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ANDREW HAMMEL

Strategizing the Abolition of Capital Punishment in Three European Nations

Zusammenfassung

Seitdem es die Todesstrafe in keinem Mitgliedsstaat der Europäischen Union mehr gibt, werden erhebliche politische Mittel eingesetzt, um in Nachbarländern die Aufhebung der Todesstrafe voranzutreiben und im Völkerrecht durchzusetzen. Werden diese Strategien Erfolg haben? Um diese Frage zu beantworten, muss man nachvollziehen können, wie es zu der Abschaffung der Todesstrafe in Europa kam. In diesem Aufsatz wird zunächst die Aufhebung in Deutschland, Frankreich und Großbritannien beschrieben und daraus ein „europäisches Modell“ herausgearbeitet. Es fällt sofort auf, dass das europäische Modell „elitegesteuert“ war – und weiterhin ist: Die Bildungselite kommt zu der Überzeugung, die Todesstrafe müsse abgeschafft werden, obwohl die Bevölkerung die Hinrichtung von Gewaltverbrechern möglicherweise weiterhin befürwortet. Die Oberschicht wird aber nicht über Nacht zu Gegnern der Todesstrafe. In der Regel ist dem ein jahrzehntelanges unterschiedenes Eintreten Einzelner vorausgegangen.

Kann diese Herangehensweise in anderen Ländern gelingen? Die Antwort hängt mit der Art, wie das Strafrecht in europäischen Ländern organisiert ist, zusammen. Es ist größtenteils zentralisiert und vereinheitlicht und wird von Mitgliedern der Bildungselite, zum Beispiel von Professoren, hochrangigen Behördenbediensteten und Psychologen, geschaffen und überwacht. Wenn nun in diesen Kreisen der Widerstand gegen die Durchführung der Todesstrafe aus „Gründen der Zivilisation“ wächst, steht der Abschaffung der Todesstrafe generell nichts mehr im Wege. Auch wenn die Bevölkerung die Abschaffung ablehnt, ändert das hieran nichts, denn die Bevölkerung hat in der Strafrechtspolitik in europäischen Ländern nur einen geringen Einfluss. In Ländern wie den Vereinigten Staaten von Amerika herrschen völlig andere Bedingungen. In den USA ist das Strafrecht in jedem Staat unterschiedlich geregelt und die Elite hat viel weniger Einfluss auf die Strafrechtspolitik, wohingegen die Bevölkerung traditionell bei der Gestaltung der Strafrechtspolitik stark partizipiert. Darum hat das europäische Modell der Abschaffung der Todesstrafe in den USA wenig Aussicht auf Erfolg – es kann aber in Ländern, in denen die Strafrechtspolitik elitär geprägt ist, zukunftsfruchtig sein.

Introduction

The European Union now styles itself as a death penalty-free zone. Each of the 27 European Union Member States has ratified Protocol 6 to the European Convention on Human Rights (ECHR), which requires prohibition of the death penalty except for crimes committed “in time or war or imminent threat of war.”¹ All 47 Member States of the Council

¹ DG COMM (2007).

of Europe have done so as well, with the exception of Russia. Protocol 13 to the ECHR, opened for signature in Vilnius in 1992, provides for a flat prohibition on capital punishment, with no exceptions. As of 2007, 22 EU Member States and 40 Council of Europe Member States had signed and ratified it. Five EU Member States (France, Italy, Latvia, Poland, and Spain) had signed but not yet ratified it.² For purposes of this essay “Europe” will refer to current Member States of the European Union, unless otherwise noted.

Since achieving its status as a “death penalty-free zone,” the European Union has invested significant political capital into extending the policy of abolition to neighboring nations, and to pushing for more aggressive moves toward abolition in international law. Will these strategies be successful? To help answer that question, it is necessary to understand how abolition succeeded in Europe. In this essay, I set out three brief case histories of abolition in Germany, France, and the United Kingdom. I will argue that there is a European model of abolition, and that this model of abolition is elite-driven. That is, the best-educated members of society come to believe that the death penalty must be abolished, even though the population as a whole is in favor of continuing to execute criminals. Driven usually by one prominent abolitionist leader, a majority consensus in favor of the abolition of the death penalty emerges among social elites. Abolition is accomplished by legislative action, usually against the will of the majority of the public. After the historical sketches, I will abstract somewhat from the direct historical approach, and analyze some of the rhetorical tactics and strategies used by abolitionists to secure their goals. Finally, I will analyze abolition in Europe from the perspective of the ‘civilizing process,’ as described in the works of Norbert Elias and his followers.

Elite-Driven Abolition in Three Societies

Scenes of mobs savoring cruelty and death are imprinted deeply in the European cultural memory. As literacy increased, so did an eager market for gruesome and melodramatic post-execution pamphlets describing the condemned’s last hours and his manner of death. Until very recently (in broad historical terms), ordinary Europeans reveled unself-consciously in grisly public executions. They did the same in the United States, as shown by the souvenir postcards depicting thousands gathered in public squares to watch suspected criminals – overwhelmingly African-American men – being publicly mutilated and hanged.

When European reformers challenged the death penalty, they interpreted widespread public support for capital punishment against this long historical background. Of course, in the post-war period, recent experience with fascism also highlighted public endorsement, or at least acceptance, of extreme violence against criminal wrongdoers and political undesirables. When the final push to abolish the death penalty in France, Germany, and the UK began, polling data showed similar levels of support for capital punishment as exists now in the United States. More importantly, the polls showed the same level of support when the struggle to abolish the death penalty ended successfully – whether by legislative enactment, judicial decision, or constitutional reform. No European abolitionist leader ever harbored the hope of changing mass public opinion. Instead, they crafted elite-driven, “top-down” abolitionist strategies. As we will see, the reformers made extensive

² See Council of Europe (2008).

use of tropes of “civilization,” often explicitly critiquing the “bloodlust” of the uneducated masses. That is, they used language that indicated their primary audience consisted of other members of the social elite, not the broad mass of the population.

Germany

In comparison to many other European countries, 18th- and 19th-century Germany followed a notably mild policy with regard to capital punishment. Although policy in the various small principalities that formed pre-modern Germany varied widely, Nicholas J. Evans, author of a comprehensive English-language history of Germany’s death penalty, notes that use of the death penalty was relatively sparing and merciful, especially compared with contemporary English policy. German and Austrian rulers frequently abolished capital punishment for periods of time. Three times in German history – during the Revolution of 1848,³ the formation of modern Germany in 1870,⁴ and during the 1919 debates on the Weimar Republic’s Constitution,⁵ proposals for the complete abolition of capital punishment were tabled and often came quite close to passage, although, in the end, they were consistently rejected. During National Socialist rule, the death penalty was firmly adopted as a crime-control policy. Some 30,000 death sentences were handed down during the Nazi era by German courts. These “judicial” death sentences were generally carried out by guillotine. Of course, the number of judicial executions was dwarfed by those killed in programs of mass extermination of ‘undesirable’ social groups, as “formal capital punishment was effectively swallowed up in the larger machinery of human destruction.”⁶

In most nations, abolition of capital punishment was preceded by a decades-long campaign. In Germany, however, it was accomplished almost overnight, during a period of crisis and upheaval. Germany’s post-war constitution, called the *Grundgesetz* (Basic Law), was promulgated on May 23, 1949, and is the founding document of the Federal Republic of Germany. Article 102 of the *Grundgesetz* is four words long, both in German and in English: “Die Todesstrafe ist abgeschafft.” (‘Capital punishment is abolished.’) Its background, however, is considerably more complex. It was the product of the deliberations of the Parliamentary Council, an organization composed of representatives from the political parties that emerged in the early post-war years. During the reconstruction of Germany after World War II, “[e]verything pointed to a restoration of the traditional German system of criminal law and penal administration.”⁷ The person who submitted the first proposal to include an article in the *Grundgesetz* advocating the abolition of capital punishment, however, did not come from any of the major parties – the Christian Democrats, the Christian Social Union, or the Social Democrats. Hans-Christoph Seebohm was, rather, one of the two delegates of the *Deutsche Partei* (German Party), a nationalist-conservative faction “bitterly opposed” to the execution of Nazi war criminals.⁸ During the very first

³ See Evans (1996: 254–277). However, the conservative restoration that followed 1848 in Germany rendered these laws a dead letter: see Evans (1996: 277–278).

⁴ See Evans (1996: 340–347).

⁵ See Evans (1996: 498–499).

⁶ Evans (1996: 875).

⁷ Evans (1996: 774–775).

⁸ See Evans (1996: 782).

session of the Parliamentary Council in December 1948, Seebohm “surprised everybody”⁹ by proposing that a clause be added to Article 2 reading “Potential life shall be protected. Corporal and bodily punishments are forbidden. The death penalty is abolished.”¹⁰ Seebohm, a wealthy industrialist who had collaborated with the National Socialist regime and whose party represented some of the farthest-right tendencies permitted under the new dispensation, urged adoption of the resolution to express the German people’s “disgust at the number of death sentences carried out in the past 15 years”.¹¹ Seebohm also mentioned various European states which had recently abolished capital punishment, and stressed that criminals must be given a chance to transform and purify themselves in prison.¹²

The Social Democratic party, despite its longstanding record of opposition to capital punishment, did not immediately support Seebohm’s motion.¹³ Only during the third reading of the proposed *Grundgesetz* did the remaining political parties, including the Social Democrats, rally to the idea of abolishing capital punishment. Carlo Schmid, a leading Social Democratic Party politician, argued, in an historian’s summary, that

today one must not approach the death penalty from the standpoint of criminal-justice policy but from fundamental issues, and one must eliminate instrumental considerations. The death penalty is, like torture, simply barbaric; in addition to the possibility of judicial murders, an especially important point is that the state degrades itself with every execution. The sentence ‘Que messieurs les assassins commencent’ should not apply – rather, the State should cease killing in its name; as it has the greater dignity and the primary obligation to do so.¹⁴

When capital punishment was outlawed in Germany, it was overwhelmingly popular. In 1949, an opinion poll by the Institut für Demoskopie Allensbach showed 77 percent of Germans in favor of capital punishment, and 18 percent against. According to Evans, “[t]he tide of popular opinion continued to flow in favour of the death penalty throughout the 1950s and showed no sign of ebbing.”¹⁵ Several motions were made in the 1950s and 1960s to abolish Article 102 of the *Grundgesetz* and bring back capital punishment. Only in the late 1960s did the tide of West German public opinion turn decisively against capital punishment. After this occurred, the moves to re-establish the punishment generally ended.

Throughout these debates in elite legal and policy-making circles, commentators established a specifically elitist discourse, in which the decision to abolish capital punishment would have to be defended against the masses, who would clamor for its re-establishment. The most famous post-war political intervention by the great German jurist Gustav Radbruch was undoubtedly his articulation of the “Radbruch Formula,” which sought to undermine the kind of apolitical, “scientific” positivism which had stymied institutional opposition to National Socialist lawmaking among the German legal establishment. In a 1949 editorial, “The Gallows Overthrown,” he also commented upon the abolition of the death

⁹ Evans (1996: 781).

¹⁰ Düsing (1952: 279).

¹¹ Düsing (1952: 279).

¹² See Düsing (1952: 279).

¹³ See Evans (1996: 781–782).

¹⁴ Düsing (1952: 281). The quotation “Que messieurs les assassins commencent,” or “let the gentlemen who commit the murders take the first step,” is a quotation from the 19th-century French writer Jean-Baptiste Alphonse Karr.

¹⁵ Evans (1996: 798).

penalty. He counseled fellow jurists that the public would surely mobilize to overrule Article 102 and re-introduce capital punishment, and counseled against giving in to the demands of the masses. Opponents of the death penalty, he wrote,

should maintain their standpoint even against occasional public moods in opposition, should not become weak in the face of the bloodlust of the unlettered masses, and even more, should prevent the emergence of these instinct-driven demands by an effective popular education campaign.¹⁶

Dr. Thomas Dehler, a member of the center-right Free Democratic Party, supplied a foreword to a 1952 history of death penalty. A committed abolitionist and then-Justice Minister of Germany, Dehler wrote: "If this [book] contributes to the replacement of the stupid, instinctual demand of the public for the death penalty with a balanced and well-thought-out judgment, it will have completely achieved its goal."¹⁷ Social Democrat Friedrich-Wilhelm Wagner, during a 1950 debate on re-introduction, conceded that the demand to reintroduce capital punishment was "popular," but argued that "it reflected 'a dark impulse' which people recognized as such by their behavior in such matters. It was not for Parliament to give way to it."¹⁸ Even supporters of capital punishment made elitist arguments. Neumayer of the Free Democrats, for instance, said during a debate on a motion to re-introduce capital punishment: "[T]he primitive way of looking at things is often on the right track, and when one asks primitive people nowadays, one usually hears the same opinion: that murder must be punished by death."¹⁹

Two years later, in 1952, another motion to restore capital punishment was tabled. During the debates, Justice Minister Dehler gave a "lengthy, detailed and powerful" speech against capital punishment:

And to the central point made by the death-penalty restorationists – that the death penalty was favored by the mass of the people – Dehler gave the classic reply: that parliamentary democracy was a representative system, and that the deputies had to make their own mind up on the issues before them. Public opinion in any case varied under the influence of events: after a particularly terrible murder it was strongly in favour of capital punishment, after a case of wrongful execution, strongly against.²⁰

Only in the late 1960s did support for capital punishment collapse, leading to an approximate reversal of the 50 percent–30 percent pattern.²¹ Public opinion has remained more or less against capital punishment to this day, and Germany's membership in the European Union precludes its reintroduction.

The United Kingdom

Britain's modern abolitionists, led by left-wing Labour MP Sir Sydney Silverman, mounted a decades-long crusade not only to highlight cases of injustice, but also to rally expert opinion against capital punishment and detach the issue of abolition from partisan politics.²² The first shot in the modern campaign to abolish capital punishment in Britain

¹⁶ Düsing (1952: 288).

¹⁷ Düsing (1952: 5). "Vorwort" (Foreword) by Dr. Thomas Dehler.

¹⁸ Evans (1996: 792): paraphrasing Wagner's speech.

¹⁹ Düsing (1952: 305).

²⁰ Evans (1996: 795).

²¹ See Noelle-Neumann and Köcher (2002: 676).

²² A general history of abolition in Great Britain can be found in: Block and Hostettler (1997).

was fired in 1948, when the House of Commons voted to suspend capital punishment for five years on Silverman's motion.²³ In the House of Lords, Viscount Templewood led the pro-abolition side of the debate. During his speech in favor of the amendment he noted that

public opinion was always against changes in penal methods. Public opinion was almost invariably ignorant of the kind of details being discussed in the debate. If during the last century they had waited for public opinion before restricting the death penalty to a few crimes they would have found public opinion almost always against the more expert views of Parliament and Whitehall.²⁴

Nevertheless, the Lords rejected the amendment. As a compromise measure, a Royal Commission on Capital Punishment was set up, which issued a report calling for death penalty reforms in 1953. In the meantime, the problematic executions of Timothy Evans and Derek Bentley helped focus public attention on flaws in the criminal justice system, and Arthur Koestler's *Reflections on Hanging* made a passionate case for abolition, taking direct aim at reactionary British judges, who came under increasing scrutiny for opposing reforms.²⁵ The 1957 Homicide Act was intended as a compromise – retaining capital punishment, but greatly restricting its scope. In practice, the Homicide Act reduced the stream of new death sentences, but did so in peculiar ways that highlighted the death penalty's arbitrary character. After several years during which the number of executions dwindled to two or three per year, the indefatigable Silverman arranged for another abolition vote in 1965. Originally an abolition bill, an amendment converted it into a bill calling for a five-year moratorium. It passed on a free vote (in which MPs may vote according to their consciences).

As the moratorium neared expiration, the Marplan group took a survey of British voters on the subject of whether they would like to see capital punishment abolished outright, preserved for certain murder, or applied in all cases of murder. An astounding 85 percent of respondents argued for preserving capital punishment in some form, whereas only 12 percent favored outright abolition.²⁶ Nevertheless, a bill proposing to make abolition permanent passed with large majorities in the House of Commons and the House of Lords in December of 1969, effectively ending capital punishment for ordinary murder once and for all in the United Kingdom.

As in Germany and France, all mainstream British parties have now embraced abolition. Nevertheless, popular support for capital punishment survives. In 1997, Lord Callaghan of Cardiff lamented that “public opinion in the country has not even yet been won over to Parliament's view,”²⁷ and in 2003, for example, a poll commissioned by the *Guardian* found 67 percent of Britons in favor of the reintroduction of the death penalty (although more recent polls show a drop).

France

France is distinguished for the long and consistent pedigree of abolitionist sentiment within its literary tradition. Victor Hugo's 1829 novel *The Last Days of a Condemned Man*

²³ See Block and Hostettler (1997: 110–113).

²⁴ Block and Hostettler (1997: 117): paraphrasing Templewood's remarks.

²⁵ See Koestler (1957).

²⁶ See Block and Hostettler (1997: 261).

²⁷ Block and Hostettler (1997: ix): Foreword by Rt. Honorable Lord Callaghan of Cardiff KG.

shocked the Parisian public with its unsparing psychological realism. Hugo made the abolition of capital punishment central to his political endeavors, and emphasized the ‘civilized’ nature of this sentiment: “One recognizes the thinking man by a certain mysterious respect for life.”²⁸ Albert Camus’ 1957 essay “Reflections on the Guillotine” remains a classic of abolitionist literature. However, the guillotine was not formally retired in France until 1981, when Parliament categorically abolished the death penalty. Former French Justice Minister Robert Badinter described his role in the French abolition movement in his 1999 book *L’Abolition*.²⁹ After witnessing a double execution in 1973, Badinter, a prominent attorney and Socialist Party member, chose to devote a significant portion of his time to abolishing capital punishment in France. As of the mid-1970s, he recognized that it would be impossible to convince a majority of French voters to oppose capital punishment. Here is his account of the “irrational fire” of support for capital punishment which he encountered on various tours through France to speak out against the death penalty:

On the basis of international studies, I tried to prove that everywhere where the death penalty had been abolished, violent crime had not increased, but rather had simply developed along its accustomed path, indifferent to the presence or absence of execution within the criminal code. In the eyes of fierce partisans, it was irrelevant that serious crime had not increased after abolition of capital punishment. What they wanted was to see the murderer pay for his crime with his life. To strengthen their convictions, they assigned a retributive effect to the death penalty which it did not in fact possess. To all arguments concerning the reformability of criminals; the ever-present possibility of judicial error; the lottery of the assize courts, which made the defendant’s life depend on a thousand imponderable factors; to all moral, historical, scientific and political factors, they brought up one consistent response: criminals must be put to death, because one must die after having committed such crimes.³⁰

And indeed, throughout Badinter’s abolition struggle, support for capital punishment in France remained hovering within a 55 to 65 percent range.³¹ Badinter makes no bones about the fact that the death penalty continued to enjoy the support of a majority of the French as he strove to abolish it. In fact, he viewed with dismay a reform which required jurors and lay judges in France to be chosen at random, instead of being nominated from “session lists,” which, Badinter noted, contained “a large proportion of members of the liberal professions, civil servants, and managers.” In these circles, Badinter reasoned, “the cultural level is superior to that of the average population,” and therefore “the number of abolition supporters, and supporters of moderate penal sanctions, is higher.”³² Badinter acknowledged that the reform, which formed juries by simple random selection from voting lists, was “more respectful of democratic principles,” but feared that participation of more average people in the sentencing process would lead to more death penalties.³³ Badinter’s account is confirmed and amplified by other historical works, which similarly

²⁸ Smets (2003: 7).

²⁹ See Badinter (2000).

³⁰ Badinter (2000: 19).

³¹ See Badinter (2000: 177).

³² Badinter (2000: 215).

³³ Death sentences did increase after the reform, although no evidence of Badinter’s speculation concerning a causal link exists; see Badinter (2000: 216).

describe a careful strategy to argue a moral case for abolition urgent enough to legitimate a ‘counter-majoritarian’ strategy.³⁴

Badinter concentrated mainly on keeping abolition of the death penalty on the Socialist Party platform, building support for abolition in conservative circles, and convincing Socialist Presidential candidate François Mitterrand to act forcefully on his abolitionist views. After the Socialist party took power in 1981, Badinter was appointed Justice Minister. His strict enforcement of party discipline resulted in the successful abolition of capital punishment. His argument for legitimacy was simple: the Socialist party was known to be abolitionist, the people voted a majority of Socialist deputies, and these elected representatives fulfilled their program.

Consolidating Abolition

These case histories – as well as those of other abolition movements worldwide – teach that abolition is possible even against majority support, when the campaign is skillfully targeted. European abolitionists used four main techniques: insulate, isolate, de-couple, and re-frame:

- **Insulate:** Take advantage of existing institutional arrangements that permit certain issues to be decided with less, or no, public input. When necessary, create new arrangements for this task.
- **Isolate:** To encourage conscience coalitions across party lines, the issue of the death penalty should be presented as having no political valence outside itself. It should be portrayed as completely independent of all other political issues – even all other areas of criminal-justice policy.
- **Delegitimize popular support:** Devise rhetorical strategies that directly undermine the notion that majority support legitimates the death penalty. This discourse is aimed mostly at elites; it appears in elite organs of opinion (such as parliamentary speeches or the pages of reputable broadsheet newspapers) and often uses nakedly elitist language about the “bloodlust” of the “uneducated” masses.
- **Re-frame:** The death penalty must be lifted out of the stream of everyday political disputes and framed as a damning symbol of social backwardness and oppression. The target should be to establish opposition to the death penalty as an uncontroversial, and necessary, element of the sort of “enlightened” world-view adopted by social elites and those wishing to associate themselves with this group.

These techniques may appear elitist, especially to American observers. However, the picture is more complicated than one of elites forcing through unpopular policies. In most abolitionist countries, the act of abolition generated its own post-hoc legitimization:

Once governments have proceeded to abolish the death penalty – and abolition has always occurred in the face of majority popular opposition – then public opinion tends slowly to change accordingly, and to learn to regard other sanctions as the ‘ultimate’ measures available in civilized society.³⁵

³⁴ See Le Quang Sang (2001).

³⁵ Garland (1990: 246). See also Zimring (2003) and Hood (2002).

Elite groups – often including conservatives who once opposed abolition – eventually welcome the end of state killing, which also ends the vicious controversies and unseemly passions it unleashed.

It is important to understand why lingering pro-death penalty sentiment never becomes sustained or focused enough to nurture an effective political movement in abolitionist countries. Here, the press plays a major role. The broadsheet media, almost all of whose writers have elite backgrounds, impose a near-absolute ban on favorable coverage of pro-death penalty sentiment. Even broadsheet newspapers, while still providing readers with detailed coverage of violent crimes, generally stop short of explicitly advocating the return of capital punishment. Tabloids in Germany, for instance – which routinely feature gruesome reports of murders – have not published a single editorial calling for the re-introduction of capital punishment since 1970, not even during the terrorist upheavals of the mid-1970s.

Civilization and Capital Punishment

The experience of abolitionist countries shows that abolition is impossible if it is made dependent on the will of a majority of ordinary citizens. The Polish philosopher Leszek Kolakowski captures the thought:

[W]e all know of crimes so hideous, so abominable, that the demand for the death penalty is understandable. In countries where the death penalty has been abolished, this generally came about through a legislative decision against the opinion of the majority of the population. The same can be said of the abolition of witch-hunting.³⁶

Criminologist David Garland has also noted this phenomenon:

That the death penalty appears to have massive popular support in the USA does not differentiate that nation from others, since virtually every other country has exhibited this kind of public opinion so long as the capital sanction is in place and usually for many years afterwards. Once governments have proceeded to abolish the death penalty –and abolition has always occurred in the face of majority popular opposition – then public opinion tends slowly to change accordingly, and to learn to regard other sanctions as the ‘ultimate’ measures available in civilized society.³⁷

If the impulse to abolish the death penalty did not come from the “bottom up,” where did it come from? It is at this point that the framework developed by Norbert Elias can be used to help clarify the processes leading to abolition of capital punishment around the world. The work of the German sociologist Norbert Elias – whose reception in the English-speaking world is now underway – provides a framework for analyzing the issue. In his 1939 classic *The Civilizing Process* and in later works, Elias argued, on the basis of thorough historical research, that the social practices we associate with “civilization” (such as codes of dress and courtliness, respect for the dignity and autonomy of others, a decrease in the level of general interpersonal violence in society, and changes in attitudes to bodily functions) originated among the secular social elites in the 14th and 15th centuries in Europe, then gradually spread throughout society, as those lower in the social

³⁶ Kolakowski (2005: 186).

³⁷ Garland (1990: 246).

hierarchy adopted “refined” manners.³⁸ Elias’ review of the historical record showed a steady decline in the level of interpersonal violence in Western societies since the medieval era. The increasing interdependence and complexity of modern societies, as well as the formation of strong, centralized governments, help drive this reduction. In addition to the growing interdependence, however, the civilizing process also involves the gradual spread of patterns of discretion, courtesy, and respect for life from social elites to groups lower in the social hierarchy. Thus, “civilizing” reforms in manners and laws – including constraints on violent impulses – generally originate among elites.

Elias emphasizes that these changes in habitus take place gradually, are not irreversible, and are generally not the product of conscious choice or guidance. Rather, as societies become more dense and interconnected, the individuals within them are linked by ever-longer chains of dependency. This interdependence forces them to take the needs of ever more people into account when acting. The increased need for tact and discretion, which is produced by external social factors (*sociogenesis*, in Elias’ terms), is then more or less unconsciously internalized by individuals, who go on to pass these internal behavioral controls on to their children in an ever-lengthening process of “civilization.”

Elias’ theoretical framework has since proven fruitful to criminologists. Elias’ suggestion that the level of general peacetime interpersonal violence in Western Europe had declined gradually, but significantly since the Middle Ages has been confirmed by later research. The murder rate in Western Europe and England, for instance, decreased by something like 90 percent between the 14th century and the present, despite the development of much deadlier weapons.³⁹ David Garland⁴⁰ and Ted Gurr, among others, have both noted the explanatory power of Elias’ model as applied to historical trends in punishment. Elias’ explanatory framework helps make sense not only of the decreasing level of general interpersonal violence in Western societies, but also the decreasing harshness of punishment. Garland argues that

it seems perfectly clear that Elias’ analysis of the development and characteristics of modern sensibilities has a profound importance for the study of punishment, which, as I have argued, is a sphere of social life deeply affected by conceptions of what is and is not ‘civilized.’⁴¹

Civilization fosters the ability to empathize with people of different social backgrounds. This empathy leads to internalized restraints that reject violence against others to satisfy cruel desires or gain personal advantage. This enhanced empathy and aversion to violence, in turn, reduces the level of condemnation and sheer hatred felt for criminals, and fosters a legal and moral order which accords even dangerous criminals basic respect and a chance at rehabilitation.

Particularly important for my thesis is the fact that, as Garland notes, this evolution in sensibility has a clear class profile:

³⁸ As the quotation marks indicate, Elias disclaimed any normative evaluations, and intended only to describe and analyze behavior which is called “civilized”. For an elegant summary of Elias’ theory of the civilizing process, see Mennell (2007: 1–22) or Fletcher (1997: 6–31).

³⁹ See Gurr (1981: 295) and Eisner (2001: 618).

⁴⁰ See Garland (1990). Chapter 10 discusses the insights Elias’ work offers into processes of social change that lead to reduced and rationalized criminal sentencing and the improvement of conditions of confinement.

⁴¹ Garland (1990: 216).

[S]ensibilities are likely to be unevenly developed in any particular society, revealing variations of attitude between different social groups. Elias' general model of a process of refinement which begins with the social elite and percolates downward towards the masses would suggest a broad correlation between high social class and developed sensitivity –; and one might find some evidence for this in the fact that most penal reformers have been drawn from upper- and middle-class backgrounds, that opinion polls in the USA and Britain show a tendency to evidence more punitive attitudes the further down the social scale one goes, [. . .]. But such a correlation is by no means general or constant and it is certainly not the case that the social elite of Europe or North America are prevented in their reforming efforts by the common people. Indeed, the leading proponents of 'popular authoritarian' attitudes, stressing severe punishment and harsh regimes, have usually been politicians of a conservative disposition and those sections of the ruling class which support them.⁴²

Echoing similar themes, Yale Law Professor James Q. Whitman argues, in a recent book-length comparison of American and European criminal justice policy,⁴³ that the trend toward milder punishment in Europe can be explained in part by the work of policy-making elites to expand privileged, humane conditions of confinement once available only to noble prisoners to the general prison population. The process of "civilization" in the context of punishment is well advanced in Europe, where the death penalty is a thing of the past, incarceration rates are the lowest in the world, life prison sentences are generally outlawed, and high-security prisons are rare.

Although scholars have criticized the representation of society that underlies Elias' model, the criticisms largely leave untouched the two aspects of the model relevant here: the basic psychological structure of the civilizing process and the assertion that the kind of civilizing advances that bring about less painful and drastic punishments proceed from the initiative of the educated elite – doctors, lawyers, politicians, religious leaders, professors, and social reformers. This is also true of the elimination of the death penalty. History may provide examples of popular support for commutation of individual death sentences, but it provides no examples of broad mass movements demanding the abolition of capital punishment *as a policy*. Indeed, as shown above, it provides many examples of mass public support for executions and opposition to reforms to the system of punishment as evidence of elitism or "soft on crime" attitudes.

However, as is clear, the "civilizing" mission to abolish capital punishment has met with vastly different results in Continental Europe and in the United States. For quite some time, this was not the case: the civilizing process developed in close parallel in the United States and in Europe throughout the 19th century. Stuart Banner's 2002 history of capital punishment in the United States describes the development of attitudes in the USA in the early 19th century and notes:

There had been an enormous change in opinion over the past two decades. Elites had become less comfortable in the presence of large numbers of those they perceived as their inferiors. Respectable people had once been proud to go to an execution. Now they were embarrassed and more than a little apprehensive.⁴⁴

⁴² Garland (1990: 237).

⁴³ See Whitman (2003).

⁴⁴ Banner (2002: 151).

On both sides of the Atlantic, elites underwent a clear civilizing process with regard to the death penalty, and were able to gradually reform legal procedure to reflect their growing unease with state killing: elites gradually eliminated public executions, introduced more “humane” execution methods, limited the range of crimes to which the death penalty could be applied, and expanded opportunities for judicial review and clemency. Further, distaste for capital punishment percolated down into broader segments of the population, as can be seen by the fact that in the late 1960s, the American public was split almost half-and-half on the question of the death penalty, making it clearly more abolitionist than most European bodies politic at that time.

Yet, around this time, the paths of European and American society drastically diverged. Under the guidance of elite activists such as Robert Badinter and Sydney Silverman, European countries abolished capital punishment. By the mid-1980s, capital punishment had not only been abolished in every European country, but its abolition had been enshrined as a basic principle of “Europeanness.” The elite consensus was so entrenched that making abolition of capital punishment a condition of entry into the European Union was relatively uncontroversial. In the United States, by contrast, developments differed dramatically. The Supreme Court invalidated all death penalty laws in 1972, but after 35 states re-introduced capital punishment in a wave of outrage at the Supreme Court’s decision, the Court re-entled in 1976, permitting executions to resume under new, stricter legal guidelines. In the background of this debate was an explosion of violent crime beginning roughly in the late 1960s. Although general background levels of lethal violence had always been higher in the USA, this steep increase in crime fundamentally altered public discourse on issues of crime and punishment, leading to a raw, populist tone that emphasized criminals’ individual personal responsibility and fostered a language of harsh condemnation toward those convicted of violent crime.

One can sum up these different developments simply: in the United States, elites *lost control* of public discourse about crime and punishment, and consequently *lost control* of the policy-making process; whereas European elites lost only partial control over discourse, while maintaining complete control over policy-making. There are a number of reasons for basic structural difference:

- *The American Entzivilisierungsschub (de-civilizing spurt)*. In America’s inner cities especially, crime among social out-groups dramatically increased from the 1970s to the 1990s, leading to a situation in which partial loss of the state monopoly on power took place.⁴⁵ The images of violence and decay produced by this social breakdown, in turn, eroded feelings of mutual responsibility and obligation between the majority and the inner-city minority. This led to a partial and targeted “de-civilizing spurt” in which harsh populist rhetoric and extreme penalties gained widespread acceptance. Although European societies also experienced an increase in crime in the late 20th century, the results were not as drastic, or as lethal, as in the United States, and did not lead to the same changes in policy.
- *Tradition of popular influence over criminal-justice policy-making*. The United States is characterized by a long and deeply-anchored tradition of relatively decentralized

⁴⁵ For an analysis of this rise in crime focusing on the dramatic difference in *lethal* violence between American and European societies, see Zimring and Hawkins (1997).

popular control over criminal-justice policy-making, characterized by the institution of the criminal jury, state-level control over criminal-justice policy, and popular election of many local judges.

- *The different status of elites in the United States.* Social elites in the United States have a much more limited ability to push through progressive social change than they do in Continental Europe. Several factors explain the relative weakness of American elites. As Stephen Menzell recently noted, the United States is simply too vast and diverse to have generated a unified class of elite opinion-leaders, and there is no real “aristocracy of office” peopled by influential and respected civil servants.⁴⁶ Elites that do exist have significantly less influence on the public debate, given America’s traditional anti-intellectualism and suspicion of expertise.⁴⁷ This is particularly true of criminal-justice policy elites, who are perceived to have failed to offer Americans sufficient protection from violent crime. Finally, the elite in the USA, such as it is, does not speak with one voice on the death penalty, as can be seen by the presence of judges on the United States Supreme Court who openly endorse capital punishment.

As powerful as the Eliasian model is in explaining psychological and social factors relating to crime and punishment, it is incomplete when assessing social practices that have been reified into legal structures, such as the death penalty. Elites can mold habitus by modulating social acceptance based on a code of conduct. But they can only change the legal order if they have the structural tools to realize and enforce the elite consensus – to change real-world conditions. In Europe, the structural background was favorable: existing traditions of strong centralized control over criminal-justice policy, exercised by professional elites insulated from the vagaries of public opinion.

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⁴⁶ See Menzell (2007: 102–103).

⁴⁷ For an interesting comparison between the influence of American and European intellectuals on public discourse in their relative societies, see Swartz (1997: 218–223).

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