

On Capital Punishment

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Capital punishment has been used around the world for thousands of years and in the United States (the American Colonies) since 1622. Only recently (the 1700s), it has been subjected to questioning. One can probably blame Cesare Beccaria for this currently controversial issue. His influential "On Crimes and Punishments," was perhaps the first serious effort to make people think about the nature of punishment in general, and the specifics of sentencing and imposing the death penalty in particular. Beccaria's work was my introduction to the subject of death penalty. From the 1764's "On Crimes and Punishments" to the latest news from the Death Penalty Information Center, I am convinced that, as is, capital punishment in the United States of America should be abolished.

An attempt for a multi-faceted approach to the death penalty will be made in this paper. I will present some generic observations, then I will address religious and ethical (theoretical), and legal (practical) arguments. Finally, I will call attention to some alternatives to capital punishment.

There appear to be a great deal of discrepancies between statements made by proponents and opponents of the death penalty. The latter reveal shocking information about the court-appointed defense and other actors in the justice system (e.g. judges and prosecutors), the discrimination and biases, the cost and money spent, etc. On the other hand, the former group of people (the proponents), insist that this is not true and bring forth equally convincing statistics and surveys to support their claims. After considering these disparities and realizing that one cannot necessarily and easily refute either set of arguments, presented by respectable individuals like Todd Graves and Sean O'Brien, as outrageous lies or just exaggerations, I have come to the conclusion that there must be some kind of reasonable explanation. My simple explanation has to do with the interpretation of the topic (the death penalty) over time, jurisdiction, and location. As in many other controversial issues, the two "camps" heavily utilize mainly information that strongly

supports their arguments and fail to present an objective picture of the whole problem. That is, they argue about completely different or variable categories, namely, federal vs. state system, now vs. the recent past, "North" vs. "South" states, generality vs. exceptions, etc.

However, even though arguments from both sides appear convincing, upon closer inspection, one discovers that there are some disturbing "big picture" facts. For example, the "virtually unlimited" resources to the defense exist only in the federal death penalty system; incidentally, the latter constitutes only a miniscule part of the capital punishment machine. Furthermore, the changes over time in the legislation, have not been aimed at improving the system, but rather at prolonging its life by making minor compromises in order to stop abolishment efforts (Bedau 6). In addition, since the majority of death sentences and executions occur in the South ("the states in the former Confederacy accounted for approximately 90 percent of the total executions in the first two decades following Furman" (Texas #1, sec.2)), those cases should be considered as representative of the workings of the death penalty system as a whole, rather than the relatively few cases in some Northern states. Finally, in connection to the previous point, considering the claims of some that most of the outrageous court and law enforcement cases are mere exceptions rather than the rule, one wonders why there are so many exceptions when there really are not as many sentenced and executed people.

One of the religious (or Christian in this case) arguments for the death penalty is that since Jesus said nothing against it, He must approve of it. If one accepts this kind of implication, presented by H. Wayne House (Bedau 418), one would conclude that Jesus must have been for slavery since He did not say much about it either. In addition, John Yoder interprets examples of this kind of omission or silence in Scripture by observing that "to condone the way things stand is not approval" (Bedau 439).

The role of the state and the right it has over the lives of its citizens seems to be crucial for many death penalty proponents. Some opponents accede to that right of the government, but due to the presence of better alternatives to protect society, urge the government to forego that right (Pew Forum 3). Others see government authorities as "agents of 'God's wrath'" (Bedau 421). This view presents a two-fold morality, public and private, which argues that governments are ordained by God to "do things which individuals cannot" (Bedau 425). And yet, Genesis 9, one of the key passages used in support of the death penalty, is stated in a setting of no government (Bedau 435). The purpose of the passage is not to demand vengeance, but to restrain it (Bedau 440). Karl Barth, who is considered by many as the leading 20th century Christian theologian, poses an interesting question, can capital punishment be a reflection of divine retribution (Barth 442)? Furthermore, he contrasts the "certainty of human verdict" with "the infallibility of the divine judgment." The subject of the "moral level" of the agent is present in the passage about the adulterous woman (John 8), which can be interpreted in regards to capital punishment as a warning that if the punishment is claimed as an act of God, "then the judge and executioner must be morally above reproach" (Bedau 438). The question about government as God's agent is interesting in respect to the interactions among the agent, the criminal, and society. The criminal is an internal enemy of society and as such, when defending against a criminal, society "is really defending itself against itself" (Barth 444). The roles of these actors are hard to define especially considering that society, represented by the jury, participates actively in the conviction and sentencing of a criminal. This is a reason for the "uneasiness" of a lot of people with capital punishment--we think that "when you execute on our behalf, you make killers of all of us" (Pew Forum 8). Ironically, the death penalty symbolizes the inward powerlessness of society in relation to a criminal and an arbitrary renunciation of the obligation of society to the criminal (Barth 441). The question is, in what "arena of moral activity" is the jury operating, the public or the private?

Incidentally, "the first intervention of God in Genesis, counter to the ordinary reading, is not to demand that murder be sanctioned by sacrificial killing, but to protect the life of the first murderer" (Bedau 431). Indeed, the context of Genesis 4 is very different from the ritual sacrificial context of Genesis 9. Yoder urges the reader to answer if an execution of a murderer is a "vengeful action" against him or her or a "restoration of divine moral balance through sacrifice" (Bedau 434). Clearly, considering the context of the passage, the answer is sacrifice. However, one need not forget the New Testament, which reveals that "[t]he death of Christ is the end of expiation" (Bedau 436).

Another key passage in the Bible is Romans 13:4. This text has been continually misinterpreted. The sword in the verse is perceived as a weapon of capital punishment or a connotation of death (Bedau 422). In reality, the word for sword used in the text (*machaira*), is a "symbol of judicial authority"; this meaning is consistent with the civil order theme of the passage (Bedau 442).

The questions of discrimination and biases bring forth interesting arguments. Some insist that there are problems only in the application, rather than the concept of the death penalty. They argue that since capital punishment is supposedly morally just in the first place, even though it is discriminatorily applied, it still remains just (Bedau 426). Justice, according to Yoder is defined as "a direction, not an achievement," and as "a relative, not an absolute concept" (Bedau 441). Louis Pojman joins House saying that "unequal justice is still justice, however regrettable" (Bedau and Cassell 70). And yet, it is not. Instead of being always applied to the worst of the worst, death penalty ends up being used for the ones with the worst representation (Pew Forum 2). Or, as Joseph Lowery put it, "[i]t's a matter of race and place, it's a matter of inequity and inequity" (Pew Forum 7). The application of the death penalty has turned into a very dangerous tool, which, by its discriminatory application, not only shows who is valued more (or at all) in society

(depending on the characteristics of the victim as well as the criminal), but also results in the dehumanization of the death row inmates (Steffen 127).

Perhaps one of the biggest concerns of both opponents and proponents of the death penalty is the wrongful conviction and execution of innocent people. This concern, however, has been turned into a major argument used by supporters of capital punishment. The use of this argument is very well illustrated in the movie "The Life of David Gale." In the movie, the main character (David Gale) is involved in a death penalty debate with the governor of Texas (one of the deadliest states). David Gale, a philosophy professor, attacks the governor with a series of statistics and shocking accounts of the flaws of the death penalty system. The governor asks one question, he asks for the name of an executed person in Texas for whom it has been proven afterwards that he or she was innocent. If such a case existed, he says, he would sign a moratorium on the death penalty. In reality, there are cases in which the guilt of the executed is under lingering, or even reasonable doubt. In most cases, however, any investigation is terminated after the execution. In few cases in which an attempt for certainty is made (usually not by the state), those efforts are greatly obstructed by the courts. For example, there are cases for which the court has forbidden DNA testing after the execution. It is unclear what the explanation for this kind of decision is, but the implication definitely is that the court does not want to allow a precedent which might seriously put in question the death penalty. Even more disturbing than the technical errors of the justice system are the premeditated and outrageous lies and manipulations of law enforcement agencies, prosecutors, judges, etc.; their premeditated actions turn into a heinous crime in itself. Joe Amrine is a perfect example of a wrongly-convicted person. In fact, he was the 109th wrongly-convicted person. As a result of this wrong conviction, he spent 16 years under sentence of death for a crime he did not commit (DPIC MO abolish). Like many others, Amrine was "found innocent *despite the system* and only as a result of extraordinary efforts not generally available to

death row defendants" (Bedau 353). The problem of innocence on death row is revealed by data which show that since the reinstatement of the death penalty in 1976, for every 8 people executed, one has been found innocent and exonerated (Bedau and Cassell 78). Unfortunately, these last minute exonerations are used by supporters as an evidence that the system works. To show the contrary, David Gale let himself be the victim of the perfect "legal murder"; the violent death of a fellow terminally-ill professor, for whose death Gale was convicted and executed, turned out to be a suicide. And all this because "almost-martyrs don't count" (Gale). All this so that the governor can have a name.

From the many outrageous events in Amrine's case, perhaps the most shocking was the declaration of the Assistant Attorney General of Missouri: "the Court need not stop the execution of an innocent person as long as the prisoner had a fair trial" (DPIC MO abolish). Fortunately for Amrine, the Missouri Supreme Court rejected that "policy." The Assistant Attorney General's reasoning is typical of politically-appointed pardon boards and prosecutors who in most cases are "ambitious politicians." Prosecutors, for whom Todd Graves and Eric Zahn assure us the worst nightmare is to convict an innocent person, usually have complete discretion in seeking the death penalty or in choosing a lesser sentence (Bedau and Cassell 163). This kind of freedom, which incidentally has been partially taken away from juries and judges through guided discretion and "cooperation" (Ring v. Arizona), allows for the proliferation of discriminatory practices. Some practices like deals with witnesses or even with certain defendants, special acts of leniency, etc., are especially ironic in light of the widely publicized motto of the need for "justice to be served." Furthermore, certain factors like the race of the victim and more recently even the race of the defendant play a decisive role in the outcome of a trial. For example, according to a report prepared by the U.S. General Accounting Office in 1990, based on 28 studies (one of which, the controversial, but nevertheless accurate Baldus study), showed that the race of the victim influenced

the likelihood of receiving the death penalty in 82 percent of the cases (Bedau 271).

Many problems with the death penalty system have to do with the state-appointed defense attorneys. As lacking and dysfunctional the public defense system is, some states (Texas, Georgia, and Alabama) do not even have one (Bedau and Cassell 168). The examples of sleeping, drunk, soon to be disbarred, or plain incompetent (due to no capital punishment experience or no skills) attorneys who represent defendants in capital cases are too numerous to list. The fact that judges continually appoint those types of attorneys is an evidence of gross injustice; the idea that a license to practice law means ability to handle capital cases is comparable to stating that "every doctor is competent to do brain surgery" (Bedau and Cassell 169).

Due to the almost complete refutation of deterrence as an argument in support of capital punishment, I am not going to address it extensively. It is ironic that proponents accede to the impossibility of proving the effects of deterrence, but still insist on it as a main supportive argument. The controversial and flawed Ehrlich study has found no support among researchers in its claims. Moreover, joined by many others, long-time deterrent researchers Bailey and Peterson, continue to issue statements like the following, "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" (Bedau 155).

In addition to arguments like the ones presented above, there are numerous accounts of judges and prosecutors, some of which have been adamant supporters of the death penalty, but who, as a result of many years of experience have come to realize and acknowledge not only its flaws, but more importantly, its fundamental failure. Supreme Court Justices Marshall and Brennan, who continually opposed the death penalty in their opinions, made this statement, "the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eight and Fourteenth Amendments" (McCleskey). An avid supporter of capital punishment, Supreme Court

Justice Blackmun stated that "the death penalty experiment has failed" (Bedau and Cassell 154). Probably the most influential Supreme Court Justice in the interpretation of the Eight Amendment and its "lack" of application in death penalty cases, Justice Powell, declared after retirement that he is for the abolition of capital punishment (for pragmatic reasons). Finally, Gerald Kogan, a former prosecutor, justice, and chief justice of the Florida Supreme Court, stated that capital punishment "does not work at this time and has not worked in the State of Florida for many, many, many years" (Bedau and Cassell 162).

Considering the statements of the Justices in the preceding paragraph and all the other arguments presented in the paper, it is clear that capital punishment should be abolished. A viable alternative to the death penalty is Life Without Parole (LWOP). Currently, 36 of the 38 death penalty states and 11 of the 12 non-death penalty states offer a sentence of Life Without Parole (DPIC LWOP). Unfortunately, in some states, the wording of this sentence is misleading and does not always have its apparent meaning. The situation is worsened by the presence of laws in states like Texas and Georgia which forbid the judge to explain to the jury the meaning of LWOP even if asked directly (Bedau 121).

I must concede that there is a tendency for "romanticizing" of criminals and their actions. It is indisputable that there are crimes which are so heinous that they are beyond human comprehension. The movie "Dead Man Walking" is an attempt for "looking inside the door of the death chamber" (the door of death row) and the door of the victims' families--two different tragedies (Robbins). While the cost of violence is tremendous, we should not think of criminals as monsters with no families. Even though the creators of the movie are for the abolition of the death penalty, they have realized that it is more important to find "common ground" with the proponents. Since death penalty is a very serious issue, we should at least be able to talk about it (Robbins); thus, the goal of the movie is to promote discussion.

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