

# ENDING THE DEATH PENALTY

THE EUROPEAN EXPERIENCE  
IN GLOBAL PERSPECTIVE

Andrew Hammel



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## The European Experience in Global Perspective

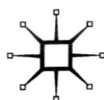
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# Ending the Death Penalty

*To my mother, Lillian Murvine Hammel*

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Andrew Hammel

# Contents

<i>List of Figures</i>	viii
<i>Acknowledgements</i>	ix
Introduction	1
<b>Part I The Transatlantic Death Penalty Divide and the Psychology of Vengeance</b>	
1 America and Europe Diverge on the Death Penalty	7
2 What Does the Worldwide Popularity of Capital Punishment Tell Us?	25
3 The Hollow Hope of Public Education	40
<b>Part II Abolition in Germany, Great Britain, and France</b>	
Preface to Part II	55
4 Case Study One – Germany	61
5 Case Study Two – The United Kingdom	86
6 Case Study Three – France	116
<b>Part III The European Model in a Global Context</b>	
7 Elaborating the European Model	149
8 Why the European Model Failed in the United States	189
Conclusion – Abolitionism beyond America and Europe	232
<i>Bibliography</i>	237
<i>Index</i>	250



# List of Figures

7.1	Public Opinion on Capital Punishment in West and East Germany, 1950–2009	179
7.2	Public Opinion on Capital Punishment in France, 1978–2006	180

# Introduction

The origins of this book date to the mid-1990s, when I worked for the Texas Defender Service, a small private non-profit law firm which represented Texas death row inmates in their appeals. Representing death row inmates is vital work, not least because it regularly can and does save human lives. But most of those who do this work have an ulterior motive: they believe it will hasten the end of capital punishment in the United States. American death penalty lawyers notched remarkable victories in the early 2000s: the Supreme Court outlawed capital punishment for those who were minors at the time of the crime (*Roper v. Simmons*, 2005), and for the mentally retarded (*Atkins v. Virginia*, 2002). But if these piecemeal victories contributed to the complete abolition of capital punishment, it was hard to see how. The death penalty still enjoyed the support of about 70% of the population, and – most importantly for the subject of this book – that fact was seen, in the United States at least, as convincing proof of its legitimacy.

After moving to Europe I resolved to examine how European jurists and activists had succeeded where their American counterparts had failed. What I heard from abolitionist lawyers and activists in Western Europe was surprisingly uniform, even across different countries and cultures: the American approach was doomed to fail. To paraphrase many conversations I had, the argument went as follows: ‘You cannot possibly hope to convince a majority of the population to oppose capital punishment. If you make that a precondition to abolishing the death penalty, you have lost the battle before it has begun. I don’t wish to give offense, but you naïve Americans do not seem to understand that a desire to see murderers executed is a basic drive of human nature, one which only the most educated are able to overcome.’ When I related these arguments to my American colleagues, they were usually greeted with suspicion.

Yet, as I delved deeper into European law and history on the subject, I began to understand what the Europeans meant. The ‘European’ argument, at its core, could be broken down into four basic assertions: first, there is an ingrained human desire to inflict retribution or revenge on those who

commit serious crimes. Second, this predisposition to seek revenge will lead a majority of ordinary citizens to favor the death penalty for murder, and it is very difficult to change their views. Third, persons with higher levels of formal education think about crime and punishment differently than members of the general public, and are thus less likely to favor the death penalty. The fourth thesis – which follows from the previous three – is that if capital punishment is to be abolished, it must be abolished by educated elites. Needless to say, these assertions are not uncontroversial, and are thus rarely stated in such blunt terms by European death penalty opponents.

This book can be considered an examination of all four theses. Part I starts with a short sketch of the divergent paths of the United States and Western Europe on the issue of capital punishment. In Europe, death penalty abolition movements prevailed, leading to the recent establishment of Europe as a truly ‘death-penalty-free’ zone. In the United States, the abolitionist movement made steady progress until the early 1970s, at which point a backlash set in, reversing many of the previous gains and entrenching capital punishment into the American legal landscape. This sketch sets up the remaining discussion, which focuses on why the divergence took place and what it tells us about the European world view I have outlined above. Part I continues with research from various disciplines showing a strong cross-cultural tendency for people to seek revenge against those who have violently victimized them, and to experience vicarious satisfaction when the state exacts harsh punishment in the name of the people. This impulse is not shared to an equal extent by all members of any given society, and is channeled in different ways by different cultures. It is there, however, and it is universal, as shown by the considerable popularity of capital punishment in many different cultural contexts. There is also considerable evidence that the desire for vengeance decreases with increasing levels of education. After discussing these findings, Part I concludes with an examination of why mass public opinion on capital punishment is so resistant to change.

Part II of the book is a detailed examination of the process of death penalty abolition in Germany, France, and England. In each chapter, I will first sketch the emergence of modern ‘abolitionism’ – defined here as a social movement calling for the complete abolition of capital punishment for all crimes committed by civilians during peacetime (and excluding the special cases of treason and crimes of military jurisdiction). In all three nations, this modern abolitionist idea first emerged in the late 18th century, was developed and expanded in the 19th century, and finally prevailed in the middle-to-late 20th century. The specific historical context leading to abolition differed from nation to nation. Nevertheless, I hope to show that each of the three abolition movements shared common traits. The idea of total abolition was pioneered by public intellectuals and philosophers, and then gradually gained in popularity among the educated upper classes, especially the liberal professions. Once support for the abolition of capital punishment reached a

'critical mass' among the educated elite, legislative proposals to abolish capital punishment were tabled, generally by lawmakers in a national assembly. In fact, the final phases of all three abolition movements were managed largely by individual lawmakers: Thomas Dehler in Germany, Sydney Silverman in Great Britain, and Robert Badinter in France. In all three countries, perhaps the chief obstacle to abolition was public support for capital punishment. These abolition movements prevailed not by changing public opinion, but rather by shielding the capital punishment issue from the vagaries of the public mood and stiffening the spines of legislators who privately disdained the death penalty but feared a public backlash if they voted to abolish it.

The first two parts of this book can thus be read as a qualified endorsement of the 'European world view' concerning capital punishment. In Part III of this book, I will propose some tentative answers to whether the European model of elite-driven, top-down abolition can succeed in those countries which have yet to abolish capital punishment. I will argue that the process of death penalty abolition fits well within the general framework of the theory of the civilizing process elaborated by the German sociologist Norbert Elias. Elias' theory helps explain why the impulse to abolition always emerged first among social elites, and why all successful abolition movements have chosen a 'top-down' model which bypasses public opinion. Although the process of change in elite opinion proceeds similarly in most societies, it is not alone sufficient to achieve abolition: there are important structural preconditions for European-style abolition movements. Many attempts to explain national differences in penal policy rely heavily on cultural explanations. I will argue that structural factors are equally important. In particular, I will argue that the process of penal change cannot be understood without careful attention to the issue of *which social groups actually influence penal policy*. I hope to demonstrate that this focus on the structural characteristics of national legal systems generates useful contrasts between Western Europe and the United States that help answer the questions raised by the U.S./Europe divergence on capital punishment.

This book is not a polemic. Arguments for and against capital punishment have changed little over the past centuries, and much more eloquent writers than I have already marshaled the arguments on both sides. This book is, rather, intended to be a comparative policy analysis: the question is not the normative one of whether the death penalty should be abolished, but rather the descriptive one of how this was achieved in the past. Nevertheless, it may be disingenuous of me to hide my perspective: I oppose capital punishment, and I would be pleased if this book helped contribute, in some small way, to its eventual worldwide abolition. A better understanding of past campaigns against capital punishment may be of use in charting the future course of the international abolition movement.



## Part I

# The Transatlantic Death Penalty Divide and the Psychology of Vengeance

'Revenge may be wicked, but it's natural.'

– Rebecca Sharp in *Vanity Fair*, by W. M. Thackeray



# 1

## America and Europe Diverge on the Death Penalty

### A Note on Methodology: Focusing on the U.S. and Europe

This book will concentrate mainly on the evolution of capital punishment policy in the United States, the United Kingdom, France, and Germany. This focus should, of course, not be understood as dismissing the importance of abolition movements in other parts of the globe, such as Central and South America. As Franklin Zimring and David Johnson (2008) have recently pointed out, Asia has been the main venue for executions in the modern era, and deserves far more scholarly attention than it has so far received. However, I believe my focus can be justified on several different grounds. First, and most arbitrarily, my own limitations: I can read and speak only German, French and English.

However, there are other, less arbitrary, reasons. First, the modern movement to abolish capital punishment is generally agreed to be an intellectual legacy of the European Enlightenment. To be sure, one can find arguments against capital punishment, or political orders which do not appear to have inflicted it, in some ancient and non-Western cultures, among them certain phases of Roman rule and among some Slavic tribes (Ancel 1967:5–6; Green 1967). However, until the 18th century, capital punishment was practiced in all Western justice systems, and sustained arguments against the ruler's right to take life were essentially unknown. This changed in the second half of the 18th century. In 1765, the Austrian jurist Joseph von Sonnenfels critiqued capital punishment as 'contrary to the purposes of punishment' and called for its use only when other means of 'defending common security' were insufficient (Schmidt 1995:220–1). However, the first coherent, comprehensive and sustained argument against the state's right to kill was made by Cesare Beccaria (2008), a 26-year-old Italian nobleman, in his 1764 book *On Crimes and Punishments*. Drawing especially on the ideas of Locke and Rousseau, Beccaria adumbrated a case for the complete abolition of capital punishment for all crimes. Beccaria's book quickly achieved worldwide notoriety and was translated into most major languages. Beccaria's arguments, in one form



or another, have furnished the rhetorical basis for abolition movements in dozens of countries and cultures far remote from his own.

I also focus my study on these nations because the abolition movements there are extremely well documented. Western European nations had high rates of literacy and political involvement during the 18th and 19th centuries. Capital punishment was always a favorite topic of debate, and remains so to this day. The U.S., U.K., France, and Germany also have highly developed legal and political systems whose operations are well understood, painstakingly documented, and influential worldwide. This fact permits capital punishment policy to be assessed against a broader background of cultural and legal development. The points of contrast I will highlight in my analyses – along the axes of centralization, bureaucratic control of policy, and the nature of political representation – are well illustrated by the nations I discuss.

Finally, these nations are influential: political systems developed in Great Britain and on the European continent have, through colonization and imitation, exercised worldwide influence. The burgeoning literature on ‘law and finance’ has identified dozens of statistically relevant policy and outcome differences that can be traced to what its authors call a country’s ‘legal origin.’ According to the general scheme used by law and finance scholars, most of the legal systems in the world are marked by their origins, which were French, British, German, or Scandinavian (La Porta et al. 1998). A country’s legal origin, these scholars argue, turns out to have a lasting and statistically significant effect on its entire architecture of commercial law. Japan, for instance, adopted German criminal and civil codifications, which ensures that German conceptual frameworks and legal scholarship continue to exercise a significant influence in that country’s legal system. Just as legal origin helps us understand differences and patterns in the way dozens of nations structure their capital markets or regulate corporations, it may also be able to help us understand how nations across the world shape criminal justice policy.

Thus, I hope to demonstrate in this book that a careful and in-depth comparison of European and American political practice concerning capital punishment generates insights that may apply in broader contexts. In particular, I will argue that it is impossible to explain the divergence in practice between the United States and Europe without addressing two specific methodological points. First, one must carefully distinguish the opinions of educated elites toward capital punishment from those of the general population. Second, one must closely examine the question of which social actors actually wield *practical control* over the development of criminal justice policy. As I will suggest, a comparison of the European and American experiences throws both of these factors into bold relief. I hope to demonstrate that they are important to understanding death penalty abolition in different regional contexts as well.