

The Death Penalty in Upper Canada:
How it Created Negative Impacts While Having Some Positive Aspects

Emma Kivari

History 1120-01: An Introduction to Canadian History

November 29, 2018

The death penalty is a highly controversial topic when it comes to crime and punishment. There are many strong opinions on the subject debating whether it is good or bad for society. In Canada, this form of punishment was increasingly used with the British colonizers as they gained control over the land, and they eventually outlined specific guidelines for the use of capital punishment¹. It is also general knowledge that the death penalty was widely practiced in other parts of the world such as Britain, France, Spain, and The United States to name a few. Although the death penalty may have had some positive aspects, the overall negative impacts were far greater, and this will be shown through dissecting the good, the bad, and the worst things to come from the death penalty. However, before looking at the different outcomes of capital punishment, it is important to first understand the basics of what crimes it was used for.

The death penalty was a capital punishment in response to capital crimes, meaning the worst crimes received the worst punishments, death being the worst. According to the *Magistrate's Manual* of 1843, there was a wide variety of crimes in Upper Canada that could receive the death penalty if convicted². These include crimes such as treason, buggery, rape, rescuing someone convicted or committed for murder, burglary with intent to murder, inflicting wounds with intent to murder, arson with intent to murder, as well as murder³. Buggery is the act of anal intercourse with either a human or animal, and both are seen as capital crimes punishable by death⁴. However, the only way "[t]he offence is deemed [complete is] by proof of penetration only", making it easier to hide if both parties are consenting⁵. On the topic of consent, rape is another issue that is interpreted differently among people. The *Magistrate's Manual* highlights an opinion from Mr. Dalton, "that if a woman, at the time of the supposed

¹ W.C. Keele, *The Provincial Justice, or Magistrate's Manual, Being a Complete Digest of the Criminal Law of Canada, and A Compendious and General View of the Provincial Law of Upper Canada; With Practical Forms, For the Use of The Magistracy*, (Toronto, H. & W. Rowsell, 1843).

² *Ibid*, 116-117.

³ *Ibid*.

⁴ *Ibid*, 108

⁵ *Ibid*.

rape, do conceive with child, by the ravisher, this is no rape; for (he says) a woman cannot conceive, except she doth consent”⁶. This shows that proving rape may be more difficult in some cases depending on the opinions of the jury or high ranking officials. Guiding a ship or vessel into known danger or “maliciously doing any thing to the immediate loss or destruction of any ship or vessel” is also seen as a capital crime with similar aspects to the concept of treason⁷. As depicted above, essentially anything to do with the murder of another can be punishable by death⁸. Rosemary Gartner states that the “reasons people kill in Canada are no different than other countries”, and she highlights “[i]nterpersonal conflicts over status, resources, control, and reputation” as some of the main factors for murder⁹. This leads to the positive aspects the death penalty can have within gaining control over a society.

The good aspects of the death penalty is that it allows murderers to receive the same punishment they inflict on others as well as maintaining law-abiding citizens through the fear of death¹⁰. The opposing argument for the death penalty is life in prison, however supporters of the death penalty might also reply with the fact that more money is spent in total on the criminals through feeding and keeping them alive in prisons. Both arguments are able to make valid points. This leads to the first murder trial in Canada, the trial of Peter Cartcel that took place in Halifax, Nova Scotia in 1749¹¹. Peter Cartcel was a Frenchman who was migrating to New France from overseas and did not speak any English¹². On the vessel he got into an altercation with Abraham Goodsides, inflicting a fatal knife wound to Goodsides, and was arrested

⁶ W.C. Keele, *Magistrate's Manual*, 517.

⁷ *Ibid*, 116-117.

⁸ *Ibid*.

⁹ Rosemary Gartner, “Homicide in Canada,” in *Violence in Canada: Sociopolitical Perspectives*, ed. Jeffrey Ian Ross (New York: Routledge, 2017), 186.

¹⁰ C.W. Topping, “The Death Penalty in Canada,” *The Annals of the American Academy of Political and Social Science* 284, no. 1 (1952): 147.

¹¹ Joseph Chisholm, “Our First Trial for Murder: The King v. Peter Cartcel,” *Canadian Bar Review* 18, no. 5 (1940): 385.

¹² *Ibid*, 385, 387.

immediately¹³. As this was the first incident involving murder among the settlers of Canada, the trial closely resembled those of England, following the same laws and procedures¹⁴. Although the testimony of four witnesses was used against Peter Cartcel, he pleaded not guilty but was quickly convicted of murder by the jury¹⁵. Shortly after the trial a report was written detailing the events back to Britain¹⁶. The Lords of Trade and Plantations wrote back stating that the “method of proceeding in the trial . . . was very regular and proper” adding it “will have a good effect as it will convince the settlers of the intention of conforming to the Laws and constitution of the Mother Country”¹⁷. Pierre Boucher, an early French settler viewed the correlation between “severity of punishment and certainty of punishment” as “the chief ingredients” for law-abiding citizens¹⁸. This is the idea that less crimes will be committed due to the fear of the punishments. Many of the high ranking officials at this time shared similar views, however the death penalty also came with some downsides.

The bad aspect of the death penalty is the inequality in the treatment of people based on their language, ethnic background and/or gender. The previous example of the Peter Cartcel trial indicates that Peter did not speak English¹⁹. Therefore the odds may have been stacked higher against him because he required an interpreter, and he might have not been able to explain his side of the story to the jury as well as he could if he spoke their language²⁰. Moving to the topics of ethnic background and gender, Scott Phillips shares that “[e]xisting research demonstrates that the death penalty is more likely to be imposed on behalf of white victims and

¹³ Joseph Chisholm, “Our First Trial for Murder,” 385-386.

¹⁴ *Ibid*, 386.

¹⁵ *Ibid*, 387.

¹⁶ *Ibid*.

¹⁷ *Ibid*, 387-388.

¹⁸ C.W. Topping, “The Death Penalty in Canada,” 147.

¹⁹ Joseph Chisholm, “Our First Trial for Murder,” 387.

²⁰ *Ibid*.

female victims”²¹. This also implies the opposite, that victims who are of unfavoured ethnic backgrounds are less likely to see justice for the crimes committed against them in the form of the death penalty. Phillips also goes on to examine the outcomes of those on trial by stating that social facts are important when determining life or death, and that “knowing the legal facts of a capital case is not sufficient to predict whether a defendant lives or dies”²². If the system were equal, people would be able to determine the defendant's life or death outcome based solely on the facts of the case. This reemphasizes the fact that individuals are not treated equally when it comes to crime and punishment. An example of this can be seen in the case of the 1852 burglaries and murder that took place in Hamilton, near Niagara Falls²³. The group responsible for these crimes consisted of mostly men of African descent with the exception of one white man, as well as four women, three of which were Irish²⁴. The break-ins occurred during the night when some of the group members would enter houses with value in the search of silver, alcohol, and other valuable items²⁵ which they would then sell or consume²⁶. Eventually they were all discovered for their crimes, however “[c]onvictions were entered against all of the African-descended men, but not the white man” leading to a prime example of white privilege²⁷. Lyndsay Campbell describes the law and legal institutions of Canada as being involved with “part of the prejudiced reality”²⁸. Although the inequality in treatment and punishments is undeniably bad, there are worse impacts the death penalty has on societies.

²¹ Scott Phillips, “Status Disparities in the Capital of Capital Punishment,” *Law & Society Review* 43, no. 4 (2009): 808.

²² *Ibid.*

²³ Lyndsay Campbell, “Race and the Criminal Justice System in Canada West: Burglary and Murder in Hamilton, 1852-53,” *Queen’s Law Journal* 37, no. 2 (2012): 478.

²⁴ *Ibid.*

²⁵ *Ibid.*, 478-479.

²⁶ *Ibid.*, 487-488.

²⁷ *Ibid.*, 477.

²⁸ *Ibid.*, 482.

The worst aspect of the death penalty is the possibility of wrongful conviction. The lines can get blurred when many maintain their innocence, when in reality they were guilty. In the previous example some of the men receive harsher punishments based on their backgrounds, however they still committed the crimes they were accused of. With wrongful conviction, the individual being accused did not commit the crime they are being accused of. Having the death penalty in place means that there is the chance of being sentenced to death for doing nothing wrong except perhaps being in the wrong place at the wrong time. An example of this is seen in the 1837-1838 case of Patrick Fitzpatrick, who was punished for a crime he did not commit²⁹. Fitzpatrick “was a boarder at an Amherstberg Inn owned by George Bullock” and later “accused of having sexual relations with” George’s nine-year-old daughter, Mary³⁰. However, at the time of the incident there was another man, Maurice Sellers, staying at the residence³¹. The evidence that was used to convict Fitzpatrick was the fact that he was at the Inn the night of the incident, and the testimony of Mary Bullock, which was heavily based on a recollection of the man’s voice³². A petition for clemency for Fitzpatrick began circulating but was ultimately denied by the Lieutenant Governor and Executive Council³³. He maintained his innocence through the very end of his life³⁴, and years later it became known that the other man, Maurice Sellers, admitted on his deathbed to committing the crime³⁵. Shortly after this revelation in 1846, Michigan became the first place “in the United States and English speaking world” to abolish the death penalty³⁶. If Fitzpatrick could be sentenced to death based on the little evidence provided, this leaves room for many others to be wrongfully convicted of crimes as well.

²⁹ Thomas L. Coffey and Jerry L. Morton, “Trial, Error, and the Abolition of the Death Penalty,” *Journal of Contemporary Criminal Justice* 5, no. 4 (1989): 249.

³⁰ *Ibid*, 249-250.

³¹ *Ibid*, 249.

³² *Ibid*, 250.

³³ *Ibid*.

³⁴ *Ibid*, 251.

³⁵ *Ibid*, 249.

³⁶ *Ibid*, 248.

In conclusion, the death penalty has the ability to help keep citizens under control of the laws by striking the fear of death into them for committing a range of varying crimes. However, contrary to this, some criminals might actually prefer death over spending the rest of their lives in prison. Of course this varies depending on the thoughts and feelings of the individuals. The inequality of punishment is also still relevant even if the death penalty is taken out of the equation. It is still possible for individuals to receive harsher punishments than others based on the backgrounds and/or gender, even if the punishments do not include the death penalty. Finally, and probably the most compelling argument is the practically endless possibilities of convicting and sentencing the wrong person to death. For every person that is wrongfully convicted and the public finds out, how many people are wrongfully convicted that the public does not know about? This seems to be a good reason as to why the death penalty is no longer practiced in Canada. The death penalty may have enforced good behaviour in some of the citizens through the fear of death, however it did not come without problems. The issues ranging from inequality in treatment and punishment to wrongful convictions overpower the positive aspects, creating an overall negative impact on the societies it was practiced in.

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