The Death Penalty

Despite the fact that the death penalty has been implemented in the United States since its inception, executions are happening less and less frequently. Murder rates have dropped to nearly half of what they'd been since 1991 (9.8/100,000 in 1991 to 4.5/100,000 in 2014), life without parole (LWOP) is a more serious alternative because the prisoner has no chance of leaving the prison, the cost of executions is becoming more expensive, and Catholics are religiously bound to be opposed to it (thanks to Sister Helen Prejean's efforts). Despite this, capital punishment still enjoys the support of a majority of Americans, but the trends seem to point to the death penalty as soon becoming a distant memory. In this essay, I will describe the arguments for the retention of the death penalty (and their shortcomings), the arguments for the abolition of the death penalty, and finally my own opinions regarding the subject.

Arguments in Favor of Capital Punishment

The most effective justification for the death penalty is retribution. According to Immanuel Kant, seeking retribution is the only way that the offender can repay his debt to society because "we consider crimes mainly as harms to society which entitles it (and only it) to retribution", it is "the paramount moral purpose of punishment" (229). However, retribution is not the same as vengeance. Retribution is sought through legal processes, it is limited to only the offender, and liability rests only on the individual. Revenge is sought by the victim's family through unofficial or illegal means, it is unlimited—which means the scope of their revenge could include the offender's family, and there is a collective liability (if you kill one, everyone could be held responsible). Many would add that retribution isn't as senseless or barbaric as the vigilantism that inspires familial vengeance. Those who agree with retribution would also say that seeking the death penalty is the right thing to do because it is morally justified and it satisfies the

arguably innate human urge to see wrongdoers punished. The "Baby Lab" experiment seems to prove that humans start to feel this urge as early as only a couple of months after being born. With the help of a few puppets and snacks, researchers found that babies are actually "little bigots": they have a desire to see those who do wrong punished, and tend to favor those who do the punishing. These results prove that the basic rationale behind retribution has been ingrained in us since birth.

Immanuel Kant finds his justification with retribution, and had formed an anecdote to summarize the purpose of the death penalty through his eyes. His "island metaphor" is essentially this: when ten people are on an island and one person murders another person on the island, the remaining eight should ensure that the murderer is killed even if they are going to leave because it is retribution is a question of morality and not utilitarianism. The offender's death should not be used as a means to justify an end; it is based on what must be done to make sure that the offender receives the appropriate punishment for his crimes. It is not meant to serve a more complicated purpose, and Ernest van den Haag would probably add that "punishment for a crime is neither compensation nor retaliation, but retribution, as threatened by law, for the harm inflicted on the social order" (241). Retribution cannot always be achieved, however, because some who commit capital murder are minors and people with mental disabilities. No matter how heinous their crimes, defendants within those demographics cannot stand trial (unfortunately, they still do sometimes) for capital punishment because neither can be the most culpable criminal by definition. And even if they weren't members of either of those demographics, it is also true that "defendants accused of some of the worst murders often escape the death penalty through plea bargaining", which doesn't achieve retribution either (360).

Deterrence is not the moral argument for capital punishment, but it is the practical one. Chapter eight is focused on deterrence and its effectiveness, and according to van den Haag, "it is the most important instrumental benefit of punishment" because deterrence supposedly saves lives (230). The deterrence theory operates under the assumption that all criminals are rational actors; this means that a potential criminal has the ability weigh the consequences of their actions before they commit the crime. Van den Haag asserts that the death penalty is necessary because it is the ultimate punishment reserved for the worst deviant actors who cannot be deterred. The death penalty serves as a reminder that those who commit capital murder will be punished, thus deterring them from the crime, but the best way for deterrence to occur is for the punishment to be swift, certain, and severe. But in this modern system (because of the appeals process that can take upward of twelve years to complete) the swiftness, certainty, and severity of the punishment is neutralized because the final date is never set or the defendant's sentence is changed to LWOP. The current death penalty system isn't nearly as "severe" as it was a couple hundred years ago, now it's done primarily with lethal injections to make the process as painless as possible.

There is also no data to support the claim that capital punishment achieves deterrence. In chapter nine, Peterson and Bailey discuss Isaac Ehrlich's study on deterrence. Ehrlich found that there was a "significant national decline in the level of execution, and a significant rise in the murder rate", but he interpreted that data to mean that capital punishment was an effective deterrent for murderers because the executions that occurred within the period (1933 to 1969) may have saved seven to eight lives (251). His research is important in one sense because he introduced new methods of statistical analyses of death penalty cases, but in another sense, his findings were quickly disproved. Ehrlich's findings looked at the nation as a whole, and not on a

state by state basis; he assumed that the death penalty was certain and never the abolitionist counties into consideration; and third, the evidence that he used to support deterrence were only located in the final years of the period he chose to study (from 1933 to 1965, the United States showed no relationship between executions and the murder rate, but from 1966 to 1969 there is a strong relationship).

Deterrence is not as strong an argument as retribution because it has only fragile data to support it. It's also true that most people who commit capital crimes are not the people who can be deterred. If they do consider the death penalty, they consider it within their own perspectives and views, which means that the potential offender may or may not consider the death penalty with as much weight as a truly rational actor would. Many of those who commit capital murder suffer from untreated mental illnesses, are mentally disabled, or are minors; Burkett and Perry, the men who were the focus of the documentary "Into the Abyss", killed three people over one car that they didn't get to keep for more than 36 hours. They made many terribly unplanned decisions (such as getting into a shoot-out with the police and leaving DNA evidence at the scene of the crime) which proves that they were impulsive, risk-taking, and short-sighted. The truly rational actors don't commit capital crimes, and the people who need to be deterred can't be.

Next, incapacitation as a justification for capital punishment has a simple rationale: executions save lives because those who are dead can't kill again. After all, the offenders "may endanger guards and fellow prisoners since without the death penalty there is no further punishment to deter him" (234). But incapacitation is an inherently problematic justification because it is motivated by fear. Juries are supposed to consider both mitigating and aggravating evidence to determine whether or not the defendant deserves the death penalty in the punishment phase of the trial. Part of the process is determining the "future dangerousness" of the defendant

(111). But therein lies the rub: who can say what will and won't be in the future? In Chapter four, Acker and Lanier explore the issues regarding the legislative process of the death penalty. One of those issues is "whether it is morally and legally defensible to focus not on an offender's adjudicated past conduct when determining his death penalty eligibility, but instead to speculate about what he *might* do in the *future*" (122). Jurors cannot enforce or interpret the laws that they do not understand, and in capital cases jurors may not fully understand their role in determining the life and death of the defendant. Haney summed it up effectively in chapter 18, "the most significant problems stem from the general incomprehensibility of the instructions and… their failure to clarify the meaning of mitigation and provide jurors with guidance about how to find and use it in any of the evidence" (501). They may believe that "the sentence they impose is not truly final; that if it is excessive judges who review it on appeal will reduce it" (123). They may make their decision about the appropriate sentence before hearing all of the evidence, which doesn't ensure a fair trial on behalf of the defendant (though it would be nigh impossible to prove that such a thing occurred). Cunningham and Sorensen use chapter 11 to analyze the accuracy of the juries to predict the future dangerousness of the defendant, and they found that those predictions were not only incorrect, they were also no better than random guesses. In the end, no one, not even the professionals, can confidently predict the future dangerousness of the defendant. The jurors are "reacting out of irrational fears as opposed to reasoned analyses" (290).

Data has revealed that of the 629 inmates who were commuted from death to life sentences, six killed again in prison (one who was released killed outside of jail). Those six represent the 1% of inmates who would kill again, but there's no way to determine whether they are always part of the 22% of offenders who are executed. Not only that, but there isn't as much of a need for capital punishment today. Prisons are much better than they've ever been at keeping the

inmates in line. In fact, less murder occurs within prison than in regular society. In prions, the

murder rate is 4/100,000, and in the "free world", the murder rate is 4.5/100,00. And, according

to a study done by Lombardi and Sluder (cited in chapter 24), "overall, death-sentenced and

LWOP inmates were significantly less likely than parole eligible inmates to be involved in

violent misconduct" (678).

The last argument for the death penalty is one regarding the closure of the victim's

families. Capital punishment should give the victim's families some emotional closure, but is

that the truth? There's only one study that analyzes this question, and the findings are a little

surprising. They compared the family's responses to death penalty sentences in Texas and the

LWOP sentences in Minnesota together. It found that over time, the families in Minnesota had

an easier time in the grieving process than did those in Texas. The reason behind this may lie in

the fact that the victims in Minnesota don't have to deal with media coverage (because LWOP

cases don't receive much publicity), and that they don't have to worry about whether or not the

offender will receive the death penalty because a life sentence has already been decided. The

appeals process for LWOP penalty cases is also much shorter than death penalty cases: two years

average verses 10-15 year average. In Connecticut "a letter signed by 179 Connecticut victims'

families criticized the death penalty for failing to serve victims and for spending resources that

were needed elsewhere" (604). In other words, the death penalty may not have the support or be

as helpful to the victim's families as one might assume they'd be.

Arguments Against Capital Punishment

One of the gorier arguments against capital punishment involves the botched executions.

The "civilized" world no longer utilizes the more horrifying methods of execution such as

hanging or gas chambers. When the use of electric chairs was legal, occasionally someone's head

would burst into flames and other gruesome things would happen in front of the eyes of the witnesses; and often those who were hung wouldn't die. These days, we usually utilize lethal injections to kill the inmate because it is quick, painless, and humane. But is it really? In 2014 there were two botched lethal injection executions. In Oklahoma, Clayton Lockett was injected with the first drug in his femoral vein and was pronounced unconscious. Actually, he was awake during the next stage of injections, and once they realized what'd happened, the execution was halted. By that time, it was too late to correct the mistake and he died of a heart attack. If the execution was stayed before the time of death, that makes his death an accident. Opponents of capital punishment would call that accident a murder. In Arizona, Joseph Wood was put to death but it took him nearly two hours to die during which, he gasped 600 times. He was only given 50mg of the anesthetic (midazolam) at the start of the execution, and the dose had to be increased to 750mg, fifteen times the original amount because nobody knows the correct dosage necessary to kill someone.

There are a few reasons why these executions went wrong. One of the most obvious ones is the fact that the drugs the government uses for executions isn't as effective as it used to be. The order of drugs that is injected into the capital offender is the anesthetic, then pancuronium bromide (a paralytic), and lastly potassium chloride (induces cardiac arrest). The original drug that was used for lethal injection, sodium thiopental, is hard to get hold of these days because the manufacturer (Hospira) doesn't make it any more, and doesn't want it used for the death penalty. Pentobarbital, the next drug is also hard to get hold of because Lundbeck (the manufacturer) refuses to sell it to U.S. prisons, and because the European Union has banned all export of both sodium thiopental and pentobarbital. Propofal, the drug after pentobarbital isn't allowed to be used in prisons—the European Union threatened to ban the export of propofal, which would

have been bad because it's used for 50 million surgeries annually in the United States. Midazolam is the current most used anesthetic, but the U.S. manufacturers refuse to sell it to prisons. As this evolution of anesthetics took place, the potency of the drug became less and less effective. A good portion of the drugs that prisons use in executions are received from unnamed compound pharmacists, and nobody knows what they use to make the drugs because states have passed a secrecy bill that allows them to keep not only the name of the compound pharmacy confidential, but also the ingredients of the cocktail and its expiration date.

The lack of potency makes it harder for the one who gives the injections to measure out the proper amount of anesthetic for the offender (hence why the amount of midazolam went from 50mg to 750mg). The amount that is injected is the same for everyone, tolerance isn't taken into consideration. The loss of consciousness is usually assumed, not monitored, and that is probably because the person who gives the injections is not supposed to be a doctor (hence why Lockett's execution failed). Pancuronium chloride prevents the inmate from revealing any pain that they may be feeling, so there's not a good way to tell whether the inmate is actually asleep.

Arbitrariness is the next argument against capital punishment. The arbitrariness comes in the form of "the exploitation of crime and the death penalty as issues, the politicization of the state courts… racial discrimination, and other deficiencies in the criminal court" (147). In the "Nathan Dunlap" documentary, we learned that America was engaged in a political storm of being "hard on crime". Politicians who talked the most about cracking down on criminals were the ones who were the most popular. In chapter five, Bright explores the politics related to capital punishment. The 1990s were a period in which there was intense war on crime, and "some argued that... much should be sacrificed—resources, personal reputations civil liberties and even basic notions of fairness—in the pursuit of those who commit violent crime" (138). The

death penalty is supposed to be reserved for the worst of the worst, as such, it should be narrowed down to only the most heinous of crimes, yet "title IV of… the Federal Death Penalty Act of 1994, expanded the death penalty to cover 60 crimes" (139). Not only are offenders more likely to be sentenced to death, they're less likely to have their cases turned to LWOP. Given the political setting, judges are pressured to rule against criminal defendants because doing the opposite—even if they are upholding the law—could mean their removal from office.

The amount of money the defendant has also affects the result of the case. Colorado has a really good indigent defense office. You can trust that these lawyers are competent and are being paid fairly and will have access to the resources that will allow them to do a good job on your case. However, other places don't have these kinds of programs because of lack of funding. As Bright mentions, this lack of funding creates an environment in which the lawyers who are assigned to poor people "lack the experience, knowledge, resources and, on occasion, even the inclination" to properly represent their client (148). In chapter fifteen, Lyon states that "for many criminal defense lawyers, the ability to do good work is circumscribed by the lack of resources, overwhelming caseloads, and institutional hostility" (376). Lyon points out that most capital defendants are indigent, so the lack of funding in the high execution states or counties (such as Texas) makes it harder for the defendant to receive a life sentence. He also mentions that having a good defense system in one county means the quality of the defense is dependent upon county lines.

Arbitrariness also comes in the form of racial discrimination. In chapter 19, Grosso, O'Brien, et. al highlight this problem. They state that the very discretion juries and judges are charged to use when choosing the most appropriate punishment, invites the prospect of discrimination on the defendant. Without obvious evidence that discrimination occurred within

the trial, it's extremely difficult for the defendant to prove that it happened. But studies have shown that the race of the victim matters more than the race of the defendant. Cases where the victim was a high status white female are much more likely to result in the death penalty than say a low status black female victim. The Baldus study held in Georgia found that the odds of a death sentence were 4.3 times higher if offender kills a white victim than a black victim. This proves that there is an arbitrary or unfair emphasis placed on the race of the victims.

The possibility that the victim will be innocent is also an argument against capital punishment. Nobody knows how many innocent people have been executed, partly because, as Radelet and Bedau mentioned, no government official has admitted to executing an innocent person under his or her authority. Despite all of the legal protections put in place to prevent the innocent from being killed, it's entirely impossible to prevent. Most death penalty supporters admit to this. Out of the thousands of people put to death, 156 have been exonerated, some post-mortem. It is entirely possible that there are more deaths, in fact about one out of every nine people on death row are likely innocent.

"Thin Blue Line" tells the story of Randall Adams, a man who was nearly executed for a crime he didn't commit, but for the confession of the true criminal (though if the police and investigators involved were more competent, one would assume his name would have been cleared long before the case went to trial), he would have spent his life behind bars. The justification that the investigators kept using was that Adams was "remorseless" in relation to the crime, but how can someone feel remorse for a crime they didn't commit? "Incendiary: The Willingham Case" had a similar case in which Willingham was killed despite conflicting pieces of evidence taken from the scene. Both cases featured cops and politicians with an agenda. They wanted to "get the guy" who committed the crime that they overlooked and disregarded the

actual evidence. In Willingham's case, the evidence that was collected in the fire was just as consistent with arson as it was with an accidental conflagration. These were also high profile cases: "Thin Blue Line" involved the death of a police officer, and Willingham's case involved the death of his young daughters. As the seriousness of the crime increases, it becomes more likely that errors will be made in the pursuit of evidence because investigators and judges and the district attorney will feel pressured to put the public at ease.

The cost of the death penalty is the last argument against capital punishment, but it certainly is not the least. The main problem with the death penalty is the fact that we're paying for both the death penalty and LWOP in Colorado and 30 other states, the modern death penalty is more expensive than LWOP, and the death penalty trial takes a lot of time and energy to complete. Because "the state-imposed death of the murderer—actively in one case and passively in the other—is the ultimate outcome from both punishments", paying for the two is unnecessary (277). Dieter discusses the heavy costs associated with the death penalty in detail. He says that the cost "*per execution* is much higher because only a minority of death sentences results in an execution" (596-597). Many counties spend millions of dollars on executions per year without executing more than three defendants. There's also the cost of the preparation for the trial on both the defense and prosecution's sides, and the appeals process. If you limited the funding for the trial costs and appeals process, as some have suggested, it would "affect the quality of trials in capital cases and increase the risk of executing an innocent person", and the cost of retrial for ineffective representation by the defense would cost even more money (604). The appeals process is necessary to ensuring the jury has all of the information it needs to give a fair and just sentence; it's impossible to sacrifice it.

Concluding Opinion

As for myself, I think that the death penalty should be abolished. Though honestly, I struggle with how I feel regarding those who commit the worst of the worst crimes. Sometimes I think that they do deserve to die, but I find retribution nearly as barbaric and outdated as vigilantism or familial vengeance. Retribution is pursued and achieved arbitrarily and in the pursuit of justice, those who are supposed to uphold the law can be carried away and can drag down the wrong person. Partial justice, while not negated by being only partially achieved, is not satisfying enough for me. Retribution is itself a paradox because it isn't always the right thing to do. Not when those who are less culpable or those who are innocent of the crime for which they are accused are sometimes killed. It is for this reason that Kant's island metaphor isn't as effective as it may at first seem. When you consider the possibility that the one who killed the other member was a minor or mentally disabled, is execution still the right decision to make? What if the criminal is unable to understand why they are to be killed? As Slobogin points out in chapter 13, "no person with intellectual disability is ever as culpable as the rare murderer who should be put to death" (338). How can someone who isn't yet or will never be a member of functioning society ever repay their debt to it? The ambulance metaphor that van den Haag mentions isn't an effective argument either because the death penalty wasn't created to heal people, it was built to kill people. And there is no evidence that deterrence is nearly as effective as van den Haag and Ehrlich had hoped.

The fact that there are alternatives to the death penalty gives me plenty of reason to be against it as well. Gun control laws and better school funding would help, though not completely ameliorate the problems children in lower income neighborhoods face. Many, many of those kids suffer from PTSD. If a veteran who suffers from PTSD could be considered as a categorical exclusion because they were actively taught by the government to kill people, so too should

those minorities who suffer from it. These kids have seen and experienced so many terrible things, and they grow up knowing that it's unlikely that they'll ever have a chance to be successful outside of the neighborhoods they grew up in. Haney describes them thusly, "they are the legacy of a society that has, over the last 20 years, systematically turned its back on its poor and on their children" (507). The institutions that were designed to save these children before they grew into criminal adults has failed them: "youngers sent to juvenile detention centers and training schools are likely to be brutalized rather than rehabilitated" as a result of the "lack of desperately needed intervention, to intervention that is ill-conceived, poorly and inadequately funded staffed, and… is terribly destructive of the human psyche and spirit" (511).

It is easy to argue that there are other people who grew up in these terrible situations who grew up to be functioning members of society. This reasoning is problematic because it implies that everyone reacts to stressful situations in the same way. Most people are able to survive the maltreatment and abuse and become successful adults. However, the fact that there are people who *can't* says a lot about the culpability of such a criminal. Just because there are successful survivors of abuse doesn't mean there won't also be failures. Nathan Dunlap had a horrible childhood and suffers from bipolar disorder that went untreated for years. Burkett had a father who was in and out of prisons his entire life. Situations like these don't give kids a lot of choice in their futures.

Also, nobody considers the perspectives of the families of the defendants who are to be killed. Radelet and Bedau of chapter 14 mention how the suffering felt by the inmate is compounded by the suffering they see their families going through: "the pain felt by the inmate anticipating his or her own execution Is often overshadowed by the pain that innocent family members experience in anticipating the death of their loved one" thus "injuring the guilty and the

innocent alike" (362). In both "Dead Man Walking" and "Death Row Stories: Nathan Dunlap", we received not only the victims' families' perspectives, but also the perspective of the offender's family. In "Dead Man Walking", Poncelet's mother talked about being treated and looked at differently by other people when she goes out because of the terrible acts her son performed on those kids. Do those families deserve to suffer or to be ridiculed in such a way for the crimes of their child? Some might say yes, using the moral justification of retribution, the practical justification of deterrence, the fearful justification of incapacitation, and even the emotional closure worthy of the victim's families. But I would disagree.

If we could come up with a way to ensure that, without any doubt, we could execute *only* those who deserve the death penalty (and in my opinion those that deserve it are not those who suffer from PTSD and other mental illnesses at the time of the crime) then I might consider the possibility of retaining the death penalty. But it wasn't possible when America was first founded, and it isn't much more possible today. Because of that, I cannot with good consciousness condone capital punishment. It is arbitrary, expensive, and it executes innocent people. In my mind, and I try not to hold others to my own moral compass, supporting capital punishment the way that it is being implemented today is the same as condoning murder.

Works Cited

Acker, James R., Robert M. Bohm, and Charles S. Lanier. *America's Experiment with Capital Punishment.* Carolina Academic Press, 2014.