

## **Publications**

### **The New Abolitionism: Why does the U.S. practice the death penalty while Europe does not?**

**by Andrew Moravcsik**

Earlier this year, nine highly regarded former Foreign Service officers filed a brief before the US Supreme Court calling for an end to execution of the mentally retarded in the United States. Led by Thomas Pickering, who has held more ambassadorial posts than any diplomat in US history, these veteran officials stated that such executions constitute a “cruel and uncivilized practice” that subjects the US to “daily and growing criticism from the international community.” Indeed, the United States stands alone among Western industrial nations in practicing capital punishment for ordinary crimes in peacetime.

To be sure, the United States is not alone. Amnesty International reports that whereas 109 countries and territories have abolished the death penalty in law or practice, 86 other countries continue to retain and use it—though the number of countries which actually execute prisoners in any single year is much smaller. If the number of governments that practice the death penalty is high, however, the company is not good. With the exception of Japan, Korea, India, a handful of Anglophone Caribbean islands, and a few others, the retentionists tend to be neither developed nor democratic. And the trend does not favor the US: Since 1985, over 40 countries have abolished the death penalty, whereas only four abolitionist countries have reintroduced it.

The greatest international tensions over capital punishment are felt across the Atlantic. The death penalty has become a hot button for left-leaning governments in Europe. A practice many politicians in the US, including its president, embrace openly, most European leaders consider abhorrent. In the past year, The New York Times ran an average of one story every four days mentioning the widening transatlantic gulf on this issue—demonstrating the depth of the problem highlighted by the Foreign Service officers’ Supreme Court brief. In the modern world, Europeans are the new abolitionists, and Americans are increasingly estranged from their closest allies.

What explains “American exceptionalism” with regard to capital punishment? This striking puzzle remains almost untouched by students of comparative politics. Addressing it is the first step in any understanding not just of current transatlantic tensions, but also the broader issue of American exceptionalism in matters pertaining to human rights.

At least four potential factors merit serious consideration: the prevalence of social and political violence, the level of public opinion support, the centralization or decentralization of domestic political institutions, and the existence of a concentrated conservative opposition. This essay offers a very rudimentary exercise in evaluating these conjectures empirically. Below I pose three queries to each: Does it provide a plausible explanation for specific attributes of US support for the death penalty? Does it provide a plausible explanation for transatlantic differences in support for the death penalty? Does it provide a plausible explanation for global coalitions, which pit abolitionists in Europe, Latin America, the Antipodes, and Canada against retentionists in the US, East and South Asia, the Islamic world, Africa, and many post-Communist societies? Let us consider each of the four factors in turn.

## **Political and Social Instability?**

Cross-national studies link state violence to armed opposition and active domestic insurgency. Extrapolating this view, we might conjecture that it is those countries where there is the threat of significant political and social instability that are most prone to employ the death penalty. Whereas the conventional version of this theory clearly does not characterize the postwar US or Japan, we might amend the claim in two ways. First, one might argue that the US, a frontier nation, has long had a legacy of local violence and retributive justice. Second, one might view relatively high rates of violent crime as another form of domestic violence. This explanation seems intuitively plausible as an account of subjective views of American citizens regarding capital punishment as retribution for murder and rape, and it provides a *prima facie* account of differences between the United States and Europe. Moreover, it would seem to explain why recently unstable democracies like Indonesia, the Philippines, Malaysia, Egypt, Algeria, Chile, and Korea may still have death penalty statutes on the books.

Yet this explanation runs into a number of anomalous facts. American exceptionalism with regard to the death penalty, far from being an enduring historical legacy, appears in fact to be a relatively recent phenomenon. Abolitionism is essentially a post-World War II trend. In some advanced industrial countries, such as Britain, where death was the mandatory sentence for murder, capital punishment was until recently practiced more widely than in the US. Europe witnessed serious efforts at continental abolition only in the immediate postwar period, starting with Italy in 1947 and Germany in 1949. In 1982, pursuant to one of François Mitterrand's election promises, France followed suit. Canada abolished its death penalty only in the last decade. The US itself was moving toward abolition until the late 1970s, with fewer states invoking capital punishment, and abolitionist tendency dominant in the US Supreme Court. In the present day, moreover, the link between violent crime and execution seems inconsistent with the cases of Japan, where crime and instability are low, as well as its practice by democratic governments in India and the Anglophone Caribbean, where crime rates are in no way exceptional.

## **Favorable Public Opinion?**

A second explanation for transatlantic divergence stresses mass public opinion. In the US, the death penalty has consistently been supported by a majority of Americans since systematic polling began. <sup>2</sup> To be sure, support dipped from over 60% to just 45% during the 1960s and early 1970s, but it bounced back up thereafter—particularly after the US Supreme Court imposed restrictions on the death penalty—and has now climbed to above 70%. The support is broad. Those who favor the death penalty tend to be disproportionately white, male, Republican, middle class, Southern, and Catholic—yet even within the African-American category, a majority support capital punishment.

The power of public opinion also appears to explain the behavior of some foreign governments. One activist reports that the Japanese government is unwilling to abolish the death penalty, despite the secrecy with which it is imposed in Japan, due to strong public opinion support for its retention.<sup>3</sup> Some speculate that Islamic, East Asian, and African countries also have mass cultures within which the death penalty is a more acceptable mode of punishment.

Yet the public opinion explanation does not appear to explain the basic transatlantic divergence we observe. European public opinion, and that of other advanced industrial abolitionist nations, views the death penalty positively. In France, for example, President Mitterrand abolished the death penalty in 1982 despite 62% percent of the French being retentionists; only last year did poll support dip for the first time below 50%. Two-thirds of the German population favored the death penalty at the time of its abolition. Today 65-70% of Britons, nearly 70% of Canadians, a majority of Austrians, around 50% of Italians, and 49% of the Swedes favor its reinstatement. 4 It is difficult to argue, therefore, that the United States and Japan differ from Europe primarily in terms of public opinion. Public opinion in Europe appears to follow national political decisions—and, even then, only slowly—rather than leading it. This suggests that the difference lies not in the public, but in the public’s relationship to politicians—to which we now turn.

### **Decentralized Political Institutions?**

A third potential explanation for transatlantic differences lies in the nature of domestic political institutions. Elsewhere I have argued that conservative opponents of global human rights norms tend to be empowered by the decentralized federal political institutions in the US. 5 Perhaps Europe differs from the US in that European political elites enjoy more “state autonomy” to pursue humane policies in the face of public opposition. Certainly in some European countries, such as Germany, Italy, and Austria, capital punishment was abolished when new democratic elites promulgated a new, post-authoritarian constitution—thereby creating a near irreversible presumption against succumbing to public pressure for its reinstatement. In other countries, a majority party or coalition abolished the death penalty by a simple parliamentary majority. Surely this was possible in part because, as compared to the federal and separation-of-powers system in the US, European parliamentary systems tend to discourage regional and single-issue politics and to create clearer partisan majorities. Regional institutions like the EC and ECHR have further entrenched and extended abolition.

In the US, by contrast, any centralized movement to abolish capital punishment would require fundamental constitutional change in a system where such change is nearly impossible. Any federal action to limit capital punishment would face the de facto super-majoritarian rules in the Senate and would in any case be limited to federal crimes. Yet only 19 of over 3,700 American death row prisoners are in federal prison, and there were no federal executions between 1963 and the recent executions of Timothy McVeigh and Juan Raul Garza. Instead criminal law is largely the province of the individual states, and any effort to standardize national policy must therefore coordinate legislative, electoral (notably referenda) and judicial action in the 38 states that currently impose the death penalty.

The only centralized political instrument able to achieve abolition would therefore be a declaration that capital punishment is unconstitutional. While until the late 1970s, it appeared US courts were moving in this direction, increasingly conservative federal courts have reversed this trend. Constitutional amendment would therefore be required. Yet amendment is impossible without exceptionally broad support—3/4 of the state legislatures or a similar Congressional supermajority. State courts, though more liberal on the average, have been even less willing to act, perhaps because many judges on the state bench are elected and abolitionist actions can trigger successful efforts to defeat or recall judges.

The result: State politicians and publics are empowered to set death penalty policy in accordance with local preferences—which encourages its perpetuation. Marshall summarizes the argument thus: “Basically, then, Europe doesn’t have the death penalty because its political systems are less democratic, or at least more insulated from populist impulses, than the U.S. government.”<sup>6</sup>

An explanation based on political decentralization (in a context of conservative public opinion) seems consistent with many aspects of US policy, and it provides a plausible account of differences between the US and Europe. Yet it does not seem to account for policy choices in East Asian, South Asian, Islamic, African and post-Communist states. Many of these governments are dictatorial, and it might be argued that an entirely different logic applies in such systems. Yet even many East and South Asian democracies—Japan, Thailand, Philippines, and Malaysia, if not Indonesia and India—tend to have more centralized non-federal political systems, yet elites do not challenge public opinion support for the death penalty.

### **Conservative Political Culture?**

A fourth explanation stresses the role of extreme conservatives in pressing for the retention and reinstatement of capital punishment. Here the argument is less that there is broad public opinion support for the death penalty, but rather than there is intense support among particular social and regional constituencies. Conservative values on race and the economy are said to help explain the “exceptional” American unwillingness to sign multilateral human rights treaties.<sup>7</sup> Similarly, some have argued that the early and extensive 19th century imposition of the death penalty in the Southern United States to punish rapists, runaway slaves and their accomplices, as well as murderers, created a culture favorable to capital punishment. Post-bellum migration of Southerners to the West, along with the frontier culture, might have spread these values. Today the US can be divided into three tiers, with the northernmost (from Alaska to Maine) almost never imposing capital punishment, a middle tier using it rarely, and a southern tier imposing it often. As Hugo Bedau has noted, two thirds of US executions over the past generation have taken place in just five southern states—Florida, Georgia, Louisiana, Texas, and Virginia—though the practice has been spreading in recent years.

In comparative perspective, we might thus conjecture that retentionist countries tend to be those with cultural tendencies that generate intense single-issue preferences around the issue of the death penalty. Explicit Islamic support for the death penalty, the Hindu practices of India, the curious martial culture of Japan, the authoritarian political cultures of East Asian, as well as Communist and post-Communist, states might help explain the range of global support for the death penalty. This is plausible, but we obviously must remain skeptical of glib stereotyping of cultural attributes. Any such explanation must remain speculative until more precise measures and causal theories can be developed.

### **Conclusion**

The analysis above is informal and inconclusive. Each of the four explanations for capital punishment—social instability, public opinion, decentralized political institutions, and conservative activism—is plausible, yet closer inspection reveals both confirming and disconfirming evidence. All we can conclude with confidence is that the sources of cross-national variation in the use of capital punishment, like the

cross-national support for many other human rights, remain in need of more sustained and rigorous scholarly attention.

### Notes

1 Most of the footnotes supporting this essay were cut for reasons of space. For a fully footnoted version, please contact the author at [moravcs@fas.harvard.edu](mailto:moravcs@fas.harvard.edu).

2 The polling data and this argument are summarized in Kristi Tumminello Prinzo, "The United States—"Capital" of the World," *Brooklyn Journal of International Law* 24 (1999), pp. 878-891.

3 Shigamitsu Dando, "Toward the Abolition of the Death Penalty," *Indiana Law Journal* 72 (Winter 1996), p. 10.

4 Joshua Micah Marshall, "Death in Venice: Europe's Death-penalty Elitism," *The New Republic* (31 July 2000).

5 Andrew Moravcsik, "Why Is U.S. Human Rights Policy So Unilateralist?" in Shepard Forman and Patrick Stewart, Eds. *The Cost of Acting Alone: Multilateralism and US Foreign Policy* (Boulder: Lynne Rienner Publishers, 2001).

6 Marshall, "Death in Venice."

7 Moravcsik, "Why is U.S. Human Rights Policy so Unilateralist?"