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The Scope of the Death Penalty

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by

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Abstract

The problem I will explore in my paper is the death penalty's role in the criminal justice system and the feasibility of it as a solution versus the current alternative of lifetime prison sentences. I will also address subtopics that fuel the death penalty versus life imprisonment debate including the effectiveness on recidivism and ethical considerations.

My motivation for exploring this topic is my interest in overall public safety. I want my family to be safe when they are walking down the street without me there to protect them. Further, I have several members of law enforcement in my family and amongst my closest friends, who are on the front lines against violent criminals and are targets for the badge that they wear.

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Chapter 1: Introduction

The death penalty is among the most controversial social subjects in the United States and around the world. The legal, ethical, and administrative issues surrounding the application of the death penalty have attracted academic and legal debates alike. Despite that, the death penalty (also referred to as capital punishment in this research) is still legal in 36 states and the District of Colombia; it has stirred passionate discussions and heated debate between supporters and abolitionists (Sethuraju et al., 2016; McMullan et al., 2010; Dotson & Carter, 2012).

There are significant changes in the circumstances surrounding the application of the death penalty in the United States since the practice was confirmed to be constitutional following the Supreme Court decision in *Gregg v. Georgia* in 1976 (Bader et al., 2010). There are three main changes that have been made in the United States regarding the application of the death penalty: It is not applied to people who are mentally compromised (the Supreme Court decision in *Atkins v. Virginia* in 2002), it is not imposed on criminals below the age of 18 (the Supreme Court Decision in *Roper v. Simmons* in 2005), and it is not imposed on criminals if the crime did not result in the death of the victim (Supreme Court decision in *Kennedy v. Louisiana* in 2008) (Bader et al., 2010; Sethuraju, Sole & Oliver, 2016).

According to several polls conducted over the past 40 years on the support of the death penalty in the United States, the results have indicated that most Americans have supported the practice. However, this trend may be waning, according to survey results by Gallup which showed the lowest support for the practice since 1972 came in 2013. This paper therefore critically analyses and discusses the legal issues, ethical issues, administrative issues, and my personal philosophy towards the future application of the death penalty.

Chapter 2: Review of the Literature

Legal Issues of the Death Penalty

According to a report by the death penalty Reform Penal (2012), capital punishment is the ultimate cruel, degrading, and inhumane punishment. The death penalty is the denial of human integrity and dignity due to its irrevocable nature and, in areas where criminal justice systems are open to discrimination errors, there is a high probability of inflicting the punishment to the innocent. As a result, in several states and countries where the death penalty is applied, there is a broad brushstroke of application which does not meet the minimal acceptable societal standards, and in most cases, prisoners are detained in areas and conditions that cause mental, and/or physical suffering. In the United States, capital punishment continues to be an ever-evolving issue.

Throughout the history of America, the death penalty was applied to a broad range of seemingly minor crimes such as horse theft and trading with Native Americans. However, in modern times, the penalty has been completely abolished in 22 states. These are two extremes which illustrate the environment of the legal system in the US in relation to capital punishment. It is important to note that the application of the death penalty is determined by the perceived magnitude of the crime and the effects caused. For instance, some crimes are regarded as so heinous that states can impose capital punishment on the offenders convicted for the crimes. Such crimes are regarded as capital crimes, and they are punished by death arbitrated, and executed by the state. Capital crimes are usually in response to the act of murder, but there are other crimes that can trigger it such as treason, aggravated kidnapping, espionage, and trafficking large volumes of drugs, among others.

In the United States, there are 36 states that ever implemented capital punishment. The federal government and the military also have their own set of laws to impose the punishment. Additionally, four states have the death penalty in their repertoire as an option, but their governors have declared moratoriums on capital punishment. More importantly, even when there are declarations and sentences of death, in most cases the penalty is overturned on appeal either by overturning the conviction or a change of sentence.

Baumer et al. (2003) and Langer and Brace (2005) discussed the evolution of the modern death penalty in the U.S. and noted that for a better part of the history of the United States, the Supreme Court did not support the constitutionality of the punishment. The beginning of the modern-day death penalty in the U.S. is based on the landmark decision made by the Supreme Court in 1972 in the *Furman v. Georgia* case. The court held that the capital punishment was applied arbitrarily and inconsistently and hence it amounted to unusual and cruel punishment which is not allowed under the 8th Amendment of the Constitution (Unnever, 2010; Dwyer-Moss, 2013). The court further indicated that there were several cases of racial bias that played a considerable role in the application of the punishment and hence such structure of sentencing did not meet 'the prevailing standards of civilized conduct' (Atwell, 2015; Lee, 2010; Lee, 2011). In the decision, the Court issued a de facto memorandum on capital punishment in all jurisdictions. The new statutes would be tested in *Gregg v. Georgia* (1976).

Where the Death Penalty Is Inappropriate

Understanding the legislative issues of capital punishment involves understanding of the conditions and circumstances in which the punishment is allowed and not allowed. In the United States, following the Gregg and Furman sentences, most of the capital punishment decisions have focused on whether the applicable statutes meet the requirements set under *Gregg v.*

Georgia (Latzer, 2010; Bienen, 2010). According to Joo (2012), the dissimilarity and discriminatory application of capital punishment is the main issue behind it, and which has hindered the death penalty's effectiveness in deterrence. The author noted that this punishment can be used by political enemies to punish people who do not support them, especially in areas where the criminal justice system is full of corruption and discrimination. In their submissions, Lee (2010), Lee (2011), and Olson (2014) noted that the death penalty is not appropriate where there was no intention to kill, where defendants are minors, where the defendant was convicted of a non-fatal assault, or where the defendant is mentally ill.

The inappropriateness of capital punishment in a non-fatal assault is supported by the Supreme Court ruling in *Coker v. Georgia* (1977) that a non-fatal rape cannot be categorized as a capital crime. In this case, the defendant had raped a woman during a violent robbery and was sentenced to death for the non-fatal rape (Reichert, 2011; Durrant, 2013; Roberson, 2015). The court ruled that the sentence was grossly inappropriate, and the defendant was poorly treated by the criminal justice system because he did not unjustly take a human life. While focusing on this ruling, Langer and Brace (2005) noted that capital punishment needs to be effectively considered and addressed effectively to ensure that it does not fail in its mandate to deter criminals from committing crimes. The authors supported the abolition of the punishment by asserting that the ruling was made on the single basis of violent robbery and rape, but that capital punishment should be reserved for the event in which the victim loses their life.

However, Baumer et al. (2003) had a different perspective, and in their argument, they mentioned the clarity of the Constitution on the application of capital punishment, despite that on many occasions, it is ignored and not effectively applied, especially its effective application would help to minimize violent crimes The authors noted that capital punishment should be

expanded and not only be used only where there is loss of life, but also where there is loss of dignity in cases such as rape. Victims of rape would only be made whole again and feel that justice has been served if the crime is regarded and case determined with the seriousness it deserves. Nonetheless, Langer and Brace (2005) had earlier cautioned that capital punishment involves taking the life of the criminal and hence it should not be based on the emotions of the victim but on the principal factor of a crime, such a s murder taking a life. The authors noted that the non-fatal assault concept is used in making a judgment to ensure that this type of punishment is reserved only for when a punishment is equal to the crime that has been committed.

For a period of thirty years, the Coker decision was applied to cases where the victim was not an adult and, in some states, child rape was still classified as a capital crime. Conversely, the Supreme Court ruled in 2008 the unconstitutionality of these such state statutes (Baker, 2016; Lane, 2010; Norman, 2010). Based on the court's decision, capital punishment cannot be applied for a non-fatal offense, regardless of the age of the victim. In *Kennedy v. Louisiana* (2008) it was ruled that the death penalty should only be applied when the perpetrator had the intent to kill. However, the intent to kill is not always necessary for conviction in a murder case (Bader et al. 2010). For instance, murder may apply in the event death occurred following conduct that demonstrated a deprived indifference to human life or if death occurred in the act of a felony. Nevertheless, if there was no intention to kill, the Supreme Court ruled that the death penalty should not be imposed in such cases. Therefore, it is the responsibility of prosecutors in the criminal justice system to prove without any reasonable doubt that the perpetrator had intent to kill (McMullan et al., 2010; Sethuraju et al, 2016).

The issue of capital punishment of minors is based on the Supreme Court ruling in *Roper v. Simmons* (2005) that the death penalty for people under the age of 18 is unconstitutional. In

this ruling, the court reasoned that minors have underdeveloped senses of maturity and hence may commit capital crimes due to their lack of biological development. Further, the court ruled that minors are more vulnerable to negative external pressures and hence they may commit capital crimes due to these pressures. The minor, according to the court, does not have a developed psyche like that of an adult and therefore is not capable of the same decision-making ability (Bessler, 2012; Blecker, 2013; Hartnett, 2010).

The death penalty has also been ruled on by the courts regarding mental aptitude. Hartnett (2012) and Acker and Champagne (2018) discussed the circumstances in which capital punishment is not legally appropriate where the defendant is mentally disabled. Drawing from the *Atkins v. Virginia* (2002) decision on Daryl Atkins, who had abducted, robbed, and killed his victim, the court ruled that he should not be executed because he was mentally ill according to an evaluation of his mental health. Acker and Champagne (2018) noted that the court reasoned that mentally impaired defendants have a high possibility of committing a crime as compared to the mentally stable defendants. This idea was supported by Londono (2013) and Eaton and Tony (2014) in their discussion that capital punishment should not be applied to mentally ill individuals because they were not mentally well when committing the crime, and hence, their criminal activities were propelled by other factors.

From this argument and the decision made by the court it can be noted that the effectiveness of capital punishment in deterring potential murderers is reduced when the defendant is mentally impaired because their ability to rationalize is flawed. In the case of Atkins, his IQ was significantly below average, and hence courts were required to consider the situation and decide based on the medical evaluations. Therefore, capital punishment is not always a legal option in all cases or circumstances but instead, its application is determined by

the condition of and circumstance surrounding the crime and hence the decision should not overrule these factors.

Constitutional Law Developments

Following the sensitivity and the weight of capital punishment not only in the United States but also around the world, there have been various developments on constitutional laws. For instance, in the United States, only 5 out of 50 states applied capital punishment in 2020. These states included Texas, Georgia, Alabama, Tennessee, and Missouri. The low number of executions in the United States is reflected globally, whereby only 20 countries out of 195 conducted government executions according to a report by Amnesty International (Fins, 2020). However, the U.S. Federal Government conducted various executions during the Trump administration. The executions by the Trump administration are regarded as unique by the abolitionists because there were no executions on the federal level in the last 16 years.

It can be argued that the Eighth Amendment supports the notion that capital punishment is cruel and unusual and that it does not consider the integrity and decency of the maturing society. Following various challenges of the constitutionality of the death penalty, the punishment was suspended in 1972 by the Supreme Court. De Boef et al., (2011) have noted that the Supreme Court has never ruled that capital punishment is unconstitutional per se. The authors based their argument on the *Furman v. Georgia* case whereby the court was requested to rule whether the defendant would be punished through the death penalty. The suspension of the death penalty in the US did not mean that some states were not in favor of it but instead it meant that the application was suspended by the court and between 1972 and 1976, no punishment of this magnitude was applied.

According to Blecker (2013), capital punishment was reinstated in 1976 following the *Gregg v. Georgia* court decision whereby rather than abandoning the death penalty; the statute was enacted by 37 states in an attempt to address the concerns of White and Stewart in the Furman case. Some states responded to the reinstatement by enacting mandatory capital punishment for criminals convicted for certain crimes such as murder (Langer & Brace, 2005; The Death Penalty Reform Penal, 2012). Dotson and Carter (2012) discussed that the Supreme Court narrowed capital offenses in the *Coker v. Georgia* decision in 1977. The court barred capital punishment for raping of adult women. In the 1980's, the *Godfrey v. Georgia* (1980) decision showcased the Supreme Court's sentiment that murder is only punishable by the death penalty if it involves a narrow and precise aggravating factor.

The legislative issues discussed makes it clear that the statute is supported legally despite its various challenges. The Supreme Court has always provided decisions to the states to ensure that the death penalty is effectively applied without any interference. According to McMullan et al. (2010) and Sethuraju et al. (2016), judges in criminal cases can impose harsher punishments than what is pursued by prosecutors. In this case, the Supreme Court has the responsibility of guiding and giving directions on the best way possible on what should be done on such cases.

Administrative Application of the Death Penalty

Most of the discussions on the death penalty are concerned with the practices on the state government level. Traditionally, states were responsible for policing, prosecution, and most of the criminal trials were held in state courts. The federal government also has the death penalty, but it is used less frequently as compared to the state government. For instance, under the Obama administration, the death penalty was suspended on the federal level to review the practice. The review was prompted by a failed execution in Oklahoma, where the offender regained

consciousness and displayed signs of significant pain and distress during the execution. The Trump administration resumed executions in July 2019.

Of note, most of the cases that find their way to the federal court system are state death penalty cases. The Eighth and 14th Amendments of the Constitution places limits on the state's criminal punishment processes and hence several cases of the death penalty are challenged in the federal court system. For instance, in *Bucklew v. Precythe* (2019), the Supreme Court assessed the challenge of an inmate's state execution method and then in *Madison v. Alabama* (2019), the prisoner's challenge to his state capital punishment based on his mental state. The discussion of the administrative application of the death penalty focuses on the Constitution, the modern-day federal death penalty, the legal process of the death penalty's application, and methods of applying the death penalty.

The Constitution

The Constitution is very clear on the roles and operations of trial and appellate courts. Before a prisoner is executed, there is a legal process that is followed, and the prisoner is allowed to appeal the case. In order to give room for the prisoners to appeal, the Constitution has defined different courts and different corresponding functions (Stojkovic et al., 2015; West & Paul, 2007; White, 1985; Williams, 2009). For instance, the trial courts have the responsibility of establishing the facts and determining whether a defendant is guilty or not. On the other hand, the appellate courts have the responsibility of reviewing whether the trial courts have observed proper legal procedures in the trial and deciding in order to establish the facts and determine guilt or liability. The appellate court can remand the case for new proceedings in the event it establishes that procedural irregularities prevented a fair trial (Tarr, 2012; Tarr, Cornelia & Aldis, 1988). This is done to ensure that the defendant is justly executed.

Most of today's criminal cases are resolved without a trial by the offender pleading guilty after plea negotiations between the prosecutor and the defense lawyer. According to Glenn (2004) and Friedman (2005), serious charges have a higher likelihood of going to trial. In this case, defendants charged with serious crimes are likely to take their chances with a jury because of the fear of the punishment that would result from a guilty plea and the prosecutor may refuse to plea bargain because of the public support for severe punishment for people who commit serious crimes.

The administrative application of the death penalty is dependent on the process used by the criminal justice system to arrest, try, and sentence the offender (Stojkovic et al., 2015). As mentioned by the International Commission of Jurists (1997), in the American adversarial system of justice, the trial courts depend on the parties in the case to establish relevant physical evidence. This can be done by enlisting expert witnesses to support the victim's version of the facts while the defense calls its own experts to counter the physical evidence of the prosecutor's experts (Langer & Brace, 2005; The Death Penalty Reform Penal, 2012). This is done to ensure that the decision of the court is not guided by emotions but by the evidence presented.

The Constitution provides guidelines on the federal and state death penalty. Under Article 1, the legislative powers of the Constitution offer Congress the power to make laws related to particular federal issues or the issues of national concern. These powers are provided in the Constitution in Article 1, Section 8 and are regarded as Enumerated Powers. Due to this clause, the death penalty exercised at the federal level is imposed with regards to crimes that are categorically federal (Geraghty, 2003; Rochvarg, 2007). Examples of the Enumerated Powers are; crimes committed on the high seas, regulating trade with foreign nations and between states, and organizing, arming, and disciplining the militia (International Commission of Jurists, 1997).

On the other hand, the Tenth Amendment of the Constitution indicates that the states have all the powers that are not specifically granted to the federal government. Therefore, traditionally the state reserved the powers of determining punishment for associated crimes. This indicates that the states have the responsibility to outline their own criminal law whereby police make arrests, and the judicial system tries the accused and decides the best sentence for the offender if found guilty or liable. In this respect, the police power is regarded as local or controlled by the state and hence in most cases the death penalty is imposed by the state government (Stojkovic et al., 2015). However, in the application of the death penalty, states are required legally to abide by the protections of the Constitution and the Bill of Rights when applying the death penalty (Bader et al., 2010).

The Eighth Amendment of the Constitution protects citizens against cruel and unusual punishment, and it applies to both the federal and state governments. The amendment has been used by many defendants as a basis to challenge the death penalty in cases such as *Gregg v. Georgia* (1976), *Jurek v. Texas* (1976), and *Roberts v. Louisiana* (1976) among others (Dotson & Carter, 2012; McMullan et al., 2010). The Sixth Amendment of the Constitution guarantees that the defendant has the right to have a jury interpret the facts of the case rather than just the judge. A good example here is *Ring v. Arizona* (2002) where the Supreme Court ruled that a jury must decide on the facts and not the judge in the determination of the imposition of the death penalty (Sethuraju et al., 2016). The discussion on constitutional interpretation with regards to the application of the death penalty has indicated that there are areas where the Constitution favors the defendants in a bid to ensure that there is fairness and justice in the application of the punishment, even if it congests the judicial system.

Legal Process of the Death Penalty's Application

Due to the magnitude of the punishment, the legal process of the death penalty in the US involves five critical steps. The application of these steps is used to ensure that the punishment is applied effectively and to the right defendants based on the provision of the Constitution. The first step, as discussed by the International Commission of Jurists (1997), is the prosecutorial decision to seek the punishment. West and Paul (2007) noted that although judges in criminal cases can impose a more severe sentence than the one demanded by the prosecution; the capital punishment can be handed down only if the prosecution decides to seek it. Since the *Furman v. Georgia* case in 1972, there have been several questions about whether or not the sentencing arbitrariness has been replaced by prosecutorial arbitrariness.

According to a study by Pepperdine University School of Law that was published in the Temple Law Review, a survey of the decision-making process of prosecutors in several states indicated that the prosecutors' death penalty filing decisions are marked by local peculiarities. The study further found that there is a wide divide in prosecutorial discretion due to the overly broad criteria. For instance, California law has 22 special circumstances making almost all the first-degree murders potential capital cases (Wihbey, 2011). This indicates that the precise type of unfairness that the Supreme Court aims to eliminate that may infect capital cases (Goodman et al., 2009). The survey further indicated that Texas had the highest number of death penalty cases (340) from 1996-2006, followed by Florida (188). Gershowitz (2010) noted that there was a proposed solution against the prosecutorial arbitrariness which aimed at transferring the prosecution of capital cases to the state attorney general. This proposal was exercised in 2017 by Governor Rick Scott in Florida by removing all capital cases from the desk of local prosecutors

because of the decision by a prosecutor not to seek the death penalty regardless of the gravity of the crime (Clark, 2017).

The second step is sentencing; 26 out of 28 states with the death penalty require the sentence to be decided by a jury. Out of the 26, 25 states require a common decision by panel with Alabama being the only state that does not require a common decision of the panel (Rochvarg, 2007; Williams, 2009; Tarr, 2012). The state of Alabama requires that at least 10 jurors concur and there is a retrial in the event that the jury deadlocks (Goodman et al., 2009). On the other hand, in Nebraska, the sentence is decided by a three-judge jury and if one of the judges opposes the capital punishment, the defendant is sentenced to life imprisonment. The other category is where the judge decides the sentence alone as is the case in the state of Montana (Gershowitz, 2010).

Dwyer-Moss (2013) noted that states in America differ on what should happen in the event that the punishment phase results in a hung jury. In this circumstance, California, Nevada, Arizona, and Kentucky advocate for a retrial of the penalty phase to be conducted before a different panel. These states advocate for the common-law rule for a mistrial. Missouri and Indiana, on the other hand, indicate that the judge has the duty of deciding the sentence. The other 19 states propose a life sentence in the case of a hung jury, even if the death penalty was opposed by only one panelist.(Stojkovic et al., 2015).

The third step is direct review where the case of a defendant sentenced to death at the trial level is appealed. In this case, the appellate court assesses and reviews the record of the evidence presented in the trial court and the law applied by the lower court to decide whether the decision made was legally sound or not (Dwyer-Moss, 2013; Steiker & Steiker, 2020). Peffley and Hurwitz (2007) and Eaton and Christensen (2014) noted three main outcomes of a direct

review of a capital sentencing: If there are no significant errors found by the appellate court, the court affirms the judgment. However, if there were significant errors, the appellate court reverses the judgment or nullifies the sentence and orders a new capital sentencing hearing.

The last outcome is that, if the appellate court finds that no reasonable judge could find the prisoner eligible for capital punishment, an order is given for the acquittal of the defendant or the defendant is found not guilty of the crime accused and hence the death penalty is not applied. Nonetheless, the third outcome is very rare in the criminal justice system because in most cases, judges find the criminal liable for the crime accused for at the trial court (Stojkovic et al., 2015). Londono (2013) noted that about 60% of the trial court cases survive the process of the direct review.

According to Acker and Champagne (2018), sometimes, when the death penalty is affirmed on the direct review, there remain supplemental methods to appeal the decision. However, these methods are less common as compared to typical appeals. The authors indicated that these supplemental methods are regarded as collateral review, which provides an avenue for upsetting decisions that have become otherwise final. In the case where the prisoner is sentenced to death at a state-level trial, which is usually the case, the first step undertaken in a collateral review is the state collateral review. Despite all states having some kind of collateral review, the process of review is different from one state to another (Charles, 2010). The collateral proceedings allow the defendant to challenge the death penalty decision on the grounds that were not raised reasonably at the trial or direct review stages. In most cases, grounds like the inadequate assistance of counsel require the court to consider new evidence outside the evidence presented to the trial courts, which may not be done in the ordinary appeal (Maier, 2017; Stojkovic et al., 2015)).

The last stage is the federal habeas corpus. According to Acker and Champagne (2018) and Steiker and Steiker (2020), after the affirmation of the death sentence in the state collateral review where the defendant may file for federal habeas corpus. This is a type of collateral review is a unique kind of lawsuit that can be brought in federal courts and it offers the state prisoners an opportunity to attack the death sentence in a federal court. The federal habeas corpus ensures that the state courts have done a reasonable job through the direct review and state collateral review in protecting the federal constitutional rights of the prisoner. Therefore, prisoners have an opportunity to bring new evidence to prove their innocence of the crime (Gershowitz, 2010).

Administrative application of the death penalty can be understood in three areas: the constitutional provisions of the punishment, the legal process followed in administering the punishment, and the methods of administering the punishment. Therefore, having discussed the constitutional provisions and legal process followed in the application of the death penalty, it is important now to discuss the methods used to administer the punishment.

Methods of Administering the Death Penalty in the United States

Fuchs (2020) and Dieter (2008) noted that all 28 states with the death penalty provide lethal injection as the main method of execution, while Vermont specifies electrocution as the main execution method for treasonous crimes. The authors further noted that despite that some states allow other methods, they are applied as secondary methods and are used merely when requested by the prisoner or when lethal injection is not available at the time of application. Maier (2017) noted that the historical three-drug protocol is used in several states. In this case, the first step is the application of anesthesia, the second is the application of pancuronium bromide to paralyze the prisoner, and the third step is application of potassium chloride to stop the heart. However, Acker and Champagne (2018) noted that 8 states have used a single-drug

protocol whereby the prisoner is inflicted with an overdose of a single anesthetic. While the drug required is specified in some states, most of them do not, thus giving more flexibility to the prison officers physically carrying out the executions.

It is crucial to note that the accessibility of the chemicals by the correlational officers has become very difficult due to outside pressures from antideath penalty stakeholders and activists. Hospira was manufacturing sodium thiopental but stopped in 2011, and it was reported in 2016 that over 20 American and European drug manufacturers such as Pfizer had taken firm steps of preventing their drugs from being used for lethal injections. The actions by these companies have contributed to use of other drugs like etomidate, pentobarbital, or fast-acting benzodiazepines such as midazolam. Ohio approved the use of an intramuscular injection of hydromorphone in 2009. Lethal injection was regarded as the constitutional method of execution by the Supreme Court in three different cases: *Buclew v. Precythe* (2019), *Baze v. Rees* (2008), and *Glossip v. Gross* (2015). Other methods that have been used include lethal gas (used in Arizona and California), electrocution (used in Florida, Virginia, Alabama, Kentucky, Tennessee, and South Carolina), and firing squad (used in Oklahoma, Utah, and Mississippi) Peffley & Hurwitz, 2007; Fuchs, 2020).

While federal executions had been suspended during the Obama administration, it was reinstated during the Trump administration. According to the annual survey released by the Death Penalty Information Center in December 2020, the federal government has made an aggressive return of the application of capital punishment after an informal moratorium of 17 years (Clarke, 2020). The report indicated that the Trump administration was responsible for about 60% of the nation's total death penalty executions in 2020. More importantly, the Department of Justice is very vital in the enforcement of the death penalty because attorneys in

the department represent the government against people accused of capital crimes. Therefore, if the death penalty is allowed by federal law, it is the responsibility of the department of justice to decide whether the punishment would be applied in a specific case.

The criminal justice system in the United States ensures that the defendants' rights are observed even in the application of the death penalty. However, the abolitionists, anti-death stakeholders, and activists base their argument against the application of the death penalty on the ethicality of the punishment. Therefore, it is important to understand the ethical application of the capital punishment in the United States.

Ethical Application of the Death Penalty

The main debate around the application of the death penalty is based on the ethics of the criminal justice system and the punishment. There have been debates on whether it is morally right or wrong for the state to execute people and, if it is right, under what circumstances should the punishment be applied. The ethical issues involved in the debate include the general moral issues of the punishment and whether it is ethical to deprive a human being of life.

The term ethic is derived from 'ethos', which is a Greek word with multiple meanings. Drawing from Aristotle and the Oxford English Dictionary, Pollock (2019), Kania (1999), and Walter (2019) defined the term ethos as relating to nature or disposition. In this case, the authors noted that ethos is the characteristic spirit of an era, community or a culture that is manifested in attitudes and aspirations of the community. In this paper, ethics is defined as the character of an individual, an institution, an organization, or a group of people as represented by values and beliefs. Ethics, therefore, denotes the values and beliefs of American society and therefore they should be analyzed with relation to the application of death penalty (Bonnie, 1990). The Supreme Court recognizes the modern societal values and beliefs, and it is very keen to analyze

whether the application of the death penalty contradicts these values and beliefs or not. This is evident from the Eighth Amendment of the Constitution.

Further, the Supreme Court also recognizes the examination of those values and beliefs with regards to the respect for the dignity of mankind and hence capital punishment should not be excessive, either being exceptionally out of proportion to the harshness of the crime or through the unnecessary and malevolent infliction of pain (Mbah et al., 2019; Schabas, 2002). The ethical application of the death penalty involves supporting the punishment based on the magnitude of the crime committed or opposing the punishment based on argument on the importance of life rather than taking revenge.

Making Moral Judgments

Society is mandated to make moral judgments in every facet of life. These judgments are made regularly, such as the benefits of giving to charity and the unethical issues of abortion, among others. Moral judgments involve differentiating good and bad behavior. It is important to note that individuals and institutions make choices which can be judged as right or wrong. To understand the ethical application of capital punishment, it should be noted that not all behaviors that involve the question of ethics. Pollock (2019) discussed four elements in which acts can be judged as moral or immoral, ethical or unethical, acts (not beliefs) that are human, free will, and which affect others. Therefore, an act that is regarded as human and was conducted in free will and has effects on others that can be judged as ethical or unethical.

For instance, the public is concerned with the act of stealing and judges it as immoral and not on the act of staying idle. A behavior is contributed by the thought process, and the thought process is determined by the idleness of an individual. In this case, an idle individual would think of stealing a large sum of money in order to purchase a sailboat. Therefore, according to Pollock

(2019), people are not concerned about the feelings of people about an action unless they are affected by the actions of others. The author noted that it is important to consider and understand the motive or the intention behind a behavior in ethical formalism.

An act is judged as ethical or unethical if it is human. For instance, when a dog bites an unsuspecting victim, the act is not judged as ethical or unethical though the dog owner is criticized for allowing the dog an opportunity to bite. Additionally, the devastating earthquakes in Ecuador in 2016, Haiti in 2010, and Nepal in 2015 are not judged as immoral because they were not perpetrated by humans. Therefore, behaviors that are perpetrated by humans are judged as ethical or unethical. The death penalty in the United States is perpetrated by the federal and state courts and the criminal justice system, and hence it can be judged as ethical or unethical. Further, Pollock (2019) noted that an act is judged as ethical or unethical if it has free will. This means that the perpetrators were not coerced to perform the task. Lastly, an act must have impacts on others in order to qualify to be judged as ethical or unethical. From this analysis therefore, the death penalty law in the US qualifies to be judged as ethical or unethical because it meets all the four requirements presented.

Unethicality of the Death Penalty

Based on utilitarianism and morality, the death penalty is unethical and hence should be abolished. The proponents of abolition of the death penalty argue that pain comes from four main sources: religion, political, physical, and moral sources (Mbah et al., 2019). In this respect, judges should always advocate for pleasures and the avoidance of pains regardless of the victims of defendants (Mbah et al., 2019). As a result, this principle of utilitarianism is used to criticize the death penalty, whereby the argument is that the main aim of punishment is to control actions or the general prevention. Jeremy Bentham, one of the proponents of utilitarianism and

opponents of the death penalty has expressed the need to abolish the punishment based on utilitarianism principles (Mbah et al., 2019). Bentham argued that any justifiable punishment that the criminal justice system should adopt is one that produces the greatest happiness (Baumer et al., 2003; De Boef et al., 2011). This happiness does not only involve a lower crime rate but also other factors such as the well-being of the offender which are not considered by the death penalty.

For instance, when the judge or the trial court decides that a father of two should be punished to death, it considers only the vengeance part of it but does not consider the lives of the children or dependents of the prisoner (Bader et al., 2010). In such a case, the decision made does not efficiently produce the greatest happiness. As a result, the proponents of utilitarianism propose that the death penalty should be abolished and replaced with the prison discipline. In the view of Bentham, prison discipline should involve imprisonment followed by hard labor and scarcely with solitary confinement (McMullan et al., 2010; Dotson & Carter, 2012). In such as case, the offender is punished for the crime committed, and at the same time, he/she is rectified and once they leave the correctional institutions, they would not engage in crimes (Sethuraju et al., 2016).

The utilitarianism view of the death penalty indicates that while the aim of punishment is to rectify the wrong done, it is also a way of paying for the wrong done. From this perspective, the victims of the death penalty cannot be profitable as the convict cannot compensate for the loss suffered by the victim of the crime or the society in bringing the criminal to justice. The winning point for utilitarianism is that there is no solution for death. This means that if the sentence was erroneously afflicted, it cannot be corrected, unlike life imprisonment that can be rectified by liberating the prisoner if discovered to have been innocent.

Another perspective of the unethicality of the death penalty is the aspect of taking the life of an individual. The opponents of the punishment argue that life is a gift given by God, and hence only God can take it. Regardless of the crime committed, the justice system has no mandate of taking what they have not been given. The government has the mandate of providing good services to people because people pay taxes, meaning that the government gives back to the society for the taxes collected. However, the government does not give life, and hence it has no mandate of taking it away.

The Constitution provides that every individual has the right to life, and no one should take the life away and hence the legal structure of the government through Constitution to implement death penalty can be interpreted as a breach of the right to life. It is worse in cases where the punishment is incorrectly applied, whereby the prisoner is innocent. In such a case, the punishment cannot be overturned and hence the damage has already been done, meaning that the prisoner has been unjustly killed. Eaton and Tony (2014) regard the death penalty as unethical and a cruel choice because of the position taken by the government to take the life of an individual. The authors base their argument on the fact that life is a gift given by God and hence the right to take it rests only with the creator of life.

Quoting Amnesty International, Londono (2013) and Acker and Champagne (2018), both noted that the death penalty is unethical, degrading, inhumane, and cruel and should be opposed regardless of who is accused or the crime committed. The authors noted that the purpose of the criminal justice system is to correct the wrongdoings of people by placing them in correctional institutions where their lives can be changed but not to take away their lives. In this case, capital punishment is viewed as breaching two fundamental human rights: the right to life and the right to live free from torture. Amnesty International base their argument on the irreversibility of the

punishment and mistakes that happen whereby prisoners are sent to death penalty only to be exonerated later after further evidence indicate their innocence. The organization indicates that the death penalty is unethical because it does not deter crime, and it is used within the skewed justice systems whereby it serves as a political tool to punish some people due to their ideological or political stance.

The ethicality of the death penalty can also be examined from the reactions of family members of the murdered victims and families of the executed prisoners. In a discussion on the cruelty of the death penalty, Mbah et al., (2019) noted that the families of the murdered victims do not feel any better after the execution of the criminal, but instead, the punishment has a negative effect on them. The authors noted that the death penalty is a type of vengeance which is aimed at compensating the lives of the murdered victims' families, but it fails miserably.

Quoting research conducted by the University of Minnesota in 2012, the authors indicated that 20.1% of the respondents indicated that the death penalty did not help the families of the murdered victims heal. These findings were echoed by research conducted by Marquette University Law School in 2012 that indicated that co-victims had improved psychologically or physically in the case where the prisoners were sentenced to life imprisonment rather than the death penalty. Mbah et al., (2019) cited the case of Jeff Ferguson who was executed in 2014 by a Missouri court for rape and murder of Kelli Hall. The Hall family indicated that the execution of the prisoner caused an emotional wound to them rather than healing them. This indicates that in many cases, the murdered victim's family regrets the execution of the prisoners, years after the execution is done because they would not think of taking part in killing the prisoner.

Mbah et al., (2019) used the effects caused by the death penalty to the family of the prisoner to discuss the unethicality of the punishment. In their discussion, the authors indicated

that the life of the children of the executed prisoner is very devastating, and at times, it builds up in the children of the prisoner a desire for revenge. This idea was echoed by Pollock (2019) in his argument that the criminal justice system does not consider the consequences of the death penalty implementation, especially where the children and family members of the executed prisoner develop a desire for revenge and future violent tendencies.

Ethicality of the Death Penalty

The death penalty is mainly defended on the grounds that society has a moral obligation to protect the welfare and safety of the citizens. This welfare and safety are threatened by rapists and murderers, and hence it can be protected only by putting murderers to death so that they do not kill again. While it is unanimously agreed that no one has the right to take the life of an individual except their creator, this argument should also be applied against the murderers. If they are left or sentenced to life imprisonment, they can still kill their fellow prisoners, and hence the best way to ensure that they do not kill again is to put them to death (Eaton & Christensen, 2014). Second, the proponents of the death penalty contend that society has an obligation of supporting practices that bring about the greatest balance of good over evil. In this case, the application of capital punishment is a method of supporting the balance of good over evil. The practice benefits the society by potential deterrence of violent crimes such as murder and rape. Though it is not possibly simple to produce evidence to support this claim because those deterred by the death penalty do not commit murder, it can be argued that if people know that they would die if they performed a capital crime; they would be largely unwilling to perform it (Acker & Champagne, 2018; Eaton & Christensen, 2014). Therefore, the aim behind the application of the death penalty in the United States criminal justice system is to ensure that individuals do not engage in capital crimes because they know the consequences.

According to Steiker and Steiker (1995), society should exercise justice, and one of the methods of exercising justice is applying the death penalty. The authors noted that those who are convicted of heinous crimes of murder should be served justice by being executed. This is because death cannot be equated with anything else, and hence a murderer should also die. Justice is a matter of ensuring equal treatment in all cases and consequently when one kills, the only way of providing justice is killing the murderer.

It is unjust to sentence life imprisonment or any other sentence preferred by the opponents of the death penalty, to a criminal who deliberately inflicts pain and great losses on others that what he/she should bear (Acker & Champagne, 2018). Justice dictates that every person should bear the same volume and weight of the pain and loss inflicted to others. There is no point of allowing someone convicted of murder to enjoy life through life imprisonment sentences, but justice should be served by inflicting the same amount of loss to the prisoner (Steiker & Steiker, 1995).

According to an article titled “Why the Death Penalty is Still Necessary” by Edward Feser, the death penalty is reserved in the United States for the most atrocious murders and the most brutal and conscienceless murderers. Feser noted that the application of the death penalty is not a rotary run by the state where the unlucky prisoners are chosen randomly for the punishment as argued by some critics but a well-thought process of punishing criminals who have been convicted for capital crimes (Mbah et al., 2019). Feser noted that capital punishment is a filter that selects the worsts of the worst. This denotes that failing to execute criminals convicted of capital crimes or sentencing them to less than death punishment would fail to serve justice because the penalty- seemingly life imprisonment- would be grossly unequal to the heinousness of the crime.

Ethicality means that justice is served by striking a balance between the crime committed and the punishment provided. Therefore, the point of the death penalty is well understood by the prosecutors, judges and the family of the murdered victims. In a discussion in favor of the death penalty, Walter (2019) quoted the words of Edward Feser that conceivably most decisively, in the supreme gravity of the death penalty, it promotes the belief in and respect for the majesty of the moral order as well as for the system of human law that both derives from and supports moral order. This means that there is no way the death penalty can be described as unethical while at the same time murder, is regarded as unethical. It would therefore mean that criminals are allowed and permitted by the moral order to kill innocent people, but they are not allowed by the moral order to be killed for the crime committed.

Antonin Scalia, a former Justice of the Supreme Court, wrote an article titled "God's Justice and Ours" published in May 2002 on the First Things. In the article, Scalia stated that he would not take part in the process of applying the death penalty if he believed that it is unethical to do it (Mbah et al., 2019). Based on this statement, the judges and the entire criminal justice system that particularly involved in the application of the death penalty have taken an oath to protect the lives of their citizens and hence applying the punishment is one way of protecting the citizens. It should be noted that ethicality is an act that should be viewed from the impacts the act has on others. The impact of a life imprisonment sentence to a murder convict is higher than the death penalty because the executed prisoner would not kill again, but there is still a possibility of the prisoner killing if imprisoned for life (Charles, 2010). The discussion of the ethicality of the death penalty indicates that, however much the practice is criticized by the abolitionists and critics, and stakeholders of the death penalty, it is an effective way of serving justice to people convicted of heinous crimes.

Personal Philosophy on the Death Penalty

This section discusses personal philosophy on the death penalty in the United States and is drawn from discussions in the aforementioned studies. The view on the issue of the death penalty is guided by the legal process, the methods of application, and the ethical application of the punishment. Notably, the drafters of the Constitution clearly indicated the circumstances and condition in which capital punishment should be applied, and unless these conditions and circumstances fall short, the punishment should be applied.

The application of the death penalty is a way of deterring criminals from conducting crimes. Unless otherwise, a criminal with a sound mind should be interpreted to have committed a crime willingly with an aim of inflicting loss or pain, and hence there would be no harm if the same pain and loss is inflicted to him/her. However, in the case that the prisoner is mentally ill, the death penalty should not be applied even if the crime committed inflicted pain and loss to the victims. This argument is drawn from the legal perspective based on the Supreme Court decision in 2002 on Daryl Atkins who has abducted, robbed, and killed his victim, the court ruled that he should not be executed because he was mentally ill according to the evaluation of his mental health. I would oppose the application of the death penalty if it were done against the law and in areas that have been prohibited by the law. For instance, using the case of a mentally ill prisoner, it is clear that the prisoner performed the illegal act due to the unstable condition of the mind and hence it cannot be interpreted to mean that the prisoner was willingly inflicting loss on the victim.

Another foundation for my support of the death penalty is the legal treatment of the minor defendants. Based on the *Roper v. Simmons* (2005) that the death penalty for people under the age of 18 years is unconstitutional, I, therefore, support the application of capital punishment

on prisoners who are above the age of 18 as they have a fully developed cognition to understand their behavior and the consequences for them. The support of the death penalty or the lack of it is informed by constitutional provisions.

For instance, the support for the punishment is motivated by *Coker v. Georgia* (1977) that a non-fatal rape cannot be categorized as a capital crime. In this case, the Supreme Court distinguished between a fatal and a non-fatal capital crime and advised that the capital punishment should only be applied to the fatal crime. This is aimed at putting the bar for the application of the death penalty very high to ensure that executions are saved for the worst of the worst. It is also important to indicate that those prisoners who are not sentenced to death are not simply exonerated from the crime committed but they are instead served with other sentences depending on the impacts of their acts on the people and the society at large. From this perspective therefore, I support the application of the death penalty on the basis of the legislative issues because the Constitution, and interpretations made by the Supreme Court, has clearly demonstrated that those who are executed are indeed the worst of the worst.

Support for the death penalty is based on the legal process followed in the application of the punishment. As discussed in the previous section on the administrative issues of the application of death penalty, there are five steps followed by the state courts to ensure that the punishment is accurately applied. The Eighth Amendment of the Constitution considers the rights of the prisoner by asserting that the death penalty should be applied in full cognizant of the rights of the prisoner and without any iota of discrimination. Drawing from the five steps, it is clear that the prisoner is given every opportunity to prove his/her innocence and why the punishment should not be implied through the appellate courts.

As mentioned by Sethuraju et al. (2016), McMullan et al. (2010), and Dotson and Carter (2012), the Constitution has provided a good ground for the application of the death penalty as well as proving the prisoners with an opportunity to appeal their case to the higher court where they can table new evidence to prove their innocence. By having several steps and a panel making the decision (as it is the case in most of the states) rather than a single juror, it means that the process does not aim at punishing an innocent individual. The authors indicated that the innocence of the prisoner can always be detected within the steps employed in the application of the death penalty.

The methods used in the application of the death penalty gradually became more humane in modern times and hence the death penalty should not be described as cruel. In fact, in some cases, the methods of execution are more humane than the methods used by the prisoner to kill the victims of murder. Therefore, the punishment should be supported on the basis that the prisoners are not subjected to cruel methods that would inflict significant pain to them as the victim felt (Dieter, 2008; Fuchs, 2020).

The support for the application of capital punishment is rooted in the ethicality of the punishment. Despite the abolitionists, critics, and stakeholders against the application of the punishment base their argument on the unethicality of taking someone's life as founded on the rights of life and the rights to live free from torture, it should be noted that the prisoner should understand that his/her rights are limited when they affect other people's rights. For instance, drawing from the article by Edward Feser, "Why the Death Penalty is Still Necessary", the penalty is necessary because it provides balance of the crime committed. This means that before the punishment is pronounced, the judges must have considered several factors and conclude that the death penalty is the most appropriate option to compensate for the crime committed. Based

on the discussion on the legislative, administrative, and ethical application of the death penalty, I strongly support the punishment. Another perspective that demonstrates the support for the punishment is the approach of retribution as discussed by Immanuel Kant.

Retribution Approach

To understand the ethical application of the death penalty, the argument is based on the retributivist approaches discussed in the previous literature. This idea is informed by the fact that the death penalty is aimed at deterring capital crimes. The retributivist approach justifies the amount of punishment for crime or misconduct by evaluating the crime committed. A classical expression of retributivism on the death penalty can be traced to the 18th century in the works of Immanuel Kant. Kant appeals to an interpretation of lex talionis which is called the Law of Retribution to justify death penalty.

Kant maintained that judicial punishment should be imposed on an individual on the basis that he/she has committed a crime and hence the defender deserves to be punished. Kant advocated for the principle of equality in the administration of punishment and the use of the law of retribution to determine the type and degree of punishment that should be imposed. In this case, the first thing is to understand that the prisoner or a wrongdoer deserves to be punished and the second thing is to decide the best punishment to be imposed based on the type and degree of crime committed. In this case, the prisoner convicted of murder should be treated as a wrongdoer who deserves to be punished. The discussion should not be on the type of punishment applied but on the fact that the prisoner is a wrongdoer and hence there should be an imposed punishment. Now, the death penalty is applied based on the crime committed and particularly on the impacts of the crime to the society. In this case, the punishment imposed should ensure that the wrongdoer shall not repeat such a crime and the victim of the crime is well compensated.

Since there is no way that a murder can be compensated, the most appropriate punishment is the death penalty. However, the application of the punishment should be done in accordance with the law (the provisions of the Constitution) to ensure that justice is served.

In defense to death penalty, Kant used the law of retribution principles to determine the punishment for the crimes committed. In this case, Kant noted that a person who has committed murder should die. This means that there is no substitute that can satisfy the requirements of the legal justice and there is no commonality between death and remaining alive even under the most severe conditions. Thus, there is no equality between crime and vengeance unless the offender is judicially condemned and put to death. According to Kant's argument, there should be equality between the crime committed and the degree of punishment imposed.

Applying the principle of equality, I would justify death as the punishment for murder because it is the same harm that has been caused by the prisoner. However, some people criticizing the principle of equality in the application of the death sentence may argue that the death penalty should be applied to the prisoner who forewarned the victim of murder. Drawing from the discussion of Kant, I would argue that the death of a prisoner convicted of murder should be kept entirely free from any maltreatment that would cause abomination of the humanity residing in the person suffering it. This means that the process of applying the punishment is very open and just by allowing the prisoner to table evidence before the trial court to prove his/her innocence. The effectiveness of the process of applying the punishment is also demonstrated by the steps used in making the judgment which allow the prisoner to appeal. Second, the methods used to apply the death penalty are very effective to ensure that the prisoner does not feel pain due to the process of death penalty.

The Principle of Proportionality

I support the death penalty based on the principle of proportionality. According to Fish, M.J. (2008) and VanDrunen, D. (2008), most of the modern retributivists interpret lex talionis not as an expression of equality of crimes and penalties but as an expression of a principle of proportionality. The principle of proportionality indicates that a punishment should be imposed proportionately to the crime. In this case, if the crime involved the murder of people the perpetrator should also be put to death. This argument has been used mainly to the prisoners convicted for terrorist acts which involve the death of many people.

For instance, the proportionate punishment for the perpetrators of the September 11th attacks incidence was the death penalty because the wrongdoers conducted a crime that involved the murder of many people. Ristroph (2005), Mekonen (2016), and Wondossen (2010) supported the principle of proportionality by asserting that crimes should be ranked according to their seriousness and then a correspondent ranking of punishments is done according to their severity. This ranking would ensure that the most serious crimes are punished through the most severe punishments. The principle of proportionality helps in deterring crimes because criminals understand the severity of the punishment that would be imposed on them if they commit a particular crime. In the case of murder, the wrongdoers understand that if they kill a victim during an act of robbery, terror, or rape or any other kind of crime, they would be put to death as the most proportional punishment.

The death penalty should not be abolished in the United States because it deters criminals from committing serious crimes (Bonnie, 1990). Common sense dictates that losing life is the most frightening thing for a human being, thus the death penalty acts as the best possible deterrent in discouraging people from committing the worst of crimes such as mass murder. In

closing, if humans understand that they would be sentenced to death once they are arrested and convicted of certain crimes, they will not engage in such activities.

Chapter 3: Implications, Recommendations, and Conclusions

In the criminal justice system, the death penalty has a heavy hand. From the prison personnel assigned to execute the prisoner to the judge presiding over the case, this subject matter is wide-reaching. If there arrives a day when there is no longer the option to sentence someone to death, then this fragile system is going to feel the ripple effect throughout, and I do not believe it would be for the better.

The death penalty should not be abolished in the United States because it deters criminals from committing serious crimes (Bonnie, 1990). Sensible logic dictates that losing life is the most frightening thing for a human being, thus the death penalty acts as the best possible deterrent in discouraging people from committing the worst of crimes such as mass murder. In closing, if humans understand that they would be sentenced to death once they are arrested and convicted of certain crimes, they will not engage in such activities.

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