

## **Death Penalty: How much has the United States evolved?**

**Liza Ramos**

"It seems to me absurd that the laws, which are an expression of the public will, which detest and punish homicide, should themselves commit it, and that to deter citizens from murder they order a public one". (Beccaria, 1764)

### **Introduction**

In 1972 and after a Supreme Court's decision in the *Furman vs. Georgia* Case, The United States suspended the application of the death penalty. Later, in 1976, as a result of a controversial decision of the Supreme Court in the *Gregg vs. Georgia Case*, based on a controversial study by the economist Isaac Ehrlich, America reintroduced the capital punishment. Many years have passed since, and now it is possible and necessary to ask: if the criminal justice has performed better? Or if less crimes have been committed? Or even is this kind of punishment constitutional?

At this time, there are thirty four states in the United States that have capital punishment for severe crimes versus sixteen that do not. The two longstanding arguments that support the death penalty are *retribution and deterrence*. According to the *retribution theory*, society has the right to inflict harm on the criminal and this reaction must be directly proportional to the harm caused by the criminal in the first place. The idea behind this theory is "deserved punishment". On the other hand, the *deterrence theory* argues that the death penalty has an important impact in the society and it works as a strong message towards the potential murderer or criminals in order to make them stop committing crimes or not to attempt them.

How valid or supported are these reasons now? As we will see, when it comes to death penalty, neither of the arguments, *retribution* or *deterrence*, have the same weight and value anymore as it once did.

### **Retribution**

The retribution theory has both a political and theological bases. The political idea assumes that if someone breaks the *social contract* in a brutal way, he/she deserves to be separated from society in a harsh way. In fact, when a heinous or brutal crime is committed, the government has to grapple with the problem, and the citizens expect so.

On the other hand, in spite of the fact the USA's justice system separates religion from law; in capital cases most of the prosecutors employ arguments with religious imagery to persuade the jurors. In particular, they invoke the Bible verse found in Exodus 21:23-27<sup>1</sup>, best known as the "eye for eye" argument. The purpose is obvious: to appeal to the juror's emotions in order to elicit an emotional response. It seems to be paradoxical to use biblical references to promote capital cases; however, this is one of the common expressions of the United States judicial system.<sup>2</sup>

Since the idea of an "eye for eye" is part of the culture in capital cases, it is necessary to analyse its bases. First of all, the Bible is not one mere verse. Certainly, we can oppose the "eye for eye" argument with the verse that says, "*I desire mercy, not sacrifice*" (Mathew 9:13). This opposition does not mean that the Bible is contradictory or the sentences are incoherent. Maybe it means that we are using an inappropriate source to support a judicial decision.

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<sup>1</sup> Exodus 21: 23-27: *But if there is harm, then you shall pay life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe. When a man strikes the eye of his slave, male or female, and destroys it, he shall let the slave go free because of his eye. If he knocks out the tooth of his slave, male or female, he shall let the slave go free because of his tooth.*

<sup>2</sup>BLUME John H. and JOHNSON Sheri Lynn, *Don't Take His Eye, Don't Take His Tooth, and Don't Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 Wm. & Mary Bill of Rts. J. 61 (2000), <http://scholarship.law.wm.edu/wmborj/vol9/iss1/5>, p. 63. Ver además, RACINELLA, Dale, *The biblical truth about America's death penalty*. Northeastern University Press, Boston. 2004, p. 6.

Furthermore, the legal system does not need to interpret the Bible to send someone to death row. However, as BLUME AND JOHNSON explain, the use of religious resources is a common practice, and an impartial practice, indeed. The selection of one verse among thousands to support the death penalty could tell us how biased this issue is. If we want to argue in favor of using the death penalty with the Bible we should be more coherent and consider all the consequences. For instance, according to the Bible, the death penalty was applied to animals (Exodus 21:28). Moreover, the Bible also calls for executing people who commit acts like adultery (Leviticus 20:10); witchcraft and sorcery (Leviticus 20:27); prophecy in the name of God, (Deuteronomy 13:5)<sup>3</sup>, etc.,. However, the USA would not put anyone to death for the above acts.

If the judicial practice in capital cases is influenced by the Bible, especially for Exodus 21:23-27, it is convenient and necessary to analyze this verse, and according to Racinella, who describes the biblical progression of the death penalty, “when the „eye for eye, life and life” of the Mosaic Law is properly understood in its biblical historical context, we see that capital punishment may not have been God’s ideal”<sup>4</sup>On the other hand, also in the Bible, the crime committed by Cain was forgiven. In fact, he was not executed, but sent into exile. As Racinella states, modern exile refers to incarcerating the individual in an isolated place which symbolize the separation from the society<sup>5</sup>. And nowadays in terms of punishment, exile is equivalent to prison without parole. Therefore, the death penalty would be not necessary to reach the political ideal of retribution theory.

Now then, besides the precedent arguments, the death penalty could be an expression of solidarity for the victims and their families. However, this Samaritan feeling causes a chain of reactions: when a severe crime is committed and there is a suspect, society demands a punishment alas there is

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<sup>3</sup> RACINELLA, Op. Cit, p. 68 – 69.

<sup>4</sup> RACINELLA, Op. Cit, p. 51.

<sup>5</sup> RACINELLA, Op. Cit., p. 42.

no sentence yet. The politicians offer an immediate, firm and exemplary response. Besides these speakers, there is the victim's family, for whom the death penalty is a sort of relief from sorrow or suffering for their loss. Alas this extreme measure is not a way to recover the victims - they don't come back. Soon, solidarity is replaced by a desire for revenge and retaliation, which is caused by outrage and disappointment. That is seemingly powerful, but it is also a response based on emotions, on visceral emotions. It seems preferable to establish a criminal policy on reasons and proof and not on an emotional basis.

Now, the question is, what is the purpose of the death penalty? For the *retribution theory* capital punishment is necessary to restore the order of society when it has been seriously broken. It is also essential for sending a strong message of disapproval, but above all and without euphemisms, the idea behind retribution theory is to cause suffering to the murderer. How much suffering? Our response shall determine the gradations or intensity of the "ideal punishment". Indeed, the fundamental principal of this theory is *proportionality* and for Beau Breslin et al., "proportionality helps to establish the *credibility* of a government"<sup>6</sup>. Additionally, it brings *legitimacy*, because proportionality works as the gauge but also as the limit that impedes undeserved punishments.

However, a question persists. What is the proper standard for punishment? Why is the American standard not the same as in Western Europe? For example, why is it that in the most "civilized" country in the world, 38 States still have the death penalty? Why not all 50 States? Why is the death penalty so varied in the United States? It seems to be quite difficult to give a categorical response to all those questions. It is even problematic to find the meaning of deserved punishment across the country, since the notion about "deserved

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<sup>6</sup> BEAU BRESLIN, John J.P. HOWLEY and MOLLY APPEL, "Evolutionary history: the changing purposes for capital punishment" *Is the death penalty dying?* Austin Sarat, ed. Studies in Law, Politics and Society, Vol. 42, Elsevier, JAI, 2008, p.11.

*justice*" and consequently the intensity of the response is, as Bandes expresses, the result of political and social factors<sup>7</sup>.

In spite of this complex landscape in terms of retribution, there is not enough support for the death penalty since the political ideal can be reached through other ways and the biblical support has been misunderstood because of political reasons and an emotional approach.

### **Deterrence**

The term deterrence means "the inhibition of criminal behavior by fear especially of punishment". It was the economist Isaac Ehrlich who supported the idea that the death penalty might prevent seven or eight murders, known as the deterrence effect<sup>8</sup>. Based on Ehrlich findings, the death penalty was reintroduced after a ten-year moratorium in the United States. But, let's ask whether this study had enough evidence or logical support. Now, is it possible to refer to authors like Hashem Dezhbakhsh<sup>9</sup> or Cass R. Sunstein and Adrian Vermeule, who sustain the deterrence effect of the death penalty, and who even think that it is morally required<sup>10</sup>.

On the other side, authors like John Donohue, professor of Mathematics, John Lamperti<sup>11</sup>, Jeffrey Fagan<sup>12</sup>, and Carol Steiker<sup>13</sup>, have discredited Ehrlich's

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<sup>7</sup> BANDES, Susan. "The heart has its reasons: examining the strange persistence of the American death penalty" *Is the death penalty dying?* Austin Sarat, ed. Studies in Law, Politics and Society, Vol. 42, Elsevier, JAI, 2008, p. 28 – 29.

<sup>8</sup> "In a light of these observations, one cannot reject the hypothesis that punishment, in general, and executions, in particular, exert a unique deterrent effect on potential murderers" One of Ehrlich's conclusion quoted by LAMPERTI, John, "Does Capital Punishment Deter Murder. A brief look at the evidence".p.6.

<http://www.math.dartmouth.edu/~lamperti/my%20DP%20paper,%20current%20edit.htm>

<sup>9</sup> DEZHBAKSH, Hashem, "Does Capital Punishment have a deterrent effect? New evidence from postmoratorium panel data". <http://www.cjlf.org/deathpenalty/DezRubShepDeterFinal.pdf>

<sup>10</sup> SUNSTEIN CASS R. and VERMEULE, Adrian "Is Capital Punishment Morally Required? Acts, Omissions, And Life-life Tradeoffs, *Stanford Law Review*, Volume 58, Issue 3 - December 2005 <http://www.stanfordlawreview.org/content/article/capital-punishment-morally-required-acts-omissions-and-life-life-tradeoffs>

<sup>11</sup> LAMPERTI, John, "Does Capital Punishment Deter Murder. A brief look at the evidence", (2010) <http://www.math.dartmouth.edu/~lamperti/my%20DP%20paper,%20current%20edit.htm>

conclusions and refuse the purported deterrence effect. Fagan even says that, “[t]he new deterrence literature fails to provide a stable foundation of scientific evidence on which to base law or policy”<sup>14</sup>. For Lamperti, the supposed deterrence effect is insignificant, and it might be ambiguous<sup>15</sup>. Similarly, Bandes says that “through the period during which deterrence was cited as the primary reason to execute there was little if any reason to believe it worked”<sup>16</sup>. Also, Steiker posits that the deterrent effect, if this exists, does not start as soon as the death penalty is applied<sup>17</sup>.

In fact, there is no relation between the numbers of executions, deterrence effect and homicides rates. On the contrary, it is paradoxical, but the South of the United States, with 80% of executions in the United States has also the highest murder rate (The FBI Uniform Crime Report)<sup>18</sup>. Considering this rate, it is possible to assume that there is not enough support for the efficacy of the death penalty. Then, what do the experts say? Eighty-eight percent of the criminologists in the United States believe that the death penalty does not work as deterrence<sup>19</sup> and, as Lamperti notices, “does not contribute to lower rates of homicides”<sup>20</sup>.

If we assume the death penalty does not work as deterrence for severe crimes, what does work? Do we have any other deterrence method? Despite

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<sup>12</sup> FAGAN, Jeffrey, “Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment, 4 Ohio, St. J. Crim. L. 255 (2006)

<sup>13</sup> STEIKER, Carol S. “No, capital punishment is not morally required: Deterrence, Deontology, and the Death Penalty” *Stanford Law Review*, <http://www.stanfordlawreview.org/content/volume-58/issue-3> (2006)

<sup>14</sup> FAGAN, Jeffrey, Op. Cit., p. 314.

<sup>15</sup> LAMPERTI, John, Op. Cit. p. 6-7.

<sup>16</sup> BANDES, Op. Cit, p. 30

<sup>17</sup> STEIKER, Op. Cit, p. 786.

<sup>18</sup> Consistent with previous years, the 2009 FBI Uniform Crime Report showed that the South had the highest murder rate. The South accounts for over 80% of executions. The Northeast, which has less than 1% of all executions, again had the lowest murder rate” <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>

<sup>19</sup> <http://www.deathpenaltyinfo.org/study-88-criminologists-do-not-believe-death-penalty-effective-deterrent>.

<sup>20</sup> LAMPERTI, Op. Cit. p. 9.

the fact that imprisonment could be considered as a machine to criminalize, especially for young offenders, it is still less costly than the death penalty.

A review of cost estimates across the country in the past decade shows that the trial, incarceration and execution of a capital case costs from \$2.5 to \$5 million dollars per inmate (in current dollars), compared to less than \$1 million for each killer sentenced to life without parole<sup>21</sup>.

On the other hand, in terms of prevention, if the idea is to lower the number of crimes, it is possible to say, with Steiker <sup>22</sup>and Donohue<sup>23</sup>, that the efforts should be focused on social programs<sup>8</sup> –especially early child interventions- or police enforcement and not diverted to the death penalty. The death penalty, as a method is not certainly effective, but also it is economically costly and morally questionable, in particular when an important number of innocents could be executed<sup>24</sup>.

Regarding the question of if the death penalty deters or does not deter crimes, empirical studies often show conflicting evidence. Given this, it seems not adequate that a standoff like this can support a decision to execute people. Thus, there is a duty that we must respect -a boundary, a limit- and its nature resides in moral reasons. A policy against crime must have not only a pragmatic side, but also a moral one.

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<sup>21</sup> FAGAN, Jeffrey, “Public Policy Choices on Deterrence and the Death Penalty: A Critical Review of New Evidence .Testimony before the Joint Committee on the Judiciary of the Massachusetts Legislature on House Bill 3834, An Act Reinstating Capital Punishment in the Commonwealth” (2005) <http://www.deathpenaltyinfo.org/MassTestimonyFagan.pdf>, p.18

<sup>22</sup> STEIKER, Op. Cit, p. 751.

<sup>23</sup> Donohue emphasizes the crime reduction benefits through social programs such us: a) preschool and early childhood education/counseling; b) family-based therapy (directed at families with children who pose unusual discipline problems); c) "treatment" programs for juvenile delinquents; and, d) labor market interventions, designed to remedy lapses in prior education and/or bolster job skills. “Allocating Resources Among Prisons and Social Programs in the Battle Against Crime”, 27 *Journal of Legal Studies*, p. 15.

<sup>24</sup> On the contrary, for SUNSTEIN & VERMEULE, “the execution of any number of innocent people is a good reason to increase the accuracy of the system of capital punishment. “Deterrence Murder: A Reply” *Stanford Law Review* 847, p. 856 (847 – 857)

Now then, as counter to Donohue and Steiker suggest, having more police officers or more social programs is not the response when a severe crime has been committed in the United States. What about heinous murders committed by serial killers? This particular problem is, probably, the trickiest for the death penalty. First of all, as a rule, serial killers do not react to the same conditioning in society, they do not have the average motivation for obeying the law, and they do not think over the consequences of their crimes. As Paul Bloom notices, it is possible that such crimes are the result of an “awful psychological disorder”<sup>25</sup>. In that case, the aggressor would be a kind of victim of himself. Does that mean that we shall consider no sanction for the crimes committed by serial killers? No, definitely not. This means that the treatment should be different. For example, the Supreme Court of the United States, in *Atkins v. Virginia* (536 US 304, 321 [2003]) held that executing those with mental retardation violates the Eight Amendment, because it constitutes a disproportionate punishment. In fact, severe mental illness produces a diminution in culpability and deterrability.

On the other hand, in Bloom's words, “empathy erosion can be the result of choice. Muggers, rapist, pedophiles and killers have diminished feeling toward their victims, but this is often because they have decided to ignore the suffering of others in pursuits of their own goals”<sup>26</sup>. But, even in these extreme cases, the threat of the death penalty works in a different way. If a criminal has already committed enough crimes to deserve capital punishment, the cost of killing to avoid capture is zero. Thus, the death penalty turns into an incentive to kill to avoid capture and execution<sup>27</sup>.

### **Constitutionality**

According to the 8th Amendment in the United States Constitution:

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<sup>25</sup> BLOOM, Paul. “I’m O.K., You’re a Psychopath”, *The New York Times*, Book Review, June 19, 2001, <http://www.nytimes.com/2011/06/19/books/review/im-ok-youre-a-psychopath.html?pagewanted=all>

<sup>26</sup> BLOOM, Paul, Op. cit.

<sup>27</sup> DONOHUE, John J., III, and Justin WOLFERS, “Uses and Abuses of Empirical Evidence in the Death Penalty Debate”, *Stanford Law Review* 58, p. 795.



"[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". Likewise, the 5th Amendment declares, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, (...) nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"

Briefly, no one shall be held to answer for a capital crime, without due process of law. Both Amendments have been interpreted as the authorization to execute a person when an infamous crime is committed, but with one important requisite, a *due process of law*<sup>28</sup>.

Regarding this topic, Beau Breslin says we should take into account that the 8th Amendment was written in 1789 and ratified in 1791. Furthermore, there is an important fact that, "executions were a common practice in the pre and post-revolutionary periods of American history"<sup>29</sup>. Beau Breslin also notices that the context in which the Founding Fathers lived was different. At that time, it was necessary to show the authority of the newly created State; and as Beau Breslin posits, the word used by the Founding Fathers in the Preamble was "establish" the fundamentals of the legal system, not to "promote" or "enhance" them. This is because a "system of justice in the newly formed polity must be instituted or launched new"<sup>30</sup>. In fact, the content of those Amendments has

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<sup>28</sup> Due process of law: (n) the regular administration of the law, according to which no citizen may be denied his or her legal rights and all laws must conform to fundamental, accepted legal principles, as the right of the accused to confront his or her accusers. (<http://dictionary.reference.com/browse/due+process+of+law>).

<sup>29</sup> BEAU BRESLIN, John J.P. HOWLEY and MOLLY APPEL, "Evolutionary history: the changing purposes for capital punishment" *Is the death penalty dying?* Austin Sarat, ed. Studies in Law, Politics and Society, Vol. 42, Elsevier, JAI, 2008, p. 6.

<sup>30</sup> BEAU BRESLIN, Op. Cit., p. 14.

not changed, but the values that inspired them and the purpose of the death penalty have<sup>31</sup>.

Although the 5th Amendment grants a due process of law, there is evidence that at least one of every eight inmates has been identified and exonerated<sup>32</sup>. What can we say about those who were not exonerated opportunely? Moreover, what about those innocents who were never identified, but yet executed? This kind of delay or wrongdoing has no rectification. Who then ought to be punished for such a mistake?

As Beau Breslin proposes, both Amendments should be re-thought – they are not enough to allow executions. Let's think about how "just" a system actually is when the death penalty has been proven to be undeserved or wrong in at least one of seven cases. In fact, the due process of law is not enough to execute someone, because as one can easily recognize, the justice system itself is not infallible, it is subject to discrimination, arbitrariness and deficiencies. By way of example, "since 1973, over 130 people have been released from death row with evidence of their innocence"<sup>33</sup>. Lately, Troy Davis was executed even when the witnesses had recanted their testimony. Duane Buck, an African-American, was executed after a psychologist testified that Buck's race is a decisive factor that would increase his chances of being dangerous in the future; and, as we must note, the due process of law is not sufficient to avoid these mistakes. The death penalty is irreversible.

### **Why does the death penalty have intense support in the United States?**

After the previous analysis, it is possible to say that there are not enough reasons for supporting the death penalty and even more, there is more

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<sup>31</sup> BEAU BRESLIN, Op. Cit., p. 2 y 14.

<sup>32</sup> Ver más en, <http://www.eji.org/eji/deathpenalty>.

<sup>33</sup> Ver más en: <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>

information that discredits the purported deterrence effect. Surprisingly people still support the death penalty. Nevertheless, just because there is broad popular support it does not mean that the death penalty must still persist. As a matter of fact, as Zimring states, the abolition of the death penalty in Europe was led by governmental leaders who acted against the common opinion<sup>34</sup>. One of the strongest arguments was DNA exoneration cases.

This global trend of abolishing the death penalty started before the 1970's and nowadays, most of the developed democracies have abolished the death penalty. However, since 1976 the United States goes in a different direction. What is the cause of the United States's resistance to this trend? Instead of looking for another method to prevent serious and violent crimes, the United States has developed a variety of methods of execution, and despite its defective and innate vice, the death penalty is still supported by 61% of voters<sup>35</sup>.

The landscape turns more complicated if we consider that in Alabama, judges are allowed to override jury verdicts of life in prison and impose capital punishment. Oddly enough, unlike in any other state, in Alabama the standard for prosecutors is lower since the death verdict can be obtained just with ten jurors. Also, the selection of the jury is in favor of those who support the death penalty. That is the reason why Alabama shows the highest per capita death sentencing rate in executions in the country<sup>36</sup>. The rate is always increased during election years<sup>37</sup>.

At this point, Danny Glover's words are quite illustrative. He said:

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<sup>34</sup> ZIMRING, Franklin E. *The contradiction of American Capital Punishment*, Oxford University Press, 2003, p. 22 – 24.

<sup>35</sup> Ver más en: <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>

<sup>36</sup> <http://www.eji.org/eji/node/541>

<sup>37</sup> LIPTAK, Adam, "Does Death Penalty Save Lives? A New Debate. *The New York Times*, <http://www.nytimes.com/2007/11/18/us/18deter.html?pagewanted=all>

Imagine, if you will, that you visited your doctor, and she or he prescribed a drug that works miracles for six out of every seven people who take it. But due to a defect with the drug, one out of every seven people who take the drug end up dying. You can imagine the many lawsuits that would ensue. You can imagine how quickly this drug would be yanked off the market. (...) But for every seven people executed since 1976, one actually innocent person has been sent to death row. Yet the death penalty remains “on the market”<sup>38</sup>.

It does not seem reasonable that, despite wrongful executions, the death penalty is still alive. Not enough reason, indeed, just emotions. That is precisely Bandes' thesis. Bandes believes that behind the theories that support capital punishment there are ideas strongly influenced by emotions. We can identify visceral beliefs behind the long life of the death penalty, or moreover, no logical explanations for the state's policy to kill people (Bandes). But, despite the significance and importance of emotions, they are always covered or masked, and as Bandes argues, the persistence of the death penalty is the result of this apparently emotional distance<sup>39</sup>.

## Conclusion

If a crime has been committed and our reaction is the death penalty, we are sending several messages such as: social control in society has not been enough, the prevention has failed, and there is no other way. There are other ways, definitely. First of all, for many years the death penalty has worked as an emotional response when, on the contrary, in terms of crime, we must look for a rational solution. We should consider, also, that the whole policy against the crime should not be reduced to a mere reaction. It must be, above all, *prevention*, and this word has a wider meaning than “*death penalty*”.

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<sup>38</sup> <http://www.yesmagazine.org/issues/can-love-save-the-world/danny-glover-the-death-penalty-in-this-great-nation-of-ours>

<sup>39</sup> BANDES, Susan. "The heart has its reasons: examining the strange persistence of the American death penalty" *Is the death penalty dying?* Austin Sarat, ed. Studies in Law, Politics and Society, Vol. 42, Elsevier, JAI, 2008, p. 22 - 23.

Prevention implies planning, investment and creativity, and certainly, the participation and commitment of different groups in society. Second, both arguments that have always supported capital punishment are no longer consistent, and when it comes to human life there is not enough space for experiments, ambiguities or standoffs.

Why is the death penalty still "living"? Probably because it is the easiest way, because it brings immediate reliance and relief; it shows that the justice system is doing something for the victims, and calms down all the turbulence that a heinous crime produces in society. Compared to prevention that requires long-term work, the death penalty is an immediate response that supposedly brings order, but is costly, both economically and morally.

Furthermore, the death penalty is irreversible and human nature is fallible. Finally, we are talking about human rights, not about "an isolated issue of criminal justice policy"<sup>40</sup>. And, certainly, the USA is not isolated in the evolution of human rights, or is it?

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<sup>40</sup> ZIMRING, Franklin E. *The contradiction of American Capital Punishment*, Oxford University Press, 2003, p. 22 – 24.

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