

Cruel and Unusual:
The Unconstitutional Practice of Capital Punishment

Matthew Harang, M.P.A.
The Policy Tree

© April 2004

Death Penalty on the Agenda

The constitutionality of capital punishment in the United States has long been a subject of heated debate. At the crux of this debate is the Cruel and Unusual clause of the Eight Amendment of the U.S. Constitution, which states that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (Palmer, Jr., 11). The existence of different interpretations of the clause has solidified the existence of this issue on the agenda of the Federal government. As recently as 1972, the Supreme Court put a stop to the implementation of the death penalty on the grounds that the sentences were given arbitrarily, and thus violated the Eight Amendment. Just four years later, however, capital punishment was reinstated on the premise that the penalty of death would be handed down using “guided discretion” (Nathanson). This policy analysis, however, is not necessarily concerned with issues of inequity, discrimination, judicial error, or economics; though these issues are relevant from a legal standpoint. This report will focus on two viewpoints: one states that by nature the death penalty is not cruel and unusual, and thus is protected under the Constitution. The other argues that the punishment of a death sentence is both cruel and unusual.

Policy Formulation

This analysis will provide reasoning and evidence that supports the notion that the practice of capital punishment is cruel and unusual; it will also propose legislation to abolish the death penalty. The proposed legislation will seek to overturn the ruling of *Gregg v. Georgia* in 1976, which legitimated the use of the death penalty as a viable method of punishment for capital crimes. In this case, the Supreme Court concluded that the death penalty is permissible punishment for capital crimes, based on its two purposes:

retribution and deterrence. The proposed policy action challenges the effectiveness of these two purposes. The policy proposal is based on the premise that the death penalty is unnecessary, excessive, degrading and unacceptable. Based on the nature of this form of punishment the institution of capital punishment is a violation of the Eighth amendment based on Justice Brennan's conclusions regarding the Cruel and Unusual Clause during *Furman v. Georgia* in 1972 (Palmer, Jr., 13.).

Policy Legitimation

In order to provide rational for a policy change, I will challenge the reasoning behind the *Gregg* decision by examining the effectiveness of the two principle purposes of capital punishment. The first aim of the death penalty is to give proper retribution. In the 1976 case, the Supreme Court held that general public believes that for certain crimes, "the only adequate response may be the penalty of death" (Palmer, Jr. 14). Many victims' families, however, have fought against the execution of the murderer of a loved one, and against the establishment of capital punishment. The fact is that no punishment, including death, could ever bring peace to grieving family members. One mother who lost her child in the Oklahoma City bombing stated: "I don't think there will ever be closure" (Lifton & Mitchell, 203). And as Robert Jay Lifton and Greg Mitchell argue, the idea of "closure" is purely a psychological illusion. When a convict is executed, we are in effect ending their stress and suffering, while the strain on the victim's family will continue. After an execution, one father discovered that he would have preferred his son's killer to have been spared, because without the murderer, there was no one towards whom he could project his anger. In this respect, capital punishment causes prolonged emotional suffering of a victim's family through feelings of internalized anger and helplessness

(Lifton & Mitchell, 202-203). Furthermore, the death penalty allows the offender to escape their responsibility to the victim's family. If the death penalty is abolished, offenders could be held more responsible for his actions. This could be achieved through a requirement by which convicts would work inside penitentiaries to alleviate the stress and suffering of the victim's family. Another option would be to require them to simply work for the betterment of society as a whole (Bowers & Steiner). This option of life in prison without the possibility of parole, coupled by such a work requirement is clearly a more effective form of retribution than the death penalty.

The death penalty's service as a deterrent to violent crimes is the other point on which the constitutionality of capital punishment has been upheld. However, in *Gregg v. Georgia* in 1976, the Supreme Court recognized that some "studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties." In spite of those studies, the justices agreed that capital punishment was constitutional based on the notion that for at least some potential murderers, "the death penalty undoubtedly is a significant deterrent" (Palmer, Jr., 14). Based on psychological information which has been compiled regarding criminals' thought processes, potential killers often have a distorted view of the world and have illusions that they will elude punishment. In many cases, drug and alcohol use is also a factor and people fail to weigh the consequences of their actions (Hanks, 70-73). Additionally in cases involving emotion and passion, criminals do not think rationally, which means that deterrence is not a factor (NCADP). In addition, it is impossible to substantiate any evidence that would provide a link between the implementation of the death penalty and crime deterrence. There is no way to prove that there are any would-have-been criminals who decided not to commit a

crime because of the death penalty. Even if one does confess that his potential actions were deterred by the death penalty, their confessions may not always be truthful. It is possible that the individual could have simply re-analyzed their situation or had a change of heart. Statistical attempts to measure the deterrence factor, such as one by the *New York Times* in 2000, show that murder rates in states which have abolished the death penalty are actually lower than the national average (Hood, 216). Furthermore, studies done in California and Oklahoma have shown that there was an increase in murder rates when these two jurisdictions reinstated capital punishment. A study done by the Death Penalty Information Center shows that two-thirds of law enforcement officers believe that capital punishment does not decrease murder rates, which further substantiates the evidence against the death penalty as a successful deterrent of violent crimes. As Robert M. Morgenthau, District Attorney of Manhattan, NY states “the death penalty actually hinders the fight against crime (NCADP).

This proposal of legislation to abolish the death penalty is also formed from the arguments that the death penalty is both “cruel” and “unusual.” Policymakers have generally held that the Eighth Amendment protects the death penalty as a form of punishment. However, it is important to closely analyze the Cruel and Unusual Clause based on today’s societal values and ideals when analyzing policy issues. According to the Oxford Dictionary and Thesaurus, cruel is defined as: “1. *Harsh; severe*, 2. *Causing pain or suffering, especially deliberately*.” Oxford also lists the following synonyms among others: merciless, hard-hearted, heartless, unsparing, callous, vicious and brutal (Oxford Dictionary and Thesaurus). The simple nature of an execution is that a defenseless human being is punished through a brutal, public killing. This act, under any

circumstances, can be viewed as cruel in that it is clearly intended to be “harsh” and “severe.” Taking one’s life is the most final, irreversible, and severe form of punishment known to mankind. The act is merciless, hard-hearted and excessive, since a death sentence is clearly not the only plausible form of punishment for any violent crime. The state can just as easily sentence an offender to live in prison, which would clearly be a less vicious and brutal form of punishment. Because life in prison is an equal or even greater form of retribution (especially when the sentence includes a mandatory working requirement), and because the death penalty does not serve as a deterrent, capital punishment is clearly an excessive form of punishment. In the 1958 case of *Trop v. Dulles*, the Supreme Court stated that the Cruel and Unusual clause stands to protect the dignity of man (Palmer Jr., 12). If a man is strapped to an electric chair which pumps thousands of watts of electricity through his body, or is locked in a room with deadly gases, how is his dignity protected? The act of killing is a cruel form of punishment regardless of the method used, or the fairness of the sentencing process. The institution of capital punishment supports the practice of a callous act that strips a helpless individual of not only their dignity, but also of their right to life.

In *Trop v. Dulles*, the Supreme Court also stated that the Eighth amendment also served to ensure that punishments handed down by the State are within the limits of civilized standards. Examining the positions of the rest of the civilized world on the issue of capital punishment, it is clear that the practice of the death penalty is no longer within these civilized limits. By the end of 2001, 89 countries had completely abolished the death penalty. Over the last 40 years, at least 67 governments have taken an abolitionist stance on the practice (Hood, 10). Most democratic nations have abolished the death

penalty including most of Europe and Latin America, Canada, Australia and New Zealand. Among democratic nations, the practice of capital punishment has become “unusual”, which as defined by Oxford Dictionary is “1. *Not usual*, 2. *Exceptional; remarkable*.” Oxford uses the synonyms: uncommon, rare and surprising to describe something unusual (Oxford Dictionary and Thesaurus). As one of the only Democratic nations that still practices institutionalized killing, the United States was the third highest executer last year, behind only China and Iran (Amnesty International). The United States takes pride in being a model for other nations on human rights issues; however, the company that it keeps in terms of the practice of the death penalty is downright embarrassing.

In order for legislation to abolish the death penalty to be implemented, it must, of course, be politically feasible. While the belief that the death penalty is the only proper punishment for murderers may have been the general consensus during *Gregg v. Georgia* in 1976, public opinion has changed over the last 28 years. According to recent polls taken in New York, Nebraska, Kansas and Massachusetts, citizens favor life sentences without the possibility of parole (LWOP) over capital punishment. Furthermore, when the life without parole sentence included a mandatory working requirement aimed at repaying the victims’ families, this option was preferred by at least a two-to-one margin over the option of the death penalty (Bowers & Steiner).

In addition, twelve states and Washington D.C. have abolished their death penalty statutes. This highlights a trend of the removal of capital punishment policy from state codes. Recent efforts to reestablish the death penalty in these states have recently failed, as well. In Michigan, a state which has banned the death penalty for 158 years,

lawmakers were unsuccessful in their attempt to include a ballot measure that would have legalized capital punishment in the state. Minnesota governor, Tim Pawlenty recently made a similar proposal to reestablish the death penalty in his state. The proposal, however, was shot down by a Senate committee (NCADP). These cases are not isolated incidents, and they provide evidence of the steadfast disapproval of capital punishment in these jurisdictions. They also serve to substantiate the point that the country is divided on issues regarding the use of capital punishment.

Much of the support of the death penalty comes from misconceptions regarding the death penalty. For example, many people believe that the death penalty is a proven deterrent for violent crimes. A Gallup Poll showed that when people are informed that the death penalty is not an effective deterrent, support for capital punishment drops significantly (Hood, 240). Proponents of the death penalty often believe that sentences have been given fairly since the reinstatement in 1976. However, the fact is that African Americans are still overrepresented on Death Row, making up 43% of all death row inmates. In addition, a defendant is more likely to receive the death penalty if the victim of the crime was white (NCADP). Furthermore, a study entitled *In Spite of Innocence* has documented at least 31 innocent individuals who have been executed since the reinstatement of the death penalty (Hanks, 119). Another misconception about the death penalty is that it saves the government money. However, a study in Florida in 1988 showed that each execution costs approximately \$2.3 million while a 40 year prison sentence costs just \$516,000. In that same year an estimate in California stated that the state could save \$90 million each year by eliminating the death penalty (Hanks, 123). So,

not only is abolition economically feasible, but it would be wasteful continue with executions.

Policy Implementation

The implementation of the proposed policy would require the Federal government to ensure that the new legislation was adopted throughout the country. This would result in an initial expenditure to cover the costs of this task. However, in the long run, both the Federal government and the states which currently practice the death penalty would save money on executions each year. Each jurisdiction could designate where the extra funding could be spent. It is feasible that the funds could go to improving prison facilities or expanding law enforcement. However, the voters and policymakers should ultimately determine where the money should be allocated.

Policy Evaluation and Change

The purpose of the proposed legislation is to simply bring the cruel and unusual practice of the death penalty to an end in the United States. From that standpoint, the post-implementation evolution would deem the policy as a success as long as the states adhere to the legislation. However, the policy should also be evaluated on other levels. The homicide rate must be monitored in each jurisdiction to ensure that the policy does not cause a significant increase in murders. If the policy does have the effect of raising the rate of such violent crimes, then capital punishment may be viewed as a more effective deterrent than a lesser sentence. In this case, legislation to re-implement the death penalty would probably pass quite easily.

After the implementation of the abolitionist policy, supplementary legislation should also be considered and evaluated. For instance, the possible sentence of life

without the possibility of parole, coupled with a mandatory working requirement should be considered as an alternative to the traditional LWOP sentence. Even after the implementation of the proposed policy, the issue of the death penalty will be permanently present on the public policy agenda. The policy should be constantly shaped and molded to reflect the values and opinions of society, and should never be considered static or unchangeable.

Resources

- Amnesty International. "Death Penalty: Latest Worldwide Statistics Released." 6 April 2004. Retrieved on 13 April 2004 from <<http://www.amnestyusa.org/news/document.do?id=80256dd400782b8480256e690056910b>>
- Bowers, William J. and Benjamin D. Steiner. "People Want an Alternative to the Death Penalty." *Capital Punishment: A Reader*. Ed. Glen H. Stassen. Cleveland, Ohio: The Pilgrim Press, 1998.
- Hanks, Gardner C. *Against the Death Penalty: Christian and Secular Arguments Against Capital Punishment*. Scottsdale, Pennsylvania: Herald Press, 1997.
- Hood, Roger. *The Death Penalty: A Worldwide Perspective*. Third Edition. New York: Oxford University Press, 2002.
- Lifton, Robert Jay and Greg Mitchell. *Who Owns Death?: Capital Punishment, the American Conscience, and the End of Executions*. New York: Harper Collins, 2000.
- NCADP. *National Coalition to Abolish the Death Penalty*. 2004. Retrieved on 3 April, 2004 from <<http://www.ncadp.org/index.html>>.
- Nathanson, Stephen. "Does it Matter if the Death Penalty is Arbitrarily Administered?" *Capital Punishment: A Reader*. Ed. Glen H. Stassen. Cleveland, Ohio: The Pilgrim Press, 1998.
- Oxford American Desk Dictionary and Thesaurus, The*. Second Edition. New York: Oxford University Press, 2001.
- Palmer, Jr., Louis J. *The Death Penalty: An American Citizen's Guide to Understanding Federal and State Laws*. Jefferson, North Carolina: McFarland & Company, Inc., 1998.