

Capital Punishment

"Let the punishment be equal with the offence." - Cicero

"Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order." -George Will

"It is by exacting the high penalty for the taking of human life, that we affirm the highest value for human life. " -Edward Koch

Issues dealing with life and death seem to garner the most emotion and strong convictions. Those who support or oppose war, abortion, and capital punishment seem by their actions far more passionate about their opinion than other issues. How many times does one see a march in Washington that brings thousands upon thousands of people out to protest the income tax or support making Nigeria a most favored trading nation? Death, though a natural part of life, is by nature the end of life, so we who cherish living might perhaps be more involved in dealing with such issues. The issue of capital punishment deals with both death and life and boils down to this question: should those who consciously and maliciously take the life of another human being have their own lives taken? Is life so sweet so as everyone should have the right to live, or do those who take life forfeit their own by doing so? This debate has gone on for a very long time, and the fact that we are still talking about it and discussing it seems to show that we are not that much closer to solving the issue. While many parts of the world seem to have made up their mind, in America this seems no closer to resolution. When all is said and done, and all points considered, it seems apparent that for all of its imperfections that the capital punishment system is a necessary part of good governance and punishment, and this position will be borne out herein.

Capital punishment is ancient in practice. For example, according to the Jewish Bible (known to Christians as the Old Testament), Yahweh instituted the death penalty after the deluge, telling Noah "For your lifeblood I will surely require a reckoning; of every beast I will require it and of man; of every man's brother I will require the life of

man. Whoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image.” (Genesis 9.5-6, *Revised Standard Version*) In the books of Leviticus and Deuteronomy, a number of crimes are listed as worthy of death, such as premeditated murder, adultery, homosexual practice, witchcraft, and cursing one’s parents.

Mitchell et.al. (2003) notes that these laws were enshrined into the laws of the New England colonies by the Puritan settlers in the 17th century, bringing the official start of the system in America. (p. 23) From the start, executions were a public event often held in the town square so that everyone could see justice being served. While this reassured some people, it made others question the practice; two early abolitionists include Dr. Benjamin Rush and Benjamin Franklin, who both signed the *Declaration of Independence* and who sought to rehabilitate criminals. The 19th century saw a growing support of abolition with many states abolishing the death penalty, but this was cut short by the Civil War. Afterward, the move was toward more humane executions, such as electrocution, gas, and lethal injection, and executions were removed from the public square. With such supporters as famed attorney Clarence Darrow, abolitionism grew in popularity in the 20th century, and saw the Supreme Court in the case of *Furman v. Georgia* (1972) forbid the death penalty, but restore it in 1976 in the case of *Gregg v. Georgia* when changes had been made to the judicial system to make it more fair in the court’s eyes. (p. 25-7)

Now we come to address certain terms in the capital punishment debate. *The Complete History of the Death Penalty* has a great glossary (p. 472-3), the most important terms of which will be summarized here. We have the two sides, *abolitionists* (who oppose the death penalty) and *retentionists* (who support keeping capital punishment). *Aggravating factors* are additional aspects of a murder that open up the possibility of the imposition of capital punishment upon conviction; one who kills somebody and robs or rapes them while doing so would stand a better chance of being executed because the crime is more severe. A *capital offense* is a crime punishable by death; a *capital case* is a court proceeding in which the death penalty is an option. When seating a jury, the *death qualification* often comes up, that is, the prospective juror is asked if his conscience would allow him to consider the death penalty subsequent to a conviction; a negative

answer may excuse a juror from duty in a capital case. When a judge *commutes* a sentence, he is changing the terms on behalf of the convicted. (A criminal sentenced to death could have his sentence commuted to life in prison, for instance.) Finally, we deal with the *deterrent effect*, that is, how effective the threat/possibility of the death penalty is in deterring murder, rape, and other crimes.

The social aspects of capital punishment are a large part of the debate. Friedman (1997), an abolitionist legal scholar writing for *USA Today* magazine, addresses some of these. First, he maintains that capital cases are very expensive, not only in the area of appeals (which he says are not so major), but in investigations, drawn-out trials (with less likelihood for plea-bargaining), and reversed rulings. This cost is absorbed by the taxpayer. Another important point he brings up is that the death penalty can be somewhat arbitrary in how it is carried out. In fact, black Americans who are accused of capital crimes have a much higher likelihood of being convicted than whites, especially if the black person has killed a white person. Also, defendants with lower incomes have a much higher incidence of being convicted (due to lack of ability to pay for a better lawyer) than people with more money at their disposal (e.g. O.J. Simpson, Robert Blake), so we do have cases of income discrimination.

Lee (1990) presents some social arguments *for* the death penalty. He points out that those who are executed do not have a chance to escape and kill again, which has happened in numerous cases of “lifers,” and gives several examples of murders committed by these folks. Also worth noting is another discrimination, viz. gender discrimination. Female defendants are much less likely to be executed than males are; “Women commit around 13 percent of the murders in America, yet from 1930 to June 30, 1990, only 33 of the 3991 executions (less than one percent) involved women.” He also argues that without the death penalty society would descend into anarchy and vigilantism because the people would have less confidence in the legal system.

Since capital punishment is such a hot-button issue due to the factors of human life and human safety, the sides are fairly polarized. First, there is the side that wishes to abolish it altogether, following in the path of other industrialized democratic nations (See below), because the death penalty is brutal, barbaric, and inhumane. Next, there are those who wish to maintain the death penalty as a necessary part of keeping people safe and

seeing justice be done. Though common ground (or compromise) is difficult to reach in such an issue, there is a third possibility which seeks to both dole out proper punishment *and* allow for their continued life and possible correction of mistaken conviction.

1. The *abolitionist* position is basically that the death penalty should be abolished completely. Some of the reasons have already been covered in the section on social aspects, including and especially racial and income discrimination. Another important factor to consider is that most of the rest of the world, at least the democracies, have abolished the death penalty. As *The Economist* (1999) notes, as of 1999 68 countries have totally abolished capital punishment, 14 have abolished it for ordinary crimes, and 23 have the penalty on the books but do not practice. The European Union has since 1995 required its members to abandon the practice. The United States is also only behind China and Congo (and slightly ahead of Iran) in official executions. This brings into question how humane the United States, the great “bastion of democracy,” can be when its justice system is more like those of less-than-savory nations. Many of these nations have abolished the death penalty for the same reasons many want America to abandon it.

The philosophical arguments against death are worth noting as well. Brasfield (1998) argues that the death penalty not only does not deter criminals, but teaches that killing is acceptable and does not distinguish in many minds between government action and individual action. Friedman also notes that innocent people have been executed, and also many who were on death row have been released based on new evidence. The main argument given by groups such as Amnesty International, the Roman Catholic Church is echoed by Wolfgang (1998): he argues that killing is wrong and evil, even if done by the government; that the criminal can be punished better by life imprisonment where he may have a chance to reform himself; that the support for death is based upon notions of revenge and retribution rather than justice; and finally that this is an emotional call rather than a logical method. He quotes anti-death penalty crusader Sister Helen Prejean who noted, “You could say, ‘They deserve to die,’ but the key moral question is, ‘Do we deserve to kill them?’”

2. There are also many people who support the continuance of capital punishment. As we have noted with Lee, it prevents the executed from killing or hurting anyone else again via escape from prison or within the prison walls themselves. Then there is the

deterrence factor: while abolitionists argue that execution does not deter crime, retentionists have their own stats which say that it does. Douthat and Poe (2005), writing for the *Atlantic Monthly*, cite a study by a liberal scholar named Cass Sunstein, who argues that the death penalty has cut homicide rates since it was reinstated, and that “on average, every execution deters eighteen murders.” Not only this, but they say that “the death penalty [is] not only just morally licit but morally required. A government that fails to make use of it, they write, is effectively condemning large numbers of its citizens to death...” The conclusion? “the harms of capital punishment would have to be very great to justify its abolition, far greater than most critics have heretofore alleged.”

The death penalty has a strong backing among the American population as well. According to a Gallup poll cited in an article by Worsnop (1990), over seventy percent of the American people support the death penalty. They do not seem to accept the effectiveness of life imprisonment and other alternative penalties. (In fact, support for capital punishment has seen an overall gradual increase over the years among the American populace since its temporary abolition in the 1970s.) Again though, the moral and philosophical argument often wins out. As Bidinotto (1997) states, whether the offender is still a threat to society does not matter. This person has taken the life of another and therefore needs to be punished for it. Since life has been taken, if we are to support the idea of proportionality (i.e., “the punishment should fit the crime”), then we must execute them because that is the only proportional punishment. He says that to abolish execution would be as bad as any large punishment for a small crime or vice versa. While revenge is not the reason for justice, retribution, which he defines as “the moral principle that the harm and injury imposed on the victim should be reflected proportionately back onto the criminal who caused them.” He considers this a bedrock of a just society. Murderers are not human, but subhuman based upon their own choice.

3. A third solution which opposes capital punishment but seeks to make those convicted pay a devastating price is offered by “traditionalist” commentator Bill O’Reilly. In a column he wrote after the execution of Oklahoma City bomber Tim McVeigh, O’Reilly (2001) comes to the conclusion that McVeigh’s punishment was not only unjust, but is far too easy on him for the scope of his crime. O’Reilly believes that “killers, rapists, drug kingpins and terrorists” should be sent to prison for life, but in a

large prison or prison system constructed in the barren wastelands of Alaska. He further argues that those sentenced to this “gulag” (his own word) should “be banished and forced to labor eight hours a day, six days a week in the harsh climate” without anything such as “television, computers, exercise equipment (as if they'd need it) and most other ‘comfort’ items.” He continues, “Their mail would be screened, and they would only be allowed a few visitors per year.” Those who do not do their work would be locked away in solitary confinement and have their food reduced. His concluding argument? “The work camp sentence is revocable. If a terrible mistake is made and the convict turns out to be innocent, the convict is still alive. The mistake can be undone. No system is perfect – but why kill people when you can sentence them in a more punitive way.” Therefore, he sees this as not only just and grueling, but humane for the innocent.

As the reader can see, there is a great deal of disagreement not only on the positions, but on the arguments supporting them. From reading the various statistics, it is apparent that they are often contradictory based upon the author’s bias or position. Many of the arguments are based on appeals to emotion, morality, and utility. Oftentimes the passion for one position or another can help or hurt the claims of the one arguing it. While I am not fully and completely comfortable in my choice, I still believe the death penalty is necessary. First of all, the question of whether Europeans or Americans support capital punishment is a moot point. People may be whipped up to support lynching blacks for being black (as in parts of the Deep South during segregation), or may for one reason or another be in favor of light sentences for, say, corporate criminals. That does not matter, however; the question is, “Is capital punishment *right*?” Whether it is the popular thing to do does not change the circumstances of whether it is the *right* thing to do.

The issues brought up above are excellent arguments for reform of the system, perhaps even a moratorium on executions in America. As retentionists such as Lee argue, there should not be endless and useless appeals that drain tax dollars and draw out these murder cases. The arguments for “an eye for an eye” by such sources as Bidinotto and the Bible also appeal to most people as morally just to force people to pay for that which they took. The argument on innocents being executed is very important, but far fewer innocents on death row have been executed than innocents outside have been killed by escaped/furloughed lifers. The fact that so few murderers are killed anymore hurts death

penalty because it becomes arbitrary and inconsistent. If capital punishment is used consistently it would seem a far better deterrent. However, I do comment O'Reilly for his ideas. If capital punishment were to be abolished, his idea would be excellent in that it would be far less tolerable for those going in, would cost taxpayers much less money, and would be lifelong. Still though, one has not heard much support or serious proposal for such an idea, and it still would not take from the criminal that which he has taken from society. In the end, capital punishment may be a necessary evil, but it *is* necessary.

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