Although these instances start as mere postponements of the punishment, in many cases they effectively translate into full pardons due to the change in circumstances, namely that the mother now has a dependant. As such, the postponement of punishment may subsequently give the judge an opportunity to take the child’s birth into account as a mitigating factor thus reducing the punishment or pardoning her altogether.

\textsuperscript{175} Prophet Muhammad (pbuh).
\textsuperscript{176} Rabbia Terri Harris, "Islam and the Death Penalty." Harris is a Co-ordinator of the Muslim Peace Fellowship. See Amnesty International website for more details.
\textsuperscript{177} Al-Jaza’iry, (op. cit. note 137) (2001) p484.
\textsuperscript{178} See, for instance, the BBC report (Sept. 25\textsuperscript{th} 2003) “Nigerian spared death by stoning” in which “the panel of judges said the decision to acquit Ms Lawal was based on procedural errors at her original trial and the fact that her adultery was not proved beyond doubt.” Available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/3137890.stm
PART 4.
7- Islamic alternatives to the death penalty - Diya or mercy.

It should now be clear that in certain circumstances Islam does permit for the death penalty to be utilised as the maximum punishment available for the crimes perceived to be the most serious according to Islamic teachings and law. However, capital punishment in Islamic law is almost never a mandatory punishment and there are alternative punishments available for most capital crimes. For instance, in cases of murder, the Quran specifies that retribution in the form of “a life for a life” is the right of the victim’s family and that they are fully entitled to request and receive the legal execution of the person who killed their family member. However, the same Quranic verses that grant them this right also then encourage them to ask for something more noble. They are advised to remit their rights either fully, in the form of a total pardon for the offender, or in the form of Diya, financial compensation.

While Diya is frequently translated as “blood-money”, Muhammad Abdel Haleem (2003) has argued that:

“Diya is not ‘blood money’, as it is normally translated. The Oxford English Dictionary gives the primary meaning of the term ‘blood money’ as ‘a reward for bringing about the death of another.’ The word Diya has no such association in Arabic, and is therefore better translated as ‘compensation’... Here is but one example of how translating Islamic terminology has been responsible for the traditional, bad image of Islam in the West.” 179

One Quranic verse says:

“We ordained therein for them: Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal, but if anyone remits the retaliation by way of charity it is an act of atonement for himself. And if any fail to judge by what Allah hath revealed they are wrong-doers.” 180

Another Quranic verse states that:

“O ye who believe! The law of equality is prescribed to you in cases of murder... But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome

180 The Quran (5:45).
gratitude. This is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave chastisement."  

Diya, is therefore a provision which enables the execution of the offender to be withheld in cases of murder. It is important to note however that, “Even if the heirs of the victim accept compensation or pardon the culprit, it is still open to the court under Islamic law to apply a fitting penalty from the wider area of tazir, in order to protect society from the wrong committed against it, and as a punishment for violating its laws.”

The Islamic concept of Diya has been highly criticised, particularly in the Western press, and many people in Western cultures seem to find the notion rather difficult to comprehend. As noted above, this probably is partially due to the mistranslation of Diya, as “blood-money”, a term that holds rather negative connotations, despite the fact that the intention behind it is positive. Despite the criticisms levelled against it however, most Muslims would argue that the option of diya has manifold logic behind it. It can serve to the advantage of many groups including:

A- The victim,
B- The offender,
C- The victim’s family,
D- The offender’s family,
E- And society as a whole.

Some of the advantages are as follows:

A- For the victim, who, in death, cannot be practically compensated in the same way that a living victim of a road traffic accident could be, for example, this option gives them their natural right to justice. Diya gives the victim either the opportunity to have

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181 The Quran (2:178).
182 Diya is only available as compensation for murder and injury. Financial compensation would not be available as a means of avoiding a death sentence for an offence such as adultery.
183 Muhammad Abdel Haleem (op. cit. note 179) (2003), p106.
184 Criticism was particularly prevalent in 1996 when two British nurses, Deborah Parry and Lucille McLauchlan, were accused of murdering an Australian nurse in Saudi Arabia. It was this case more than any other in recent years that seemed to bring the issue of “blood-money” to the attention of the non-Muslim world.
their death avenged by facilitating the execution of their killer, or at the very least it ensures that their family is financially provided for after their death.

**B- For the offender** this option provides an obvious potential respite from death, which most would probably argue is a better alternative than execution. It also allows for any extenuating circumstances and mitigating factors to be taken into account by the victim’s family when they make their decision in a way that would not be possible if death was a mandatory sentence to be passed by the judiciary alone.

If the offender is executed however, it is believed that this punishment will expiate their sins and that, similar to the law of double jeopardy, they will not be punished for that same sin in the hereafter.

**C- From the victim’s family’s** perspective, they are given a say in the matter of the judgement of their tormentor. This provision empowers them. It becomes their right, once the offender has been found guilty of murder in a court of law, to choose between enforcing the death sentence, or accepting compensation in return for his life or pardoning the offender altogether.

If they choose to insist on the death penalty, they have the legally sanctioned retribution that they are entitled to under Islamic law. Alternatively, if they opt for mercy for the offender and pardon him in return for compensation, this has the obvious practical benefit of compensating the family, at least partially, for any loss of income and will help contribute to costs incurred by their bereavement. They may, for example, have lost the breadwinner of the family and this scheme enables the suffering that they have incurred, at least in practical financial terms, to become somewhat abated. It also has the spiritual advantage of the reward the Quran promises the victim’s family that they will attain for showing mercy to the offender despite their heinous crime. Finally, there is always, of course, the option to forgo any financial compensation and to pardon the offender altogether, which in religious terms is the best and most worthy option. Mercy and forgiveness are virtues accorded a high status in Islam and each Muslim is encouraged to exercise both whenever they can.
D- For the offender's family, whose position is often ignored in modern legal systems, Diya also potentially benefits them. They too are an innocent party in the scenario and it seems unfair that they should be punished as well as the victim's family. If their breadwinner, for example, is executed then two families have lost a loved one and a source of income and stability. By having the option of Diya, they have at least two benefits. One is that even though they will initially share the burden of paying a potentially huge sum to the victim's family, their breadwinner will at least be alive and able to continue to make a living to support the family who would otherwise potentially be left destitute.

The second and undoubtedly most important advantage to them is the possibility that mercy on the part of the victim's family will give their loved one a chance to live.

E- Society. With regard to following the law of Qisas (equality) and taking a life for a life, the Quran teaches that, "In the law of equality there is (saving of) life to you." 185 In explanation of this verse, "Abu Zahran, the modern Egyptian jurist, argues that the purpose of qisas is the preservation of life... Abu Zahran understands this verse the same way many Muslim jurists have understood it, namely that the murderer's execution has the long-term effect of preserving the life of the community"186 and this is further understood in terms of both general deterrence and as the ultimate form of irreversible incapacitation. The death penalty in this context also has all of the social benefits that any retentionist supporter will argue including saving the tax-payer the cost of keeping the convict in a high security prison for life, as well as serving as a strong message of public denunciation.

Alternatively, if the death sentence is abrogated in favour of compensation, it may at least relieve the tax-payer from bearing the burden of any costs related to supporting the executed convict's family.

Due to this process of financial compensation for death, this aspect of Islamic law can be considered to be a hybrid between criminal law and tort law. As El-Awa explains:

185 The Quran (2:179).
"It can be said... that neither the concept of crime nor of tort is dominant. Consequently, one may rightly conclude that homicide and its punishment in Islamic law have a dual nature, that of a crime for which punishment is imposed and that of tort which makes the wrongdoer liable to pay compensation from which the wronged party may benefit."\(^{187}\)

An analogy may be drawn here between the Islamic system of *Diya* and the modern equivalent of compensation for injury or physical harm in a secular or Western legal system. In English tort law, for example, a price is essentially put on limbs so that, in the event of an accident, a lawyer can request that the responsible party pay "X" for their client's broken leg or "Y" for their client's fractured arm etc... This is seen as a form of natural justice, a fair compensation for a serious loss, it is not criticised for putting a price on limbs and thus cheapening the value of a limb or debasing an organ's worth. Islam simply takes this principle and applies it to the more serious loss of life.

This concept of reparation is becoming an increasingly important aspect of many contemporary justice systems and reparative sentencing is becoming an ever more popular\(^{188}\) way to address both criminal and civil wrongs. The British Criminal Injuries Compensation Authority, for instance, has in recent years extended its provisions to include compensation for certain instances of death. Called the "fatal award" scheme, it is available to "qualifying relatives" of victims who die as the result of violence and is available through the Criminal Injuries Compensation Authority. As the "Guide to compensation in fatal cases" says:

"No amount of money can make up for the death of a close relative, but the compensation scheme is intended to give some recognition to the grief and distress caused by a death resulting from a criminal injury."\(^{189}\)

However, the Islamic system is much older and places the power directly in the hands of the victim’s family instead of giving the power to the governing authorities. Leaving this decision to the discretion of the victim’s family seems very just, particularly in an

\(^{188}\) The frequency and occurrence of *Diya* is, however, exceedingly difficult to discern and whether its practice is increasing or decreasing is virtually impossible to ascertain. There are some records however, of when families have openly rejected the offered “blood-money” in favour of seeing the executions go ahead. See, for instance, “Pakistan: Family won’t pardon Briton for money.” At: http://www.amnesty.org.uk/news_details.asp?NewsID=16974 Posted on May 31st 2006.
\(^{189}\) http://www.cica.gov.uk. The criminal injuries compensation scheme was created by the Secretary of State under the Criminal Injuries Compensation Act 1995. It includes covering the cost of funerals, the loss of parental services and in some cases, dependency.
age where victims are often ignored, despite concerted efforts to change that by encouraging schemes such as victim reparation and victim impact statements along with other victim recognition and victim's rights programmes. It is interesting to note that the issue of victim's rights and victim's family's rights, to which academics, politicians and researchers are only just beginning to pay attention, were considered in Quranic legislation that was laid down some fourteen hundred years ago.

Two final points should be made here, the first being that any form of negotiations regarding the option of execution or diya must be done through the legal process. Only the courts have the right to allow this process to take place. It is unacceptable for families to take vengeance into their own hands. It is partly to prevent acts of private vengeance, traditional tribal warfare, family feuds and so-called “honour” killings,¹⁹⁰ that the Quran makes so many provisions for legal justice within the penal and legal system in the first place. Second, it must be realised that although Islam allows the Diya process to take place, very few countries actually utilise it in practice. Saudi Arabia and Afghanistan, for example, do, whereas Egypt does not.

It is clear therefore that there are several provisions in Islamic law that provide alternatives to the death penalty in capital cases. They include financial compensation to the bereaved family in lieu of death or a full pardon. Most Islamic scholars would also concede that prison is an acceptable punishment in place of death in cases where the pre-requisites of a capital conviction have not been met.

PART 5.

8- Conclusion.

In conclusion, as with the Christian stance on capital punishment, it has become abundantly clear that there is no one absolute view when it comes to the Islamic perspective on the death penalty. There is more than one valid approach. On the one hand, it can legitimately be argued that Islamic law undeniably makes legal provisions for the use of capital punishment, albeit in very few instances. Alternatively however, it can quite plausibly be argued that due to the nature of most contemporary societies and in light of the number of restrictions and safeguards put on the use of capital

¹⁹⁰ This is a practice that, despite popular belief, has no foundation or basis in Islam whatsoever.
punishment, it is, in practice, virtually impossible to implement except on the rarest of occasions.

I shall briefly summarise both positions below.

A- The pro-capital punishment perspective.
From the perspective of a Muslim arguing in favour of capital punishment it can legitimately be argued that:

1- The Quran unequivocally prescribes the mandatory use of capital punishment for at least one crime, (that of murder committed in the commission of Al-Hiraba.)

2- The Hadith clearly prescribes the use of capital punishment for the offences of murder, adultery and, potentially, for the apostate who threatens the security of the Muslim community. In addition to which, several hadith also attest to the fact that Prophet Muhammad (pbuh) sanctioned the use of capital punishment during his lifetime, as did his Companions and the Caliph after his death, which essentially sets a precedent for its use in similar cases.

3- Provisions have also been made within the Islamic legal framework for legal scholars, lawmakers and the judiciary, through consultation and consensus, to expand the scope of capital offences in line with societal developments and social needs.

There is clearly, therefore, a definite basis for a strong pro-death penalty position in Islam and this goes some way to explain why so many Muslim countries practice capital punishment and why they are so reluctant to give up their retentionist status, despite constant international pressure from organisations such as Amnesty International and the United Nations to sign treaties to at least place a moratorium on the practice. It is clearly a practice deeply entrenched within Islamic law and history, and it is this religious background that many Muslim countries cite as their primary justification for their constant refusal to abandon the practice. In his book The Death Penalty – A Worldwide Perspective, Roger Hood cites some prominent examples of such claims. He cites the example, for instance, whereby:
“In voting against a draft resolution of the United Nations Commission on Human Rights in 1982, the Kuwaiti government insisted that there could be no question of abolition because, “that would involve changing a cardinal principle of Kuwaiti religion and national jurisdiction.”

Similarly Hood cites how the representative from Oman expressed the contention that, “to the extent that it was an integral part of Islamic law, it must be upheld at all costs…” Further still at the United Nations General Assembly in late 1994, Sudan expressed these views in uncompromising terms: “Capital punishment is a Divine right of some religions. It is embodied in Islam and these views must be respected.”

Accordingly, although there have been some positive moves towards abolition in recent years, such as the 2004 abolition of capital punishment for all crimes in Senegal, it is unlikely that too many more Muslim countries will give up their right to practice capital punishment at any time in the near future. Some of the more secular Muslim states, however, may agree to consider it as a result of political pressure on an international level, as has been the case with Turkey who recently abolished capital punishment, in part, as a means of joining the European Union.

B- The anti-capital punishment perspective.

However, despite fervent pro-death penalty support among many Muslim nations, I would contend that it is also possible to legitimately argue that there is no place for capital punishment in today’s societies, Muslim or otherwise. However, this is not because any Islamic text or doctrine has changed, nor is it because any fundamental Islamic teachings have altered. The core Islamic teachings have remained essentially the same for over fourteen hundred years; it is simply that the societal context into which the rules need to be applied have drastically changed. Islamic laws are ideally suited to an Islamic society. If no such society exists, how can its laws be enforced? Islam teaches for instance, that if a person steals for want of food, basic provision or shelter, they cannot be punished with the Haad punishment for theft. This punishment can only be applied if society has first provided them with work, food,

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192 The haad punishment for recidivist thieves is amputation of the hand. However, there are certain conditions that must be met before this sentence can be handed down, some of which shall be explained in the following footnote.
shelter, security and so on. In Islam it is deemed to be the right of the authorities to punish its citizens as long as it also provides for them. It is arguable that if a government has not provided for, or protected, its citizens, that removes the legitimacy for that authority to punish them, at least with the mandatory Haad punishments. This is the view of many Muslims. According to the former Chief Justice of the Egyptian Supreme Court and a leading jurist Said Al-Ashmawy, for instance, the hudud punishments are only “to be applied if we reach a just society in which everyone can find political and economic justice.”

According to this approach, modern Islamic societies, should therefore concentrate on following the spirit of Islam as well as the letter. They should first establish a moral and fair society, with just and merciful rulers before they impose sanctions that have been designed to regulate that society. As El-Awa concluded from his studies on punishments in Islamic law:

“It is therefore nonsense to say that we must apply the Islamic penal system to present-day Muslims societies in their present circumstances. It is nonsense to amputate a thief’s hand when he has no means of support but stealing. It is nonsense to punish in any way for zida (let alone to stone to death) in a community where everything invites and encourages unlawful sexual relationships… Those who try to justify some of the current systems in Muslims countries only prove their lack of understanding of the Islamic concept of life as laid down in the Quran, the sunna, and the scholars’ teachings.”

An Islamic state is neither an abstract proposition nor a philosophical ideal but for Muslims it is a very real and practical vision, but not one that currently exists in our

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193 A number of rules surrounding this much debated punishment for theft include the fact that the theft must have included an element of breaking and entering and cannot be used for theft of unsecured properties or properties left outside. The valuables stolen must also have been adequately guarded and locked away and it cannot apply to products such as food, fruit and so on. The theft must also have been witnessed by two or three male witnesses present at the scene of the crime. Furthermore, it is a punishment for recidivist offenders only. Imam Ibn Al-Hanbal says that two or even three “sustained confessions are needed before conviction.” See Doi (op. cit. note 41) (1997) p225.

194 See the hadith referred to in Part 3 (6) D above at footnote 176, in which the punishment for theft was set aside during a famine.


196 Unlawful sexual relations.

and not one that would accept any of the current practices of capital punishment as they presently exist worldwide.

Another abolitionist approach is to argue that although Islam clearly allows for capital punishment in principle, in practice there are so many restrictions placed on it so as to render its practice as a rarity at best.

However, if there are religiously viable arguments for opposing the practical application of capital punishment in Muslim societies around the world today, it is reasonable to ask why Muslim countries persist in their regular application of the penalty? I recently came across the work of Dr Tariq Ramadan who addresses this very point. Described as “Europe’s leading Muslim intellectual” Dr Ramadan has launched a campaign calling for an “Immediate international moratorium on corporal punishment, stoning and the death penalty in all Muslim majority countries.” He argues that the Islamic principles of a just and equal society must be met before the Islamic penalties can be implemented and that these standards are currently not being met.

He explains that there are several reasons why the penalty continues to be applied, despite obvious and sound religious arguments against it. He identifies, among others, two groups who are responsible for the perpetuation of a non-Islamic practice in the name of Islam. He identifies firstly the mass of public opinion. Having travelled

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198 The closest vision of an ideal Islamic society, most Muslims would agree, was that which existed under the rule and guidance of Prophet Muhammad (pbuh). It may thus reasonably be asked if a true Islamic nation could ever exist in today’s world. The answer to this question is surely similar to that of most religions. We could equally ask, is a true Christian society in which basic Christian values and morals are actively practised a plausible reality in this day and age? The answer to both questions, for their own followers, must be that one would like to think so. There is no reason why society could not embody more of the teachings of these two faiths. There is very little incompatibility with their basic tenets and modernity.


200 Dr Ramadan, “An International call for moratorium on corporal punishment, stoning and the death penalty in the Islamic World.” P8. Published March 30th 2005. This is available on Dr Ramadan’s website at: http://www.tariqramadan.com/imprimer.php?id_article=264

201 See Dr Ramadan, (ibid.) for a discussion of all of his reasons for opposing capital punishment in Muslim societies today. He also calls for open debate and dialogue between Muslims scholars and society in general on all issues pertaining to capital punishment and other hudud penalties.

202 It goes without saying that the governments and leaders of the retentionists nations are to be held accountable first and foremost for the policies adopted within their jurisdictions.
widely throughout the Muslim world and interacted with Muslims at every level, he argues that a swelling tide towards religiosity is prominent and growing, and that where Muslims are trying to assert their religious identity in the face of worldwide frustration and humiliation, the result is popular passion in favour of a strict adherence to religious practices and principles, and that as a result, “On the question of hudud, one sometimes sees popular support hoping or exacting a literal and immediate application because the latter would guarantee henceforth the “Islamic” character of a society.”

Secondly he identifies the Ulama (Scholars of Islam) as being complicit in the continued application of an essentially religiously non-viable and inappropriate punishment, thus lending it an undeserved veneer of religious legitimacy. The reasons for this, Dr Ramadan asserts, are that:

“Many Ulama remain prudent for fear of losing their credibility with the masses... The majority of Ulama are afraid to confront these popular and simplistic claims which lack knowledge... for fear of losing their status and being defined as having compromised too much, not been strict enough, too Westernised or not Islamic enough.”

Although Dr Ramadan has a large and growing number of followers, his opinions have nonetheless been met with some fierce opposition. His views have, for instance, been publicly condemned by critics at the Al-Azhar University’s Legal Research Commission who released an official statement opposing his call for a moratorium. He has however, countered most of these arguments and has released responses defending his position.

203 Of the public, Dr Ramadan furthermore argues that, “some will persuade themselves by asserting that the West has long since lost its moral references and become so permissive that the harshness of the Islamic penal code which punishes behaviours judged immoral, is by antithesis, the true and only alternative to ‘Western decadence.’” Ramadan (op. cit. note 200) (2005) p5.
205 See the Al-Azhar Legal Research Commission’s statement against Dr Ramadan’s call for a moratorium which they officially released on Thursday 28th April 2005. Also see Dr Ramadan’s “Response to the official statement of the Al-Azhar Legal Research Commission on the Call for a Moratorium” which can be found at: http://www.tariqramadan.com/imprimer.php?id_article=308. The Commission argued for instance that “Whoever, denies the hudud (Islamic penal code) recognised as revealed and confirmed or whoever demands that they be cancelled or suspended, despite final and indisputable evidence, is to be regarded as somebody who has forsaken a recognised element which forms the basis of the religion.” Ibid., p1. Dr Ramadan, however, responds by saying, “I do not dispute that these texts are authentic and determined as an essential part of the religion.” Ibid., p2. He nevertheless, re-iterates his argument that the hudud rules were conditional and dependent on the social and political contexts of the day which are, at present, not conducive to a literalist reading of the texts. While the Commission agreed that this may be true in times of war and that “one could suspend the
Even if Dr Ramadan’s call is not heeded by Muslim nations, at the very least there is a strong case that can be made for the drastic curtailing of the number of capital laws that currently occupy the statute books of numerous Muslim nations worldwide. Professor Cherif Bassiouni, for example, has posited that Muslim states can “curtail the death penalty by legislation and remain consistent with the Shari’a. The existence of the death penalty for several crimes in Muslim states is a policy choice, but not one which is necessarily mandated by the Shari’a.”

Similarly, as Professor William Schabas has argued:

“Obviously there is some basis for the claim that capital punishment is part of Islamic law. Its scope, however, is considerably more limited than certain Islamic states like to claim in International debates. Capital punishment is a mandatory penalty under the Shari’a for only a small category of crimes.”

As such, in The Abolition of the Death Penalty in International Law, Professor Schabas concluded that:

“Islamic law is regularly cited as an insurmountable obstacle to abolition of the death penalty, although it would seem that ancient religious texts are more of a pretext than anything else for the enthusiastic resort to capital punishment by what are profoundly undemocratic and repressive states.”

This certainly does seem to be the case. But why is it that suggestions for reform and moderation have not been taken up? Given the fact that it is abundantly clear that most, if not all, Muslim countries do not emulate the Islamic model for law, justice and social welfare as laid out in the Quran and Sunnah, why, even at the most basic grassroots level, do more Muslims not speak out against the human rights violations being application of hudud in Iraq, because it is a country at war, this punishment cannot be suspended in Egypt or other Islamic countries.” Ibid p2. Dr Ramadan continues to argue for an extension of the suspension of capital punishment in countries which have unequal social systems, inadequate recourse to legal representation and so on... The debate between the two remain ongoing.


Professor Schabas is the Director of the Irish Centre for Human Rights at the National University of Ireland, Galway, where he also holds the chair in human rights law.

William Schabas, (2000) “Islam and the Death Penalty” William and Mary Bill of Rights Journal, 9:1 pp223-237. This article can also be found at: http://pewforum.org/deathpenalty/resources/reader/15.php3 from where the above quote was taken (p5).

perpetrated by their nations? Why is it that, unlike Christian opponents to capital punishment who form high profile vociferous focus groups, their Muslim counterparts seem relatively silent on the issue, particularly in countries which are so openly violating the most basic teachings of Islam?

Firstly, as Professor Bassiouni explains, justice and mercy are hallmarks of Islam and “how Muslim societies have managed to stray so far from these and other noble characteristics of Islam can only be explained by reasons extraneous to Islam.” For instance, according to one Amnesty International report, one of the main reasons for this apparent apathy is essentially political in nature. The report states that in Saudi Arabia, for instance:

“The absence of a debate on the death penalty cannot be attributed to Islam or Shariah rules because the works of Muslim jurists are full of interesting debates on crime and punishment, including the death penalty... In Saudi Arabia, the fundamental reason for the absence of any debate on the death penalty is due to the threat of the imposition of the death penalty itself... Dissent, be it religious or political can easily be seen as “corruption on earth” or a deed harmful to the unity of the nation and both of these acts can be categorised as capital offences.”

The report goes on to say that this is why there are “no political parties, trade unions or even a bar association” in Saudi Arabia. As such, Amnesty argues that in the current climate, “a debate on the death penalty in Saudi Arabia seems a distant aim.”

Nevertheless, although many Muslim countries do not seem to actively engage in debates on the issue at a level that includes the general public, opposition is slowly growing and a call is gradually spreading for the correct application of Islamic laws, including applying all of the requisite safeguards, which currently are not always adhered to. Muslims are becoming more and more disenchanted by the practices of their governments who frequently abuse the name of Islam in a bid for power and, as such, there have been demonstrations against hangings in Lebanon for instance. It

212 Ibid.
may just be a matter of time before public opposition to the death penalty slowly emerges in other Muslim countries too. With time however, as more people begin to speak out against the injustices perpetrated by the world’s various “justice” systems and as more Muslim countries turn to what Islam really teaches, instead of what their dictators and oppressive regimes tell the people that their religion teaches, capital punishment may gradually reduce in scope and volume, and along with it the basis of many current human rights violations.

In light of the findings made and teachings uncovered in this chapter I must conclude with my contention that, although Islam undoubtedly permits for the use of capital punishment in principle, in light of the inequalities prevalent in today’s societies and the corruption infecting many of the world’s judicial systems, Islam does not permit for it in the way that it is often used in practice today. The majority of penal and social systems in place around the world today are simply not conducive to a fair and just capital punishment system. This applies just as much to the practice of the American and European systems of capital punishment as it does to Arab, Asian and African ones. As such, arguing for abolition, or at least a moratorium in practice, is, in my opinion, compatible with Islam until that time when the justice system is improved, in terms of access to unbiased and untainted justice for all.214

214 This is an issue discussed in much greater detail in Chapter 7 below.
Chapter 4.
Retributivism, Religion and Capital Punishment.

1- Introduction – Justifying punishment.

The concept of punishment is an ancient one. Before the emergence of centralised governments, punishments in response to wrongdoings were typically visited upon malefactors by their own families, tribes or clans. As central governments developed however, the power to impose and carry out punishments came instead under the remit of the government and their state apparatus, including the judiciary, the police force, and other penal authorities.

While many definitions of the word “punishment” have been propounded over the years and while the concept will have different connotations according to factors such as who is administering it, for our present purposes the word is taken to refer to the intentional infliction of a legal sanction, harm or deprivation, on a person or persons as imposed by a court of law after the offender has been charged and found guilty of a criminal offence.

Generally conceded to be a major infringement of a person’s individual rights and liberties, the concept of punishment has always needed to be justified as legitimate and necessary in order for its continued use to be accepted. Among the various justifications to have been put forward to defend and justify punishments in general are the concepts of retribution, deterrence, denunciation, incapacitation and public security, as well as rehabilitation and restitution. Punishments that have been justified by these concepts have ranged from fines to torture; and from incarceration to capital punishment.

Retribution is one of the oldest justifications for capital punishment and one of its oldest expressions can be found in the principle of lex talionis. The oldest written record of the lex talionis approach can be found in the eighteenth century BCE, Babylonian Law of Hammurabi (also known as the Code of Hammurabi) in which it says:

1 Punishments obviously differ in nature if administered by parents, lynch-mobs, teachers and so on.
2 See Chapter 5 for an examination of deterrence arguments as they pertain to the capital punishment debate.
3 Lord Denning, for instance, expressed the view that: “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: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.” Quoted on p18 of the The British Royal Commission Report on Capital Punishment 1949-53. Her Majesty’s Stationary Office. (Cmd 8932.)
“If a builder builds a house for someone and does not construct it properly and the house which he built falls in and kills its owner, then the builder shall be put to death. If it kills the son of the owner, then the son of that builder shall be put to death.”

It is important to note however that, as the rest of this chapter will demonstrate, this archaic and extreme version of retribution is not endorsed by most retributivists today, secular or religious. This is because retributivism as it is understood today fundamentally requires culpability to be at the centre of the retributivist notion. The builder’s son as described in the Code is obviously not culpable and it would therefore go against modern understandings of retributivism to punish him.

Of all of the justifications to have been put forward in support of capital punishment however, retributivism is one of the most innately interesting as it, possibly more than any other justification for punishment, seems to be the most basic and innate expression of the instinctive human desire to see justice done. Opinion polls almost consistently demonstrate that retribution is one of the most oft-cited justifications for public support of the death penalty. In their article, “Hardening of the Attitudes: Americans’ Views on the Death Penalty”, Ellsworth and Gross, for instance, concluded that, “Retribution is by far the most common reason given for favouring the death penalty.” Most opinion polls also show that the two key justifications for supporting capital punishment are deterrence and retribution. However, research indicates that on the whole “when the two purposes (deterrence and desert) are placed in opposition, it would appear that the public is more influenced by retributivism than utilitarianism.”

(It is important to note however, that opinion polls will not always show public sympathy for retributivist principles. The outcome of the polls will be largely influenced by the sample being questioned, the way in which the questions are phrased and other methodological factors related to the way in which the data is collated and interpreted.)

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4 This quote can be found in the Internet Encyclopedia of Philosophy which can be found at: http://www.edu/research/iep under the heading “Capital punishment and retribution.” The principle of lex talionis will be discussed further in the context of religious Scriptures in Part 5 A (iii) (b) below.


Similarly, when looking at Christian and Muslim defences of the penalty, retribution is again one of the most influential and oft-cited penal justifications. Teachings of *lex talionis* or “like for like”, which is the most basic and strict expression of the traditional retributivist principle, can be found in the Sacred texts of both religions. Dale Recinella has argued that, knowing the persuasive power of retributivist arguments, especially when coupled with Biblical exhortations, “the most popular scripture quotes to be used by prosecutors are those involving vengeance as justice” including primarily, scriptural references to “eye for eye.” Gallup polls have also consistently shown that, an “eye for an eye/punishment fits the crime” is the most prominent reason given by death penalty supporters for their support of capital punishment for murderers.

But aside from being a popular public sentiment in support of the death penalty, how do retributivist arguments supporting the punishment really fare when subjected to objective scrutiny from both secular and religious perspectives? Can retributivist principles as enshrined in Christian and Islamic Scriptures and tradition legitimately be used to defend the death penalty, or do alternative interpretations exist which preclude the death penalty even on retributivist grounds?

In order to fully examine this issue, Part 2 below will outline the key tenets of retributivism, followed by a consideration of ways in which retribution has been used to specifically justify capital punishment in Part 3. This is then followed in Part 4 by an examination of some of the main critiques levelled against this justification, as well as some rebuttals of those critiques. Part 5 then considers the role that retribution plays in both Christian and Islamic penal philosophies. The chapter then ends with a brief conclusion in Part 6.

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8 Dale S. Recinella, (op. cit note 7) (2004) p5. This includes specific reference to quotations of “an eye for an eye” and *Genesis* (9:6) both of which will be looked at in Part 5 of this chapter below. The difference between vengeance and retribution will also be discussed in Part 4 C below.

9 There are several Biblical sources for the quote “eye for eye” including, for instance, *Deuteronomy* (19:21) and *Exodus* (21:23).

10 See Appendix A for an extract of four Gallup polls demonstrating this trend.
2. The basic tenets of retributivism.

The main tenets of retributivism are founded on a few basic principles. Analogous to a philosophical version of Sir Isaac Newton's Third Law of Motion, which states that for every action there is an equal and opposite reaction, the principle of retributivism expounds the philosophy that for every wrong action there deserves to be an equal and commensurate penal sanction, and that sanction should match the crime in terms of proportional severity. Applying to both Ordinal proportionality (i.e., related to the seriousness of the various offences in relation to each other) and Cardinal proportionality (which requires that the penalty is commensurate to the severity of the crime committed), this requires the employment of a tariff, namely a "set of punishments of varying severity which are matched to crimes of differing seriousness." It entails making an objectively calculated assessment of the gravity of the damage done as a result of the crime and the subsequent culpability of the offender, and demands a punishment of proportionate severity be enforced against the offender, essentially fulfilling the maxim "a punishment to fit the crime."

Championed by philosophers such as Immanuel Kant (1724-1804), G. W. F. Hegel (1770-1831) and more recently Andrew von Hirsch, retributivism requires that punishments should be commensurate to the harm intended and administered in order to achieve moral equilibrium. Also known as the principle of "just deserts," retributivism is a concept that has at its core, the idea of redressing the balance of harm in a measured and proportionate manner. The complete antithesis of utilitarian or reductivist justifications for punishment, such as deterrence, which are forward-looking, consequentialist theories, retributivism does not purport to justify punishments in terms of preventing future crimes, nor does it endorse punishments as a form of rehabilitation which will have a projected benefit on the offender and society. Instead it advocates punishments primarily on the simple retrospective grounds that a crime has been committed and that every crime deserves a proportionate punishment in response. This very simple approach to crime and punishment addresses the intuitive human desire to see wrongs righted.

One of the attractions of retributivist reasoning is that retributivism is one of the very few philosophical concepts of punishment which actively seeks to put criminal wrongdoing right by making the victim feel as though his or her suffering has not gone unnoticed. Unlike the rehabilitation model, for instance, which may leave the victim feeling that their rights have been subverted and that justice has not been done, retributivism necessarily requires a measurement of the harm intended and done to the victim and seeks to redress that harm, by punishing the offender on a commensurate basis thus restoring a degree of moral parity.

Retributivism also provides protection to offenders as well as victims. Whereas consequentialist theories such as deterrence can be used to justify exemplary sentences, and therefore set no upper limits on the amount or type of punishment that can be prescribed, retributivists consider this to be a form of injustice and assert that a person should only be punished in accordance with their own blameworthiness and not as an example to others nor to serve any purpose other than achieving just deserts.

3- Retribution as a justification for capital punishment.

A- Kant, retributivism and capital punishment.

There is a long tradition of support for capital punishment, not just from among the public but also from among renowned philosophers and academics, and from within the retributivist tradition the German philosopher Immanuel Kant remains one of its most acclaimed champions.

Although Kant acknowledged that there are certain limitations to the application of retributivist punishments and understood that sometimes the exact same evil can not practically be visited upon the offender, in which case an equivalent evil would have to do,14 he nevertheless argued that there is no appropriate substitute for the death penalty when it comes to punishing a killer. It was his contention that capital punishment is the only fitting punishment for a crime such as murder. In his book The Metaphysics of Morals, (1797) Kant declares that:

“ar however, he has committed murder he must die. Here there is no substitute that will satisfy justice. There is no similarity between life,

According to Kant, punishing an offender is not simply a right, but it is a duty; a “Categorical Imperative.” In other words, it is a duty of a moral kind, one not dependent on the practical consequences. Kant considered that, not only are the rights of the victims acknowledged and respected by punishing the offender, but so too are the rights of the offender respected by punishing him. According to Kant, criminals should be treated as ends and not a means, as they would be if their punishment were founded on concepts such as general deterrence. Kant argued that to punish criminals is not to degrade them or disregard their fundamental right to life but on the contrary is to accord respect to them as individuals endowed with the capacity of rational thought and free will. It is also, he contended, respecting the right and individuality of the murderer to treat him in the same way that he has treated another.

While Kant saw punishment as “deserved”, the German philosopher Hegel (1770-1831) viewed punishment more as a means of annulling crime. This approach however is largely unconvincing and has left itself open to much criticism. Nigel Walker for instance, has said of the idea that penalty annuls crime that, “as anyone who has been mugged or raped is aware, this is nonsense. Victims can be compensated, but not unraped or unmugged.” Walker further argues that “even the dullest capacity must be aware that ‘dead men rise up never’ even when you hang their murderers. Sentencing may have a ritual function, but whatever the ritual celebrates it is not annulment.” Punishment may serve to denounce the crime but it hardly erases it. Nevertheless, it is probably Hegel who best comprehended Kant's approach to this issue of crime and retribution when he wrote that:

“Punishment is the right of the criminal... His crime is a negation of right, punishment is the negation of this negation and consequently an affirmation of right, solicited and forced upon the criminal by himself.”

19 This quote can be found at: http://www.people.fas.harvard.edu/~mponeil/law/kant.html
Kant in fact took his view of retribution so far that he suggested that in the interests of administering total justice, even if it was made known that an entire civil society was to be dissolved the very next day, "the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve." This very strict adherence to the retributivist principle is completely in line with the retributivist view that punishments should be imposed to redress the balance of right and wrong and not necessarily to offer any future or utilitarian social benefits.

B- Other retributivist arguments justifying capital punishment.

Other retributivists have hailed retributive punishments as serving the additional function of denunciation, an expression of society’s moral outrage. Robert Nozick, for instance, argues that:

"Retributive punishment is thus a message from people whose values are assumed to be correct... to someone whose act or omission has shown that his values are by their standards incorrect... For some murderers the death sentence is the only appropriate message."

Another view is expressed by Professor Ted Honderich who explains that an integral part of the retributivist philosophy is the notion that "there is an intrinsic good in the suffering of the guilty," a notion Honderich calls "Intrinsic retribution."

Retribution has also been lauded as a key means of preventing anarchy and mob-rule. In the seminal U.S. Supreme Court case Furman v Georgia, for instance, Justice Potter Stewart remarked in his concurring opinion that:

"The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organised society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve' then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law."

However, the argument that the public will take matters of justice into their own hands if the law is not seen to be actively taking steps to adequately punish offenders is often

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criticised by abolitionists as a gross and largely unsubstantiated exaggeration. They point to countries and states where the death penalty is not employed and they argue that there is no evidence of mob rule or anarchy in those abolitionist regions. For instance, Eric Svanidze states that with regards to the abolition of capital punishment in Georgia, a former state of the USSR, “the argument that the removal of the death penalty has led to an increase in the practice of ‘mob rule’ appears to be unfounded.”24 Similarly, with regards to abolitionist states in the USA, Hugo Adam Bedau says that in these abolitionist regions:

“The public has not responded to abolition with riot and lynching; the police have not become habituated to excessive use of lethal force; prison guards, staff and visitors are not at greater risk; surviving victims of murdered friends and loved ones have not found it more difficult to adjust to their grievous loss.” 25

Conversely, however, there is also undoubtedly some truth to Justice Potter’s remarks. There have been times when the suffering has been raw enough and citizens have perceived the legal response to a crime as unsatisfactory, when even the most law-abiding citizens have resorted to taking matters into their own hands. This was seen, for instance, in the weeks following the murder of British schoolgirl Sarah Payne in 2000, where for weeks after her death there were news reports of angry mobs of vigilantes taking to the streets campaigning to name and shame paedophiles. As a result of that campaign, a number of protests and riots took place during which a number of innocent people were wrongly targeted as child abusers eventually escalating to the point where one man was in fact summarily executed.26 This sort of occurrence seems to provide support for the arguments of Wesley Cragg who posits that:

“The desire for revenge is in many ways a natural response to perceived wrongs. To ignore those emotions invites further conflict. When offenders are punished in accordance with their deserts, the desire for revenge is quieted. Feelings left over that demand further punishment can then be seen as unjustified. Just punishment is therefore a way of redirecting natural but potentially very destructive emotions in morally acceptable and socially constructive ways.”27

When researching the evolution of retributivist principles one comes to observe several different “varieties” of retributivism. John Cottingham, for instance, claims to have identified nine such varieties, including: “repayment theory” (whereby the offender pays for his crime through his punishment); “desert theory” (where, simply put, the offender deserves to be punished for his crimes); “fair play theory” (according to which it would be giving the offender an unfair advantage over law-abiding citizens if they were not punished for their crimes), as well as denunciation and annulment theories which have already been discussed in Part 3A above.

However, there are two primary, related yet distinct schools of retributivist thinking. The first, which may be referred to as old or orthodox retributivism, is founded on the ancient principle of lex talionis and is harsh and unyielding, while the second, modern retributivism, shifts the focus away from qualitative proportionality to quantitative proportionality. Both of these conceptions of retributivism will be looked at next in terms of the problems they present when used to justify capital punishment.

4- Criticisms of retributivism as a justification for capital punishment.

A- Criticisms of Old Retributivism and the principle of lex talionis as a justification for executing murderers.

As previously mentioned, the cry of “a life for a life” is frequently heralded as a primary logical and moral justification for the execution of murderers. However, while this may seem reasonable from the perspective of “Rights Retributivism” whereby the offender loses “those of his rights which are counterparts of the rights of another which he has violated,” as well as from a position of Kantian logic, it is by no means free of criticism. In the context of executing murderers, while execution may, to some, seem like the only proportionate and therefore just option available, not everyone believes that the death penalty is a proportionate response to murder, even on retributivist grounds. Nobel

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29 A distinction between “Old” and “New” retributivism can be found referred to by Honderich, (op. cit. note 22) (1989), p211. Honderich refers to “New Retributivism” as those theories of desert used to justify punishment since the 1970’s.

30 See footnote 10 above and its corresponding text for an earlier mention of this justification.

31 See Part 3A above. The religious perspectives of lex talionis will be considered in Part 5A (iii) (b) below.


33 See the text at footnote 15 above where Kant argues that there is no punishment other than death that can adequately punish a killer.
Laureate Albert Camus (1913-1960), for instance, wrote in his *Reflections on the Guillotine*:

“For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.”

Given the concept of retributivist justice as expressed by Hegel whereby “an injustice is done if there is even one lash too many, or one dollar or one groschen (cent), one week or one day in prison too many or too few”, there is certainly some value in Camus’ line of argument even from within the retributivist tradition.

Even if one were to argue that death is the most just punishment for murderers, not all forms of homicide are the same, and a further problem with advocating qualitatively proportionate retributive punishments is that there are noticeably some crimes for which there is clearly no equivalent. For instance, how could you adequately punish a serial killer, mass murderer, arsonist, terrorist, spy, or those responsible for instigating genocide? Even in the most extreme cases of criminal offending, one cannot impose more than one sentence of death on the offender, regardless of the death toll they have amassed. Even such staunch retributivists as Kant have had to admit to the impossibility of matching certain punishments to certain crimes in this context.

Furthermore, if the argument of *lex talionis* is used to justify the execution of murderers, then surely, in the interests of sentencing consistency the same principle of “like for like” should be invoked for punishing all harms. In this event it would be perfectly acceptable, and indeed required, to rape a rapist, beat a thug and in every other way ensure that all punishments exactly mirror their counterpart crimes. However, this is rarely, if ever, seriously endorsed as a plausible or desirable penal policy by retributivists. But if it is seen as archaic and brutish to punish an “eye for an eye”, how is it any less so to punish

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36 I refer to qualitative as opposed to quantitative proportionality which would determine factors such as the length of sentence or the size of fine imposed.
37 Kant discusses the impossibility of applying *lex talionis* strictly in all cases. See, for instance, Kant, (op. cit. note 15) (1797) pp144-45.
“a life for a life”? It is perhaps partly in light of these largely insurmountable stumbling blocks that many contemporary retributivists have moved away from the old principles of *lex talionis* and have instead embraced modified notions of retributivism.

Before looking at these however, it should first be noted that not everyone has given up so easily and some contemporary death penalty supporters have risen to the challenge and have attempted to support the strict retributivist position on this issue, while not necessarily advocating its application in all cases. Ernest van den Haag, for instance, writes:

“Legal punishment need not differ physically from crime. Punishment differs because it has social sanction and a legitimate purpose... if it were ‘absurd’ as Beccaria thought, to punish homicide with execution – to do as a punishment to the criminal what he did to his victim – it would be equally absurd to fine an embezzler or to deprive of freedom a man who deprives others of freedom.”

He then goes on to cite several other examples of physically indistinguishable crimes and their counterpart punishments, which most people find morally acceptable such as the legal imprisonment of kidnappers and the lawful confiscation of property from robbers. As such, he contends that there is no fundamental difference between those crimes and their respective, proportionate punishments and the execution of a murderer.

**B- New Retributivism and concepts of commensurate proportionality.**

Newer versions of retributivism, such as that propounded by Andrew von Hirsch, favour a move away from identical to commensurate proportionality. According to this shift, punishments need not be identical in type to the harm suffered but need only reflect the seriousness of the culpability and harm done, whereby on a scale of seriousness the most serious crime receives the harshest punishment available. While according to this approach many may still equate crimes such as murder with the death penalty, Andrew von Hirsch opposes this view and in accordance with his reductionist penal policies “von Hirsh rules out the use of the death penalty as an inhumane and degrading punishment.

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and favours relatively low levels of incarceration, with a longer prison sentence for the most serious and a fine for lesser offences.  

This reference to a scale of seriousness leads to more criticisms however, and as Wesley Cragg has said, “The inability of retributive accounts to generate a determinate scale of sanctions or to help us evaluate the appropriateness of proposed or existing sanctions like capital punishment points to a gap which the account itself can not fill.”

A major problem with this non-universal tariff on a more global scale is its cultural and regional subjectivity. While Andrew von Hirsch has argued that research studies generally point to a public consensus when it comes to ranking crimes according to seriousness, the problem is that the public do not always have a say as to how the scale is organised. In many countries, particularly non-democratic ones, capital punishment is thus used to punish what the governments may consider to be the most serious crimes, but which the wider global community does not. For instance, in their publication *When the State Kills*, Amnesty International cite several examples of harsh laws enacted in the past few decades that have provided for:

“The death penalty for non-violent political acts such as forming or being involved in political parties or groups... organising a “counter-revolutionary” secret society (China);... carrying out activities to illegally overthrow the government (Taiwan); publishing or distributing “anti-state propaganda” (Somalia); collusion in any verbal or physical act hostile to the revolution (Syria)... publicly and flagrantly insulting the President of the Republic or his deputy (Iraq)...”

As such, advocating recourse to a scale of cardinal proportionality could provide a retributivist explanation as to why in some countries non-fatal offences, such as espionage, treason, drug related offences, rape, adultery and even apostasy have been deemed to be capital crimes. As a result of particular moral, religious, cultural, economic and political factors, capital punishment may very well be seen by the lawmakers of a particular country, as well as potentially its citizens, to be a proportionate and measured

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43 See the text at footnote 12 above for an explanation of cardinal proportionality.
response to certain types of activities seen to be the most dangerous to the health and safety, or moral fabric of the state.

There have however, been international efforts made over the years to restrict the use of capital punishment, in those regions where it is still in use, to punishment of only the “most serious” offences. This includes for instance, Article 6 (2) of the International Covenant on Civil and Political Rights (ICCPR), as well as Article 4 (2) of the American Convention on Human Rights, both of which attempt to restrict the scope of the death penalty to the “most serious crimes.” However, these efforts have been laid open to much criticism. As Professor William Schabas points out for instance, “The reference to ‘most serious crimes’ has since been attacked for allowing too much variation in state practice and for being ineffectual as a check on some states’ proneness to resort to capital punishment.”

In recent years however, attempts have been made to more adequately define and categorise “serious crimes.” The Secretary General of the UN, for instance, has stated that “the offences should be life-threatening.” Nevertheless, many countries, such as Jordan, Tunisia and Belarus, have still been shown to contravene or at least challenge these standards, either by defining crimes as serious which do not fit the intended level of seriousness or by defining too many crimes as “serious crimes.”

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45 Article 6 (2) of the ICCPR states: “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime...” The ICCPR was “Adopted and opened for signature and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.” ICCPR (1976) UN Treaty Series, Vol. 999, 171. It can also be found at: http://www.ohchr.org/english/law/ccpr.htm Underlining is my own emphasis.

46 Article 4 of the American Convention on Human Rights states: “In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime...” This can be found at: http://www.oas.org/juridico/english/Treaties/b-32.htm Underlining is my own emphasis.


48 UN Doc. E/2000/3. para.79. This would seemingly preclude offences such as apostasy, espionage, and crimes of a political nature.

49 See William A. Schabas, (op. cit. note 44) (2004) pp47-8. Also see Schabas, pp45-51, for an in depth discussion of “serious crimes” as they pertain more generally to International Convention and Treaty Standards.
C-Revenge and retributivism.

Another major criticism of retributivism is its seemingly innate association with the concept of revenge.\textsuperscript{50} Unfortunately for retributivists, retribution is often thought of as synonymous with words such as vengeance, revenge and consequently even brutality. This detrimental connotation has the effect of degrading the concept of retribution by its very association with these other negative notions. Although it is true to say that retribution is the primary philosophy that facilitates the cry of those seeking vengeance, to the extent that those seeking vengeance are trying to ensure that the offender gets their just deserts, it is not however, always the case and it is damaging to the credibility of the principle of retributivism to give the impression that the two are identical.

It can be argued that impulses of revenge are an integral part of human nature and that feeling that injustices perpetrated should be avenged is, to a degree and within limits, "normal."\textsuperscript{51} Even as a topic of entertainment most cultures and societies are quite accustomed to the idea of vengeance and revenge. Dating back to ancient Greek and Roman plays,\textsuperscript{52} revenge tragedies have always been a popular subject matter. However, the themes that we are so comfortable and familiar with in literature and film are not themes that we seem to be very comfortable with in real life. While we can applaud the hero of a book for avenging their father's death for example, the argument that pro-death penalty supporters are, by their retributivist stances, promoting revenge is far less palatable.

The criticism that retributivism is really a euphemism for vengeance is very harmful to the retributivist position, as when discussing the merits of penal philosophies, vengeance, which is inherently based upon subjective emotions and anger, is hardly a commendable practice to endorse and is quite rightly considered to be an undesirable basis on which to found a penal system.

\textsuperscript{50} This is an association defended by Jeffrie Murphy in his article, "Two Cheers for Vindictiveness." (April 2000) Punishment and Society – The International Journal of Penology. Vol. 2, No. 2, pp131-143. See the end of this section (section C) for further discussion of Murphy's defence.

\textsuperscript{51} See for instance, Justice Potter Stewart's remarks in which he expresses the view that "the instinct for retribution is part of the nature of man." See footnote 23 above and its corresponding text.

\textsuperscript{52} Such as the revenge dramas penned by the Roman philosopher, statesman and writer, Seneca (4 BC-AD 65).
However, retributivists would argue that their philosophy is distinct from pure vengeance as it entails an objective, rational, and proportionate response to the pain and suffering inflicted upon the victims and their families, as opposed to the emotional and unrestricted nature of revenge. Research scholar David Crocker, for instance, has proposed at least six ways in which retributivism and revenge may be distinguished. First, he argues that retributivism always "addresses a wrong"\textsuperscript{53}, usually a crime or some other substantive infraction, whereas revenge may be sought for a minor slight such as an unintended injury or being shamed in front of one's friends.

Second, Crocker refers to revenge as "wild" and "insatiable"\textsuperscript{54}, having no upper limit, whereas retributivism he conversely describes as being "restrained" by the constraints of proportionality. In this context it can be argued that, by its very nature, a system of proportionate punishments restricts unbridled, vengeful attacks as it places a ceiling on the amount of punishment that can be inflicted on an offender, thus safeguarding them from overzealous judges and prosecutors. In this way, as Crocker describes it, retributivism serves as both "a sword to punish wrongdoers and a shield to protect them from more punishment than they deserve."\textsuperscript{55}

Third, Crocker describes retributivism as "impersonal"\textsuperscript{56}, in the sense that, whereas vengeance is usually something sought on behalf of a friend, family member or some other personal affiliate, retributivism can be sought by an impartial judge and does not require ties of familiarity or kinship in order to be sought. Fourth, whereas agents of vengeance may express pleasure at the suffering of their victim the same is not necessarily true of retributive justice where the punisher may feel no emotion at all. In this sense retributivism "takes no satisfaction."\textsuperscript{57}

\textsuperscript{53} See: David. A. Crocker, (2000) "Retribution and Reconciliation." Institute for Philosophy and Public Policy, School of Public Affairs, University of Maryland. Vol. 20, No.1, pp1-7, at p3. This can be found at: http://www.pusf.umd.edu/IPPP/Winter-Spring00/retribution_andreconciliation.htm
Each of the differences described by Crocker and outlined in the text above can be found in this aforementioned article. Crocker also generally attributes credit for these distinctions, with the exception of the sixth, to the work of Robert Nozick.

\textsuperscript{54} Ibid. p3.
\textsuperscript{55} Ibid. p3.
\textsuperscript{56} Ibid. p4.
\textsuperscript{57} Ibid. p4.
The fifth distinguishing feature is that retributivism follows certain guidelines and is thus “principled”\(^{58}\), whereas vengeance is not. Finally, Crocker also argues that retributivism “rejects collective guilt”\(^{59}\) in the sense that it extends only to blameworthy individuals and not necessarily to a whole group. So whereas revenge may take place indiscriminately against all members of an ethnic group, for example, according to retributive principles only culpable individuals should be held to account and not all members of the offender’s race, class, party, family or other group related characteristics.

Another approach is to concede that retribution does contain inherent elements of vindictiveness but to argue that this is not necessarily such a bad thing. This is a position adopted by Jeffrie Murphy, for instance, in his article “Two cheers for vindictiveness” in which, in addition to positing a few cautionary remarks against the desire for revenge, he argues that “vindictiveness has been given an unfairly bad press. Contrary to various pious clichés, there is much to be said in favour of the passion.”\(^{60}\) Murphy points, for instance, to the role that vindictiveness has to play in the modern usage of Victim Impact Statements,\(^{61}\) in which, “Although these statements are sometimes religiously based pleas for forgiveness and mercy, they are most often angry (and presumably vindictive) demands that the sentencing authority impose the harshest possible sentence.”\(^{62}\)

However, in order to cover the wider spectrum of human emotions it is necessary to point out that not all people do want revenge. Many individuals and families who have lost their loved ones as a result of violent crimes have called for clemency towards their tormentors. This position of forgiveness and leniency is the position famously adopted by murdered Martin Luther King’s widow. In a speech to the National Coalition to Abolish the Death Penalty in Washington DC on 26\(^{th}\) September 1981, Corretta Scott King said:

“As one whose husband and mother-in-law have died, the victims of murder and assassination, I stand firmly and unequivocally opposed to the

\(^{58}\) Ibid. p4. 
\(^{59}\) Ibid. p4. 
\(^{60}\) Murphy, (op. cit. note 50) (2000) p132. 
\(^{61}\) “Victim impact statements are statements presented by crime victims (or by surviving family members in murder cases) whose purpose is to influence those with discretionary sentencing authority.” Murphy (op. cit. note 50) (2000) p136. These are becoming increasingly popular in the United States. Pilot schemes are also being conducted in the Old Bailey in London as well as Crown Courts in Birmingham, Winchester, Manchester and Cardiff in which “the families of murder and manslaughter victims will be allowed to speak out in court for the first time about the impact of the death on their lives.” Clare Dyer, (23\(^{rd}\) February 2006) The Guardian, “Pilot Scheme allows families to tell court of their suffering.” At: http://society.guardian.co.uk/print/0,,329418951-107705,00.html 
death penalty for those convicted of capital offences. An evil deed is not
redeemed by an evil deed of retaliation. Justice is never advanced in the
taking of a human life. Morality is never upheld by a legalized murder.  

An example of one increasingly influential organisation giving voice to such forgiving
individuals is "Murder Victims' Families for Reconciliation" (MVFR).  

Having now reviewed some of the basic principles of retribution as well as some
criticisms of those principles, it is now time to ask, from a religious perspective, if
retribution has any role to play in the death penalty debate and if so, how persuasive
those retributivist arguments are when considered in light of seemingly opposing
religious concepts.

5- Religion and the concept of retributivism.
Nigel Walker has observed that "in Christian, Judaic, and Islamic cultures there are many
people to whom the retributive justification seems to need no further explanation. It has
scriptural authority." As such, while some religious adherents may find some of the
secular arguments canvassed above persuasive, others will be unmoved and will find
them largely redundant. However, the next section frames the debate in terms of
primarily religious arguments and seeks to establish how retributivist conceptions of
justice measure up, not against secular notions of justice, but against other Scriptural
notions which seem to oppose principles of retribution such as the concepts of love,
mercy, forgiveness and repentance.

As this thesis has shown, and will continue to show, religious adherents frequently use
recourse to religious pronouncements in order to justify capital punishment. As the quote
from Dale Recinella at the beginning of this chapter illustrated, these pronouncements
are often overtly retributivist and include Scriptural quotes focusing on elements of
retaliation, revenge and proportional justice, so much so that the Biblical “quotes of an

63 For more on this position see the American Civil Liberties Union website at: http://www.aclu.org/
64 Founded in America in 1976, MVFR is a non-religious organisation whose mission is to seek the
abolition of the death penalty. Their slogan is “Reconciliation means accepting you can’t undo the murder,
but you can decide how you want live afterwards.” See: http://www.mvfr.org/
66 The quote referred to here is: “the most popular scripture quotes to be used by prosecutors are those
'eye for an eye' and a 'life for a life' have become a part of the American culture.” Recinella goes on to cite an example whereby: “In a recent death penalty case in Colorado, the appeals court discovered that jurors had written Biblical passages on note cards and taken them into deliberations. The passages written on the cards, which included Leviticus 24:20, ‘fracture for fracture, eye for eye, tooth for tooth, as he has caused disfigurement of a man, so shall it be done to him’ were used to persuade other jurors to impose a death sentence.” 67 This concept of “harm for harm” is similarly embedded in many Muslim cultures and communities which use this concept as a basis on which to implement capital punishment as well as other forms of corporal punishment. 68 Conversely however, abolitionists from within the same religions place their emphasis on New Testament or Quranic exhortations of love, mercy, forgiveness, and repentance in order to undermine or entirely dismiss retributivist notions. The remainder of this chapter will focus on drawing out the retributivist principles for punishment as propounded by Christianity and Islam discussing whether they have any basis as a justification for capital punishment or whether the retributivist philosophies are ultimately trumped or abrogated by other more lenient and forgiving theological notions. While the remainder of this thesis considers the teachings of Christianity and Islam in separate sections, in Part A below they will be considered together under the same headings. This is because there are so many beliefs and principles common to both religions that to consider them separately would involve an unnecessary amount of repetition. Considering them together also serves to show how similar both religions are at their core. Part B will then consider them both separately in order to elaborate certain points in greater depth. 67 Dale Recinella, (op. cit. note 7) (2004) p10. 68 See for instance, (Dec. 12th 2003), “Eye-for-eye in Pakistan acid case.” Story from BBC news: http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/3313207.stm In this case, a court in the Punjab precinct sentenced a man to have his eye mutilated in the same way that he mutilated his fiancé’s eye. The decision was based, in part, on the lex talionis grounds found in the Shariah. However, it has been remarked by observers that the sentence is likely to be overturned on appeal by a higher court and as Chapter 3 explained, due to the fact that no country, including Pakistan, follows Islamic law in its fullest form, it is easy to argue from a Muslim’s perspective that such sentences are not in accordance with the Shariah.
A- Common strands running through retributivist and religious penal discourse.

In order to elucidate upon any philosophical justification for punishment three basic questions may be asked, namely:

i) Why punish?

ii) Who should be punished?

iii) How much should they be punished?

There are definite parallels, as well as distinction divergences, between retributivist philosophies and religious conceptions of justice. The three questions above will be used as a framework by which to evaluate some of the common strands running through retributivist and religious discourse.

As this chapter has already shown, the retributivist responses to the above questions may very briefly be described as follows:

i) Punishment should be a response to past wrongdoing and is necessary in order to restore balance to the scales of justice.

ii) Only the culpable and blameworthy are deserving of punishment.

iii) Offenders should be punished in proportion to their culpability, or in the words of Andrew von Hirsch, "severity of punishment should be commensurate with the seriousness of the wrong."[69]

How do these retributivist ideals fare when considered from a religious perspective?

**i) Why punish?**

a- God's commands.

As Walker observes above,[70] to some religious adherents rules regarding religiously prescribed punishments, or any other aspect of God's Commands, need no more justification than that they have been ordained by God. Mohamed El-Awa, for instance, explains that "Muslim jurists justify the severity of the *haad* punishments because they are prescribed by God; consequently they cannot be objected to and are eternally to be considered the most suitable punishments for the crimes for which they were prescribed by God."

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[70] See the text at footnote 65 above.
prescribed.”

Others, while still accepting God’s decree, also seek an understanding of why certain punishments or responses to crime may have been ordained and seek answers to these questions, presumably in order to better understand and implement His will.

Both religions express a number of clear justifications for punishment, including deterrence, and social protection among others. However, at their very core, in secular terms, both religions seem to have retribution as a primary aim. The Catholic Catechism, for instance, explicitly states that “punishment has the primary aim of redressing the disorder introduced by the offender,” a distinctly retributivist goal. Similarly, the Quran refers to certain punishments in terms of “recompense” which is again an entirely retributivist notion. In the case of recidivist burglars for instance, the Quran says: “And as for the male thief and the female thief, cut off (from the wrist joint) their (right) hands as a recompense for that which they committed…”

b- Punishment as an expiation of sins.

In addition to this concept of recompense or just deserts, which is shared by secular and religious philosophies alike, both religions also teach that punishment is valuable for the strictly religious reason that it serves as an expiation of sins. In some ways similar to the law of double jeopardy, both Christianity and Islam contain teachings which view punishment on earth as a form of expiation for certain sins in the Hereafter. This is based on the retributivist idea that when a wrongdoing occurs the moral balance needs to be restored and only once the debt has been repaid is the slate clean once again.

Following a sin, religious moral equilibrium can be restored in a number of ways. First is the ability of the governing authorities to punish. If this form of punishment is received by the wrongdoer on earth, it is generally believed that they will not be punished for that

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72 See Chapter 5 of this thesis for examples of deterrence arguments from within both religions.
73 The Catholic Catechism for instance, refers to capital punishment in terms of “defence of the common good” (Article 2265) and “safeguarding the common good” (Article 2266). A copy of the Catholic Catechism can be found at: http://www.cacp.org/pages587878/index.htm
74 Rehabilitation for instance is expressed as a goal in the Catholic Catechism. Article 2266 states that “punishment then in addition to defending public order and protecting people’s safety has a medicinal purpose: as far as possible, it must contribute to the correction of the guilty party.” (Italics are my own emphasis.)
75 Article 2266 of the Catechism. (Underlining is my own emphasis.)
76 The Quran (5:38). (Underlining is my own emphasis, while those words in brackets are part of the Quranic tafseer (exegesis) found in the publication used.)
same sin in the Hereafter. As Avery Cardinal Dulles explains, for instance, "Thomas Aquinas held that sin calls for the deprivation of some good, such as, in serious cases the good of temporal or even eternal life. By consenting to the punishment of death, the wrongdoer is placed in a position to expiate his evil deeds and escape punishment in the next life." From this perspective punishment, capital or otherwise, is sometimes desired by the very pious who would rather be punished here on earth than receive a punishment in the Afterlife. Additionally, from some religious perspectives moral equilibrium can also be attained to a degree by strictly religious, non-retributivist concepts such as atonement and sincere repentance leading to penance, redemption and absolution.

It is worth making the obvious but salient point here that while most crimes are sins, not all sins are crimes and so while the aforementioned concepts may have some effect on religious notions of sin and guilt, they are of little to no effect in secular courts of law.

**ii) Who should be punished?**

Both religions share the retributivist concern with punishing the guilty and culpable only. The Catholic Catechism for instance, discusses the availability of capital punishment only in the context of the "unjust aggressor." Article 2267 of the Catechism states that "the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of defending human lives against the unjust aggressor." Similarly, in Islam legal punishments are discussed only in the context of those who breach the law.

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78 See, for instance, the hadith referred to in footnote 168 and the accompanying text of Chapter 3, which refers to a hadith in which a man approached the Prophet Muhammad (pbuh) saying that he had committed a legally punishable sin and asking for the legal punishment to be inflicted upon him. See Sahih Al-Bukhari, Vol. 8, No. 812, p535.

79 Atonement is the Christian doctrine that "Christ died for our sins." (1 Corinthians: 15:3.) There is no equivalent of atonement in Islam. The closest thing is the expiation of sins through one’s own good deeds.

80 Repentance is a prominent concept in both religions. In Islam a great amount of emphasis is placed on the importance of repentance. It is believed that God can forgive any sin and repentance is a key to seeking God’s forgiveness. For just a few examples of this teaching see: The Quran (39:53) “Despair not of the mercy of Allah: verily, Allah forgives all sins. Truly He is Oft-Forgiving, Most Merciful.” Also see: The Quran (6:54) “…if any of you does evil in ignorance and thereafter repents and does righteous good deeds (by obeying Allah) then surely, He is Oft-Forgiving, Most Merciful.” Also see, The Quran (66:8) “O you who believe! Turn to Allah with sincere repentance! It may be that your Lord will expiate from you your sins, and admit you into Gardens under which rivers flow (Paradise)...”

81 To a Catholic, absolution is the remission of the sins of a repentant sinner achieved through confession to a priest. To a Protestant, only direct repentance to God is required with no intermediary in between. There is similarly no equivalent concept of absolution in Islam in which it is taught that no intermediary is needed between God and humans and that no living person has the right of intercession, as far as granting absolution is concerned, only the sincere repentance of the individual is required.
So while it has been stated above that both religions do express some deterrence arguments in the context of justifying punishments, it is important to note that neither religion takes utilitarianism to its limits by advocating exemplary punishments or the punishment of an innocent person, even when it may serve to benefit the wider community. Both religions condemn the punishment of innocent human beings. While this might seem like an obvious statement it is an important point to make as this distinguishes the religious conceptions of justice and punishment from several secular theories of punishment, such as utilitarianism, which may, in extreme circumstances, accept the sacrifice of innocent lives if it were to serve to benefit the greater good.

It is for this reason that both religions would oppose the execution of a woman who has been sentenced to death while still carrying an unborn child, for instance. Mohamed El-Awa explains that:

"It is a unanimously held view that a sentence pronounced against a pregnant woman should be suspended until she has given birth to her child and recovered from her confinement. This is based on the fact that the authority does not have the right to inflict harm on the child by punishing his mother, for while the mother deserves punishment, the child is innocent. This rule of limiting the effect of punishment to the person who has earned it is well-established in the retributive doctrine."  

This is not just an abstract religious principle but it is also utilised in practice. In Nigeria for example, a Shariah (Islamic Law) court sentenced a woman called Amina Lawal to death for committing adultery and having a child out of wedlock. Before, her sentence was quashed, the initial judgement of the court held that her sentence of death was to be suspended for two years in order to allow her to care for and fully wean her baby. This is not just an abstract religious principle but it is also utilised in practice. In Nigeria for example, a Shariah (Islamic Law) court sentenced a woman called Amina Lawal to death for committing adultery and having a child out of wedlock. Before, her sentence was quashed, the initial judgement of the court held that her sentence of death was to be suspended for two years in order to allow her to care for and fully wean her baby. 

Similarly, the Bible says "Fathers shall not be put to death for their children, nor children put to death for their fathers; each is to die for his own sin." A similar principle is found in the Quran where it says: "and no bearer of burdens shall bear another's burden" and

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82 See text at footnote 72 above.
83 See El-Awa, (op. cit. note 7) p28.
84 “Nigeria: Amina Lawal's Victory Welcomed but Others Threatened.” (Sept. 25th 2003) at: http://www.amnesty.org.uk/news_details.asp?NewsID=14904 This report also states that: "According to her defence lawyer, Amina Lawal was freed from the threat of punishment on the grounds that neither the conviction nor the confession were legally valid. This meant that no offence as such was established."
86 Deut. (24:16).
87 The Quran (35:18).
again it says “that no burdened person (with sins) shall bear the burden (sins) of another.”\footnote{The Quran (53:38).} This teaching that no one should be made to carry the burden of another's sins is a further teaching consistent with retributivism and common to both religions and this in itself distinguishes both religions' philosophies of punishment from other non-retributivist theories of punishment at the very earliest hurdle.

This basic retributivist concept of criminality and wrongdoing as deserving punishments, including in some cases punishments of death, is one assumed throughout the Bible. Even in the story of Cain and Abel, when Cain slew Abel he instinctively feared for his life and lamented that “Whoever finds me will kill me.”\footnote{Gen. (4:14).} He seemed to intuitively know that his wrongdoing was deserving of the taking of his own life in retribution for the life-taking of his brother.

Similarly, in the New Testament, for instance, Paul standing in Caesar's court having been accused of various unfounded offences said that he had done nothing wrong. However, he then added, “If however, I am guilty of doing anything deserving death, I do not refuse to die.”\footnote{Acts (25:11).}

But who are the deserving and why do offenders “deserve” punishment?

\textbf{a- Deservedness and the role of free-will.}

One secular retributivist argument used to determine “deservedness” and used to justify the punishment of those found guilty of criminal offences relies on a concept which is found in the Classical school of criminology,\footnote{The Classical school of criminology was exceedingly popular between the 1750-1870's and was founded by philosophers such as Bentham and Beccarria.} that is the assumption that all humans are, for the most part, rational beings endowed with the ability to choose whether or not to offend. The rationale that follows is simply that, if a person chooses to commit a crime, then punishment is viewed as being deserved. This inherent human rationality is an integral part of the retributivist justification for punishing crime. This premise also serves as a common denominator between retribution as a theory of punishment, and the religious approaches to human responsibility and offending. However, the only difference
is that in religious discourse the words “rational” human beings would most likely be followed by the words endowed with “free-will.”

It is true to say that many theological debates exist as to whether a person’s fate is fully pre-determined, and therefore beyond human control, and consequently beyond just punishments; or whether we make our own destinies and are therefore fully responsible for our actions, and consequently deserving of punishment when we offend. These debates are particularly prevalent in Christian theology and scholarship. However, the subject of free-will is a veritable theological minefield and here is not the place to address the intricacies of the debate between determinism (pre-destination) and libertarianism (free-will). Suffice it to say however, that for the most part both religions accept the doctrine of free-will and therefore accept that it is morally justifiable and indeed often required to punish offenders and that they deserve to suffer the consequences of their actions. To cite just one example demonstrating the range of the debate, however, a prominent defence of the compatibility of human free will and Divine prescience can be found, for instance, in the works of St. Augustine (354-430). In his work the *City of God - Against the Pagans*, St. Augustine criticised the arguments of the writer Cicero (106-43 BC) who had argued, in Augustine’s words, that:

“If all future events are known in advance, they will come about in the order in which their occurrence was foreknown... if this is the case however, then nothing is in our power and there is no free choice of the will; and if we concede that... then the whole of human life is undermined. It is in vain that laws are given; it is in vain that reproaches, praises, denunciations and exhortations are used; nor is there any justice in the appointment of rewards for good men and punishment for bad.”

According to Augustine, Cicero thus “restricts the mind of the religious man to a choice between two alternatives: either there is something which lies within the power of our own will, or there is foreknowledge of the future. He considers that both these statements

92 Similar debates are also common in non-religious philosophical contexts. After considering the views of Descartes, Spinoza, Hume and many others, Philosopher Mark Thornton concludes his book with a personal postscript in which he posits the view that, even from non-religious perspectives there are “very good reasons for believing that we have free will. Even if from the physiologist’s standpoint we are deterministic mechanisms, that does not preclude our also being rational, choosing, self-reflective, free-willed creatures.” See Mark Thornton, (1989) *Do We Have Free Will?* Bristol Classical Press, p134.


94 Author of the treatise *On the Nature of the gods*.

95 Book V, Chapter 9, p200.
cannot be true.” Augustine responds by saying: “Against these impudent, sacrilegious and ungodly arguments, we say both that God knows all things before they happen, and that we do, by our own free will, and only by our own free will, whatever we know and feel to be done by us.” Augustine further argues that “a man does not sin because God foreknew that he would sin... If a man chooses not to sin, he certainly does not sin; but if he chooses not to sin, this also was foreknown by God.”

Putting the minutiae of the debate aside, the prevailing view in both Christianity and Islam seems to be that humans are, by and large, free moral agents endowed with free will and the capacity to choose between right and wrong, and good and evil, and are therefore deserving of punishment when committing a sin or crime, in the same way that a good deed might be seen as deserving of a reward. As St. Thomas Aquinas (1224-74) posited: “Human beings have free will. Otherwise counsels, precepts prohibitions, rewards and punishments would be pointless... It is because human beings are rational that their will is necessarily free.”

This approach to the issue of free will is generally considered to be compatible with the notion of pre-determination, and the belief that God has determined our fates from before the time we were even born is not seen to be necessarily discordant with the notion of free will in either religion. This approach is however, largely in contrast to the Positivist school of criminology which favours determinism over free will. Positivism purports that humans act largely as a result of internal forces beyond their control and that therefore crime should be responded to by treatment rather than punishment. This includes “biological positivism”, made famous by Cesare Lombroso, and “psychological positivism” famously championed by Sigmund Freud as well as behaviourists such as Hans Jurgen Eysenck. This is not to say that religion is completely opposed to all of the propositions of biological positivism. The idea, for instance, that some element of a person’s biological makeup may make them more inclined towards criminality is not denied in religious exposition. In the cases of the mentally ill, for instance, they are largely viewed as agents not responsible for their actions, and are therefore largely

96 Ibid. p200.
97 Ibid. p201.
98 Ibid. p206.
99 This quote of St. Aquinas from Summa Theologica Book 1, Ques. 83, Article 1-3 can be found extracted in Mark Thornton, (op. cit. note 92) (1989) p10.
exempt from punishment. Islam in particular places much emphasis on the fact that if a person is mentally ill, or too young to understand right from wrong, they are not to be held responsible for their actions nor are they to be punished unduly for their transgressions. Similarly, while both religions constantly address the internal struggle between good and evil, which takes place in a person’s mind, heart, body and soul, they also emphasise the importance of external stimuli, including the impact that society and family values can have on a person’s moral compass. Such teachings lead to much prominence being placed on the importance of living in, and raising children in, an atmosphere conducive to becoming moral and law abiding individuals.

iii) How much should they be punished?

a- Proportionality in punishments.

Retribution is a principle that can be found clearly expounded in both Christianity and Islam in several contexts including the theological, which pertains to issues such as Heaven and Hell or Divine Retribution, and the jurisprudential, which relates to the retributivist penal laws outlined in both faiths.

Considering the purely theological aspects first, proportionality is a key principle underpinning conceptions of Heaven and Hell and there is thus a prominent strand of retributivist theory running through the religious discourse of any faith professing belief in their existence, with retributivism therefore comprising a major cornerstone of their faith. If one looks to the very essence of a practising Christian or Muslim’s life, the very aim of their existence is to seek the pleasure of God and to live a good and worthy life and then attain Heaven in the Hereafter. Heaven and Hell, at least in their traditional, conceptualised forms, rest on the concept of a system of proportionate rewards and punishments that are distributed in relation to good and bad acts accumulated over a person’s entire lifetime. If you believe that a person who leads a righteous life will have a reward in Paradise that ultimately corresponds with their good deeds, and that a bad person will suffer in the torment of Hell for a duration and degree corresponding to their bad deeds, this is surely a form of basic retributivism.101

100 See Chapter 3, Part 3 (6) A and B, for more on those exempt from punishment under Islamic law.
101 This sort of moral balancing of a person’s “goodness” and “badness” can also be found to varying degrees in many other religions. For example, in both Buddhism and Hinduism the idea of Karma incorporates the belief that essentially “what goes around comes around” and that a person will be
With regards to Divine Retribution, The Bible and the Quran are both replete with stories of individuals and societies who invited God’s wrath and punishment upon themselves as a result of the way that they behaved and conducted their lives. We are told that they deserved punishment as a result of their sins. A prominent example would be the story of Noah’s Ark or the people of the cities of Sodom and Gomorrah, (stories found in both the Bible and the Quran.) Their punishment was one retributive in nature in the sense that they are considered to have acted contrary to God’s commands and are, as such, seen as deserving of punishment. This type of retribution may be best referred to as examples of Divine Retribution. As always however, these accounts are subject to interpretation. While some may see them as evidence of God’s justice, some Christians and some non-religious people will view them as myths. (Muslims however, take these stories very literally and there are no Islamic grounds on which to argue otherwise.)

With regards to legal punishments in this lifetime, according to both faiths, in some instances the amount of punishment to be meted out to a wrongdoer has been directly prescribed by God. In others it is left to the governing authorities, secular or religious, to determine the appropriate punishment to fit the crime and both religions share notions of respecting the rules and laws of the land in which a person lives. Nevertheless, both religions also contain teachings which establish that proportionality should be a determining factor in the amount of punishment meted out by the ruling authorities. For instance, Article 2266 of the Catholic Catechism states that “legitimate public authority has the right and the duty to inflict punishment proportionate to the gravity of the offence.” The most concise declaration of proportionate punishment however is found in the lex talionis principle which is found in both the Bible and the Quran and this will be looked at next.

rewarded or punished in a future incarnation for all of the good and bad deeds that they have performed during their present existence.

102 For some examples of laws set by God according to Islamic law, see hudud crimes as explained in Chapter 3, Part Two, (4) A. Also see Chapter 2, Part Three (3) E, for a list of Old Testament offences and their correspondingly prescribed punishments.

103 A Biblical example of such a teaching would be: “Then give to Caesar what is Caesar’s and to God what is God’s” Luke (20:25). Similarly, in Islam no Muslim would ever suggest flouting the laws of a country simply because the rules prescribed were not formulated or enforced by Muslim rulers. Instead Muslims are taught to live respectfully and peacefully in the land in which they live.

104 Underlining is my own emphasis.
b- Lex talionis - A Divine demand for proportionality or a law of restraint? - A socio-historical context.

The Biblical principle of lex talionis has come to be widely accepted as one of the most basic and fundamental pronouncements of traditional retribution and it can be found in several parts of the Old Testament including Exodus (21:23-25) where it says:

"But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise." 105

Pro-death penalty supporters take this and other lex talionis passages as the key Scriptural basis on which to support their view that the Bible does support capital punishment on retributivist grounds. Considered literally and in isolation from other teachings, it does seem that the “life for a life” verses do sanction the execution of murderers in no uncertain terms. As Dale Recinella says:

“It is absolutely clear... that the Mosaic Law is describing a retributive system of punishment. Furthermore, this retributive punishment is enacted as retaliatory violence directly proportional to the harm caused. Whatever the injury that has been suffered by the victim, that identical injury is to be inflicted on the perpetrator by the community.” 106

However, despite the seeming clarity of the lex talionis passages, many Christians interpret them in a different light. This alternative view is one propounded by Sister Helen Prejean, for example. According to Sister Prejean, this Biblical pronouncement is frequently misinterpreted and misapplied. She expounds the belief that it was not intended to sanction capital punishment but was in fact intended to restrict the tribal feuds that were so common at the time of the Biblical revelation. In her book Dead Man Walking, she writes that:

“The eye for eye passage from Exodus, which pro-death penalty supporters are fond of quoting, is rarely cited in its original context, in which it is clearly meant to limit revenge... Only an eye for an eye, only a life for a life is the intent of the passage. Restraint was badly needed. It was not uncommon for an offended family or clan to slaughter entire communities in retaliation for an offence against one of their members.” 107

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105 This principle is also repeated in several other verses including Lev. (24:19-22) and Deut. (19:21).
106 Recinella, (op. cit. note 7) (2004), p38. Recinella then however goes on to cite several problems with this interpretation of the law today including some of those arguments raised in the text above.
Referring thus to the socio-historical context in which the verses were written allows abolitionists to argue that it was not intended to open the floodgates of bloodletting during a time of peace and serenity but, on the contrary, it was intended to curb the rampant killing sprees that, generation after generation, extinguished so many innocent lives.

Similar arguments have been used to explain the Quranic reference to principles of lex talionis (such as in the Quran at 5:45) and a retrospective look at the socio-historical context in which the Quran was revealed also serves to demonstrate why retribution is not merely, as many critics suppose, a philosophically deceptive way of alluding to revenge.

As Karen Armstrong explains in her book Muhammad - A Western Attempt to Understand Islam, tribal vengeance and retaliation was a common feature of life in Arabia before the advent and spread of Islam. It is worth quoting Armstrong at length here to get a sense of the reason behind the ease with which tribes resorted to blood feuds. She writes:

"To protect the tribe and its members, a chief had to be prepared to avenge each and every injury. Where there was no common law that could be enforced by a central authority, the only way of preserving a modicum of social security was by means of the blood-feud or vendetta. Life was cheap and there was nothing immoral about killing per se, it was only wrong to kill your own tribesmen or their allies. Each tribe had to avenge the death of a single one of its members by killing somebody in the murderer's tribe. This was the only way a chief could provide protection to his tribesmen: if he failed to retaliate, nobody would respect his qawm (position) and would feel free to kill tribal members with impunity. Since it was so easy for an individual to disappear without trace there was no duty to punish the killer himself. Instead, the offending tribe would be weakened by the loss of an equivalent number if its own men... in the absence of a modern police force it was the only way of ensuring a minimum of public order. The system also ensured a reasonable balance of power since a loss in one caused the offending tribe to be comparably weakened." 108

Furthermore, "revenge was taken not only against the murderer himself but against any of his fellow-tribesmen. Frequently, tribal pride required several victims as equivalent to

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one fellow-tribesman, and the same was the case with regard to the infliction of injury.”

The emergence of Islam brought with it harsh condemnation of these primitive and immoral practices and instead established a set of principles and procedures for meting out justice on a more equitable and proportionate basis. It clearly taught that in cases of murder, only the murderer could be slain in return for his victim’s life, and only one life could be taken for one life. As Mohamed El-Awa notes:

“The Quranic law ‘radically altered the legal incidents of homicide’ from the pre-Islamic custom of revenge (tha’r) to the Islamic law of qisas (equality). The distinction is illustrated by the change of terminology. Justice is now to be measured ‘in accordance with the moral standard of just and exact reparation for loss suffered.’ Moreover, the maxim ‘a life for a life’ stems from the religious principle that all men are equal in the sight of God. It is in terms of these principles that the exaction of qisas was prescribed, and it should be understood accordingly.”

So, both religions contain teachings endorsing lex talionis, but arguments in both religions can also be made on socio-historical grounds to say that the supposed intent behind these laws was to restrict vengeance and not promote it. However, even if we accept this argument it still does not remove the fact that, although only one life for one life may be taken, a life may still be taken. This still therefore seems to give capital punishment support on religious retributivist grounds.

Following on from this, the next abolitionist argument would be that principles of love, mercy and forgiveness should trump notions of lex talionis. If so, however, that directly challenges the retributivist nature of the debate as an essential ingredient of strict retributivism is that once guilt has been established mercy should not be a consideration. As Professor Honderich says, strict retributivism dictates that “a man must be punished if he has performed an act for which he deserves a penalty. Further, he must not be given a lesser penalty than he deserves for his action…”

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110 The bracketed word is my own insertion. See Part 5 B (ii) below for more on the Quranic teachings on Qisas and refer back to Chapter 3 above for a more detailed discussion on Qisas.
So, what is to be the primary consideration when faced with a potential death sentence from a religious perspective, the ancient and well-founded Scriptural principles of *lex talionis*, or the potentially overriding New Testament and Quranic ethics promoting principles of forgiveness and love which also have the authority of Scripture behind them? How should we react to crime on religious grounds, with retribution or mercy or a combination of approaches? These are some of the issues that will be considered next.

**B- Vengeance, retributivism and religion.**

The same criticisms that arise in opposition to secular retributivist arguments raise their heads again when considering religious retributivist arguments; namely, is retributivism just another euphemism for vengeance and, more pressingly, do not these religions claim to oppose vengeance and retaliation in favour of principles of love and mercy?

Part i will examine this issue from a Christian perspective followed in Part ii by a discussion of the Islamic perspective.

**i- Vengeance, retributivism, forgiveness and the Bible.**

As we have seen in the above section, there are many verses relating to retribution in the Bible, particularly in the Old Testament where the Bible demands the exchange of “a life for a life” or where, for instance, the Rule of Blood is established in *Genesis* which says, “Whosoever sheds the blood of man, by man shall his blood be shed.”

However, this seems to conflict with passages, for instance, where it is recommended that individuals should not themselves act on impulses of vengeance and that although God allows vengeance for Himself, (see for instance, “Do not take revenge, my friends, but leave room for God’s wrath, for it is written: ‘It is mine to avenge; I will repay,’ says the Lord”) it is ostensibly prohibited for individuals. Abolitionist Christians point, for

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113 *Gen.* (9: 6).

114 As discussed in Chapter 2, for a Christian who believes that the New Testament has repealed many of the Old Testament laws including *lex talionis* requirements, there may seem to be no conflict, but as already discussed, to many Christians the New does not replace the Old, it simply adds to it and. See Parts 2 F and 4 C (i) of Chapter 2 for more on this issue of potential conflict between Old and New Testament verses and principles.

115 *Romans* (12: 19). And again, "For the Lord is a God of Retribution; he will repay in full." *Jer.* (51: 56). In this context, abolitionists argue, that although the Bible does mention vengeance as grounds for bloodshed and punishment, it ultimately restricts it as the rightful domain of God only to exercise.
example, to the Sermon on the Mount,\textsuperscript{116} in which Jesus is said to have taught, "If someone strikes you on the right cheek, turn to him the other also"\textsuperscript{117} and that mankind should "Love thy enemies and pray for those who persecute you."\textsuperscript{118} Jesus is also reported to have said, "Do not seek revenge or bear a grudge against one of your people, but love your neighbour as yourself."\textsuperscript{119} The Bible similarly admonishes, "Do not judge, or you too will be judged."\textsuperscript{120} As well as giving the weighty warning that "If you forgive men when they sin against you, your heavenly Father will also forgive you. But if you do not forgive men their sins, your Father will not forgive your sins."\textsuperscript{121}

The response of most retentionists to this apparent contradiction, however, is to interpret the verses related to forgiving one's enemies and turning the other cheek, as aimed at individual Christians and not at the state. According to Biblical Commentator Donald Hagner, for instance, what Jesus is expounding is the "Ethics of the kingdom. What he presents is ethics directed more to conduct at the personal, rather than the societal level. These directives are for the recipients of the kingdom, not for governmental legislation."\textsuperscript{122} Kerby Anderson postulates that:

"In the Sermon on the Mount, Jesus is not arguing against the principles of a life for a life. Rather, He is speaking to the issue of our personal desire for vengeance. He is not denying the power and responsibility of the government. In the Sermon on the Mount, Jesus is speaking to individual Christians. He is telling Christians that they should not try to replace the power of the government, but rather he calls individual Christians to love their enemies and turn the other cheek."\textsuperscript{123}

Michael Green further elaborates by saying that:

"Jesus is not talking about global pacifism or the abolition of the police forces or the rights or wrongs of war. He is not talking about the responsibilities of the state at all... No, he is prohibiting for members of the kingdom the attitude that says, 'The so-and-so has cheated me. Wait till I get even with him!' Natural but wrong."\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{116} The Sermon on the Mount can be found in the New Testament, \textit{Matthew}, Chapters 5-7.
\item \textsuperscript{117} \textit{Mat.} (5:38).
\item \textsuperscript{118} \textit{Mat.} (5:44).
\item \textsuperscript{119} \textit{Lev.} (19:18).
\item \textsuperscript{120} \textit{Mat.} (7:1).
\item \textsuperscript{121} \textit{Mat.} (6:14-15).
\item \textsuperscript{123} See: http://www.leaderu.com/orgs/probe/docs/cap-pun.html
\end{itemize}
According to this approach, the commandments directed at the individual differ on several levels to those aimed at the practices of the state. It seems therefore to be the case that, to a degree, retaliation or retribution is allowed to be exercised by man but ideally only through the State as the Agent of God. Whereas individuals are admonished not to practice vengeance against one another, they are told that the authorities can implement retributive punishments on their behalf. It states in Romans, for instance:

"Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. For he is God’s servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God’s servant, an agent of wrath to bring punishment on the wrongdoer." 125

However, this form of state enforced vengeance is probably more correctly termed as retribution, as it is meant to be a measured and proportionate sense of justice as encapsulated in the lex talionis principle and not unbridled outbursts of emotional retaliation. 126

To take one or two of the aforementioned verses out of context and read them in isolation of the others can result in an extreme approach to punishment. For example, to read only the verses endorsing lex talionis would seem to allow all individuals to go out and settle their own personal vendettas. If this was the only Biblical interpretation applied this would seemingly endorse a society today re-enacting brutal societies of times gone by where communities were riddled with, lynchings, vigilantism, illegal posses and tribal warfare. There would be no restriction on the blood-letting as each act of vengeance would become the catalyst for another, in a self-perpetuating cycle of violence. Similarly, taking the opposite approach and reading only, for instance, Jesus’ exhortations to love thy neighbour and thy enemy would make Christianity seem totally anti-retributivist, in which case no punishment could ever be meted out for any crime and this would lead inevitably to lawlessness, anarchy and chaos.

Taken together and read as a whole however, these moral and Biblical injunctions and exhortations seem to offer a practical approach to punishment and capital punishment.

125 Romans (13:3-4). Italics are my own.
126 This is despite being referred to as an “Agent of wrath” in Romans (13:3-4) above.
They restrict vigilantism yet provide an outlet through the agency of the courts and governing authorities to enforce retributivist punishments on the public’s behalf.

On a practical penal and social level this approach seems to make sense and is, in fact, the basis of most systems of judicial punishment around the world. It leaves the matter of punishment to the state and prohibits individuals from seeking their own private remedies to serious crime. This approach is favourable, as personal, emotional and subjective punishments would be more likely to be arbitrary and unjust, whereas the supposedly impersonal, non-biased retribution of the state should be more fairly applied, at least in theory. Leaving punishments such as executions to the state, instead of endorsing lynch mobs, is an integral foundation of an ordered, non-anarchic society.

ii- Vengeance, retributivism, forgiveness and the Quran.
Throughout the Quran, reference is made to punishing offenders on a retributivist basis, whereby the punishment should match the offence. It recommends that punishment should not be excessive but should be meted out in equal measure to the harm received. So much so, that the law for punishing crimes such as murder is actually known as “Qisas” or the “Law of Equality”, literally retaliation. As we saw in Chapter 3, the law of Qisas states, for example: “O ye who believe! The law of equality is prescribed to you in cases of murder.” This clearly sanctions the use of capital punishment in proven cases of murder. A life for a life. The Quran says that there is wisdom behind a law of equality such as Qisas (or a life for a life) when it says; “In the Law of Equality there is saving of life to you. O ye men of understanding.” This can be taken to refer to the fact that without such a balanced law there would be a return to the kind of tribal warfare that over the centuries led to such indiscriminate waste of life.

127 The Quran (2:178).
128 The same is not true of accidental killing however, in which case the prescribed Quranic penalties range from Diya (financial compensation for homicide) to fasting as a means of repentance. See The Quran (4:92). You can see therefore that the punishment is not always a retributive one in the sense that the punishment is not necessarily simply proportionate to the loss of life, but it instead takes into account the circumstances of the offence in addition to the circumstances of the offender, i.e., if he cannot afford to financially compensate the family of a person he killed by mistake, then he need only fast by way of repentance.
129 The Quran (2:179).
However, it is then followed by a clause that allows the offender to be pardoned in the event that the family of the victim chooses to be compensated by them instead.\(^{130}\) In fact, it is interesting to note that after almost every Quranic verse recommending that offenders should be punished on a level proportionate to their offending, the following verse almost invariably adds the teaching that to grant them a degree of mercy or forgiveness is preferable to retribution. For instance, one verse specifically refers to the Biblical principle of *lex talionis* but then immediately adds an additional verse recommending forgiveness, a line not found in the Biblical *lex talionis* verse.\(^{131}\) The Quran says:

"We ordained for them, 'Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.' But if any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by what Allah hath revealed, they are wrongdoers."\(^{132}\)

Similarly, the Quran says in cases of physical harm:

"The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah: For Allah loveth not those who do wrong."\(^{133}\)

And again:

"And if ye punish let your punishment be proportionate to the wrong that has been done to you; but if ye show patience, that is indeed the best (course) for those who are patient."\(^{134}\)

Forgiveness, compassion and kindness are highly praiseworthy attributes in Islam and Muslims are encouraged to show compassion to all of their fellow human beings and that is one reason why even punishments such as capital punishment come with the exhortation to embrace the preferable impulse of mercy. From a retributivist perspective therefore, Islam teaches that criminals should get their just deserts, but that there are instances where diverting from retributivist principles is better, it therefore endorses mercy over vengeance.\(^{135}\) From an Islamic perspective there is no conflict or

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\(^{130}\) See Part 4 of Chapter 3 above for more on the issue of financial compensation in the form of *diya*.

\(^{131}\) However, in the New Testament Jesus does quote the Old Testament and then adds the advice to turn the other cheek, *Mat. (5:39)*.

\(^{132}\) The Quran (5:45).

\(^{133}\) The Quran (42:40).

\(^{134}\) The Quran (16:126).

\(^{135}\) As mentioned in Chapter 3 however, once the issue comes to court, if the judge feels that it is in the public interest that the offender is incapacitated or in another way similarly punished, this will override all else.
contradiction seen here. While retributivism does form a basis on which to justify certain punishments, the punishment can also be remitted by the victim in favour of forgiveness.

A further divergence from strict retributivism comes when looking at the issue of Divine Justice. As already mentioned, any religion teaching the existence of Heaven and Hell must have some basic understanding of the fundamental concepts of retributivism. Islam teaches however, that in terms of God punishing and rewarding his people, the rewards He bestows always outweigh His punishments. Islam teaches, for instance, that on the Day of Judgement, also known as the “Day of Recompense”, all of the good and bad deeds a person has accumulated throughout their lifetime will be weighed against one another on a balance or scale. The weightier the good deeds, the higher the chances of being permitted into Heaven. Conversely, the heavier the bad deeds, the higher the chances that their final abode will be Hell. This concept of desert certainly seems to have a retributivist basis.

However, the Quran also teaches that for every bad deed a person commits, they will receive one bad mark or credit against them, commensurate to their sin, which will be weighed on the scales of justice. Conversely however, for every good act they perform, or even intend, they will receive credits many times greater, for the Quran says:

“He that doeth good shall have ten times as much to his credit: He that doeth evil shall only be recompensed according to his evil: No wrong shall be done to them.”

This shows that penal retribution is commensurate to the sins committed and that punishment will not exceed the evil they have committed. The good deeds however, will be compensated for disproportionately in as far as they will be rewarded far beyond the degree to which they necessarily deserve to be rewarded. This shows that God is fair in exacting the just and proportionate punishment for wrongdoers but that his mercy and generosity extends far beyond his anger.

136 See Part 5 A (iii) (a) above.
137 The Quran (6:160).
138 A further evidence of this belief is found in a Hadith Qudsi (Sacred Hadith). (All of the hadith that have been looked at in this thesis so far have been “Prophetic Hadith”, or in other words the reported sayings, actions and tacit approvals of the Prophet Muhammad (pbuh). However, a “Hadith Qudsi” is known as a “Sacred Hadith” as it is a record of the words told to the Prophet as revealed to him by God.) Hadith No.1, states that “On the authority of Abu Hurayrah (may Allah be pleased with him), who said that the Messenger of Allah, (may the blessings and peace of Allah be upon him) said: ‘When Allah decreed the Creation He pledged Himself by writing in His book which is laid down with Him: My mercy prevails over
Similarly the Quran states that, “He who does good, his reward may be better than that; but he who commits a wrong shall not get punishment disproportionate to what he has done.”

As such, while in the Quran Allah refers to himself as the “Lord of Retribution” He is also referred to as the “Most Gracious, the Most Merciful.” In fact Muslims refer to God in these words many times a day as the words, “In the name of Allah, the Most Gracious the Most Merciful” is found at the start of every chapter of the Quran and should also be uttered by Muslims in their prayers and before commencing any meal or action. It is also the case that while Muslims are aware of God’s punishments they are also aware that Allah’s mercy and compassion prevails over them. Allah says in the Quran: “Know ye that Allah is strict in punishment and that Allah is Oft-Forgiving Most Merciful” and in another verse, “For thy Lord is quick in punishment: yet He is indeed Oft-forgiving Most Merciful” and in another verse, “Thy Lord is quick in retribution, but He is also Oft-Forgiving, Most Merciful.”

From this we can see that God will proportionately punish those who deserve to be punished but that He will also forgive those who turn to Him and ask for His forgiveness.

C- Beyond retribution?

Despite the teachings in Islam that only those guilty of a crime may be punished, some criticisms still abound that Islamic law exceeds the limits of proportionality in some instances. Many people, for instance, find it hard to reconcile capital punishment for “sins” such as adultery and apostasy. However, each of these offences are, to some advocates, considered to be so serious as to render them as proportionate to the punishment.

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140 The Quran (5:95).
141 The transliteration of this would be “Bismillah Al-Rahman Al-Raheem.”
142 The Quran (5:98).
143 The Quran (6:165).
144 The Quran (7:167).
For instance, drug trafficking has become a capital crime in several Muslim countries. It is not only many Muslims who see this as a proportionate punishment, but many non-Muslims also sympathise with this punishment being administered to drug lords. Even in an English case in 1982 Lord Lane CJ confessed that considering “the degradation and suffering and not infrequent death which the drug brings to the addict... It is not difficult to understand why in some parts of the world traffickers in heroin in any substantial quantity are sentenced to death and executed.” 145 In fact it is not only Muslim countries such as Saudi Arabia, Sudan, Egypt, Malaysia, Indonesia and Iran who implement the death penalty for crimes of drug trafficking, but it is also true of China, Vietnam, Singapore and Taiwan.146 In these instances the death penalty may not be qualitatively proportionate in the strictest sense of lex talionis, but it is proportionate in terms of modern retributivist thinking if capital punishment is reserved for the most serious of crimes, and if drug trafficking is perceived to rank among the most serious crimes.

Similarly, to a degree and within limits, from a position of cultural relativism every country and culture has the right to define what it considers to be the most serious offences. This is a complex topic and as Andrew von Hirsch explains, several difficulties arise with regards to the question of whose standards should govern. He writes:

“To what extent ought the governmental body charged with setting sentencing standards make its own assessments of seriousness? To what extent must it adhere to the communities perceptions of seriousness...? How this last question should be resolved would depend in part, on one’s theory of government – on how much one thinks officials should be permitted to rely on their own judgements rather than on popular preferences on particular issues.” 147

In any event, a country such as Nigeria, for example, has seen justification, in the Shariah governed provinces at least, to declare adultery as a capital offence. This is because, in addition to being considered a grave sin, to many people, adultery, in the form of sexual relations between persons already married to other people, is seen as one of the most socially damaging acts. It is seen as disruptive to the very moral fabric of society and destructive to family values, encouraging immorality, deceitfulness and betrayal. In a society where modesty, chastity and fidelity are highly valued and safeguarded qualities,

146 See Roger Hood, (1996), The Death Penalty - A Worldwide Perspective, Clarendon Press, p77 for a list of countries who have in the past, or do presently, implement capital punishment for drug related offences.
147 Andrew von Hirsh, (op cit. note 41) (1986) p82.
extra-marital affairs are seen as a serious contravention of morality and ethics and, as such, a serious breach is seen as deserving of a serious penal response.

Countries such as Nigeria also view crimes such as rape, as one of the most serious acts of criminality and, as such, it too is deemed a capital offence. This is a capital crime that many people seem to have more understanding of when considering the circumstances of some cases. For example, recently in Nigeria a man confessed to the brutal rape of a 9 year-old girl and was consequently given a capital sentence.148 This sentence was later quashed when his plea of insanity was accepted by a Shariah Court of Appeal.149

However, before his mental condition came to light, considering the tender age of the victim and the physical and long-term emotional trauma she will undoubtedly be scarred by, it was quite correctly predicted by BBC Correspondent Dan Isaacs that, despite the fact that "previous convictions have provoked outrage from human-rights groups both within Nigeria and outside... in a case of rape such as this against a young girl, there is little chance of a strong international outcry."150

6- Conclusion.

This chapter began by looking at some of the different models of retributivism set forth as justifications for punishments, including capital punishment. After considering several critiques of retributivism as a general penal philosophy and as a justification for the death penalty in particular, it remained obvious that despite its many and varied flaws, it still remains a major and influential argument in favour of the penalty, one which clearly warranted further investigation from the perspectives of both religions. This chapter then demonstrated that both religions contain philosophical concepts identical, or at least analogous, to retributivist penology. However, despite both having authoritative Scriptural bases on which to support capital punishment on retributivist grounds, both faiths also contain teachings which promote notions of mercy and forgiveness, notions which may be seen as overriding factors when considered alongside those of strict retaliatory justice.

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For pro-death penalty advocates considering the death penalty from a secular perspective, retribution provides a seemingly sound philosophical justification for capital punishment. Whether viewed as a means of annulment, as Hegel saw it, or simply a way to balance the scales of justice, retribution offers an objective way to morally neutralise the effects of wrongdoing and it seems to address the innate human desire to see that the punishment fits the crime.

For the religious death penalty advocate, retribution seems to fulfil the commands of God which call specifically for a “life for a life”, and it therefore appeals to those Christians and Muslims who want to see God’s laws of justice put into effect.

For abolitionists however, retribution is a fundamentally flawed concept. While to the secular abolitionist, retribution may seem to be an unduly harsh philosophy of punishment which removes elements of mercy from the law, this issue is of particular concern to religious abolitionists who see mercy and love as concepts that must trump harsh unyielding retributivism. For abolitionist Christians, New Testament ethics of love and forgiveness are seen as particularly vital philosophies which offer alternative ways to deal with criminality and offending. Similarly, Muslim abolitionists can point to the fact that Quranic prescriptions of lex talionis are almost invariably followed by the recommendation that although the victim may be legally and morally entitled to equal justice, the remittance of that right and the gesture of forgiveness is far better for them in terms of their spiritual wellbeing and their Hereafter than an unyielding insistence on that right.

As such, in response to the question posed at the start of this chapter, although retributivist principles as enshrined in Christian and Islamic Scripture and tradition can legitimately be used to support the death penalty, alternative interpretations and concepts can be employed which, if not precluding the death penalty altogether, at least make a strong case for severely restricting its use.
Chapter 5.
Deterrence and capital punishment.

1- Chapter outline.
As the introduction to the previous chapter demonstrated, two of the most influential and oft-cited justifications for punishment are retribution and deterrence. Having considered the role of retribution in Chapter 4, this chapter examines the second of these justifications and considers the relevance and persuasiveness of deterrence arguments as they pertain to the death penalty debate from both secular and religious perspectives. Part 2 below provides a brief introduction to the concept of deterrence as a justification for punishments in general. This is followed in Part 3 by a discussion of three elements of punishment that can serve to either enhance or diminish the deterrent effect of any given punishment; namely certainty, severity and celerity.

Part 4 analyses some of the arguments purporting to demonstrate that capital punishment does not deter, while Part 5 looks, conversely, at some of the arguments used to assert that capital punishment does deter. Part 6 examines the primary methodological techniques utilised by academics researching the deterrent effect of capital punishment with a primary focus on that of comparative cross-state and longitudinal, or time-series, analysis. It examines several studies arguing that capital punishment does not deter and several arguing that it does. This is followed in Part 7 by a look at some of the criticisms of deterrence studies in general, as well as asking why the research has failed to yield a consensus on the issue one way or the other. Part 8 then turns to look at the “brutalization thesis.”

Part 9 considers the role that concepts of deterrence play in religious teachings generally, as well as in relation to capital punishment specifically. Parts 10 and 11 look at deterrence from Christian and Islamic perspectives respectively. The issue of deterrence is a vital aspect of the death penalty debate even if only because of the frequency and fervour with which it is used both to defend and oppose the penalty and, as such, it is of great relevance and importance to both secular and religious considerations of the penalty.
2- Introduction to deterrence as a justification for punishment.

A- General and Individual deterrence.

Deterrence may be described as a factor reducing or eliminating a person’s will or desire to follow through with a certain course of action. This phenomenon acts as a disincentive and often manifests itself in the form of a penalty or some other distinctly negative effect on the person considering the act, such as stigmatisation, deprivation, or incarceration. The greater the negative affect of the considered action the greater the deterrent effect it is said to have. Some examples of common penal deterrents include prison as a deterrent to serious crime, and pecuniary penalties, such as fines, as a deterrent to less serious offending.

Deterrence can be categorised into two forms; “general” deterrence, whereby the sanction threatened acts as a warning or disincentive to a large group of people, and “specific” or “individual” deterrence, which occurs “when someone commits a crime, is punished for it, and finds the punishment so unpleasant or frightening that the offence is never repeated for fear of more of the same or worse.”1 While capital punishment may deter individuals in the sense that, before an individual commits an offence, when balancing and calculating the benefits of the crime against its costs, the prospect of a death sentence may conceivably deter them from committing a capital offence to start with, this is not really “individual deterrence” as understood from the definition above. This is because once that individual has committed and been convicted of a capital crime, the punishment specified for that crime no longer has any deterrent effect on them, as once the convict has been incarcerated and executed it is not so much that they have been specifically deterred than that they have been permanently and irreversibly incapacitated! Their execution however, may still have a general deterrent effect on other would-be offenders.

B- A utilitarian concept of punishment.

Deterrence is a utilitarian principle in the sense that it aims to fulfil the utilitarian ethos of maximising the greatest happiness for the greatest number of people. As lawyer and writer Michael Martinez explains it, “If the death penalty can be shown to be an effective deterrent or simply a tool in reducing recidivism among offenders, then the greatest good

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of society has arguably has been served. In other words, utility has been maximised."

Deterrence may also be described as consequentialist and forward looking in the sense that, unlike concepts such as retributivism which seek to right past wrongs, deterrence aims to benefit society by preventing future crimes. It is, in this sense, a reductivist, majoritarian philosophy of punishment.

Deterrence has traditionally been one of the primary justifications given for public support of the death penalty and public opinion polls frequently demonstrate that, despite fluctuations over time, including a recent decline in support, deterrence is still nevertheless a leading reason cited for public support of the death penalty.

Deterrence is also one of the most oft-cited justifications for capital punishment in the political arena. James Galliher and John Galliher, for instance, show that during the legislative debates in New York in which the reinstatement of the death penalty was being discussed, deterrence was “by far the most frequent justification for re-instatement of capital punishment.”

Deterrence is thus one of the most influential classical justifications for punishment, including capital punishment, and can be seen to have been developing as a prominent penological concept as far back as the works of eighteenth century criminologist Cesare Beccaria (1738-1794). In his 1767 essay On Crimes and Punishments we find an early articulation of criminal deterrence from a classical utilitarian perspective. Beccaria asserts that:

“The purpose of punishment is not that of tormenting or afflicting any sentient creature, nor of undoing a crime already committed... Can the purpose of a wailing wretch, perhaps, undo what has been done and turn

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3 See Appendix A for a Gallup poll graph showing a decline in public support for the death penalty on deterrence grounds.

4 See Appendix B for a graph produced by Ellsworth and Gross showing that support for capital punishment on deterrence grounds hovered around the 60% mark throughout the life of their study. Also see Appendix C which shows that according to a (2000) Newsweek poll, deterrence is still a leading reason for public support of the penalty.

back the clock? The purpose therefore is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise... Punishments and the means adapted for inflicting them should, consistent with proportionality, be so selected as to make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.”

Beccaria was himself a fervent opponent of the death penalty and the classical expounding of the deterrence concept quoted above goes some way to address the standard retributive critique of utilitarianism, which is that it is inextricably associated with the harshest forms of punishment. While some utilitarians might argue that exemplary punishments are justifiable on grounds of deterrence, including, in extreme cases, the punishment of innocent individuals if it were deemed to serve the greater good, Beccaria shows here that ideally, even from a deterrence perspective, a principle of parsimony or frugality should be adopted. Michael Cavadino and James Dignan (2002) explain that this principle essentially requires that:

“Punishments should be no more severe than they need to be to produce a utilitarian quantity of deterrence. ‘Overkill’ causes unnecessary suffering to the offender, and all suffering is bad unless it prevents a greater amount of suffering or brings about a greater quantity of pleasure.”

Citing this principle of parsimony provides utilitarian grounds on which to oppose capital punishment in favour of other less severe alternatives to capital punishment, such as life without parole.

In contrast to retributivist justifications for punishment, in which punishment itself may be viewed as intrinsically good, utilitarians view punishment, in itself, as undesirable. As Jeremy Bentham (1748-1832), the founder of utilitarianism wrote: “All punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to

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7 Utilitarianism itself as a general penal philosophy is open to a vast number of criticisms including the potential for majoritarian tyranny, the elevation of the rights of the majority over the rights of the individual and the potential for sanctioning the use of severe and exemplary punishments on undeserving individuals in order to maximise general deterrence thereby maximising the social benefit. However, due to constraints of time and word-count, these and other criticisms of utilitarianism cannot be considered in any great detail here. For a discussion on utilitarianism as a general philosophy of punishment and some of the standard criticisms associated with it, see, for instance, Andrew Ashworth (1992) “Deterrence.” Principled Sentencing. Andrew von Hirsch and Andrew Ashworth (eds.) Northeastern University Press, pp53-61 at pp55-56. For a modern defence of utilitarianism, see, for instance, Mirko Bagaric, (2001) Punishment and Sentencing – A Rational Approach. Cavendish Publishing, pp93-126.

be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”\(^9\)

Jeremy Bentham further elaborated on the utilitarian concept of deterrence when he wrote:

“The immediate principle end of punishment is to control action. This action is either that of the offender, or of others: that of the offender it controls by its influence, either on his will, in which case it is said to operate in the way of *reformation*; or on his physical power in which case it is said to operate by *disablement*: that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of example.”\(^{10}\)

### 3- Factors affecting deterrence - Certainty, severity and celerity.

It is an intrinsic feature of deterrence that its effectiveness can be enhanced or diminished by three primary factors; certainty, severity and celerity. “Certainty” is generally referred to as “the likelihood of being caught and made liable to punishment… in practice this ordinarily refers to the likelihood of being arrested and convicted”\(^{11}\), whereas “severity”, as its name suggests, is used to refer to “how stringently the offender is punished, once caught and convicted.”\(^{12}\) “Celerity” refers to the speed with which the punishment is enforced, and while it is by far the most under-researched of the three, it too shall be looked at briefly below.

#### A- Certainty.

Of the three elements of deterrence delineated above, it is the element of “certainty” which is generally conceded to be the aspect most influential in deterring would-be offenders. How certain an offender is to be detected and apprehended can have a huge impact on their deterrability from committing a particular crime. As Michael Cavadino and James Dignan (2004) attest, “There is some good evidence that general deterrence can be improved if potential offenders’ perceived likelihood of detection can be

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increased. 13 One of the most vital elements identified here is perhaps the element of "perception." How certain an offender's detection is likely to be, in the context of deterrence, is primarily an issue of subjective assessment. As Andrew Ashworth explains:

"Criminal deterrence (being concerned with fear of penal consequences) is subjective in two senses. First it depends not on what the certainty and severity of punishment actually are but on what potential offenders believe that they are... Second, criminal deterrence depends not on what potential offenders believe the sanctions to be, but on how they evaluate those risks in terms of their subjective disutilities. If penalties have increased and potential offenders know this, the change can still have no deterrent effect if those persons do not fear the increased penalties, or fear them but have overriding interests (e.g., financial ones) or inclinations (e.g., drug addiction) favouring offending." 14

The converse is also true in the sense that if an offender assesses that the certainty of detection is high, even if in reality it is very low, but they nevertheless fear detection, deterrence has been achieved. As Nigel Walker explains:

"As for the possibility of the deterring consequences, all that matters is that the person should believe in it. His belief may be quite illusory. There may be no way in which the action he contemplated could be brought home to him, but if he abstains because he believes it may be, he is deterred." 15

As such, particularly in the context of certainty, "the subjective character of deterrence is one of its most important characteristics." 16

This process whereby the offender is seen to actively weight and calculate the pros and cons of their offending and consider whether or not the chances of detection outweigh the benefits of their offending makes one obvious assumption without which the entire concept falls apart. "The assumption is that citizens are rational beings, who will adjust their conduct according to the disincentives provided by sentencing law." 17 In other words, it assumes that the offender is a rational being who can be deterred. While, for the most part, this usually is the case, it should also be borne in mind that there are circumstances in which an offender may simply be undeterrable. This may include instances in which the offender is operating under the influence of a mental illness, or

under impulses fuelled by alcohol, drugs, uncontrollable rage, or for any number of other reasons.\textsuperscript{18} In such cases individuals may be precluded from employing a rational calculation of risk.

In other cases still, the offender may simply be optimistic and assume that they will not be detected, and as such, underplay the certainty of their detection. Furthermore, in some cases where the offender is determined to offend, in order to reduce the chances or certainty of detection, instead of being deterred from offending altogether, the offender simply aggravates the circumstances of their crime by, for instance, killing any witnesses to their offence in order to reduce the likelihood of their detection and apprehension.

Having briefly looked at the issue of certainty in general terms, let us now turn to look at the issue of certainty in the specific context of capital punishment. Moving away from the issue of purely subjective assessments of certainty let us now ask: how certain, or likely, is a capital crime to result in a capital conviction and subsequently an execution in America today? According to most estimates it is not certain at all and it has been argued that this lack of certainty is one reason for the lack of evidence of a deterrent effect of capital punishment in America today. Abolitionists constantly ask how can it be reconciled that, “The United States is said to have the highest violent crime rate, highest criminal homicide rate, and the greatest use of guns in the commission of violent crimes of any western nation…” while simultaneously having “more persons currently on death row than any other western nation”?\textsuperscript{19} This observation alone, at first glance, seems to raise serious questions regarding the alleged deterrent effect of the death penalty.

However, as tempting as it may be to draw broad and confident inferences from these facts, it must be remembered that correlation does not necessitate causation.\textsuperscript{20} The conclusions drawn must not be too rash and an assessment of this issue must take into account a host of other complex factors and variables. For instance, let us look at the issue of certainty. According to standard deterrence arguments there must be certainty of

\textsuperscript{18} See for instance Part 4 B below which discusses the issue of undeterrable offenders.
\textsuperscript{20} See Part 7 C below for an examination of the issues of correlation and causation.
punishment in order for a deterrent effect to take hold, but how certain is the American
death penalty? According to Hugo Adam Bedau for instance:

"The story of capital punishment in the United States today is largely the
story of this extraordinary attrition – 24,000 criminal homicides, 18,000
arrests, 10,000 convictions, 2-4,000 death eligibles, and 250 death
sentences (and two dozen or so executions each year)... What functional
role... can the death penalty really play in a society when 24,000 criminal
homicides are punished with death in only 1% of the cases?" 21

So not only is the capture, conviction and sentence of perpetrators of homicide 22
uncertain but so too is their eventual execution. As Bedau says, what remains largely
"unpredictable and without evident pattern is whether a given death sentence will
culminate in the defendant's execution." From a pro-death penalty perspective, this
uncertainty will undoubtedly be one core factor diminishing the potential detent effect of
capital punishment.

While it has been suggested that in order for capital punishment to have a greater and
more certain deterrent effect it should be employed with greater frequency, 23 the
impracticality of this approach has been argued by Roger Hood who states that, although:

"Those retentionist countries that rely on the deterrent justification should
face the fact that if capital punishment were to be used to try and obtain its
maximum possible deterrent effect, it would have to be enforced
mandatorily, or at least with a high degree of probability, and therefore
across most categories of homicide. This is not an option for democratic
states bound by the rule of law, concern for humanity, and respect for
human rights." 24

B- Severity.

Severity can relate to several aspects of a punishment, such as the length of a prison
sentence, the amount of a fine, or the level of physical pain involved in a particular
penalty. Again, it seems logical that the more severe the punishment, the greater deterrent

21 Bedau, (op. cit. note 19) (1996) pp48-9. More updated statistics are available from the Department of
Justice website under the heading “Crime in the U.S.”, but the same general pattern stands even when
considering the most recent figures. Italics are my own.
22 The reason why wilful homicide is the target behaviour of most deterrence studies is that it is the only
crime in the USA for which the death penalty is still currently available.
23 This argument is made, for instance, by Joanna Shepherd in her (2004) study “Deterrence Versus
Brutalization: Capital Punishment’s Differing Impacts Among States.” (October 1st 2004.) See:
http://law.pepress.com/emorylwps/papers/art1/ Also see Part C below, “Study 1.”
dition) p231.
effect it will have. Death, in this context is widely considered to be the most severe punishment and thus the greatest deterrent of serious crimes. As Sir James Fitzjames Stephen said almost 142 years ago:

“No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions that is difficult to prove, simply because they are in themselves more obvious than any proof can make them... Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because ‘All that a man has will he give for his life.’ In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly.”

It has similarly been stated by death penalty proponent Ernest van den Haag that:

“Science, logic or statistics often have been unable to prove what commonsense tells us to be true... experience shows us that the greater the threatened penalty, the more it deters... the threat of 50 lashes, deters more than the threat of 5; a $1000 fine deters more than a $10 fine; 10 years in prison deters more than 1 year in prison - just as, conversely, the promise of a $1000 reward is a greater incentive than the promise of a $10 reward etc... One is most deterred by what one fears most, from which it follows that whatever statistics fail, or do not fail, to show, the death penalty is likely to be more deterrent than any other.”

However, not everyone does agree that a death sentence is the greatest penal deterrent. Beccaria, for instance, expounded the view that:

“It is not the terrible but fleeting sight of a felon’s death which is the most powerful brake on crime, but the long-drawn-out example of a man deprived of freedom... Permanent penal servitude in place of the death penalty would be enough to deter even the most resolute soul: indeed, I would say that it is more likely to...”

Nineteenth century philosopher John Stuart Mill (1806-1873) similarly argued that, in his opinion, imprisonment was a more severe punishment than death. In a speech given before Parliament on April 21st 1868 he argued in favour of capital punishment and against a bill proposing to ban it. He asked: “What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and

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immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil?"  

Furthermore, in response to the criticism that the death penalty had failed to deter, he said:

"As for what is called the failure of the death punishment, who is able to judge of that? We partly know who those are whom it has not deterred; but who is there that knows of whom it has deterred, or how many human beings it has saved who would have lived to be murdered if that awful association had not been thrown round the idea of murder from their earliest infancy?"

C- Celerity.

Celerity refers to the speed with which a punishment is carried out. It is important that there is a balance struck between the time at which a death sentence is passed and the time at which that sentence is executed. Too little time leaves too few opportunities for appeals, whereas too much time runs the risk of punishing the offender beyond the scope of their original sentence by subjecting them to additional torment on top of their executions, such as "death row syndrome."

Opinions regarding celerity in the context of deterrence and capital punishment are mixed. On the one hand, for example, is a study by Radelet and Acker (1995), *Deterrence and the Death Penalty: The Views of the Experts*, who assert that 73.2% of the death penalty experts surveyed either "disagreed strongly" or "disagreed very strongly" with the proposition that decreasing the time spent on death row would deter more homicides.

On the other side of the debate, however, are studies such as the 2004 study, *Murders of Passion, Execution Delays and the Deterrence of Capital Punishment*, in which Joanna Shepherd argues that the length of time between sentencing and execution does have a significant impact on the deterrent effect of the penalty. She asserts that, the fact that many death row convicts "try to delay their executions as long as possible with multiple

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28 John Stuart Mill, "Speech in favour of capital punishment", opposing Mr Gilpin's bill to ban capital punishment. This speech can be found at: http://ethics.acusd.edu/Mill.html
29 Ibid. p3.
31 See footnote 58 of the introduction for an elaboration on death row phenomenon.
32 See: http://sun.soci.niu.edu/~criticrim/dp/dppapers/mike.deterrence Also see the text at footnote 84 and 85 below for more on this study.
appeals and requests for stays... implies that they prefer a longer wait on death row to a shorter wait."33 This is turn, she proposes, "suggests that the executions of prisoners who had a short wait on death row may have a greater deterrent effect than executions of prisoners who waited on death row for a long time."34

She further asserts that "the shorter the wait on death row, the greater the deterrence"35 and specifically calculates that "one less murder is committed for every 2.75 years reduction in death row waits."36 While her methodologies and subsequently her results may be brought into question upon review,37 if her general assertion is to be believed, then the deterrent effectiveness of capital punishment is being diminished in countries such as America, in which, according to Roger Hood:

"The new post-Furman death sentence laws have brought so much litigation in their train that the average length of time spent on death row rose from around thirteen months in 1976 to over seven years by the 1990's and by 2000 to eleven years and five months. Some prisoners wait far longer. In June 2000 Gary Graham was executed for a crime he had committed when aged 17, after nineteen years on death row."38

More recently, on 12th March 2002, British citizen Tracey Housel was executed in Georgia after waiting on death row for 16 years. In that same year a man called Charles Kenneth Foster applied for a writ of certiorari39 to the Supreme Court of Florida after waiting 27 years for his execution. This excruciating limbo between death sentence and death penalty is by no means unique to the USA alone. In Japan there was a case where a man was reported to have been on death row for over 30 years before his execution!40

Having considered the impact of certainty, severity and celerity on the deterrent effectiveness of capital punishment it is important to note that the primary question for those embroiled in the death penalty debate is not simply whether the death penalty deters...
at all (absolute deterrence), but whether it has a unique capacity to deter more effectively than other arguably less serious alternative punishments (marginal deterrence), which is in most cases life without parole (LWOP). If it does not, then according to Beccaria’s utilitarian principle of parsimony, the least severe punishment should be employed if it achieves the same results. It is on this question therefore that most deterrence studies focus their attentions, comparing regions and eras with capital punishment to those with life imprisonment as their most severe penalty. However, before moving on to look at some of the most prominent empirical studies claiming to refute or affirm the unique deterrent effectiveness of the penalty, this chapter will first look at some of the standard “commonsense” arguments frequently purported in favour of and against the deterrent effect of the death penalty.

4. “Commonsense” arguments asserting that capital punishment does not deter.

A. History tells us that capital punishment is no deterrent to crime.

One of the most oft-cited examples used to refute the deterrent effect of capital punishment is an anecdote according to which “numerous pickpockets were seen to be active in a crowd in eighteenth century England that had gathered to see a pickpocket hanged.” The argument which usually follows is that, if a hanging did not succeed in deterring pickpockets, it certainly would not succeed in deterring would-be murderers. However, Professor Ernest van den Haag takes issue with this argument on several grounds. For instance, he argues that “for all we know, the death penalty did reduce the number of pickpockets to an unknown degree. That some activity remained active does not show that it did not. No penalty is likely to eliminate any crime altogether.” He also makes the point that “deterrence does not so much influence habits already formed, criminal or legitimate, as it influences habit formation”; according to which a habitual, recidivist criminal, which pickpockets usually are, will not be as deterred as a “one off”

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42 I use the word “commonsense” here simply to indicate that these are not arguments necessarily predicated upon empirical research, but they are simply lines of argument usually spoken of with an air of assuredness, as they are assumed to be well-known facts of “commonsense.” More empirically based arguments will be considered in Part 6 below. Due to word-count restrictions only a few of the primary “commonsense” arguments will be considered in Parts 4 and 5 below.

43 Ernest van den Haag, (op. cit. note 26) (1986) p244.


non-recidivist criminal might, such as a murderer.\textsuperscript{46} Thus, he argues, “deterrence is effective in the long and not so much the short run.”\textsuperscript{47}

\textbf{B- The deterrable and undeterrable.}

A further seemingly commonsensical argument is that some people, during the commission of certain crimes, may simply be undeterrable and so employing the death penalty will make little to no difference to them. Alan Duce (2003), for instance, argues that deterrence:

“Seems irrelevant to the range of offences that are compulsive or self-destructive and that may even be sought by an offender through a desire to seek punishment. Fear of being detected may deter, but there are many for whom a reputation for violence has become a matter of pride; such people are not deterred by a severe penalty.”\textsuperscript{48}

It is similarly argued that the death penalty will not deter many categories of homicide which are crimes of passion and crimes based on impulsive actions.\textsuperscript{49} As Mr O’Hair, a U.S. prosecutor and judge explains:

“To illustrate the point that killers rarely considered the consequences of their actions, a prosecutor in Des Moines, John Sarcone, described the case of four people who murdered two elderly women. They killed one in Iowa, but then drove the other across the border to Missouri, a state that has the death penalty.”\textsuperscript{50}

This sort of anecdotal evidence may be refuted however by reference to opposing evidence. For instance, one may point to “an American case where a man drove his wife across the state line to kill her because there was no death penalty there…”\textsuperscript{51}

Nevertheless, it is also suggested that:

\textsuperscript{46} This obviously would not apply to serial killers, but as serial killers may be considered to be habitual, we can assume that Ernest van den Haag would not expect them to be particularly deterred.\textsuperscript{47} Ernest van den Haag, (op. cit. note 26) (1986) p246.\textsuperscript{48} Alan R. Duce, (2003) “A Christian Approach to Capital Punishment.” The Use of Punishment. Sean McConville, (ed.) William Publishing, pp23-54 at p48.\textsuperscript{49} See Mr O’Hair, “States with no death penalty share lower homicide rates.” This article can be found on the Death Penalty Information Center (DPIC) website at: http://www.deathpenaltyinfo.org/article.php?scid=17&did=437\textsuperscript{50} Ibid. p5.\textsuperscript{51} Susan Easton and Christine Piper, (op. cit. note 30) (2005), p118. Other anecdotal examples whereby offenders have openly claimed to have been deterred, or undeterred, by the knowledge of potential punishments can be found in Appendix 6, Part III of the British Royal Commission Report on Capital Punishment 1949-1953, (op. cit. note 25) pp335-339.
"Most potential criminals are optimistic; they assume that they are going to be among the lucky ones and ignore the severity of any sentence. The preponderance of crime is a male activity committed on the spur of the moment, where the impulse to act criminally is opportunistic, often accelerated by alcohol or drugs as well as by peer encouragement."\(^{52}\)

In response to the "undeterrable" argument however, Joanna Shepherd has argued that her research proves that:

"This assertion is wrong: the rates of crime-of-passion and murders by inmates - crimes previously believed to be undeterrable - all decrease in execution months. In addition, my results show that stranger murders neither increase, nor decrease in execution months."\(^{53}\)

She concludes therefore that, "although murders by inmates and crime-of-passion murders may be less pre-meditated than other murders, they are nonetheless deterred by capital punishment."\(^{54}\) As she says:

"Even an offender who does not premeditate a murder, has an instant to weigh the expected costs and benefits of committing that murder. Because executions increase the expected costs of murder, some offenders will choose not to commit the crime of passion."\(^{55}\)

Despite Shepherd's findings, it nevertheless remains undeniable that some offenders will simply be undeterrable. Some mentally ill offenders, for instance, may lack the capacity and understanding to weigh out their actions on an emotional, moral or practical level, either consciously or unconsciously. The deterrence arguments also exclude juveniles in many jurisdictions where they know that they will probably never be executed if they commit a capital crime whilst still under age. However, this argument does not apply to countries which do not abide by International Human Rights Instruments such as the International Covenant of Civil and Political Rights (ICCPR) or the United Nations Convention on the Rights of the Child (UNCRC), and which have executed and continue to execute young people under the age of 18, including, Iran, Pakistan, Yemen, Nigeria and Saudi Arabia, among others.


\(^{54}\) Ibid. p318.

\(^{55}\) Ibid. p292.
Similarly, the use of death as a punishment will not deter suicide bombers or terrorists who intend to kill themselves during or after the commission of their crime. Nor will it deter the commission of manslaughter and other non-capital homicide offences. As such, it is perhaps to those who are deterrable that the focus should turn and remain, as otherwise this “undeterrability” argument could presumably be used to oppose any punishment, including incarceration, and yet no one is suggesting this!

5- “Commonsense” arguments asserting that capital punishment does deter.

A- The death penalty saves lives.

One standard argument in favour of the death penalty is that it saves innocent lives. Many have founded their support for the death penalty on these very grounds. George W. Bush, for instance, in his presidential election campaign stated that, “the reason I support the death penalty is because I believe it saves lives. That’s why I support it.” Similarly, when debating the reinstatement of capital punishment in New York, Assemblyman Kauffman asked, “Do you know that 850 people last year who were convicted of murder and got out of jail committed murder again?... But I tell you, if you had the death penalty, 850 people would not have been out to kill again.”

But despite a being a point of popular rhetoric, does the death penalty really save lives? Sceptics abound. But before looking at the arguments of one such sceptic; it is important to first note that the line of argument propounded by Kauffman, as well as many others, frequently confuses deterrence with incapacitation. The innocent lives they speak of could also be saved by alternatives to the death penalty, such as the increasingly popular alternative, life without parole. If those 850 murderers had received life sentences in which life really meant life, their next batch of victims would probably have been just as safe as if those killers, when caught the first time, had been executed. This is not to say however, that some of them may not have still gone on to kill, as short of keeping them in

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57 See: http://transcripts.cnn.com/TRANSCRIPTS/0006/21/wt.06.html This is a transcript of a talk entitled “Does the death penalty deter crime” which was aired on June 21st 2000.
59 The use of life without parole as an alternative to capital punishment has become increasingly popular in recent years. According to a 2004 Gallup poll, those in favour of this alternative have grown to 46%. See Appendix E for a graph setting out the Gallup poll results for 1985-2004.
permanent solitary confinement, it is true to say that even incarcerated convicts can, and do, kill again, even while in prison. As Professor Ronald Allen and Amy Shavell point out, “In fact, the chances that one will be murdered while in prison are higher than the chances that one will be executed. During the years 1985-1997, a total of 980 people were murdered in prison: during this same period 400 people were executed.”

Secondly, even if the death penalty truly did deter enough to save innocent lives, it does not follow that the penalty automatically becomes a desirable one to adopt. Stephen Nathanson, for instance, argues that, “superior deterrence power is not the only issue. A punishment may save more lives and yet involve society in such ghastly practices that we would reject it as immoral.” To give just one example of such a “ghastly practice” which would nevertheless have a decidedly deterrent effect, he asks us to consider the prospect of adopting the following punishment for murder. We would:

“Execute not only the person who committed the murder but also the three people in the world who were of greatest personal significance to the murderer... If we were solely interested in making potential murderers ‘think twice’, this policy would probably work much better than the death penalty as currently practiced.”

Furthermore, in light of the flaws of the American judicial system, and other criminal justice systems worldwide, and given the risk that innocent people may be executed for crimes they did not commit, he suggests that, “While the failure to protect is morally bad, the active killing seems much worse. So, if innocents are to die, it is better that we not be the agents of their deaths.” He further posits that even if we were to consider the execution of an innocent person as morally justifiable, “We must have reason to believe

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60 Even in top security lock-down facilities there have been instances of inmate on inmate murder. See for instance, “Lapses at jail led to inmates killing.” L.A. Times, May 15th 2004, p1, which reports one such incident.
61 Killing may occur by either by hiring a contract killer to murder someone on the outside or by killing a fellow inmate or prison guard for example. The death penalty may also be added incentive for an offender to kill during the commission of his offence as the more certain and severe their punishment is likely to be, the more desperate they will be to ensure that no witnesses are left alive.
64 Ibid. p121.
65 See Chapter 7 for a discussion on the flaws of the capital punishment system, particularly in light of the unequal application of capital punishment as it pertains to racial minorities and indigent defendants.
that the number of lives saved is substantial. Superior deterrent power cannot mean simply that a few lives are likely to be saved."\(^{67}\) He concludes however, by asserting that:

"It is highly unlikely that the death penalty will ever operate so effectively as to save many more lives than other, less severe punishments... all of this is merely hypothetical. We have no reason to believe that the death penalty does save more lives than other punishments, and so we need not actually confront this choice."\(^{68}\)

Unfortunately however, we do have to face this choice and as we shall see in Part 6 below it is the very effectiveness of the death penalty to save lives which is the crux of the deterrence debate today.

6- Research investigating the deterrent effect of capital punishment.

A- Methodological techniques used to study the deterrent effect of capital punishment.

The primary methodological technique favoured by academics investigating the potential deterrent effect of capital punishment is that of comparative analysis. This can take several forms. There are cross-state analyses whereby the crime rates for a capital offence such as murder are compared in two different states or regions, one abolitionist and one retentionist. The assumption is that if capital punishment does deter the most serious crimes, there should be a significantly lower crime rate in the retentionist states.

Another comparative method is that of longitudinal or time-series analysis whereby the rate\(^{69}\) of a crime, such as wilful homicide, is compared in one region before and after the abolition of the death penalty. The assumption in this instance is that if the death penalty has any significant deterrent effect this will manifest itself in an increase in the homicide rate following the abolition of the death penalty. Or conversely, it may manifest itself in a decrease in homicide following the penalty's re-instatement. The studies looked at in Parts B and C below use a combination of these methods.

B- Research showing no deterrent effect.

While for centuries it has been argued on philosophical and anecdotal grounds that capital punishment has a uniquely deterrent effect, there have been very few credible

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\(^{67}\) Nathanson (op. cit. note 63) (1987) p123.

\(^{68}\) Nathanson (op. cit. note 63) (1987) p129.

\(^{69}\) These rates may be examined on an annual or monthly basis. The rate chosen depends on the proclivity of the individual researcher.
research papers claiming to be able to prove it, until recently. In fact until now, as Herbert Haines explains, “the evidence from nearly 40 years of research runs overwhelmingly against the proposition that the death penalty deters more effectively than other severe punishments.”

During that time, the general consensus of penologists and social scientists in this field of research has generally been that, by and large, the results of comparative studies have failed to yield convincing evidence in support of the notion that the death penalty has a uniquely deterrent effect. Bailey and Peterson, for instance, argue that:

“Over the decades, the findings from comparative studies were very consistent and quite contrary to the deterrence thesis. For example, studies of changes in murder rates before and after the abolition and/or reinstatement of capital punishment revealed that states that abolished the death penalty did not experience unusual increases in homicides. Rather, abolition and/or reintroduction of capital punishment was sometimes followed by an increase in murders and sometimes not... Also contrary to the deterrence thesis, simple comparisons of retentionist and abolitionist jurisdictions showed that the provision for the death penalty had no discernible effect on murder. Indeed, such studies often showed an opposite pattern of higher murder rates for death penalty states.”

This trend includes a study by Bailey and Peterson themselves in which they compared the murder rates for several neighbouring retentionist and abolitionist states throughout the period between 1977 and 1993. Their findings did not support the deterrence thesis. Their research instead showed that:

“In some cases rates are higher for abolitionist jurisdictions (e.g., Michigan), and in some cases the opposite is true, (e.g., Illinois). In addition, examining changes in homicide for individual states over time, there is no indication of either an increase in murder during abolition years or a decrease in rates following reinstatement of capital punishment.”

Other reports and studies comparing the homicide rates in abolitionist and retentionist regions which have shown, not only that the death penalty does not seem to deter but also

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72 This was the point at which executions resumed following the U.S. moratorium.
73 See Appendix F for a copy of a table setting out their key findings.
that regions which do employ capital punishment in fact have much higher rates of homicide than abolitionist regions include the following:

**The FBI Uniform Crime Reports.**
The FBI's Preliminary Uniform Crime Report published in June 2006 shows that in 2005, the South had the highest national murder rate,\(^{75}\) despite the fact that this is the region that almost consistently executes the highest number of offenders,\(^{76}\) (since 1976 around 82% of all executions have taken place in the South.)\(^{77}\) Whereas in the South there were 6.9 victims per 100,000 of the population, in the Northeast there were just 4.4.\(^{78}\) A similar trend has been manifest for many years now.

**The Death Penalty Information Center.**
The Death Penalty Information Center (DPIC) also demonstrates on its website that if the murder rates of neighbouring states, one being abolitionist and the other retentionist, are examined, the usual trend is that the death penalty state has a considerably higher murder rate than its abolitionist neighbour.\(^ {79}\)

**New York Times.**
Similarly, a survey undertaken by the New York Times in 2000 showed that over the last twenty years the homicide rates in retentionist states has been up to 101% higher than in abolitionist states.\(^ {80}\)

This method of comparative analysis has been taken even further afield and many researchers have attempted to compare homicide rates not just from one U.S. state to another but from one country to another. Again, generally the results have not supported the deterrence thesis. The *New York Times* in 2002, for instance, highlighted the fact that,

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\(^{75}\) See: http://www.deathpenaltyinfo.org/newsanddev.php?scid=12 Also see Appendix G for a table showing the regional murder rates (per 100,000 people) for 2001-2004, produced by the DPIC, based on the FBI Uniform Crime Statistics for 2004, published in October 2005.

\(^{76}\) See Appendix H for a DPIC graph showing the percentage number of U.S. executions to have taken place in the South, with 72% of all U.S. executions having taken place in the South in 2005. This appendix also shows this information in table format as produced by the DPIC 2005 year end report.

\(^{77}\) See Appendix I for a pie chart illustrating the number of executions in the U.S. by region, as of January 2006.

\(^{78}\) Refer back to Appendix G for the statistics in table format as of 2005.

\(^{79}\) See Appendices J, K and L for charts demonstrating this trend.

according to figures released by the British Home Office, the homicide rate in Britain and several other abolitionist European countries, is in fact approximately one third lower than that of the United States.  

In terms of comparative longitudinal analysis whereby the homicide rate in one region is compared before and after abolition, this too has yielded mixed results. In order to support the deterrence theory one would expect to find evidence of a rise in serious crime after the penalty’s abolition. On the whole however, as Peterson and Bailey observe, “typically... the abolition and/or re-instatement of the death penalty has not been followed by an unusual increase or decrease in killings.”

There are of course some studies that show otherwise. Comparing the homicide rates in Canada before and after abolition, for instance, has shown that the homicide rate in 1975 (the year before abolition) was in fact 23% higher than the homicide rate in 2001.  

Given the trend found in the above studies it is perhaps not surprising that a survey by Radelet and Acker in 1995 found that 80% of experts associated with the American Society of Criminology, the Academy of Criminal Justice Sciences and the Law and Society Association, believe that research has failed to provide evidence supporting the deterrence justification. It is also not surprising to read comments by researchers such as Bailey and Peterson making the assertion that, “We feel quite confident in concluding that in the United States a significant general deterrent effect for capital punishment has not been observed, and in all probability does not exist.”

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81 See Appendix M for a table comparing the homicide rates of Europe and the USA.
83 See the DPIC article: “Homicide rates in Canada fall after abolition of death penalty.” The homicide rate in 1975 was 721, while in 2001 it was 554. Found at: http://www.deathpenaltyinfo.org/article.php?&did=1705 For similar longitudinal analyses of other countries before and after abolition see Roger Hood, (op. cit. note 24) (2002) pp214-216.
84 Their survey sample included 67 out of 70 current and former presidents of the 3 aforementioned criminological organisations.
However, there are studies which claim to be able to provide evidence that the death penalty does deter, some of which will be considered next. This will be followed, in Part 6 D and Part 7 below, by a critique of these particular studies and deterrence studies in general.

C- Studies showing a deterrent effect.

One of the most well known early studies purporting to have found a deterrent effect is that of Isaac Ehrlich. In his 1975 study, Ehrlich asserted that in the time period that he had studied (1933-1969), “an additional execution per year... may have resulted, on average, in 7 or 8 fewer murders.” However, his findings have been largely discredited by social scientists over the years. His methodology has been subjected to criticisms ranging from the fact that he did not differentiate between abolitionist and retentionist nations when assessing execution rates, to the fact that he did not control for the variations that would have existed from state to state as well. Additionally it has been pointed out that, “his results were highly sensitive to how different variables were defined and to the statistical form of equation used to relate variables.” A further major criticism is that “Ehrlich’s deterrent results disappear if just the last seven years of the thirty-four year sample period were excluded from analysis.” In summary, it has been said that, “Ehrlich’s work does not meet the generally accepted standards of statistical research” resulting in the general consensus that his work “has been seriously questioned if not discredited.”

Until recently Ehrlich’s savaged study stood virtually alone and as Wendy Kaminer states, “social science evidence that the death penalty deters is scant (some would say non-existent.)” At their most forgiving, researchers have concluded that “studies are...

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88 For more details on some of the precise criticisms of his study, see, for instance, James, Q. Wilson, (1985) Thinking About Crime, Vintage, Chapter 10, specifically pp184-188.
90 Ibid
inconclusive at best. However, there has been a shift in thinking in recent years and as Dr Rubin explained to the U.S. Senate Committee on the Judiciary in 2006:

"Recent research on the relationship between capital punishment and homicide has created a consensus among most economists who have studied the issue that capital punishment deters murder... The modern refereed studies have consistently shown that capital punishment has a strong deterrent effect, with each execution deterring between 3 and 18 murders."

The studies that will be looked at next are some of the more prominent and influential studies responsible for this newly developing "consensus" on the unique deterrent effect of the death penalty.

**Study 1.**

In her 2004 study *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, economist Joanna Shepherd claims that her research shows that, "in only 22% of states did executions have a deterrent effect. In contrast, executions induced additional murders in 48% of states. Execution created no deterrence in 78% of states." She goes on to explain her theory that there is a threshold number of executions, which she calculates to be nine, according to which, "in states that conducted more executions than the threshold, each execution deterred murder. In states that conducted fewer executions than the threshold, the executions increased the murder rate." She explains this phenomenon by suggesting that:

"If a state executes many people, then criminals become convinced that the state is serious about the punishment, and the criminals start to reduce their criminal activity. When the number of executions exceeds the

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96 Due to the constraints of this study, there is no time or space to adequately critique each study in full detail here. As such, criticisms may be made in passing, as well as in more general terms in Part 6D and Part 7 below. The primary aim here is simply to draw the results of these studies to the forefront of the debate and to show the range of deterrence claims made.
97 Joanna Shepherd is Assistant Professor of Economics at Clemson University and Visiting Associate Professor of Law at Emory University School of Law.
98 Shepherd, (Oct. 2004) “Deterrence versus Brutalization - Capital Punishment’s Differing Impacts Among States.” Emory Legal Scholarship Working Paper Series, pp1-39 at p38. This paper can be found at: http://law.bepress.com/emorylwps/papers/art1/ In this study Shepherd employs state level monthly panel data as opposed to county level data. (This may account for some of the differences in her results compared to her earlier paper.)
threshold, the deterrence effect begins to outweigh the brutalization effect."99

By disaggregating the data, state by state, Shepherd claims to have discovered that the entire deterrence effect that seems to be in operation nationwide is in fact driven by only 6 states100 and that the other 21 retentionist states do not display any evidence of a deterrence effect. She postulates that what distinguishes these 6 states from the other 21 is their high rate of executions and that each state which executes more than the threshold number, 9, will see a marked deterrent effect.101

She concludes her article by suggesting that her paper has important policy implications as, "a state would need to recognize that, to achieve deterrence, it could not establish a modest execution programme. Unless the state executed enough people to exceed the threshold, then the executions would increase murders, not deter them."102 She further argues that, "If states are unwilling to establish such a large execution programme, it may be better to perform no executions."103

Study 2.

In their 2004 article, The Deterrent Effect of Capital Punishment: Evidence from a ‘Judicial Experiment’104, Dezhbakhsh and Shepherd explain how, using state level panel data from 1960-2000, (which is significant in that it covers the years before, during and after the U.S. Supreme Court moratorium on executions), they found that, contrary to the findings of other studies, “the before-and-after comparisons reveal that about 91 percent of states experienced an increase in murder rates after they suspended the death penalty. In about 70 percent of the cases, the murder rate dropped after the state reinstated the death penalty.”105 They state:

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100 See Appendix N for a graph produced by Shepherd illustrating the “Individual State Deterrent Effect” and the “Number of murders deterred or incited by an average execution.”
101 Shepherd does not fully account for the possibility that this particular threshold might just be a coincidence and that other unconsidered variables may be responsible for this trend.
105 This quote can be found at p13, Shepherd “Deterrence versus Brutalization: Capital Punishment’s Differing Impact Among States,” October 1, 2004, (see: http://law.beypress.com/emory/wps/papers/art1/ in
"The results are boldly clear; executions deter murders and murder rates increase substantially during moratoriums. The results are consistent across before-and-after comparisons and regressions regardless of the data’s aggregation level, time-period, or the specific variable used to measure executions."106

Study 3.

In the 2003 study “Does Capital Punishment have a deterrent Effect? New Evidence from Postmoratorium Panel Data”107, Dezhbakhsh, Rubin and Shepherd used data from 3,054 U.S. counties between 1977 to 1996 to examine the deterrent effect of capital punishment. It is the only study thus far to have used county level data. As a result of their research they claim that their “results suggest the capital punishment has a strong deterrent effect; each execution may result, on average, in eighteen fewer murders.”108

Study 4.

In her 2004 study “Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment” Joanna Shepherd argues that “each execution results in, on average, three fewer murders.”109 Having carried out her research using monthly execution data and monthly homicide data as provided by the FBI supplementary homicide reports, she further argues that, “It is evident that the murder rates in death penalty states have been declining since capital punishment resumed in 1977, while murder rates in non-death penalty states have been increasing.”110

Study 5.

In their research, Mocan and Gittings (2003) use “a data set that consists of the entire history of 6,143 death sentences between 1977 and 1997 in the U.S. to investigate the

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which Shepherd is referring to her article, “The Deterrent Effect of Capital Punishment: Evidence from a ‘Judicial Experiment.’” An Emory University Working Paper, 2003. Part of the reason for their results yielding such different conclusions to previous comparative studies is the fact that other studies did not take into account the fact that the moratorium began and ended in different years in different states.

108 Ibid. p344.
impact of capital punishment on homicide.”¹¹¹ They conclude their research by asserting that, “Each additional execution decreases homicide by about 5, and each additional commutation increases homicide by the same amount, while 1 additional removal from death row generates 1 additional homicide.”¹¹²

Study 6.

In his (2004) applied economics study of U.S. state level data between 1978-1997, Zimmerman estimates that “each state execution deters somewhere between 4 and 25 murders per year (14 being the average.)”¹¹³

D- Criticisms of these studies.

i- Flawed methodologies and conflicting results.

As we can see therefore, in just the last few years a number of studies have claimed to provide evidence in support of the deterrence theory. To leave the discussion here and move on to another topic would leave one with the impression that the age old question, “does the death penalty deter” has been solved by the ruminations and research of the current era of researchers. However, as legal scholars Sunstein and Vermeule¹¹⁴ (2005) point out, although at first:

“the recent evidence of a deterrent effect of capital punishment seems impressive... in studies of this kind, it is hard to control for confounding variables, and a degree of doubt inevitably remains. It is possible that these findings will be exposed as statistical artefacts or will be found to rest on flawed econometric methods.”¹¹⁵

These studies, as a group, have in fact already been subjected to severe criticism and as Dr Jeffery Fagan in his testimony before the United States Senate Committee on the Judiciary in February 2006 stated: “These new studies are fraught with numerous technical and conceptual errors: inappropriate methods of statistical analysis, failures to

¹¹⁴ Both Sunstein and Vermeule are Professors of law at the University of Chicago Law School.

These comments include reference to the recent studies of Joanna Shepherd as cited in the chapter above.
consider all the relevant factors that drive murder rates, missing data on key variables in key states..."\textsuperscript{116} His critique goes on, but the final assessment of Dr Fagan, who is by no means a lone voice on this matter, is that "These studies fail to reach the demanding standards of social science to make such strong claims, standards such as replication, responding to counterfactual claims, and basic comparisons with other causal scenarios."

Even more worryingly, Dr Fagan adds:

"These are serious flaws and omissions in a body of scientific evidence that render it unreliable, and certainly not sufficiently sound evidence on which to base laws whose application leads to life-and-death decisions. The omissions and errors are so egregious that this work falls well within the unfortunate category of junk science. To accept it uncritically invites errors that have the most severe human cost."\textsuperscript{117}

Furthermore, even if we were to accept the current studies as valid and assume that, with slight revision, they would stand up against robust replication, it is the view of death row lawyer and abolitionist campaigner Clive Stafford Smith (2005), for instance, that resorting to statistics in this life and death context is "facile." He points out that the studies claiming to prove the deterrent effect of the death penalty vary from claiming that each execution saves 18 lives to claiming it saves 3 lives. As he says:

"Which researchers are we to believe? How would it look if, rather than dealing with life or death, these were financial analysts all promising a profit on an investment but unable to decide whether it would be 3 per cent or 18 per cent? My bet is that you would get nervous about investing."\textsuperscript{118}

But why are there so many variations between the studies, and what makes deterrence studies so complex? Comparative analysis is not always easy to carry out and a number of methodological problems inevitably arise when comparing the effects of capital punishment, some of which will be discussed next and each of which may go some way to explain why different studies produce such different results.

\textsuperscript{116} Testimony of Dr Jeffery Fagan, Professor of Law and Public Health at Columbia University, before the United States Senate Committee on the Judiciary on "An Examination of the Death Penalty in the United States." Hearing held on February 1\textsuperscript{st} 2006. Testimony entitled, "Deterrence and the Death Penalty: Risk, Uncertainty, and Public Policy Choices." For a transcript of this testimony see: http://judiciary.senate.gov/testimony.cfm?id=1745&wit_id=4992

\textsuperscript{117} Ibid. Dr Fagan's testimony.

7- Evaluating the research – General methodological problems involved in deterrence research.

A- Selection of geographical regions for comparison.

The difficulties associated with conducting deterrence research have been widely examined in penological and criminological literature. Andrew von Hirsch et al. (1999), for instance, points to the fact that:

“Making a valid inference of deterrent effects is an undertaking of considerable complexity... Deterrence is undoubtedly difficult to study, both because of the presence of other possible influences and because of its ultimately subjective nature. 119 But study of deterrence is not impossible, and there are ways of inferring whether deterrence effects are at work.” 120

They go on to point out that when conducting deterrence research, in order to ascertain and support valid inferences of deterrent effects, several issues must be borne in mind in order to avoid the common pitfalls associated with deterrence studies. One of which is related to the initial selection of areas for comparison.

There is a need for great care when selecting areas for statistical analysis as when comparing two or more areas in terms of factors such as crime rates, which are a standard variable in deterrence studies, it is important to be able to account for “significant local differences in policy or practice within a given area of study. A degree of regional disaggregation is particularly important in examining the effects of certainty of punishment.” 121

For instance, if one were to investigate the frequently cited proposition 122 that retentionist countries such as Saudi Arabia, China and Japan have lower crime rates than abolitionist

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119 Elsewhere in their research they explain that the issue of criminal deterrence is subjective in the sense that “it depends not on what the certainty and severity of punishment actually are but on what potential offenders believe that they are.” Andrew von Hirsch et al. (op. cit. note 7) (1999) p6.
121 Andrew von Hirsch, et al (op. cit. note 7) (1999) p18. This includes looking at and controlling for variables which may be responsible for a perceived correlation between crime rates, such as localised socioeconomic factors and criminal justice policies.
122 For instance, this very proposition was recently cited (May 2006) in a newspaper article in which a British manufacturer and distributor of gallows justified his choice of trade saying “You’re safer walking down the street in Libya and African countries than you are here and that’s because of capital punishment. Third world countries are laughing at us because we’ve got no deterrent against crime.” “Unrepentant British Soldier Who Sells Gallows to Dictators.” The Daily Mail, (Tuesday 305 May 2006.) p23. Story by Andrew Levy. This statement is obviously ill-informed however, as I doubt that anyone would propose that
countries, such as England, as a result of their employment of capital punishment and its subsequent deterrent effect, an immediate difficulty is how to control for the necessary range of variables. If the regions are deemed to have too many incomparable variables the comparison will be rendered as invalid. Each country operates within an entirely different political sphere and social structure and each possesses unique socioeconomic, legal and political characteristics that will have an indelible and immeasurable effect on factors such as the national crime rate. This includes differences in religious traditions, cultural backgrounds, different standards of living, different styles of policing ranging from liberal to oppressive, and different forms of government which may range from democratic to despotic; each of which may be accountable for phenomenon and fluctuations related to actual levels of crime as well as reported levels of crime, and the rates of national executions. There are clearly too many variables to control for and this creates serious logistical and methodological difficulties which make a valid comparison hard to achieve. \[123\]

Even when studying two regions within the same country a number of complex variables must be accounted for. As Joanna Shepherd (2004) argues, for instance, abolitionists frequently point to charts and graphs comparing the crime rates in Southern U.S. retentionist regions to other U.S. abolitionist areas arguing that the considerably higher murder rates evident in retentionist regions are proof positive that executions have no deterrent effect. She goes on to show however, that such accounts do not take into consideration all the regional and social variables and that “several differences between southern, northern and western states might explain the contrast in murder rates. For example... differences in the labour market prospects or demographic composition of the states with and without capital punishment laws.” \[124\]

As Michael Martinez (2002) cautions, when comparing homicide rates between death penalty and non-death penalty states for instance:

\[123\] It is not entirely impossible however, and academics such as Roger Hood have succeeded in constructing credible and valuable data on the issue of capital punishment based on practices of countries worldwide. See for instance, his highly acclaimed (2002) book the Death Penalty – A Worldwide Perspective. (3rd edition.) Oxford University Press.

"Researchers must be careful not to take the analysis too far. The data do not explain why differences exist between death penalty and non-death penalty states. Other variables may explain the differences. For example, death penalty states may include cities with large urban, black, young and poor populations, which are demographic characteristics associated with increases in the murder and non-negligent manslaughter rate. In such cases, the murder rate would probably be higher than the other states regardless of whether imposition of the death penalty was a strong possibility."\(^{125}\)

These are factors that must be controlled for in order to avoid false inferences being drawn as many of these variables, such as unemployment levels, are factors which will influence the crime rate and may have nothing to do with whether or not a state has capital punishment on the statute books.

B- Official statistics.

Another obvious point for those embarking on or assessing deterrence studies, as well as penological studies more generally, is to have a healthy scepticism of official crime statistics. As Mike Maguire (1994) warns:

"If their limitations are fully recognised, crime-related statistics offer an invaluable aid to understanding and explanation. On the other hand, not only can they be highly misleading if used incorrectly, but, if presented in mechanical fashion, without any deeper comprehension of their relationship to the reality they purport to represent, they can grossly distort the social meaning of events as understood by those experiencing or witnessing them."\(^{126}\)

Dr Susan Easton and Dr Christine Piper (2005) similarly point out for instance, that:

"Official statistics are notoriously inaccurate as a true measure of crime, for example, figures on prison populations may be an inaccurate measure of criminal activity if not all offenders are caught and punished. Prison numbers may decline through sentencing policies, which themselves are influenced by prison overcrowding, for example."\(^{127}\)

Andrew von Hirsch \textit{et al.} (1999) emphasises that in order to avoid false inferences being drawn from any seeming correlations, the reliability of the crime data used must first be considered, and any irregularities or discrepancies must be taken into account. They further suggest that in order to ensure as much consistency and accuracy as possible, the

\(^{125}\) Michael Martinez, (op. cit. note 94) (2002) p201. Italics are my own emphasis.


\(^{127}\) Dr Susan Easton and Dr Christine Piper, (op. cit. note 30) (2005), p116.
same data collection methods should be employed in the different regions being studied.128

With regards to the criticism that much recorded crime data is based on police recording practice which may vary over time and geographical region, Von Hirsch et al. suggest that “one way to overcome this problem would be to use officially recorded crime data only for the jurisdictions and time periods where these figures can be checked against victim survey data.”129

C- Correlation does not necessitate causation.

Andrew von Hirsh et al. (1999) also make a seemingly obvious yet vital observation with regards to the analysis of statistical data, which is that even if the statistics used are accurate and reliable, it must be remembered that “a correlation does not suffice to establish a deterrent effect.”130 They give the example that if crime rates declined during a period in which more bowling alleys were being constructed, although:

“There may well be a statistically significant negative association between construction of bowling alleys and crime rates. No sensible person would think this shows bowling prevents crime. Yet when the association has more common-sense appeal - as does the link between punishment and crime - then the mere fact of a statistical association is sometimes cited as evidence of deterrence.”131

Dr Susan Easton and Dr Christine Piper similarly argue that, “even if the crime rate fell following an increase in punishment we cannot be sure that it resulted from the punishment rather than from the numerous other factors which affect crime.”132 With specific regard to the U.S., they point out that, “statistics do not take account of local variations in law enforcement and local applications of sentencing policies. This is a problem in the USA, where there may be local applications of sentencing policies.”133 Fluctuations in homicide rates may therefore be affected by a wide range of factors completely unrelated to the death penalty, such as unemployment rates and the amount of

128 By which they mean to ensure as far as possible that both samples of data have been collected in the same way, such as through direct personal interviews or by telephone interviews. See Andrew von Hirsch, et al. (op. cit. note 7) (1999) p18-19.
130 Ibid. (1999), p17.
131 Ibid. (1999), p17.
132 Dr Susan Easton and Dr Christine Piper, (op. cit. note 30) (2005) p116.
money and resources put into the local criminal justice system, including the police force, prosecutorial salaries and prisons facilities.

In light of the methodological problems inherent in deterrence studies, Roger Hood (2002) argues that:

“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. Indeed, it is quite incorrect to conclude, when statistically significant negative coefficients have been found, that they constitute proof of deterrence as such. They may be consistent with a deterrent hypothesis, but there are often alternative explanations.”134

D- How is the evidence interpreted and why is there so much disparity between the deterrence arguments of both supporters and opponents of the death penalty when they are presented with the same evidence?

When examining the evidence, many of those embroiled in the death penalty debate seem to find it hard to view the research objectively. Franklin Zimring (1989), for instance, makes the observation that:

“Those who are already firmly committed to well-defined policies are not interested in hearing about possible alternatives. What they are looking for is evidence to support their convictions. Frequently they seem to treat the annuals of deterrence research as arsenals from which they can obtain weapons with which to launch attacks on their opponents.”135

James Galliher and John Galliher, similarly suggest that “research has found that subjects’ attitudes toward the death penalty determine how evidence on the effectiveness of the death penalty as a deterrent is interpreted.”136 They point out that a number of times during various New York State Assembly debates on this issue, Assemblymen have blatantly dismissed all evidence purporting to show that the death penalty has no deterrent effect. Assemblyman Friedman for instance is reported to have said “Capital punishment is a deterrent, there is no question about it, and the findings of any studies notwithstanding.”137 A similar disregard for the evidence that had been provided by death penalty opponents was adopted by Assemblyman Kremer who said: “I don’t work with

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charts... I am in the real world..."138 This sort of attitude towards deterrent studies seems to add weight to the accusation of Senator Eckert who said to a death penalty opponent, “You are not opposed to capital punishment because you don’t think it’s a deterrent. You don’t think it’s a deterrent because you’re opposed to it.”139

Galliher and Galliher also refer to a statement made by Senator Volker who said:

“Almost all of the deterrence studies that have found that the death penalty has no deterrent [value were] done by people who started out opposing the death penalty and wanted to find out how in effect to oppose it through the deterrence argument.”140

However, even if this is the case, provided the studies are properly conducted, the personal views of the researcher do not necessarily invalidate their findings, it simply reminds those looking at their studies to be aware of the motive and potential biases of the researcher and subsequently, potentially, their research.

**E- Concluding comments on deterrence research.**

Having reviewed the primary evidence published by deterrence researchers thus far, it still seems to be the case that, as Bedau rather diplomatically puts it: “Abolitionists might as well concede that, indeed, the death penalty probably does deter someone, sometime, somewhere – just as retentionists must concede that the thousands of criminal homicides each year... prove that the death penalty is at best a far cry from a perfect deterrent.”141

Despite a lack of professional consensus and a lack of irrefutable concrete evidence either way, as previously mentioned,142 many public opinion polls demonstrate that deterrence nevertheless remains one of the primary reasons cited by the pro-death penalty public for their support. Some researchers have observed, in fact, that even when confronted with evidence to show that the death penalty does not deter, public support in favour of the penalty sways very little. Professor Robert Johnson has suggested that this implies that

142 See footnotes 3 and 4 above and Appendices A, B and C.
although deterrence may be cited as a reason to support capital punishment, the real reason is probably more accurately founded on principles of retribution and feelings of revenge.\(^{143}\)

One possible reason for this potentially insincere use of deterrence arguments as a mask justifying support for capital punishment is that the deterrence argument at least has the benefit of sounding like an acceptable philosophy of punishment, one that could potentially morally trump other harsher philosophies. As death penalty opponent Reverend Jesse Jackson (1996) says in his book *Legal Lynching - Racism, Injustice and the Death Penalty*:

> "In modern debate, deterrence has emerged as the only morally palatable argument for the death penalty. Seeking vengeance for its own sake against cold-blooded killers or saving precious tax dollars is difficult to argue directly, but the basic logic of deterrence - sacrificing the lives of a few cruel and dangerous murderers in order to save innocent lives - resonates powerfully with the American people."\(^{144}\)

In any case, despite the importance placed on the deterrence issue by all those involved in the debate it is important to remember that even if it was proven unequivocally that capital punishment did have a uniquely deterrent effect, and even looking at the matter from a distinctly secular perspective, this would not automatically qualify the punishment as being a desirable one to employ as there are other competing considerations which may, when balancing all the issues, outweigh its use. For instance, an analogous example of a measure that may arguably be used to decrease crime is that of increasing the use of private firearms. John Lott and David Mustard (1997), for instance, have argued that according to their research, "We find that allowing citizens to carry concealed weapons deters violent crimes without increasing accidental deaths."\(^{145}\) They further concluded from their research that:

> "If those states without right-to-carry concealed handgun provisions had adopted them in 1992, county and state level data indicate that approximately 1,500 murders would have been avoided yearly. Similarly,


we predict that rapes would have declined by over 4,000, robbery by over 11,000 and aggravated assaults by over 60,000.”

Despite this evidence however there are numerous social, moral and political reasons for arguing against the increased use of handguns. The same is true of capital punishment.

8- The brutalization thesis and the debate regarding televising executions.

Another important aspect of the deterrence debate is that of brutalization, namely, the proposition that executions may in fact, contrary to the goals of deterrence, increase the murder rate. This issue also leads into the question of how open, or public, executions should be, the most recent and controversial aspect of which has been the prospect of televising executions.

Part A below will examine the progression of capital punishment from its historical role as a public spectacle to its present role as a private and hidden punishment, as well as looking briefly at the question of televising executions. Part B considers the research on the brutalization thesis.

A- Capital punishment as a public spectacle.

i- A shift from public to private executions.

Even a brief glance at the history of capital punishment will demonstrate that the concept of publicising executions is by no means new to the death penalty debate. Throughout history it has been a prominent and recurring theme of penology, correctly or incorrectly, to regard public punishments as having a greater deterrent effect than private ones. Deterrence, both general and individual, has been a primary goal behind all sorts of punishments, from the eighteenth century stocks, pillory and branks, to the use of branding and mutilating offenders as a visual warning to all who saw the mark. In fact it has been said that “The main weapon of the pre-modern system of crime control was the spectacular, public, bloody punishment of the offender which was also viewed as a deterrent to the rest of the populace by means of terror…”

146 Ibid. p1.
In the interests of maximising the general deterrent effect, throughout history a number of punishments have been conceived and employed which involved not only excruciating pain for the individual offender, but also an explicit warning to those observing the administration of the punishment. Complete mutilation of the body after death, for instance, was an inherent feature of punishments such as being hanged, drawn and quartered; broken on the wheel; burnt at the stake and boiled in oil. These punishments were clearly intended, not only to punish the individual criminal (who would be especially distraught if they believed that they would be resurrected in the Hereafter in their mutilated state, or excluded from resurrection altogether\(^{148}\)) but also to serve as a deterrent to the rest of society.

In a similar vein, leaving decomposing corpses in gibbets, and placing decapitated heads on sharpened stakes outside castle walls and on the road into main cities, such as London, was intended to instil horror and fear thus deterring crime and rebellion. It has been said that, “No matter by what approach the stranger then entered London, he had the fact of the stringent severity of English criminal law most painfully impressed upon him by a sight of the gallows.”\(^{149}\) Whether or not these methods worked in the intended way however, is clearly a matter open to debate. As Professor Robert Johnson (1998) says on the matter:

“A public killing was exciting and worthy of interest, a communal and political event of some moment; residual bodies were empty of larger meaning. Executions occurred; public attention rose and fell not in response to the tragedy of life lost but in response to the drama of life taken. The bodies of the dead may have lingered but life in the community went on.”\(^{150}\)

Similarly, given that capital punishment has largely been supported on the grounds that it deters the masses from committing serious crimes, the logic that follows has frequently been that the more people who witness an execution firsthand, the more who will be deterred. As far back as the Roman Empire, for instance, public displays of feeding rebels to the lions in front of a packed Roman Coliseum was intended to serve the function of mass deterrence, as well as entertainment! The public nature of methods such as

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\(^{148}\) As Ian Cairn explains, for instance, “To expose a corpse to birds of prey (Gen. 40:19) was a frightening atrocity because it was believed to cause the victim to enter into the afterlife in a mutilated condition.” Ian Cairns, (1992) Deuteronomy – Word and Presence – International theological Commentary, Handsel press, pp192-3.


crucifixion, in addition to its slow and torturous nature, was intended to serve as a
warning to potential criminals and traitors to the Roman Empire, demonstrating the fate
that awaited those who rebelled against the rulers.

A similar belief in the deterrent effect of publicising an execution was also widely held,
for example, in nineteenth century England where it was commonplace for thousands, if
not tens of thousands, of people to frequently attend public hangings, particularly at
infamous locations such as Tyburn and Newgate where executions were a recurrent
public spectacle. It has, in fact, been estimated that “audiences of up to 100,000 were
occasionally claimed in London, and of 30,000 or 40,000 quite often. Crowds of 3,000-
7,000 were standard.”

However, as the “pickpocket analogy” looked at in Part 4 A above demonstrates, over
time it was argued that instead of deterring crime, public executions seemed to be having
a desensitising effect, so much so, that pickpockets would use the hanging of a fellow
thief as an opportunity to relieve spectators in the audience of their purses! It was
observed that, in general, instead of serving the desired deterrent effect, executions
instead “promoted the baser instincts of human nature and encouraged general rowdiness
and bad behaviour.” In time, and with growing opposition to capital punishment on
both liberal and humanitarian grounds, it was deemed time for capital punishment to
move indoors and out of public sight.

In the United States capital punishment, a previously public spectacle, eventually became
a process which now takes place behind closed doors, normally on prison grounds and
usually after midnight. As a result of the gradual bureaucratisation of justice, very few
people ever get to actually witness an execution today. In America, witnesses to an
execution consist of a carefully selected few and, although rules may vary from state to
state, generally those allowed in the viewing room include: the warden, prison officials,
relatives (of the victim and/or offender), a spiritual advisor, chaplain or priest, selected

University Press, p7.
153 In England the last public execution was that of Michael Barrett, which took place on 26th May 1868,
after which public executions were permanently banned.
154 Some countries however, such as China and Saudi Arabia continue to make use of public executions.
155 See Appendix Q for a table showing the witnesses allowed to view an execution by jurisdiction.
members of the press, and a small number of “reputable citizens.” Some people argue that this restriction has diminished the general deterrent effect of executions, as the very people who are supposed to be deterred by the punishment are no longer able to see the consequences of the sentence being carried out. It has also had the effect of distancing the punishment of the offences from the community where the crime was committed by taking the opportunity for condemnation and censure completely out of the hands of the local community and placing it firmly in the hands of the state. It has become, in essence, the complete antithesis of the traditional mob scenes that characterised most executions in the early colonial days of America or eighteenth and nineteenth century England and is now a formal and, in many cases, sterilised process.

However, having become private and hidden affairs it is now argued that this privacy and lack of transparency leaves the penal system open to abuse because the procedures are not open to public scrutiny and therefore the public are not fully informed about the reality of the execution process. It has furthermore been argued by people such as, American Chief Justice Burger that, “no community catharsis can occur if justice is ‘done in a corner [or] in any covert manner.” The problem has now become, therefore, to find a balance, a middle ground between the open public executions of the past, (or even of the present, in countries such as Saudi Arabia and Nigeria which may also be suffering from the brutalization effect,) and the closed, hidden execution process of countries such as Japan, where secrecy is taken to an extreme.

In fact Japan’s level of secrecy regarding its capital punishment protocol has become an issue of great concern to many human rights advocates. In a recent article, David Johnson (2006) identifies some of the key practices of secrecy surrounding the Japanese execution process. He explains for instance, the fact that inmates are only notified of their imminent execution an hour or so before it takes place. This leaves all death row inmates in a constant state of heightened anxiety, never knowing, for all their years on death row, which day will be their last. Even their defence lawyers and family members are not notified until after the execution occurs. During the execution itself, no journalists,

156 If there is an overflow of observers, some prisons provide an opportunity for extra witnesses to watch the proceedings via CCTV from another room within the prison grounds.
relatives, friends or press are allowed to attend and even the names of the executees are not released to the press. Furthermore, “Scholars and reporters are denied access to death penalty documents – including trial records – that by law should be made public.” While Japanese authorities have suggested that such secretive policies are in the interests of the offenders and the executioners, as well as being a Japanese tradition and the East Asian way, Johnson argues that of all of their justifications, “none seems cogent.”

ii- Televising executions.

As previously mentioned, one suggestion of a middle ground whereby the public can witness an execution without having to actually physically congregate in their masses, is to televise the process. This leaves a degree of distance while still allowing the public to see the punishment carried through to its natural conclusion.

The most famous case exploring the possibility of televised executions is probably *KQED v. Vasquez* No. C 90-1383 (1991). This case dealt with the prospect of televising the execution of the notorious killer Robert Alton Harris who murdered two teenagers in San Diego. KQED was a public television station broadcasting in the San Francisco area, arguing in favour of televising his execution. Many fundamental Constitutional principles were raised in this case, such as the First Amendment right to free speech versus the right to respect for a person’s privacy, even if that person is a convicted murderer. Finally, Judge Schnacke ruled against the recording of the execution, primarily on grounds of the security problems raised by Warden Vasquez. The case spawned a huge debate as well as a renewed interest in the brutalization hypothesis. A similar debate also surrounded the execution of, among others, Oklahoma City bomber Timothy McVeigh, who told a newspaper that he wanted his execution to be made as public as possible. He stated that the government should “hold a true public execution – allow a public broadcast.”

While he ostensibly argued that this was to give the Oklahoma City survivors a chance to

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160 Ibid. p267.

161 See, for instance, the short article on the issue by Henry Schwarzschild and Robert R. Bryan who respectively represent the opposing views on “Why KQED should win” and “Why KQED should lose.” “To see or not to see: Televising executions.” In Bedau (ed.) (1998) *The Death Penalty in America: Current Controversies.* Oxford University Press, pp384-386.


“close this chapter of their lives,” others have suggested that his true motivation was that “he hopes his execution will make him a martyr in his quest to get back at the government.”

We seem to have come full circle with the debate to televise. From its historical roots of public spectacle, it was moved to make the punishment a private, hidden affair but now there are voices calling to re-open the process, (voices that never really went away). But in opposition to those voices are others suggesting that televising the killing of killers will have a desensitising, brutalizing effect on the viewing public. But what is the reality of the brutalization argument? Are they groundless or well-founded concerns?

B- The Brutalization Argument.

There are proponents and opponents on both sides of the debate. In favour of televising executions are death penalty proponents who argue, on deterrence grounds, that the more high profile and visual executions are, the greater the deterrent affect it will have. Conversely, there are also abolitionists in favour of televising executions on the grounds that showing what really goes on at an execution will educate the public as to the brutal and horrific nature of an execution thus spurning the public into opposing the practice. As Sister Helen Prejean has consistently argued, “Citizens would consider the death penalty even more shocking if they could see it close up.”

On the other hand there are those from both sides of the capital punishment debate, arguing against the prospect of televising executions on the grounds of the “brutalization

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164 Ibid.
166 In 2004 a national telephone poll conducted by Harris Interactive showed that two-thirds of Americans support televising executions. See: “Two-Thirds of Americans Support TV Execution.” At: http://www.msnbs.msn.com/id/4353934
167 See, for instance, George J. Bryjak, “We believe in the death penalty but shrink from watching.” National Catholic Reporter, May 18th 2001. Bryjak is Professor of sociology at the University of San Diego. Studies used to argue in favour of televising executions include that of David Phillips, for instance, who has concluded that publicising executions does serve to deter, and that the greater the publicity the greater the deterrent effect in terms of fewer homicides. (See, David Phillips (1980) “The deterrence effect of capital punishment: New evidence on an old controversy.” American Journal of Sociology, pp139-148 at p144.)
thesis.” One of the main contentions of the brutalization thesis is that the more frequent or prominent executions are, the more desensitised the public will become to the idea that violence and murder are acceptable solutions to society’s problems, a perception that will subsequently lead to an *increase* rather than a *decrease* in crime. This is by no means a new concept and its essence can even be found in the works of Beccaria in his 1767 essay *On Crimes and Punishments* in which he wrote:

> “The death penalty is not useful because of the example of savagery it gives to men... It seems absurd to me that the laws, which are the expression of the public will, and which hate and punish murder, should themselves commit one, and that to deter citizens from murder, they should decree a public murder.” \(^{169}\)

As with the deterrence argument, the statistical evidence supporting the theory of brutalization has also been mixed. According to Professor William Bailey’s \(^{170}\) early research for instance, he claimed that there was no evidence to support the theory. In his 1990 article, *Murder, Capital Punishment, and Television: Execution Publicity and Homicide Rates*, he explained that, “A fundamental premise of deterrence theory is that to be effective in preventing crime the threat and application of the law must be made known to the public.” \(^{171}\) However, his research examining monthly homicide rates and the television publicity covering executions between 1976-1987 showed that “homicide rates were not found to be related to either the amount or the type of execution publicity over the period.” \(^{172}\) He concluded that “the current levels of execution and media practices regarding executions in this country neither discourage nor promote murder.” \(^{173}\)

In another article he similarly argued that he had seen “no credible evidence that the level or type of print or electronic media attention devoted to executions significantly discourages murder.” \(^{174}\) In a later study in 1998 however, *Deterrence, Brutalization and the Death Penalty: Another Examination of Oklahoma’s Return to Capital Punishment*, in which he examined the rates of murder and several sub-categories of murder \(^{175}\) before and after abolition (between 1989 and 1991), he claims to have found evidence of a

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\(^{170}\)*William Bailey is Professor of Sociology and Associate Dean of the Graduate College at Cleveland State University.*


\(^{172}\)*Ibid.* p628.


\(^{175}\)*Including felony murder, robbery related killings, stranger non-felony murder, and argument related killings.*
significant *increase* in stranger killings following Oklahoma’s resumption of capital punishment after a twenty-five year moratorium. Bailey now therefore claims to have "produced results consistent with the brutalization hypothesis." 176

William Bowers also finds in favour of brutalization over deterrence. He does not rule out the deterrence theory completely but argues that, "the brutalizing effect tends to be longer in duration and stronger in impact than any deterrent effect that may occur – that the *net* effect is brutalization rather than deterrence." 177 Although a supporter of the brutalization thesis he also concedes that in the deterrence versus brutalization debate, the two theories are not necessarily at odds with one another and in fact, "strictly speaking, deterrent and brutalizing effects are not mutually exclusive; the same execution could dissuade some potential murderers and provoke others to kill." 178 In their study *Deterrence or Brutalization: What is the Effect of Executions?* 179 which examined executions in New York between 1907-1963, Bowers and Pierce furthermore concluded that, on average, the homicide rate increased in the weeks following an execution.

Another study arguing that regions employing capital punishment may actually be directly contributing to an increase in their homicide rates is *Deterrence or Brutalization? An impact Assessment of Oklahoma’s Return to Capital Punishment*. In this study Cochran *et al.* (1994) used weekly time series data for more than a year before and after the execution, by electric chair, of Charles Troy Coleman in Oklahoma on September 10th 1990. Cochran *et al.* state that "evidence was found for the predicted brutalization effect on the level of stranger homicide.” They argued that:

> "It appears that the return to the death penalty, at least in Oklahoma, produces a brutalization effect in situations where prohibitions against killing are weakest and where the offender perceives having been wronged (i.e., non-felony and arguments-related stranger homicides.)" 180

By means of explanation for these results the researchers stated:


"We interpret these findings for stranger-related homicides as an indication that a return to the exercise of the death penalty weakens socially based inhibitions against the use of lethal force to settle disputes and thereby allows the offender to kill strangers who threaten the offender's sense of self or honour."181

Even more recently, the Death Penalty Information Center has reported that, "new studies on deterrence throw further doubt that there is any deterrent effect from sentencing people to death or executing people for homicide. The studies did find support for the brutalization effect."182 These studies183 include, Capital punishment and deterrence: Examining the effect of executions on murder in Texas by Sorenson, Wrinkle and Marquart;184 Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to capital punishment by William Bailey185; and Effects of an Execution in Homicides in California by Ernie Thompson.186 As with most aspects of the death penalty however, the debate rages on.

Given the conflicting results produced by research in this field, it is not surprising perhaps that a study into the views of the experts on deterrence and brutalization has shown that 67.1% of the experts either disagreed or disagreed strongly with the statement: "Overall, the presence of the death penalty tends to increase a state's murder rate rather than decrease it."187

In addition to fears that executions may lead to an increase in homicide as a result of an increasingly desensitised public, there is also the additional fear that the more publicity an execution is given, the more desensitised the public will become towards the thought and image of the state taking a life in their name and the more blasé and ambivalent they will become about capital punishment in general. A further potential consequence of televising executions which will be of concern to death penalty supporters is the possibility that the viewing public may, in fact, come to sympathise more with the person... 

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181 Ibid.
182 See “Death Penalty Information Center” (DPIC) website under the heading “Facts about the death penalty.” Deterrence news and developments at: http://www.deathpenaltyinfo.org/article.php?did=1705
183 A brief synopsis of each study as well as much useful information on deterrence studies and their findings can be found at the Death Penalty Information Center website.
187 Michael Radelet et al. (op. cit. note 85) (1995).
who they are watching be executed than with the unknown and unseen victim, thus undermining their support of the penalty.

9- Religion and deterrence.
A- Elements of compatibility and incompatibility between deterrence arguments and religious principles of justice.

Having now invested some considerable time and effort investigating the potential deterrent effect of capital punishment, it seems logical to ask whether deterrence studies actually have any impact on religious perspectives on the death penalty. As discussed in the previous chapter in the context of retributivism, the answer may be that to some people of faith, secular arguments will have no bearing on their opinions when it comes to a matter they consider to be within the realm of only their religion and God to decide. In these cases, if they consider that God has ordained capital punishment by Divine Decree, no amount of research scholarship is likely to alter their positions. However, other religious adherents are happy to be guided by secular reasoning and by changing social circumstances as well as religious doctrine and faith alone. Both of these approaches will be looked at below in the context of the deterrence arguments for and against capital punishment.

i- Elements of the deterrence arguments that are incompatible with religious teachings.

a- Deterrence in practice.

At first glance, having looked at the definition of deterrence at the start of this chapter, there seems to be no reason why the notion of deterrence should be incompatible with religious teachings. After all, the concept of deterrence essentially rests upon the classical view that humans are rational beings endowed with free will and therefore possessing moral agency and responsibility. As the previous chapter demonstrated, this concept of free will, although seen by some to be in conflict with religious teachings of predestination and fate, is generally considered to be consistent with the religious teachings found in both Christianity and Islam, which teach that God has endowed humans with free will. In theory therefore, there is nothing fundamentally incompatible between the basic premise of deterrence, which is that humans can be deterred from certain actions, and a religious worldview.

188 See Part 5 A (b) (i) of Chapter 5 for a discussion on free will from religious perspectives.
There are, however, some problems that arise when it comes to the application of the deterrence theory in practice and which in some instances may lead to situations that are, arguably, incompatible with religious teachings. For instance, it can be argued that the utilitarian philosophy which allows for the potential imposition of an undeserved exemplary sentence on one individual for the purposes of general deterrence, cannot legitimately be justified on religious grounds. Both religions, for instance, emphasise very fervently that no person should suffer for the sins of another. Similarly, most people would agree that, although imposing the death penalty as a punishment for unpaid parking fines would certainly deter, it would nevertheless be grossly incompatible with the fundamental right to life, which is enshrined as a basic precept in both religions, and so to impose such an extreme and disproportionate punishment simply on the grounds of general deterrence is also indefensible on religious grounds. Lastly, the utilitarian philosophy of punishment may be used to justify, in extreme cases, the punishment of an innocent person. This again, goes completely against teachings of responsibility and rights in both Christianity and Islam, both of which predicate the punishment of individuals on the retributive grounds of deservedness and blameworthiness alone and cannot and do not condone the execution or punishment of innocent individuals.

b- Capital Punishment is a matter of faith and not a matter to be determined by empirical studies.

As we foresaw, there are those who argue, from a strictly theological perspective, that the deterrence debate is, in reality, irrelevant to religious beliefs. From a Christian perspective, for example, in his book, *Capital Punishment – What The Bible Says*, Professor Bailey writes, “The Pentateuchal rationale for the penalty was not basically in terms of societal order, and thus modern utilitarian values (e.g., does it deter?), have no bearing on the validity of the biblical attitude toward the topic.” Similarly, Kerby Anderson poses the question “Is capital punishment a deterrent to crime?” and then

189 See Part 5 A (b) of Chapter 5 for a discussion on this issue and Scriptural texts from both faiths demonstrating this principle.
190 See for instance, *The Quran* 5:32. From a Christian perspective, see for instance, the *Evangelium Vitae’s* references to “the original and inalienable right to life” (No. 20). The “sacredness and inviolability of human life” (No. 53) and, “Human life as a gift of God, is sacred and inviolable” (No. 81), as well as many other similar references throughout.
writes, “Although it is an important question it should not be the basis for our belief. A Christian’s belief in capital punishment should be based upon what the Bible teaches not on a pragmatic assessment of whether or not capital punishment deters crime.”

This is also very similar to the Muslims’ approach to this topic. Religiously it is irrelevant whether or not a person can see God’s rationale for establishing a rule or a law in a Holy Book such as the Bible or the Quran. If a thing is proclaimed by Divine decree, so it is to be, no questions asked. As such, many view capital punishment as the definitive punishment that God has prescribed for certain crimes. Whether or not one can prove that it serves as a practical penal deterrent is, as such, largely irrelevant. All that matters is that God decreed it as such. If, as an added benefit, it can be seen how it helps society by reducing crime, so much the better, but it is by no means determinative of the issue.

ii- Elements of the deterrence arguments that are compatible with religious teachings.

However, there are others who would argue that, used moderately, deterrence can be a valuable penal tool. For example, punishing a person in a manner proportionate to their crime and in the amount that they deserve, no more and no less, but making a public spectacle of it can serve a positive deterrent function while not necessarily doing the offender any huge disservice. This has been an argument behind public executions in Muslim countries today, as well as behind Old Testament demands for public involvement in the execution protocol. In this respect, making executions public may be justified on grounds of general deterrence and still be compatible with religious doctrine, and as Part 10 below will show, there are many grounds based on Scripture and tradition which specifically delineate deterrence as a primary aim and justification for punishment. As such, as Kerby Anderson argues:

“Even if we are not absolutely sure of its deterrent effect, the death penalty should be implemented. If it is a deterrent, then implementing capital

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193 Public punishment may, however, humble the offender but this in itself may be a useful form of censure and denunciation. Whether or not this is acceptable would obviously depend on each individual case and the way in which the punishment was carried out and for what offence the offender was being punished.
194 See Part 10 B and 11 C of this chapter regarding religious pronouncements on the public involvement in the execution process.
punishment certainly will save lives. If it is not, then still we have followed Biblical injunctions and put convicted murderers to death."  

Viewed from another perspective, it can also be said that, in many ways the concept of deterrence is in fact fundamental to the most elementary and basic religious teachings. For instance, many people feel that religious faith, in itself, can deter individuals from offending in so far as a truly God fearing person will believe that God is constantly watching them and therefore will, or at least should, be deterred from committing a crime or a sin even when completely alone. Even on a deserted island they will try to avoid harmful or forbidden actions, knowing that God is always with them. This notion of God consciousness is known as taqwa in Islam and is an important element of the Islamic faith.

This is not to say that a person with no religious belief will have a propensity towards criminality. It is obvious that you can have a very outwardly religious and pious person who falsely justifies his actions based on religion and can perpetrate the most horrendous crimes, and conversely an atheist with no religious convictions whatsoever can live a life full of morality and goodness. On the whole however, most people would probably agree that by its very nature, religion in itself can have a positive deterrent effect against wrongdoing as well as acting as a buffer against crime. For anyone who believes in particular interpretations of Heaven and Hell for example, the very thought of eternity spent in a blazing pit of fire is surely the ultimate deterrent!

This issue of the relationship between religiosity and crime, or more specifically the lack of a propensity for it, has in fact been the subject of many research endeavours. While some studies have found little or no support for the proposition that religiosity inhibits criminal tendencies, such as Hirschi and Stark’s 1969 *Hellfire and Delinquency* study, others have found that religion can in fact act as an inhibitor against crime. In their 1995 study entitled “Religion and crime re-examined: The impact of religion, secular controls and social ecology on adult criminality,” Evans et al. used

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195 Kerby Anderson, “Capital Punishment.” Produced by Probe Ministries - Christian Leadership Ministries. This can be found at: http://www.leaderu.com/orgs/probe/docs/cap-pun.html

196 I refer here to both individual religiosity and community level religiosity.


a self-report crime survey\textsuperscript{199}\ of adults\textsuperscript{200}\ to examine the "extent to which religion, independently, or in combination with other factors, inhibits adult crime."\textsuperscript{201}\ They concluded from their study that, "participation in religious activities was a persistent and non-contingent inhibitor of adult crime."\textsuperscript{202}\ They argued that in some respects, religion can act as an "insulator" against crime, and they found this to be the case particularly in the context of religious activities. They found that:

"Religious activities appear to be the best predictive measure of religious control... Compared with the less religiously active, they are more often and more intensely exposed to "proscriptive moral messages" that help curb criminal activity. Frequent interaction with others... who are themselves religious may enable close monitoring and sanctioning of waywardness. And continual reinforcement of moral values and policing of behaviour are more likely when one is embedded in such a community of fellow believers."\textsuperscript{203}

They also explained this phenomenon by suggesting that "religious involvement may motivate respect for secular morality and authority, and strong social bonds may reinforce religious bonds."\textsuperscript{204}

From this study at least, despite its obvious flaws such as its restrictive sample size and non-generalisability, it does seem to be the case that, as one might expect, religion can be effective as an informal (i.e., non-legal) inhibitor or sanctioning system against crime. Whether from this it can be argued that religion can act as a form of deterrence against crime or not is debateable, but it would appear that fear of sanctioning or disapproval from within the religious community may have a significant deterrent effect.

\textbf{Criminology. Vol. 33, pp195-216.} While there are many studies such as this investigating Christianity, I did not find an equivalent study investigating this phenomenon with Islam as the focus. Some studies are available, but they tend to focus more on racial groups than religion. See for instance, Muzammil Quraishi, (2005) Muslims and Crime – A Comparative Study. Ashgate publishers. This study focused on Pakistani and Asian Muslims. It also focused on the victimisation of Muslims, from ethnic minority groups living in Britain (via policies such as stop and search) as opposed to looking at Muslims who themselves perpetrate crimes.\textsuperscript{199}\ Questionnaires were sent to 1,500 individuals over the age of 18, residing in urban Midwestern areas. See Evans et al. (op. cit. note 198) (1995) p201, for more on their sample selection and methodological approaches.\textsuperscript{200}\ Evans et al. (op. cit. note 198) (1995) focused on adults as opposed to juveniles, who are the usual focus of such studies, because, as they point out, using factors such as church attendance as an indicator of religiosity among juveniles may be an "unreliable indicator of religious commitment" given that, at their age, as a result of parental influence "church attendance may be less than voluntary." See ibid. p199.\textsuperscript{201}\ Ibid. Evans et al. (1995) p196.\textsuperscript{202}\ Ibid. p195. This was seen to be the most influential factor and had a noticeable effect whereas the other factors such as "religious salience" and "hellfire beliefs" did not.\textsuperscript{203}\ Ibid. p210.\textsuperscript{204}\ Ibid. p212.
10- Christianity and general deterrence.

A- Scriptural references to deterrence and capital punishment.

Regardless of whether or not secular based research can prove that capital punishment works as a deterrent today, it is quite clear that, in the historical and social context in which many books of the Bible, specifically those of the Old Testament,\(^{205}\) were composed, it was definitely believed that capital punishment did deter. As Professor Bailey writes in his book, *Capital punishment - What the Bible says*, Old Testament books, such as “Deuteronomy, clearly affirms that, for the society of its time, the punishment was an effective deterrent. It is a claim undergirded with canonical authority, for which no counter evidence is possible.”\(^{206}\)

Although the word “deterrence” may not be used in the Bible specifically, deterrence is, nevertheless, frequently discussed in the context of the death penalty. Deterrence as a justification behind punishments in Old Testament references mainly refer to general deterrence whereby an execution is specifically intended to serve as a warning to the “rest of the people.” As Biblical commentator Ian Cairn explains, “Implicit in the phrase ‘all Israel shall hear and fear’ is the understanding that this drastic action will be an effective deterrent.”\(^{207}\) Obviously once a person is found guilty of a capital crime and once their execution is imminent, individual deterrence is a pointless concept and therefore general deterrence seems to be the overall message in many Biblical passages.

i- Purge the evil from society and deter future would-be offenders.

Biblical justifications for capital punishment in relation to deterrence are normally phrased in terms of preventing a repeat of a heinous act by scaring the rest of society. Many of these deterrence verses will be found in conjunction with a passage outlining the importance of “purging evil from society”, which in modern terms is probably equivalent to the argument of public protection. Here are just a

\(^{205}\) Chapter 2 above explains that the primary Biblical texts dealing with the death penalty are to be found in the Old Testament.


few examples of the Biblical passages referring to deterrence in relation to the pronouncement of a capital sentence:

1- “The man who shows contempt for the judge or the priest who stands ministering there to the Lord your God, must be put to death. You must purge the evil from Israel. All the people will hear and be afraid, and will not be contemptuous again.” (Deut. 17:12-13.)

2- “If a man has a stubborn and rebellious son who does not obey his father and mother and will not listen to them when they discipline him his father and mother shall take hold of him and bring him to the elders at the gate of his town. They shall say to the elders, “This son of ours is stubborn and rebellious. He will not obey us. He is profligate and a drunkard. Then all the men of his town shall stone him to death. You must purge the evil from among you. All Israel will hear of it and be afraid.” (Deut. 21:18-21.)

3- “That prophet or dreamer must be put to death, because he preached rebellion against the LORD... you must purge the evil from among you.” (Deut. 13:5.)

4- “If your very own brother, or your son or daughter, or the wife you love or the closest friend secretly entices you saying, “let us go and worship other gods”... do not yield to him or listen to him. Show him no pity. Do not spare him or shield him. You must certainly put him to death... stone him to death... Then all Israel will hear and be afraid and no-one among you will do such an evil thing again.” (Deut. 13:6-11.)

Traditionally, verses such as these were put into a practical context by preachers and religious leaders leading up to or following an execution. It was after reciting the following verses from Deuteronomy that Reverend James Dana, in New Haven in 1790, for example, preached a sermon to a full hall, entitled The Intent of Capital Punishment. He addressed the condemned convict who was present by saying to the criminal, “In about 3 hours, you must die, must be hanged as a spectacle to the world, a warning to the vicious.”208 This address was made in conjuncture with a reading of part of the following verse from Deuteronomy:

“...if the witness proves to be a liar, giving false testimony against his brother, then do to him as he intended to do to his brother. You must purge the evil from among you. The rest of the people will hear of this and be afraid, and never again will such an evil thing be done among you. Show

208 Bessler (op. cit. note 177.) (1997) p27.
no pity: life for life,\textsuperscript{209} eye for eye, tooth for tooth, hand for hand, foot for foot.” (Deut. 19:18-21.)

It is notable that the above cited passages of Scripture which refer to purging evil through capital punishment are all extracts from Deuteronomy, and indeed this message “is not found outside Deuteronomy.”\textsuperscript{210} There are those who may argue that, as the above rules are primarily contained in the Old Testament, they are not applicable to today’s society and are specific only to the historical context and region in which they were revealed. There are also, however, as discussed in Chapter 2, many Christians who follow the Old Testament teachings and consider them just as relevant as the New Testament.\textsuperscript{211} Additionally, as previously mentioned, these laws and pronouncements regarding capital punishment were never repealed or abrogated by the writers of the New Testament, Jesus Christ or anyone else.\textsuperscript{212} So while it may be argued that many verses referring to deterrence refer specifically to the people of Israel and therefore may only be relevant to a time and place where deterrence was perhaps more plausible than today, the converse can also be argued. It can, and often is, contended that the teachings laid down for the people of Israel, as found in the Old Testament, apply to all people for all times, such as the Ten Commandments, unless specifically repealed by the New Testament. As Professor George Knight states, for instance, “It is the Gospel as it is contained in the Old and New Testaments that together comprise our Bible, and the Church, both reformed and unreformed, has always said as much throughout the Christian centuries.”\textsuperscript{213} And although it may seem that the Law of Moses was temporary and specific to his time, this:

“Does not mean that the Law of Moses is now past and forgotten, In Christ it has found new potency and validity, and has taken on a wholly new dimension... The Law of Love now subsumes the Law of Moses, and reinterpret[s] it so that the latter can be applied in principle to any and every situation in any century of the world’s history.”\textsuperscript{214}

\textsuperscript{209} Any underlining of the Biblical verses is my own emphasis.


\textsuperscript{211} See Part 2 F of Chapter 2 for a discussion of the authority of the Old and New Testaments and whether the New abrogates the Old.

\textsuperscript{212} Bear in mind however that, as Chapter 2 indicated, many Christians interpret the New Testament ethos to love thy neighbour and to turn the other cheek as injunctions against all violence, including capital punishment.

\textsuperscript{213} George A. F. Knight. (1962) Law and Grace - Must a Christian Keep the Law of Moses? SCM Press Ltd., p14. The author is a Professor of History and Theology at McCormick Theological Seminary in Chicago. Italics are those of Professor Knight.

\textsuperscript{214} \textit{Ibid.} p115.
This obviously remains, however, a matter open to interpretation and the validity and applicability of the Old Testament verses relating to deterrence and capital punishment today depends on the authority each individual Christian and denomination vests in the Old Testament in light of New Testament doctrine and ethos.

B- Biblical prescriptions regarding public participation in the execution process.

A further aspect of the concept of public deterrence is that of public participation in the execution process. The Bible makes it abundantly clear that executions were intended to be a public spectacle in which the active involvement of the community, or at least the men of the community, should be a natural part, presumably, at least in part, for its supposed deterrent effect. This is evidenced by Biblical verses which say, for instance, that any Israelite who gives his children to Molech, “must be put to death. The people of the community are to stone him.”\textsuperscript{215} Or in the case of a Sabbath breaker, “The man must die. The whole assembly must stone him…”\textsuperscript{216} Similarly, in the context of a rebellious son it is said, “all the men of his town shall stone him to death.”\textsuperscript{217}

C- Concluding comments on Christianity, deterrence and capital punishment.

It is clear, therefore, that Biblically there can be a case made for both supporting and opposing capital punishment today based, in part, on deterrence arguments. On strictly theological grounds, Scripture can be used to support capital punishment on deterrence grounds by referring to the Old Testament verses cited above. Conversely, Scriptural references from the New Testament can be used to argue that those verses were specific to the time and place in which they were revealed and that the Old Testament no longer applies in today’s societies.\textsuperscript{218}

Moving away from strictly theological arguments, Christians on both sides of the debate have also used secular deterrence research to support their positions on the issue. In fact, most official church statements opposing capital punishment make specific reference to the failure of social scientists to \textit{prove} the deterrent effect as one of their primary grounds for opposing the punishment. There are dozens, if not hundreds, of examples of such statements made by prominent church groups, organisations and individuals opposing

\textsuperscript{215} \textit{Lev.} (20:2)
\textsuperscript{216} \textit{Num.} (15:35)
\textsuperscript{217} \textit{Deuteronomy} (21:21).
\textsuperscript{218} See Chapter 2 Parts 3 (iv) and 4 (i) for these argument in more depth.
capital punishment on precisely these grounds. Although it may seem surprising that Churches seem to be influenced by the findings of secular studies, it seems to be the case that although there are certainly Biblical grounds on which to support the punishment as a deterrent, it is widely conceded that secular studies do also matter. As Dale Recinella (2004) explains it:

"First, Biblical truth, revealed through the scriptures in Torah/Pentateuch concerning deterrence and the rules of Talmud to give them effect, indicates that the death penalty should cease when it is no longer a deterrent to capital crimes in the society at large. Second, the American death penalty is not a deterrent to capital crime. We must conclude therefore that the Biblical truth reveals no support for any implied authority to kill through the American death penalty based upon Biblical deterrence."\(^{219}\)

Accordingly, the lack of proof that the death penalty deters more adequately than life without parole, for instance, has been cited as a reason to oppose the punishment by many churches. Official Church statements opposing the death penalty include specific reference to the fact that, "empirical studies indicate that it has no effect as a deterrent."\(^{220}\) And again, it has been said that, "The question of the death penalty's deterrence value remains unproven... There is no clear evidence that the death penalty prevents or deters crime."\(^{221}\) And again, "Capital punishment has not proven to be a deterrent to crime."\(^{222}\) There are many such examples.\(^{223}\)

This position is also adopted by many individual Christian leaders. Reverend Jesse Jackson, for instance, a staunch Christian abolitionist argues that there is no proof that deterrence works and therefore no case for capital punishment on those grounds. He says


that his “investigations into decades of deterrence research reveals that there is no such thing as deterrence. Not even close.”

Some Pro-death penalty Christians, however, argue that “Traditional Catholic teaching maintains that capital punishment is morally justified and a much needed deterrent to criminals… It is the most effective deterrent to crime…” As such it has also been argued that, from a Christian perspective, “if it could be shown that the death penalty had a significant deterrent effect on the number of murders, there would be a case for it.”

11- Islam and the concept of deterrence.

A- Deterrence as a major aim of Islamically prescribed punishments.

The main purpose of Islamic criminal laws in general is the protection of society and the advancement and maintenance of the moral and social wellbeing of the people under its domain. As explained in Chapter 3, there are three categories of punishment in Islamic law (Shariah): Hudud, Qisas and Tazir. While each and every punishment prescribed under these categories may be justified by reference to a multitude of penological concepts such as retribution, denunciation, rehabilitation, social protection, deterrence and so on, each category may also be said to have a slightly different primary emphasis. For example, with regards to Qisas, (also known as the “Law of Equality”), as its name suggests, retribution is the primary penological aim. Conversely, the primary penological aim behind hudud punishments, (namely those fixed penalties prescribed in the Quran and Sunnah) may be said to be that of deterrence. In fact the word Hudud may literally be translated as “prevention, restraint or prohibition” words with definite deterrence connotations.

In order to examine more closely the deterrent nature of some of the Islamically prescribed punishments, including corporal and capital punishment, one can look to two of the key features of these punishments which help to identify their primary purpose as a
deterrence one; namely their severity and their public administration, both of which shall be discussed below.

B. Severity.

As we saw in Part 3 B above, "severity" is one of several features determining the deterrent effectiveness of a punishment. It was said that the more severe a punishment, the greater deterrent effect it has. In this respect, while some Islamic punishments are deemed to be "severe", this is precisely because they are intended to have a major deterrent effect. As Mashood Baderi (2003) explains:

"Both classical and contemporary scholars of Islam do not deny the harshness of the punishments. Their justification however, is that the harshness of the *hadd* punishments are meant to, and actually do, serve as a deterrent to the offences for which they are prescribed."^230

There is also said to be a moral message behind the severity, as the extreme nature of the punishment is meant to show the extreme gravity of the offence in question. Tariq Ramadan (2005), for instance, says:

"The legal text concerning *hadd* is used fundamentally as an indicator of the gravity of the sinful act committed, which is thus considered as a reprehensible act and one of the greatest sins (*kabair*) that merit a correspondingly great punishment. This has a deterrent effect that dissuades people from committing such crimes."^231

One such example of a severe punishment is that of amputating the hand of recidivist burglars. This punishment, as with many other Islamic punishments, is said to serve as both a specific and general deterrent. It is said to serve as a:

"Specific deterrent via its visual and tangible penal tactics imposed upon the convicted offender. Instead of imposing severe limitations on individual freedom such as imprisonment, Islamic punishment causes momentary physical pain to the criminal (which) remains unforgettable to him so that in most cases, he will refrain from future criminal conduct."^232

It is also said to serve as a general deterrent to all who witness the punishment, as well as to all those who later see the mutilated, branded hand of the stigmatised offender.


This *hudud* punishment is undoubtedly severe, but when challenged that it is too severe, a standard response of Muslims is to point out that the punishment is rarely carried out in practice as a result of all of the evidentiary standards and safeguards surrounding its use.\(^{233}\) It has been said, for instance, that while "the cutting off of hands is an Islamic punishment, it is very rarely practised in Muslim countries; it is not known in the Muslim countries of Asia."\(^{234}\) It has also been suggested that, "the fact that the punishment for theft has been executed only 6 times throughout a period of four hundred years is a clear proof that such punishment was primarily meant to prevent crime"\(^{235}\) by serving as an individual and general deterrent; as if it was not predominantly intended to be an exemplary punishment, it would have been made easier to implement on a more frequent, individual retributive basis.

However, although the start of this chapter delineated "certainty" as another factor enhancing the deterrent effectiveness of punishment, the infrequency\(^{236}\) with which this particular punishment is employed does not seem to have eradicated its potential to deter. While there are very few studies available in English on the deterrent effectiveness of such penalties, there is much anecdotal evidence to support its success as a penal deterrent. This is problematic, however, as anecdotal evidence is in many cases unreliable as it is merely a matter of subjective interpretation of what one sees in a particular region instead of a generalisable, objective, fact based observation. This makes it difficult to establish a valid causal link between variables. Nevertheless, it does say something with regards, at least, to the perception of the deterrent effectiveness of such punishments.

As Mohamed El-Awa\(^ {237}\) explains:

"The most common example given by contemporary Muslim writers as evidence of the deterrent effect of the *haad* punishments is the enormous decrease in the crime rate in Saudi Arabia since their re-introduction in that country. During the Ottoman administration of the Arabian Peninsula, the *haad* punishments were not applied. In the late 1920's, when the Saudis took over, they reintroduced them, ordering judges to implement"

\(^{233}\) See footnote 193 of Chapter 3 for more on these safeguards.


\(^{236}\) Statistics are not available on how often this sanction is carried out, largely for the reasons outlined in the introduction.

\(^{237}\) El-Awa is Legal Adviser to the Arab Bureau of Education for the Gulf States, and a Former Associate Professor of Law in the University of Riyadh.
the teachings of the Hanbali School in entirety, including those relating to penal law. Soon after this order, the crime rate fell noticeably.\(^{238}\) More recently Akbar Ahmed (2001) has said that:

"The punishment of cutting off a thief’s hand freezes crime. Because this is practised in Saudi Arabia, it is still possible to see shopkeepers leaving their shops unattended during prayer-time without any fear of theft. It would be a foolish person indeed who would try to steal from them. This state of affairs can be compared to other societies with highly developed and sophisticated police forces where theft, burglary and rape are common because there is no fear of the law or indeed of the punishment it provides."\(^{239}\)

Similar arguments can be made about the use of the death penalty to punish adulterers. As Chapter 3 demonstrated, the death penalty is theoretically prescribed for adultery. However, it was also pointed out that in practice its legal implementation is exceedingly rare. Surely, if adultery was deemed to be such an immoral sin as to deserve death and the aim of punishing adulterers was retribution or revenge, as opposed to deterrence, the evidentiary rules surrounding it would be much more flexible and the law would have been framed so as to make convictions much easier to secure, as every offence would need to be punished in order to achieve the strict aims of retributivism. However, the fact that there are such high evidentiary standards goes to show that it was not intended to be a punishment that could be easily or often meted out. The punishment is therefore more to make a point about the severity of the offence than to actually punish adulterers. As Tariq Ramadan (2005) explains with regard to these hudud penalties:

"The majority of the ulama,\(^{240}\) historically and today, are of the opinion that these penalties are on the whole Islamic but that the conditions under which they should be implemented are nearly impossible to re-establish. These penalties, therefore, are "almost never applicable." The hudud would, therefore, serve as a "deterrent", the objective of which would be to stir the conscience of the believer to the gravity of an action warranting such a punishment."\(^{241}\)


\(^{239}\) Akbar Ahmed, (2001) (op. cit. note 234) p145. For similar arguments attesting to the low crime rates of countries such as Saudi Arabia after the implementation of Islamic law, see, for instance, Baderi (2003) (op. cit. note 230) pp80-81.

\(^{240}\) Ulama are Islamic scholars.

As Aly Mansour explains it, “The underlying intent of Islamic law is not to frighten Muslims, but instead to prevent, through general deterrence, the growth of a climate favourable to the existence and spread of such crimes...” Furthermore, it has been said that “Islamic law lays greater emphasis on the prevention of crimes than on punishing the culprits after the offences are committed.”

It is debateable whether or not punishments such as that for adultery, have actually reduced the incidence of that practice, as statistics are obviously not available for such “offences”. However, it has, at the very least, served to make the subject of adultery a social taboo thus deterring people from practising it publicly or admitting to it openly and thus achieving one of the aims of this particular law.

C- The public nature of some Islamic punishments.

A further characteristic of several Islamically prescribed punishments, which is believed to enhance their deterrent effectiveness, is the public nature of the administration of the penalties. The purpose of meting out a punishment in public is to serve as an example and as a warning to others. For instance, with regard to the punishment for recidivist burglars the Quran says: “And (as for) the male thief and the female thief, cut off, their (right) hands as a recompense for that which they committed, a punishment by way of example from Allah. And Allah is the All-Powerful, All-Wise.”

Similarly, with regards to the corporal punishment for pre-marital sex the Quran says; “And let a party of believers witness their punishment.” In one commentary, or Quranic exegesis (tafsir), for this verse it specifically says “The punishment should be open, in order to be a deterrent.”

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242 Although a key element of “deterrence” is undoubtedly “fear”, the two words are not always synonymous. One would not say that the purpose of the English criminal law is to “scare” or “frighten” its citizens, but one might say that its purpose it to “deter” its citizens from crime. The same is true in the context of Islamic law.


245 The Quran 5:38. Italics are my own emphasis.

246 This punishment consists of flogging.

247 The Quran: 24:2.

248 See p1002 of The Holy Quran - English Translations of the Meaning and Commentary. Printed and translated by the King Fahad Holy Quran Printing complex, (1410 Hijrah.)
Furthermore:

"It is... agreed that all haad punishments should be carried out in public in order to achieve the fullest deterrent effect. Because the Quran commands that the punishment for adultery be carried out in public, the jurists extended this command to all other haad punishments. This... is a clear application of the deterrence theory."249

In the context of punishments such as stoning the adulterer, Mualana Abdullah Nana (2005) explains:

"The perspective of Islamic law is that the punishment of stoning be meted out as seldom as possible, but when it is applied, it should be as a means of deterring people and admonishing them to avoid sin. The severity of the punishment should overcome any possible pleasure to be derived from the sin in the mind of the perpetrator."250

Once again however, there is a lack of empirical evidence able to attest to the deterrent effectiveness of such a penal policy. Again, it is largely a matter of anecdotal arguments both for and against its effectiveness.

Either way, the reality of the situation is that, despite the general theological approval of public executions, in many Muslim countries the death penalty is a punishment that is administered in secret. So whereas countries such as Saudi Arabia and Iran enforce death sentences regularly and very publicly, in countries such as Egypt the execution of convicted capital offenders is carried out behind closed doors, within prison walls.

D- General crime trends in Muslim countries.
With regards to capital punishment specifically, most countries that claim to be actively implementing the Shariah assert the view that the death penalty does have a positive deterrent impact on the crime rate of their countries and most Islamic countries that have retained the death penalty emphasise their satisfaction with it. For example, Saudi Arabia boasts of a very low crime rate, one it attributes largely to the active implementation of Islamic law. In fact, in a recent report prepared for the UN by Graeme Newman entitled, *Global Report on Crime and Justice* (1999), it was recorded that most crimes rates increased in the 1980’s and 1990’s but with “Arab countries usually reporting much

lower rates for all types of crime." It was similarly shown, for instance, in the 7th UN Survey of Crime Trends and Operations of Criminal Justice Systems (1998-2000), that out of 113 selected countries and areas, 5 of the 10 countries with the lowest homicide rates in the world were Muslim Arab countries. This low homicide rate in Arab states has been a consistent trend for decades now.

It is important to bear in mind however, that low crime rates may be attributable to a number of factors which have nothing to do with a country’s retentionist status but are instead related to the methodological difficulties inherent within cross-country comparisons. For instance, as Mark Shaw et. al. (2003) point out, “the crime category for which any incidents are recorded relies on the legal definition of that type of crime in a particular country... should the definition differ across countries... comparisons will not, in fact be made of the same type of crime.”

Similarly, in jurisdictions where it is known that reporting a crime is unlikely to result in a prosecution or conviction, the incentive for citizens to report offences against them is greatly diminished. Furthermore factors such as low reporting by victims of crime, repressive measures by the police to keep crime rates down (or at least the reporting of crime down); misleading figures cited by various governmental regimes and their criminal justice agencies and so on, all have the potential to result in a misinformed, distorted picture of the true situation. While some of the problems regarding accepting crime statistics at face value were considered earlier in Part 7 B and C above, these points

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252 See: http://www.unodc.org/pdf/crime/seventh_survey/7su.pdf for the statistical results of the survey. This data was compiled with reference to 92 different countries.


254 See Appendix P for a graph from Mark Shaw et al., ibid. p48, which shows this trend between 1986-2000.

255 Mark Shaw et. al. (op. cit note 253) p37.

256 As a result of traditional and cultural mores, this reluctance is particularly prevalent in cases where women feel that they cannot report incidents of sexual or domestic abuse.

257 Periods of political instability and times of war will also affect the results. According to the study by Shaw et al., (op. cit. note 253) for instance, Sudan had the second lowest homicide rate despite the fact that it is a country that suffers from huge losses of life on a daily basis as a result of its civil and political unrest, losses that go unrecorded.
are even more salient when considering regions where the criminal justice system is controlled by a repressive or secretive governmental regime.

Regardless of the reality of the situation, the perception is frequently that implementing the strict Shariah criminal laws does deter crime. Those Muslim countries which implement capital punishment, purportedly in accordance with Islamic law, generally attribute their low crime rates, at least in part, to the deterrent effectiveness of capital punishment. As Roger Hood (2002) explains, “it has been claimed that the imposition of Islamic law, including the death penalty, has been an essential factor in the transformation of Saudi Arabia into a society with a high degree of public order and a low rate of crime.” Similarly, it has been said with regards to Nigeria that, “Although no reliable statistics have been compiled, Dr Datti Ahmad, the President of the Supreme Council that oversees the implementation of Shariah law, claims that Shariah is working because the crime rate has plummeted.”

Again, although there may be a host of other political, social, penal and economic reasons for this alleged drop in crime, the perception of Shariah as a successful deterrent seems, nevertheless, to prevail once again.

E- A final comment on Islam and the concept of deterrence.

A final point to make is that, as with Christianity, the deterrent effectiveness of Islam against criminality is not solely founded on legal grounds. If it were, then there would be no difference between a Muslim being deterred by an Islamic law or a secular one. In Islam, deterrence against wrongdoing takes place on two levels; the worldly and the otherworldly. Namely, the system of punishment and reward that face us all in this life, and that pertaining to the Day of Judgement, the Day when all of humankind will stand before their Lord for judgement and when they will be punished and rewarded according to their deeds set forth in this life. A Muslim’s relationship with their Lord is therefore a

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258 According to Amnesty International, some of the Muslim countries known to have carried out executions in recent years, include, Egypt, Iran, Iraq, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia and the United Arab Emirates.


261 Also know as the “Day of Reckoning”, “The Day of Recompense”, “The Event Inevitable” and “The Hour”; it is said that the Day of Judgment is a period that will last, for some, for the equivalent of 50,000 years.
mixture of love and fear. On the one hand is the love for God and the desperate yearning to earn His pleasure, and then there is also the fear of displeasing Him and the fear of incurring His punishment and wrath. This creates a balance of emotions which encourages righteousness and deters one from sinfulness.

12- Conclusion.
Deterrence arguments surrounding the death penalty are clearly very complex. From a strictly secular perspective there is ample evidence, both anecdotal and empirical, to either support or oppose capital punishment. Studies supporting both sides have been cited in court judgments, presidential campaigns and religious statements and appeals.

The failure of the death penalty to deter serious crimes has also recently been cited by some countries as one of their reasons for abolishing the practice. In June 2006, for instance, while discussing a Bill in front of the Philippine Senate and House of Representatives, which had moved to replace the death penalty with life imprisonment or imprisonment for up to 40 years, (depending on the nature of the offence), Edcel Lagman, a senior legislator in the Philippines said, “Studies show that the death penalty is not a deterrent to the commission of heinous crimes.”262 The death penalty was subsequently abolished.

While it is clear why deterrence research is so vital to the development of an informed understanding of the death penalty from a secular perspective in terms of directing and developing public policy, deterrence arguments are also increasingly becoming a major touchstone of religious perspectives on the issue as well. It has been seen that, religious bodies, particularly Christian ones, have increasingly bolstered their religious positions with reference to secular research and have couched their appeals, not only in religious terms but also in secular terms and using secular arguments. Whether this is to expand their appeal to a wider non-conformist audience or whether simply to add the weight of logic to their religious beliefs is unclear, but it is probably a combination of both. Either way, deterrence arguments and deterrence research are clearly important elements in the quest for either supporting or opposing capital punishment at both secular and religious levels.

Chapter 6. 
Methods of Execution.

1- Introduction.
The first part of this chapter addresses the question as to why investigating the methods of execution is an important endeavour. This is followed in Part 2 by a very brief discussion on methods of execution in a historical context and an examination of some of the changing aims of punishment. Taking America once again as a focal point, Part 3 assesses the constitutionality of capital punishment in light of the Eighth Amendment of the U.S. Constitution, which states that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Part 4 then looks in some detail at some of the more contemporary methods of imposing capital punishment. This is followed in Parts 5 and 6 with a discussion on methods of execution from the perspectives of Christianity and Islam respectively. This includes examining some of the traditional methods of execution referred to in the Scripture and traditions of both religions as well as asking which contemporary methods, if any, are specifically promoted or prohibited in each faith.

2- The importance of studying the different methods of execution.
It would be a very superficial study of capital punishment to consider only the theoretical penal and religious justifications for and against it without also discussing the practical methods of execution used. It is very easy to talk in the abstract about a government’s right to take a person’s life in theory but the issue becomes much more tangible and grave when the actual act and process of taking that life is examined. What do we really mean when discussing putting a person to death? What kind of death are we referring to? Are we talking about a quick and painless death or a prolonged and agonising one? Should the method used be humane or torturous? These are only a few of the inevitable questions raised when discussing methods of execution.

My main reason for examining this aspect of the debate is to assess the impact that the method of execution has on the religious debate. If it is argued, for instance, that either religion accepts the death penalty in principle, it must then be asked how it is to occur

1 Italics are my own emphasis.
in practice. Can death be delivered in any legal state-sanctioned manner or is there a religiously prescribed method in which it must be done? Similarly, does the religious position alter if the method employed is particularly gruesome, painful or unnecessarily inhumane? Alternatively, what if the methods employed are shown to be as humane as possible? Would that not alleviate one of the primary grounds of opposition and thus remove a substantive critique from the religious abolitionist's perspective? In order to answer these questions regarding how, if at all, the method of execution effects religious considerations of the penalty, the methods themselves must first be examined and discussed.

Before that however, it is worth drawing attention to the fact that a number of interest groups, both secular and religious, including abolitionists, retentionists and even more pertinently, death row inmates themselves, each have a vested interest in such discussions, some of which shall be examined briefly next.

A- Death row inmates.
First and foremost, the question regarding the methods of execution used is an issue of vital concern to the thousands of convicts worldwide who are currently residing in prison cells awaiting their executions. This includes the 3,370² inmates on death row in America today, each of who face the imminent or eventual prospect of execution. The fact that their lives are to be forcibly taken by the state is one thing, the fact that the chosen method of execution may conceivably amount to torture, is quite another.

In light of this concern, over the years several requests have been made to the courts by convicts who have sought permission to videotape executions in an attempt to prove that certain methods of killing constitute cruel and unusual punishment and are hence unconstitutional under the Eighth Amendment of the U.S. Constitution. Whereas the courts have denied these requests in some cases,⁢ in others the applicants have been permitted to submit recordings of executions as evidence in their own hearings.⁣ In

² This is the estimate, as of Spring 2006, provided by the "Quarterly Report by the Criminal Justice Project of the NAACP Legal Defence and Educational Fund Inc." Available at: http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Spring_2006.pdf
order to call attention to the cruelty of capital punishment some offenders have even
gone so far as to elect the method of execution that they feel is the most brutal and that
would thus be hardest on the state to administer and justify. Such was the reasoning of
John Taylor, for instance, for electing his death to occur by firing squad in 1996.5

B- Abolitionists.
Abolitionists frequently refer to the methods of execution when framing their
arguments against the death penalty. Exposing the detailed nature of botched executions, for instance, has become a primary debating technique for many
abolitionists in their quest to discredit and abolish the punishment. As has already been
demonstrated, many are convinced that if the public are made aware of the pain and
suffering brought about by even the most “humane” methods of execution, they will be
so horrified and repulsed that they will inevitably turn against the prospect of
executions being carried out in their names.7 It is by exposing the horrors of the process
of state-sanctioned life taking that many abolitionists feel that they will gain the most
support for their cause. Many abolitionist organisations therefore go to some lengths to
detail the horrors of the execution protocol in an attempt to discredit the process and all
those who support it.8

This is not an approach favoured by all death penalty opponents however; there are
some abolitionist organisations, who do not want to be drawn into the debate as to
which method is the most or least humane as they are categorically opposed to all
methods. The American Civil Liberties Union (ACLU), for instance, state in their

5 See Part 4 E (i) below for another mention of John Taylor’s case.
6 To clarify the term “botched” I would refer to the definition provided by Marian Borg and Michael
Radelet according to whom, “botched executions” are “those involving unanticipated problems or delays
that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of
Punishment – Strategies for Abolition. Peter Hodgkinson and William A. Schabas, (eds.) Cambridge
University Press, pp143-168 at p144.
7 See for instance, the opinion of Sister Helen Prejean at footnote 168 in Chapter 5 above.
8 This is the case, for instance, with Human Rights Watch, (an organisation that opposes capital
punishment in all circumstances). See for instance: http://hrw.org/reports/2006/us0406 Or see the website
of an organisation such as Canadian Coalition Against the Death Penalty at:
http://www.ccadp.org/botchedx.htm Beware, however, that photographs of botched executions on this
website may be disturbing.
**Briefing Paper Number 8 – The Death Penalty**, that “execution by any of these methods is often an excruciating and always degrading process…”

International Human Rights authorities, such as the UN Human Rights Committee, also seem to be moving increasingly towards this view. In the case *Ng v Canada*, for instance, the use of the gas chamber was successfully challenged when it was found to constitute a cruel and inhumane punishment thus violating Article 7 of the International Covenant on Civil and Political Rights (ICCPR). There is still much more work to be done however before abolitionists can claim the ultimate victory of a death penalty free world and so, until that goal is realised, abolitionists will continue to draw attention not only to the horrors of the state being able to take a human life but also to the horrors of the methods of execution themselves.

**C- Retentionists.**

Retentionists may not be as keen as abolitionists to detail the specific horrors of botched executions but it is nevertheless an important issue for them too. Just because a person is an ardent supporter of capital punishment does not mean that they advocate suffering. It is quite plausible to defend capital punishment but specify that the convict’s death should be as painless and humane as possible and it is only if the horrors of present methods are exposed that new relatively humane methods of execution can be sought. To most retentionists, religious or secular, it is the loss of life itself that is supposed to be the punishment, not the additional elements of pain and torture. Many retentionists are therefore in favour of finding and utilising more humane methods of execution, (particularly if they are trying to show that death can in fact impose less suffering than life imprisonment.)

In general, therefore, it can be said that the primary purpose of studying execution methods to a retentionist is to aid the quest to find the most humane method available,

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9 By “any of these methods” they refer to the modern methods of execution. American Civil Liberties Union Briefing Paper, Number 8, at: http://www.lectlaw.com/files/cri03.htm.
10 *Ng v Canada*, (No 469/1991) (UN Doc. A/49/40, Vol. II, p189, HRLJ 149). This case will be discussed in greater detail in Part 4 C (iv) below.
11 Although the pain brought about by an execution can take a number of forms, this chapter is primarily concerned with the physical process of execution and the physical effects on the human body as opposed to, for instance, the psychological or emotional effects.
whereas for an abolitionist it is to expose the horrors of, and subsequently discredit, state-inflicted death.

2- Execution methods in a historical context.

A- Historical methods of execution and the intended infliction of torture.

Today, numerous international human rights instruments include commendable prohibitions against the infliction of torture and cruel and unusual punishments. In the context of capital punishment specifically, a primary focus of the contemporary death penalty debate revolves around the humanitarian need to reduce the infliction of unnecessary pain and suffering which is imposed during an execution.

This is a relatively new state of affairs however, as historically pain, torture and suffering have been hallmarks of a ‘successful’ execution. Traditionally, the method chosen has tended to reflect the intended penological philosophy or justification behind the punishment. When general deterrence has been a primary goal, for instance, in addition to making executions open, public spectacles, pain and torture have also frequently been intended as necessary prerequisites to death itself. The intended infliction of pain can be seen to have been an intrinsic element of punishments such as being: disembowelled, burned at the stake, drowned, boiled in oil, broken on the wheel, crucified, fried to death, beaten to death, buried alive, flayed or skinned alive; poisoned, pressed to death, sawn in half, suffocated, thrown from a great height;

12 This includes, for instance, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted and opened for signature, ratification and accession by General Assembly Resolution on 10th December 1984. For more information on this Convention see, for instance: http://www.hri.ca/uninfo/treaties/39.shtml Also see, for example, Article 5 of the Universal Declaration of Human Rights (1948) which states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Also see Article 7 of the International Covenant on Civil and Political Rights, among many others, for further examples of such prohibitions.

13 See Chapter 5 Part 8 A (i) for more on the purpose of public executions in the context of general deterrence.

14 See Appendix A for a rendering of a person being burned alive.

15 This punishment is probably best known for its employment in cases of suspected witchcraft by way of the infamous ducking stool. It was also sometimes used to punish for maritime crimes related to piracy.

16 Records exist that show that some people boiled for as much as two hours before succumbing to death. See, for instance: http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html

17 This method consisted of the condemned’s limbs being broken and then the shattered appendages being woven through the spokes of a large wheel. This was the method by which Saint Catherine was executed (hence the term the Catherine Wheel). This was a particularly popular method in Europe during the Middle Ages.

18 This was infamously the fate of Socrates in 399BC.

19 This was often used for those who refused to confess to their alleged crimes.

20 See Appendix B.
torn apart between two trees, beheaded, killed by pendulum or ripped apart by animals.

The aim of public deterrence was also frequently sought by leaving the severely mutilated corpses of convicts on public display. One of the various methods used to achieve this aim was gibbeting. Leaving crucified bodies and decapitated heads staked on posts at a city’s entrance was another method used to warn potential offenders of the penalty they risked incurring in the event of their lawbreaking. Regardless of whether or not these methods actually succeeded in deterring other potential offenders, the fact remains that they clearly allowed for, and indeed often required, the intentional infliction of pain, torture and mutilation.

A seminal epoch, in terms of the changing methods of execution, occurred towards the end of the eighteenth century where, partly due to the Enlightenment era, there was a perceptible shift away from some of the more brutal methods of execution. During this time, a concerted effort was made to reduce the number of capital offences, to restrict torture and to find more humane alternatives to the previously popular methods of execution. While discussions of deterrence and retributivism still remain a focal aspect of penal discourse today, the emphasis on the method of execution has been reduced to the act of life-taking alone (at least in countries such as America) and has moved away from the intended infliction of torture.

This change occurred in conjunction with a perceptible shift away from physical punishments of the body, such as whipping, branding, maiming and blinding, (previously acceptable methods of torture), towards punishments of the mind and soul. As Michael Foucault (1977) describes the transition in his book *Discipline and Punish – The Birth of The Prison*, “The body as the major target of penal repression disappeared.” Contrary to traditional penal practices, “Physical pain, the pain of the

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21 Beheading has taken various forms including, by axe (Appendix C), sword (Appendix D), gibbet (Appendix E), guillotine (Appendix F and G), or simply by slitting the throat from ear to ear.
22 See Appendix H for an explanation of these last three methods of execution.
23 Gibbeting refers to one of two practices. Either the imprisonment of an offender in a metal cage suspended from a tree in which they would be left to die of huger, thirst and exposure to the elements; or the practice of leaving a hanged corpse to decompose while suspended in a metal cage in full public view.
24 See Chapter 5 Part 8 A (i) above for more on the issue of public spectacle and deterrence.
body itself, is no longer the constituent element of the penalty." Furthermore, death itself is the punishment and it must be “a death that lasts only a moment – no torture must be added to it in advance, no further actions performed upon the corpse; an execution that affects life rather than the body.”

Given that the ultimate purpose of punishment is, by general consensus of the “civilised” world no longer supposed to be the infliction of physical pain itself, it goes some way to explain the drive throughout the last century of international human rights laws and humanitarian bodies to seek a reduction in the number of capital offences, to find alternatives to capital punishment, to abolish torture and to find more humane alternatives to the previously popular methods of execution.

Although most of the aforementioned methods have thankfully been relegated as relics of the past, today there still remain a number of methods of execution that many would declare to be just as barbaric and inhumane as some of their more gruesome predecessors. It is to these modern methods of execution to which we shall soon turn. First however, it is important to discuss some of the legal and constitutional principles that are leading the way in the debate on humanising the methods of execution. Taking America once again as a case study it is to the American Constitution to which we now turn.

3- Developments in the modern execution process.

A- The constitutionality of capital punishment in light of the Eighth Amendment of the U.S. Constitution prohibiting “cruel and unusual” punishments.

On the 15th December 1791 the United States Bill of Rights was ratified. A cornerstone of American law and politics, it aimed to secure the basic freedoms and fundamental rights of the American people. Of the ten Amendments that together constitute the Bill, it is the Eighth Amendment of the U.S. Constitution that is most commonly associated

26 Ibid. p11.
27 Ibid. p12.
28 It is evident however, that this is by no means a universal consensus and many regions of the world continue to implement horrific methods of torture, within their penal systems, on a daily basis.
29 Once again, this Amendment states in full that, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
with the death penalty debate. It is this amendment that guarantees the right of Americans not to be subjected to "cruel and unusual punishments."\(^{30}\)

Over the years, the American courts have had to consider numerous aspects of the death penalty in light of this Amendment, including the issues of: which offences can and cannot constitute capital crimes;\(^{31}\) who can and who cannot be subjected to the death penalty;\(^{32}\) whether excessive amounts of time on death row can constitute cruel and unusual punishment;\(^{33}\) as well as the constitutionality of the death penalty itself.

The question of what constitutes cruel and unusual punishment is a complex and controversial area of American Constitutional law. However, with regards to the argument that capital punishment as a penal sanction, in and of itself, violates the Eighth Amendment, the courts have largely settled this issue. Following the case \textit{Furman v Georgia}, 408 U.S. [1972],\(^{34}\) which successfully contested the constitutionality of capital punishment and led to a temporary national moratorium and several changes to the penal and judicial process, the U.S. Supreme Court in the case \textit{Gregg v Georgia}, 428 U.S. 153 [1976],\(^{35}\) specifically ruled that the Eighth Amendment did not extend to capital punishment \textit{per se}, (although it could apply to the way in which the penalty was administered). The Justices cited a number of reasons for their decision. One argument posited by Mr Justice Stewart was that the death penalty, (which was widespread at the time the Bill of Rights was penned), is specifically referred to in the Fifth Amendment which says in part: "No person shall be held to

\(^{30}\) This amendment also applies to punishments other than the death penalty. In \textit{Weems v United States}, 217 U.S. 349 [1910], for instance, it was held that twelve years of hard labour could constitute cruel and unusual punishment, as could expatriation, see \textit{Trop v Dulles}, 356 U.S. 86 [1958].

\(^{31}\) In \textit{Coker v Georgia}, 433 U.S. 584 [1977], for instance, it was held that the death penalty was a disproportionately excessive punishment for the crime of rape and was therefore unconstitutional in that context. It was also held in \textit{Woodson v North Carolina}, 428 U.S. 280 [1976], that mandatory death penalties are unconstitutional.

\(^{32}\) For instance, it was recently held in the case \textit{Atkins v Virginia}, 536 U.S. [2002], that the execution of a person who is mentally retarded does constitute cruel and unusual punishment under the Eighth Amendment. See Chapter 7 below for more on the execution of ethnic and racial minorities, the indigent, and mentally ill offenders.

\(^{33}\) \textit{Foster v Florida}, 537 U.S. [2002] Oct. 21" 2002. In this case the petitioner had spent over 27 years imprisoned after he was sentenced to death.

\(^{34}\) The Justices in this case held that capital punishment as it was then practised did violate the Eighth Amendment by virtue of the way the penalty was arbitrarily applied. For more information on the reasons behind this decision see Chapter 7, Part 1 D (i).

\(^{35}\) See Chapter 7 Part 1 D (ii) below for more on this case.
answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...”

From this, Mr Justice Stewart argued, it can legitimately be surmised that the framers of the Constitution did not intend to abolish capital punishment when they prohibited cruel and unusual punishments.

Nevertheless, despite the evident constitutionality of capital punishment itself, it is widely acknowledged that the prohibition can extend to particular methods of execution which may, by their very natures, amount to cruel and unusual punishment. The problem then becomes to ask which methods amount to cruel and unusual punishment and which do not and why some are considered to be crueller than others?

In part, the perception as to which methods amount to cruel and unusual punishment is a dynamic one, constantly changing with time. Its non-static nature is an acknowledged characteristic of the Eighth Amendment. In Trop v Dulles, 356 U.S. [1958], it was said that the interpretation of the Eighth Amendment largely relies upon, “the evolving standards of decency that mark the progress of a maturing society.” This interpretation leaves the issue wide open to debate. In the past, for instance, burning at the stake was seen as an acceptable form of punishment, whereas today, not only would it be considered as unacceptable by the vast majority of people, it would also undoubtedly be considered as unconstitutional. In a more modern context however, the issue is not as easy to discern. The gas chamber, for instance, had until very recently been seen as a humane way to kill. While still approved of by many, it has nevertheless recently been declared as unconstitutional in certain regions, including California.

In Fierro v Gomez, 77 F3d 301 (9th circular 1996), a federal court decision in 1996, the court “specified three criteria for judging the constitutionality of a particular execution method. In order to be within constitutional limits, the means of execution must provide

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36 See Part III - C of the Gregg ruling. Exceptions to this rule are then cited in the next part of the Amendment.
37 Trop v Dulles, 356 U.S. at 101 [1958].
38 In Re Kemmler, 136 U.S. at pp446-7 [1890], for instance, the court acknowledged the unconstitutionality of punishments such as breaking on the wheel and crucifixion.
39 See Part 4 C below for more on the reasons behind the prohibition of the gas chamber in California.
a death that is (1) instantaneous, (2) painless and (3) not lingering.\textsuperscript{40} These criteria are rarely met however and, as such, there is no way of telling how many of today’s “humane” methods may in a few years become obsolete and looked upon as equally savage and barbaric as their predecessors.\textsuperscript{41}

Even putting the issue of constitutionality temporarily aside, there are a number of aspects of the administration of capital punishment that many people instinctively feel violate human rights by causing unnecessary pain and by needlessly prolonging the killing process. Some of the arguments forming the bedrock of such opposition will be considered throughout the next section.

\textbf{4- Contemporary methods of execution.}

In this section each of the methods of execution presently used within the United States will be examined. The methods currently employed are: lethal injection, the electric chair, the gas chamber, hanging, and death by firing squad. I shall discuss them in rank order from the method used by the greatest number of U.S. states to the method used by the least.\textsuperscript{42} In each section the following issues shall be considered:

1- The historical development of that method.
2- Its current usage, including the number of states or countries worldwide that employ it.
3- A detailed description of the process leading to death.\textsuperscript{43}

\textsuperscript{40} Borg and Radelet (op. cit. note 6) (2004) p145.
\textsuperscript{41} The issue of the unconstitutionality of some of the modern methods of execution will be considered further in Part 4 of this chapter under “Particular issues of concern.”
\textsuperscript{42} See Appendix I for a list of the execution methods used in the various U.S. states. Also see Appendix J for a map of the U.S. showing the various execution methods used by jurisdiction.
\textsuperscript{43} It is important to note that although the specific details of the execution protocol may vary slightly between states, (including variables such as the exact cycles of voltage used in an electrocution) nevertheless, the basic procedures outlined are essentially the same in most states that adopt that particular method. In addition to this is it worth noting that, regardless of the method used to kill, or the state in which the execution is to take place, the pre-execution protocol is also fairly standard. For instance, regardless of which state they are in, it is normal practice for the executee to be put on “death-cell watch” or “suicide watch” in the days or hours leading up to their execution. In the final hours he, or she, will be issued the last meal of their choice. A final shower is taken and a change of clean clothes is issued. Final statements are recorded. Letters to loved ones may be dictated or written. At the request of the convict, a prison chaplain, or a spiritual advisor, may meet with the offender and can stay with them until the Warden announces that the time has come to move into the execution chamber itself. Until that moment, their time is frequently spent writing letters to loved ones and praying for a last minute reprieve or pardon from the governor.
4- A selection of some of the primary issues of concern relating to that particular method including, among others, the problem of botched executions and the perceived humanity of that method.

A- Lethal Injection.44

i- History.
The concept of delivering death to convicts by way of a lethal cocktail of drugs was originally conceived during a quest to find a more humane alternative to hanging. It was first proposed as a method of execution by J. Mount Bleyer MD in New York in 1888. The proposal was rejected however in favour of the electric chair. Nevertheless, in 1977, almost a century later, after investigating alternatives to the electric chair, Dr Stanley Deutsch proposed the reconsideration of lethal injection. This time it was accepted. Oklahoma was the first state to adopt the option but it was in Texas that lethal injection was first used. Convicted of kidnap-murder, on 7th December 1982, Charles Brooks was the first man to be killed by this method. His execution was hailed as such a success that within a year “it was the second most frequently authorised means of execution in the United States.”45

ii- Current usage.
Lethal injection is the most common method of execution in America today. According to Human Rights Watch, as of June 2006, “Lethal injection executions are virtually the only form of execution used to kill prisoners in the United States. Of the 1,026 executions since 1976, 858 were by lethal injection. Every execution in 2005 was by lethal injection.”46 Thirty-six out of the thirty-eight retentionist states use lethal injection as either their sole method, or as one of several alternative methods.47 It is also a method used by the U.S. government and military.

44 See Appendix K and L for a picture of a typical lethal injection gurney and chamber. Also see Appendix M for a medical visual aid explaining the physiological effects of lethal injection.
47 Refer back to Appendix I for information on the methods available in each state.
America was the first country in the world to utilise the lethal injection as a means of execution. However, the popularity of the method is slowly spreading around the globe. In 1997 China was the first country after America to adopt the lethal injection, following by Taiwan, Guatemala, the Philippines and Thailand.

iii- Procedure.

a- The procedure for administering lethal injections in the U.S. is a highly clinical and detached one. It begins by strapping the offender to a gurney and fully restraining them, after which they are connected to an electrocardiogram (EKG) machine that will be used to monitor their heart rate throughout the procedure and detect the inevitable flat-line. Two intravenous lines (IVs) are then inserted into the convict’s arms through which a harmless saline solution is immediately run. The prisoner is then wheeled into the execution chamber where, on the Warden’s signal, the curtains are drawn back to allow the witnesses in the viewing room to observe the execution.

b- On the Warden’s signal the first of three chemicals are administered by the executioner. The three standard drugs used are:

A- Sodium Thiopental, (Penthonal.)
B- Pancuronium Bromide, (Pavulon.)
C- Potassium Chloride.

c- The first chemical, Sodium Thiopental, is a barbiturate with an anaesthetic effect. Whereas in a normal surgical procedure a patient may receive between 100-150mg, in an execution the dose is 5000mg leading to the supposition that once this drug is administered no pain is felt at all.

48 The lethal injection procedure has in fact been considered so successful that, in an effort to be more efficient and cost effective, provincial authorities in China have sanctioned the use of lethal injection execution vans. See Appendix N for a photo of these execution chambers on wheels. See Amnesty International magazine May/June 2003, Issue 119, p10 for the source of this report.
49 Two IVs are generally used so that one can serve as a backup in case of difficulties.
50 Some states use one-way mirrors so that the offender cannot see the witnesses while others use clear glass to allow full viewing both ways.
51 Although there was a time when a lethal injection machine was used to administer these drugs, this method was abandoned by most states after concerns regarding the potential for mechanical and technical failures. As a result, today the drugs are normally administered manually.
52 See: http://www.howstuffworks.com/lethal-injection4htm
d- After flushing the IV line with saline solution\textsuperscript{53} the Pancuronium Bromide is administered. This is a muscle relaxant and paralytic agent that has the effect of stopping respiration as it forces the lungs and diaphragm to cease functioning. Its effect is estimated to take between 1-3 minutes.

e- Finally the toxic agent, normally Potassium Chloride, is administered. This has the effect of inducing cardiac arrest and causing death. It usually takes between 1-2 minutes for the chemical to take effect.

The time to elapse between the Warden’s instruction to begin the execution and the doctor’s pronouncement of death is usually anywhere between 5-18 minutes.

iv- Particular issues of concern.

a- The dilemma of medical professionals and their involvement in the execution process.

One of the major moral concerns surrounding the administration of lethal injections is the participation, or indeed lack of participation, of medical professionals. It is universally acknowledged that to kill goes against everything a doctor or nurse has been trained to do, a principle enshrined in the Hippocratic Oath which precludes the involvement of doctors in any act that may harm or prematurely shorten a person’s life. This naturally prohibits their involvement in a process that precipitates in the medically unnecessary death of a healthy patient. As such, doctors and other medically trained professionals are generally prohibited from involvement in administering the lethal injection. This is the position adopted by medical organisations such as the American Medical Association (AMA), The American Public Health Association, The American Psychiatric Association and The American Nursing Association, who have each “resolved that members of their professions should not actively participate in executions.”\textsuperscript{54} As such, it is normally the case that the only involvement a doctor has is to pronounce the time of death and to be present throughout the execution in case of medical complications.

\textsuperscript{53} Between the administration of each new chemical, the IV’s are flushed with saline solution. This is, among other things, to prevent clogging of the IV line.

\textsuperscript{54} Zimring and Hawkins, (op. cit. note 45) (1989) p114.
However, as Federman and Holmes (2000) point out in their article, *Caring to Death: Health Care Professionals and Capital Punishment*, “A doctor is not required to belong to the AMA, and no professional penalties are imposed upon doctors who participate in lethal injections.”55 Similarly, thus far, “the nursing profession has not acted to sanction nurses who do participate in execution procedures.”56 Nevertheless, despite this apparent loophole for those medics who do want to participate, it is usually the case that the person who administers the drugs has no medical background at all. They may never even have experienced an execution before as shifts are often rotated among prison staff. This is problematic for several reasons. For one, if the IV is incorrectly inserted into a muscle instead of a vein, this can result in severe pain for the condemned. For another, it is vital that the IV is inserted into a vein instead of an artery as this is the quickest route to the heart and therefore the fastest way to induce death. In addition to this, it can often be very hard to find a vein, especially in the case of ex-drug users or insulin dependent diabetics who may suffer from collapsed veins. Furthermore, given that veins also contract when a person is very scared, this also makes it harder to find a suitable vein, especially for a non-medic, thus prolonging the ordeal and suffering for the condemned.

b- A humane method?

Death by lethal injection was initially posited as a more humane and painless alternative to death by hanging. Today it is still considered, by many, to be the most humane (and least mutilating) method of execution. According to one study for instance, 71% of those polled considered it to be the least painful method of execution.57 That perception has been one of the primary reasons for its spreading popularity over the last few decades.

Some people in fact argue that death by lethal injection is too humane. After the execution of murderer Don Patrick Hauser in August 2000, the mother of his murder victim is reported to have said of his execution by lethal injection, “It was too

56 Ibid. p447.
57 This is the figure reached as a result of the poll undertaken by Mailto Richard which can be found at: http://www.geocities.com/trct111/contents.html
humane... I would like to see “Old Sparky” back.”58 It has also been criticised as being more akin to the mercy killing of a critically ill euthanasia patient than the legally sanctioned punishment of a convicted criminal.

Given that many are led to believe that the greatest physical discomfort of this method is the initial prick of the needle, ostensibly it does seem like a very humane way to die. But is it? It has been suggested by some critics for instance, that just because the convict is unconscious and paralysed, and therefore unable to express or scream their pain, does not mean that they are not in fact in excruciating agony. This is the opinion that has been voiced by several prominent death penalty experts. Law Professor Deborah Denno, for instance, is reported to have said that:

“Death by lethal injection is as cruel and unusual as any other method of execution... The public always assumes lethal injection is painless and quiet and medically sound, but it’s nothing like that at all. It is administered by very inexperienced people who often can’t find a vein and it is very painful.”59

A similar view was expressed when:

“Dr Edward Brunner, Chairman of the Department of Anaesthesia at Northwestern University Medical School submitted an affidavit on behalf of death row inmates in Illinois in which he stated that, lethal injection ‘creates the substantial risk that prisoners will suffocate or suffer excruciating pain during the three chemical injections but will be prevented by the paralytic agent from communicating their distress.’”60

Even the U.S. Court of Appeals voiced concern over this method fairly early on. In the case Chaney v Heckler, 718 F.2d 1174 [1983], it was said that there is:

“Substantial and uncontroverted evidence... that execution by lethal injection poses a serious risk of cruel, protracted death... Even a slight error in dosage or administration can leave a prisoner conscious but paralysed while dying, a sentient witness of his or her own asphyxiation.”61

59 Michele Snipe, June 13th 2000, “Professor says lethal injection is messy and cruel.” Available at: http://www.fordham.edu/current/Whats_New/archive144.html
60 http://www.richard.clark32.binternet.co.uk/injection.html
There have been cases where extreme and violent reactions to the chemicals have been witnessed. In the case of Stephen McCoy, for instance, he was reported to have had such a “violent physical reaction to the drugs (heaving chest, gasping, choking etc...) that one of the witnesses (male) fainted, crashing into and knocking over another witness.\textsuperscript{63}

Recent studies have also caused serious disquiet over the practice. A 2005 study published in the medical journal the \textit{Lancet}, for instance, has suggested that “concentrations of thiopental in the blood were lower than that required for surgery in 43 cases. In 21 of those, the concentrations in prisoners’ blood were consistent with them being aware of what was going on.”\textsuperscript{64}

Although these particular results have been criticised as “bogus” by some doctors,\textsuperscript{65} studies such as these nevertheless raise serious questions about the humanity and constitutionality of the punishment. In fact, in recent months, mounting concern over lethal injection has led to what the \textit{New York Times} refers to as a “flood of lawsuits challenging lethal injection as cruel and unusual.”\textsuperscript{66} Several executions have in fact been stayed over concerns regarding this method. On January 24\textsuperscript{th} 2006, for example, just minutes before his execution, Clarence Hill was granted a stay of execution by the U.S. Supreme Court. The stay was granted until the Court could hear Hill’s challenges to the lethal injection procedure. Having heard his petition, in its decision the court unanimously held that any death row inmate seeking to challenge the constitutionality of the lethal injection process could pursue the matter as part of a civil rights claim. The court did not, however, go so far as to rule that lethal injection itself is unconstitutional. In fact, the opinion was that, as Hill was not contesting the concept itself, just the current process and the fact that the chemicals used could cause severe and unnecessary

\textsuperscript{62} McCoy was executed in Texas on May 24\textsuperscript{th} 1989.

\textsuperscript{63} http://www.geocities.com/CapitolHill/6142/ijection.html

\textsuperscript{64} “Prisoners ‘aware’ in executions. – Prisoners executed by lethal injection in the U.S. may have been aware of what was happening to them, researchers claim.” April 14\textsuperscript{th} 2005, referring to the study by Leonidas Koniaris, in \textit{The Lancet}, Vol. 365, p1412. See BBC News at: http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/health/444447.stm

\textsuperscript{65} See, for instance, State Senator Kyle Janek (Anaesthesiologist) “Attack on Texas lethal injection is bogus.” Available at: http://www.cjlf.org/deathpenalty/TXInjection.htm

pain, "Hill's challenge appears to leave the state free to use an alternative lethal injection procedure." 67

Similarly, in California on February 21st 2006 Federal Judge Fogel ordered the postponement of the execution of Michael Morales, just two hours before it was due to take place. Judge Fogel ordered that, "the state provide better assurance that the process would not constitute cruel and unusual punishment by either providing an anaesthesiologist to monitor the inmate's state of consciousness during the execution, or that the state use only barbiturates in carrying out the execution." 68 As of July 2006 however, Missouri state officials had still not managed to find an anaesthesiologist willing to participate in the execution, and as such the execution has been postponed until September when the court will re-examine the protocol. 69

One of the latest major developments took place on June 26th 2006 when U.S. District Judge Fernando Gaitan Jr. put all executions in Missouri on hold following an appeal by Michael Taylor challenging lethal injection as violating the U.S. Constitution. 70 Similar legal challenges are taking place all over the United States and it may therefore only be a matter of time before a new procedure to deliver death by lethal injection is conceived and put into practice.

c- A lengthy procedure.

Another drawback of lethal injection is that it is one of the methods that potentially takes the longest amount of time to administer and subsequently to cause death. The reasons for the extreme length of time involved in this process are numerous. In some cases the procedure is drawn out as a result of the length of time it takes the executioners to find a suitable vein. In the case of Billy Wayne White, 71 for instance, it took the executioners 47 minutes just to insert the IVs. In the case of Ricky Ray Rector in 1992 it took them 50 minutes just to find a vein, during which time loud moans could

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67 See, Hill v McDonough, No. 05-8794. Decided June 12th 2006, p6. The court's decision can be found at: http://www.supremecourts.gov/opinions/05pdf/05-8794.pdf Hill had originally been convicted of first degree murder.
69 See, for instance, Henry Weinstein, (July 12th 2006) "Showdown looming over lethal injection in Missouri." Los Angeles Times.
be heard coming from the convict. Rector eventually had to help his executioners insert the IVs into his own arms!

Even once the IVs are inserted and the drugs have started flowing, death can still take some time in a botched execution. In the case of Emmitt Foster the restraints that bound him were tied so tight that they were restricting the circulation of the chemicals in his bloodstream. It was only when Foster was still alive 20 minutes after the drugs had been administered that a coroner realised what the problem was and ordered Foster's restraints be loosened. Death still took approximately another 10 minutes. Other causes of botched executions have included problems with kinks in the IV line as well as clogged tubes.

Attempts have been made to rectify this however. After the execution in May 2006 of Joseph Clark in which it took prison staff 90 minutes to find a useable vein, Ohio has changed its protocol and "The state now requires staff to make every effort to find two injection sites and use a low-pressure saline drip to make sure the veins stay open once entryways are inserted." This process was used in the execution of Rocky Barton on July 12th 2006 "in what prison officials say was a successful first test" of the new lethal injection guidelines. This may therefore be the first of many steps required in order to ensure the process conforms to more humane standards.

B- Death by electric chair.

Towards the end of the nineteenth century there was widespread and vocal opposition to the practice of hanging. The anti-capital punishment movement was growing, its cause aided by a succession of botched hangings, including that of John "Babacombe"

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72 Executed in Missouri on May 3rd 1995.
73 This occurred in the case of Charles Walker who was executed on September 12th 1990 in Illinois.
74 This occurred in the case of John Wayne Gacy who was executed on May 10th 1994 in Illinois.
76 Ibid.
77 See Appendix O for two photographs of electric chairs.
Lee who the noose failed to kill three times in 1885.78 Hanging was increasingly viewed as outdated and brutal and a more humane alternative was sought. It was into this atmosphere of dissatisfaction and disenchantment that the concept of the electric chair was developed.

Among its most prominent originators was a dentist by the name of Alfred Porter Southwick, a man who later gained the nickname the “Father of electrocution.” The idea for electrocution as a form of capital punishment is said to have initially sprung from a news report about a man called George Smith who died accidentally as a result of electrocution. The autopsy carried out on his body indicated that he had died an almost instantaneous death with very little bodily mutilation. This report inspired Southwick and his colleagues to embark on a series of experiments in an attempt to find a humane form of euthanasia for stray and unwanted animals and this, in turn, led to the idea that the same process could be used to take human lives. After a series of botched tests on hundreds of stray animals Southwick finally declared success and officially postulated his theory that electrocution could be used as a humane alternative to hanging.

Another major driving force instrumental in the development of the electric chair was a corporate battle between two electricity companies, that of Edison and that of Westinghouse.79

After much debate, a commission was set up to investigate the viability of electrocution as a method of capital punishment to replace, or at least rival, hanging. A bill was passed setting up “A commission to investigate and report the most humane and practical method of carrying into effect the sentence of death in capital cases.”80 The

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78 The law would not allow for him to be hanged for a forth time as it was assumed that he had been saved by Divine intervention. For more information see Craig Brandon, (1999) The Electric Chair – An Unnatural American History. Hardcover, p42.
79 Both companies, pioneers of the new and mysterious substance known as electricity, were promoting their own forms of current; Westinghouse his alternating current (AC) and Edison his direct current (DC). Edison was campaigning for the electric chair to use Westinghouse’s AC in a publicity ploy to prove to the public that AC was dangerous and that therefore any electrical purchases or contracts should be made with him, the producer of the safer DC. In fact, in a ploy by Edison to show just how dangerous Westinghouse’s AC was, the first electrocutions to be made public were those of animals. Edison subsequently pushed for the use of AC to power electric chairs, insisting that it was dangerous enough to kill. In the end it was Westinghouse’s AC that was the chosen current for executions.
80 This bill was passed on May 13th 1886. The Commission was also known as the Gerry Commission.
commission eventually recommended that electrocution be formally adopted as New York’s official method of capital punishment in place of hanging. As a result, New York’s *Electrical Execution Act* was passed on 4th June 1888.

In New York in 1890 amid a media furore, axe-murderer William Kemmler was the first man to be sentenced to die by this method.\(^1\) He immediately appealed against his sentence arguing that death by electrocution was a “cruel and unusual” punishment contrary to the Eighth Amendment of the U.S. Constitution. Throughout his trial the unpredictable nature of electricity was debated, as was the inevitable mutilation of the electrocuted body. Nevertheless, the final outcome was the U.S. Supreme Court’s declaration that death by electric chair was constitutional and did not violate his Eighth Amendment rights.

Kemmler’s execution went ahead on 6th August 1890. The press and public alike waited with bated breath for the outcome of his execution. If deemed as a failure it could herald the end of capital punishment altogether whereas if a success it would potentially be adopted nationwide, if not worldwide, as the new revolutionary method of humane executions.

Although the reports of his death were certainly mixed and confusing it is generally accepted that the execution was botched.\(^2\) Nevertheless, despite the botched nature of this execution, witness reports were mixed as to the success of the event. Witnesses with different vested interests varied considerably in their accounts of the event. While some spectators reportedly turned away in horror, one fled the room and another fainted. Speaking about what he had seen, one Sheriff is reported to have said, “The

\(^{1}\) In the quest to develop death by electrocution many different designs were suggested to provide a means to deliver the fatal current. Proposed designs included electric chambers, (see Appendix P for a drawing of a proposed “electrocution closet”) electrocuting the prisoner while strapped to a gurney; or administering the voltage while parts of the body were submerged under water. Eventually though, it was Southwick’s favoured design, the electric chair with its striking resemblance to the dentist chair with which he was so comfortable and familiar, that finally won out.

\(^{2}\) After the initial jolt of electricity Kemmler was said to be dead and the current was turned off. It was only after congratulations erupted around the room that one of the many doctors present took a closer look at the body and realised that Kemmler was in fact still alive. Panic immediately set in. The order was shouted, “Turn on the current! Turn on the current! This man is not dead!” (See Brandon, {op. cit. note 78} [1999] p177.) The dynamo was turned back on and it was only after the second jolt that Kemmler was officially declared dead. How long it took for him to die is a contested matter. Some witnesses reported 4 minutes while other said 2, whereas the official report states 70 seconds. The botched execution was blamed on everyone from the doctors, to the executioner, to the electricians.
smell of burning flesh haunts me still... It was terrible. His entire body seemed to be convulsed and he acted as though he was making a terrible struggle for his life."83 One report said that, "From a scientific point of view... the Kemmler execution was a failure, beyond doubt he suffered intense torture."84 Southwick however, who was also present at the electrocution, defended his invention by saying, "The experiment of yesterday was a success. I don't care what anybody says, science proved that Kemmler died an absolutely painless death."85

It was into this conflicting mass of public and professional debate that the electric chair was born and, despite the mixed sentiments it aroused, it looked as though the electric chair was here to stay. Between the 1930's and 1970's death by electric chair was the most common method of state sanctioned execution. Infamous victims of "Old Sparky" include, Bruno Haupton,86 Julius and Ethel Rosenberg,87 John Spenkelink, and Ted Bundy.88 Throughout the twentieth century the electric chair alone has claimed the lives of over 4,000 convicts.89 In recent years however, there has been a drastic decline in the number of executions by electric chair for reasons that will soon become apparent.

ii- Current usage.

America is currently the only country in the world to use electrocution as a means of execution. Within America, although ten U.S. states allow for electrocution as an alternative to another method, Nebraska is currently the only state that electrocutes as their sole method of execution.

The standard statutory proclamation regarding the means and cause of death by electric chair is:

"The sentence shall be executed by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death

86 The convicted kidnapper and killer of the Lindbergh baby was executed on April 3rd 1936.
87 It took five jolts of electricity to finally kill Ethel during her execution in Sing-Sing prison in 1953.
88 One of the most notorious and infamous serial killers in American history Ted Bundy was executed on Jan. 24th 1989.
and the application and continuance of such current through the body of such convict shall continue until such convict is dead."  

iii- Procedure.

a- The inmate is seated in a high-back chair which is normally constructed of solid wood and which is securely bolted to the floor. They are then securely bound to the chair at the chest, lap, arms and forearms.

b- An electrode is connected to their calf and scalp, with a damp sponge being placed between the scalp and electrode to aid the conduction of electricity.

c- Once the Warden has given the signal for the execution to begin, the first of a series of volt cycles is passed through the convict’s body. There is apparently no standard protocol with regards to the voltage used and it therefore varies between states. An example of an automatic cycle is:

-2,300v for 8 seconds.
-1,000v for 22 seconds.
-2,300v for 8 seconds.

After a few minutes pause, known as the “cooling period” in which they wait for the temperature of the body to drop slightly, the doctor checks for a heartbeat. If the inmate is not declared dead at this point then the cycle is repeated until death occurs.

iv- Particular issues of concern.

a- The need for several attempts.

One of the most disconcerting aspects of electrocution, is that in some cases it takes several agonising attempts before death occurs. In the case of William E. Vandiver, for instance, even after the initial surge of 2,300 volts passed through his body, it took another 3 jolts and a total of 17 minutes to kill him.


The executioner and the switch are generally in a separate partitioned area so that the condemned cannot see his executioner. In some cases there may be up to three executioners so that no one knows the identity of the true executioner. Only one switch is real however, the other two switches are dummy switches.

This is the standard voltage cycle used in accordance with the Florida execution protocol.

Vandiver was executed in Indiana on Oct. 16th, 1985.
The case *Francis v Resweber*, 329 U.S. 459 (1947), reports how Francis survived the electrocution as a result of a mechanical failure. After being returned to prison, a new death warrant was issued and the convict immediately appealed to the Supreme Court to prevent his sentence being attempted for a second time. However, the court rejected his appeal and held that as “the pain inflicted upon Francis was accidental and unintentional, the state would not be precluded from making a second attempt to execute him.”94 Francis was subsequently executed one year and six days after the state’s first attempt to take his life.

b- A gruesome execution.

For a method of killing that was invented and adopted as a supposedly humane alternative to hanging, there are a surprising number of cases that graphically illustrate that electrocution can actually be a horrifically brutal way to die. In the case of John Evans95 for instance, one eyewitness account described how:

“Sparks and flames erupted... from the electrode tied to Mr Evan’s left leg. His body slammed against the straps holding him in the electric chair and his fist clenched permanently. The electrode apparently burst from the strap holding it in place. A large puff of greyish smoke and sparks poured out from under the hood that covered Mr Evans’ face. An overpowering stench of burnt flesh and clothing began pervading the witness room. Two doctors examined Mr Evans and declared that he was not dead. The electrode on the left leg was re-fastened... Mr Evans was administered a second thirty second jolt of electricity. The stench of burning flesh was nauseating. More smoke emanated from his leg and head. Again the doctors examined Mr Evans. (They) reported that his heart was still beating, and that he was still alive... A third charge of electricity 30 seconds in duration was passed through Mr Evans body. At 8:44 the doctors pronounced him dead. The execution of John Evans took fourteen minutes.”96

In the case *Glass v Louisiana*, 471 U.S. 1080 (1985), in his dissenting opinion Justice Brennan gave a disturbingly vivid account of the effects of an execution by electrocution.

“The prisoner’s eyeballs sometimes pop out and rest on (his) cheeks. The prisoner often defecates, urinates and vomits blood and drool... The body turns bright red as its temperature rises” and the prisoner’s “flesh

95 Evans was executed in Alabama in 1983.
swells and his skin stretches to the point of breaking.” Sometimes the prisoner catches on fire, particularly, “if he perspires excessively.” Witnesses hear a low and sustained sound, “like bacon frying” and “the sickly sweet smell of burning flesh” permeates the chamber. This “smell of frying human flesh in the immediate neighbourhood of the chair is sometimes bad enough to nauseate even the press representatives who are present.” In the meantime, “the prisoner almost literally boils: the temperature in the brain itself approaches the boiling point of water” and when the post electrocution autopsy if performed “the liver is so hot that doctors have said that it cannot be touched by the human hand” The body is frequently burned and disfigured.”97

Electrocution is also frequently accompanied by drooling, urinating, defecation and bleeding. In the 1990 electrocution of Wilbert Lee Evans he was reported to have suffered from a severe nosebleed and the blood was said to have exploded from his hood where it quickly formed a large puddle of blood on his chest staining his shirt a deep red the size of a dinner plate.98

In addition to being a painful and slow process, death by electrocution can also clearly result in the gross mutilation and disfiguration of the body. Law Professor Deborah Denno, who is considered to be an expert on capital punishment, has said that death by electrocution, is “grotesquely painful, terribly disfiguring and a kind of brutality that hearkens back to ancient times. It is absolutely barbaric and compares to no other type of punishment that exists in modern society.”99

c- Human Error - Causes of botched executions.

When searching for the causes of these botched executions many answers present themselves. One is that an electrocution is by no means an exact science. If too much voltage is used the body is likely to burn and may catch on fire. As Fred Leuchter,100 a designer and supplier of execution equipment, explains:

97 Justice Brennan attributes this description to a variety of sources in the endnotes of his judgement.
98 Pictures of the blood stained body of the dead convict are available on the internet. However, I have decided, for the most part, not to include pictures of dead or dying people in my appendices due to their graphic and disturbing nature and as I feel they will not add anything to the quality of this thesis apart from an element of macabre gratuitousness. I also feel that it would be disrespectful to the deceased and their families. However, if you would like further information on this execution or others, some photos can be found at: http://www.richard.clark32.btinternet.co.uk/content.html
99 http://www.fordham.edu/current/Whats_New/archive201.html
100 In 1990 it emerged that Leuchter, who had been posing as an engineer and had contracted his death machinery to many capital states had in fact been misrepresenting himself and did not even posses a degree or licence.
“Current cooks, so it is important to limit the current... if you overload an individual’s body with current, more than 6 amps, you’ll cook the meat on his body. It’s like meat on an overcooked chicken. If you grab the arm, the flesh will fall right off in your hands.”

On the other hand if the voltage used is too low or if the current is not left on for long enough, the convict will take too long to die. The amount of voltage needed to kill will also vary from person to person.

Another cause of many botched executions has been attributed to human error. In the case of Horace Dunkins, for instance, it was only after mentally retarded Dunkins was still alive having received his first jolt of electricity that a prison guard realised that the cables had been incorrectly connected. It took nine minutes for them to be reattached and for Dunkins to finally die.

In another shockingly botched execution, it was reported that in the case of Jesse Joseph Tafero, “during the execution six inch flames erupted from Tafero’s head and three jolts of power were required to stop him breathing.” This horrific spectacle was attributed to “inadvertent human error” in which a defective sponge was used.

Another botched execution that was attributed to the improper use of a sponge was that of Pedro Medina. It was reported that:

“A crown of foot-high flames shot from the headpiece during the execution filling the execution chamber with a stench of thick smoke and gagging the two dozen official witnesses. An official then threw a switch to manually cut off the power and prematurely end the two minute cycle of 2,000 volts. Medina’s chest continued to heave until the flames stopped and death came.”

It is largely as a result of the horrific reports of such gruesome spectacles that the previously popular option of electrocution as a means of execution has been abandoned by most states.
Incredibly enough though, although death by electrocution has been condemned by the American Veterinary Medical Association as a method of euthanasia for animals, it is still considered, by many, to be an acceptable way to kill a human being!

d- The constitutionality of the electric chair.

The case law on the constitutionality of this method has varied from state to state. In the 1999 case Provenzano v Florida, 744 S. 2d ( Fla. 1999), for instance, the electric chair was upheld by the Florida Supreme Court as constitutional, despite claims that it amounted to "cruel and unusual" punishment as it caused unnecessary pain and suffering and due to the serious mutilation that it inevitably produced.

Nevertheless, in Georgia, the opposite conclusion was reached. At first, however, the issue was unclear, as the two key cases that challenged the constitutionality of the electric chair rendered two conflicting decisions. Whereas, the trial court in Dawson v The State, 554 S. E. 2d 137 (Ga. 2001), ruled 4-3 that electrocution did constitute "cruel and unusual" punishment, in violation of the Eighth Amendment, in Moore v The State (S01A1210 Ga. 2001), the chair was declared not to violate the constitution. However, after deliberating on the two conflicting judgements, on October 5th 2001, the Supreme Court of Georgia held that:

"Upon consideration of this difficult issue, we conclude that future use of electrocution as a means of executing death sentences in Georgia would violate the prohibition against cruel and unusual punishments in Art. 1, Sec. 1, Par. XVII of the Georgia constitution. Therefore we direct that any future executions of death sentences in Georgia be carried out by lethal injection."107

The court concluded by saying that, "Accordingly we hold that death by electrocution, with its spectre of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition of cruel and unusual punishment."108

as The Green Mile which, although a fictional story by Stephen King, did provide what many would consider to be a fairly realistic and very disturbing portrayal of a botched execution by electrocution.

106 Florida v Thomas Harrison Provenzano, Case No. CR84-835 3/8/1999, can be found on The Florida Department of Corrections website at: http://www.dc.state.fl.us/oth/deathrow/dorder.htm

107 Per Justice Hunstein, Dawson v The State (S01A1041) p1-2. Moore v The State (S01A1210) both of which can be found at: http://www.state.ga.us/Court/Supreme/

108 Ibid. p16.
C- Gas Chamber.109

i- History.

Dr Allen McLean Hamilton was one of the original proponents of the gas chamber as a means of execution in America.110 It is an innovation said to have been inspired, in part, by the use of poison gas during World War One. It was also allegedly inspired by the increasingly common tendency of suicides to choose the gas oven as their preferred method of suicide!

One of the primary appeals of the gas chamber is that, as opposed to other methods, it results in relatively little bodily damage. Mutilation is rare and this lends it the veneer of a more humane death than other more outwardly physically destructive methods, such as death by hanging, firing squad or electrocution. The first man to die by this method was Chinese immigrant Gee John who was executed in Nevada in 1924. He was declared dead after approximately 6 minutes and the execution was heralded as a great success.

ii- Current usage.

America is currently the only country in the world to employ this method. The procedure is presently available in 5 U.S. states.

iii- Procedure.

a- The condemned is strapped into a chair in a hermetically sealed metal chamber. Beneath the chair is a container holding approximately 8 ounces of potassium cyanide, or sodium cyanide, either in the form of crystals or tablets.

b- On the Warden's signal, the executioner111 pushes the switch which releases the cyanide, allowing the crystals or tablets to fall into a dish of hydrochloric or sulphuric acid below the chair. This initiates a chemical reaction, the result of which is the

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109 See Appendix Q for a picture of a typical gas chamber.
110 In its earliest stages, “the original idea was to surprise the prisoner by gassing him in his cell as he slept without prior warning. This proved impracticable and thus the gas chamber was invented by Major Delos A. Turner, an army medical corps officer.” See: http://www.richard.dark32.btinternet.co.uk/gascham.html
111 Often there are three executioners who simultaneously push three different switches. Only one switch works and the other two are dummy switches that have no effect. As with other execution protocols this is intended to preserve the identity of the executioner.
production of Hydro-cyanic gas. The effect of the gas is to damage the body's production of haemoglobin.

c- The convict is instructed to breathe deeply. If he does, unconsciousness may take only a matter of seconds. If however, they hold their breath it will take much longer for unconsciousness to occur and there will be many more visible signs of suffering, among which are usually bulging eyes, a deeply reddening face and wild convulsions.

d- Death is estimated to take between 6-18 minutes.\textsuperscript{112}

e- After a doctor declares that the convict is dead, having monitored the heartbeat from an adjoining room, the gas chamber is filtered and neutralised through a fan extraction system. A cleanup crew wearing facemasks then enters the chamber and scrubs the body with bleach. As a further safety precaution it is even advised that they ruffle the hair of the deceased in order to free any trapped gasses.\textsuperscript{113} This is vital, as if the gas is not thoroughly expunged, remaining traces of the gas could result in the death of the undertaker or anyone else who comes into close contact with the body.

iv- Particular issues of concern.

In addition to problems such as the negative connotations drawn between this method and the gas chambers of Nazi Germany,\textsuperscript{114} there are also many other practical drawbacks to the gas chamber as a form of execution.

In addition to the fact that it is a costly\textsuperscript{115} and complex way to kill, one of the major sources of concern has evolved as a result of the number of botched gas chamber executions. Once again, two familiar criticisms levelled against this particular method include the time it takes for the offender to die and the pain that is undoubtedly involved. In the case of Jimmy Lee Gray for instance, “eight minutes after the gas had been released officials cleared the witnesses from the viewing area as Gray continued to

\textsuperscript{112} Estimate found at: http://www.deathrowbook.com/noflash/nf_gas.htm
\textsuperscript{113} This cleanup procedure can take up to half an hour after the time of death has been announced.
\textsuperscript{114} Carbon monoxide and cyanide gas were the primary chemicals used to kill countless numbers in Nazi death camps in Auschwitz and Treblinka.
convulse. He is reported to have gasped eleven times during this period. Jimmy Lee Gray died banging his head against the steel pole behind the chair.\textsuperscript{116}

In the case \textit{Gomez v U.S. District Court for the Northern District of California}, 503 U.S. 653 (1992), another gruesome account of death by lethal gas was recounted which is worth quoting here at length. Justice Paul Stevens included the following narrative in his dissenting opinion. He wrote:

"When the fumes enveloped Don's head he took a quick breath. A few seconds later, he again looked in my direction. His face was red and contorted, as if he were attempting to fight through tremendous pain. His mouth was pursed shut, and his jaw was clenched tight. Don then took several more quick gulps of the fumes. At this point, Don's body started convulsing violently... His face and body turned a deep red and the vein in his temple and neck began to bulge until I thought they might explode. After about a minute, Don's face leaned partially forward, but he was still conscious. Every few seconds he continued to gulp in. He was shuddering uncontrollably and his body was racked with spasms. His head continued to snap back. His hands were clenched. After several more minutes, the most violent of the convulsions subsided. At this time the muscles along Don's left arm and back began twitching in a wavelike motion under his skin. Spittle drooled from his mouth. Don did not stop moving for approximately eight minutes, and after that he continued to twitch and jerk for another minute. Approximately two minutes later, we were told by a prison official that the execution was complete. Don Harding took ten minutes and thirty-one seconds to die."\textsuperscript{117}

In an attempt to describe the feelings of a person dying in a gas chamber, Dr Richard Traystman of John Hopkins University School of Medicine, explains that, "The person is unquestionably experiencing pain and extreme anxiety... The sensation is similar to the pain felt by a person during a heart attack, when essentially the heart is being deprived of oxygen."\textsuperscript{118} He explains that death is eventually caused by hypoxia whereby the brain and vital organs are starved of oxygen. Similarly, Dr Harold Hillman, a neurobiologist, explains that:

"It is usually thought that the failure of the convict to move is a sign that he cannot feel pain. He cannot move because all of his muscles are contracted maximally. A physiological effect that in itself is enormously painful and further prevents the prisoner from crying out or providing

\textsuperscript{116}http://www.geocities.com/trct111/gascham.html
\textsuperscript{117}Gomez v U.S. District Court for the Northern District of California, 503 U.S. 653 (1992)
\textsuperscript{118}http://deathpenaltyinfo.msu.edu/c/about/method/gaschamber.htm
other outward signs of other massively painful effects of electrocution... While the subject remains conscious, strapped into the chair, paralysed yet aware of the gruesome burning of his body, it is scientifically and medically certain that death is not instantaneous."

In his dissenting judgement in Glass v Louisiana, 471 U.S. 1080 [1985], former Supreme Court Justice Brennan voiced his opinion that the use of the gas chamber violated the Eighth Amendment of the U.S. Constitution.

His opinion was later supported in the case Fierro v Gomez, 77. F.3d 301 [9th Cir. 1996], in which it was unanimously held that execution by lethal gas was indeed an unconstitutionally inhumane punishment. This postulation was largely based on the amount of time it took for the offender to die. The gas chamber has subsequently been outlawed in California.120

It is also interesting to note in this context, that the use of the gas chamber was successfully challenged in the case Ng v Canada (No. 469/1991) (UN Doc. A/49/40, Vol. II, p. 189, 15 HRLJ 149),121 in which The Human Rights Committee found that the gas chamber was contrary to the prohibition of “cruel, inhuman and degrading punishments” as contained in the International Covenant on Civil and Political Rights. In this case Ng was appealing against Canada’s decision to extradite him to California. It was held by the court that “execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of ‘least possible physical and mental suffering’, and constitutes cruel and inhuman treatment, in violation of Article 7 of the Covenant...”122

It has since been suggested that this may be the first step towards abolishing death by gas chamber altogether and as Marian Borg and Michael Radelet have asserted, “Clearly, the gas chamber is an execution method that is on its way to joining the guillotine and the rack as an historical artefact.”123

120 http://www.richard.clark32.binternet.co.uk/gascham.html
D- Hanging

i- History.

Hanging is one of the oldest recorded methods of execution. Reports of hanging go back at least as far as the rule of the Roman Emperor Constantine. One of its greatest appeals has always been its cost and convenience. It does not require any specialist facilities or equipment. All that is required is a length of rope and place to tie it from. As such, it is a cheap, if not the cheapest way to execute criminals.

However, despite its traditional popularity as a method of execution, over the years it has gradually lost its appeal worldwide. Hanging was, for instance, used widely in England until the mid-nineteenth century, at which point hangings came to be seen by the public as too gruesome and inhumane to warrant their continuation. After continuous reports of botched executions alternatives were finally sought.

ii- Current usage.

On a worldwide scale, hanging is the second most popular method of execution. It is used in Egypt, Iran, Japan, Jordan, Pakistan and Singapore among many other regions. In the USA, hanging is presently still an option but only in three states; Delaware, New Hampshire and Washington. However, it is rarely utilised in practice and since the resumption of capital punishment in 1976 there have only been three hangings in America.

iii- Procedure.

Hanging is one of the easiest, cheapest and, if done correctly, fastest ways to bring about a person’s death. There have been several different methods and mechanisms employed for hanging over the years. Traditionally one of the easiest methods was simply to hang the condemned from a tree by leading them up a ladder, tying a noose around their necks and swiftly removing the ladder. However, sometimes the slanted angle of the ladder gave the condemned an opportunity to gradually lower themselves down thus preventing a successful and speedy hanging. See Stuart Banner (2002) The Death Penalty – An American History. Harvard University Press, pp44-5.

124 See Appendix R for a photograph of the last public execution in America, which was a hanging.
125 Evidence of hangings can be found as far back as in the Old Testament. See for instance Deut. (21:22-3).
126 The last English hanging took place on Aug. 13th 1964.
127 See Appendix S for an Amnesty International list of methods of executions.
128 These are some of the reasons for its popularity as a suicide method.
129 However, sometimes the slanted angle of the ladder gave the condemned an opportunity to gradually lower themselves down thus preventing a successful and speedy hanging. See Stuart Banner (2002) The Death Penalty – An American History. Harvard University Press, pp44-5.
become common practice to place the condemned on the back of a horse-drawn cart, tie the noose around their neck and then to move the horse and cart away from underneath them. However, eventually one of the most successful methods developed was to place the condemned on a scaffold, stand them over a trap door and then remove the trap door allowing the condemned to drop out of view. It is this method, minus the scaffold, that is most commonly employed in the USA.

With regard to the drop itself, tables to calculate the length of rope necessary to perfect the drop were compiled in England in the 1800’s. The ideal result of a hanging is a dislocation of the spine between the 2nd and 3rd cervical vertebrae, which requires an optimum force of 1260 foot-pounds to the neck. Also, ideally, the knot should be placed behind the left ear of the condemned to help ensure that the neck snaps at the end of the drop. The rope is preferably one of manila hemp which has been pre-stretched, smoothed and oiled to avoid springing or stiffness and to aid the rope to move smoothly through the knot.

**iv- Particular issues of concern.**

In the past not only was a protracted and painful death a worry, but the fact that death may not occur at all was also a concern. Although not common, there were times in the eighteenth century where cases of “resurrection” would occur whereby a person who had been hanged would be revived. John Smith, for instance, spent two hours hanging from a noose in 1709 but was later revived thus earning himself the name “Half-Hanged Smith.” This sort of failed execution primarily occurred because asphyxia resulted if the knot was tied in a particular way and therefore, unlike a dislocated neck, which virtually guarantees death, a person could regain consciousness after temporary unconsciousness caused by asphyxia. However, due to improved medical understanding of death, this sort of occurrence is not a real concern today.

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130 Again, often this did not provide a drop fast or far enough to ensure instant death.
131 In other countries many items not normally associated with executions have been employed. In Iran, for instance, the condemned have been known to be hanged from cranes and in Saudi Arabia football posts have apparently been used to suspend hanged criminals.
132 See Appendix T for a standard drop distance table. This is used as part of the execution protocol used in the State of Delaware.
However another problem with hanging is the scope it leaves for decapitation or strangulation to occur. If the drop is too long or the condemned too heavy, decapitation may follow, whereas if the drop is too short or the condemned too light, strangulation is likely to ensue. Neither are desirable prospects. Strangulation would certainly prolong the dying process as well as increasing the obvious pain and suffering of the condemned. Decapitation, on the other hand, although quick and relatively painless for the condemned, is seen as gruesome and unnecessarily vicious by most opponents.

In his time as Warden of San Quentin Prison, Clinton Duffy witnessed approximately 90 executions. He described hangings in the following graphic terms:

“When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes a large portion of skin and flesh from the side of his face that the noose is on. He urinates, defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint and have to be helped out of the witness room.”

It is this evident brutality and gruesomeness of the process that is one of the main reasons for having sought alternatives to hanging in the first place.

**F- Death by Firing Squad.**

i- History.

The first recorded execution by firing squad in the USA took place in 1608. Traditionally, executions by shooting were viewed as a punishment reserved for the military. Over the years however, death by firing squad became a recognised part of civilian law and its use as an accepted method of execution was confirmed in the 1878 case *Wilkerson v Utah*, 99 U.S. 130, 25 L.Ed. 345 (1878). One of the most infamous convicts to have been executed in this way is Gary Gilmore who elected shooting over the option of hanging. His last words were reportedly, “Let’s do it!” Another convict who opted for death by firing squad was child murderer John Taylor who in

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135 See Appendix U for a picture of an execution by firing squad.
136 Gilmore was executed on January 17th 1977.
137 Taylor was executed by firing squad on January 26th 1996.
1996 supposedly chose this option in order to “make his death as difficult for the state as possible.”

ii- Current usage.
Death by firing squad is currently available in only three US states; Idaho, Oklahoma and Utah. Despite its infrequency in America, death by firing squad is the most common form of execution in the world. This method of capital punishment is available in approximately 70 countries worldwide including China, Iran, Japan, Nigeria, Somalia, Thailand, Vietnam and Yemen among many others.

iii- Procedure.
In the USA “there is reportedly no protocol for the procedure, which according to information involves a five man team, one of whom will use a blank bullet so that none of them knows who was the real executioner.” The following is however, an example of a typical firing squad process.

a- Generally the practice consists of the condemned being securely strapped to a chair or stake, offered a blindfold and surrounded by sand bags to absorb the blood, gore and any stray bullets. They are also normally given a black hood to wear at this point.

b- In order to protect the identity of the executioners, there are generally five shooters, one of whom will have only blank rounds in his gun. Typically the shooters, who are usually stationed in an enclosure approximately 20 feet from the target, use 30.30 calibre rifles and shots are aimed at a velcroed patch placed over the heart. The target is the chest rather than the head as it is clearly an easier mark to aim for and successfully hit. Done in this way, the cause of death is usually massive haemorrhage and instant shock as the heart, lungs and greater vessels are ruptured. Other countries such as China

138 http://www.deathrowbook.com/noflash/nf_hang.htm
139 Again see Appendix S for a list of the most common methods of execution used worldwide.
140 http://www.agitator.com/dp/methods/shooting.html
141 Alternatively a special jacket can be worn which has been designed with the express purpose of absorbing sprayed blood and gore resulting from an execution by firing squad.
142 Firearm professionals point out however, that the executioners themselves would know whether or not they had fired real bullets as anyone firing a blank round would know from the lack of recoil that they had not been given real ammunition.
tend to use only one gunman who shoots the offender "executioner style" in the back of the head while the victim kneels at the shooter's feet.

iv- Particular issues of concern.

One inevitable criticism of this method is the gross mutilation that the body inherently incurs as a result of being riddled with bullets. The gory image of bloodshed is neither humane nor aesthetically pleasing compared to the more clinical and relatively "clean" method of execution by lethal injection.

One serious criticism is that the firing squad is normally made up of, not professional marksmen or soldiers but volunteers, and that obviously increases the likelihood of botched executions. There have been cases where, for instance, the shooters have run out of bullets mid-execution. In one report, "the victim was shot in the shoulder and screamed in pain for twenty minutes until more ammunition could be obtained." In other cases the shooters have missed the target completely. In the 1951 case of Eliseo Mares, for instance, all four of his executioners shot at the right side of his chest instead of the left, leaving him to agonisingly bleed to death. Just as horrific perhaps are reports that in countries such as Nigeria, the practice at one time was for the squad to start shooting at the ankles and then work their way up towards the heart. This obviously had the specific intention of prolonging the pain and delivery of death! A further example of the fallibility of executioners was made evident by Amnesty International who in their 2005 report on Vietnam reported that: "In October, the Prime Minister asked the police to consider changing the method of execution because nervous members of firing squads with trembling hands frequently missed the target." Death by firing squad is neither instantaneous nor painless, and this is probably true even in cases where the target is hit accurately in the first shot as it still takes time to bleed to death, even from a clean shot.

144 Amnesty International (1989) When the State Kills, p57. This was the punishment utilised specifically for those convicted of armed robbery.
146 These are some of the reasons why the British Royal Commission on Capital Punishment (1949-1953), when considering the viability of various execution methods, reported their opinion that the firing squad was not a suitable or desirable method of execution. They criticised the fact that, "it needs a multiplicity of executioners and it does not possess even the first requisite of an efficient method, the
Despite its drawbacks, it does however remain the most popular mode of execution in the world today, probably largely due to its cheap and uncomplicated administration.

The religious perspectives on methods of execution.

Having examined in previous chapters the stances of both Christianity and Islam on the issue of capital punishment in principle, it is now time to assess what they teach about the practical implementation of the death penalty. This incorporates several issues. One is to ask what each religion specifically teaches about the methods of capital punishment. This will naturally include a commentary on traditional, religiously prescribed methods such as stoning. Another is to ask what, if anything, each religion teaches with regards to the contemporary methods of execution that have just been outlined above. Do the aforementioned criticisms of these modern methods have any bearing on the religious stance on capital punishment in the twenty-first century or is the method utilised largely irrelevant?

Part 5 will examine some teachings of Christianity on this issue, followed in Part 6 by some Islamic ones.

5- Christianity and the methods of execution.

A- Old Testament pronouncements on the methods of execution.

The practical administration of capital punishment has been a long-standing concern of Christians for many reasons. In the seventeenth and eighteenth centuries, for instance, a particularly common concern was that the method of execution would affect a person in the afterlife. It was believed that if the human body was mutilated, when it came time for the body and soul to be reunited on Judgement Day, the body would remain in its mutilated state. Even more horrifying to some, was the widespread belief that “a corpse whose integrity had been violated would be denied resurrection at the final judgement.”147 As Professor Banner (2002) points out, against a background of superstition and Christian theology;

“A punishment that destroyed the body was especially terrifying. Even an executed criminal, if properly buried, might hope for bodily resurrection at the last judgement, but someone who had been...

147 Banner, (op. cit. note 129) (2002), p82.
intentionally burned beyond recognition, or whose body had been permitted to decompose in a gibbet, or who had been cut into quarters for display or who had been carved up by surgeons, could never be resurrected. By merely hanging a criminal, the state could end this life, but it could not preclude the possibility of an eternal and perfect life in the future. When the state killed and destroyed the body, however, the stakes were much higher.148

Nevertheless, “although there is no systematic discussion of the topic in the Bible”,149 the Bible does specify several methods of execution for use against offenders. As Chapter 2 above explained, most of the Biblical pronouncements regarding capital punishment are found in the Old Testament. This includes directions and commentaries regarding the methods of execution and these include: death by the sword,150 being burnt in the fire,151 being shot with arrows,152 and on multiple occasions stoning.153

While these methods were considered acceptable to most mainstream Christians only a few centuries ago, there is no doubt that today, not only in a secular context do “all punishments prescribed in the scriptures, no longer meet the evolving standard of decency marked by the progress of our maturing society”154 but also in modern Christian terms, such torturous methods of execution are no longer considered as acceptable or necessary.

As discussed in Chapter 2 the position of many churches on the issue of capital punishment has changed over the centuries and this is just one more example of how. In a Catholic context, for instance, during the pontificate of numerous popes,155 burning was a commonly sanctioned punishment for heretics. As James Megivern (1997) says, “death was the standard punishment and burning at the stake was its specific form”156 and “while the thirteenth century accounted for how the burning of heretics became the

148 Ibid.
150 Deut. (13:13-16)
151 Lev. (20:14) and Lev. (21:9) for instance.
152 Ex. (19:13)
155 Such as Pope Gregory IX (1227-1241).
standard practice... the sixteenth century created the intolerable situation in which there was less and less restraint on its use."157 However, despite the Scriptural basis for the continued use of such punishments, the Catholic Church gradually came to oppose the continuation of such practices.

An analogy may be drawn here between the Church's acceptance of the death penalty and their acceptance of torture. There have been times in the history of the Catholic Church when torture was considered to be an acceptable penal practice. Under Pope Innocent IV (1243-12540), for instance, "the use of torture was officially introduced into the inquisitorial procedure as one more tool for ferreting out secret heretics."158 Today, however, the Church completely opposes all forms of torture. In the Catholic Catechism, for example, under the sub-heading Respect for the Dignity of Persons, Article 2297 states: "Torture which uses physical or moral violence to extract confessions, punish the guilty... is contrary to respect for the person and for human dignity." As such, most Catholics and indeed most other mainstream Christian denominations would accept that the Old Testament methods of execution are no longer appropriate or applicable to today's societies. Again, as discussed in Chapter 2 this perspective will vary according to the individual denomination and will be affected by issues such as whether they believe that the New Testament overrides the Old or whether they believe that the Old Testament is as applicable today as ever.

Groups advocating this latter position for instance, even today, on occasion, have advocated a highly controversial return to traditional Biblical methods of execution. For instance, a now infamous preacher in Pennsylvania has written an article in favour of applying the Biblical prescription to execute rebellious children.159 Reverend William Einwechter (1999) writes in his article "Stoning Disobedient Children", that capital punishment should apply to "a grown son (and by extension to a daughter as well) who, for whatever reason, has rebelled against the authority of his parents and will not profit from any of their discipline nor obey their voice in anything." The Reverend further asserts that:

158 Ibid. Megivern, p111.
159 This is in accordance with the Biblical verse in Deut. (21:18-21) which says, in part: "If a man has a stubborn and rebellious son who does not obey his father and mother and will not listen to them when they discipline him... then all the men of his own shall stone him to death...."
"Theonomists must not be embarrassed by the law of Deuteronomy 21:18-21, nor should they be chagrined when others try to use it to discredit the case laws of the Old Testament. Properly understood, it displays the wisdom and mercy of God in restraining wickedness so that the righteous may flourish in peace. It is those who reject this case law that should be embarrassed, for they have cast reproach on God and His Law, cast aside the testimony of Jesus Christ and have substituted their own imaginations (Jer. 7:24) for the blessed word of God."

Reverend Einwechter’s article was printed in the January 1999 “Chalcedon Report” which is:

“The leading publication of the “Christian Reconstructionist” movement, the most extreme contingent of the religious right. Reconstructionists reject democracy and believe Christians should take “dominion” over American society. Under their version of “biblical law”, the death penalty would be required for over a dozen offences, including adultery, homosexuality, witchcraft and spreading ‘false religions.”

However, Reverend Einwechter’s view is an extreme and minority view, one that the vast majority of Christians do not advocate.

It should be noted that in addition to mentioning the methods that should be employed, Biblical texts also lay down prohibitions and stipulations on the execution methods used. For instance, Deuteronomy (21:22) says, “If a man guilty of a capital offence is put to death and his body is hung on a tree, you must not leave his body on the tree overnight. Be sure to bury him that same day, because anyone who is hung on a tree is under God’s curse.” This would, for instance, presumably preclude the practice of gibbeting if it were to occur overnight.

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160 See footnote 159 above for an extract of Deut. (21:18-21).
161 At this point Reverend Einwechter adds the footnote saying “Jesus himself specifically endorsed the death penalty for cursing parents. (Ex. 21:17) in Matthew 15:4.”
162 “Bible requires death by stoning for “rebellious” teenagers, says PA. Preacher.” (Feb. 18th 1999.) See the Refuse and Resist website at: http://www.refuseandresist.org/resist_this/021899stoning.html.
B. Modern methods of execution.

In terms of the more modern methods of execution, naturally the Bible does not make any specific reference to them but in applying both the spirit and letter of the Bible there have been Christians arguing for and against nearly every modern method.

One American state that has been greatly influenced by Christian teachings on the issue is Utah. A largely Mormon state, Utah is one of only three states to deliver death by firing squad. According to Richard Dieter, Executive Director of the Death Penalty Information Centre, Utah's reliance on this method "is a remnant of the early Mormon belief that bloodshed is a required punishment for taking a life."165

Stuart Banner also attributes Utah's use of the firing squad to be "a consequence of the Mormon doctrine of blood atonement, the concept that some sins are so heinous that the offender can atone only by literally shedding his blood."166

In more general terms it seems that most Christian pro-death penalty supporters find almost any modern method acceptable, although many naturally argue that the method should preferably be as humane as possible. Christian opponents of capital punishment however, seem to oppose all methods of execution and do not have a particular Scriptural objection to one method over another. As the Bishops of Florida asserted in their 1990 Statement on the death penalty, "there is no such thing as a 'humane way to kill' someone... all forms of execution are brutal and brutalising."167 Although many Christians may object to capital punishment andcite procedural or medical critiques of a particular method, these objections are usually not supported by reference to any particular Scriptural evidence regarding the individual method, just general secular objections.168 They may also refer to general principles of Christian ethics. For

164 It should be noted however, that there are some who argue that Mormons fall outside the scope of Christian belief. See for instance, Cooper Abrams, "Are Mormons Christian? – The Bible and LDS Scriptures Prove Conclusively That Mormons are not Biblical Christians." Available at: http://cnview.com/on_line_resources/are_mormons_christian.htm However, the Church of Latter Day Saints themselves would contend that they absolutely are Christians. See for example, "Are Mormons Christian?" At: http://www.bbc.co.uk/religion/religions/mormon/beliefs/christians
168 See for instance, Megivern, (op. cit. note 156) (1997) p375, in which he cites the concerns of Bishops in Oklahoma who objected to the death penalty by lethal injection because of its involvement of health
instance, a standard objection to capital punishment is that "to inflict pain and suffering on another because of his or her acts is not within the highest call of a Christian."\textsuperscript{169} It is therefore the ostensible lack of humanity and efficiency inherent in many of the modern methods already outlined that make them so objectionable from a Christian as well as humanitarian perspective.

C- Alternative methods of execution.

Given the potential Christian opposition to many arguably inhumane methods of execution today, one naturally turns to see if there are any alternative methods which would be more in line with Christian teachings on the subject and which would accommodate both opponents and proponents of the penalty. Over the years, many new methods have been postulated as potentially desirable alternatives. Of those options suggested, one that has repeatedly been opposed on theological grounds is that of the "suicide paradigm." The idea of a suicide paradigm was posited by Martin Gardner in his article, \textit{Executions and Indignities – An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment}.\textsuperscript{170} According to this proposal, the condemned would be free to take his, or her, own life by the voluntary ingestion of a lethal barbiturate within a specified time period.

However, as suicide is considered by many to be a grave sin in Christianity\textsuperscript{171} this method would certainly not be consonant with the teachings of the Bible and Christ. In fact it has long been acknowledged that:

\begin{quote}
"In the eyes of Catholics in particular, suicide was a far worse crime than execution with the hand-held axe... For the condemned offender, even for the executioner, there was always the hope of repentance, purgatory, and eventual forgiveness. For the suicide, however, there could be nothing but eternal damnation."\textsuperscript{172}
\end{quote}

\textsuperscript{169} Megivern (op. cit. note 156) p409 quoting a 1989 statement of the Catholic Bishops of Missouri.
\textsuperscript{170} Gardner, M. (1978) \textit{Executions and Indignities – An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment}, \textit{Ohio State Law Journal}, Vol. 39, No. 1, pp96-131. It is also similar to the process used to execute Socrates.
\textsuperscript{171} Suicide is considered by many to be contrary to the Commandment "thou shall not kill", which is generally taken to include killing oneself. This is the approach taken for example by St. Augustine in his book \textit{City of God}, Translated by Henry Bettenson (1972), Penguin Classics, p31.
Similarly from a Protestant perspective, in consideration of the proposed suicide paradigm, the Archbishop of Canterbury made the following statement to the British Royal Commission on Capital Punishment:

"I think if society demands this penalty (of death), it must itself inflict, and quite clearly inflict it itself, and not invite the victim to do it for himself... It is always a sin to commit suicide: to take one's own life is always a form of self-murder... It is a dilemma that he should not be faced with."

This has been a consistent Christian position and, as such, the only really viable Christian alternative to the heavily criticised aforementioned methods of execution seems to be an alternative to the death penalty itself, such as life imprisonment. This is an alternative, as we saw in Chapter 2, wholly supported by the Pope, a number of Catholic Bishops and a large percentage of the general Christian population.

6- Islam and the methods of execution.

Having established the potential legitimacy of capital punishment in Islamic jurisprudence in Chapter 3, the issue at hand now becomes to discern which methods of execution, if any, are prescribed or prohibited in Islamic law.

A- Islamic pronouncements on the methods of execution.

i- Stoning.

It seems to be the general consensus that while Islam does not specify one general method of execution for capital offences, it does prescribe stoning as the appropriate method of execution for one offence, namely adultery. Although stoning is not mentioned anywhere in the Quran, it is mentioned in several hadith, thus legitimating its use by Muslim governments for that particular offence. As previously mentioned however, due to the Islamic legal restrictions put on its use, this practice is utilised only in extremely rare cases. Worldwide only six countries are known to use this

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174 As previously explained, adultery in this context only refers to that committed between two people, one or both of whom are married to other partners. The adultery must also have been witnessed by at least four male witnesses or have been confessed to.
175 See, for instance, Sahih Al-Bukhari Vol. 8, No. 816, pp536-7. This hadith is discussed in more detail in Chapter 3, Part Two B (iii) b. The punishment of stoning is only prescribed as the punishment for adultery and not for any other offence. Also see Sahih Al-Bukhari Vol. 8, No. 803-8.
176 See Chapter 3, Part Two 5 B (iii) b for details on when, why and how this punishment is applied.
method\textsuperscript{177} and there are very few statistics regarding the details of this practice. As Roger Hood attests, “there is no information as to how often this occurs, if at all…” but “public stoning has apparently taken place.”\textsuperscript{178} The process generally involves the offender being buried up to the waist if male and up to the neck if female before being stoned.\textsuperscript{179}

The continued use of such a practice has troubled many. In his 1997 report on “Stoning to death in Iran”, Mr Maurice Danby Copithorne, Special Representative of the Commission on Human Rights on the Situation of Human Rights in Iran, “Declares his condemnation of such punishments.” He stated that he was:

“Deeply concerned at the continuing reports of... conduct banned by the Universal Declaration of Human Rights (article 5), the International Covenant on Civil and Political Rights (article 7) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 16).”\textsuperscript{180}

Nevertheless, despite criticisms of countries retaining this method, in recent years there have been many confirmed sentences of stoning passed in countries such as Nigeria, Iran and Afghanistan. While most of these sentences have been repealed for one reason or another,\textsuperscript{181} others are likely to have taken place, although, as previously mentioned, how many is very hard to confirm.

\textit{ii- Beheading.}

There is some debate among Muslim scholars as to the correct method of execution for crimes other than adultery. For the crime of murder, for instance:

“The Hanafi and Hanbali schools hold that the culprit should be killed by the sword, whether or not he has killed his victim in this manner. The Maliki, Shafai and Zahiri schools, on the other hand, hold that the murderer should be put to death in the same manner in which he killed his victim.”\textsuperscript{182}

\textsuperscript{177} Refer back to Appendix S for the most popular methods of execution used worldwide.
\textsuperscript{179} This is said to be to stop the offender from struggling, thus helping to bring about death as soon as possible. It is also said to aid in guarding their modesty.
\textsuperscript{181} Such as in the case of Amina Lawal. See Chapter 3 footnote 178.
Nevertheless, apart from the aforementioned reference to stoning, there is no specific method of execution prescribed in Islam. The general consensus among Muslim laymen and scholars alike is that any method may be utilised as long as it fulfils the prerequisites of being as swift and painless a method as possible. Islam teaches that prisoners must be treated in a humane and respectful manner and should not be abused or humiliated in any way. Both the manner in which they are detained and the manner in which they are executed should be as humane and merciful as possible. In terms of execution methods this requirement of humanity naturally entails a preferable element of swiftness and painlessness and this is perhaps one reason why traditionally the sword, although not mentioned in the Quran, is the method that most Islamic jurists seem to favour. It is a method that has traditionally been considered by many to be the fastest, least painful and therefore potentially most humane method of execution.

As British death penalty researcher Richard Clark explains:

"Beheading is effective and is probably as humane as any other method if carried out correctly. When a single blow is sufficient to decapitate the prisoner, they lose consciousness within a few seconds. They die from shock and anoxia due to haemorrhage and loss of blood pressure within less than 60 seconds."  

For the state, beheading also has the advantage of requiring no special equipment (apart from the cutting implement itself) and is therefore generally a cheap method to utilise.

As previously mentioned, beheading has taken many forms over the years. However, in Muslim countries such as Qatar, Yemen and Saudi Arabia where beheading is still employed, the traditional method used is usually a quick blow to the back of the neck.

184 According to Robert Fredrick Opie, despite much debate as to the humanity of beheading over the years, "the consensus of opinion based upon international research suggested that of all forms of capital punishment, the guillotine was believed to have been the least painful and therefore the most merciful." This can presumably also be extended to a swift and successful beheading by sword, provided no more than one blow is required. Robert Fredrick Opie, (2003) Guillotine - The Timbers of Justice. Sutton Publishing, p129.
185 http://www.richard.clark32.btinternet.co.uk/behead.html
186 This is the case if the implement is a sword or axe but not if the implement is a guillotine, in which case the process is considerably more complex and expensive. This contrasts sharply with the cost of a gas chamber, which can run up to $200,000, or an electric chair which can cost as much as $35,000 according to Stephen Trombley, (1993) The Execution Protocol - A Controversial and Shocking Look Into America's Capital Punishment Industry. From The Inside. Century, p39.
187 See footnote 21 above.
by sword or scimitar. Decapitation ideally results from one blow, although there may be instances where more than one is needed. How often multiple blows are needed is, however, very difficult to ascertain. This is, in part, because retentionist countries such as Saudi Arabia are notoriously difficult to extract information from with regards to their execution procedures. As Amnesty International wrote in a 2002 report on Saudi Arabia, even the most basic information is hard to come by as “the government continue to keep secret information on people under sentence of death and at risk of execution.”

According to most Saudi sources, however, the process usually runs relatively smoothly. In an interview for OKAZ newspaper, Saudi’s leading executioner, Muhammad Saad Al-Beshi said of the sword used in the beheading process, “It’s very sharp. People are amazed how fast it can separate the head from the body.” Indeed, even reluctant witnesses have observed the speed of the process. One visitor to Saudi Arabia reported how, “With one mighty swing, the executioner severed Aisha’s head and sent it flying two or three feet away.

iii- Prohibited methods of execution.

Despite the flexibility in choosing a method of execution, certain methods are nevertheless clearly prohibited in Islam. One such method is the use of fire to kill. This is clearly explained in the following hadith, which refers to the punishment of an enemy of the Prophet, in which it was said: “If you find so-and-so kill him, but do not bum him with fire. For verily none punishes with fire except the Lord of the Fire (i.e., Allah).” This obviously rules out the ancient European practice of burning at the stake. To some, this hadith may also be grounds to rule out the prospect of death by

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188 The standard execution stance is to have the victim kneeling on the ground with their hands tied behind their back. The executioner then sometimes prods the offender with their sword tip to make them extend their neck before he swings the scimitar or sword.


190 All such reports must, however, be viewed with an eye of, if not scepticism, at least awareness of the difficulties implicit in asking a citizen or government employee to criticise the state in a regime in which opposition to the ruling authorities is viewed with a degree of hostility.

191 Arab News - The Middle East’s Leading English Language Daily. Available at: http://www.arabnews.com/?page=1&section=0&article=2703&d=5&m=6&y=2003


electrocution, as experience has shown that severe burning is a common, if not inevitable, consequence of death by electrocution.

In addition to this, excessive mutilation is also prohibited, with the exception of the mutilation required to bring about death in a process such as decapitation or stoning. Even after a person is dead it is forbidden to mutilate the body. This does not apply only to the death penalty but even to the case of war. Once a person has died, their body should still be treated with respect and not harmed or unnecessarily exposed in any way. This is clear, for instance, from the statement of Imran bin Husayn who said: "The Messenger of Allah, peace be upon him, used to encourage us to give in charity and he prohibited us from mutilating." 194

B - Modern methods of execution.
In the retentionist Muslim regions of the world today, a variety of other methods are used which are not specifically referred to in Islamic texts, such as hanging and shooting. It is generally considered however, that these are acceptable methods of execution based on the discretion given to Islamic scholars and judges to develop principles and practices of Islamic law on the grounds of analogy and scholarly consensus. In addition to this, according to the late Sheikh Shaltut, "the Prophet ordered the believers to improve methods of killing even for the slaughtering of animals; hence whatever quick, easy and efficient means of execution can be found should be used." 195

In terms of more modern methods, it is true, that no Muslim country has, as of yet, adopted the electric chair, lethal injection or the gas chamber, and generally, Muslim countries tend to use traditional methods such as beheading, hanging, stoning or shooting. This may be attributable to a number of factors including the perceived humanity of the methods as well as the practical economic considerations. With a gas chamber costing as much as $200,000, it is perhaps not surprising that so many third world countries continue to retain what some may consider to be the antiquated practices of hanging, stoning and beheading.

194 Ibid, p181.
C- Alternatives methods of execution.

Alternatives to the death penalty have already been discussed from an Islamic perspective in Chapter 3.\textsuperscript{196} However, with reference specifically to the aforementioned suicide paradigm,\textsuperscript{197} this would be a completely unacceptable practice from a Muslim perspective as suicide is indisputably forbidden in Islam in both the Quran\textsuperscript{198} and hadith.\textsuperscript{199} As such, this method is unlikely to ever be employed in a Muslim country.

Finally, although even Muslims arguing in favour of an international moratorium on capital punishment\textsuperscript{200} do not seem concerned with discussing methods of execution \textit{per se}, it does seem that the basic Islamic teaching is that, with the exception of stoning, which by its very nature is a painful way to die, all other methods utilised must be as quick, painless and humane as possible.

7- Conclusion.

As this chapter has shown, even once a person has traversed the theoretical, moral, religious and political landmines in the death penalty debate, one is then faced with even more difficulties when addressing the question of how to implement the death penalty in practice. The clauses within International human rights laws and national Constitutions protecting citizens from cruel and unusual punishments are constantly being challenged in the world’s courts in the context of the methods of execution, and slowly but surely over the years they are successfully chipping away at current practices for delivering death. However, while every report highlighting the cruelty of the various methods, and every botched execution is a small yet sad testimony in the abolitionist’s favour, retentionists continue to argue that it is not the death penalty itself that should be challenged, just the method. However, although necessary, it seems oxymoronic to suggest finding a “humane execution” method. By its very nature, the intentional causation of death in the pursuance of capital punishment can never be a humane matter.

\textsuperscript{196} This refers specifically to the practice of \textit{Diya} or financial compensation for homicide.

\textsuperscript{197} See Part 5 C above.

\textsuperscript{198} \textbf{The Quran} 4:29 says, “And do not kill yourselves.” Also see \textbf{The Quran} 6:151 and 17:33.

\textsuperscript{199} See for instance Sahih Al-Bukhari Vol. 2, No. 445–446.

\textsuperscript{200} Such as Tariq Ramadan whose campaign was discussed in Chapter 3, Part 5 (8) B.
In the context of religious perspectives, it seems that most Christians and Muslims who oppose the death penalty do so on two primary grounds. Either they object to the very concept of life-taking in and of itself or alternatively they object to the biases inherent within the criminal justice systems worldwide which taint the execution process and result in an unfair and discriminatory use of capital punishment (an issue that will be considered in some detail in the following chapter.) However, they seem less concerned with the actual methods of execution and it is quite difficult to find religious statements commenting directly on specific methods of execution in any detail. Instead they refer generally to the intrinsic sanctity and value of human life.

Although hard-line death penalty advocates among Christians and Muslims may never abandon their beliefs that capital punishment is a practice Divinely mandated by God, they may, however, more readily accept that, following the spirit of compassion and mercy inherent within both religions, at the very least every effort should be made to employ the most humane methods possible. This form of dialogue in itself may lead many religious voices to the path away from capital punishment in the same way that it has done for the Catholic Church, who, while not denying the God given right of the state to execute malefactors, currently argue in favour of utilising alternative blood-free means such as life imprisonment.

Whether abolitionist, retentionist, Christian or Muslim, it seems evident that “in distinction with earlier times, there appears to be virtually unanimous agreement in modern systems of criminal law that the method should attempt to avoid undue suffering.” There are, as such, many grounds on which to argue in favour of continuing and indeed broadening the quest to find humane methods of execution from both secular and religious perspectives.

Having now reviewed some of the various ways in which death is brought about through the execution process, the next chapter looks at to whom this penalty is applied. Highlighting further areas of concern inherent in the administration of the death penalty, Chapter 7 demonstrates the uncomfortable reality that it is not necessarily the worst or even the most morally culpable offenders who are sentenced to

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death. In many cases, children, the mentally ill and even the innocent are fated to die at the hands of the state. This aspect of the death penalty process is a further area of concern to both abolitionists and retentionists and is clearly a major stumbling block to anyone supporting the death penalty on religious or any other grounds.
Chapter 7.
The Unequal Application of Capital Punishment.

Introduction.

One of the most damning and oft espoused indictments of the capital punishment process is that it allows for the disproportionate and discriminatory application of the death penalty. It is often said that the death penalty process is a lottery according to which the chances of ending up on death row too often seem to have more to do with legally and morally insignificant factors, such as race, gender, social status, politics and even geography, than necessarily the type or severity of crime committed. Given that both Christianity and Islam claim to be religions of humanity and righteousness, and assert that adherence to their rules and ways of life would improve the condition of mankind, it is reasonable to ask, specifically the retentionists, how evidence of the subjugation and discrimination of ethnic minorities and the disadvantaged in the death penalty process correspond to their teachings on capital punishment. Does evidence of injustice in the capital “justice” system alter their religious positions or are reports of individual cases of bias and discrimination considered to be acceptable collateral in the bigger fight for justice?

There are many criticisms regarding the way in which capital punishment is meted out in America today, but for the purposes of this chapter the focus will be on the primary issues of unjustly, or disproportionately, executing black offenders, indigent offenders and mentally ill offenders. I chose to focus on these three groups as they have been highlighted by organisations such as Amnesty International as areas of particular concern in terms of basic human rights violations. They are also three of the most well documented groups of capitally convicted offenders and thus provide the most raw data from which to derive general patterns of sentencing which may, or may not, indicate unjust sentencing trends.

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1 Michael Mello, for instance, worked as a death row lawyer for 14 years, but having been disillusioned by the amount of injustice he saw he withdrew from that field and wrote several books against the death penalty including, Dead Wrong - A Death Row Lawyer Speaks Out Against Capital Punishment (1994: University of Wisconsin Press), in which he wrote; “I oppose capital punishment as it exists as a legal system in the United States today. From my personal experience with that legal system, I am convinced that the death penalty is imposed mostly on the basis of arbitrariness and capriciousness. Capital punishment is a lottery, but it is a rigged lottery, skewed by matters of politics, class, race, geography and, most important, the quality and resources of the defence lawyer.” P28.

2 There are, nevertheless, many other aspects of unjust or disproportionate sentencing that, given more time and word count allowance, I would have liked to have investigated, such as the issue of juvenile
However, before addressing the Christian and Islamic positions on these specific issues we must first establish whether there is in fact evidence that such unjust or discriminatory practices occur at all, and if so to what extent. Each section therefore begins by setting out some current statistical and anecdotal evidence demonstrating an inequitable use of capital punishment against that particular group. Parts 1, 2 and 3 deal respectively with the issues of race, poverty and mental illness. Each is then followed by a consideration of the various Christian and Islamic perspectives on these issues followed by the chapter’s conclusion in Part 4.

1. Race and capital punishment.

A. Brief historical examples of the role that race and discrimination have played in capital sentencing.

It is important to first begin by noting that allegations of discrimination and arbitrariness in capital sentencing procedures are by no means a critique unique to the modern U.S.4 capital punishment process alone. On the contrary these are criticisms that resonate throughout the entire history of abolitionist sentiment and such criticisms have haunted almost every known system of capital punishment in the world at one point or another. In Ancient Rome, for instance, social status was so important that even when it came to executions. However, during the course of writing this thesis, the Supreme Court has largely settled this issue (see the reference to Roper v Simmons 543 U.S. (2005), at footnote 61 of Chapter 1) and as such it became a much less urgent matter than the other still unresolved issues that I did choose to examine. Other areas which I would also have liked to have been able to consider include: the composition of death row according to gender, age, other ethnic minority groupings, and religious affiliation. 3 As this is such an immense topic I have chosen to examine one area in more detail than the others. I have selected the issue of the disproportionate execution of black offenders as my primary case study and, as such, this section (Part 1) is considerably longer and more detailed than the others. I chose to focus on this issue as it seems to be one of the foremost areas of concern in the current death penalty debate. Books, articles, journals and websites are replete with arguments canvassing this topic seemingly more than any other area of concern. However, relatively little has been written considering this issue in light of the religious debate, which is what I am doing here. It is also much easier to access information regarding the racial composition of death row than it is the composition in terms of, for instance, mentally ill offenders. I also found this area to have the most intriguing history.

4 Once again, the greater part of this chapter will focus on the American system of capital punishment for the reasons already outlined in the introduction to this thesis (see text at footnote 61 of the introduction). This includes the fact that the USA has one of the highest execution rates in the world, as well as the fact that, as already mentioned, from a practical research perspective, statistics relating to the American system of capital punishment are much more readily available than those of many other countries. Furthermore, as Morayo Fagborun relates, while much research has been compiled on capital punishment and racism in America, “authoritative data identifying the extent and forms of racism in the administration of the death penalty in Asia, Eastern European and African states is still lacking.” See, Morayo Fagborun, (2003) “Race and the administration of the death penalty – An international perspective.” Centre for Capital Punishment Studies, Occasional Papers, Peter Hodgkinson (ed.). Vol. 1, p88. This report is also available at: http://www.wmin.ac.uk/ccps/ops.pdf
matter of punishment, “distinctions were made based on the offender’s social class.”

The death penalty itself was a punishment primarily reserved for cases where the offender was a slave, or at least for cases where the victim was a free person. Likewise, as Mr Justice Douglas has pointed out, “in Ancient Hindu law a Brahman was exempt from capital punishment... Generally in the law books, punishment increased in severity as social status diminished.” Similarly, capital punishment in early nineteenth century England was a penalty that seemed to adversely affect predominately the poor and impoverished as the capital laws, of which there were many, were largely in place to protect the property of wealthy landowners.

America’s criminal justice system has also historically been fraught with racial tension and accusations of discrimination and bias. Lynchings of African-Americans, for instance, had reached epidemic proportions in the 1880’s after the U.S. Civil War, (1861-1865), and after the founding of the infamous Ku Klux Klan. By 1930 it is estimated that over 4,000 black people had been lynched at the hands of white supremacist mobs. These executions were often carried out in response to trivial “offences” such as, insulting a white woman, arguing with a white man “not knowing one’s place”, or “peeping in a window.” Although lynching is not usually considered to be a legitimate form of capital punishment (as by its very definition it occurs “without due process of

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6 This often entailed the convict being thrown from a high rock. Ibid. Jackson p29.
8 By 1820 the group of laws known collectively as the “Bloody Code” had grown to include approximately 200 capital offences, the vast majority of which related to property offences. See B. Bailey, (1989) Hangmen of England – A History of Execution From Jack Ketch to Albert Pierrepoint, W. H. Allen: London, p36, as well as Chapter 1, Part 3, of this thesis, and its corresponding Appendix B for some of the offences that constituted the Bloody Code.
9 In the early Colonial days and the years just prior to the Civil War, (1861-65), if a black person was accused of an offence the punishment was frequently left to the slave owner to impose as “blacks” were seen as the property and thus responsibility of their owner. After 1863, however, at which point slaves were freed by Lincoln’s Emancipation Proclamation, lynching was to become an increasingly common form of unofficial capital punishment.
10 The Ku Klux Klan was founded in Tennessee in 1865.
12 See, Robert A. Gibson, (1979) “The Negro Holocaust: Lynching and Race Riots in the United States, 1880-1950” Yale – New Haven Teachers Institute, Vol. II, at: http://www.yale.edu/yhti Here Gibson also explains how black people were generally subjected to a longer list of offences than white as a result of the Jim Crow laws (of the 1880s-1960’s), which enforced segregation in areas such as transportation and eateries.
law"\(^{13}\)), it has nevertheless been argued that, even in cases where law-makers did not openly sanction executions, the fact that law enforcement authorities often did nothing to discourage or prevent lynch mobs was in itself implicit official endorsement seemingly legitimating its practice.\(^{14}\)

Even when executions were legally sanctioned they were frequently submerged in an atmosphere deeply tainted with bias and carried out under the shadowy banner of racism.\(^{15}\) For instance, not only were black people typically excluded from sitting on juries altogether but, as Professor Banner explains, “throughout the South, for all crimes, black defendants were executed in numbers far out of proportion to their population… the death penalty was a means of racial control.”\(^{16}\)

As to the relevance of historical lynchings to the modern death penalty debate, it is extremely germane because, as Peter Hodgkinson explains, “it demonstrates the societal backdrop and is a precursor to today’s more insidious racism within the administration of the death penalty around the world.”\(^{17}\)

**B- Racial inequality in America’s contemporary capital punishment process.**

**i- The race debate.**

Although the use of lynch mobs are largely a phenomenon of times gone by, America’s current capital punishment record is by no means free of the echoes of a racist past which is manifested, even today, in a disproportionate number of black offenders on death row.\(^{18}\) The present system of state sanctioned capital punishment is carried out in such a

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\(^{13}\) This is from the definition of “lynch” according to the *Reader’s Digest Universal Dictionary.* (1994) Published by the Reader’s Digest Association Limited.

\(^{14}\) It is important to note however, that in many instances, officials did very openly sanction lynchings. Robert Johnson for instance, explains how “lynchings were all the rage… even with officials in the South, including a few governors who not only deferred to the public will but also often reflected its demand for justice.” Johnson goes on to cite the example of the former Governor of Mississippi James, K. Bardaman who is reported to have said: “If it is necessary every Negro in the state will be lynched; it will be done to maintain white supremacy.” See, Robert Johnson, (op. cit. note 11) (1998) p33.

\(^{15}\) Such as in the infamous case of the Scottsboro Boys in the 1930’s. This was a heavily publicised trial in Alabama in which the legal execution of nine young black men was sought on charges of rape; charges which later turned out to be based on false evidence.


\(^{18}\) See Part 1 B (ii) of this chapter for some of the statistics indicating a racial discrepancy.
way that it has led some contemporary human rights activists and civil rights leaders to
dub the capital punishment process as a form of "legal lynching."\textsuperscript{19} To a country which
has come far and struggled hard to transcend its troubled racial history and which has
worked tirelessly to break down racial barriers and promote cultural integration, the
argument that racism still pervades the very heart of the criminal justice system is both
legally and morally disturbing.

The allegation of a racist element tainting America’s modern execution process is one of
the most scathing and damaging ones there is to the retentionist position. However, one
of the first issues that needs to be established when investigating the alleged incidence of
racial discrimination, is to ascertain if there is in fact as much racism incorporated into
the system as abolitionists say there is. Countless numbers of Abolitionist groups and
human rights organisations, such as Amnesty International (AI), The American Civil
Liberties Union (ACLU), Catholics Against Capital Punishment (CACP) and The
National Association for the Advancement of Coloured People (NAACP), cite racism,
among other reasons, as a major justification for abolishing the death penalty. But are
these accusations well founded and grounded on methodologically sound research or are
they merely the desperate emotive pleas of those hoping to bring the capital punishment
process into disrepute? What are the statistics and do they really provide evidence of
racial injustice?

\textbf{ii- The statistics.}

The researcher trying to ascertain the truth behind allegations linking racism and capital
punishment is immediately faced with a daunting task. The first major obstacle is the
extremely large but non-consensual wealth of information surrounding this issue in which
many sources of information are often in conflict, if not in direct contradiction, with
others. Abolitionist sources almost invariably quote figures indicating racism to a greater
degree than retentionist sources and even when certain figures are agreed upon, the
interpretation of them is often very different. The time scales of the studies cited are also
very important, as many changes have been wrought throughout the penal system in the
last few years that will mean that statistical evidence of past discrimination is not
necessarily reflective of today’s practices.

\textsuperscript{19} A term used by Reverend Jesse Jackson and the title of his book, see footnote 5 above.
Nevertheless, there are several basic official facts and figures that do seem to be objectively reliable and which generally do indicate a discrepancy between the number of black people on death row and the number of white, a discrepancy particularly staggering when assessed in terms of their proportion to the general population. Some of these statistics will be outlined next followed by a brief assessment of some of the potential explanations for this racial discrepancy in Part C.

a- Death row sentencing, death row composition, rates of executions and victim race bias.

* According to the Death Penalty Information Center approximately 3,370 convicts are under sentences of death as of Summer 2006. Of those, 1,411 (41.9%) are black and 1,527 (45.3%) are white. So although more white men live on death row than black men, death row is currently made up of approximately 42% of black inmates. This is despite the fact that according to the U.S. Census 2000, there are 36.4 million African-Americans living in the United States, which means that African-Americans constitute only 12.9% of the total U.S. population. From these figures alone it is evident that black people are disproportionately represented in terms of the number of death row inmates compared to their overall number in the general population.

* Although since 1976 quantitatively more white people have been executed than black people, according to the Death Penalty Information Center, since then 80% of crimes that have received the death penalty have been for killing white people, despite the fact that black people constitute about 50% of the victims of violent crime.

* According to Michael Radelet, "of the roughly sixteen thousand executions carried out in America since 1608, only thirty whites... have been executed for crimes against blacks. This represents about two-tenths of 1% of known American executions." Since 1976, according to the Death Penalty Information Center, only 14 white defendants have

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20 See Appendix A. The remainder is made up of other racial minority groups including Native American Indians, Asians and Hispanics.
Also see the U.S. Census 2000 produced by the U.S. Census Bureau Department of Commerce at:
http://www.census.gov/population/cen2000/phc-t1/tab01/txt
22 The death penalty was reinstated in 1976 following a 4 year moratorium.
23 See Appendix B.
24 See Appendix C, Part 1.
25 Robert Johnson, (op. cit. note 11) (1998) p7. Johnson was referring to M. L. Radelet, (1989) Facing the Death Penalty: Essays on Cruel and Unusual Punishment, Temple University Press, pp124-125. This figure obviously refers only to the time at which he was writing. It nevertheless shows an important racial trend.
been executed for the murder of black victims, compared to 208 black defendants who have been executed for the murder of white victims. 26

* "Studies of prosecutions in the 1970's indicated remarkable leniency in black victim cases: in Florida for example, black offenders who killed whites were forty times more likely to receive the death penalty than blacks who killed blacks." 27

* A landmark study carried out by Professor Baldus and his colleagues, 28 estimates that the chances of receiving a death sentence in Georgia are 4.3 times greater if the victim is white. The Baldus study also asserts that the chances of receiving a capital sentence in cases in which a black person killed a white person were 11 times higher than in cases where a white person killed a black person. 29

These statistics are apparently a stark testimony that the system seems to operate detrimentally against black people. They suggest two primary areas of concern. One is that the race of the accused is likely to impact the outcome of a capital trial, with white people being proportionately less likely to be convicted of a capital offence than black people. The second is that the race of the victim also seems to have a profound impact on the outcome of a capital trial. 30

This is by no means a new phenomenon. In his book Crime in America, first published in 1970, former U.S. Attorney General Ramsey Clark wrote:

"The poor and the black have been the chief victims of the death penalty... Racial discrimination is manifest from the bare statistics of capital punishment. Since we began keeping records in 1930 there have been 2,066 Negroes and only 1,751 white persons put to death. Negroes have been only one-eighth of our population. Hundreds of thousands of rapes have occurred in America since 1930, yet only 455 men have been executed for rape – and 405 of them were Negroes. There can be no

26 See Appendix C Part 2.
29 See more on the Baldus study in part 1 D (iv) of this chapter in the context of the McCleskey case.
30 The race of the victim has also been shown to affect the likelihood of being charged with a capital crime. See the U.S. General Accounting Office, (February 1990) "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities." Report to Senate and House Committees on the Judiciary. Also see Part 1 E (i) of this chapter.
rationalisation or justification of such clear discrimination. It is outrageous public murder, illuminating our darkest racism."^31

The question now becomes to ask why this racial anomaly still exists.

C- What is the cause of this apparent racial discrepancy? Interpreting the statistics.

i- Criminological theories of offending.

There are a vast number of theories that may be utilised to try and explain why black offenders are disproportionately represented on death row. Many of these are criminological theories that focus on the causes of crime itself and may be used to explain if, and why, black offenders may be more inclined towards criminal behaviour than white offenders.32 Criminological theories range from Cesare Lombroso’s, (1835-1909), largely discredited concept of anthropological criminology, (which includes his notion that “dark skin”33 is one of the atavistic characteristics that make a person more genetically predisposed towards criminality); to the more credible sociological criminological theories, such as Hirschi’s Social Control Theory34 or Agnew’s General Strain theory.35

^31 Ramsey Clark, Former United States Attorney General, (1970) Crime in America – Its Nature, Causes, Prevention and Control, Cassell London, p335. 32 While there is a huge body of work dealing with this aspect of criminology it is unfortunately beyond the scope and remit of this thesis to go into them in any detail and, as such, only a few brief examples of a few prominent theories will be alluded to here. Suffice it to say however, that this is an enormous area of academia of which there is plenty of material for anyone wishing to investigate further. See for instance, Cook and Hudson (eds.) (1993) Racism and Criminology. Sage. 33 Cesare Lombroso’s classical positivist theory of biological criminology asserts that certain types of physiognomy (study of facial characteristics), phrenology (relating to the study of a person’s skull) and other bodily characteristics can be used as indicators of atavistic qualities that make one more inclined towards criminal behaviour. For more on Lombroso’s theories on Atavism and the above reference to “dark skin” as one of his indicators, see, for instance, Katherine Williams, (1994) Textbook on Criminology, Blackstone Press Ltd, (2nd edition) pp113-116. Also see Cesare Lombroso, (1876) The Criminal Man. (L’ Uomo delinquente.) 34 Hirschi’s Social Control Theory postulates that it is not lawbreaking that needs to be dissected, as it is a natural act, but rather it is law abidance that needs examining. He contends that criminality is constrained in law-abiding citizens by four elements: “their attachments with other people; the commitments and responsibilities they develop; their involvement in conventional activity; and their beliefs.” (See ibid. Katherine Williams, [1991], p327.) He asserts that it is when these elements are missing that criminality is most likely to ensue. It is important to note however, that although this theory was not postulated specifically in relation to explaining racial crime trends, it may be used to explain why, considering the sociological disadvantages that many black people have suffered over the years, some may be more susceptible to criminal activities. This in turn may make them more likely to be apprehended, prosecuted and, as unable to afford a proper defence, consequently more likely to be convicted on capital charges. 35 Agnew’s General Strain Theory asserts that strain, (of which he detects three variants: “a- Strain resulting from failure to achieve positively valued goals or goods... b-Strain resulting from the removal of positively valued stimuli... c-Strain resulting from negative stimuli.” (See Ibid. Williams, pp304-5)), can result in negative emotions such as anger, fear and depression each of which can lead to criminal behaviour.
However while such theories, as well as many others,\textsuperscript{36} may account for some degree of offending committed by some black people coming from the poorest echelons of society and who occupy the lower brackets of the socio-economic stratum, this is by no means a complete answer. Studies such as the Baldus study\textsuperscript{37} have shown that even taking into account factors such as socio-economics, and variables such as poverty and class, (and in light of the number of poor white people who populate America and yet manage to escape death row), black people are still inexplicably disproportionately represented on death row.

\textit{ii- Factors within the legal system.}

One increasingly prevalent and fairly persuasive explanation for the racial disparities is to attribute this phenomenon to a host of serious problems inherent within the legal system itself, as opposed to attributing them to characteristics of the offenders themselves.\textsuperscript{38} This approach maintains that black people are confronted with potentially racist obstacles throughout the various stages of the criminal justice process, each of which help to grease the path to death row. These potential points of racial conflict include racism and bias, whether direct or indirect, of the police, prison officials, lawyers, judges, juries, and so on. Racism at all of these stages, and at many others, make an unfair representation of black people at the highest end of the penal system hardly surprising. Some of the most prominent areas in which racism has been identified as a serious concern are considered next.

\textsuperscript{36} Other theories that may have a bearing on this subject include those pertaining to Critical or Radical Criminology. Radical Criminology sees “a high incidence of crime as inevitable in a society characterised by gross inequalities in wealth and opportunity.” In our context of race and crime the argument is that “if crime is linked to economic deprivation and marginalisation, then it is black unemployed youth who suffer most from these conditions. Black unemployment rates, black residence in areas of urban decay, black exclusion from the political and cultural milieu would all lead to an expectation of high crime rates.” See, Cook and Hudson (op. cit. note 32) (1993), ppl2-13. This also links closely to theories of Marxist Criminology which would attribute such problems as being a by-product of social inequality resulting from oppressive class structures.

\textsuperscript{37} The Baldus Study controlled for 39 aggravating and mitigating factors and yet still concluded that a prevalent racial discrepancy existed. See Part 1 D (iv) of this chapter for more on the Baldus Study in context of the \textit{McCleskey} case.

\textsuperscript{38} This approach is typical of Administrative Criminology in the sense that “much of administrative criminology’s interest has been focused on whether or not criminal justice and penal system agencies and processes discriminate against people on account of their skin colour or ethnic affiliation... it does not concern itself so much with the rights or wrongs of the outcomes, but whether the outcomes can be justified by proper adherence to processes and procedures.” See Cook and Hudson, (op. cit. note 32) (1993) p6.
a- The Prosecution and District Attorneys.

In the United States the decision to pursue a death sentence is largely left to the "prosecutorial discretion" of the District Attorney (DA). DAs are endowed with the "near limitless discretion"39 to pursue a capital conviction, accept a plea bargain or drop the charges altogether. It has been suggested however, that this unfettered decision-making has led to some discriminatory practices. Evidence has shown, for instance, that some DAs are less likely to accept plea bargains in cases involving black offenders than they are in cases involving white offenders.40

In the case *U.S. v Bass*, 536 U.S. 862 (2002), for instance, to support his claim that the government had pursued his conviction unduly influenced by his race, the defendant provided the court with a statistical survey compiled by the U.S. Department of Justice which indicated that, "the U.S. charges blacks with death-eligible offences more than twice as often as it charges whites and that the U.S. enters into plea bargains more frequently with whites than it does with blacks."41 The Supreme Court’s response was to reaffirm their earlier decision in *U.S. v Armstrong*, 517 U.S. 456 (1996), in which it was held that, "in order to demonstrate a discriminatory effect, the defendant must make credible showing that similarly situated individuals could have been prosecuted but were not."42 It was subsequently determined by the Court that nationwide statistics such as those presented by Bass failed to meet this test. This standard of proof has however, been criticised as "an unreasonably high standard"43 and "all but impossible to meet"44 and the decision in Bass effectively conveys the message that the prosecutorial decisions made by

40 See Appendix D for a breakdown of the percentage of federal cases for which the government accepted a plea bargain in light of the race of the defendant between 1995-2000. No satisfactory explanation has been given for these results. While the Department of Justice 2001 survey of the death penalty, asserts that the disparity may be due to African-Americans being less likely to accept plea bargains than whites, this is not supported by any statistical or anecdotal evidence and remains mere supposition.
41 *U.S. v Bass*, 266 F.3d at pp538-539 (6th Cir. 2001). (Citing the report by the U.S. Department of Justice, "The Federal Death Penalty System: A Statistical Survey." (1998-2000) 2. The full report can also be found at: http://www.usdoj.gov/dag/pubdoc/dpsurvey.html Also see section E (iii) of this chapter.
DA’s are practically beyond question, even in cases where racial discrimination seems to have played a part.⁴⁵

Another factor which adds to the veneer of racism, (while not necessarily proving any racial misconduct), is the fact that, according to a report compiled by the Death Penalty Information Center, approximately “98% of the District Attorneys in death penalty states are white.”⁴⁶

b- Defence lawyers.

The defendant’s own lawyer is often also a point of major concern.⁴⁷ Stephen Bright, Director and Lead Counsel for the Southern (U.S.) Center for Human Rights, for instance, has pointed to several cases in which the defendant’s own counsel has referred to their client in racially hostile terms using offensive words such as “nigger”⁴⁸ and “little old nigger boy.”⁴⁹ This sort of obvious distain of a client by his own lawyer will certainly not help the defendant’s case but will instead, in many cases, only serve to increase the likelihood of the jury finding the accused guilty as charged.

c- The jury.

One of the attractions of the traditional jury system is that it supposedly gives the accused an opportunity to be tried by a jury of their peers. However, the selection of a jury is another aspect of the legal system that is potentially open to discrimination and abuse. According to research compiled by organisations such as Amnesty International⁵⁰ and The Death Penalty Information Center,⁵¹ the practice of prosecuting attorneys who use their peremptory challenges to systematically exclude black people from a jury is not unusual. According to Amnesty International, in some states prosecutors have been

⁴⁵ As Donna Coker points out, in many cases it is impossible for the defendant to find data on “similar situation” cases and even when they can the prosecution can almost always point to some dissimilar aspect distinguishing the cases. See ibid. Coker p846, for more on the problems of the “similarly situated” standard of discovery. It is also interesting to note that the last time that a claim of selective prosecution was successfully made was more than 100 years ago in the case Yick Wo v Hopkins 118 U.S. 356 (1886).


⁴⁷ For a more in depth discussion on the poor quality of the court appointed attorneys assigned to represent indigent defendants, see Part 2 of this chapter.


⁴⁹ Ibid. Bright referring to Goodwin v Balkcom, 684 F.2d 794, 805 n.13 (11th Cir.1982).

⁵⁰ See footnotes 52 and 53 for examples.

"routinely excluding around 90 percent of prospective minority jurors in order to obtain all-white or almost all-white juries." In many cases prosecutors have been known to use each of their 27 “strikes” to remove black jurors from the pool for selection. Contrary to being a hidden agenda, this sort of biased jury construction is actually in accordance with some training manuals and videos specifically designed for lawyers, which encourage them to exclude minority groups on the grounds that they are more likely to sympathise with the accused.

This sort of practice continues to occur despite that fact that in the 1986 case of *Batson v Kentucky*, 476 U.S. 79 (1986), the U.S. Supreme Court ruled that it was unconstitutional to remove jurors because of their race and that only “race neutral” grounds could be employed. This places the onus on the defendant to prove that discrimination has occurred during the jury selection process. According to Amnesty International however, this is an almost impossible charge to prove, as “prosecutors simply have to come up with a vaguely plausible non-racial reason for dismissing a minority juror.” As such, in the past after striking off black jurors, prosecutors have cited reasons such as, because of “the way he was dressed”, for being a painter and for being “litigious” (having been witness to a previous unrelated accident in which a lawsuit followed).

Nevertheless, there have been some cases in which discrimination has been proven. On June 13th 2005, in *Miller-El v Dretke* (No. 03-9659), the Supreme Court held in a 6-3 decision that Miller-El was entitled to a new trial. This was because:

“In choosing a jury to try Miller-El, a black defendant, prosecutors struck of 10 of the 11 qualified black panellists. The Supreme Court said the

53 Amnesty International report how in 1997, after a training video teaching lawyers how to successfully exclude blacks from the jury selection pool became public, a journalist monitored the jury vetting process of four trials in Philadelphia and “of the four cases he looked at, the prosecution used 27 out of 27 strikes to eliminate potential black jurors.” See “USA – Canada: Killing with prejudice” at: http://www.amnesty.ca/library/1999/5amr5152.htm
54 Amnesty International News Release. (op. cit. note 52) (2002). (Assuming the accused is black.)
55 See for instance, (March 15th 2006) “Judge and Prosecutor Agreed on Keeping Jewish People off Juries.” Available at: http://www.deathpenaltyinfo.org/article.php?&did=1717
57 Ibid. p47.
prosecutors chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion. The selection process was replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race.”  

Later that same day in *Johnson v California*, (No. 04-6964), finally “the Court struck down California’s standard for reviewing *Batson v Kentucky* challenges as too demanding.”  

It was held that in *Batson*:

“The Court did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies *Batson’s* first step requirements by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.”  

However, even once a jury has been selected, racial bias can still infect proceedings. In their interviews with almost 1,000 jurors, the nationwide *U.S. Capital Jury Project* uncovered some deeply felt racist tendencies. Their data shows that the race of the person on trial may in some cases be the primary, if not only, reason for a juror voting to sentence a convict to death. In one interview, for example, a man is reported to have said, “He (the defendant) was a big man who looked like a criminal... He was big and black and kind of ugly. So I guess when I saw him I thought this fits the part.” Another said “just a typical nigger. Sorry that’s just the way I feel about it.”

A study published in May 2006 in *Psychological Science* reported that:

“Our findings suggest that in cases involving a Black defendant and a White victim – cases in which the likelihood of the death penalty is already high – jurors are influenced not simply by the knowledge that the defendant is Black, but also by the extent to which the defendant appears stereotypically Black.”  

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59 Ibid.
61 This project is a “multi-state research effort designed to better understand the dynamics of juror decision making in capital cases.” It has been running since 1990. See “About the Capital Jury Project” at: http://www.lawschool.cornell.edu/lawlibrary/death/cjp.htm
63 Ibid. “Killing with prejudice.”
Stereotypical features they considered included "stereotypically Black appearance, (e.g. broad nose, thick lips, dark skin.)" They concluded that their "present research demonstrates that in actual sentencing decisions, jurors may treat these traits as powerful clues to deathworthiness."

These elements of racism are very hard to control as, apart from interviewing and eliminating prospective jurors with overtly racist tendencies at the jury vetting or voire dire stage, at which point deep seated biases may not emerge or may be intentionally hidden by the juror, there is very little else that can be done.

d- Geographical disparities.

The location of the commission and prosecution of a crime also has a major role to play in the lottery of death. The first and most obvious factor is whether the crime was committed and tried in a retentionist or abolitionist state. A person can commit the same offence in Texas as in Rhode Island, but in the former state they may receive a sentence of death whereas in the latter abolitionist state the maximum sentence available is a custodial one.

The second geographically significant factor is that even within a group of retentionist states there are legal and statistical differences according to which one you are in. States such as Colorado, New Mexico and Tennessee have capital punishment on the statute books but only utilise that penalty on rare occasions. Conversely a state such as Texas, despite only being home to some 8% of the total U.S. population, has been responsible for approximately three quarters of all executions in recent years.

Even more surprising is the difference location can make within one state. In 2003 when Governor Ryan of Illinois issued his state’s moratorium on capital punishment he attributed one of his reasons to the injustice of geographical disparities. He said:

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Ibid. p385.

Ibid. p385.

See Appendix E for a list of retentionist and abolitionist states and Appendix F for a map of them.

See Appendix G for a list of states in rank order of the number of executions from highest to lowest and see Appendix H for a map of the number of executions by state.
“Should geography be a factor in determining who gets the death sentence? I don’t think so but in Illinois it makes a difference. You are five times more likely to get a death sentence for first-degree murder in the rural area of Illinois than you are in Cook County. Where is the justice and fairness in that... where is the proportionality?”

Each state also varies quite dramatically in terms of the actual percentage of ethnic minorities it executes. In Philadelphia, a Northern state, over 89% of people on death row are said to be minority races. In Alabama it has been estimated that, over the last 25 years, 70% of those executed have been African-American males, despite the fact that they make up only 12% of Alabama’s total population. Ohio also has a population of which only 11% constitute African-Americans but their death row population consists of approximately 51% African-Americans.

It is similarly estimated that the South as a whole is responsible for carrying out approximately 80% of all executions in the USA. It was estimated in an article of African-American Issues that, “regional differences make it 160 times more likely that a person convicted of a capital offence in the South will be executed than one in the Northeast.”

Again it is unclear what the causes of these discrepancies are. It may be that more ethnic minorities commit capital crimes in those areas or, as is more likely, it may be indicative of some deeper geographically variable racial intolerance. In any event, these regional differences are further examples of factors influencing the administration of capital sentences that are independent of the actual commission of the crime and that therefore have the potential to adversely affect defendants from ethnic minority backgrounds.

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69 For a transcript of his full speech see: CNN.com/USSat/Jan/11/2003 or see “Ryan: I never intended to be an activist on this issue.” At: http://www.cnn.com/2003/US/Midwest/01/11/ryan.text.one.ap/index.html
70 “Moratorium Now – How racism riddles the U.S. death penalty.” (op. cit. note 46).
71 See: http://www.allarise.org/Moratorium.pdfs
73 See Appendix I for a Death Penalty Information Center chart showing executions by region.
75 See footnote 127 of this chapter and its corresponding text for Bedau’s comments on the high execution rates in Southern states.
D- What does the Supreme Court say?

Faced with the serious accusation of a capital punishment system riddled with bias and racism, how has the Supreme Court reacted? The following are some of the most important landmark legal judgments to have been delivered by the U.S. Supreme Court in our present context.

i- Furman v Georgia, 408 U.S. 238 (1972). 77

In the seminal 1972 case of Furman v Georgia it looked as though capital punishment was seeing its final days. The Supreme Court ruled in a 4-5 vote that the death penalty, as it was then practised, was both “capricious” and “arbitrary” and hence violated the prohibition against cruel and unusual punishment 78 as enshrined in the Eighth Amendment of the U.S. Constitution. In the words of Mr Justice White, this arbitrariness was evidenced by the fact that “the death penalty is exacted with great infrequency even for the most atrocious crimes and... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” 79 Mr Justice Brennan (concurring) opined that, “the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed it smacks of little more than a lottery system.” Furthermore he pointed out that “no one has yet suggested a rational basis that could differentiate... the few who die from the many who go to prison.” In the context of cruel and “unusual” punishments Mr Justice Douglas stated that:

“It would seem to be incontestable that the death penalty inflicted on a defendant is “unusual” if it discriminates against him by reason of his race, religion, wealth, social position or class, or if it is imposed under a procedure that gives room for the plays of such prejudice.” 80

It was, as such, held in Furman that although the death penalty was not unconstitutional per se, the way in which it was administered was as “the Eighth and Fourteenth

77 See pp42-43 above for more on the facts and findings of this case.
78 The test for what constitutes “cruel and unusual” punishment was explained by Mr Justice Brennan in his concurring opinion. He stated that: “The test then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhumane and uncivilised punishment upon those convicted of crimes.” According to this test, arbitrariness is a key determining factor and it was therefore held by the Court that the death penalty under the then-existing law did allow for the arbitrary use of capital punishment.
79 Per Mr Justice White, (concurring opinion), 408 U.S., at 313.
Amendments can tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed. The abolitionist victory however was not long lived and in the 1976 case Gregg v Georgia, 428 U.S. 153 (1976), the U.S. Supreme Court effectively re-instated capital punishment.

**ii- Gregg v Georgia, 428 U.S. 153 (1976).**

In 1976 the U.S. Supreme Court overruled Furman by holding that the system under which Gregg was sentenced to death no longer violated the U.S. constitution. The Court held that sufficient changes had been made to the law so as to remove many of the previous objections to capital punishment that had been raised in Furman. This included new standards and sentencing procedures that minimised the threat of a discriminatory or arbitrary application of the punishment. In Georgia, for instance, these changes included greater guidance for juries at the sentencing stage, as well as a review system of automatic appeals for all those sentenced to death. As a result of these and many similar changes it was held that, “the new procedures on their face satisfy the concerns of Furman” and, as such, the manner in which capital punishment was administered was no longer held to be in violation of the constitution.

**iii- Batson v Kentucky, 476 U.S. 79 (1986).**

In this case the U.S. Supreme Court ruled that jurors could only be removed from the pool of selected jurors on race neutral grounds. It was determined that if a prosecutor

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81 The Fourteenth Amendment guarantees equal protection under the law.
82 *Per* Justice Stewart. In addition to the general condemnation of a capriciously imposed punishment, many specific criticisms were also levelled at individual flaws glaringly inherent within the sentencing procedures that were highlighted as probable causes for the arbitrariness of the death sentences meted out. For instance, Mr Justice Brennan in his concurring opinion argued that juries, “make the decision whether to impose a death sentence wholly unguided by standards governing that decision... In other words, our procedures are not constructed to guard against the wholly capricious selection of criminals for the punishment of death.” It was similarly argued that not enough attention was given to the circumstances surrounding the crime or the character and past record of the defendant.
83 Since then however, other cases have rendered certain categories of capital punishment as unconstitutional. For instance in Woodson v North Carolina, 428 U.S. 280 (1976) it was held that mandatory death sentences were unconstitutional. Similarly, in the case Coker v Georgia, 433 U.S. 584 (1977), it was held that the death penalty for rape was unconstitutional.
84 Issues for deliberation at the review would include consideration as to whether the sentence was imposed under the influence of prejudice and whether the sentence was disproportionate to sentences imposed in similar cases.
85 *Per* Mr Justice Stewart, Mr Justice Powell and Mr Justice Stevens, (Part 3).
struck off a disproportionate number of black jurors they would be required to give reasons for their chosen strikes. As previously noted however,\textsuperscript{86} due to the high standard of proof required to establish purposeful discrimination in the jury selection process, this is extremely difficult to prove in practice. What therefore seemed to be a breakthrough ruling at the time can, in reality, be easily overcome by those practising racist legal tactics.

As discussed above, however, the 2005 Supreme court decision in \textit{Johnson v California} is set to make the burden of proof on the defendant less onerous by requiring them to provide evidence by which the judge can \textit{infer} discrimination, as opposed to requiring them to prove to the judge that discrimination was \textit{more likely than not}.\textsuperscript{87}

\textit{iv- McCleskey v Kemp, 481 U.S. 279 (1987).}

\textit{McCleskey v Kemp} is one of the most significant and controversial cases examining the relationship between race and the administration of the death penalty. In this case, the defendant, Waren McCleskey, argued that the procedures by which the state of Georgia processed capital cases was racially discriminatory and, as such, had contravened his right to equal protection under the law in accordance with the Fourteenth Amendment of the U.S. Constitution, as well as violating his Eighth Amendment right to be protected from cruel and unusual punishments.

McCleskey’s arguments were supported by a groundbreaking study undertaken by Professor David Baldus and colleagues\textsuperscript{88} at Iowa University. The study was essentially a complex statistical analysis of more than 2,000 murder cases that had occurred in Georgia throughout the 1970’s. Taking into account 39 non-racial variables, the researchers concluded that a black man who killed a white man was statistically more likely to receive a capital sentence than a black man who killed another black man. It also showed that in cases where a white man had been killed, the death penalty was received in 11\% of cases, whereas it was only received in 1\% of cases involving black victims.

\textsuperscript{86} See 1 C (ii) c of this chapter.
\textsuperscript{87} See \textit{Johnson v California} as discussed on p331 above.
\textsuperscript{88} Baldus study (op. cit. note 28) (1983).
Even though the Baldus study centred around cases that had occurred in the previous decade, the NAACP Legal Defence Fund who had been managing McClesky’s case had wanted to introduce the investigation principally because, “it wanted to show that one of the defects in the older system of capital punishment that had led the Court’s majority to condemn it as arbitrary and capricious in 1972 was still operating in full force in that same state”\(^89\) in the post-

Furman\ years.

Nevertheless, despite these powerful criticisms, and despite acknowledging that “apparent disparities in sentencing are an inevitable part of our criminal justice system”\(^90\) the court argued that:

“Racial disparities in death sentences, however well established statistically, are insufficient to warrant intervention by the federal courts, unless those disparities can be traced to intentional discrimination on racial grounds against the defendant in question.”\(^91\)

The issue of institutionalised racism was not therefore dealt with despite Justice Powell’s acknowledgement that the Baldus study was “valid statistically.”\(^92\) The Court held that McCleskey had not proven purposeful discrimination in his particular case\(^93\) and he was subsequently executed in Georgia in 1991.\(^94\)

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\(^90\) McCleskey v Kemp, 481 U.S. 279 (1987) Per Justice Powell Part IV, C.


\(^92\) Justice Powell was writing for the majority opinion. 

\(^93\) Justice Powell also used the slippery slope argument to convey the court’s concern with McCleskey’s claim “which if taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system... If we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race could easily be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.” Part V, McCleskey v Kemp, per Justice Powell.

\(^94\) It is interesting to note that Justice Powell later voiced his regret at his decision admitting that “he had not fully understood the statistical evidence of prejudice in the McCleskey case and wished he had voted differently.” See “Extreme Prejudice: Racism and the Death Penalty” on the Amnesty International Canada website at: http://www.amnesty.ca/usa/racism.php
E- Other important studies and reports relating to capital punishment and the issue of racial bias.

i- The U.S. General Accounting Office.

In 1990 the U.S. General Accounting Office performed an “evaluation synthesis” whereby they assessed 28 studies on capital sentencing procedures and examined how they were affected by the race of the victim and the race of the offender. In their conclusion they stated that:

“Our synthesis of 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty after the Furman decision. In 82% of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were more likely to be sentenced to death than those who murdered blacks... more than three-fourths of the studies that identified a race of defendant effect found that black defendants were more likely to receive the death penalty... To summarise, the synthesis supports a strong race of victim influence.”

ii- The American Bar Association.

In 1997 The American Bar Association (ABA) called for a moratorium on capital punishment on several grounds, one of which was evidence of racial bias. They released a statement in which they said:

“The American Bar Association, while taking no position on capital punishment per se... has urged the federal and state governments to halt executions in order to take a hard look at the growing body of data showing that race, geography, wealth and even personal politics can be factors at every stage of a capital case, from arrest through to sentencing and execution.”

Their 1997 report condemned the system in harsh terms saying that, “today the administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.”

In January 2006 the ABA renewed their call. The American Bar Association Moratorium Implementation Project and the Arizona Death Penalty Assessment Team released a

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97 Ibid., p26.
report in which they recommended a moratorium be imposed in Georgia. Among their many grounds for this call was the fact that currently in Georgia, "research shows race plays a key role in a defendant's likelihood to receive the death penalty." On June 11\textsuperscript{th} 2006 a similar call was heralded following a 20 month study of the situation in Alabama after which it was reported that the "ABA calls for a death penalty moratorium in Alabama."\textsuperscript{99} ABA studies of other death penalty jurisdictions are currently in progress and will also be examining the issue of racial bias in the capital sentencing process.

\textit{iii- U.S. Department of Justice 2000 Report.}

In a report published by the U.S. Department of Justice entitled, \textit{The federal death penalty system – A statistical survey (1998-2000)}, it was shown that, among other things, approximately three-quarters (79\%) of all defendants on federal death row were from minority groups. Attorney General Janet Reno said of the report that she was "sorely troubled\textsuperscript{100}" by the statistical evidence of racial disparities within the federal death penalty system. She ordered further investigation and research into the phenomenon.

\textit{iv- U.S. Department of Justice 2001 Report.}

Despite many reports indicating bias in the context of federal capital trials, the U.S. Department of Justice has not been so ready to concede to allegations of a racist justice system. In a report published in 2001 under Reno’s successor, Attorney General John Ashcroft, the Department of Justice freely acknowledged the fact that, “the proportion of minority defendants in federal capital cases exceeds the proportion of minority individuals in the general population.” However, they asserted that “the cause of this disproportion is not racial or ethnic bias but the representation of minorities in the pool of potential federal capital cases.” The report goes on to explain that the federal enforcement authorities had been targeting specific areas of crime such as “drug trafficking enterprises and related criminal violence” and that, as they were necessarily targeting “areas where large-scale, organised drug trafficking is largely carried out by gangs whose membership is drawn from minority groups, the active federal role in investigating and prosecuting

\textsuperscript{100} Marc Lacey and Raymond Bonner, (Sept. 12\textsuperscript{th} 2000), “Reno troubled by death penalty statistics.” \textit{New York Times}. 
these crimes results in high proportions of minority defendants."\(^1\)

However, this rationale has been vigorously refuted by critics such as Professor of Law Donna Coker (2003) who argues that these assertions are largely unsubstantiated and do not adequately explain racial discrepancies.\(^2\)

**F- International criticism.**

Despite the fact that in 1994 America finally ratified the *International Convention on the Elimination of All Forms of Racial Discrimination*,\(^3\) there is still much international criticism over its seemingly racist application of capital punishment. The *International Commission of Jurists* for instance, published a report in 1996 in which they concluded that "the administration of capital punishment in the U.S. continues to be discriminatory and unjust and hence "arbitrary" and thus not in consonance with the ICCPR\(^4\) and the race Convention."

In July 2006, once again citing the 1966 ICCPR, a UN panel again called for the U.S. to impose a moratorium on capital punishment. The report published on 28\(^{th}\) July 2006 by the *UN Human Rights Committee* stated that, "the panel remains concerned by studies according to which the death penalty may be imposed disproportionately on ethnic minorities as well as on low-income groups, a problem which does not seem to be fully acknowledged by the state party."\(^5\) As such, the committee suggested that the State party should:

"Assess the extent to which the death penalty is disproportionately imposed on ethnic minorities and on low-income population groups, as well as the reasons for this, and adopt all appropriate measures to address the problem. In the meantime, the State party should place a moratorium

\(^1\) U.S. Department of Justice (DoJ) Report 2001. Washington D.C. June 6, 2001 at:

\(^2\) See Donna Coker, (2003) "Supreme Court Review. Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System." *The Journal of Criminal Law and Criminology*, Vol. 93, No. 4, pp827-879 at p833. Professor Coker argues (p851) that the DoJ report provides no evidence for the assertion that major drug traffickers are of minority races. Coker also argues that, contrary to the impression given by the DoJ report, the findings of the 2001 National Household Survey on Drug Abuse, show that African-Americans do not use illegal drugs any more than whites.

\(^3\) General Assembly Resolution 2106A (XX) (Dec. 21, 1965 Art. 5).

\(^4\) *International Covenant on Civil and Political Rights.*


on capital sentences bearing in mind the desirability of abolishing the death penalty.”

As The Washington Post point out however, “criticism by the panel brings no penalties beyond international scrutiny. The U.S. ratified the treaty in 1992 with a number of reservations, including provisions on the death penalty.”

Many highly publicised cases have also drawn negative international attention to the American death penalty process. There has been a long running campaign for instance, to free Mumia Abu-Jamal, a black man convicted in 1982 for the murder of a white policeman. Abu-Jamal’s case has been so fraught with allegations of prosecutorial misconduct and racism that his trial has been dubbed by some as a “travesty of justice” and as a result Abu-Jamal has become something of an international cause celebre, personifying the fight against racial injustice in death penalty trials.

Having now considered a preponderance of evidence indicating that the death penalty is administered in a manner that is discriminatory, and hence incrementally unjust, the question now becomes how, if at all, does this temper the religious arguments surrounding the issue of capital punishment? For both Christian and Muslim abolitionists, arguments of unequal justice clearly bolster their positions, whereas for retentionists it seems to offer a significant, but not necessarily fatal, theological and moral challenge. Some of these positions and responses shall be examined next.

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107 Ibid. p9.
109 Officer Daniel Faulkner was murdered on Dec. 9th, 1981.
110 See “Protest Mumia’s 20 years on death row” at the Refuse and Resist website. Also see “Stop the Execution of Mumia Abu-Jamal – Overtturn the Conviction” at: http://www.refuseandresist.org/mumia/2002/013102mpg2.pdf for an outline of some of the critical issues surrounding his trial including, among others, the fact that his jury was almost exclusively white; he was not allowed to represent himself at trial; and that he was obliged to accept a court appointed attorney who withheld vital facts of the case from the jury. (His attorney was later disbarred.) Abu-Jamal’s sentence of death was also passed by Judge Albert Sabo, who has earned the notorious nickname “the hanging judge” by virtue of the fact that he has sentenced more black people to death than any other judge in America. (Note: Refuse and Resist is an organisation claiming to be against “today’s national agenda of repression and cruelty, poverty and punishment” and was formed in 1987 by activists and lawyers, among others, who were opposed to state control and oppression.) See refuse and resist homepage at: http://www.refuseandresist.org/altindex.php
G-Christianity and the race debate.

Although historically there have been numerous instances in which Christianity has been used to justify racist practices, such as slavery, apartheid, and segregation, Christians have also been at the forefront of movements to abolish such practices and a growing Christian concern with racial inequality in the world today also extends to the racially unequal practices of the capital punishment process. Christian organisations such as Catholics Against Capital Punishment (CACP), the Friends Committee on National Legislation and Pax Christi USA are firmly opposed to the death penalty and while their arguments are not founded solely, or even primarily, on the issue of racial injustice, it certainly forms one of their more prominent and persuasive justifications for advocating its abolition. Many churches and church leaders have also issued statements opposing capital punishment citing unequal justice and racism as one of their central grounds of opposition. A Parish in Florida, for instance, issued a resolution in 1999 stating: "As Catholics we must take note of the fact that there is ample evidence that the death penalty is applied in an unfair and racially and economically discriminatory manner." They cited this as one of their reasons for calling upon congress to adopt a moratorium on the punishment.

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111 The Bible has historically been used by many people to justify slavery. Davis Jefferson, (1808-1889) for instance, President of the Confederate States of America between 1861-1865, is reported to have said, "slavery was established by decree by Almighty God... it is sanctioned in the Bible, in both Testaments, from Genesis to Revelations." See: http://www.religioustolerance.org/chr_slav.htm for this quote and for other examples of the Bible being used to justify slavery. Also see Biblical verses such as Exodus (21:2) for references to slavery.

112 According to Nelson Mandela for instance, several practises of the South African apartheid were either actively supported by some churches (such as The Dutch Reformed Church and the Lutheran Mission) or passively complied with by others (such as the Wesleyan Church to which Mandela himself belonged). See Nelson Mandela, (2001), Long Walk to Freedom. Abacus, p196.

113 This includes the segregation that existed between blacks and whites in the USA in the years following the American Civil War. Another form of segregation that occurs, even today, is that separating "black" churches, "white" churches and other churches catering to specific racial denominations. Richard Niebuhr, for instance, has pointed to the fact that "a bare list of the Christian denominations in America indicates the importance of ethnic and national factors in dividing the church. Among the names one notes in such a list are: German Seventh Day Baptists... Polish National Catholic Church... Syrian Orthodox Churches... the Norwegian Lutheran..." and so on. See Richard Niebuhr, (1929) Social Sources of Denominationalism, Meridian Books, p107.

114 The Quakers, Mennonites and Anabaptists, for instance, were forerunners of the abolitionist cause in the seventeenth century and have traditionally opposed practices such as slavery and capital punishment.

115 CACP cite the discriminatory application of capital punishment against the poor and ethnic minorities as one of the reasons for their opposition to the penalty. See, “Frequently asked questions” on their website at: http://www.cacp.org/pages/585136/index.htm

Similarly, the “U.S. Bishop’s Statement on Capital Punishment” (November 1980) stated that, “it is a reasonable judgment that racist attitudes and the social consequences of racism have some influence in determining who is sentenced to die in our society. This we do not regard as acceptable.” \(^{117}\) The U.S. Catholic Conference (USCC) further voiced their opposition to capital punishment on the grounds of racial discrimination following the 1987 Supreme Court decision in *McCleskey v Kemp*. \(^{118}\) USCC general secretary Daniel Hoye stated:

> “The U.S. Catholic Conference is deeply disappointed… We disagree with the court’s judgement in this matter. The fact that capital punishment is applied in a racially discriminatory way has been one of the reasons for our continued opposition on moral grounds to the application of the death penalty. The evidence submitted in the *McCleskey* case strengthens our conviction that the death penalty is frequently applied in an irrational and discriminatory fashion.” \(^{119}\)

In support of these positions however, while there are some Biblical verses that clearly demonstrate the principle that the law should be applied equally to all people and not to the detriment of one ethnic group over another, (such as *Leviticus* 24:21-22 which says, “Whoever kills a man must be put to death. You are to have the same law for the alien and the native-born”) such verses are, nevertheless, relatively few and even fewer relate specifically to the issue of racism and capital punishment. As such, abolitionists tend to focus instead on the general spirit of the Christian message, specifically teachings on love and tolerance, drawing attention to the fact that Biblical exhortations to love one’s neighbour \(^{120}\) do not come with the disclaimer, “as long as he is white.” If Christians are taught to love even their enemies, how much more so should they love their non-white neighbours?

Similarly, Jesus’ message was one intended to be passed through the ages and spread abroad. As it says in *Matthew*, Jesus told his followers to “Go and make disciples of *all nations*… teaching them to obey everything I have commanded you.” \(^{121}\) He did not restrict his message to one race or tribe. This mission of universality is evidence of the


\(^{120}\) *Matthew* (5:43-44.)

\(^{121}\) *Matthew* (28:12-20.). Italics are my own emphasis.
importance of all humans and racial discrimination is therefore usually viewed as contrary to the very spirit and message of Christianity. Many Christian organisations, as well as individual believers, therefore feel that evidence of racial discrimination within the capital punishment process offers sufficient religious grounds on which to oppose the practice as it occurs today.

Conversely however, there are other Christians to whom arguments of discrimination do not justify abandoning a penalty that they believe has been given Divine Sanctification in the Bible. Pastor John Kohler, for instance, a pro-capital punishment Baptist author argues that, “When God instituted capital punishment, He knew that it would not always be carried out fairly. The real solution here is to improve the way in which the law is administered, not to eliminate the punishment for violations of that law.” He further argues that if one was to follow the logic of abolishing capital punishment because of its discriminatory application “then we might as well do away with all of our laws and all punishments.” This seems to be the overwhelming view of many retentionist Christians in America who continue to support its practice despite its seemingly unequal application.

In fact, capital punishment is often most strongly associated with Christianity in regions where the most blatant racial disparities are evident. It is well known, for instance, that the “Death Belt” of America, which is the region most notorious for its high level of executions, is also known as the “Bible Belt.” However, evidence of a geographical correlation between fervent Christianity in the southern states and the high rates of executions in the same region does not necessarily mean that Christianity endorses harsher punishments for ethnic minorities than it does for whites. There is no evidence to

122 See for instance, “Resolution Opposing the Death Penalty” adopted unanimously by the General Assembly of the Texan Conference of Churches, February 24th 1998, para. 5, for a Bishop’s statement opposing capital punishment citing racism as one of their grounds of opposition. This can be found at: http://www.usccb.org


124 ibid.

125 It is also the view, for instance, of Kerby Anderson regarding the Christian position on capital punishment. See the concluding comments of this chapter for more on Anderson’s position.

suggest that an unequal or discriminatory application of capital punishment can legitimately be supported by or based upon Biblical Scripture or Christian theology. As Professor Hugo Adam Bedau says on this point, a wide range of factors could explain this correlation. He writes:

"Describe the South however, one wishes – the erstwhile slavocracy, the Old Confederacy, the Bible-Belt – in this region the death penalty is as firmly entrenched as grits for breakfast. Why the death penalty should be so deeply rooted in southern culture is not entirely clear; conventional explanations (unsupported by any unambiguous empirical evidence) point to the relatively rural, religious, and racist attitudes of the native white residents in the region, attitudes whose roots go back to the days of slavery when the threat of violent repression of the resident African American labour force was an essential element of social, political, and legal control. The death penalty today, so this explanation goes, is nothing but the survival in a socially accepted form of the old Black Codes and the lynch law enforced by the Ku Klux Klan."  

Bedau then adds the disclaimer that this is a “crude stereotype” to which must be added a host of other more complicated factors in order to explain the geographical correlation between the “Death Belt” and the “Bible Belt.”

Many factors are likely to influence the high execution rates of black people in Bible Belt states which have nothing to do with Christianity preaching racism but more to do with a steadfast and deeply entrenched religious belief in the concept of capital punishment itself. For instance, it is suggested that in areas where there is likely to be a high concentration of Christian jurors, in capital trials, prosecution lawyers frequently appeal to the jurors’ religious sentiments by invoking God and quoting the Bible in their closing arguments. They entice jurors to believe that it is their religious duty to convict the accused and sentence them to death, regardless of race. As Gary Simpson and Stephen Garvey explained in the 2002 Cornell Law Forum:

128 Professor Franklin Zimring, for instance, postulates that the strength of the political right in the Southern states along with its traditional support for the death penalty may account for some of this correlation. Alternatively he points to the possible explanation “that the South is more violence-prone than other regions, and this tradition of violence might create a higher execution propensity.” See Zimring, (2003) The Contradiction of American Capital Punishment. Oxford University Press, p115. (Professor Zimring is a Professor of Law and Director of the Criminal Justice Research Program at the University of California, Berkley.)
"Appeals to religion at closing argument come in various shapes and forms. Some appear to urge the jury to follow an "eye for an eye" or some other religious command rather than worry about the particular requirements of the applicable law. Others cite a religious authority as establishing the jurors' duty to enforce the state's laws, while others assure the jurors that they can reach a particular verdict without violating their religious beliefs." 129

Although the defence team undoubtedly counters these arguments with reminders of the more forgiving and tolerant elements of Christianity, this attitude of religiosity frequently attached to legal proceedings may be one reason why, in a region where many Christians are in favour of capital punishment, they are more likely to convict than in other areas which are less well known for their staunch Christian values. In principle however, the overwhelming Christian position on this issue is undoubtedly one opposed to a racist application of the law. As Dale S. Recinella (2004) argues:

"It is clear that the standards of the biblical death penalty cannot abide disparate application based on the 'value' of the victim. White victims must not be treated as more valuable than black victims. It also does not allow for disparate treatment of the accused based on one being more valuable than another. White murderers are not to be treated differently from black murderers. The American death penalty falls far short of this Biblical standard on both counts." 130

H- Islam and the race debate.

Islam is a religion that teaches transcendence above racial barriers. It is universally accessible, open to all of humanity and not just one specific race, tribe or nation. Muslims are taught that no one person is better than another, except by virtue of the strength of their faith in God and what is in their hearts. The Quran says, "O mankind! We have created you from a male and a female and made you into nations and tribes that you may know one another. Verily the most honourable of you with Allah is that (believer) who has At-Taqwa (i.e. he is one of the pious)." 132

131 Unlike religions such as Judaism, for instance, which have intrinsic ties to racial identity.
132 The Quran, (49:13).
Islam teaches that, at one time or another, prophets have been sent to every nation on earth. The last prophet, Prophet Muhammad (pbuh),\textsuperscript{133} was however, sent as a messenger to the entire world and not just to one specific racial or cultural group.\textsuperscript{134} The Quran says: “We have not sent thee but as a (Messenger) to all Mankind, giving them glad tidings, and warning them (against sin), but most men know not.”\textsuperscript{135} In fact racial equality was one of the primary topics of Prophet Muhammad’s (pbuh) Last Sermon. In this sermon, in addition to admonishing men to be kind to women and treat them well, he discussed the issue of racial equality. He said: “All mankind is from Adam and Eve. An Arab has no superiority over a non-Arab nor does a non-Arab have any superiority over an Arab; Also a white has no superiority over a black, nor does a black have any superiority over a white except by piety and good action.”\textsuperscript{136}

Once a person declares that they are a Muslim\textsuperscript{137} they become a part of the global family or community known as the Muslim \textit{Ummah}. Islam breaks down all barriers of race, class, language or any other characteristic that a person may feel defines them. Nowhere is there a greater practical example of the dissolution of racial barriers and the integration of races within Islam than on the annual Muslim pilgrimage, \textit{Hajj}, to Mecca.\textsuperscript{138} Even some of the world’s most jaded and cynical racists have been overwhelmed by the integration of races evident in the Muslim world culminating in the Hajj. One prime example of an infamous self-proclaimed ex-racist moved by the universality of the Islamic teachings is Malcolm X.\textsuperscript{139} His rejection of his own previously held anti-white sentiments only came after he performed the Hajj in Mecca. He writes of his life-changing experience in his self-titled autobiography:

\begin{itemize}
\item \textsuperscript{133} Peace be upon him.
\item \textsuperscript{134} Among the Prophet Muhammad’s (pbuh) followers and greatest companions were men and women from all backgrounds, each of whom were viewed as equal in terms of race.
\item \textsuperscript{135} \textit{The Quran}, (34:28). Italics are my own.
\item \textsuperscript{136} Prophet Muhammad’s (pbuh) Last Sermon was delivered on the ninth day of Dhul Hijjah 10A.H. (of the Islamic calendar) in the Uranah of Mount Arafat.
\item \textsuperscript{137} As explained in Chapter 3, this is done by repeating the \textit{Shahada} or the Declaration of Faith which states that: “There is no God except Allah and Muhammad is the Messenger of Allah.”
\item \textsuperscript{138} Mecca is a city in Saudi Arabia. Hajj is the largest religious gathering on earth and annually attracts around two and a half to three million pilgrims.
\item \textsuperscript{139} Having belonged to a racist religious sect known as the Nation of Islam (a group considered by orthodox Muslims not to be at all related to true Islam but in fact considered to be abusing the name Islam by associating it with many non-Islamic ideas) he had spent years preaching the racist idea that the white man was literally the Devil. It is only when Malcolm X left the Nation of Islam and declared himself to be a “true Muslim” following orthodox mainstream Sunni Islam that he rejected all of his previous misconceptions about race.
\end{itemize}
“There were tens of thousands of pilgrims, from all over the world. They were of all colours, from blue-eyed blonds to black skinned Africans. But we were all participating in the same ritual, displaying a spirit of unity and brotherhood that my experiences in America had led me to believe never could exist between the white and the non-white. America needs to understand Islam, because it is the one religion that erases from its society the race problems... I have never before seen sincere\textsuperscript{140} and true brotherhood practiced by all colours together, irrespective of their colour.”

He goes on to say:

“You may be shocked by these words coming from me. But on this pilgrimage, what I have seen, and experienced, has forced me to re-arrange much of my thought-patterns previously held, and to toss aside some of my previous conclusions... During the past eleven days here in the Muslim world, I have eaten from the same plate, drunk from the same glass, and slept (on the same rug) – while praying to the same God – with fellow Muslims, whose eyes were the bluest of blue, whose hair was the blondest of blond, and whose skin was the whitest of white. And in the words and in the actions and in the deeds of the “white” Muslims, I felt the same sincerity that I felt among the black African Muslims of Nigeria, Sudan and Ghana.\textsuperscript{141}

He quite rightly refers to Islam as a religion promoting and practicing “colour-blindness.”\textsuperscript{142}

Given the principle of racial equality as promulgated in Islam,\textsuperscript{143} it is reasonable to ask how the religion deals with the potential for racial bias in the application of a punishment that the religion ostensibly permits. Firstly, it is important to remember that capital punishment as prescribed in Islam is very different to that practiced in a country such as America, in the sense that, for instance, it is a relatively rare penalty in Islamic law. As previously outlined, there are only three well-established capital offences in Islam\textsuperscript{144} and

\textsuperscript{140} All italics are those of Malcolm X.


\textsuperscript{142} Ibid. Malcolm X, p453.

\textsuperscript{143} It is important to acknowledge that although racial conflicts do exist between Muslims and non-Muslims, (such as between Muslims and Hindus in Kashmir), these are usually based on historical, political or geographical clashes but racial bias is not sanctioned or permitted on Islamic Scriptural grounds.

\textsuperscript{144} As outlined in Chapter 3, these are the offences of murder; adultery between a couple, (at least one of whom is married to a third party); and apostasy when it is accompanied by a threat or attack to the Muslim community from which they came. Precedents can also be set by religious scholars and judges for other capital offences in the modern era.
unlike certain capital laws in American history, none of these crimes contain, or are allowed to contain, any element of ingrained racial bias. As Shariah scholar Abdur Rahman Doi writes, “Any injustice or any tribal or racial consideration is nothing but a grave sin and disobedience.”

Furthermore, to ensure the just application of even these race neutral capital offences there are several legal safeguards in place that attempt to counter any potential for a racist application of the law. For instance, the requirement that any witness who brings a capital case to court, or testifies in one, must be known in the community for their honesty and integrity in order for their testimony to be fully considered, in addition to the fact that false testimony can result in the malicious witness themselves being eligible for severe sanctioning, serves to restrict unfounded litigation based on racial motivations.

Furthermore, as with judges in most secular jurisdictions, once a charge has been brought before the court a judge is required to consider all aggravating and mitigating circumstances so as to reach the fairest judgement and this may certainly include evidence of racial discrimination. Judges of Islamic law are also taught that, “it is better for the judge to err in acquitting the accused rather than erring in awarding him punishment.”

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145 As this chapter has already mentioned, American legal history is littered with laws that criminalized acts based on race, such as laws relating to segregation and laws imposing harsher penalties on blacks than on whites for similar offences. This was a practice particularly prevalent in the Jim Crow era (1880’s-1960’s).


147 The first and most important constraint to a Muslim acting in a biased or discriminatory manner is their awareness that Allah is constantly watching, recording and judging him or her according to their every word, deed, act and intention. As such, in an ideal Muslim society the knowledge of Allah’s judgement should be enough to make any act in a fair, just and non-biased manner. However, as we do not live in a spiritually ideal world, in addition to numerous faith-based safeguards that rely on a person’s ingrained sense of morality, piety and justice, there are also several legal provisions in place to curb such misconduct.

148 In most capital cases a minimum of 2, if not 4, witnesses of good character are required. The number of witnesses varies according to the crime committed.

149 Whether a person’s character is worthy enough to make them eligible to stand as a credible witness is left to the prerogative of the presiding judge.

150 See Chapter 3 Part 3, 6 C (iii) for more on the role of witnesses in capital Shariah cases.

151 It may also include any number of other mitigating factors such as a person’s health, whether they have dependents and so on.

A further safeguard protecting the accused from institutional racism for instance, is that for most offences there is no mandatory punishment. If a person is guilty of the capital crime of murder, for example, their death is not inevitable. There are several alternatives available in lieu of their execution and these are largely left to the discretion of the victim’s family. This restricts the practice of chronic institutional racism among prosecutors and judges as they simply do not always have the final say.

Given that a core teaching in Islam is one of brotherhood, unity and equality, it is clear that no racial inequality should be allowed to operate within the Islamic justice system. As previously mentioned however, no country today fully practices true and pure Islam. As a result therefore, if any Muslim country does implement capital punishment in a manner that allows any form of bias to taint its legal proceedings this is not a reflection in any way of the teachings of Islam, which preaches only equality and equity among races, but is an effect or symptom of their own cultures. Saudi Arabia, for instance, has been accused of treating foreign workers harsher than its own citizens when it comes to the matter of capital punishment. However, there are no grounds for favouritism in Islamic law. On the contrary it is clearly and strictly prohibited.

In response to the evidence of racial discrimination pertaining specifically to the American capital punishment system, such a state of affairs is clearly incompatible with Islamic teachings. As such, while the majority of mainstream Muslims may support the concept of capital punishment in principle, in light of the aforementioned evidence, it

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153 Another safeguard against racist executions is that Islam does not allow for mob justice. Justice must be sought through the legal process and no individual can take the law into his or her own hands. This avoids problems of racist lynch mobs such as those that took part in vigilant justice throughout much of American history.
154 See Chapter 3, Part 3 for more details on the defences available for capital crimes in Islamic law and Part 4 for some Islamic alternatives to capital punishment.
155 These alternatives include financial compensation for the victim’s family or a full pardon in which the family of the victim may chose to completely forgive the offender.
156 Thus avoiding the situation that has arisen in America, for instance, in which some judges have earned nicknames such as the “hanging judge” (Mumia Abu Jamal’s judge, Judge Sabo, for example, see footnote 110 above), on account of their overzealous application of the death penalty against black people.
157 Of course this does not mean that individual families may not be racist themselves but in a true Muslim society they would be aware of the importance of questioning their own motives in line with the belief that they too will be judged on the Day of Judgement and that if they choose mercy over retaliation that may redeem them during their own judgement.
159 As Part 2 C below will show.
would be legitimate to oppose the way that it is currently practiced, in terms of racial inequality, in countries such as America today. According to Imam Jamil Abdullah Al-Amin, this is the current thinking among many Muslims today who “oppose the implementation of capital punishment in America, while embracing the legitimacy of the death penalty.”

Having examined some of ways in which race influences the capital punishment process, some of the other manifestations of inequality in capital sentencing procedures will be examined next including the argument that the death penalty is applied discriminatorily against the poor and unjustly against the mentally ill.

2- The poor and capital punishment.

A- Defendants who can not afford their own attorneys.

Amnesty International estimate that in America “around 90% of prisoners who end up on death row are too poor to afford their own lawyers.” These defendants are therefore generally in a position where they have no choice but to be represented by a court-appointed attorney, which is their Constitutional right under the Sixth Amendment. This Amendment places a duty on all states to provide legal representation to those who cannot afford it themselves.

However, court appointed attorneys are frequently overworked, inexperienced, underpaid and often suffer from a lack of funds and resources, all of which result in a substandard legal defence which too often results in the execution of impoverished defendants. In his article Counsel for the Poor, Stephen Bright cites several examples

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This is also the approach of the Nation of Islam who, (although not considered to be Muslim by mainstream orthodox Muslims), oppose capital punishment in terms of its application in America today which they see as biased against blacks. See for instance: http://www.againstdp.org/muslim.html

161 Amnesty International leaflet. “USA: Death Penalty – A National Lottery.”

162 The Sixth Amendment, as ratified on 12/15/1791, states that: “In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defence.” This right was confirmed in the case Gideon v Wainwright, 372 U.S. 335 (1963), in which the U.S. Supreme Court held that all states were required, by virtue of the Sixth and Fourteenth Amendments, to provide counsel to those indigents in their jurisdictions who could not afford to pay for legal representation themselves. The right for a person to be represented by a court appointed attorney if they are facing the death penalty and can not afford their own counsel was further established in Powell v Alabama, 287 U.S. 45 (1932).

163 See footnote 173 below and its corresponding text for some examples of the wages earned by some court appointed attorneys.

of cases in which a defendant’s inability to afford decent counsel has seriously jeopardised, if not literally cost them, their lives. He cites for instance, several cases whereby vitally important mitigating factors had failed to be presented by the defence lawyer, including a case in which a lawyer failed to inform the court that his defendant was mentally retarded. Steven Bright also refers to one case in which the lawyer was in a state of intoxication throughout the trial, several cases in which the lawyer referred to their client, in front of the judge and jury, in offensive racist language, and even cases in which lawyers have simply been shown to be blatantly ignorant of the law.

Other examples of lawyers failing their clients during capital murder trials include instances of defence lawyers literally falling asleep mid-trial. The Houston Chronicle, for instance, reports how:

“Defence attorney John Benn spent much of Thursday afternoon’s trial in apparent deep sleep. His mouth kept falling open and his head lolled back on his shoulders and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again. Every time he opened his eyes a different prosecution witness was on the stand…” During recess, “Benn was asked if he truly had fallen asleep during a capital murder trial. “It’s boring” the 72 year old long-time Houston lawyer explained.”

The extraordinary unprofessionalism of Mr Benn was held by the trial judge not to have violated Mr McFarland’s constitutional right to counsel as, according to the judge’s rationalisation, “the Constitution does not say the lawyer has to be awake.”

Given this state of affairs it is not surprising that Amnesty International have reported that, “in many states 50% of death sentences are overturned on appeal because the original defence was inadequate.”

165 See, for instance, the case of Horace Dunkins whose mental retardation was not disclosed by his counsel at his trial. He was subsequently convicted and executed. For more details see, Peter Applebome (July 15th 1989) “Two electric jolts in Alabama execution.” New York Times, at A6.

166 Also see, for example, “Amnesty International urges halt of execution for man whose lawyer was intoxicated during trial.” Aug. 29th 2001. This article can be found on the AI website.

167 This includes instances in which lawyers have used such offensive terms as “nigger”, “little old nigger boy” and “wetback.” See Stephen Bright, (op. cit. note 48) (1997) footnote 18, p305.

168 Stephen Bright provides a number of examples of such cases in “Counsel for the poor” (op. cit. note 48) (1997) at pp304-305 including one case in which the lawyer had not read the death penalty statute before the beginning of the trial!


170 Ibid. Mr McFarland’s appeal was also subsequently denied.
One of the major contributors to this substandard level of defence, and to the proliferation of what the ex-Governor of Illinois, George Ryan, has referred to as “shabby defence lawyers”172 is undoubtedly a lack of proper funding. There have been reports of court appointed attorneys trying capital cases in which they have been paid the meagre sum of $4.05/hour, $11.84/hour, 173 or some other paltry sum. Without adequate financial resources however, attorneys cannot afford, or be expected, to thoroughly investigate all the facts and avenues of their cases, thus leaving many pertinent issues undisclosed and much relevant evidence unconsidered. This level of financial remuneration is also hardly an incentive for good lawyers to work on cases that require much time and effort and will be the source of considerable stress.174

The problem is therefore, as Sister Helen Prejean succinctly explains, “No matter what other death penalty reforms are undertaken, if defendants on trial do not have defence competent enough to challenge the prosecution’s evidence, the adversarial system of arriving at truth crumbles, and wrong verdicts are inevitable.”175 Furthermore, “Without adequate defence, fair trials are not possible. Defendants will be sentenced to death, not for committing the worst crimes, but for having the worst lawyers.”176

The American Bar Association, concerned with this problem of inadequate representation for indigent defendants, concluded in one investigation that:

“Georgia’s recent experience with capital punishment has been marred by examples of inadequate representation ranging from virtually no representation at all by counsel, to representation by inexperienced counsel, to failures to investigate basic threshold questions, to lack of knowledge of governing law, to lack of advocacy on the issue of guilt, to failure to present a case for life at the death penalty phase.”177
They go on to report that the same is also true of other states.

It is this type of evidence, pointing to the disparate quality of defences available to defendants, determined by factors as arbitrary as the wealth of the accused, which has yielded itself as more ammunition in the hands of abolitionists. They argue that due to the well-documented evidence of arbitrary representation among capital defendants it has been shown that capital punishment is too capricious to be justified and that capital punishment as a whole should be abolished.

However, once again retentionists would argue that this is not necessarily evidence against capital punishment *per se* but is instead evidence of an unjust and biased application of capital punishment in practice. It can be argued that the fact that death row is disproportionately populated by poor defendants does not necessarily provide incontrovertible evidence that the system is biased. It may, for example, simply be representative of one possible reality, which may be that poor people are simply more likely to commit capital offences. Retentionists therefore view the statistics relating to the number of poor people on death row as a disgraceful commentary on the legal system, which inexcusably does not provide them with adequate counsel, but in no way necessarily reflective of a failure of capital punishment itself.

However, regardless of which position one adopts, the differential\(^{178}\) treatment received by poor defendants who are facing the prospect of death is a shocking indictment of a justice system that claims to practice blind justice. It also certainly gives weight to the cynical but seemingly true adage that "capital punishment means them without the capital get the punishment."\(^{179}\)

**B- Christianity and poor defendants.**

A primary social function of the church has always been the establishment and maintenance of philanthropic programmes aiding the poor, such as charities, homeless shelters, orphanages and so on. The importance of caring for the underprivileged and

\(^{178}\) Differential in the sense that this is not the standard of legal service that a person who was able to hire a lawyer privately would expect to receive from their defence counsel.

\(^{179}\) This is a well-known saying and is quoted by Sister Helen Prejean in her (1997) article “Would Jesus Pull the Switch?” See: http://sun.soci.niu.edu/~critcrim/dp/reldir/prejean1.html
marginalized is central to the message and mission of Jesus Christ. As Sister Helen Prejean points out in her article, “Would Jesus pull the switch?”:

“Look at who Jesus hung out with: lepers, prostitutes, thieves – the throwaways of his day. If we call ourselves Jesus’ disciples, we too have to keep ministering to the marginalized, the throwaways, the lepers of today. And there are no more marginated, thrown away and leprous people in our society than death-row inmates.”

For anyone trying to follow in the footsteps of Christ therefore, the evidence of a system discriminating against the very poor that he was so concerned to save are certainly grounds for serious concern and major reform, if not complete abolition of that system.

General exhortations to righteousness and justice permeate the Bible and with regards specifically to the treatment of the poor on trial, the Biblical message seems highly equitable. On the one hand, one finds under the “Laws of Justice and Mercy” in the Old Testament the admonition “Do not show favouritism to a poor man in his lawsuit” and yet only a few lines later this is balanced by the words, “Do not deny justice to your poor people in their lawsuits.” This clearly indicates that you should find neither for nor against someone simply on grounds of their poverty but that they should be dealt with on a just and impartial basis. The fact that this is not happening in practice has led some Christian abolitionists to take the view that the imposition of the death penalty has “a bias against the poor and that therefore it is not compatible with the Church’s preferential option for the poor.” But is a bias free legal system a realistic prospect, or as Dale Recinella asks:

“Is the goal of wealth-blind justice system an impossible pie-in-the-sky moral ideal? No. The Bible shows us that basic justice, regardless of economic status, is a practical necessity. As people of Biblical faith we have a duty to make sure that justice is not a commodity, available at a price, but is a fundamental right of all people regardless of their wealth. The American death penalty is nowhere close to the standards revealed by Biblical truth with respect to equal treatment of rich and poor. If anything, America is experiencing tremendous pressure in the opposite direction, pressure to save money – not by abandoning the death penalty, but rather by abandoning even the semblance of adequate representation for the poor.

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180 (ibid.) Sister Helen Prejean, “Would Jesus Pull the Switch?”
181 See for instance, Matthew 12:18.
182 Exodus 23:3. A similar command is also found in Leviticus 19:15.
who are facing the death penalty. Any movement to economize by abandoning adequate representation for the poor facing capital punishment is an abomination of God’s word.”

To retentionist Christians however, just because there is evidence of a flaw in the way that poor people are represented in capital cases does not necessarily justify abolition. According to David Anderson, for instance, the Biblical verse “Do not accept a ransom for the life of a murderer, who deserves to die. He must surely be put to death”, teaches that:

“In other words, no one should be able to buy himself free from the death penalty. Money should not be able to save the life of a murderer. An important principle is grounded here. The principle means that everyone is equal before the law. There is no difference between the poor and the rich. No matter the wealth – a murderer shall be punished by death.”

According to Anderson therefore the death penalty is not invalidated even if poor people are executed at a higher rate than the rich, it simply means that the death penalty as currently practiced does not live up to the Christian standards of justice. Either way, given the Christian preoccupation with the well-being of the poor, the inequitable treatment of the indigent in capital cases is certainly discordant with the basic principles of Christian ethics and is, as such, a powerful Christian argument against this aspect of the punishment.

C. Islam and poor defendants.

Like Jesus (pbuh), Prophet Muhammad (pbuh) was also greatly concerned with the plight of the poor and the needy. In the same way that Jesus (pbuh) had among his companions the poorest outcasts of society, so too did Prophet Muhammad (pbuh). While some of his closest companions had been, by today’s standards, multi-millionaires, others of the most noble and beloved of his companions had been slaves. The Prophet himself led a very humble lifestyle and while he could have lived like a king he chose to live simply and modestly, and very often in a state of total poverty, forsaking his food and provisions for the sake of the poorer members of his community. His example of concern for the poor was followed by his companions who would frequently go without sleep in order to

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187 Most of whom forsook their fortunes for the sake and cause of Islam.
patrol their neighbourhoods searching for anyone they could help in any way, including bringing them food and even cooking for impoverished families. Islam clearly teaches that a person’s worth is determined by their faith and actions and not by material possessions, wealth or social status. Many Islamic laws were revealed specifically in order to protect the weaker members of society and many times in the Quran kindness to the poor and needy is emphasised. For instance, one Quranic verse reads:

"Worship Allah and join none with him (in worship); and do good to parents, kinsfolk, orphans, Al-Masakin (the poor), the neighbour who is near of kin, the neighbour who is a stranger, the companion by your side, the wayfarer (you meet) and those (slaves) whom your right hand possess. Verily, Allah does not like such as are proud and boastful."  

Islam constantly emphasises the importance of providing for the poorer members of society. As Dr Ziauddin Ahmad explains:

"To ensure fulfilment of the basic needs of all, Islam enunciates the principle of the poor having a ‘right’ in the income and wealth of the well-off members of society. Islamic laws and economic teachings in the sphere of production, consumption, exchange and distribution are all designed to secure distributive justice and an equitable pattern of income and wealth distribution."

The idea therefore that a penal code might detrimentally affect one particular group of people simply by virtue of their poverty is Islamically unacceptable. It is related in one hadith that the downfall of some past generations had been that they had oppressed the weak and poor by punishing them while exempting the rich. In this particular hadith the Prophet Muhammad, (pbuh) also famously related that even if his own daughter stole he would not hesitate to pass the lawful sentence upon her. This was an important teaching as it laid down the precedent for all Muslims that no one should escape justice just because they hold an important position in society or are related to someone important.

188 As previously mentioned, Islam is a religion sent to all people for all time, regardless of race or social status. Its prophets have come from all races and have occupied all manner of social positions. They have ranged from the ranks of exalted Kings, like Prophet Solomon, to simple carpenters, like Prophet Noah, to humble shepherds, such as Prophet Muhammad, peace be upon them all. This in itself shows that no particular group of people are preferred over another in terms of race, wealth or social class.  
189 Laws were revealed and implemented, for instance, granting women rights of inheritance and property ownership that they did not have in the West until centuries later. Similarly, Islam encourages the humane treatment of prisoners of war as well as having established rules regarding the manumission of slaves.  
190 The Quran, (4:36).  
191 Dr Ziauddin Ahmad, (1991) Islam, Poverty and Income Distribution, The Islamic Foundation. p95. This includes elements of compulsory charitable taxes, such as Zakah which is one of the Pillars of Islam, as well as voluntary charity, and rules relating to inheritance.
Favouritism, nepotism and bias should not be factors when meting out legal judgements. The hadith relates that:

"The Prophet said, "The people before you were destroyed because they used to inflict the legal punishments on the poor and forgive the rich. By Him in whose Hand my soul is! If Fatima (the daughter of the Prophet) did that (i.e. stole), I would cut off her hand."" 192

This is a significant hadith as it highlights the importance of an equal application of the law. 193 The Quran also emphasises this point where it says, "O you who believe! Stand out firmly for justice, as witnesses to Allah even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a better protector to both (than you)." 194

A further principle clearly established within Islamic jurisprudence is that legal punishments can be temporarily suspended if the community requires it in a time of need. It is narrated, for instance, that Umar Ibn Al-Khatab, (may Allah be pleased with him) (AD 591-644), 195 the second Calipha of Islam, suspended the legal sanctions for theft during a year of famine. His example demonstrates the principle that the governing authorities only have a legitimate claim to punish its people, in such instances, if they are first able to provide for their community. It is also another illustration to show that no man should be punished if his crime is a result of, or affected by, his poverty.

Considering all of the teachings surrounding the importance of looking after the poor, the prospect that a person may be disproportionately punished by virtue of being unable to afford a decent defence is unacceptable is Islam. For any sentence to be passed by a Muslim judge, the accused must have received a fair and impartial trial with full access to a fair defence. A person should neither be unjustly punished by virtue of their poverty nor should they escape justice due to their wealth or social status. If they do, this is

192 Sahih Al-Bukhari, Vol. 8, Number 778, p512. This hadith was narrated by Aisha, the wife of the Prophet Muhammad, peace be upon them both.
193 As usual however this is not always followed through in practice and in many Arab countries where Islamic law is purported to be followed, many people escape justice by virtue of their royal or wealthy connections. This is completely un-Islamic.
194 The Quran, (4: 135).
195 The concern of Umar (may Allah be pleased with him) for the wellbeing of all those under his authority was so great that it extended even to unknown animals in far off regions. He worried that even if a goat tripped on an unpaved path in one of his jurisdictions, he would be held accountable by God on the Day of Judgement. Needless to say, his concern for the provision, health and general wellbeing of the human citizens under his domain was far greater and far more benevolent. For this, and hundreds of other stories about the early Muslims and their concern for the poor, see any biography of any of the companions of the Prophet.
undoubtedly a legitimate Islamic ground on which to oppose that particular aspect of the penal system.

This is a position adopted by Islamic scholar Dr Tariq Ramadan for instance, who in his 2005 “International call for Moratorium on Corporal Punishment, Stoning and the Death Penalty in the Islamic World”\(^{196}\) states that:

“A still more grave injustice is that these penalties are applied almost exclusively to women and the poor, the doubly victimised, never to the wealthy, the powerful, or the oppressors. Furthermore, hundreds of prisoners have no access to anything that could even remotely be called defence counsel. Death sentences are decided and carried out against women, men and even minors... without ever being given a chance to obtain legal counsel. In resigning ourselves to having a superficial relationship to the scriptural sources, we betray the message of justice of Islam.”\(^{197}\)

In following the true message of justice as propounded in Islam therefore, there are legitimate grounds, not only to oppose capital punishment as it exists in America, but also, more pertinently, to oppose it as it is practiced around the Muslim world today. While evidence of how often capital sentences unjustly affect the poor and marginalised in Muslim societies is difficult, if not impossible, to obtain, it is reasonable to deduce that it is a common practice in many of the poorer regions of the Muslim world. Even in the wealthier Muslim nations it is undoubtedly a practice that exists, contrary to Islamic teachings. Amnesty International have reported for instance, that, “In law, the death penalty in Saudi Arabia is applicable to all capital offenders without distinction. However, in practice it disproportionately affects the disadvantaged and the victims of discrimination such as foreign workers and women.”\(^{198}\)

Given this disturbing trend, Dr Ramadan’s call for a moratorium, at the very least, is the best way to ensure that until legal provisions are made to safeguard Islamic notions of justice and equality between rich and poor, no more indigent offenders should be made to suffer unjustly for their poverty.

\(^{196}\) Published on March 30\(^{th}\) 2005. See: http://www.tariqramadan.com/imprimer.php3?id_article=264

\(^{197}\) Ibid.

3- Mentally ill offenders. 199

A- The execution of mentally ill offenders.

The subject of executing mentally ill offenders has also received much negative press in the last few years and has increasingly become a topic of widespread humanitarian concern. The fight against the practice has been championed by organisations such as The American Mental Disability Clemency Organisation (AMDCO) and Amnesty International. Over the years, as more and more convicts were executed while issues relating to their mental health were largely overlooked, it often seemed as though a losing battle was being fought. 200

However, in the 2002 Supreme Court decision *Atkins v Virginia*, 536 U.S. 304 (2002), the court finally declared that the execution of mentally retarded offenders was unconstitutional, violating the Eighth Amendment of the U.S. Constitution. It was held to be both excessive and cruel and unusual, in as much as it is inconsistent with the “evolving standards of decency that mark the progress of a maturing society.” 201 This was a huge break from the previous case of *Penry v Lynaugh*, 492 U.S. 302 (1989), in which it had been held that executing mentally retarded convicts was not unconstitutional as there was no “national consensus” against it.

Change has been slow however and more than a year later;

“Texas legislators have failed to pass laws that could bring the state into compliance with the U.S. Supreme Court’s ruling in *Atkins v Virginia* that bans the execution of those with mental retardation. Nearly a year after the Court’s ruling in *Atkins*, Texas officials have no idea how many of the 449 death row inmates have the disability, and no safeguards to ensure that those affected by the ruling are not put to death.” 203

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199 Although the term “mentally retarded” may not sound politically correct, it is in fact the term used by the Supreme Court in cases such as *Atkins v Virginia* 536 U.S. 304 (2002). It is also the terminology used by medical experts such as the defence witness in the *Atkins* case, forensic psychologist Dr Evan Nelson, who testified that Atkins was “mildly mentally retarded” (at p308). (Atkins had an IQ of 59.) As such, it is also the terminology used in academic reports on this subject. See for instance, Roger Hood, (1996) *The Death Penalty Debate - A Worldwide Perspective*, Oxford University Press, pp99-100.

200 It was estimated in the *New York Times*, August (7th 2000), pA1, that approximately 10% of inmates on death row suffer from mental retardation.


202 The element of mental illness was only allowed to be considered as a mitigating factor by the jury prior to sentencing. *Penry* was reported to have an IQ of 59.

Furthermore, the *Atkins* ruling is not as far reaching as it may have seemed at first. Two issues of considerable complexity immediately present themselves. Firstly, the Court in *Atkins* did not provide a legal or medical definition as to what constitutes “mental retardation” but left it instead to the discretion of the individual states to regulate. While some states therefore rely on IQ\(^\text{204}\) tests to determine retardation and state that anyone with an IQ lower than 70, for instance, may be categorised as mentally retarded and therefore exempt from execution under the *Atkins* decision, this method has been subject to much criticism. As Sorensen and Pilgrim point out for instance, some of the objections to this process as the sole method for establishing retardation include the fact that “intelligence tests are notoriously inaccurate.”\(^\text{205}\) Furthermore, as Justice Scalia noted in his dissenting opinion in *Atkins*, “one need only read the definitions of mental retardation … to realize that the symptoms of this condition can be easily feigned.”\(^\text{206}\)

The second criticism of the *Atkins* decision is that, while it prohibits the execution of “mentally retarded” offenders, it does not do the same for “mentally ill” offenders. This distinction therefore allows for the execution of offenders suffering from any form of “mental illness” such as Bipolar Manic Depression, Schizoaffective disorders, Dissociative disorders, Post-Traumatic Stress disorders and even brain damage. Organisations such as the U.S. National Mental Health Association have criticised this element of the decision arguing that the same reasons proffered for exempting the mentally retarded from execution may also be just as applicable to a defendant suffering from mental illness. However, the Court gave no comprehensive reasons for their decision not to include a wider scope of mental illness in their judgment. Justice Stevens, writing the majority opinion in *Atkins*, simply stated that:

“Mentally retarded persons… have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others… Their deficiencies do not

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\(^\text{204}\) IQ: Intelligence Quotient.

\(^\text{205}\) Jon Sorensen and Rocky Leann Pilgrim, (2006) *Lethal Injection - Capital Punishment in Texas During the Modern Era*. University of Texas Press, p93. As they explain, the results of IQ tests can be affected by factors such as the individual’s rapport with the examiner; whether the test subject is offered an incentive, such as a reward, for good results; their experience with test-taking; illness, fatigue and so on, each of which may have a considerable bearing on the outcome of the test.

warrant an exemption from criminal sanctions, but they do diminish their personal culpability."

As the National Mental Health Association point out however, the mentally ill can also “suffer from impaired judgement, confess to crimes they didn’t commit, make terrible witnesses at trial and may appear to jurors to be unrepentant.” It is for these reasons, that groups such as Amnesty International and the American Bar Association are currently campaigning for the scope of Atkins to be widened to include a greater range of mental disorders.

**B- Christianity and mentally ill offenders.**

Christian abolitionists have frequently been at the forefront of those opposing the execution of mentally ill offenders. Some of the most vociferous opponents have been: The United Methodists Church of the USA, The Evangelical Lutheran Church of America and The General Synod of the United Church of Christ, among many others. Even groups who, in principle, accept the Biblical authority for capital punishment have condemned the execution of mentally retarded offenders, including many Catholic Bishops.

The arguments advanced by these opponents seem not to be specifically based on any particular Biblical passages but appear instead to be founded on basic religious and secular principles of human rights, morality and social responsibility. This principled opposition is a stance adopted by many religious groups and in 2001 several religious bodies united as *amicus curiae* on behalf of Ernest Paul McCarver to oppose his execution. The Court noted that:

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207 *Per* Justice Stevens delivering the majority opinion. *Atkins v Virginia*, 122 S. Ct 2242 (June 20th, 2002) and 536 U.S. (2002).


209 See for instance, the ABA Resolution 122A of August 8th, 2006.

210 See the statements made in the “Brief Amici Curiae of the U.S. Catholic Conference and Other Religious Organisations in Support of The Petitioner” (Carver). It was filed with the Supreme Court on 8th June 2001 and can be found at: [http://www.usccb.org/ogc/amicuscuriae3.htm](http://www.usccb.org/ogc/amicuscuriae3.htm) See text at footnote 212-214 below for more on this position.

211 See for instance, “Statements by the Catholic Bishop of Texas Opposing the Execution of the Mentally Retarded.” (Jan. 21, 1999) at: [http://www.usccb.org/sdwp/national/deathpenalty/dpstate.shtml](http://www.usccb.org/sdwp/national/deathpenalty/dpstate.shtml) This is despite the fact that the Vatican has not ruled out the use of capital punishment.

212 An Amicus Curiae is a “friend of the court” who brings a point of law or fact to the attention of the court which may otherwise have been overlooked.

"Representatives of widely diverse communities in the United States – reflecting Christian, Jewish, Muslim and Buddhist traditions – unite here as amici curiae on behalf of the petitioner. These amici have differing views about the death penalty as a whole. Some object to it in principle, opposing it at all times and in all circumstances; others do not. Notwithstanding complex and often highly nuanced differences in theology and moral outlook, all of these amici share a conviction that the execution of persons with mental retardation cannot be morally justified."214

C- Islam and mentally ill offenders.

The position regarding punishing the mentally ill is very clear in Islam. As acts are based on intentions, a person who does not have the mental ability requisite to form a coherent and sane intention cannot be judged for his actions and is therefore exempt from serious punishment. This is made very clear in a hadith which says:

“And Ali said to Umar, “Don’t you know that no deed, good or evil are recorded (for the following) and are not responsible for what they do: (1) An insane person till he becomes sane, (2) and a child till he grows to the age of puberty, (3) and a sleeping person till he wakes up.”215

However, whether or not the mentally ill are executed in Islamic states around the world in practice is a matter worthy of investigation not only by secular human rights organisations but by Muslims themselves who should actively partake in condemning a practice that is so clearly contrary to the nature and teachings of Islam. This is no easy feat however because, as previously mentioned, many Islamic countries do not publish details of their executions and it is therefore quite difficult to ascertain whether the religious safeguards are in fact implemented in practice.

Nevertheless, there are certainly some cases in which the Islamic prohibition against executing the mentally ill is implemented. Recently in Nigeria, for instance, following his confession, a fifty-five year old Nigerian farmer was found guilty of raping a nine year-old girl. He was accordingly sentenced to death by stoning. However, an Islamic Appeal Court then quashed his conviction “accepting his insanity plea and remanding him for psychiatric tests in accordance with Sharia, Islamic law.”216 The judge in his case,
Mohammed Inuwa, told the court, “Since we are convinced that Samiru is insane, his conviction is not valid... All Islamic scholars agree the confession of an insane man is not valid and he is immune from prosecution.”

Whether a retentionist or abolitionist, the execution of the mentally ill is undoubtedly prohibited in Islam and is therefore a valid ground on which to oppose that element of capital punishment in any nation.

4- Conclusion.

This chapter began by asking how evidence of the disparate and seemingly discriminatory treatment of black defendants and disadvantaged defendants in the capital punishment process corresponds to the teachings of Christianity and Islam on the death penalty. After reviewing some of the most authoritative and reliable sources indicating the extent to which such discriminating practices occur, the various approaches of both religions towards capital punishment were then examined in light of these allegations.

As with each element of the death penalty debate examined thus far, it is clear that, even in the face of irrefutable evidence of immoral and incrementally unjust sentencing practices, religious arguments can still be made both to support and oppose capital punishment. From an abolitionist perspective, in both Christianity and Islam, there are abundant examples of specific Scriptural injunctions and decrees, as well as general exhortations towards equity and equality, that point to the incompatibility of an unjust and discriminatory penal system within the teachings and practices of their faith.

Nevertheless, while both Christianity and Islam clearly oppose the individual elements of injustice described in this chapter, there are still retentionists from both faiths who continue to support the punishment as religiously viable, or even desirable, despite evidence of its unequal application. One common retentionist approach is to argue that what the research has uncovered is evidence of a problem with the practical application of capital punishment and not a problem with the principle of capital punishment per se. This is the approach adopted by Wayne House for instance who, in

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217 Ibid.
218 Such as the Baldus study or any number of other studies referred to in this chapter which have concluded that the punishment is administered on an unjust basis.
his article “The New Testament and Moral Arguments for Capital Punishment”, argues that:

“Capital punishment is not contrary to God’s moral standards as revealed in either the Old or New Testaments... Inequities in the application of the death penalty exist, but they are reasons for revamping our criminal justice system, not eliminating capital punishment.”

Similarly, Kerby Anderson in his theological essay on capital punishment and Christianity writes:

“Even if we find evidence for discrimination in the criminal justice system... this is not really an argument against capital punishment. It is a compelling argument for reform of the criminal justice system. It is an argument for implementing capital punishment carefully.”

This approach is prevalent among retentionists, both religious and secular, who argue that simply because a system is shown to be flawed does not necessarily predicate rejection of the entire concept. Analogies are frequently employed to elucidate this approach. Dr John McAdams, for instance, uses the analogy that just because some taxpayers find ways to cheat the Internal Revenue Service (IRS) does not mean that the IRS should be abolished altogether. Similarly, if a disproportionately large number of black people were given custodial sentences this would not be sufficient grounds on which to justify abolishing the entire prison system. This line of thought is also advocated by retentionist Ernest van den Haag who argues that the unequal application of capital punishment does not render it as intrinsically immoral or unworkable as:

“The moral quality of capital punishment is no more affected by its distribution than an unfair distribution of cookies affects their quality”...

“Justice demands that those deserving it suffer the death penalty, even if others, who deserve it no less, escape because of discrimination, prosecutorial incompetence, insufficient evidence or for any other reason.”

220 “Christianity and Capital Punishment.” (2001) At: http://www.leaderu.com/orgs/probe/docs/cap-pun.html Kerby Anderson is the Director of Probe Ministries International which is a “non-profit corporation whose mission is to reclaim the primacy of Christian thought and values in Western culture.” See: www.probe.org for their full mission statement.
In another article he further argues that, "guilt is individual. If guilty whites or wealthy people escape the gallows and guilty poor people do not, the poor black do not become less guilty because the others escaped their deserved punishment."\(^{223}\)

Nevertheless, although evidence of discrimination and inequity may not be enough to convince some retentionists that capital punishment should be abolished altogether, it is often, at the very least, enough to convince them that the process itself is in need of many more checks and balances\(^ {224}\) to counter the threat of arbitrary and undeserved death sentences. This approach also clearly goes to the heart of many religious expositions against the penalty and is used by many religious abolitionists as one of their most powerful lines of debate aimed at both religious and lay audiences.

Given that even the injustices highlighted in this chapter are not enough to convince some retentionists to forsake capital punishment on legal, moral, humanitarian or religious grounds, we should briefly consider one further source of injustice; that being the ultimate injustice of the potential execution of innocent human beings.\(^ {225}\) Amnesty International estimates that “Since 1973,\(^ {226}\) 123 prisoners have been released in the USA after evidence emerged of their innocence of the crimes for which they were sentenced to death.”\(^ {227}\) Furthermore, “Other U.S. prisoners have gone to their deaths despite serious doubts over their guilt.”\(^ {228}\)

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\(^{224}\) These checks and balances could range from anything like more stringent jury vetting to rule out overt racism, to more stringent checks as to how district attorneys in capital cases come to their decisions as to which cases to prosecute at the capital level.

\(^{225}\) The areas from whence unjust sentences can be derived are numerous. As this chapter has shown, the biased and unequal treatment of offenders can occur at almost any stage of the criminal justice process resulting in an unsound conviction. It can stem from the bias of police officers, lawyers, judges and juries. A wrongful conviction can also be the result of “inadequate legal representation, police and prosecutorial misconduct. Perjured testimony and mistaken eyewitness testimony; racial prejudice. Jailhouse ‘snitch’ testimony. Suppression and/or misrepresentation of mitigating evidence. Community/political pressure to solve a case” or any number of other factors between the stages of arrest, conviction and subsequently execution. For the source of the above quote see: “Abolishing the death penalty – The death penalty claims innocent lives.” At: http://amnestyusa.org/abolish/factsinnocence.html

\(^{226}\) Until 2001.

\(^{227}\) Amnesty International, “Execution of the Innocent.” At: http://web.amnesty.org/web/web.nsf/print/0F97867C9B88D6C88025704C003AFF41 These figures are correct as of Summer 2006.

\(^{228}\) Ibid. For a list of those executed but possibly innocent see, for instance, “Executed but possibly innocent” at: http://www.deathpenaltyinfo.org/article.php?scid=6&did=111#executed
A landmark study, undertaken by Professor James Liebman at the Columbia Law School in 2000, exposed a number of shocking flaws in a capital punishment system described as “fraught with error.” After reviewing every capital conviction between 1973 and 1995, (4,578 state capital cases altogether), the study entitled “A Broken System: Error Rates in Capital Cases, 1973-1995”, reported that serious mistakes had been made in approximately two-thirds of all cases. Among the findings made was the estimate that “82% of those whose capital judgements were overturned due to serious error were given a sentence less than death on re-trial, and 7% were found not to be guilty of the capital crime.”

Amnesty International estimate that in 2003, for instance, an average of one person each month was freed from death row. Much of the credit for this unearthing of evidence of innocence is due to DNA testing which has been revolutionary in this field and has led to many exonerations in the last few years. As Franklin Zimring explains in his book *The Contradictions of American Capital Punishment*:

“The importance of DNA in a quarter of the recent exoneration cases not only increases the reliability of the conclusion that a defendant was wrongfully convicted, it also seems to have increased the volume of exoneration by providing a new category of exculpatory evidence that has been used in the process.”

While retentionists may argue that this spate of exonerations proves that the system works as exonerations are allowed to occur via the appeals process, it is often not thanks to the “system” that innocence is uncovered but due to the tireless efforts of abolitionist campaigners. For example:

“The most famous cluster of falsely condemned prisoners was found in Illinois... No fewer than thirteen defendants on death-row in Illinois were exonerated after convictions and death sentences, and ten of these cases were discovered after the beginning of 1995. The pivotal event in the

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229 See Appendix J for a summary of the study’s central findings.
231 “Nearly One Person A Month Freed From Death Row in 2003 – Capital Punishment System is Broken and Must Be Abolished.” See A1 website.
233 The Innocence Project is one such organisation. Created in 1992 at the Benjamin Cardoza School of Law, they specialise in using post-conviction DNA evidence to help provide indigent offenders with proof of innocence. For more on the Innocence Project see: http://www.innocenceproject.org/about/index.php
To an abolitionist the prospect of a wrongful execution is in itself enough to condemn the entire capital punishment process. To a retentionist however, although most would not advocate the intentional execution of a person known to be innocent, some see the potential for error as a necessary evil, one that could be minimised by a fair and impartial penal process. Therefore most retentionists would consider the criticisms as outlined in this chapter as evidence of an unjust and seriously flawed justice system but not necessarily as an argument against capital punishment itself.

The worrying prospect of sentencing an innocent person death has long been a concern of Christian abolitionists. Religious statements opposing capital punishment frequently cite factors such as "the fallibility of human agencies and legal justice"; "the possibility that innocent persons may be executed" as well as "the immorality and injustice of capital punishment for persons later proved innocent." Furthermore, the Bible clearly states, "...do not put an innocent or honest person to death." However, retentionists can use this to argue that the word innocent as employed in this context supports the premise that you can execute a guilty person and that the guilt or innocence of a person therefore depends on the outcome of the trial. According to this line of argument, if the court says a person is guilty this verse consequently can not be used to object to their execution.

In Islam to execute an innocent person is murder and there are no grounds at all, utilitarian or otherwise, on which to entertain the possibility of such an infringement of life. A death sentence must only be passed if guilt is established beyond all doubt. Most right thinking people, Christian and Muslim alike, must concede that the execution of an innocent person is a gross violation of human rights and is certainly contrary to the principles of justice as promulgated in both faiths. As such, when a criminal justice
system is deemed to be "broken" or "fraught with errors" these are serious theological grounds on which to object to the continued application of the death penalty.

Religious voices have frequently been at the forefront of those opposing capital punishment and injustice in all its forms. This is a role that they are proud to fill and as the United States Catholic Conference (USCC) and fellow religious organisations proclaimed in their brief statement as amici curiae in the McCarver case, they contend that: 239

"As religious bodies and religiously-affiliated organisations, we are uniquely qualified to comment on moral issues such as the death penalty... Few if any institutions can claim a greater tradition of working with and studying the conscience of the human person and related questions of guilt, blame and punishment than the religious community... Morality and decency are subjects on which religious bodies legitimately can claim a particular experience and competence." Furthermore, "Every revival of the conscience of the country has had at its centre religious leaders and congregations. Whether the call was for abolition, or temperance, or equal rights under law, religious leaders have been in the forefront of these movements." 240

Given the evident scope for discrimination and injustice in the capital punishment process, campaigning for justice remains a vital role that religious groups must continue to fulfil. Whether abolitionist or retentionist, there can be no honour in inflicting greater penalties on a person by virtue of their race or by taking advantage of their poverty or inability to defend themselves. As an abolitionist, opposing these injustices is an incremental part of the campaign to abolish capital punishment; and as a retentionist, in order for the "justice" process they support to earn that title, it must be seen to be doing justice, especially when it comes to an issue as momentous and critical as taking a human life.

239 See footnotes 210 and 212-214 above.
240 USCCB (Office of Media Relations) at: http://www.usccb.org/comm/archives/2001/01-100.shtml
Chapter 8 - Conclusion.

1- Reaching a conclusion.

For years I have listened to and actively participated in heated and heartfelt discussions on the controversial, age-old issue of capital punishment. Particularly fascinated by the strength of passion surrounding the subject when considered from a religious perspective, I decided to focus this thesis on the penology of capital punishment with a primary emphasis on religious justifications for and against the penalty.

My initial impression of the subject when I first began to research the matter was that there surely had to be one position that was dominant in each religion. Aware that adherents of both faiths hold both pro and anti-death penalty views, I thought that an objective analysis of the official theological teachings would uncover one approach that was slightly more “correct” or authoritative than the other. I thought that surely to analyse the teachings of the Pope, for instance, would offer a definitive answer on the subject from a mainstream Catholic perspective. Similarly, I thought that looking to the words of the Holy Quran would help to establish an immutable answer as to what the Islamic position is with regards to the punishment. I assumed that identifying the “true” religious positions of both faiths would simply require finding and isolating the key teachings of both religions and, from a position of dispassionate objectivity, ranking them in terms of the most authoritative ones.

I was not prepared however, for the extreme fluctuations of religious approaches over time and across cultures. Nor had I anticipated the extreme variations of attitude towards the death penalty from within the same religious circles. The further I investigated the issue, the more I came to realise just how complex it is, in the sense that, although the ancient and contemporary edicts and teachings of both religions may arguably point more towards one view than another, when interpreted in light of social circumstances, practical implementation and current penal developments, a legitimate case can still be made both for and against the death penalty within these broad religious traditions.

However, although there may not be one definitive approach to the issue, having now examined the key teachings of both faiths with regards to the death penalty and having
reviewed capital punishment from a variety of diverse perspectives and disciplines, and having taking into account historical developments, political trends, the role of public opinion, cultural variations and so on, it is now clearer as to what the principal teachings of Christianity and Islam are with regards to capital punishment. Not surprisingly, considering their similar historical roots and theological traditions, ultimately and in very general terms, I have found that almost identical conclusions can be reached as to the broad approach of both religions to the issue; namely, that there is considerable authority within both faiths that can be taken to indicate that, in principle, they accept the concept of the death penalty as a valid punishment as it is prescribed in their Holy texts and traditions. However, despite those provisions, both religions also have legitimate practical and theological reasons for not promoting or sanctioning the use of capital punishment in practice today.

A summary of the preceding chapters and their primary aims and findings are set out below and by means of a cursory backwards glance at them, it will be briefly explained why it seems viable to claim that both religions can, by and large, ultimately be said to acknowledge the theological legitimacy of capital punishment in theory, while rejecting its current utilisation in practice.

Part One - Capital punishment in context.

Chapter 1 – Capital punishment in a historical context.

The primary goal of the first chapter was to put the practice of capital punishment into a historical context. By highlighting some of the key eras and events in the development of capital punishment as a legitimate penal tool, it provided a chronological framework from which to evaluate the progression of the enduring controversy surrounding its use. This was important as it served to explain the long and entrenched history of capital punishment in British and American societies while simultaneously exploring the origin and development of the abolitionist movement, a movement which has grown from the voices of a dissident few to the millions of voices that today comprise a strong political, humanitarian and religious force calling, in unison, for the abolition of capital punishment worldwide.
Part Two – Capital punishment in a theological context.

Chapters 2 and 3 – Christianity, Islam and capital punishment.

While chapters 2 and 3 considered the respective positions of Christianity and Islam separately, at this point I shall briefly consider them together drawing out similarities in the approaches of both.

Generally speaking similar conclusions were reached at the end of both chapters, namely that, despite what some of their adherents may claim, in broad terms, neither religion can be said to offer a blanket acceptance or rejection of the punishment. Although both certainly provide clear grounds for its usage, they simultaneously both provide numerous prerequisites and principles that restrict its application and which must be taken into account if the punishment is to be employed.

A- Qualifying statements.

Both chapters opened with a similar caveat, namely that in the interest of accuracy, sweeping generalisations cannot easily be made about the approach of either religion. One cannot definitively say that either faith is wholly for or against capital punishment without a host of qualifying statements. In Chapter 2, for instance, one of the primary observations made was the necessity of acknowledging the diversity of legitimate approaches to the issue of capital punishment within Christianity. The multiplicity of Christian denominations means that one cannot make broad declarations on behalf of all Christians. The most one can do is explain the official approach of a particular denomination, and even then there may be different approaches within that one group over time and place as a result of historical, political, sociological and theological developments. Furthermore, as was explained, approaches are also influenced by the individual politics and traditions of each particular group and its individual spiritual and religious leaders. The version and translation of Bible used, as well as the form of Scriptural interpretation employed, was also examined in terms of the effect these factors have on developing and influencing Christian perspectives on capital punishment.

These qualifying remarks were essential introductions to the issue. As Dr Jean Howell states in her book review of Christian Perspectives on Law Reform:
"There are two immediate difficulties which a book attempting to give a Christian perspective on a topic has to overcome: the first of showing that there is in fact a distinct Christian point of view and the second of taking into account different perspectives within the Christian tradition." ¹

These difficulties were addressed at the outset in the context of both religions and their respective approaches to capital punishment. Although the problem of denominational differences is not as pronounced in Islam, which has far fewer divisions, Chapter 3 began by highlighting the importance of differentiating between what Islam as a religion teaches, and the practices of Muslim countries and individuals worldwide, as the latter do not always reflect the former.

B- Core Holy Texts and teachings.

Having made these qualifying assertions and clarified some of the historical approaches of Christianity and Islam regarding the issue, the primary Holy texts of both religions were examined. In both chapters the conclusions reached were essentially that the core Holy texts and traditions of the two faiths do allow for, and in many cases actively endorse the practical application of capital punishment. In the case of the Old Testament, for instance, an examination of the text rapidly reveals an extensive list of approximately 36 offences for which the sentence of death is specifically prescribed. Consequently, despite some debate on the issue, the broad theological and academic consensus seems to be one of agreement that the Old Testament does, in no uncertain terms, permit for the use of capital punishment. Even the majority of abolitionists today readily concede that the Old Testament is vehemently pro-capital punishment. This assertion was further supported by reference to early Catholic Catechisms, historical Papal decrees and statements by the early Fathers of the Catholic Church as well as statements by several non-Catholic church leaders.

Chapter 2 went on to demonstrate that the branch of Biblical inquiry relating to the New Testament is much more controversial however, in the sense that there is no incontrovertible mandate either way. Of the verses that do explicitly relate to the death penalty, of which there are several, they are often largely ambiguous and can be read in

a light sympathetic to both abolitionist and retentionist positions. So much so, in fact, that in many cases the very same verse or sentence can be used by both abolitionists and retentionists to support their opposing arguments! In other instances, one seemingly straightforward abolitionist verse can often be contended and seemingly countermanded by an equally clear pro-death penalty verse, and vice versa. To most Christians, as Chapter 2 explained, the issue will be primarily predicated upon their approach to the Testaments when read in conjunction. Those who consider the Old Testament to be applicable today are more inclined to accept and indeed promote the continued use of capital punishment, whilst those who see the New Testament as effectively repealing the Old are usually more inclined to support abolitionism.

With regards to the Islamic perspective on capital punishment, after examining the various categories of crime and punishment legislated for in Islamic jurisprudence, Chapter 3 demonstrated that the Quran and hadith also clearly provide for instances, (although far fewer than the Old Testament), in which capital punishment may be used, in theory at least. The specific elements of the crimes for which mandatory and discretionary capital sentences are allowed were also considered as well as alternatives to capital punishment, specifically in the context of homicide.

If the analysis of the issue were to stop here, the findings would clearly be that both religions contain some Scriptural and traditional teachings that can be taken to sanction the use of capital punishment. That is not the end however, as even if one adopts the controversial position, for instance, that the New Testament ultimately does permit the death penalty, it is also the case that, in practice, both Christianity and Islam lay down several preconditions which must be put into effect before the penalty can be enforced. Both chapters canvassed some of these safeguards, which include provisions relating to the number of witnesses required to secure a successful conviction; rules relating to confessional testimony; the crimes for which the penalty is available and so on. This is important, as whether or not these conditions are satisfied, may ultimately decide the issue as to whether a state can claim to have the religious sanctioning of that faith in its observance of the death penalty. It subsequently also forms the bedrock of whether or not the predominant position of either religion today, in light of current practices, can be said to be in favour of the retention or abolition of the penalty.
Part Three – The philosophical and theoretical justifications for and against capital punishment.

Chapter 4 – Retributivism, religion and capital punishment.

After identifying retributivism as one of the most influential and oft-cited penological justifications for capital punishment, this chapter outlined the core tenets of retributivism as a basic penological philosophy. With specific reference to capital punishment it looked at the concept of lex talionis (or “like for like”) as well as more modern concepts of retributivism. It examined some of the criticisms of retributive justice, including the innate association it shares with the concept of revenge as well as rebuttals of these criticisms.

The chapter then moved on to examine retributivism from a religious perspective identifying several common strands running through retributive and religious discourse. This included an examination of both jurisprudential and strictly theological conceptions of justice as they pertain to retributive philosophy in both faiths. It examined the key Biblical and Quranic verses indicating that retribution is a fundamental penological concept in both religions and looked at the various retributive verses that are used to justify capital punishment, specifically for murderers, from a religious perspective.

This was countered however, by examining the verses in their socio-historical contexts which seemed to restrict their scope. They were also considered in light of the various verses and teachings, within the contexts of both religions, that extol mercy, forgiveness and love as vital elements of faith and which espouse believers to adopt these as some of the most virtuous attributes of a believer. The chapter concluded by suggesting that, although the ethos of forgiveness is an elemental precept of faith in both religions, they do not necessarily preclude the ruling authorities from exacting justice on a retributive basis. While individuals from both faiths are certainly urged to forgive, this does not necessarily extend to the authorities who are entrusted with the guardianship of its citizens nor does it, as such, preclude those authorities from resorting to capital punishment on a retributive basis.

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2 This includes issues pertaining to Divine retribution as well as the concept of “just deserts” as a philosophy underpinning the very foundation of the belief in Heaven and Hell, at least in their traditional conceptualised forms.
Chapter 5 – Deterrence and capital punishment.

Whether or not capital punishment has a uniquely deterrent effect has been the subject of a great deal of research, analysis and controversy over the years. This chapter began by examining the deterrent effectiveness of the death penalty in terms of its certainty, severity and celerity. After examining some of the primary “commonsense” arguments used both to refute and affirm the deterrent effectiveness of the punishment, in both historical and contemporary contexts, this chapter turned to look at some of the various types of studies used to examine this issue, including longitudinal studies and cross-state analyses. After examining some of the main findings of some of the most prominent articles of deterrence research, it highlighted some of the primary critiques of the standard methodological techniques used and explained why it is so hard for the scholars of this subject to reach a consensus on the issue one way or the other. The Brutalisation thesis was also examined, particularly in the context of the debate to televise executions.

Having examined the deterrent aspect of capital punishment in a secular context, the chapter then addressed the role that deterrence plays in the context of theological arguments for and against the death penalty. After considering elements of compatibility and incompatibility between deterrence arguments and religious principles of justice, the chapter provided evidence from the writings and traditions of both religions, to suggest that both faiths adhere to the notion that punishment and the way in which it is administered, if it is administered, is intended and able to serve a deterrent function. In addition to straightforward written proclamations of its deterrent effectiveness, found in both the Bible and Quran, this also includes provisions such as requirements making punishments public or requiring the active participation of the community in the punishment of malefactors.3

Chapters 4 and 5 clearly demonstrate that penal conceptions of both retribution and deterrence have frequently been couched in religious terms in order to bolster support for capital punishment and there is ample evidence within the traditions of both religions to suggest that these are legitimate theological and theoretical grounds on which to support the penalty, at least in some cases.

3 The public participation is discussed specifically in the context of the Old Testament.
Part Four - The practical applications and implications of capital punishment.

Despite the abundance of historical and Scriptural evidence produced indicating that, generally speaking, both religions\(^4\) have traditionally supported and endorsed capital punishment, at least in some circumstances, several issues arise, however, which make the practical application of capital punishment in a contemporary context a near impossibility.

In addition to restrictive rules pertaining to religious decrees which have no basis outside religious edicts, (such as requirements as to the number of witnesses needed and some of the categories for which the penalty is available, including for sins such as adultery and blasphemy), a number of other practical issues must also be addressed in terms of their effect on the religious acceptance or rejection of the punishment in a modern context. The first is the method of execution used, which was the focus of Chapter 6. The second is the arbitrariness of the application of the penalty, which was considered in Chapter 7. Lastly is the existence of alternatives to capital punishment, such as life imprisonment, which is a theme addressed at several points throughout this dissertation.

Chapter 6 – Methods of execution.

After outlining some of the reasons why investigating methods of execution is an important aspect of this debate, Chapter 6 briefly considered some of the most infamous methods of execution to have ever been utilised in a historical context. This was followed by an examination of the constitutionality of capital punishment from an American jurisprudential perspective and a discussion on how and why some of the more contemporary methods utilised may violate some of the most fundamental principles of human rights. Five specific methods of execution were considered next, specifically the five methods currently employed in America today namely: Lethal injection, the electric chair, the gas chamber, hanging and death by firing squad. Each method was deconstructed and considered in terms of four primary aspects including: the historical development of that particular method; its current usage, including the number of U.S. states and countries worldwide that employ it; a detailed description of the technical and physiological processes leading to death and finally a selection of

\(^4\) Exceptions are outlined however, with reference to denominations such as the Quakers who have remained steadfastly abolitionist over the centuries.
some of the primary issues of concern relating to that particular method including, among others, the problem of botched executions and the perceived humanity of that method.

The chapter then canvassed some of the arguments for and against particular methods of execution from a theological perspective. In addition to discussing contemporary methods from a religious perspective, traditionally prescribed religious methods were also looked at. The practice of stoning, for instance, is sanctioned in both the Old Testament and the hadith. As such, some retentionist advocates, both Christian and Muslim, argue in favour of utilising stoning as a method of execution today. However, although grounded in the religious texts and traditions of both faiths, abolitionists have argued that, considering the teachings prevalent in both religions emphasising the importance of qualities and traits such as compassion, humanity and mercy, if capital punishment is to be employed, at the very least, the most humane method should be utilised. It was concluded that the current methods of execution utilised can be used, in some circumstances, as a primary objection to capital punishment by abolitionists today on religious grounds, in addition to being a ground of contention for retentionists who should endeavour to find the most humane method of bringing about death if capital punishment is to continue to be employed.

Chapter 7 – The unequal application of capital punishment.

Chapter 7 focused on the unequal application of capital punishment. Compiling data from a variety of authoritative sources, the evidence produced provided overwhelming support for the popular contention that capital punishment is frequently employed on a discriminatory basis, adversely affecting some defendants by virtue of their race or financial status. Having established some of the various ways in which the practical application of the punishment is applied in an arbitrary, unjust and discriminatory manner, it was subsequently argued that even if both religions are said to theoretically sanction capital punishment for some crimes, certain practical pre-conditions must first be met. Both religions, for instance, advocate principles of impartial justice according

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5 Although examples were given of Christians advocating this view, it is undoubtedly a minority opinion and one that is much more prevalent among Muslims.

6 In terms of investigating the physiological and psychological effects of execution on the human body however, and ranking one as more humane than another, this seems to be an area more suited to the consideration and investigation undertaken by the medical and scientific communities rather than religious ones.
to which, each offender should be treated as equal with no preference given with regards to class, social status, race and so on. If these basic conditions of equality are not met this effectively renders that justice system an unfair one, one which does not have the moral authority or religious right to kill according to both Christianity and Islam. The unequal application of capital punishment therefore becomes another primary ground of objection to the current practices of capital punishment utilised worldwide and gives even retentionist Christians and Muslims significant religious grounds on which to, at the very least, demand a moratorium on capital punishment until such time, if ever, that these unjust practices are stopped.

2- Conclusion.

Over the centuries, religion has been used to justify some of the most horrendous practices known to man; from the torture, mutilation and murder of suspected witches, to the blatant and unjustifiable subjugation and mistreatment of women guilty of no crime. However, religion has also been the driving force behind some of the most noble and humanitarian endeavours the world has ever seen; from the charitable works of Mother Theresa to the foundation of the world's first fully functioning welfare system. It has been an inspiration for countless numbers who have gone on to become patrons of orphanages, schools, hospitals, hospices, and innumerable other worthy causes.

The scope of religious influence has not only extended to the philanthropic, social and humanitarian but has also impacted greatly on concepts and practices of law and penology. Its impact is immeasurable and ranges from the principles enshrined in the Ten Commandments laying the foundation for modern Christo-Judeo legal and social systems, to the direct adoption and implementation of Islamic (Shariah) law as the primary basis of Muslim legal systems worldwide, legal systems encompassing every aspect of daily life. With regards to punishment in general, religion has played an intrinsic and fundamental role in determining, in numerous societies, the answer to such basic penological questions as: who should be punished? How much should they be punished? How should they be punished? And perhaps most pertinently why should they be punished?

Despite the archaic roots of capital punishment, the death penalty continues to be a standard feature of life in many regions of the world and yet the religious communities
are still basically divided as to how it should be considered and approached. Is it a penalty Divinely mandated by God and thus a requirement of believers to endorse; or is it an outdated practice contrary to God’s teachings on justice and mercy?

In light of all of the findings set forth in the above chapters, it does seem reasonable to deduce that while the overwhelming theological evidence may point to an approval of capital punishment in principle, this does not extend to the way it is implemented in practice today. Without betraying the letter of the law one must also endeavour to obey the spirit. Capital punishment may well have Divine sanctification, in certain circumstances, but only if implemented as Divinely prescribed and, as these chapters have shown, both Christianity and Islam can be said to oppose capital punishment, at its most fundamental level, if meted out unjustly or without recourse to the full and fair due process of law. This is an important understanding as it effectively undermines the declarations of many countries around the world today that claim to be operating under a God-given mandate to execute offenders. This particularly relates to those countries claiming to be upholders and maintainers of their faiths and yet are being indiscriminately selective about the religious practices they follow whereby, on the one hand, they accept the clear provisions in favour of capital punishment as a legitimate tool of penal practice but then do not reconcile their practices with the pre-conditional safeguards provided by their religion. If they ignore these provisions relating to the punishment, they can thus be seen to contravene the teachings of their faith instead of embracing them as they claim.

This applies to countries that use capital punishment as a tool for political gain or oppression,\(^7\) as well as to countries who allow the death penalty to have a disproportionately adverse effect on ethnic minorities, women,\(^8\) children or the mentally ill.\(^9\) It also applies to counties that use religion to make punishable, crimes that are not clearly expounded as such in religious texts,\(^10\) as well as countries that invoke the harsher elements of a religious state without first exercising their duty to provide for

\(^7\) Refer back to p169 footnote 42 for some examples of where this occurs. Also see p108-9 footnotes 35-7 for some further examples.

\(^8\) Refer back to p348 and see the text at footnote 198 for an example of a Muslim nation where this practice is alleged to occur.

\(^9\) Refer back to p352 Part 3 C for an earlier reference to this issue.

\(^10\) Refer back to p134 and see the text at footnote 141 for an example of an offence controversially criminalised in the name of religion.
their citizens' general well-being. Furthermore, but perhaps to a lesser degree, it also applies to countries that have ignored religious legal provisions entirely, such as Scriptural decrees regarding the number of witnesses required in a capital prosecution trial, the participation of community members in the execution protocol and so on.12

Hopefully, having examined the underlying reasons underpinning the religious arguments for and against the death penalty, this will increase the understanding behind why some countries today remain vehemently retentionist despite increasing international pressure to abolish the punishment. It should simultaneously provide human rights activists with a new way to appeal to the religious sensibilities of those countries and communities who blindly say that Islam or Christianity supports capital punishment without understanding in more depth the contexts in which the punishment was meant to be applied, as well as the ways in which that punishment was intended to be utilised.

With regards to the Muslim retentionist, for instance, who asserts that there is only one position with regards to the death penalty, they should be reminded that although this may be so in principle, in practice several qualifications should also be borne in mind. Firstly is that the Islamic rules pertaining to capital punishment can only be fully implemented in an Islamic state and, as already explained, there is no country in the world today that fully implements the Shariah in a way that earns them the right to call themselves an “Islamic state.” Any country professing to be one should focus first on implementing the basic social structures of their states in terms of ensuring societal provision and wellbeing before they move on to the strictures of penal policies that were intended to be applied in a fully formed and just society. Furthermore, it must be acknowledged that interpretation and contextualisation also have a role to play, even in the Islamic considerations of the issue. For example, as Ann Elizabeth Mayer states in her book *Islam and Human Rights*:

“Muslims who currently call for the execution of apostates are not compelled to do so by unambiguous Islamic authority supporting this penalty. There are ample grounds for deciding that the juristic rules on apostasy no longer apply. Muslims can select alternative interpretations of the Islamic rules on apostasy that are more in keeping with the tenor

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11 See for instance the quote by Sardar and Malik on p109 as well as p152 text at footnotes 193-195.
12 Refer back to pages 88-89 for some examples of such provisions in a Biblical context.
of the Quran and with modern ideas of religious freedom. Where they elect not to do so and insist that apostates are to be executed, one must wonder whether Islam or another concern provides their motivation. 13

Secondly, for those Muslims living in non-Muslim countries, their opinions on capital punishment cannot be confined to the Islamic ideal alone but must also take into account the socio-political reality of the countries in which they reside. For instance, Muslims, whether living in China, Vietnam or America should not automatically support capital punishment in those countries simply on the grounds that it is mandated in the Shariah, but they must first acknowledge the context into which the Shariah permitted the punishment. As such, in light of the glaring inequities of capital punishment inherent within those criminal justice systems and unless the safeguards of the Shariah are put into place, they should thereafter qualify their support for those systems accordingly; A qualification demanded by a true understanding of the religious teachings on the issue.

Similarly, with regards to Christianity it must be recognised that a plurality of approaches exist, many of which are legitimate and any one of which is not necessarily more “correct” than another. They depend on issues as diverse as the method of Biblical interpretation employed, be it literal, allegorical, metaphorical or any other; the version and translation of Bible they adhere to; the teachings and politics of their individual denominational leaders and so on. Furthermore, it is important to acknowledge the historical fluidity of thought on the issue. The official theological shift of thinking towards capital punishment was demonstrated in Chapter 2 which traced the development of doctrine within the Catholic Church from a historical position of acceptance and indeed zealous adoption of the death penalty as a standard feature of Christian life, to the currently growing shift in tide towards the vehement and vociferous opposition of the penalty in practice.

Understanding religious perspectives on this issue is an important endeavour. It is vital to focus the attention of religious death penalty advocates towards the merciful principles espoused by these faiths and challenge current religious notions with regards to the theological acceptability of capital punishment. This is essential in order to

further the discourse and action required to advance the increasingly global aim of humanising, if not completely abolishing, the practice of capital punishment.

I would end therefore by urging those claiming to support capital punishment on religious grounds to be as loyal to the spirit of these two great faiths as they are to the letter. While it is true that both religions ultimately have advocated the use of capital punishment for certain offences, at one point or another, pause for a moment to consider the historical contexts into which the Holy texts of both faiths were revealed. Could some of the unjust practices we find today even have been fathomed in those early days? Could those first generations of followers of the Bible and the Quran have imagined that by the year 2006 there would be cases where some offenders will have spent 30 years imprisoned on death row awaiting their executions? Could they have imagined that it would be a capital offence in one region to raise the flag of another? 14 Would they have approved of a system described as so “fraught with errors” that people are being exonerated at a rate of approximately one a month and in which, in only a few decades, one country alone saw the release of more than 123 innocent people from death row; and if so, that the punishment would have been, in many cases, justified in the name of their religion?

Neither religion supports a blanket acceptance or rejection of the penalty. Times have changed and so have penal practices and, as such, modern practices of capital punishment must be re-examined in light of religious teachings as they relate to our contemporary societies. As long as unjust or discriminatory practices occur, whether against women, ethnic minorities, mentally ill offenders or juveniles, adherents of both faiths should unite to oppose these injustices, especially when being done in the name of their religions. This is by no means inciting opposition to the teachings of their religions. On the contrary it is a call for the correct application of the teachings of these faiths in terms of both the spirit and the letter. Both religions claim to stand for the betterment of humankind and claim to have been sent to elevate and guide mankind. Where this includes recourse to capital punishment this too is said to be for the protection of society in terms of the safety and wellbeing of both individuals and communities as a whole. However, one cannot be selective with religion. If you accept

14 In Irian Jaya (in Indonesia), for instance, it has been a capital offence to raise the flag of Papua New Guinea.
the decrees authorising the punishment you must also fulfil those obligations requiring
the fair and equal treatment of offenders and the adherence to a due process of law. Only once those guidelines are followed can one truly claim to be supporting the
religiously prescribed teachings on capital punishment.
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Some text bound close to the spine.
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Appendices for Introduction.
Major Religions of the World Ranked by Number of Adherents

(Sizes shown are approximate estimates, and are here mainly for the purpose of ordering the groups, not providing a definitive number. This list is sociological/statistical in perspective.)

- **Christianity** (including Catholic, Protestant, Eastern Orthodox, Pentecostal, Anglican, Monophysite, AICs, Latter-day Saints, Evangelical, SDAs, Jehovah’s Witnesses, Quakers, AOG, nominal, etc.) 33%
- **Islam** (Shiite, Sunni, etc.) 21%
- **Buddhism** 6%
- **Hinduism** 14%
- **Judaism** (0.22%) 1%
- **Sikhism** (0.36%) 1%
- **Chinese traditional** 6%
- **primal-indigenous** (ind. African Traditional/Diasporic) 6%
- **Nonreligious** (ind. agnostic, atheist, secular humanist, + people answering ‘none’ or no relig. preference. Half of this group is ‘theistic’ but nonrelig.) 16%

NOTE: Total adds up to more than 100% due to rounding and because upper bound estimates were used for each group.

The adherent counts presented in the list above are current estimates of the number of people who have at least a minimal level of self-identification as adherents of the religion. Levels of participation vary within all groups. These numbers tend toward the high end of reasonable worldwide estimates. Valid arguments can be made for different figures, but if the same criteria are used for all groups, the relative order should be the same. Further details and sources are available below and in the Adherents.com main database.

A major source for these estimates is the detailed country-by-country analysis done by David B. Barrett's religious statistics organization, whose data are published in the Encyclopedia Britannica (including annual updates and yearbooks) and also in the World Christian Encyclopedia (the latest edition of which - published in 2001 - has been consulted). Hundreds of additional sources providing more thorough and detailed research about individual religious groups have also been consulted. The Adherents.com collection of religious adherent statistics now has over 43,000 adherent statistic citations, for over 4,300 different faith groups, covering all countries of the world. This is not an absolutely exhaustive compilation of all such data, but it is by far the largest compilation available on the Internet. Various academic researchers and religious representatives regularly share documented adherent statistics with Adherents.com so that their information can be available in a centralized database.

Source: http://www.adherents.com/Religions-By-
Adherents.html

At: http://news.bbc.co.uk/2/hi/americas/4409857.stm
Appendices for Chapter One.
Appendix A.
Chronology of capital punishment.

This is a very brief timeline illustrating some of the key eras and events in the development of the capital punishment process. Naturally, this list is by no means exhaustive, but it does help to put some of the major death penalty related events into a historical context, which is useful when charting the development of capital punishment over time.

Similar timelines may be constructed using entirely different eras and events with emphasis being placed on any number of different themes, such as abolitionist victories or legal or international developments. However, I chose these eras specifically in order to supplement Chapter 1 and serve as a visual aid helping to locate the seminal eras discussed the chapter within a chronological framework. Details regarding the sources of many of the events highlighted below can be found in Chapter 1.

I have primarily confined the outline of events taking place after the 1st Century AD to Britain and the USA, although naturally passing reference may be made to other jurisdictions as well.

BC – (Before Christ.)
-18th Century
Codex of Hammurabi (1750 BC).

-7th Century
Draconian Code of Athens.

-5th Century
Roman Law of the Twelve Tables (457-450).

AD – (Anno Domini.)
-1st Century – The Old Testament mentions capital punishment on multiple occasions. (Although many sections of the Old Testament date back much further, most historians concede that a final version was compiled around 1 AD)

-Imperial Age of Rome. Capital punishment was frequently utilised.

10th Century
-Capital punishment was very common in Britain.

11th Century
-Under the reign of William the Conqueror (1027-1087) capital punishment declined sharply.

15th Century
-Under the reign of King Henry VIII (1491-1547) it is estimated that some 70,000 people were executed for a variety of offences.

17th Century
-1608, The first recorded U.S. execution. Captain George Kendal was convicted of spying for Spain.

18th Century
-Enlightenment Era.

-1723 Waltham Black Act, also known as the Bloody Code, was passed. It eventually made over 200 offences capital crimes.
-1764 - Cesare Beccaria publishes his essay “Dei delitti e delle pene” (On Crimes and Punishments) which is very critical of capital punishment.
-1776-1783 - The American Revolution.
-1780-90's - The penitentiary is introduced in America as an alternative to capital punishment.

19th Century
-1830's - Capital punishment becomes an affair that takes place in private in several U.S. states.
-1829 - Victor Hugo publishes “Le dernier jour d'un condamné.” (The Last Day of a Condemned Man)
-1834 - Michigan is the first U.S. state to abolish capital punishment altogether.
-1861-1865 - The American Civil War pushed capital punishment off the political agenda for a while during which time the issue of slavery became a focal point of political and social concern.
-1868 - The last public hanging in England took place.
-1890 - William Kemmler is the first person to be executed by electric chair.

**C20th**
-1900-1930 - Known as the "Progressive Era", this period saw a drastic reduction in the number of states who practiced capital punishment.
-1930's - U.S. executions peak in the 1930's with an all time high of 167 executions per year. (See Appendix C.)
-1955 - Ruth Ellis is the last woman to be hanged in Britain.
-1957 - The Homicide Act is passed in Britain.
-1964 - Last British execution is carried out.
-1972 - *Furman v Georgia*, 408 U.S. 238 (1972), - The U.S. Supreme Court declares capital punishment to be unconstitutional in the way that it was meted out. A moratorium subsequently follows.
-1993 - Sister Helen Prejean publishes her world renowned book *Dead Man Walking*.
-1994 - Kansas reinstates capital punishment.
-1999 - Pope John Paul II calls for an end to the death penalty while on a visit to Missouri.
-1994 - Russian President Boris Yeltsin commuted the death sentences of all inmates on Russia's death row.

**C21st**
-2003 - January 11th - Governor George Ryan of Illinois issues a moratorium on capital punishment in his state and commutes the sentences of 167 men on death row, (most to life imprisonment) in one of the largest commutation of capital sentences in modern history.
-2006 - The Philippines are the latest country to abolish the death penalty, thus commuting the death sentences of 1,200 inmates on death row to that of life imprisonment.
An act for the more effectual punishing wicked and evil-disposed persons going armed in disguise, and doing injuries and violences to the persons and properties of his Majesty's subjects, and for the more speedy bringing the offenders to justice.

I. Whereas several ill-designing and disorderly persons have of late associated themselves under the name of Blacks, and entered into confederacies to support and assist one another in stealing and destroying of deer, robbing of warrens and fish-ponds, cutting down plantations of trees, and other illegal practices, and have, in great numbers, armed with swords, fire-arms, and other offensive weapons, several of them with their faces blacked, or in disguised habit, unlawfully hunted in forests belonging to his Majesty, and in the parks of divers of his Majesty's subjects, and destroyed, killed and carried away the deer, robbed warrens, rivers and fish-ponds, and cut down plantations of trees; and have likewise solicited several of his Majesty's subjects, with promises of money, or other rewards, to join with them, and have sent letters in fictitious names, to several persons, demanding venison and money, and threatening some great violence, if such their unlawful demands should be refused, or if they should be interrupted in, or prosecuted for such their wicked practices, and have actually done great damage to several persons, who have either refused to comply with such demands, or have endeavoured to bring them to justice, to the great terror of his Majesty's peaceable subjects: For the preventing which wicked and unlawful practices, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in parliament assembled, and by the authority of the same. That if any person or persons, from and after the first day of June in the year of our Lord one thousand seven hundred and twenty-three, being armed with swords, fire-arms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised, shall appear in any forest, chase, park, paddock, or grounds inclosed with any wall, pale, or other fence, wherein any deer have been or shall be usually kept, or in any warren or place where hares or conies have been or shall be usually kept, or in any high road, open heath, common or down, or shall unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer, or unlawfully rob any warren or place where conies or hares are usually kept, or shall unlawfully steal or take away any fish out of any river or pond; or if any person or persons, from and after the said first day of June shall unlawfully and wilfully hunt, wound, kill, destroy or steal any red or fallow deer, fed or kept in any places in any of his Majesty's forests or chases, which are or shall be inclosed with pales, rails, or other fences, or in any park, paddock, or grounds inclosed, where deer have been or shall be usually kept; or shall unlawfully and maliciously break down the head or mound of any fish-pond, whereby the fish shall be lost or destroyed; or shall unlawfully and maliciously kill, maim or wound any cattle, or cut down or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard or plantation, for ornament, shelter or profit; or shall set fire to any house, barn or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay or wood; or shall wilfully and maliciously shoot at any person in any dwelling-house, or other place; or shall knowingly send any letter, without any name, subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing; or shall forcibly rescue any person being lawfully in custody of any officer or other person, for any of the offences before mentioned; or if any person or persons shall, by gift or promise of money, or other reward, procure any of his Majesty's subjects to join him or them in any such unlawful act; every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy.
Executions by Year 1608–2000

(Source: "Executions in the U.S. 1608-1987: The Espy File," with recent years added by DPIC)

http://www.deathpenaltyinfo.org/ESPYexecbyyear.gif

Executions, 1930-2005

http://www.ojp.usdoj.gov/bjs/glance/exe.gif
Figure 1-3. Public opinion on the death penalty, 1936-94.

As of February 23, 2006, there have been 123 exonerations in 25 different States.

Graph accurate as of February 9, 2005

**STATE** | **NO.** | **STATE** | **NO.**
---|---|---|---
Florida | 22 | Massachusetts | 3
Illinois | 18 | Missouri | 3
Louisiana | 8 | Indiana | 2
Texas | 8 | So. Carolina | 2
Arizona | 8 | Idaho | 1
Oklahoma | 7 | Kentucky | 1
Alabama | 5 | Maryland | 1
Georgia | 5 | Mississippi | 2
No. Carolina | 5 | Nebraska | 1
Pennsylvania | 6 | Nevada | 1
Ohio | 5 | Virginia | 1
New Mexico | 4 | Washington | 1
California | 3 | 

http://www.deathpenaltyinfo.org/Gr-ExonsByState.jpg
EXONERATIONS BY YEAR

In the 25 years from 1973 to 1998, there were an average of 2.96 Exonerations per year. In the five years since 1998, thru 2003, that average has risen to 7.60 Exonerations.

There were 6 exonerations in 2004.

Amnesty International –

Abolitionist and Retentionist Countries

More than half the countries in the world have now abolished the death penalty in law or practice. The numbers are as follows:

Abolitionist for all crimes: 86
Abolitionist for ordinary crimes only: 11
Abolitionist in practice: 27

Total abolitionist in law or practice: 124
Retentionist: 72

Following are lists of countries in the four categories: abolitionist for all crimes, abolitionist for ordinary crimes only, abolitionist in practice and retentionist.

At the end is a list of countries which have abolished the death penalty since 1976. It shows that in the past decade, an average of over three countries a year have abolished the death penalty in law or, having done so for ordinary offences, have gone on to abolish it for all offences.

1. Abolitionist for all crimes
Countries whose laws do not provide for the death penalty for any crime

ANDORRA, ANGOLA, ARMENIA, AUSTRALIA, AUSTRIA, AZERBAIJAN, BELGIUM, BHUTAN, BOSNIA-HERZEGOVINA, BULGARIA, CAMBODIA, CANADA, CAPE VERDE, COLOMBIA, COSTA RICA, COTE D’IVOIRE, CROATIA, CYPRUS, CZECH REPUBLIC, DENMARK, DJIBOUTI, DOMINICAN REPUBLIC, ECUADOR, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE, GUINEA-BISSAU, HAITI, HONDURAS, HUNGARY, ICELAND, IRELAND, ITALY, KIRIBATI, LIBERIA, LIECHTENSTEIN, LITHUANIA, LUXEMBOURG, MACEDONIA (former Yugoslav Republic), MALTA, MARSHALL ISLANDS, MAURITIUS, MEXICO, MICRONESIA (Federated States), MOLDOVA, MONACO, MOZAMBIQUE, NAMIBIA, NEPAL, NETHERLANDS, NEW ZEALAND, NICARAGUA, NIUE, NORWAY, PALAU, PANAMA, PARAGUAY, POLAND, PORTUGAL, ROMANIA, SAMOA, SAN MARINO, SAO TOME AND PRINCIPE, SENGAL, SERBIA AND MONTENEGRO, SEYCHELLES, SLOVAK REPUBLIC, SLOVENIA, SOLOMON ISLANDS, SOUTH AFRICA, SPAIN, SWEDEN, SWITZERLAND, TURKISH REPUBLIC, TURKEY, TURKMENISTAN, TUVALU, UKRAINE, UNITED KINGDOM, URUGUAY, VANUATU, VATICAN CITY STATE, VENEZUELA

2. Abolitionist for ordinary crimes only
Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances

ALBANIA, ARGENTINA, BOLIVIA, BRAZIL, CHILE, COOK ISLANDS, EL SALVADOR, FIJI, ISRAEL, LATVIA, PERU

3. Abolitionist in practice
Countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions. The list also includes countries which have made an international commitment not to use the death penalty

ALGERIA, BAHRAIN, BENIN, BRUNEI DARUSSALAM, BURKINA FASO, CENTRAL AFRICAN REPUBLIC, CONGO (Republic), GAMBIA, GRENADA, KENYA, MADAGASCAR, MALAWI, MALDIVES, MALI, MAURITANIA, MOROCCO, MYANMAR, NAURU, NIGER, PAPUA NEW GUINEA, RUSSIAN FEDERATION, SRI LANKA, SURINAME, SWAZILAND, TOGO, TONGA, TUNISIA

4. Retentionist
Countries and territories which retain the death penalty for ordinary crimes

AFGHANISTAN, ANTIGUA AND BARBUDA, BAHAMAS, BANGLADESH, BARBADOS, BELARUS, BELIZE, BOTSWANA, BURUNDI, CAMEROON, CHAD, CHINA, COMOROS, CONGO (Democratic Republic), CUBA, DOMINICA, EGYPT, EQUATORIAL GUINEA, ERITREA, ETHIOPIA, GABON, GHANA, GUATEMALA, GUINEA, GUYANA, INDIA, INDONESIA, IRAQ, IRAQ, JAMAICA, JAPAN, JORDAN, KAZAKHSTAN, KOREA (North), KOREA (South), KUWAIT, KYRGYZSTAN, LAOS, LIBERIA, LIBYA, MALAYSIA, MONGOLIA, NIGERIA, OMAN, PAKISTAN, PALESTINIAN AUTHORITY, PHILIPPINES, QATAR, RWANDA, SAINT CHRISTOPHER & NEVIS, SAINT LUCIA, SAINT VINCENT & GRENADINES, SAUDI ARABIA, SIERRA LEONE, SINGAPORE, SOMALIA, SUDAN, SYRIA, TAIWAN, TAJIKISTAN, TANZANIA, THAILAND, TRINIDAD AND TOBAGO, UGANDA, UNITED ARAB EMIRATES, UNITED STATES OF AMERICA, UZBEKISTAN, VIETNAM, YEMEN, ZAMBIA, ZIMBABWE

http://web.amnesty.org/web/web.nsf/print/714BB3479E3E999980256D51005D69BE
The state of the death penalty worldwide

Key
- Death penalty abolished for all crimes: countries whose laws do not provide for the death penalty for any crime.
- Death penalty abolished for ordinary crimes only: countries whose laws provide for the death penalty only for exceptional crimes, neglecting ordinary law or crimes committed in exceptional circumstances.
- Death penalty abolished in practice: countries which retain the death penalty for ordinary crimes such as murder, but which have not executed anyone in the past 10 years and are believed to have a policy or established practice of not carrying out executions. If some of these countries have made an international commitment not to use the death penalty.
- Death penalty retained: countries in which the death penalty is retained for ordinary crimes.

Note: Hong Kong abolished the death penalty for all crimes in 1993. All understandings that after Hong Kong's return to China in 1997, the territory remains abolished. The map may also show other territories whose laws on the death penalty differ significantly from those of the country with which they are associated.

Small countries and territories
- Antigua & Barbuda
- Bahamas
- Barbados
- Belize
- Brunei
- Cambodia
- Cook Islands (New Zealand)
- Dominica
- Dominican Republic
- East Timor
- Fiji
- Grenada
- Haiti
- Hong Kong (China)
- Jamaica
- Kiribati
- Lao PDR
- Marshall Islands
- Palau
- Palau
- People's Republic of China
- Saint Kitts & Nevis
- Saint Lucia
- Saint Vincent & The Grenadines
- Samoa
- Sao Tome
- Sao Tome & Principe
- Seychelles
- Solomon Islands
- Tonga
- Tuvalu
- Tuvalu
- Vanuatu
- Western Samoa

Other developments in 2002:
- Turkey’s parliament amended a law abolishing the death penalty in a decision generally accepted on 26 June.
- The Czech Republic decided to abandon its death penalty law in June.
- Egypt abolished the death penalty for all crimes in April.
- The Federal Republic of Yugoslavia abolished the death penalty for all crimes in June.
- China continues to execute the largest number of people. Scores of executions have taken place across China since July, when the government stepped up its anti-crime campaign.
- Japan executed two men, Tamotsu Kusano and Tatsuya Harada on 10 September. With 18 people currently on death row, all fears for more executions were removed.
- Barbados and Israel: the last executions were in the mid-1990s, but moves are under way to restrict appeals by prisoners under sentence of death.
- Pakistan: on 16 June the federal Sharia Court acquitted Zafar Bibi, sentenced to death by a lower court for committing adultery. In 2000 Zafar Bibi had told police she was raped while her husband was in prison. She was charged with adultery.
- Guatemala: legislation to abolish the death penalty in 1999 and it is highly debated. The opposition to it is strong. The death penalty is rarely carried out, but the death penalties for which it can be used have increased. Two people have been sentenced to death since July.
- USA: in June the US Supreme Court ruled that the execution of offenders with "mental retardation" was unconstitutional.
- Sudan: at least 19 men have been executed this year following trials by special courts set up under the 1998 State of Emergency Act. Special courts fall far short of international fair trial standards. On 17 July a special court in Nyala sentenced 60 people, including four 14-year-olds, to death. The defendants did not receive proper legal representation.
- Philippines: President Gloria Arroyo has suspended the execution of all death row prisoners while Congress debates abolition of the death penalty. More than 1,600 prisoners are on death row, including 29 women.
- Democratic Republic of Congo: In September the government announced an end to the moratorium on executions, nominally in place for three years. Days later, the public prosecutor called for the death penalty for 215 people accused of committing the assassination of President Laurent-Désiré Kabila in January 2001. At least 230 people, including children, have been executed in the DRC since 1997, after unfair military trials. Some were executed within a few hours of the trial.
- India: On 18 December an anti-terrorism court sentenced three men to death for their role in an armed attack on India's parliament in December 2001. It was the first death penalty under the new Prevention of Terrorism Act.
### TABLE 1: ABOLITIONIST COUNTRIES AT YEAR END, 1981-2005

<table>
<thead>
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<th>Year</th>
<th>No. countries abolitionist for all crimes</th>
<th>No. countries abolitionist in law or practice</th>
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<tr>
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</tr>
</tbody>
</table>

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Number of Countries That Have Abolished the Death Penalty In Law or In Practice, by Year

Source: Amnesty International 2006


http://www.deathpenaltvinfo.org/International%204-20-06.gif

The Commission on Human Rights, . . . urges all States that still maintain the death penalty:

- Not to impose it for crimes committed by a person below 18 years of age;
- Not to impose the death penalty on a person suffering from any form of mental disorder;
- Not to execute any person as long as any related legal procedure, at international or at national level, is pending;
- Progressively to restrict the number of offences for which the death penalty may be imposed;
- To establish a moratorium on executions, with a view to completely abolishing the death penalty;


Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty as amended by Protocol No. 11

Strasbourg, 28. IV. 1983

Heads of articles added and text amended according to the provisions of Protocol No. 11 (ETS 155) as from its entry into force on 1 November 1998.

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty,

Have agreed as follows:

**Article 1 – Abolition of the death penalty**

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

**Article 2 – Death penalty in time of war**

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.
Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances

Vilnius, 3.V.2002

The member States of the Council of Europe signatory hereto,

Convinced that everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989

The States Parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

From the Office of the United Nations High Commissioner for Human Rights.

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be re-established in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offences or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.

From the Office of International Law - Organization of American States, Washington D.C.


Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

Entry into force 2 September 1990, in accordance with article 49.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

From the Office of the United Nations High Commissioner for Human Rights.

http://www.ohchr.org/ english/law/crc.htm
International Covenant on Civil and Political Rights.

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

Entry into force 23 March 1976, in accordance with Article 49.

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

From the Office of the United Nations High Commissioner for Human Rights.

http://www.ohchr.org/english/law/ccpr.htm
Amnesty International - Ratification of international treaties

The community of nations has adopted four international treaties providing for the abolition of the death penalty. One is of worldwide scope; the other three are regional.

Following are short descriptions of the four treaties and current lists of states parties and countries which have signed but not ratified the treaties. (States may become parties to international treaties either by acceding to them or by ratifying them. Signature indicates an intention to become a party at a later date through ratification. States are bound under international law to respect the provisions of treaties to which they are parties, and to do nothing to defeat the object and purpose of treaties which they have signed.)

Second Optional Protocol to the International Covenant on Civil and Political Rights

The Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty, adopted by the UN General Assembly in 1989, is of worldwide scope. It provides for the total abolition of the death penalty but allows states parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. Any state which is a party to the International Covenant on Civil and Political Rights can become a party to the Protocol.

States parties: AUSTRALIA, AUSTRIA, AZERBAIJAN, BELGIUM, BOSNIA-HERZEGOVINA, BULGARIA, CANADA, CAPE VERDE, COLOMBIA, COSTA RICA, CROATIA, CYPRUS, CZECH REPUBLIC, DENMARK, DJIBOUTI, ECUADOR, ESTONIA, FINLAND, GERMANY, GREECE, HUNGARY, ICELAND, IRELAND, ITALY, LIBERIA, LIECHTENSTEIN, LITHUANIA, LUXEMBOURG, MACEDONIA, MALTA, MONACO, MOZAMBIQUE, NAMIBIA, NEPAL, NETHERLANDS, NEW ZEALAND, NORWAY, PANAMA, PARAGUAY, PORTUGAL, ROMANIA, SAN MARINO, SERBIA AND MONTENEGRO, SEYCHELLES, SLOVAK REPUBLIC, SLOVENIA, SOUTH AFRICA, SPAIN, SWEDEN, SWITZERLAND, TIMOR-LESTE, TURKEY, TURKMENISTAN, UNITED KINGDOM, URUGUAY, VENEZUELA (total: 57) Signed but not ratified: ANDORRA, CHILE, GUINEA-BISSAU, HONDURAS, NICARAGUA, POLAND, SAO TOME AND PRINCIPE (total: 7)

Protocol to the American Convention on Human Rights

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organization of American States in 1990, provides for the total abolition of the death penalty but allows states parties to retain the death penalty in wartime if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. Any state party to the American Convention on Human Rights can become a party to the Protocol.

States parties: BRAZIL, COSTA RICA, ECUADOR, NICARAGUA, PANAMA, PARAGUAY, URUGUAY, VENEZUELA (total: 6) Signed but not ratified: CHILE (total: 1)

Protocol No. 6 to the European Convention on Human Rights


States parties: ALBANIA, ANDORRA, ARMENIA, AUSTRIA, AZERBAIJAN, BELGIUM, BOSNIA-HERZEGOVINA, BULGARIA, CROATIA, CYPRUS, CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE, HUNGARY, ICELAND, IRELAND, ITALY, LATVIA, LIECHTENSTEIN, LITHUANIA, LUXEMBOURG, MACEDONIA, MALTA, MOLDOVA, MONACO, NETHERLANDS, NORWAY, POLAND, PORTUGAL, ROMANIA, SAN MARINO, SERBIA AND MONTENEGRO, SLOVAK REPUBLIC, SLOVENIA, SPAIN, SWEDEN, SWITZERLAND, TURKEY, UKRAINE, UNITED KINGDOM (total: 45) Signed but not ratified: RUSSIAN FEDERATION (total: 1)

Protocol No. 13 to the European Convention on Human Rights


States parties: ANDORRA, AUSTRIA, BELGIUM, BOSNIA-HERZEGOVINA, BULGARIA, CROATIA, CYPRUS, CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, GERMANY, GREECE, HUNGARY, ICELAND, IRELAND, LIECHTENSTEIN, LITHUANIA, LUXEMBOURG, MACEDONIA, MALTA, MONACO, NETHERLANDS, NORWAY, PORTUGAL, ROMANIA, SAN MARINO, SERBIA AND MONTENEGRO, SLOVAKIA, SLOVENIA, SWEDEN, SWITZERLAND, TURKEY, UKRAINE, UNITED KINGDOM (total: 36)

Signed but not ratified: ALBANIA, ARMENIA, FRANCE, ITALY, LATVIA, MOLDOVA, POLAND, SPAIN, (total: 8)

Last updated: 20 June 2006

# SIZE OF DEATH ROW BY YEAR (1968 - present).

## SIZE OF DEATH ROW BY YEAR (1968 to the PRESENT)

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1969</td>
<td>517</td>
<td>1,405</td>
<td>2,575</td>
<td>2,716</td>
<td>2001</td>
<td>3,581</td>
</tr>
<tr>
<td>1970</td>
<td>575</td>
<td>420</td>
<td>1,591</td>
<td>2,890</td>
<td>2002</td>
<td>3,557</td>
</tr>
<tr>
<td>1971</td>
<td>631</td>
<td>482</td>
<td>1,781</td>
<td>3,054</td>
<td>2003</td>
<td>3,374</td>
</tr>
<tr>
<td>1972</td>
<td>642</td>
<td>539</td>
<td>1,984</td>
<td>3,219</td>
<td>2004</td>
<td>3,315</td>
</tr>
<tr>
<td>1973</td>
<td>334</td>
<td>691</td>
<td>2,124</td>
<td>3,335</td>
<td>2005*</td>
<td>3,373</td>
</tr>
<tr>
<td>1974</td>
<td>134</td>
<td>856</td>
<td>2,250</td>
<td>3,355</td>
<td>2006</td>
<td>3,452</td>
</tr>
<tr>
<td>1975</td>
<td>244</td>
<td>1,050</td>
<td>2,356</td>
<td>3,424</td>
<td>2007</td>
<td>3,527</td>
</tr>
</tbody>
</table>

Bureau of Justice Statistics: Capital Punishment, 2004; except 2005 which is from NAACP LDF Death Row USA Winter 2006

## Death Row Population, 1968 to 2004

![Graph showing death row population from 1968 to 2004]


2000 figure reported in Bureau of Justice Statistics, "Capital Punishment 2000" (number of inmates as of December 31, 2000).

2001 figure reported in Bureau of Justice Statistics, "Capital Punishment 2001" (number of inmates as of December 31, 2001).

2002 figure reported in Bureau of Justice Statistics, "Capital Punishment 2002" (number of inmates as of December 31, 2002).

2003 figure reported in Bureau of Justice Statistics, "Capital Punishment 2003" (number of inmates as of December 31, 2003).

2004 figure reported in Bureau of Justice Statistics, "Capital Punishment 2004" (number of inmates as of December 31, 2004)

2005 figures reported in NAACP Legal Defense & Education Fund, "Death Row USA".

From the Death Penalty Information Center at:
http://www.deathpenaltyinfo.org/article.php?scid=9&did=188
Appendices for Chapter Two.
Map showing the global distribution of the Christian religion. (2006)


In February and March 2002 the Pew Research Council conducted a survey of 2,002 adults. Questions about religious preference were included. People who identified their religious preference as Christian were asked about which branch of Christianity they belonged to.


<table>
<thead>
<tr>
<th>Survey Response</th>
<th>%, June 1996</th>
<th>%, March 2000 1</th>
<th>%, March 2000 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protestant</td>
<td>53</td>
<td>53</td>
<td>52</td>
</tr>
<tr>
<td>Catholic</td>
<td>23</td>
<td>23</td>
<td>24</td>
</tr>
<tr>
<td>Mormon (Latter-day Saints)</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Orthodox</td>
<td>1</td>
<td>1</td>
<td>*</td>
</tr>
<tr>
<td>Non-denominational</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Something else (Specify)</td>
<td>1</td>
<td>*</td>
<td>2</td>
</tr>
<tr>
<td>Not practicing any religion</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Don't know/Refused</td>
<td>2</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>TOTAL CHRISTIAN</td>
<td>84%</td>
<td>82%</td>
<td>82%</td>
</tr>
</tbody>
</table>

The percentages shown in this table reflect the number of members of each branch as a proportion of the total U.S. population, not just the Christian population. So the Catholic percentage of 24% for 2002 means that 24% of Americans identified themselves as Catholic in 2002. This table matches data from Gallup, Barna, and other polling organizations.

http://www.adherents.com/rel_USA.html
Religion and Death Penalty Support.

The combined aggregate results from the nine surveys conducted from 2001 through 2004 show some interesting, albeit subtle, differences in death penalty support by religiosity.

**Church Attendance:** Americans who attend religious services on a regular basis are slightly less likely to support the death penalty than those who attend less frequently. Although a majority of frequent and infrequent churchgoers support the death penalty, the data show that 65% of those who attend services weekly or nearly weekly favor capital punishment, compared with 69% of those who attend services monthly and 71% of those who seldom or never attend.

![Death Penalty Support by Church Attendance](http://www.deathpenaltyinfo.org/article.php?scid=23&did=1266)

**Practicing vs. Non-Practicing:** Practicing Catholics, or those who attend church on a weekly or near weekly basis, are less likely to support capital punishment than are non-practicing Catholics (those who attend services rarely or never). Fewer than 6 in 10 practicing Catholics (59%) support the death penalty. This compares with 73% of non-practicing Catholics who support it. This result suggests that practicing Catholics are more likely to adhere to the Catholic Church’s anti-death penalty position.

![Death Penalty Support by Practicing/Non-Practicing Catholics](http://www.deathpenaltyinfo.org/article.php?scid=23&did=1266)

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http://www.deathpenaltyinfo.org/article.php?scid=23&did=1266

Just under two-thirds (64%) of the public now support the death penalty, compared with 78% in 1996. And 43% felt strongly about their support seven years ago, compared with just 28% today. While still a minority view, opposition to the death penalty over this period has grown from 18% to 30%.

In 1996 views on the death penalty were largely unrelated to religious differences. While evangelicals, mainline Protestants, Catholics, and seculars held similar views. The views of white evangelicals have changed relatively little since that time - dropping from 82% support to 76% today - but members of other groups have moved further. Support for capital punishment among mainline Protestants has dropped from 85% to 70%, and among white Catholics it has declined from 79% to 69%. Seculars also are less supportive of the death penalty than they were in 1996 (78% then, 60% today).

Support for the death penalty among African-Americans, which has been consistently lower than among whites, also has declined. Seven years ago, a 54% majority of African-Americans favored the death penalty while 36% were opposed. Today, these figures are reversed, with just 39% in favor of capital punishment and 55% opposed. Hispanics, too, have become increasingly skeptical on this issue. Just half favor the death penalty today, compared with three-in-four in 1996.

While a majority favors capital punishment as a general policy, there is far less support for executing persons who committed murder when they were under the age of 18. Just 35% support such a policy, while 58% are opposed. Only 11% strongly favor execution in this circumstance, compared with 20% who strongly oppose it. There is little religious division on this issue. Similar percentages of white mainline Protestants (43%), white evangelicals (42%), and seculars (41%) favor capital punishment for minors, compared with 31% of white Catholics. As with the death penalty in general, African-Americans are the most opposed to capital punishment for minors. Fully 80% oppose this, while just 16% favor it.

In a survey experiment, half of the sample received this question rather than the standard death penalty item.

WHO SUPPORTS THE DEATH PENALTY?

By Joseph Carroll, Gallup Poll Assistant Editor.

November 16, 2004

Religious Preference.

Protestants are somewhat more likely to endorse capital punishment than are Catholics and far more likely than those with no religious preference. More than 7 in 10 Protestants (71%) support the death penalty, while 66% of Catholics support it. Fifty-seven percent of those with no religious preference favor the death penalty for murder.

Death Penalty Support by Religious Preference

<table>
<thead>
<tr>
<th></th>
<th>In favor</th>
<th>Not in favor</th>
<th>No opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protestants</td>
<td>71%</td>
<td>24%</td>
<td>5%</td>
</tr>
<tr>
<td>Catholics</td>
<td>66%</td>
<td>30%</td>
<td>4%</td>
</tr>
<tr>
<td>No religious preference</td>
<td>57%</td>
<td>38%</td>
<td>5%</td>
</tr>
</tbody>
</table>

Based on aggregated data from 2001 through 2004

Policies of religious groups towards the death penalty.

<table>
<thead>
<tr>
<th>Denomination</th>
<th>Membership in millions</th>
<th>Position on the death penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roman Catholic Church</td>
<td>60</td>
<td>Abolitionist</td>
</tr>
<tr>
<td>Baptist Churches</td>
<td>36</td>
<td>Southern Baptists are retentionist; American Baptists are abolitionist.</td>
</tr>
<tr>
<td>Non-religious</td>
<td>23</td>
<td>Mixed.</td>
</tr>
<tr>
<td>Methodist Churches</td>
<td>13</td>
<td>United Methodist Church is abolitionist.</td>
</tr>
<tr>
<td>Pentecostal Churches</td>
<td>10</td>
<td>Mixed.</td>
</tr>
<tr>
<td>Lutheran Churches</td>
<td>8</td>
<td>Evangelical Lutheran Church in America is abolitionist; the Lutheran Church, Missouri Synod is retentionist.</td>
</tr>
<tr>
<td>Eastern Orthodox Churches</td>
<td>5</td>
<td>Abolitionist</td>
</tr>
<tr>
<td>Islam</td>
<td>5</td>
<td>The Qur'an supports the death penalty, but there is a strong tradition of mercy within the faith.</td>
</tr>
<tr>
<td>Latter-Day Saints</td>
<td>5</td>
<td>Retentionist</td>
</tr>
<tr>
<td>Judaism</td>
<td>4</td>
<td>Mixed; split along liberal and conservative lines.</td>
</tr>
<tr>
<td>Presbyterian Churches</td>
<td>4</td>
<td>Abolitionist</td>
</tr>
<tr>
<td>Episcopal Church</td>
<td>2</td>
<td>Abolitionist</td>
</tr>
<tr>
<td>Reformed Church in America</td>
<td>2</td>
<td>Abolitionist</td>
</tr>
<tr>
<td>United Church of Christ</td>
<td>1</td>
<td>Abolitionist</td>
</tr>
<tr>
<td>Atheists</td>
<td>1</td>
<td>Mixed.</td>
</tr>
<tr>
<td>Neopagans</td>
<td>Perhaps 1</td>
<td>Mixed.</td>
</tr>
</tbody>
</table>

There are 16 main religious groups in the U.S. which have over 1 million adherents. This includes 12 Christian faith groups, Islam, Judaism, Atheism; and persons with no religious affiliation or identification.

Produced by ReligiousTolerance.Org
http://www.religionstolerance.org/execut7.htm
Books of the Bible referred to in this thesis and the abbreviations used.

<table>
<thead>
<tr>
<th>Old Testament</th>
<th>New Testament</th>
</tr>
</thead>
<tbody>
<tr>
<td>Genesis</td>
<td>Matthew</td>
</tr>
<tr>
<td>Exodus</td>
<td>Mark</td>
</tr>
<tr>
<td>Leviticus</td>
<td>Luke</td>
</tr>
<tr>
<td>Numbers</td>
<td>John</td>
</tr>
<tr>
<td>Deuteronomy</td>
<td>Acts</td>
</tr>
<tr>
<td>Jeremiah</td>
<td>Romans</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Executions in Bible Belt</th>
<th>Executions</th>
<th>Percentage in Bible Belt</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>98</td>
<td>81</td>
<td>83%</td>
</tr>
<tr>
<td>2000</td>
<td>85</td>
<td>80</td>
<td>94%</td>
</tr>
<tr>
<td>2001</td>
<td>66</td>
<td>55</td>
<td>93%</td>
</tr>
<tr>
<td>2002</td>
<td>71</td>
<td>67</td>
<td>94%</td>
</tr>
<tr>
<td>2003</td>
<td>65</td>
<td>59</td>
<td>90%</td>
</tr>
<tr>
<td>Five-year total</td>
<td>385</td>
<td>342</td>
<td>88.8%</td>
</tr>
</tbody>
</table>

*Bible Belt executions (1999): Tex. 35, Okla. 6, Va. 14, Fla. 1, Mo. 9, Ala. 2, Ark. 4, N.C. 4, S.C. 4, La. 1 and Ky. 1; total of 81.

*Bible Belt executions (2000): Tex. 40, Okla. 11, Va. 8, Fla. 6, Mo. 5, Ala. 4, Ark. 2, N.C. 1, S.C. 1, La. 1 and Tenn. 1; total of 80.

*Bible Belt executions (2001): Tex. 17, Okla. 18, Va. 2, Fla. 1, Mo. 7, Ark. 1, N.C. 5, Ga. 4; total of 55.


Over 80 percent of the twenty-two executions that have taken place in 2004 have been in the Bible Belt.

Appendices for Chapter Three.
Appendices for Chapter Four.
## Appendix A.

**Why do you favour the death penalty for persons convicted of murder?**
*(Asked of death penalty supporters)*

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Eye for an Eye/Punishment Fits Crime</td>
<td>37%</td>
<td>48%</td>
<td>40%</td>
<td>40%</td>
</tr>
<tr>
<td>They Deserve It</td>
<td>13%</td>
<td>06%</td>
<td>05%</td>
<td>05%</td>
</tr>
<tr>
<td>Save Taxpayers Money/Prison Costs</td>
<td>11%</td>
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<td>Acts as Deterrent/Sets an Example</td>
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<td>06%</td>
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<td>01%</td>
<td>03%</td>
<td>02%</td>
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Appendices for Chapter Five.
"Public Divided Between Death Penalty and Life Imprisonment Without Parole. – Large majority supports death penalty if no alternative is specified."

By The Gallup Organisation.

David W. Moore.

Gallup News Service.


Most Americans, 62%, believe the death penalty is not a deterrent to murder, while only 35% say it is a deterrent.

The current results represent a significant change from what people thought in 1991, when a Gallup Poll showed that 51% of Americans thought the death penalty was a deterrent. In the mid-1980s, about 6 in 10 thought it was a deterrent.

The deterrence issue seems to have only a modest effect on supporters' attitudes toward the death penalty, however. Among people who say it is a deterrent, 69% would still support it even if it could be proved the death penalty did not lower the murder rate.

Figure 7-3. Reasons given for death penalty support.
The top two lines show the percentage of Americans supporting the death penalty and the percentage agreeing that the death penalty deters crime (yes-no questions). The deterrence questions are taken from the following national samples: Opinion Research Corp. 7/72; Harris 4/73; CBS/New York Times 1/77, 7/77, 3/90, 8/90; Research & Forecasts 5/80; Audits & Surveys 10/81; Gallup 1/85, 1/86, 6/91. For 1973, and all years from 1985 to 1991, the general support questions come from the same surveys; for the other years the data points are from the surveys reported in Figure 7-1.

The lower four lines show responses to open-ended questions asking, "Why do you favor the death penalty?" The data are from the following polls: ABC News/Washington Post 5/81; Gallup 1/85, 6/91.

As asked of death penalty supporters:

"Which of the following is the main reason why you support the death penalty? It deters others from committing violent crime. An 'eye for an eye' is just punishment for those convicted. It provides some comfort and consolation for the loved ones of the victims. OR, Some other reason."

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<td>Eye for an eye</td>
<td>26</td>
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<td>Comfort and consolation</td>
<td>13</td>
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<td>Other reason</td>
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<td>Don't know</td>
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Found at “PollingReport.com” under Crime/Law Enforcement at:

http://www.pollingreport.com/crime.htm
**Table I.**

**Number of Times Issues Appear in the New York Legislative Debate on Capital Punishment, 1977-1995**

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<th>Year</th>
<th>Deterrence</th>
<th>Racism</th>
<th>Innocence</th>
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<td>37</td>
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*Figures reflect each time an issue was raised, not length of debate.*
Over the years, support for the sentence of Life Without Parole as an alternative to the death penalty has steadily increased, to the point where now the country is evenly split on capital punishment. In 1994, only 32% favoured Life, with 50% favouring death. In 2004, support for life without parole had grown to 46%.

Available at the Death Penalty Information Center at:

### Murder Rates for Neighboring Death Penalty and Abolitionist States, 1977-93

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*States without capital punishment for murder for the periods indicated. Death penalty status determined as of 31 December of the years indicated.

\[\Delta\] The figures represent the number of murders per 100,000 of the population.
REGIONAL MURDER RATES, 2001-2004

MURDER RATES PER 100,000 PEOPLE

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<th>REGION</th>
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<th>2002</th>
<th>2001</th>
<th>EXECUTIONS SINCE 1976 (As of 10/1/05)</th>
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DATA SOURCE: FBI Uniform Crime Statistics for 2004 (Published October, 2005).

Death Penalty Information Center.

Death Penalty Statistics

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<td>Public Support for Death Penalty</td>
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<td>Percentage of executions by region:</td>
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Death Penalty Statistics Since 1973

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*As of Dec. 15, 2005 with no more executions scheduled for this year.
**Corrected Projection (3/28/06)
#Gallup Poll

At: http://www.deathpenaltyinfo.org/YearEnd05.pdf
EXECUTIONS IN THE UNITED STATES
AS OF JANUARY 19, 2006

- Texas (355)
- Midwest, West & Northeast (184)
- Other Southern States (466)

Death Penalty Information Center at:
http://www.deathpenaltyinfo.org/Regional%20Executions%20Chart.gif
States with the death penalty vs. states without.

When comparisons are made between states with the death penalty and states without, the majority of death penalty states show murder rates higher than non-death penalty states. The average of murder rates per 100,000 population in 1999 among death penalty states was 5.5, whereas the average of murder rates among non-death penalty states was only 3.6.

A look at neighboring death penalty and non-death penalty states show similar trends. Death penalty states usually have a higher murder rate than their neighboring non-death penalty states.

Death Penalty Information Center at:

http://deathpenaltyinfo.org/article.php?&id=1705#STATES%20WITH%20THE%20DEATH%20PENALTY%20V%20STATES%20WITH%20OUT
### Murder Rates in Death Penalty and Non-Death Penalty States

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*Includes Kansas and New York, which adopted the death penalty in 1994 and 1995 respectively.*
The Death Penalty Is Not a Deterrent

A September 2000 New York Times survey found that during the last 20 years, the homicide rate in states with the death penalty has been 48 to 101 percent higher than in states without the death penalty.

FBI data showed that 10 of the 12 states without capital punishment have homicide rates below the national average.

Amnesty International USA – “Abolish the Death Penalty. – The Death Penalty is Not a Deterrent.”

At: http://www.amnestyusa.org/abolish/factsheets/deterrence.html
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<th>Country</th>
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Figure 1: Individual State Deterrent Effects:
Number of Murders Deterred or Incited by an Average Execution

Produced by Joanna Shepherd in her 2004 study: "Deterrence Versus Brutalization: Capital Punishments Differing Impact Among States."
Ref: Emory Legal Scholarship working paper. Available at: http://law.bepress.com/emorylwps/papers/art1/
Figure II. Average homicides per 100,000 inhabitants, selected countries and areas, 1980-2000.
The overall trend for the European Union shows comparatively low levels of homicide, under three incidents per 100,000 inhabitants, with a slight decline being noted in the number of cases being recorded at the end of the 1990s. The data for the European Union should be considered accurate, as a large number of countries report statistics with a high level of reliability. Data for North America were not included in the graph as only Canada had consistently provided data across the reporting period. The homicide figures for Canada mirror those of the European Union and, as stated earlier, United States homicide rates, though declining, are at an incomparably higher level than those for the European Union.

Of all the regions under consideration, data from Eastern Europe and the Commonwealth of Independent States show the clearest increases across the reporting period. While in the mid-1980s homicide rates in the region were recorded at under five incidents per 100,000 inhabitants, increases occurred from the late 1980s into the early 1990s, peaking during 1993 and 1994 at approximately eight incidents per 100,000 inhabitants, and thereafter showed slight declines.

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These data reflect what is contained in the death penalty statutes of each jurisdiction.

Appendices for Chapter Six.
Burned at the stake. This was usually the fate of martyrs; it was thought that the flames would cleanse their souls.

Being sawn in half.

Appendix C

The execution of Lady Jane Grey

Execution by the sword in medieval Germany was granted as a privilege to aristocrats and as a much sought-after alternative by lesser mortals, who otherwise suffered on the rope or wheel.

The Halifax Gibbet was an early forerunner of the guillotine. The blade was released by the crowd rather than by a single executioner.

Queen Marie-Antoinette is guillotined at the Place de la Révolution (now the Place de la Concorde). Engraved by Helman after an original by Monnet. (The Mary Evans Picture Library)
The last public execution in France. The murderer Eugène Weidmann is guillotined by Henri Desfourneaux outside the St Pierre prison at Versailles on 16 June 1939. A large crowd had waited up all night to view the spectacle. In 1981 the French government finally approved a bill to abolish the death penalty, ending two centuries of the use of the guillotine. (The Mary Evans Picture Library)
Appendix H
Methods of Execution.

The following is a brief elaboration of some of the historical elements of death by: pendulum, animal attack and beheading.

i- Pendulum.
A product of the Spanish Inquisition, the pendulum could be used to slowly torture victims and force them to confess or divulge information pertinent to the authorities. If they refused to cooperate, the process would inevitably culminate in their slow and agonising death. The pendulum method consisted simply of tying the victim to a bench beneath a suspended swinging blade set in an active pendulum motion in such a way that the blade gradually descended lower and lower over the victim’s immobilised body. In his very evocative phraseology Geoffrey Abbot, author of The Book of Execution, describes the process in grim and graphic terms:

“See his eyes dilate in horror, his body stiffen and arch, his every muscle strain against the ropes in a frenzied attempt to twist out of its path, to avoid the arc which will surely glide sinuously over his palpitating flesh, tracing thin blood-red lines along its path as it swings, scything deeper and deeper, little more than a millimetre at a time, slicing through muscle, tissue and bone, until, eventually, his chest cavity gaping and ruptured, the implacable blade skims across his very heart.”

ii- Animals as an instrument of execution.
At certain points in history being fed to animals was a highly popular method of execution. This could include methods as diverse as being fed to the lions in a grand and very public Roman amphitheatre, to being fed to the crocodiles on the bank of a sacred pool, as was the practice, at one time, of the Ibo tribe in Nigeria. Another method of execution in which animals were utilised was to have the victim torn apart, limb-by-limb, by tying their extremities between two or more horses pulling in opposite directions.

Animals could also be used to literally eat away at a person’s insides. One such method was to place animals, such as mice, onto a person’s stomach covered by an upside-down cauldron, cage or bowl, and then the mice, “after a fire had been kindled on top of the bowl, would be driven into a frenzy by the increasing heat, and, after scuttling madly around, would eventually burrow their way out through the victim’s stomach and entrails.” In Germany, wildcats were sometimes the animals of choice. They would be tied to the victim’s stomach where they would then be tormented by the executioners to the point that, “finally, the maddened animal clawed its way into the flesh and bowels of the victim.” Soldier ants are also known to have been the preferred animal of execution in certain Central African tribes.

One of the most peculiar methods involving animals was the Roman Empire’s punishment of parricides. Their punishment would sometimes consist of being “bound in a sack with a dog, a rooster, and a snake and then thrown into water. This bizarre practice continued in some places until the Middle Ages.”

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2 Ibid. Abbott, p110.
3 Ibid. Abbott, p87. This method as a tool for torture was recently portrayed in the 2003 film “Two Fast, Two Furious.”
5 Parricide being the murder of a parent or other close relative.
### iii- Beheading.

Beheading has always been a popular method of execution. Cheap and efficient it has taken many forms over the years, including beheadings by axe, sword, guillotine, or simply slitting the throat. Particularly, popular in England in the sixteenth and seventeenth centuries, beheading was often confined to those of a noble birth. Famous victims of the block in England include, King Charles I, Mary Queen of Scots, Anne Boleyn, Catherine Howard, sixteen year old Lady Jane Grey and Sir Walter Raleigh.

An invention of the eighteenth century, the Guillotine remains one of the most infamous and controversial methods of beheading. It is the French Dr Joseph Ignace Guillotine (1738-1814) who is generally credited with its creation. He lived in an era in France where the method of execution employed generally relied upon the offender's class and social status. While aristocrats were typically accorded a swift and relatively painless demise, plebeians could expect a protracted, torturous and agonising end.

A humanitarian and reformer, Dr Guillotine's intention was to devise a humane method of execution, one that would be used universally for all classes and types of criminal without discrimination or distinction. He considered that decapitation was the fastest and thus presumably most painless way to die. However, he also acknowledged that one of the major problems with beheadings in the pre-guillotine era, was the margin for human error, whereby the executioner could easily miss the mark and require the deliverance of several painful blows before successfully severing head from body. Dr Guillotine therefore recommended the use of a simple mechanical device that he felt would eliminate this margin of error and torture.

After numerous trials on animal and human test subjects, the first victim of the guillotine, Nicolas-Jacques Pelletier, was beheaded on 25th April 1792. Over in the blink of an eye, his death was delivered in a matter of seconds and was, in fact, such a success that the crowd was left complaining that it had been too quick and humane a death. Nevertheless, despite the good intentions of its namesake, over the years the guillotine was to be hijacked and used, not as a humane and universal method of execution but instead as a tool for the mass extermination of upper class people during the French Revolution, eventually claiming more than 20,000 victims. The last public beheading by guillotine took place in France in 1939, although the guillotine was last used officially in France on 10th September 1977.

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7 Executed in 1587, Queen Mary's executioner required three blows to fully decapitate her.
8 Refer back to Appendix C for a picture of the execution of Lady Jane Grey.
9 The guillotine was also known as the “National Razor” and “The Widow.”
10 The French guillotine was not however the first of its kind as similar devices had been constructed and used before, such as the Scottish Maiden, the English Halifax Gibbet and the Italian Mannaia or Mandra. Refer back to Appendix E for a picture of the Halifax Gibbet.
11 Common methods employed to kill convicts from the lower echelons of society included being burned alive at the stake, being hung, drawn and quartered, and being broken on the wheel.
12 That goal was certainly met, although not at all in the way that he had foreseen.
13 The final design was not, in fact, one of Dr Guillotine’s own manufacture but was the product of a combination of designs from a variety of sources. Ironically enough one of the sources was King Louis XVI, who helped to design the very contraption that was to eventually deprive him of his own head! For more details see, Robert Fredrick Opie, (2003) Guillotine – The Timbers of Justice. Sutton Publishing, p45-6.
14 At the height of the French Revolution, records show that sometimes in a series of multiple executions the process required only one minute per execution.
16 Among its more infamous victims are, King Louise XVI and his wife Queen Marie Antoinette. See Appendix F for a picture of the execution of Marie Antoinette.
17 That was for the execution of mass murderer Eugene Weidmann, which took place in Versailles on 18/6/1939. See Appendix G for a photograph of it.
Despite its advantages, the guillotine faced many critiques. One criticism was the proposition that the speed with which the head was severed was, in fact, so swift and surgical that the decapitated head would possibly be able to feel and comprehend for some time after decapitation. In response to the ghoulish suggestion that severed heads may have been able to witness their headless bodies being carted away, a series of controversial and macabre medical experiments took place, including the attempted regeneration of decapitated heads via transfusions of blood from a living dog.¹⁸ tests involving the reflexes of severed heads and other such Frankenstinian experiments. Although some experiments prompted widespread concern as to the humanity of beheading as a method of execution, most were discounted as inconclusive and unethical by the medical community. Nevertheless, despite much debate and research over the years as to the humanity of this instrument of death, “the consensus of opinion based upon international research suggested that of all forms of capital punishment, the guillotine was believed to have been the least painful and therefore the most merciful.”¹⁹

Other countries that have employed the guillotine, at one point or another, include Belgium, China, Germany, Italy and Sweden.²⁰

Traditionally beheading has been a favourite method because it is cheap, quick and, if done correctly, relatively painless. Today, beheading is still used as a method of execution in countries such as Saudi Arabia, Qatar and Yemen where the sword or scimitar is typically used.

---

¹⁸ This was a particularly gruesome experiment carried out by Dr Dassy de Lignieres on September 7th 1880. See Opie, (op cit. note 13) (2003) pp126-7 for more on this particular experiment.


²⁰ Ibid, p42.
## Authorized Methods of Execution by Method

(click the state to get specific information about the methods authorized)

<table>
<thead>
<tr>
<th>Method</th>
<th># of executions by method since 1976</th>
<th># of states authorizing method</th>
<th>Jurisdictions that Authorize</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electrocution</td>
<td>153</td>
<td>10 states (Nebraska is the only state that requires electrocution)</td>
<td>Alabama, Arkansas, Florida, [Illinois], Kentucky, Nebraska, [Oklahoma], South Carolina, Tennessee, Virginia</td>
</tr>
<tr>
<td>Gas Chamber</td>
<td>11</td>
<td>5 states (all have lethal injection as an alternative method)</td>
<td>Arizona, California, Maryland, Missouri, [Wyoming]</td>
</tr>
<tr>
<td>Hanging</td>
<td>3</td>
<td>2 states (all have lethal injection as an alternative method)</td>
<td>New Hampshire, Washington</td>
</tr>
<tr>
<td>Firing Squad</td>
<td>2</td>
<td>2* states (all have lethal injection as an alternative method)</td>
<td>Idaho, [Oklahoma], Utah** **Utah offers the firing squad only for inmates who chose this method prior to its elimination as an option.</td>
</tr>
</tbody>
</table>

**NOTE:** states in [brackets] authorize the listed method only if a current method is found unconstitutional (see state description, below, for more information).
Methods of Execution

- Lethal Injection
- Electrocution and Lethal Injection
- Gas Chamber and Lethal Injection
- Hanging and Lethal Injection
- Firing Squad and Lethal Injection
- No Death Penalty

A photograph of the execution of Tomas Cerrate Hernandez by lethal injection on 29th June 2000 in Guatemala City.


http://www.richard.clark32.btinternet.co.uk/cerrate.jpg
Photograph of a lethal injection gurney.
Available at the website for the Clark County Prosecuting Attorney.

See: http://www.clarkprosecutor.org/images/gurney15.gif
DEATH BY INJECTION

Lethal injection is used as a method of execution in 37 of the 38 states that have the death penalty (Nebraska is the only state that requires electrocution). The condemned person is usually bound to a gurney, and two needles are inserted into veins, one of them as a backup.

What happens as drugs are administered

1. LOSS OF CONSCIOUSNESS
   Sodium pentothal, an anesthetic
   Makes brain cells stop reacting to nerve impulses, puts inmate to sleep

2. RESPIRATORY ARREST
   Pancuronium bromide, a derivative of curare, which is used on poison arrows in the Amazon
   Paralyzes muscles used in breathing; does not paralyze heart muscle
   Lungs stop putting oxygen into red blood cells

3. CARDIAC ARREST
   Potassium chloride, a simple chemical salt
   Blocks electric signals inside the heart; heart slows, then stops

4. BRAIN DAMAGE
   Death results from anesthetic overdose, respiratory and cardiac arrest
   Brain's supply of oxygenated blood stops
   Within 5 minutes, irreversible damage begins in brain stem, which controls breathing, other basic body functions

Problems with lethal injection
In inmates with a history of intravenous drug use, execution technicians sometimes have to probe the body repeatedly with needles to find a usable vein. Some inmates have helped their executioners find a suitable vein.

Sources: Death Penalty Information Center, Associated Press, Knight Ridder, Current Medical Diagnosis & Treatment, Textbook of Medical Physiology

Graphic taken from: "Lethal Injection Facing Scrutiny" Feb 26, 2006, by Brandon Bailey, Mercury News
Converted buses used as mobile chambers to execute prisoners by lethal injection.

Amnesty International Magazine.
May/June 2003 issue 119
The execution chamber at Sing Sing Prison, showing the electric chair and the visitors seating, about 1930. (New York State Library)


Before the electric chair was designed, engineers came up with this idea for an "electric closet." The electrodes would have been connected at the head and to a plate the man stood on. (New York Medico-Legal Society Journal, 1888)

Photograph of a gas chamber.
Available at Richard Clark’s “Capital Punishment - U.K” website.

See: http://www.richard.clark32.btinternet.co.uk/sq-10.jpg
This photograph shows the hanging of Rainey Bethea in Owensboro, Kentucky, before a crowd of 20,000 on August 14, 1936. It was the last public execution in America.

From: Perry T. Ryan, “The last public execution in America.” Available at: www.geocities.com/lastpublichang/
1. Method of Execution

<table>
<thead>
<tr>
<th>Method</th>
<th>Practiced in...</th>
</tr>
</thead>
<tbody>
<tr>
<td>firing squad</td>
<td>73 countries (sole method in 45 countries)</td>
</tr>
<tr>
<td>hanging</td>
<td>58 countries (sole method in 33 countries)</td>
</tr>
<tr>
<td>stoning</td>
<td>6 countries</td>
</tr>
<tr>
<td>lethal injection</td>
<td>5 countries (sole method in 1 country)</td>
</tr>
<tr>
<td>beheading</td>
<td>3 countries</td>
</tr>
<tr>
<td>electrocution</td>
<td>1 country</td>
</tr>
<tr>
<td>lethal gas</td>
<td>1 country</td>
</tr>
</tbody>
</table>

2. Methods of Execution

Executions have been carried out by the following methods since 2000:

- **Beheading** – (in Saudi Arabia, Iraq)
- **Electrocution** – (in USA)
- **Hanging** – (in Egypt, Iran, Japan, Jordan, Pakistan, Singapore and other countries)
- **Lethal injection** – (in China, Guatemala, Philippines, Thailand, USA)
- **Shooting** – (in Belarus, China, Somalia, Taiwan, Uzbekistan, Viet Nam and other countries)
- **Stoning** – (in Afghanistan, Iran)

(As of 1st Jan. 2006).

1) [http://www.amnestyusa.org/abolish/methods.html](http://www.amnestyusa.org/abolish/methods.html)
STATE of DELAWARE
FRED A. LEUCHTER ASSOCIATES, INC.

EXECUTION BY HANGING
OPERATION and INSTRUCTION MANUAL

Department of Correction
State of Delaware

Delaware Correctional Center
Smyrna, Delaware 19977-1597

May 1, 1990

STATE of DELAWARE
DELRAWARE CORRECTIONAL CENTER

EXECUTION PROTOCOL - EXECUTION BY HANGING

The following Special Protocol applies:

APPENDIX

1. DROP DISTANCE TABLE

Weight in Drop Weight in Drop
Pounds Distance Pounds Distance

120 or less..........8' 1" 170..................6' 0"
125................7'10" 175................5'11"
130................7' 7" 180................5' 9"
135................7' 4" 185................5' 7"
140................7' 1" 190................5' 6"
145................6' 9" 195................5' 5"
150................6' 7" 200................5' 4"
155................6' 6" 205................5' 2"
160................6' 4" 210................5' 1"
165................6' 2" 220 and over........5' 0"

The 1980 public execution in Mauritania of Sidi Ould Matalla, who had been convicted of murder. Shooting by firing-squad does not necessarily result in immediate death – the squad may have been told to aim at the trunk of the body rather than the head (it is an easier target), and may be shooting from a considerable distance. In Taiwan in 1988, for example, a prisoner was found to be breathing over an hour after the first two volleys had been fired.

Appendices for Chapter Seven.
Appendix A.


<table>
<thead>
<tr>
<th>Race</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>BLACK</td>
<td>1,411</td>
<td>41.9%</td>
</tr>
<tr>
<td>HISPANIC</td>
<td>354</td>
<td>10.5%</td>
</tr>
<tr>
<td>WHITE</td>
<td>1,527</td>
<td>45.3%</td>
</tr>
<tr>
<td>OTHER</td>
<td>78</td>
<td>2.3%</td>
</tr>
</tbody>
</table>

(Death Row Population Figures from NAACP-LDF "Death Row USA (April 1, 2006)")

Produced by the Death Penalty Information Center, at:

http://www.deathpenaltyinfo.org/article.php?scid=5&did=184

Graph produced by the U.S. Department of Justice – Office of Justice Programmes – Bureau of Justice Statistics. "Capital Punishment 2004." (These are the latest figures provided by the Bureau.) Available at:

Appendix B.

### RACE OF DEFENDANTS EXECUTED IN THE U.S. SINCE 1976

<table>
<thead>
<tr>
<th>Race</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>353</td>
<td>34%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>68</td>
<td>6%</td>
</tr>
<tr>
<td>White</td>
<td>592</td>
<td>57.1%</td>
</tr>
<tr>
<td>Other</td>
<td>24</td>
<td>2.3%</td>
</tr>
</tbody>
</table>

**Note:** The federal government counts some categories, such as Hispanics, as an ethnic group rather than a race. DPIC refers to all groups as races because the sources for much of our information use these categories.

Produced by the Death Penalty Information Center at:

http://www.deathpenaltyinfo.org/article.php?scid&did=184
Appendix C.

<table>
<thead>
<tr>
<th>RACE OF VICTIMS* SINCE 1976</th>
<th>RACE OF VICTIMS</th>
</tr>
</thead>
<tbody>
<tr>
<td>BLACK</td>
<td>219</td>
</tr>
<tr>
<td>HISPANIC</td>
<td>72</td>
</tr>
<tr>
<td>WHITE</td>
<td>1226</td>
</tr>
<tr>
<td>OTHER</td>
<td>32</td>
</tr>
</tbody>
</table>

*NOTE: Number of Victims refers to the victims in the underlying murder in cases where an execution has occurred since the restoration of the death penalty in 1976. There are more victims than executions because some cases involve more than one victim.

Produced by the Death Penalty Information Center. At: http://www.deathpenaltyinfo.org/article.php?scid=5&did=184

<table>
<thead>
<tr>
<th>PERSONS EXECUTED FOR INTERRACIAL MURDERS IN THE U.S. SINCE 1976</th>
<th>White Defendant / Black Victim (14)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The cases represented in this graph are cases of one defendant executed for the murder of one or more victims of one race. Cases involving multiple victims of several different races are not included here.</td>
<td>Black Defendant / White Victim (208)</td>
</tr>
</tbody>
</table>

Produced by the Death Penalty Information Center at: http://www.deathpenaltyinfo.org/article.php?scid&did=184
Appendix D.

Racial Disparities in Plea Agreements.

"These statistics show the racial breakdown of the cases in which defendants entered into an agreement resulting in a guilty plea and a lesser sentence after the Attorney General authorized seeking the death penalty.

From 1995-2000, the Attorney General authorized the seeking of the death penalty for 159 defendants. Of these, 51 defendants (32%) entered into plea agreements. The rates for individual racial/ethnic groups were as follows:

- 48% for White defendants (21 out of 44 authorized)
- 25% for Black defendants (18 out of 71 authorized)
- 28% for Hispanic defendants (9 out of 32 authorized)
- 25% for Other defendants (3 out of 12 authorized)


http://deathpenaltyinfo.org/article.php?scid=29&did=196
Appendix E.

<table>
<thead>
<tr>
<th>STATES WITH THE DEATH PENALTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
</tr>
<tr>
<td>Arizona</td>
</tr>
<tr>
<td>Arkansas</td>
</tr>
<tr>
<td>California</td>
</tr>
<tr>
<td>Colorado</td>
</tr>
<tr>
<td>Connecticut</td>
</tr>
<tr>
<td>Delaware</td>
</tr>
<tr>
<td>Delaware</td>
</tr>
<tr>
<td>Florida</td>
</tr>
<tr>
<td>Georgia</td>
</tr>
<tr>
<td>Idaho</td>
</tr>
<tr>
<td>Indiana</td>
</tr>
<tr>
<td>Illinois</td>
</tr>
<tr>
<td>Kentucky</td>
</tr>
<tr>
<td>Kentucky</td>
</tr>
<tr>
<td>Oregon</td>
</tr>
<tr>
<td>Pennsylvania</td>
</tr>
<tr>
<td>South Dakota</td>
</tr>
<tr>
<td>Texas</td>
</tr>
<tr>
<td>Utah</td>
</tr>
<tr>
<td>Virginia</td>
</tr>
<tr>
<td>Virginia</td>
</tr>
<tr>
<td>ALSO</td>
</tr>
<tr>
<td>ALSO</td>
</tr>
</tbody>
</table>

* The New York (6/24) death penalty statute was declared unconstitutional in 2004.

<table>
<thead>
<tr>
<th>STATES WITHOUT THE DEATH PENALTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
</tr>
<tr>
<td>Hawaii</td>
</tr>
<tr>
<td>Iowa</td>
</tr>
<tr>
<td>Maine</td>
</tr>
<tr>
<td>Massachusetts</td>
</tr>
<tr>
<td>West Virginia</td>
</tr>
<tr>
<td>ALSO</td>
</tr>
</tbody>
</table>

Provided by the Death Penalty Information Center under “State by state information” at: http://www.deathpenaltyinfo.org/state/
Appendix F.

A Look at the Death Penalty by Jurisdiction.

Red areas on the map have the death penalty, blue ones do not.

Taken from Court TV Library: “The Death Penalty” at:
http://www.courttv.com/archive/legaldocs/capital/map/penalty.html
Appendix G.
"Number of Executions by State and Region Since 1976."

<table>
<thead>
<tr>
<th>STATE</th>
<th>TOTAL EXECUTIONS</th>
<th>EXECUTIONS IN 2006</th>
<th>EXECUTIONS IN 2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>TEXAS</td>
<td>372</td>
<td>17</td>
<td>19</td>
</tr>
<tr>
<td>VIRGINIA</td>
<td>97</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OKLAHOMA</td>
<td>81</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>MISSOURI</td>
<td>66</td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>FLORIDA</td>
<td>60</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>NORTH CAROLINA</td>
<td>42</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>GEORGIA</td>
<td>39</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>SOUTH CAROLINA</td>
<td>36</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>ALABAMA</td>
<td>34</td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>LOUISIANA</td>
<td>27</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ARKANSAS</td>
<td>27</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>ARIZONA</td>
<td>22</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OHIO</td>
<td>22</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>INDIANA</td>
<td>17</td>
<td>1</td>
<td>5</td>
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<tr>
<td>DELAWARE</td>
<td>14</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>CALIFORNIA</td>
<td>13</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>ILLINOIS</td>
<td>12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NEVADA</td>
<td>12</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>MISSISSIPPI</td>
<td>7</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>UTAH</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MARYLAND</td>
<td>5</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>WASHINGTON</td>
<td>4</td>
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<td></td>
</tr>
<tr>
<td>NEBRASKA</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PENNSYLVANIA</td>
<td>3</td>
<td></td>
<td></td>
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<tr>
<td>KENTUCKY</td>
<td>2</td>
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</tr>
<tr>
<td>MONTANA</td>
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</tr>
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<td>OREGON</td>
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</tr>
<tr>
<td>COLORADO</td>
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<td>CONNECTICUT</td>
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<td></td>
<td>1</td>
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<tr>
<td>IDAHO</td>
<td>1</td>
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<tr>
<td>NEW MEXICO</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TENNESSEE</td>
<td>2</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>WYOMING</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>U. S. FEDERAL GOVERNMENT</td>
<td>3</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Executions By State
Death Penalty in the
United States of America

January 1, 2005 to December 13, 2005

<table>
<thead>
<tr>
<th>Executions</th>
<th>January 17, 1977 to December 13, 2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 Executions</td>
<td>0 Executions</td>
</tr>
<tr>
<td>1 to 3</td>
<td>1 to 5</td>
</tr>
<tr>
<td>4 to 6</td>
<td>6 to 10</td>
</tr>
<tr>
<td>7 to 10</td>
<td>11 to 25</td>
</tr>
<tr>
<td>11 to 15</td>
<td>26 to 50</td>
</tr>
<tr>
<td>Over 15</td>
<td>Over 50</td>
</tr>
</tbody>
</table>

Year to date: 59*

* Federal (3) and Military executions are not included.
### Executions by Region

<table>
<thead>
<tr>
<th>Region</th>
<th>Total</th>
<th>South</th>
<th>Midwest</th>
<th>West</th>
<th>Texas &amp; Virginia Alone</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>848</td>
<td>120</td>
<td>65</td>
<td>4</td>
<td>469</td>
<td></td>
</tr>
</tbody>
</table>

**Note:** For executions by region, federal executions are included in the state where the crime occurred.

(Executions since 1976.)

From the Report: "A Broken System: Error Rates in Capital Cases, 1973-1995" James S. Liebman, Simon H. Rifkind Professor of Law, Columbia University School of Law; Jeffrey Fagan, Joseph Mailman School of Public Health; and Valerie West, doctoral candidate, Department of Sociology, New York University are authors of this report which was released in the spring of 2000.

“Our 23 years worth of results reveal a death penalty system collapsing under the weight of its own mistakes. They reveal a system in which lives and public order are at stake, yet for decades has made more mistakes than we would tolerate in far less important activities. They reveal a system that is wasteful and broken and needs to be addressed.

Our central findings are as follows:

- Nationally, during the 23-year study period, the overall rate of prejudicial error in the American capital punishment system was 68%. In other words, courts found serious, reversible error in nearly seven of every 10 of the thousands of capital sentences that were fully reviewed during the period.
- Capital trials produce so many mistakes that it takes three judicial inspections to catch them--leaving grave doubt whether we do catch them all. After state courts threw out 47% of death sentences due to serious flaws, a later federal review found "serious error"--error undermining the reliability of the outcome--in 40% of the remaining sentences.
- Because state courts come first and see all the cases, they do most the work of correcting erroneous death sentences. Of the 2370 death sentences thrown out due to serious error, 90% were overturned by state judges--many of whom were the very judges who imposed the death sentence in the first place; nearly all of whom were directly beholden to the electorate; and none of whom, consequently, were disposed to overturn death sentences except for very good reason. This does not mean that federal review is unnecessary. Precisely because of the huge amounts of serious capital error that state appellate judges are called upon to catch, it is not surprising that a substantial number of the capital judgments they let through to the federal stage are still seriously flawed.
- To lead to reversal, error must be serious, indeed. The most common errors--prompting a majority of reversals at the state post-conviction stage--are (1) egregiously incompetent defense lawyers who did not even look for--and demonstrably missed--important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who did discover that kind of evidence but suppressed it, again keeping it from the jury. Hundreds of examples of these and other serious errors are collected in Appendix C and D to this Report.
- High error rates put many individuals at risk of wrongful execution: 82% of the people whose capital judgments were overturned by state post-conviction courts due to serious error were found to deserve a sentence less than death when the errors were cured on retrial; 7% were found to be innocent of the capital crime.
- High error rates persist over time. More than 50% of all cases reviewed were found seriously flawed in 20 of the 23 study years, including 17 of the last 19. In half the years, including the most recent one, the error rate was over 60%. High error rates exist across the country. Over 90% of American death-sentencing states have overall error rates of 52% or higher. 85% have error rates of 60% or higher. Three-fifths have error rates of 70% or higher.
- Illinois (whose governor recently declared a moratorium on executions after a spate of death-row exonerations) does not produce atypically faulty death sentences. The overall rate of serious error found in Illinois capital sentences (66%) is very close to--and slightly lower than--the national average (68%).
- Catching so much error takes time--a national average of nine years from death sentence to the last inspection and execution. By the end of the study period, that average had risen to 10.6 years. In most cases, death row inmates wait for years for the lengthy review procedures needed to uncover all this error. Then, their death sentences are reversed.
- This much error, and the time needed to cure it, impose terrible costs on taxpayers, victims’ families, the judicial system, and the wrongly condemned. And it renders unattainable the finality, retribution, and deterrence that are the reasons usually given for having a death penalty.”

This report is available at: http://www.afsc.org/pwork/1200/122k11.htm
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**Books.**


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