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An Examination of the Death Penalty

Alexandra N. Kremer
Cleveland State University

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The death penalty, also known as capital punishment, is defined as, “death as a punishment given by a court of law for very serious crimes” (Death Penalty, 2018). Capital punishment is typically a sentence handed out for the most egregious crimes in a society, such as murder. Some states have statutes that allow for the death penalty for offenses other than murder, including rape of a child; the federal government also has statutes for non-murder crimes, including espionage and treason (Death Penalty Information Center, 2018). In society, the application of the death penalty is a controversial issue wrapped in arguments of revenge, economics, and constitutionality.

History of the Death Penalty

The death penalty dates back centuries, to the courts of the Romans and the Greeks and to the codes of the Babylonians. According to one source the first death penalty laws can be found in the 18th century B.C. in the Code of King Hammurabi, then in the 14th century B.C. in the Hittite Code; in the 7th century B.C. in the Draconian Code of Athens, and the 5th Century B.C. in the Roman Law of the Twelve Tables (Death Penalty Information Center, 2018). In the 11th century A.D., William the Conqueror stopped executions of people for crimes—except in war times—but this was ended in the 16th century A.D., when Henry VIII executed as many as 72,000 (Death Penalty Information Center, 2018).

Britain introduced the death penalty to the Americas, where laws varied amongst the colonies. The first execution in the colonies took place in 1608 in the Jamestown colony of Virginia (Death Penalty Information Center, 2018). During these colonial times, there was also the rise of the abolitionist movement. Especially driven by *On Crime and Punishment*, abolitionists used his arguments concerning the idea that there was no justification in the government’s power to take a life; these arguments resulted in the abolition of the death penalty in Austria and Tuscany (Beccaria, 1764). Beccaria’s arguments further spurred abolitionist movements in the United States, but they were not as successful. Further influence was provided by Dr. Benjamin Rush, who challenged whether the death penalty was a good source of deterrence. Rush gained the support of William Bradford, who would later lead Pennsylvania as the first state to consider degrees of murder and lead to the eventual repeal of the death penalty for all degrees except first (Death Penalty Information Center, 2018).

As the U.S. entered the 19th century, the abolitionists gained momentum as states moved to decrease capital crimes and focus on building state penitentiaries and working towards abolishing the death penalty completely as was done in Rhode Island and Wisconsin, and, by the end of the century, in Venezuela, Portugal, Netherlands, Costa Rica, Brazil, and Ecuador (Death Penalty Information Center, 2018). However, the Civil War led to a decline in opposition

to the death penalty as focus moved to the anti-slavery movement, and, after, the electric chair emerged as a new form of execution, first used in 1890 (Death Penalty Information Center, 2018).

The 19th and 20th centuries marked the “Progressive Period” in the U.S., during which time nine states abolished the death penalty, or limited it to rare crimes; however, with the U.S entrance into World War I, five states that had abolished capital punishment reinstated it following fear of revolution and class conflicts as socialists challenged capitalism (Death Penalty Information Center, 2018). Around this time the use of cyanide gas was also introduced and the gas chamber was constructed, and there was a resurgence in use, partially due to criminologists stating that the death penalty was necessary and partially due to Prohibition and the Great Depression in the United States (Death Penalty Information Center, 2018). By the mid-1900s, support for the death penalty reached an all-time low as many nations abolished or limited its use and the number of executions in the U.S. dropped (Death Penalty Information Center, 2018).

Around the 1960s, the death penalty was suggested to be a violation of the Eighth Amendment as it was an example of “cruel and unusual punishment”. However, in *Trop v. Dulles*, the Supreme Court decided that the Eighth Amendment was a standard that evolved with the progress of society, an argument that abolitionists would use to argue against the toleration of the death penalty (*Trop v. Dulles*, 1958). In the years to come, the Supreme Court would here many more cases and arguments concerning the legality of the death penalty. These would include *U.S. v. Jackson*, which argued that federal kidnapping should have the death penalty applied by a jury and which was found unconstitutional because it encouraged waiving the right to a jury trial; *Witherspoon v. Illinois*, which held that jurors reservations were not enough to keep them off a jury unless it could be proven that it would affect their ability to make an impartial decision; and *Crampton v. Ohio* and *McGautha v. California*, both of which argued the violation of the Fourteenth Amendment rights to due process with jurors having the decision of life or death, with *Crampton* adding that it was unconstitutional for guilt and sentencing to be decided together since the jury was instructed that death was the sentence for first-degree murder. The Supreme Court rejected the claims in both, allowing the jury discretion and the concurrence of guilt and sentencing to continue (Death Penalty Information Center, 2018).

Following cases such as *Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas*, the Supreme Court stated that the Eighth Amendment would be considered to be violated if the punishment was too severe for the crime, the punishment was arbitrary, or if it was equally or less effective than a less serious punishment, which resulted in the Supreme Court voiding 40 death penalty

statutes on June 29, 1972, causing the commutation of 629 death row inmates nationally and leading to the suspension of the death penalty (*Furman v. Georgia*, 1972). This suspension would not last, however, as the Court did not find the death penalty as a whole to be unconstitutional.

Shortly after *Furman*, states began to rewrite their death penalty statutes to fit with the findings of the Supreme Court. In the *Gregg* decision of 1976, the Supreme Court found the new statutes put forth by Florida, Georgia, and Texas to be constitutional and found the death penalty itself constitutional (*Gregg v. Georgia*, 1976). Following *Gregg*, the death penalty was reinstated in states that chose to alter their statutes to reflect those approved by the Supreme Court. Today, 31 states, the federal government, and the U.S. military have the death penalty, while 19 states and Washington D.C. have abolished it (Death Penalty, 2018).

Methods of Execution

The death penalty can be carried out through a myriad of different methods. In its early history, common methods included “crucifixion, drowning, beating to death, burning alive, and impalement”, then moved to include “boiling, burning at the stake, hanging, beheading, and drawing and quartering”, and more recently moved to gas chambers, the electric chair, and lethal injection (Death Penalty Information Center, 2018). Today, most of the 31 states that have the death penalty have lethal injection as their primary form of execution. In 2008, the Supreme Court approved a three-drug method of execution, but since then the drugs have become increasingly harder to purchase due to manufacturers refusing to sell for the purpose of execution (*Baze v. Rees*, 2008). This has led to some states adopting different drugs that are similar, such as midazolam, which was challenged in later as being a violation of the Eighth Amendment because people argued that it would not adequately put someone under, leading them to feel the second and third drugs and the pain associated (*Glossip v. Gross*, 2015). While lethal injection is the primary method of execution in all states that have the death penalty, fifteen states have a secondary method as well, including lethal gas, hanging, and firing squad for if the lethal injection is unavailable, for prisoners sentenced before the adoption of lethal injection, and for when an offender requests an alternative as they are allowed to when challenging lethal injection as found in *Baze* (National Conference of State Legislatures, 2017). Of the secondary methods of execution, two states have the firing squad, three have lethal gas, three have hanging, and eight have electrocution (National Conference of State Legislatures, 2017). Each method has its own problems that have been addressed by abolitionists, including disputes regarding the constitutionality of each.

Arguments

Economics

Perhaps one of the largest components of the evaluation of the death penalty is the cost of execution versus the cost of life without parole. Many supporters of the death penalty argue that death is less expensive for tax payers because the individual is dead. However, research has demonstrated that this is not the case. In 1994, it was found that the estimated cost of a life sentence ranged from \$750,000 to \$1.1 million, while the cost of the death penalty was found to be \$118 million in New York, \$3.2 million in Florida, \$1.6 to \$3.3 million in Wisconsin, \$2.3 million (about three times life) in California and Texas, and about \$2.16 million more expensive than life in North Carolina (Costanzo & White, 1994). According to a statement that cites Mallicoat *Mutability of student support on the death penalty: A test of the Marshall hypothesis in California*, studies found that the average cost of execution was 2.5 to 5 times higher than the cost of life (Falco & Freiburger, 2011). A third source states that the average cost for Americans when seeking death is an extra \$1.15 million per case, about 1.4 to 1.5 times the cost of a life sentence (Sterbenz, 2015).

The death penalty is more expensive than life for numerous reasons, including the cost of trials and appeals, the cost of maximum security facilities, and the cost of execution itself. The trials in capital cases take longer than other criminal cases, in some cases three to five times as long, and take longer to complete, which can increase the cost along with the use of various experts for testimony on either the side of the prosecution or the defense (Costanzo & White, 1994). There are also many motions filed and the jury selection can take longer, along with the fact that capital cases typically include more work, which means more attorneys and investigators (Costanzo & White, 1994). Death penalty cases have higher costs in defense fees and in court costs (Sterbenz, 2015).

A study conducted through the National Bureau of Economics Research found that the cost of capital trials and convictions led to tax increases in counties that amounted to approximately \$1.6 billion over 15 years and in decreases in the spending on police and highway spending (Baicker, 2001). This would also affect the opportunity costs that are increased when the death penalty is sought. Due to the expenses of capital cases, other projects and programs must lose funding to maintain a stable budget.

Deterrence

A primary argument in the debate surrounding the death penalty is deterrence. According to the Classical School of Criminology, deterrence is one of the main goals of punishment, utilizing the idea that punishment must be swift, certain, and match the severity of the crime. Supporters of the death penalty claim that its use deters others from committing capital crimes. According to one source, some studies claim that the reason the effect of the death penalty as a deterrent was inconclusive is because the death penalty is not used as often as other punishments and it takes longer to be carried out, stating that the death penalty does reduce murder rates (Michigan State University; Death Penalty Information Center, 2000). Ernest van den Haag was quoted as saying "...capital punishment is likely to deter more than other punishments because people fear death more than anything else. They fear most death deliberately inflicted by law and scheduled by courts. Whatever people fear most is likely to deter most" (Michigan State University; Death Penalty Information Center, 2000). Proponents of the death penalty argue that if not deterring other criminals, it at least keeps the already convicted from committing another crime.

Abolitionists, however, argue on the side of the brutalization effect. The brutalization effect posits that the use of capital punishment increases violent crime, specifically homicides, in the time surrounding the execution (Potter, Ph.D., 2000). In this argument, abolitionists claim that not only is the death penalty not a deterrent, but it actually increases criminal activity. Hugo Adam Bedau, a professor at Tufts University, argued that capital crimes are not usually planned out and are typically heat of the moment crimes that could not be deterred by punishment; "Most capital crimes are committed in the heat of the moment. Most capital crimes are committed during moments of great emotional stress or under the influence of drug or alcohol, when logical thinking has been suspended" (Michigan State University; Death Penalty Information Center, 2000). He also speaks on behalf of the idea of the brutalization effect: "The vast preponderance of the evidence shows that the death penalty is no more effective than imprisonment in deterring murder and that it may even be an incitement to criminal violence" (Michigan State University; Death Penalty Information Center, 2000). Furthermore, states that have the death penalty do not necessarily have lower homicide rates than those that do not have the death penalty, and in one source it is cited that some murder rates have fallen since the repeal of the death penalty in the state (Death Penalty Focus, 2018).

Retribution and Closure

Supporters of the death penalty often argue that the only way for the victim's family to receive closure is through the use of the death penalty and the confirmation that, since the offender is dead, they will never be able to commit

the same act against anyone else. There is a belief that an “eye for an eye and a life for a life” will restore the balance that was disrupted by the taking of the victim’s life (Michigan State University; Death Penalty Information Center, 2000). Proponents claim that the death penalty is the worst punishment offered by society and it is the punishment that the offenders in capital crimes deserve, or else the punishment will undermine the value of the lives of potential future victims (Michigan State University; Death Penalty Information Center, 2000). Louis P. Pojman, an author and professor at the U.S. Military Academy discusses the role of religious teachings in the use of capital punishment and states that the Bible confirms the states’ ability to carry out such sentences as well as the states’ duty to protect the citizens:

So, according to the Bible, the authority to punish, which presumably includes the death penalty, comes from God. But we need not appeal to a religious justification for capital punishment....Just as the state has the authority (and duty) to act justly in allocating scarce resources, in meeting minimal needs of its (deserving) citizens, in defending its citizens from violence and crime, and in not waging unjust wars; so too does it have the authority, following from its mission to promote justice and the good of its people, to punish the criminal. If the criminal, as one who has forfeited a right to life, deserves to be executed, especially if it will likely deter would-be murderers, the state has a duty to execute those convicted of first-degree murder (Michigan State University; Death Penalty Information Center, 2000).

That is to say that if an offender commits such a crime as first-degree murder, the state has the duty to execute them to protect the citizens from violence and victimization.

Opponents to the death penalty argue that it is not done in retribution, but out of revenge. Revenge has no place in the criminal justice system and can be carried out in blind rage that could lead to wrongful convictions and hateful acts. Many families of victims’ actually do not seek the death penalty because they see that the execution will not ease their pain and the vengeance of the death wouldn’t be much different from the acts committed against them and their loved ones (Michigan State University; Death Penalty Information Center, 2000). Revenge is not endorsed in society: “We do not allow torturing the torturer, or raping the rapist. Taking the life of a murderer is a similarly disproportionate punishment...” (Michigan State University; Death Penalty Information Center, 2000). Furthermore, while supporters cite religious teachings in defense of the death penalty, it should be noted that various religious sects have denounced its use. The National Council of Synagogues and the Bishops’ Committee for Ecumenical and Interreligious Affairs of the National Conference of Catholic Bishops is cited in 1999: “We see the death penalty as perpetuating a cycle of violence and

promoting vengeance in our culture. As we said in *Confronting the Culture of Violence*: ‘We cannot teach that killing is wrong by killing’” (Michigan State University; Death Penalty Information Center, 2000). More recently, Pope Francis of the Catholic Church claimed the death penalty to be against the Gospel and that life should not be taken from anyone (Magliano, 2017). Supporters may claim that the writings of religious sects support the use of the death penalty, but the leaders of these groups denounce its use for its tendency to perpetuate violence and because it takes away from their chance to repent to their God.

Abolitionists also believe that the sentence of life without parole is a reasonable severe and effective punishment for offenders of capital crime. Life without parole is a death sentence; prisoners will not be released. According to one source, “no one sentenced to life without parole has ever been released on parole, in California or any other state” (ACLU of Northern California, 2018). A sentence to life without parole is comparable to the death penalty, and arguably a worse sentence. When serving a life sentence, prisoners are given less liberties and are housed in maximum security facilities in crowded cells (ACLU of Northern California, 2018). Not only is life without parole a valid way to be sure that the offender never returns to society and cannot commit such violence against another, it is also cheaper than the death penalty, and, perhaps most importantly, life without parole prevents the irreversible execution of an innocent person.

Innocence

One of the biggest concerns of the debate surrounding the death penalty is the idea of wrongful execution. Once an individual is executed there is no fix or way to make amends if that individual is found to be innocent of the crimes of which they were convicted.

Supporters of the death penalty state that execution of innocents is rare and is a risk they are willing to take. They argue that with the appeals and the safeguards in the system, it is nearly impossible to execute an individual who is innocent, but if it does happen it is justified because the death penalty saves more lives with the deterrence it provides (Michigan State University; Death Penalty Information Center, 2000). Paul G. Cassell, a professor and former law clerk, states, “The mistaken release of guilty murderers should be of far greater concern than the speculative and heretofore nonexistent risk of the mistaken execution of an innocent person” (Michigan State University; Death Penalty Information Center, 2000). Proponents claim that executing an innocent is a better option than allowing a possible murderer the opportunity to possibly create more victims.

Evidence shows that since 1973, there have been 150 death row inmates exonerated in the U.S. and that others have been executed regardless of the doubt of their guilt (Amnesty International, 2017). Between 1973 and 2000, at least 88

people were exonerated, while 650 people were executed, meaning that one in seven should not have been convicted (Michigan State University; Death Penalty Information Center, 2000). Two cases cited to display the effects of the death penalty and its potential to execute innocents are Cameron Todd Willington, who was executed for killing his family in a fire, but experts now say that there was no evidence that the fire was intentional, which means no evidence that he committed murder, and Carlos DeLuna, who was executed for a crime likely committed by a look-alike, Carlos Hernandez (Death Penalty Focus, 2018). Both of these cases illustrate the fact that the death penalty is not infallible, and the execution of innocents is possible. It has been observed that at least 1 in 25 on death row could be innocent, and that while less than 0.1% of sentences are death, 12% of exonerations were capital cases between 1989 and 2012 (Reardon, 2014). The risk of sentencing an innocent person to death is a concern to many opponents to the death penalty because it cannot be undone, and there is not always evidence or resources available at the time to exonerate an individual.

Conclusion

The death penalty has been a subject of debate for decades, one that does not appear to be disappearing anytime soon. Proponents and abolitionists alike make arguments concerning such factors as the economic cost, the possibility of deterrence, the assurance of protection for citizens, retribution to victims' families, and the risk of execution of an innocent. These arguments have been presented here for both sides. Capital punishment has a long history of use around the world, but in the modern world it has been abolished by most nations and several states within the U.S.

The death penalty is not the most cost-efficient form of punishment, regardless of which method of execution is used. There is no evidence that it is a deterrent for other murders; in fact, it is seen to have the opposite effect. It is not endorsed by major religious groups and is even not sought by victims' families, but rather is an act of revenge that perpetuates violence in society. Finally, the death penalty poses an unacceptable risk concerning the execution of an innocent individual through wrongful convictions.

Life without parole offers the same certainty that an offender cannot create more victims while also being less expensive, thus allowing funds to be used for other important tasks of the criminal justice system such as assisting victims, solving murders, and preventing violence; it therefore meets the requirements of an effective deterrence centered punishment. Most importantly, it eliminates the potential of making an irreversible mistake. For these reasons, and more, the death penalty ought to be abolished and the sentence of life without parole should be adopted.

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