

Contemporary Controversies Surrounding Capital Punishment:

How does the deterrence theory, victim participation and human rights impact upon current debate?

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Abstract

This dissertation examines three issues of capital punishment that are central to current debate. The areas that are of concern include: the efficacy of the deterrent effect, the role and impact for victims in capital cases and human rights influences.

In the evaluation of the deterrence effect, the retrospective data revealed that murders and sanctions are independent phenomena. A comparison of abolitionist and retentionist states in the United States of America informed us that there is no apparent correlation between imposing the death penalty and a reduction in the average homicide rate. There are various other social and demographic factors that may have more impact upon crime.

It is argued that the four main dimensions of punishment that the deterrence theory relies upon – severity, certainty, celerity, and publicity – are not exercised sufficiently for the death penalty to act as an effective deterrent to murder in the United States of America.

An examination of the role of the victim in capital trials revealed a strong political backdrop to the victims' rights movement. The introduction of victim impact statements expands the notion of who can be assigned victim. However much of the research indicates that this has implications for sentencing decisions and consistency. The evidence provokes debate as to whether the influence of victim statements invites prejudice. The most interesting point raised here, is perhaps the notion of increased rights for victims being used as a political mechanism to justify capital punishment. Redressing state killing as a service to victims to gain closure is, in the views of scholars, a political tool to gain votes.

An assessment of the human rights issues indicates that countries that retain the death penalty are in violation of much of the legislation that exists. Racial discrimination, unfair trials and torture induced admissions are just a few of the violations that are occurring. Despite the work of Amnesty International and the United Nations, evidence in China demonstrates to us that reaching universal abolition is highly problematic.

There is undoubtedly, a significant amount of counter-evidence to the claims of proponents of the death penalty. This dissertation provides a critical analysis of both sides of the argument with regards to the issues raised.

Introduction

This dissertation will address the contemporary controversies surrounding Capital Punishment. The key themes which will be addressed are as follows: Chapter One will examine the efficacy of the death penalty as a method for deterring serious crimes, such as murder. Chapter Two will analyse the importance of capital punishment with regard to the perspective of the victim and as a mechanism for providing closure for the victims' families. Finally Chapter Three will discuss the death penalty in connection with issues surrounding human rights violations. These topics have all been selected on the basis that they underpin contemporary debate concerning penal policies around the world. State killings have formed an element of penal and political regimes for decades but there is growing debate over the immorality and unjust nature of this irrevocable form of punishment. Deterrence, victim impact and human rights are just three of the many fundamental arguments that prevail in contemporary discussion.

Chapter One will concentrate on the extent to which capital punishment is an effective method of deterrence for acts of murder. An evaluation of empirical evidence of average homicide rates in the United States will be reviewed in both retention and abolitionist states. The United States is one of the few Western countries which continues to impose the death penalty. However, due to inconclusive evidence as to whether this form of punishment does in fact deter the act of homicide, questions are raised as to whether it is used for other, more utilitarian, reasons. In addition, Chapter One will examine whether capital punishment has any relevance for those whose mental capacities mean they cannot comprehend consequences such as a death penalty, and those that kill under impulse. The nature of the death penalty in the United States and whether the very manner which the process is carried out may undermine any deterrence effect it might have will also be explored. Certainty and severity are two of the key elements to retributive forms of justice, particularly sanctions for murder. Arguments for its effectiveness as a method of deterrence will be presented, as will the counter-claims based upon both empirical evidence and academic literature. Deterrence is generally the major claim in favour of capital punishment for its proponents so the identification of major flaws in its substance would be important for penal policy makers.

Chapter Two will analyse the more recent debate about the status of the victim in capital trials. Far more attention is now paid to victims in the criminal justice as a whole, but their role in capital cases has potentially sparked the most controversy. This chapter will address how victims have gained from their new 'consumer' role in the criminal justice system, with particular reference to victim impact statements in the United States. Victims have been awarded with far greater rights but this raises the question as to whether this has serious implications for sentencing decisions? This chapter will discuss these implications and the impact that impact statements might have upon consistency and fairness. Finally there will be questions raised over the U.S. government's intention to increase the rights of victims and whether in fact awarding victims increased status is more accurately seen as a bargaining tool to win votes. Evidently, the position of victims in capital cases triggers more controversy than might be immediately apparent. The victims' rights movement cannot be taken at face value in respect to capital offences; it is an important broad socio-political issue.

Chapter Three will address the legal aspects concerning the death sentence in the form of human rights laws. According to activist groups such as Amnesty International, capital punishment is a breach of fundamental human rights. Despite achieving success in Europe with regard to abolition of the death penalty, there still remains a number of countries around the world that retain the right to execute their citizens. Progressive restriction of the death penalty has been implemented however the safeguards in place are still continuously violated. Regardless of it being a punishment that violates the right to life, the worrying aspect of it for opponents is that both in Western and non-Western countries, there is very strong association of state killing with racial bias, unfair trials and forced admissions. Violation of fundamental human rights should be of concern to us all as it undermines key humanitarian values which are applicable to everyone.

This dissertation aims to effectively evaluate these core controversies noted above, and come to some conclusions as to how the evidence impacts upon how the death penalty is perceived in a legal, social and political context.

Chapter One - Deterrence

This chapter will focus upon the extent to which capital punishment is an effective deterrent to murder. It will seek to answer some of the crucial questions as to what capital punishment *is* achieving if it is not deterring crime. Garland (2010) stated that: “the death penalty has always been a harsh punishment and a tool of law enforcement. And in its modern penal mode its function was to deter serious offenders and eliminate those who would not be deterred” (Garland 2010, p245). The utilitarian perspective of capital punishment would argue that this statement prevails and the threat of a death sentence to potential murderers would deter them from going through with the act. However research into this field might beg the question as to whether this is actually the case or, ever has been the case. Is capital punishment more of a symbolic mechanism for which the state can uphold its sovereignty and step up to the role of fighting the ‘war on crime’? Is the primary function of this punitive regime deterrence and saving innocent lives by executing those that might well go on to kill more? Or is it purely retributive by bringing justice to those that commit the most heinous acts in the eyes of the public? Are the elements of deterrence even being exercised to its full capacity when those on death row are so infrequently executed and those that are, may only meet their fate decades after the sentencing? Some critics go as far to say that capital punishment may have the opposite of the desired deterrent effect. The brutalisation theory works on the premise that the death penalty encourages rather than discourages killing as it sets a “savage example” (Smith & Zahn, 1999, p.225). Questions as to the efficacy of deterrence of capital punishment are many and varied; this chapter will look in further detail at the issues and seek to answer these questions raised.

Deterrence has been defined by the National Academy of Science Panel on Research on Deterrent and Incapacitative Effects (1978) as: ““the inhibiting effect of sanctions on the criminal activity of people other than the sanctioned offender”, and includes all ‘the internal psychological mechanisms by which sanctions discourage crime’ such as ‘the normative validation and moral definition effects of punishment’” (National Research Council, 1978 cited in Zimring and Hawkins, 1986, p170). For

capital punishment, it is general deterrence that is being dealt with as opposed to specific deterrence. General deterrence operates on the belief that “people in general can be prevented from engaging in crime by punishing specific individuals and making examples of them” (Bohm, 2011, p.153). Specific deterrence is not relevant to capital punishment because it is “the prevention of individuals from committing crime again by punishing them... [this] does not apply to capital punishment because executions precludes the determination of whether a punished individual returns to crime” (Bohm, 2011, p.153).

Smith and Zahn (1999) state that “deterrence theory is rooted in the classical and neo-classical schools of criminology. Two basic assumptions underlie these perspectives. First is the fundamental purpose of state-imposed sanctions to prevent crime. Second, these perspectives rely on a rationalistic view of human behaviour” (Smith & Zahn, 1999, p.224). Bedau (1977) states: “deterrence theory contends that to be effective in preventing crime, criminal sanctions must be severe enough to outweigh the pleasures (psychic and material gains) to be derived from crime, administered with great certainty, administered promptly so there is a clear cause and effect connection between crime and punishment in the minds of would-be offenders, and made known to the public” (Bedau, 1977, p.137) Based on this premise, deterrence incorporates four main dimensions; severity, certainty, celerity and publicity and these factors “interact in impacting would-be offenders” (Bedau, 1977, p.137)

Using the given definitions, it could be assumed that one would not follow through with an act of murder on the basis that the punishment (being sentenced to death) would be a sufficient discouragement for the potential perpetrator to not kill. The severity and irrevocable nature of the sanction would be more effective at deterring potential murderers than the likely alternative which would be life imprisonment. Comparing the effectiveness of capital punishment over life imprisonment is highly problematic, for which reason, this chapter will simply look at the efficacy of the death penalty as a deterrent but in no relation to it yielding better results than life imprisonment.

Most forms of punishment or legal threats operate on the understanding that increasing the severity of the sanction will increase deterrence from the crime. The punishment should be proportionate to the crime so that the likely repercussions of committing the crime should outweigh the possible gains thus applying a cost-benefit analysis to the situation (Van Den Haag, 1969). Despite this cost-benefit rationale being applied to most penal sanctions there are authors that would argue that in respect to capital punishment, this theory is inappropriate. The United Nations Social Defence Research Institute (UNSDRI) stated that:

“The basic assumption of the deterrence hypothesis is that potential offenders are rational and they calculate costs-benefits before they actually commit crimes. However, such an assumption in itself is questionable, especially when the murder rate is used as an indicator of deterrence, because it is recognised that emotional conditions play a significant role in a large number of murder cases” (UNSDRI, 1988, p.546).

It is widely thought that many murders that take place are ‘one off’ killings and not pre-meditated therefore the perpetrators would be unlikely to go on and kill more.

The reasoning and calculation of costs and benefits are insignificant in instinctive and emotionally driven situations. For example the infuriated husband who kills his wife in passion after discovering an affair (Van Den Haag, 1969). The husband is unlikely to kill again, in which case execution would not be acting as a deterrent but solely as a form of retributive justice. Other reasons are also offered as to why the death penalty is not an effective deterrent in reference to rationalistic psychology of penal sanctions. Murderers may be non-responsive as they are either self-destructive or have an incapacity to react to threats (Van Den Haag, 1969, p.143). Liptak (2007) states that potential murderers are not necessarily thinking clearly enough to make rational decisions. The legal threats have not been internalised therefore they do not feel the same moral obligation as law-abiding citizens (Van Den Haag, 1969).

Another of the elements that the costs-benefits theory incorporates and relies on is the certainty of the sanction. Certainty being the actual levels of execution compared with the homicide rate (Bedau, 1977, p.140). One of the major criticisms of capital punishment is that despite the number sentenced to death, relatively few result in an execution. Statistics demonstrate that there is a substantial difference between the amount of death row sentences given and the number of actual executions. Liptak (2007) highlights this in his article and states that “In 2003, for instance, there were more than 16,000 homicides but only 153 death sentences and 65 executions” (Liptak, 2007). These figures emphasise that for those murderers who may attempt to calculate the costs of their actions, they may decide that the chances of them getting executed are so low that the certainty of sanction might not be enough for them to desist from killing. Even in the state of Texas, with the highest annual rate of executions in America, only killed 107 out of 668 of those sentenced to death row between 1977-1996 (Shepherd, 2005, p.221). Donohue and Wolfers (2005) claim that “The death penalty – is applied so rarely that the number of homicides it can plausibly have caused or deterred cannot reliably be disentangled from the large year-to-year changes in the homicide rate caused by other factors” (Donohue and Wolfers, 2005, p.794).

Another of the dimensions of punishment identified by Bedau (1977) as being important for the deterrence theory to work effectively is celerity, or the swiftness of the punishment:

“An immediate punishment is more useful; because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of ‘crime’ and punishment; so that they may be considered, one as the cause, and the other as the unavoidable and necessary effect... *Delaying* the punishment serves only to separate these two ideas...” (Beccaria 1809: 75-76 cited in Bedau, 1977, p.143)

As Garland (2010) states “uncertainty, infrequency, and delay undermine its deterrent effect” which is what provokes arguments that the death penalty is an ineffective means of deterrent (Garland, 2010, p. 385).

There is also research into the publicity of executions having an impact upon reducing homicide rates as a direct result. Bedau (1977) argues that:

“...the threat and application of the law must be communicated to the public. Proponents of deterrence theory have long contended that the publicity

surrounding punishment serves important educative, moralizing, normative validation, and coercive functions. Applying this premise to capital punishment, high levels of execution publicity should result in lower homicide rates" (Bedau, 1977, p.144).

Phillips (1980) explored this theory and attempted to investigate the correlation that might exist between the publicity devoted to an execution and evidence of a decrease in homicides thereafter (Phillips, 1980, p.139). He found that a long-term deterrent effect was not apparent however a temporary impact was found:- "(1) homicides drop significantly in the week of a publicised execution, and (2) the more publicity given to the execution, the more homicides drop" (Phllips, 1980, p.144). Despite these claims, Garland (2010) again would contradict this and questions "why, when death sentences are imposed at trial, they are so seldom subsequently executed? And why, if the aim is to produce deterrence or retribution or victim satisfaction, are executions held in private, often decades after the crime, with such a minimum display and so much concern as to ensure the convicted feel no pain?" (Garland, 2010, p.39). It would appear that in America, the manner in which executions are now increasingly carried out, actually weakens the efficacy of the deterrence element.

Before the death penalty was abolished in England (formally in 1999, however the last execution took place in 1964) the statutes stated that executions took place within two days of the proclamation of the sentence. Garland (2010) claims that "terror served as a deterrent purpose, aided by the speed with which executions followed convictions" (Garland, 2010, p.80). Wilson (1983) also acknowledges this notion in his comparison of the English and American deterrence effect. Wilson stated that "It is possible, of course, that executions deter murders in England but not in the United States. That might be true because, before the use of the death penalty was first restricted and then abolished, a convicted murderer faced in England a much greater risk of execution than he did in this country (United States)" (Wilson, 1983, p. 187). It is difficult to compare the efficacy of deterrence between the early-modern state's death penalty and the current process in the United State's however critics such as Donohue and Garland would argue that the extent to which the death penalty is exercised in the operating states is fundamentally flawed by the manner in which it is delivered. Furthermore the incapacitation effects of death row imprisonment are somewhat similar to those of the alternative sentence which would be life imprisonment (Garland, 2010).

There have been many studies carried out looking at the statistical evidence as to the extent to which capital punishment does, or does not, have a deterrence effect. Two main authors, Sellin and Ehrlich have, however, stand out in the literature. Sellin (1967) selected clusters of states that have been "grouped so that one of the states in each figure is an abolitionist state bordering upon retentionist states, whose homicide rates serve for comparison" (Sellin, 1967, p.138). By looking at neighbouring states which have been selected so they are similar in population, organisation and economic and social conditions, he came to the 'inevitable' conclusion that the homicide death rate is not influenced by the presence of the death penalty (Sellin, 1967, p.138). Sellin's methodology and findings were however criticised by Ehrlich. Ehrlich (1975) used different variables to Sellin in an attempt to isolate the impact of capital punishment on the homicide death rate from other social and demographic factors (Zimring and Hawkins, 1986). Ehrlich found that between 1932 to 1970, when there was a decrease in executions, this resulted in an increase in homicide. His

evidence in support of the death penalty was used in the Supreme Court in 1976 in the case of *Fowler v North Carolina*. Two of the main studies on the deterrence effect of capital punishment demonstrate contrasting data. Despite the vast amount of research done in this field, there is a lot of ambiguity surrounding the statistics. Wilson (1983) notes; “there was so much statistical ‘noise’ in the analyses that it would be almost impossible to get any reliable estimates of deterrence out of them...the effect on murder of a rare event such as an execution could literally be swamped by errors” (Wilson, 1983, p. 187-188). However, if anything, there would appear to be more evidence in favour of a non-deterrent effect of capital punishment than a deterrent effect.

The majority of research in the area suggests that capital punishment has a non-deterrent effect, but some critics go as far as suggesting that there is a brutalisation effect. Bowers and Pierce (1980) describe this as being when:

“The potential murderer will not identify personally with the criminal who is executed, but will instead identify someone who has greatly offended him – someone he hates, fears, or both – with the executed criminal...By associating the person who has wronged hi with the victim of an execution, he sees that death is what his despised offender deserves. Indeed, he himself may identify with the state as executioner and thus justify and reinforce his desire for lethal vengeance” (Bowers & Pierce, 1980, p.456).

Shepherd (2005) looks at individual state deterrent effects and the number of murders deterred or incited by an average execution from 1977 to 1996. Shepherd (2005) found that “in only twenty-two per cent of states did executions have a deterrent effect. In contrast, executions induced additional murders in forty-eight per cent of states” (Shepherd, 2005, p.247). This study noted that the magnitude of the increase in homicides was as many as 175 in that state of Utah. These findings are also backed by other scholars such as Smith and Zahn (1980).

One of the most significant counter-arguments that contradict statistics that support a deterrence effect of the death penalty is the claim that broader social and demographic trends have a greater influence upon any increase or decrease in homicide rates. The United Nations Social Defence Research Institute (UNSDRI) state that “even if co-variations between capital punishment and the murder rate are found, they do not necessarily indicate a causal relation between them. There always is the possibility that other uncontrolled factors are influencing both” (UNSDRI, 1988, p.545). Retrospective studies that have looked at homicide rates in particular jurisdictions before and after abolition of the death penalty, or after a moratorium, may be hindered by alternative possibilities. Zimring and Hawkins (1986) advocate that “rates of crime may fluctuate independently of any change in penalties; conditions leading to changes in penalties may themselves independently influence the crime rate or produce other social responses which do so” (Zimring and Hawkins, 1986, p.173). This argument would appear to dismiss assertions that capital punishment is a suitable deterrent to murder as murders and penalties may be independent phenomena.

The impact of economic variables have been a widely accepted counter argument to the deterrent effect of penal policies. It is argued that increases in legitimate earning opportunities may reduce the incentive to commit murder. By the same token, an

increase in illegitimate earning opportunities, for example by selling drugs, may increase the propensity to commit murder. Additionally “any relative disadvantage in areas may lead to ambition, frustration, resentment and, if insufficiently restrained, to crime” (Van Den Haag, 1969, p.144). On this basis, it would appear that economic conditions may be more influential than modes of sanction. By looking at similar states, grouped by closeness in population and economic climate, as Sellin (1967) did, there is so little variance between retentionist and abolitionist states that social indicators are far more likely to be the instrumental controlling factors.

Amongst other variables, the make-up of the population is also an important consideration. Race and ethnicity feature prominently in discussions over the death penalty; when looking at statistics, variables such as race must be taken into account. Shepherd (2005) reports that “the percent of the county population that is African American has a statistically significant, positive relationship with murder in most models. Some minority groups have fewer legitimate earning opportunities, and thus a lower opportunity cost of criminal activities relative to their white counterparts” (Shepherd, 2005, p.229). Clearly not all people that belong to an ethnic minority group will commit crime, however in the United States, simply being a member of this group can contribute to being relatively disadvantaged which is a factor with the potential to trigger crime. When average homicide rates are compared, race and economic climate must also be taken into consideration as statistics do not fluctuate independently of this.

With regard to the death penalty the deterrence debate has been expressed as “traditionally the most important single consideration for both sides in the death penalty controversy” (Bedau, 1980 cited Zimring and Hawkins, 1986, p.167). When evaluating the efficacy of the deterrent effect of the death penalty there are many elements to look at, other than simply the retrospective studies that attempt to calculate fluctuations in mean homicide rates between abolitionist and retentionist states. The statistical evidence is highly ambiguous therefore it cannot be fully relied upon. In terms of general deterrence, there appear to be several factors which undermine the death penalty as an effective deterrence tool, particularly the manner and frequency in which it is now carried out. Data implies that executions are applied so rarely, with so much delay and reduced publicity that potential perpetrators that may desist on the basis of severe, certain and swift sanction, are now not discouraged sufficiently. Furthermore, the rationale of cost-benefit analysis that the death penalty operates on, may be irrelevant when in fact, the majority of homicides are passion killings or the perpetrators would not be inhibited by penal sanctions as they are incapable of responding to threats. Finally evidence implicates that there are other more influential factors that affect homicide rates such as changes and differences in the social and economic conditions and population make-up within regions. These factors weaken arguments that look at capital punishment and homicide rates in isolation. With reference to other studies carried out, Van Den Haag (1969) concludes that “the similar areas are not similar enough; the periods are not long enough; many social differences and changes, other than the abolition of the death penalty, may account for the variation (or lack of) in homicide rates with and without, before and after abolition; some of these social differences and changes are likely to have affected homicide rates” Haag, 1969, p.146). Given the amount of inconclusive evidence with regard to the deterrence effect, Western countries that have abolished it have not done so on under grounds of scientific assessment but

evolving attitudes in view of what is moral and just (Zimring and Hawkins, 1986). It is less of a tool to discourage crime than a moral badge declaring the wearer's stance on the war on crime.

Chapter Two – Victim's rights, victim closure and the revenge-retribution distinction

This chapter will concentrate on the elevated role of the victim in capital cases, the victim's rights movement and the importance of these rights in respect to the victim's relatives and survivors. Since the 1980s, but more so in the 1990s, victims have seen a shift in political discourse which has afforded them increased value as a stakeholder in the criminal justice process (Garland, 2010, p.279). As a result of *Payne v Tennessee* (1991), victims now have the right to give victim impact statements in capital trials which has created a divide in scholarly debate as to its appropriateness in a capital trial context. The overturning of *Booth v Maryland* (1997) has shed light upon the revenge-retribution dichotomy. This raises questions as to whether victim impact statements are a means of achieving personal vengeance or whether it is just another public-friendly political justification for state killings in America. This chapter will seek to explore the appropriateness of victim impact statement and their influence upon sentencing decisions but also the potential positive effects for relatives of victims in search for a cathartic end to a grievous process.

It became apparent, from the 1980s onwards that the criminal justice system was becoming more victim-focused and their position within law and order was gaining momentum after a long period of disenfranchisement. Sarat (2001) explains:

“The tendency of criminal justice systems in Western democracies has been to displace the victim, to shut the door on those with the greatest interest in responding to a crime. In response, victims are demanding that their voices be heard throughout the criminal process” (Sarat 2001, p.34).

The most prominent right that victims have been awarded in terms of having their voices heard has been the ability to give victim impact statements and provide victim character testimonies in capital trials. In *Booth v. Maryland* (1987) it was decided that “victim impact evidence showing the pain and loss suffered by surviving relatives and friends of a murder victim offered in support of the prosecution’s argument for a death sentence, is inadmissible during the sentencing phase of a capital trial” (Bedau, 1997, p. 240). However this decision was overturned in the Supreme Court only four years later in *Payne v. Tennessee* (1991) when they ruled that “the prosecution may bring in so-called victim impact evidence to show the jury just how valuable and loved the victim was and thus, by implication, how deserving of a death sentence the convicted murderer is” (Bedau, 1997, p.312-313). Justice Rehnquist (judge in *Payne v. Tennessee*) believed it to be unjust to concentrate exclusively on the offender’s characteristics and circumstances in the sentencing phase.

Sarat (2001) describes the victim's rights movement in reference to capital trials as going "from anonymity to embodiment, from absence to presence, victim impact evidence becomes a vehicle for resurrecting the dead and allowing them to speak as their killers are being judged. Giving voice to victims moves them to the centre of the judicial process, even as it expands the notion of who qualifies as a victim" (Sarat, 2001, p. 52). This statement would seem to suggest that victim impact statements hold a symbolic function and almost a service to the victims' friends and relatives that allows them to play a part in gaining a just sentence for the victim's killer. Although the direct victim may not be present at the trial, victim character statements and victim-impact statements provide an insight to their personality and the grief that the victim's loss has left behind.

Victim impact statements allow an expansion of the term 'victim' so that it includes the survivors or those left behind that bear the trauma of their loved ones death (Sarat, 2001, p.36). Garland (2010) states that victim impact evidence "permits the prosecution to enter evidence – in the form of a written or spoken statement, or even a video presentation – describing the crime's impact on the victim's family member, together with their characterisation of the crime and murderer" (Garland, 2010, p.278). As of 2005, victim impact statements are permitted in thirty-five out of the thirty-eight states that hold the death penalty (Yoshino, 2005, p.1869). In these thirty-five states that authorise the use of victim impact statements, the Minnesota Statute 611A.038 encompasses the language and scope that is also used in other state statutes;

"A victim has the right to submit an impact statement to the court at the time of sentencing or disposition hearing. The impact statement may be presented to the court orally or in writing, at the victim's option...Statements may include the following subject to reasonable limitations as to time and length:

- a) A summary of the harm or trauma suffered by the victim as a result of the crime;
- b) A summary of the economic loss or damage suffered by the victim as a result of the crime; and
- c) A victim's reaction to the proposed sentence or disposition" (Schuster & Propen, 2010, p.75-76)

Sarat (2001) describes this as a way of "creating empathetic bonds between speaker and listener seeking to evoke compassion by presenting an artificial and incomplete portrait of formerly blissful family life, ruined by villainous acts" (Sarat, 2001, p.45). In Younglove et al's (2009) study of murder victim's character testimonies in court, it was found that photos, videotapes as well as other personal belongings of the victim were also being used in court to sway the jury's position. This has sparked controversy amongst scholars as to the appropriateness of the introduction of victim impact statements in capital trials and questioned whether reasoned decision making gives way to mercy and emotion.

The argument that the introduction of victim impact evidence has created is whether or not the information provided in the statement is "relevant to the moral blameworthiness of the defendant" (Younglove et al., 2009, p.357) or does it just distract the court from the relevant evidence of the criminal act needed to make a

reasoned decision. It is widely believed that evidence provided in these statements can create prejudice and inconsistencies in sentencing decisions. Bedau (1994) explains the inconsistencies that may arise as a result:

“The harm caused in criminal homicide is deemed uniform in all cases, on the tacit ground that all human lives are of equal worth...Now, however, it will be up to each capital trial jury to decide for itself whether the murder of which the defendant has been found guilty is deserving of a death penalty because of some special features about the victim, features not defined by any statute, possibly not evident to the defendant at the time of the crime, and not specifiable by the trial court or any uniform manner from case to case” (Bedau, 1994, p.299-300).

This statement suggests that the impact statement can invite prejudice and even influence sentencing decisions. It begs the question as to whether the extent of the harm done to the victim’s family and friends is foreseeable and whether this should be taken into account. Sarat (2001) asks the question: “do victim statements divert the juries’ attention from the defendant’s background and the elements of the crime itself to factors which the killer is unaware of, such as overall impact?” (Sarat, 2001, p.47-48). How important is overall impact to the sentence that is given whether the killer intended it or not? Justice Souter (*Payne v. Tennessee*, 1991) opposes claims that overall impact to those closest to the murder victim is irrelevant; “the harm to the victim’s family is a culpable wrong because it is *always* foreseeable. That wrong is as blameworthy as the wrong done to the person murdered (Souter (1991) cited in Sarat, 2001, p.55).

The recent trial of Shawn Tyson in Sarasota, Florida in April 2011 involving the murder of two British tourists, Cooper, 25 and Kouzaris, 24 can provide us with examples of the emotionally charged nature of victim impact statements. The statements were delivered by the family and friends of the two victims before the sentencing phase and were aimed directly at Tyson. Hallet, a friend of Cooper and Kouzaris, said: “you have ripped the hearts out of so many of us...Tyson I need you to understand the pain that you have caused” (Hallet cited in ITV News, 2012). The mother of one of the victims also made a statement and cried to the courts: “you have failed in life – you have been failed by your family, your friends, the educational system, your local community. But those failings don’t excuse your actions” (Mother of victim cited in ITV News, 2012). The statements went on further to describe the kind, friendly and adventurous nature of the innocent two that lost their lives to a merciless act. It can be said that the words of the victims’ friends and family, in this case, are reflective of the compassionate and emotional nature that is common within victim impact statements.

However, for those critics that imply sentencing discrepancies do occur between capital cases that incorporate victim impact statements, there may be evidence to suggest there is truth in their argument. In Younglove et al’s (2009) mock jury simulation study of victim character evidence in death penalty cases there was a strong implication that the victim impact testimonies changed the jury decision to enforce the death penalty. Content analysis of the transcripts from three different states “revealed that there were numerous references to victims’ character in the form of positive personality traits, in addition to descriptions of the impact the crime had on the victims’ families and friends...They strongly suggest that the death

penalty tends to be imposed more often when victim impact evidence is offered" (Younglove et al., 2009, p.537). In another study carried out by Aguirre et al. (1999) in California, looking at the sentencing outcomes of 151 death penalty cases between 1989 to 1994 before and after *Payne v. Tennessee* (1991), it showed remarkably similar results. "When victim impact evidence was not introduced in the post-*Payne* period, the cases were evenly distributed between receiving the death penalty and life in prison; however when victim impact evidence was introduced, receiving the death penalty was twice as likely" (Aguirre et al., 1999).

One major criticism of victim impact statements is that they can fulfil the desire for victims to gain personal revenge as opposed to penal aims of attaining social retribution. Sarat (2001) claims that "rather than skill at arms, verbal acumen would be the tool for exacting revenge. The use of the victim impact statement placed the family in the position of seeking a champion, using language to persuade the jury to do what the law forbids the family doing directly" (Sarat, 2001, p.48). As well as describing their grief and trauma in victim impact statements, victims' families sometimes go as far as actually requesting the judge to sentence the murderer to execution. Scholars argue that this goes beyond what the courtroom should allow and pulling at the emotional heart strings of the jury is inappropriate in the setting of a capital case. Garland (2010) states that "wherever the death penalty is the ultimate punishment permitted by law, any lesser sentence – even one of life imprisonment without parole – can appear grievously lacking to those who hope for proper retribution following a heinous crime" (Garland, 2010, p.291).

Whereas some victims may seek vengeance in their hope for a death sentence to be given to the murderer, "many of those most injured by the loss of a loved one might resist executions as explicitly designed as revenge in their name" (Zimring, 2003, p.58). An important element of victim impact statements for the victims' families is not always to seek revenge but often to gain psychological closure on a traumatic phase in their lives. Schuster and Propen (2010) describe how "being allowed to make a record on what happened and how you feel about it is one way of dealing with the emotional stress" (Schuster & Propen, 2010, p.86). Many of the victims' friends and family members have been reported to find that their suffering and emotional distress is only exacerbated by the criminal justice system and the trial proceedings (Eschholz et al.,2003, p.175). Furthermore, telling the story of one's grief and suffering has been found to aid the healing process and provide relief for victims; "the acceptance, the affirmation, the acknowledgement that they had indeed suffered was cathartic for them" (Eschholz et.al.,2003, p.160). There is a strong notion that an execution brings an end to any uncertainty surrounding the trial outcome, it provides healing and can even have therapeutic effects. Garland (2010) states that it can provide the victims' families "with the satisfaction of (what they regard as) just punishment and a vindication of their loved ones worth" (Garland, 2010, p.291).

Despite claims capital cases that result in execution supposedly provide closure, there is also evidence to suggest that the process cannot heal the victims of their loss. Zimring (2003) draws upon a critique for the potential of victim closure in capital trials. So few result in an execution and it is not uncommon for those that are executed (around 70 or 80 per year out of a total of 3500 condemned to death row) to not meet their fate for ten years or over (Zimring, 2003). Clearly the delay and uncertainty surrounding the case could delay and even inhibit healing. Arrigo and

Williams (2003) further suggest that “the courtroom setting in which victim impact statements are presented does not fulfil this purpose...there is nothing inherently wrong with these sentiments; after all, they are genuine feelings. However the manner in which they are mobilised and acted on (i.e., to advocate for the death of another) is what we question, as it does not enable the victim to heal”. They go on to say that “when presented during the penalty phase of a capital case, victim impact statements (especially victim allocution evidence) keep us that much more removed from this liberating possibility” (Arrigo & Williams, 2003, p.622). The evidence to suggest that victim impact evidence and death sentences being awarded provides closure to victims is ambiguous. On one level, the execution is said to bring the mourning of a loved one to an end but on another level, the launch of a capital trial and the delays that are involved in the process may only add additional pain that could be avoided (Zimring, 2003, p.59). There is little in the way of research which could provide a definitive indication as to whether an execution can end the mourning of losing a loved one. According to authors such as Arrigo and Williams (2003) it would appear that the very act of having an input on the sentence of your loved one’s murderer, may inhibit the healing process.

Another main theme which has impacted on the victim’s movement and the increase in victims’ rights has been the politicisation of the victim and the importance of their ‘closure’ as a selling point for the United States government to retain the death penalty. Zimring (2003) notes that victim closure is “an attempt to reimagine executions as a service that the government provides to relatives of crime victims rather than a manifestation of the power of the state” (Zimring, 2003, p.14). After a period of political disenfranchisement of victims before the 1990s, it was unusual for victims to be given such an elevated status in the criminal justice process as to have the ability to give victim impact statements (Dignan, 2004). To a certain extent, the measure of a just punishment was now dependent on whether the victim felt sufficiently satisfied with the outcome and the sentence. Victims had never had this power in the criminal justice system before (Sarat, 2001, p.34).

Although, at one level, state killing is a method for the United States government to demonstrate its sovereignty; on another level, state officials still want to maintain the vote of their citizens by appealing to their needs. Although penal populism remains strong in the United States, proponents of the death penalty still face much opposition. Zimring (2003) argues that “the strenuous effort at degovernmentalization of the reasons for execution is a signal that many citizens feel uncomfortable watching governments kill to achieve solely governmental purposes. It is far more comfortable to imagine the executioner as the personal servant of homicide survivors than to accept the legitimacy of a government killing for its own purposes” (Zimring, 2003, p.63). This recognises the values of vigilantism within the population and separates the act of punishment as another mechanism for the government to demonstrate unlimited state power. In this sense, execution becomes more of a community role or a function to serve the community (Zimring, 2003). By doing this, the United States government have tried to attach a more appealing label to the death penalty which represents victim inclusion within the judicial process as a form of commodity that politicians can use as a bargaining tool to gain electoral support (Garland, 2010, p.293). The idea of meeting the need for victims to gain closure is much more palatable than personal vengeance or retribution.

Politicisation of the victim has occurred in the United States and this chapter has looked in greater detail at this new consumer role they have been accorded in respect of the victims' rights in capital proceedings. The right to give a victim impact statement has possibly been the most influential change. This came as a result of *Payne v. Tennessee* (1991) which opened the door for victims to demonstrate how the crime has impinged upon their lives. This decision however was not received without denunciation. Critics argue that the introduction of victim impact statements has brought compassion and prejudice into the courtroom upon decisions that should be based solely on reason and the elements of the crime itself, given that every life should be of equal worth. Evidence from studies (Younglove et al., 2009) would seem to suggest that by increasing scope for who the victim is and the emotion brought by these statements have undoubtedly influenced jury decisions and created inconsistency in sentencing.

Sarat (2001) argues that the outcome of *Payne* (1991) has legitimised revenge by giving victims' families and friends the opportunity to try and advocate the death of another human being. Those victims who would "resist executions explicitly designed as revenge in their name" may claim that 'closure' and 'healing' were the purpose of their involvement in the criminal proceedings (Zimring, 2003, p.58). Whether closure can be achieved is proven to be disputed but it is an appealing notion that has been promoted in both media and politics to justify and gain support for the ultimate state sanction of execution.

Chapter Three – Human rights issues surrounding capital punishment – an international perspective

This chapter will discuss human rights law in relation to state executions as set out by the European Convention of Human Rights (ECHR) and the United Nations (UN) and examine to what extent this is adhered to by nations worldwide. A further insight will be provided in to those states whose laws do not correspond with contemporary human rights laws. Human rights issues have continuously provoked debate in discussions of the death penalty. For opponents of the death penalty, human rights and violation of these fundamental human rights as set out by internationally recognised political organisations, are of paramount importance to their arguments opposing capital punishment. Abolitionism is developing organically within law and policy across the globe and the vast majority of 'Western' nations have completely abolished the death penalty. However there are still a number of state governments that refuse to eliminate it as a punishment from its statute books, namely the United States of America and China, who have entered reservations in regard to international standards.

Hood (2001) describes the relatively recent shift towards notions of international standards concerning capital punishment: "What marks out the modern period from the past, when abolition was very much an internal 'national' matter, is the development from the late 1970s onwards of a European-led political movement to make abolition of the death penalty the touchstone of acceptable *international* standards of respect for human rights" (Hood, 2001, p.337).

In order to adequately examine the nature of the human rights laws which are associated with the death penalty, it is important to firstly acknowledge what these human rights are. Since the 1970s there have been numerous political and legal developments which have contributed to pressure to abolish the death penalty. It was however, in 1948 that the *Universal Declaration of Human Rights* (hereinafter *Universal Declaration*) was officially announced by the General Assembly of the United Nations which triggered international recognition for respect of human rights with regard to punishment. Schabas (1997) declared this as “the cornerstone of contemporary human rights law” (Schabas, 1997, p.23) and the United Nations (2012) proclaimed that it “has inspired a rich body of legally binding international human rights treaties” (United Nations, 2012). The *Universal Declaration* did not include any reference to capital punishment or the abolition of it, however article 3 stated that “everyone has the right to life, liberty and security of person” (Article 3). Schabas (1997) argues that “because of its role in the subsequent elaboration of international norms and its continuing significance as a benchmark for standards of human rights, it is essential to analyse the scope of the *Universal Declaration* with respect to the death penalty” (Schabas, 1997, p.24).

It was eighteen years later, in 1966, that the *International Covenant on Civil and Political Rights* (hereinafter, *Civil Rights Covenant*) was developed as a result of article 3 of the *Universal Declaration*, to enter into force in 1976. Article 6 of the *Civil Rights Covenant* begins with the proclamation that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life” (Article 6(1)). Within article 6, reference to the abolition of the death penalty is given twice however does not refer to the abolition as an obligatory action but more of an undesired limitation to the “inherent right to life”. Schabas (1997) describes how “interpreters of article 6 have been torn in two directions between viewing article 6 as being essentially permissive, and therefore, ‘recognizing’ the death penalty as being beyond the scope of the right to life, and being restrictive, admitting the existence of the death penalty as a regrettable and temporary compromise, but viewing it as being ultimately incompatible with the right to life in its most pure expression” (Schabas, 1997, p.94). Drafters believed that proclaiming, without equivocation, the abolition of the death penalty could serve to isolate certain powerful and influential states (such as the United States of America) whose statute books retain the death penalty. As a compromise, the death penalty was still declared as the ultimate limitation to the right to life but in no way, was the UN endorsing the delay of abolition (Schabas, 1997, p.24-5).

The *Universal Declaration* and the *Civil Rights Covenant* are two of the key pieces of human rights legislation that exist with regard to the death penalty. Neither the *Universal Declaration* nor the *Civil Rights Covenant* are binding treaties therefore countries whose laws still permit the death penalty may use this punishment. However the UN have put into place a number of safeguards and restrictions, for example article 6 states that the death penalty shall be imposed “only for the most serious crimes” (Article 6(2)) and “shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women” (Article 6(5)). Prokosch (1998), a coordinator of Amnesty International, stated that international human rights standards are progressively restricting the application of the death penalty in the retention states and the standards tend to be abided by (Prokosch, 1998, p.3). Narrowing down the scope of the death penalty so that it is

only used for the ‘most serious crimes’ excludes the enforcement of the death penalty “for economic and other so-called victimless offences, actions relating to prevailing moral values, or so-called religious offences as well as activities of a religious or political nature...or other vaguely defined acts usually described as ‘crimes against the State’ [they] do not by themselves fall within the category of ‘most serious crimes’” (UN GA Special Rapporteur, 2004). Nevertheless, China is the most prominent exception to this rule as they annually execute more persons than all other countries combined, including death sentences for non-violent acts such as bribery and embezzlement (Prokosch, 1998, p.4). China’s exceptional violation of human rights will be discussed later in this chapter.

Amnesty International is the central organisation that fights for human rights worldwide and are particularly involved in the battle for the abolition of the death penalty. Amnesty International’s stance upon the death penalty, which is documented in much of their literature, is clear and unapologetic:

“Amnesty International opposes the death penalty in all cases without exception regardless of the nature of the crime, the characteristics of the offender, or the method used by the state to kill the prisoner. The death penalty is the ultimate denial of human rights. It is the premeditated and cold-blooded killing of a human being by the state in the name of justice. It violates the right to life as proclaimed in the Universal Declaration of Human Rights. It is the ultimate cruel, inhuman and degrading punishment.”

(Amnesty International, 2007, p.1)

Amnesty’s key argument is that human rights are something which are inalienable; they cannot be taken away from anybody, irrespective of what offence they have committed. “They are accorded equally to every individual regardless of their status, ethnicity, religion or origin... Human rights apply to the worst of us as well as the best of us, which is why they are there to protect all of us” (Amnesty International, 2007, p.6). One of Amnesty’s key concerns in regard to this is that, despite being ideologically universal in nature, human rights tend to be adhered to more in developed Western countries than those that are less developed. “Although they have been often developed in a Western context, they are not Western in content but derive from many different traditions and are acknowledged by all the members of the United Nations...” (Amnesty International, 2007, p.7).

Another of Amnesty International’s key concerns is the discriminatory manner in which the death penalty is applied. Much of the academic literature which assesses the use of the death penalty draws upon certain state’s uses of the death penalty as a crime control tool. However there is some evidence of repression and over-use against certain ethnic groups.

“In country after country, it is used disproportionately against the poor or against racial or ethnic minorities. It is also used as a tool of political repression. It is imposed and inflicted arbitrarily. It is an irrevocable punishment, resulting inevitably in the execution of people innocent of any crime. It is a violation of fundamental human rights” (Amnesty International, 2007, p.1).

Unnever (2010) found in his research that a higher demand for more punitive sanctions and the death penalty occur where there is greater ethnic intolerance. In these societies, Unnever (2010) claims that “the public views crime through a jaundiced racial lens that often associates crime with ‘others’ – marginalised minority groups who are disliked by dominant members within a society” (Unnever, 2010, p.467). This disproportionate and discriminatory application of the death penalty is the “ultimate denial of dignity and worth of the human person” and contradicts the value of articles 2 and 7 of the *Universal Declaration of Human Rights* (Prokosch, 1998, p.3). Unnever (2010) further argues that in societies where racial intolerance exists:

“...people perceive crime control efforts through a racialized lens. Therefore, these people typify race with crime and crime with race and, as a result, perceive that crime control policies will disproportionately affect individuals that they particularly do not like; the racialized ‘criminal other’” (Unnever, 2010, p.480).

This would appear to be true in the United States of America where 62 per cent of the prison population is made up of Blacks and Hispanics, despite these groups comprising only 25 per cent of the total population (Human Rights Watch, 2002). The Supreme Court has been subjected to allegations of racial discrimination: for example in *Coker v Georgia* (1977), it was brought to the jury’s attention that in the previous twenty years, black men were eighteen times more likely to be sentenced to death for raping a white woman than a white man for the same offence (Ogletree, Jr., 2002, p.27). Despite the United Nations’ proclamation in the *Universal Declaration of Human Rights* that all human beings are entitled to the right to life “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2). It would appear that the USA may be guilty of discrimination, whether intended or not. Fellner (2012), of Human Rights Watch notes that “both international human rights law and U.S. constitutional law prohibit racial discrimination... both are violated by laws that explicitly permit or require adverse distinctions on the basis of race” (Fellner, HRW, 2012).

The USA has remained a retentionist country despite increasing political pressure coming from Europe to abolish capital punishment. There are now 97 countries that have abolished the death penalty and outlawed it from their constitutions completely, the majority of which have done so on human rights footings (Amnesty International, 2006, p.6 & 2012). Garland (2010) refers to the recent international shift towards abolitionism as the “age of abolition” and claims that this European-led movement has “made America an anomaly, the last remaining holdout in a historical period that has seen the Western nations abolitionism as a human rights issue and a mark of civilisation” (Garland, 2010, p.11). The USA is perceived to be the ultimate ‘Western democracy’ yet it continues to use the death penalty as a form of punishment.

Hood (2001) notes that the USA have entered reservations with regard to article 7 of the *Civil Rights Covenant* which proclaims “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (Article 7). The USA advocated that it would only observe article 7’s prohibition of “cruel, inhuman or

degrading treatment or punishment” as defined by the Fifth, Eighth or Fourteenth Amendments and the Supreme Court’s interpretation of their constitution (Schabas, 1997; Hood, 2001). The United States takes a ‘relativistic’ or ‘just desserts’ position on punishment, at least in part because this is popular with many voters. The political pressure and public demand for strict sanctions prevents them from abolishing it, this is known as penal populism. Unnever (2010) argues that those who are in favour of retaining or reinstating the death penalty tend to be less resistant to penal populism. It is the influence of “populist politicians” and their ability to exaggerate the notion of the criminal ‘other’ and heighten the tension around terrorist attacks that helps to fuel demand for a punitive culture (Unnever, 2010, p.465).

China has also been highlighted as being a country that operates in breach of the international standards in regard to capital punishment. Data indicates that China accounts for over 70 per cent of executions across the world, and this has a major impact on both perceptions and statistics (Lu & Miethe, 2007, p.7-8). Although the United States is seen to be the anomaly in the context of Western nations, China stands out as the global anomaly and skews all trends on capital punishment. Lu and Miethe (2007) argue that the “...patriarchal socio-political system during the imperial rule and the Communist ideology in the first thirty years of the PRC (People’s Republic of China) served as a catalyst for the inquisitorial legal system in which defendant’s rights were subject to the interest of the state and the collective good. Under these conditions, pro-death penalty policies seemed to be a natural consequence” (Lu & Miethe, 2007, p.8).

China’s main justifications for its use of the death penalty are on the grounds of retribution, deterrence and education. “The old saying of ‘a life for a life’ has been deeply rooted in Chinese culture for thousands of years” (Lu & Miethe, 2007, p.24). When it comes to punishment, China’s system is far removed from the growth of restoration and rehabilitation that is occurring in the UK, Australia and New Zealand amongst other countries. Deterrence is another justification for China’s death penalty, although empirical evidence exists to suggest it is having a non-deterrent effect. Friedman (1984) claimed that according to the utilitarian doctrine, the death penalty may have a plausible deterrent effect in states “which use it quickly, mercilessly, and frequently” (Friedman, 1984, p.214). China uses the death penalty in a manner which is swift, certain and severe (Lu & Miethe, 2007, p.25). Wang Hanbin, Secretary General of the National People’s Congress Standing Committee in China, explained how any clauses that would delay the onset of an execution would be a hindrance to “... our efforts to frighten the criminals, frustrate their arrogance, maintain public order and protect the life and property of the people” (Wang Hanbin, 1983 cited in Amnesty International, 1984). The last of China’s justifications of the death penalty is based on the moral grounding that it can be an educative tool. Deng and Mao were amongst the leaders in China who believed the death penalty to be a ‘necessary’ educative tool and believed in the popular Chinese proverb: “killing one to warn a hundred” (Lu & Miethe, 2007, p.24).

Despite external pressures coming from the international abolition movement and the human rights campaign, it would appear that China’s historical tradition of execution and punitive roots of retribution will prohibit the abolition of capital punishment in the near future.

“The current death penalty policy in China can be summarized with reference to three basic principles: (1) it cannot be without the death penalty; (2) it cannot be with the excessive use of the death penalty; and (3) it must prevent erroneous killing” (Lu & Miethe, 2007, p.25-26).

Their constitution prohibits the abolition of the death penalty; it is only through external pressures that the prevention of excessive and erroneous killings has been incorporated into the legislation (Lu & Miethe, 2007, p.26). Seemingly the latter two statements are not adhered to as China continues to kill thousands every year. This often occurs without a fair trial or opportunity to appeal and so frequently and swiftly that the likelihood of performing executions upon innocent persons is extremely high, if not inevitable. The Special Rapporteur (2004) noted concerns for two Tibetans that were sentenced to death in 2002 for supposedly causing an explosion: “Reports indicate that the trial was unfair and based mainly on circumstantial evidence. Besides, confessions were allegedly obtained under torture and the two accused did not have access to a lawyer during their trial (UN Special Rapporteur, 2004, p.17). Amnesty International have countless concerns about the People’s Republic of China; these include the lack of legal safeguards, unfair detention and excessive executions (Amnesty International, 1984, p.1). China is in constant breach of international human rights according to the *Universal Declaration* and the *Civil Rights Covenant*. Lu and Miethe (2007) argue that despite, the abolition movement and reduced use of the death penalty in other parts of the world, China’s persistent and increased use of it overshadows improvements elsewhere (Lu & Miethe, 2007, p.7).

The final aspect of human rights to be considered is the methods of execution which are used. The most common process for execution used at present is the lethal injection. Historical methods of execution included hanging, drawing and quartering, burning and decapitation amongst many other cruel mechanisms for the taking of one’s life. In the twentieth century however, there is a strong desire to take the lives of criminals in the most painless and humane manner possible in order to comply with article 5 of the *Universal Declaration*: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (Article 5). Florida substituted electrocution with the lethal injection after the Florida Supreme Court deemed electrocution unconstitutional in 2000. This came after the ‘botched’ execution of Cuban, Pedro Medina in 1997 who was set alight in the chair. In order to suppress adverse public opinion, and conform to ‘humane’ means of killing, Florida changed its default form of execution to the lethal injection (Sarat, 2001, p.62-63). The lethal injection is supposed to be the fastest and most painless method of execution. First the prisoner is sedated, then injected with deadly poisons which paralyse the lungs and heart (Sarat, 2001, p.62). Nevertheless, there have been several reports of cases where the lethal injection has caused problems. For example in Ohio, Romell Broom was subjected to spending hours strapped to a gurney during which time the prison staff and medical assistants attempted to locate a viable vein that they could insert the poisonous chemicals (Pilkington, 2012). Amnesty International (2007) highlight the stories of Coronado, 1998 and Diaz, 2006 who took eighteen and thirty-four minutes to die by lethal injection while the offender’s family watched. In Diaz’s case, it took a second dose of fatal substances before he

was declared dead; the whole ordeal was televised live (Amnesty International, 2007, p10-11).

Amnesty International claim that no form of execution is humane or painless and it is not solely about the actual execution; “it must be remembered the death penalty is not only about the minutes during which the prisoner is brought from the cell and killed; a prisoner lives with the penalty of death hanging over their head from the moment he or she is sentenced to the moment of unconsciousness and death” (Amnesty International, 2007, p.11). Moreover, Pitts (1997) argued, in respect of the Medina execution: “Seeking a ‘humane’ form of execution has nothing to do with it. It is not about sparing the condemned, but sparing ourselves. We like to keep the whole awful business at arm’s length, to tell ourselves capital punishment is civilised” (Pitts, 1997 cited in Sarat, 2001, p.65). This begs the question as to whether the objective to make state killings more ‘humane’ in the name of human rights or whether it is a mechanism designed to make the process more palatable to those responsible for performing the execution? Is it a governmental tool to justify to the public, pre-meditated killings in their name? Amnesty International (2007) argue that this is the real reason for the scientific advances to make executions as painless as possible; it is for selfish reasons rather than to comply with article 5 of the *Universal Declaration*. There have been many cries from victims and victims’ families to actually make the condemned suffer a lot more.

This chapter has provided an examination of the human rights laws which exist in relation to the death penalty and the extent to which nations across the world adhere to current legislation. Amnesty International and the United Nations are the two key organisations involved in worldwide abolition of the death penalty and the enforcement of fundamental human rights. Schabas (2002) takes a positive stance upon universal abolition and states that “the day when abolition of the death penalty becomes a universal norm, entrenched not only by convention but also by custom and qualified as a peremptory rule of *jus cogens*, is undeniably in the foreseeable future” (Schabas, 2002, p.3) However there are more pessimistic scholars, that discern the static position that China is currently holding with regard to the death penalty, and predict a more troublesome journey for abolitionists and human rights activists. Unnever (2010) is one of these scholars: “at this point, if the key to securing abolition over the long term is to have the world’s population define the death penalty as a human rights violation I believe abolitionists have a long road to travel (Unnever, 2010, p.480). Evidence provided in this chapter suggests that persuading China on a voyage towards abolitionism might be the most crucial piece of the jigsaw needed to achieve universal abolition and respect for human rights. Currently both the United States of America and China, are upholding their sovereignty and retaining the death penalty even if only as a symbolic function of the war against crime.

Conclusion

This dissertation has analysed three of the key contemporary controversies surrounding the death penalty and sought to answer some of the significant questions that academics and scholars alike, have been researching for decades. The issues concerning the death penalty are of interest in the fields of law, sociology and

politics. The areas that this paper explored were the deterrence effect, victim-impact and closure, and the human rights laws issues in relation to the death penalty.

Chapter One focused upon the effectiveness of the death penalty as a method of deterring crime. In essence this is an empirical question and the evidence, or lack thereof, of a deterrence effect suggests that imposing death upon criminals does not generally deter other potential killers. The statistical evidence is ambiguous at best but the inability to find any clear correlation between deterrence and average homicide rates suggests that there is a non-deterrant effect. In the United States, the lack of certainty and celerity of the sanction would appear to undermine any deterrent effect. There is controversy, uncertainty and delays (on average ten years) surrounding every execution which are unlikely to prevent rational thinking offenders. Furthermore, ‘one-off’ offenders who commit crimes of passion, or offenders whose mental incapacities do not allow for them to comprehend a death sentence, are often not taken into account by advocates of capital punishment (Amnesty International, 2007).

Shepherd (2005) argues that capital punishment achieves the opposite of the desired effect and creates a brutalisation effect which is ultimately counter-productive. Hood (2001) states that “it legitimizes the very behaviour – killing – which the law seeks to repress...It therefore undermines the legitimacy and moral authority of the whole legal system” (Hood, 2001, p.332). There is much evidence which fosters the argument that the states which retain the death penalty use it as a symbolic mechanism in order to uphold their sovereignty and, in some cases, a political tool to repress citizens whose “governments deem it expedient to eliminate” (Amnesty International, 2007 p.7).

A more recent development within the criminal justice system is the attention paid to victims, due to their politicisation and the growing victims’ rights movement. Chapter Two analyses the status of the victim within the capital trial process and the importance of the introduction of victim-impact statements. As of 1991, in the United States, victims have been granted the opportunity to provide victim testimonies. This has sparked controversy in relation to the moral justification of the impact this has in trials as the statements can have significant consequences for the fate of the offenders.

One argument presented is that, giving testimony to their loved one’s worth can be cathartic and provide closure for the friends and family of victims. Nevertheless opponents claim that advocating the death of another person is solely symbolic of personal vengeance and could actually impede the healing process (Arrigo & Williams, 2003, p.619). Moreover the implications for sentencing consistency is highly debatable. Victim impact statements are seen to be very influential in capital trials, which when presented, deliver a greater number of death sentences due to their emotionally-fuelled nature. This then raises the question as to whether victims’ character statements or even photos and videos of the murder victim, should be admissible in court as they are irrelevant to the moral blameworthiness of the defendant (Younglove et al., 2009). Ultimately, the victim impact statement is a political tool which allows the government to conduct state killings as a means of total state power, yet present them as a service to victims’ families to help them achieve closure (Garland, 2010). The apparent consideration of victims’ families is much more appealing to proponents of capital punishment to justify a brutal act.

The third and final chapter discusses the extent to which human rights laws clash with the retentionist states' justifications for upholding the death penalty in their statutes. Amnesty International and the United Nations are in continuous battle to secure universal abolition but fear that including the abolition of the death penalty *without exception*, may only serve to isolate states that are determined to continue performing state killings. They have compromised by setting safeguards and restrictions and stress that it should only be imposed for the most serious crimes. Nevertheless these limitations are still violated by certain nations, particularly China. It is strongly argued that so long as the death penalty exists, this will inevitably result in the loss of innocent lives due to unfair trials, racial bias and torture-induced admissions. Countries may use the death penalty as a form of demonstrating its sovereignty but there is little evidence to suggest that it has any positive impact upon reducing crime.

Overall, this paper has evaluated some of the key conflicts, but the evidence would suggest capital punishment does not achieve its primary function which is to deter potential criminals. Neither is there any overwhelming evidence in favour of its benefit as a healing tool for victims. It is often abused by governments and politicians as a tool of repression and undermines several fundamental human rights. The road to reaching universal abolition appears to be filled with obstacles.

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