

Why the Death Penalty is Disappearing*

“(1) Auto da fe (2) Beating with clubs (3) Beheading: Decapitation (4) Blowing from cannon (5) Boiling (6) Breaking on the wheel (7) Burning (8) Burying alive (9) Crucifixion (10) Decimation (11) Dichotomy (12) Dismemberment (13) Drowning (14) Exposure to wild beasts etc. (15) Flaying alive (16) Flogging: Knout (17) Garrote (18) Guillotine (19) Hanging (20) Hari kari (21) Impalement (22) Iron Maiden (23) Peine Forte et Dure (24) Poisoning (25) Pounding in mortar (26) Precipitation (27) Pressing to death (28) Rack (29) Running the gauntlet (30) Shooting (31) Stabbing (32) Stoning (33) Strangling (34) Suffocation.”¹

This is a list of execution methods compiled by a New York State Commission in 1888. The Commission had been charged with investigating the most humane and practical methods of carrying into effect the sentence of death. The Commission, and the state of New York, would eventually

* Oslo Symposium. This lecture draws upon David Garland, Peculiar Institution: America’s Death Penalty in an Age of Abolition (Harvard University Press, 2010). Full citations and supporting evidence for the present paper can be found in the book’s endnotes.

¹ *New York State Commission to Investigate and Report the Most Humane and Practical Methods of Carrying into Effect the Sentence of Death*, 1888

introduce a new item into the historical record: the electric chair – first used in Auburn Prison on August 6th 1890.²

There is a reason this list is so long. Capital punishment has been practiced in most known societies over the course of human history. One might say that, until quite recently, it was the historical norm, a cultural universal. But in modern liberal democracies – in societies like Norway – the death penalty no longer exists.

We rarely think of it, but this transformation is remarkable. The death penalty once formed an elementary particle of governmental power in every nation state. Today the practice is widely regarded as a shameful violation of human rights and is prohibited throughout most of the western world. What happened?

This answer is by no means simple. There are exceptions to the Western trend – the USA being the most notable – and outside the Western world the death penalty is still alive and well, especially in the Middle East and Asia. Even in the West, the direction of historical change is not always the same. But we can roughly sketch the overall arc of change and trace the social causes that brought about this remarkable development.

² Stuart Banner, *The Death Penalty: An American History* (Harvard University Press, Cambridge 2003)

In the early modern period – between about 1400 and 1700 – newly-emergent state authorities took up the death penalty and accorded it a central role in the project of state building. Elaborate public ceremonies, horrifying execution techniques, and ritual proclamations were so many means to this end, with the most atrocious punishments being reserved for crimes of *lese majesty* and challenges to the state.³

A crucial element of state-formation was the effort of nascent political authorities to exert a monopoly of power over territory they now claimed as their own. This historic struggle to impose sovereign rule gave a new prominence and intensity to capital punishment. Prior to the emergence of the state, the death penalty appears to have been carried out without elaborate ceremony. Discussing the late medieval evidence from Germany, Evans says “Illustrations of executions in the fourteenth and fifteenth centuries show them as casual and unceremonial affairs, with a handful of people standing informally around while the hangman does his work” Referring to England, Sharpe writes that there “is little evidence that any elaborate ceremonial attended the execution of felons in the later middle

³ James Sharpe, *Judicial Punishment in England* (London: Faber and Faber, 1990), 33; Richard van Dulman, *Theatre of Horror: Crime and Punishment in Early Modern Germany* (Oxford: Polity, 1990); Mitchell Merback, *The Thief, the Cross and the Wheel: Pain and the Spectacle of Punishment in Medieval and Renaissance Europe* (Chicago, University of Chicago Press, 1999)

ages.” Otterbein’s ethnographic survey also suggests that pre-state societies were mostly executed in secret or without fanfare.⁴

The emergence of sovereign states altered these older practices in several respects. The punishment of death became the prerogative of state authorities who asserted their monopoly over legitimate violence and prohibited traditional practices of private vendetta and vengeance. Death penalties came to be imposed and administered under the auspices of the royal courts, imparting a greater degree of rule-governed formality and legal rationality. And the execution of these penalties became more public, more elaborately ceremonial and more violent, as the new states sought to use shock-and-awe tactics to impress the populace and strike fear in the hearts of enemies.⁵ Though we sometimes describe cruel punishments as “medieval”, it was in fact the emergence of despotic states in the late medieval and early modern period that transformed these events into elaborate spectacles of suffering. It was not Europe’s medieval lords but the absolutist rulers who replaced them that gave capital punishment its greatest cruelty, intensity, and display.

⁴ Richard Evans, *Rituals of Retribution: Capital Punishment in Germany 1600-1987* (Oxford: Oxford University Press, 1996) p.50; James Sharpe, *Judicial Punishment in England* (London: Faber and Faber, 1990), 31; Otterbein, *Ultimate Coercive Sanction*.

⁵ Katherine Royer, “The Body in Parts: Reading the Execution in Late Medieval England,” *Historical Reflections/Réflexions Historiques* 29 (2003): 323.

By the mid-19th century, in a context of increasingly well-established and rationalized states, capital punishment's main purpose had altered, so that what had once been an instrument of rule, essential to state security, became an instrument of penal policy, focused on the narrower goals of doing justice and controlling crime.⁶

As its functions changed, so too did its forms. The death penalty came to be formatted as a penal sanction rather than a political spectacle. Its focus came to center on criminal rather than political offences. Its executions came to be more swiftly administered, not in the political space of the town square but in the penal space of the jail yard. It sought to minimize bodily pain rather than maximize it, as before.⁷

By the late 20th century, in the very different context of the modern liberal democratic welfare state, capital punishment had ceased to be a central measure of crime control and had become increasingly rare and controversial. By century's end, it had been abolished by all the developed western nations other than America, and by several non-western nations besides.⁸

⁶ Evans, *Rituals of Retribution*.

⁷ Garland, *Peculiar Institution* chapter 3.

⁸ Banner, *The Death Penalty*; Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2008)

The widespread use of the death penalty – in earlier centuries in the West, and in much of the world still today – should hardly surprise us. If we set aside contemporary moral qualms and political objections to its use, it is easy to see why capital punishment has been so important. As a political weapon and a penal instrument, the death penalty has an irresistible power. Putting political enemies, serious wrongdoers, and dangerous individuals to death is an obvious, effective, and efficient way for authorities to eliminate the threat such individuals represent. Imposing a death penalty on law-breakers permits authorities to proclaim their power, impress onlookers, exact revenge, undo pollution, restore social order and send a warning to would-be offenders.

Nor has this self-evident efficacy diminished in the contemporary period. If swiftly applied, frequently utilized, and imposed with the requisite amount of pain and publicity – as it still is in places such as China, Iran, Saudi Arabia and Singapore – the death penalty retains much of its power as a penal and political instrument.⁹

The Character and Capacity of States

⁹ On the death penalty in Asia today, see David Johnson and Franklin Zimring, *The Next Frontier: National Development, Political Change and the Death penalty in Asia* (Oxford University Press, New York, 2009)

How should we explain the rise and fall of capital punishment in the modern West? The explanation is to be found in a series of social transformations that altered *the character of the state* in western society, its strategic interests, and the social fields in which it operates.

The death penalty is always and everywhere an exercise of state power. Capital punishment's use and character are – and have always been – shaped by the structure of state institutions and the decisions of state officials, acting in accordance with their perception of governmental interests. State actors strive to maintain control and deploy power in the interests of their institutions, their allies and their constituents. The death penalty is one more tool to be deployed – or not – in the furtherance of these ends.

As the nature and operational environment of the state have changed in different nations over time, so too has capital punishment.¹⁰

In the wake of the *ancien regime*, a series of political and cultural forces altered the state in western societies in ways that had major consequences for capital punishment. Processes of state-building enlarged the institutional capacities of government and the ability of state actors to exert social and penal control. The struggles of liberal and democratic forces transformed state institutions, forged new power balances, and imposed legal

¹⁰ For details, see Garland, *Peculiar Institution*, chapters 3-5

constraints on state policy. The emergence of cultural practices embodying civilized and humanitarian sensibilities softened state power, establishing new criteria of legitimacy and imposing new limits on the use of violence.¹¹

The coming of mass democracy, universal citizenship, and the welfare state transformed the government's relation to the individual citizen/voter and placed his or her welfare at the centre of political calculation.

Over the long run, the social fields in which the state deploys its powers have been continuously transformed. Throughout the West, societies have become more pacified, more orderly, more market-dominated, and more individuated. All these processes impacted capital punishment.¹²

Relations *between* states have also affected death penalty practice, especially in the context of war, imperial conquest, and decolonization. (Several South American nations repealed their death penalty laws to mark their new-found independence. Others, including several the Caribbean nations, insist on retaining capital punishment as a mark of their sovereign autonomy.) From the end of the 20th century onwards, pressure for abolition

¹¹ Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression* (Cambridge: Cambridge University Press, 1984); Paul Starr, *Freedom's Power: The True Force of Liberalism* (New York: Basic Books 2007); Lynn Hunt, *Inventing Human Rights: A History* (New York: Norton, 2007)

¹² Charles Tilly, *Coercion, Capital and European States, AD 990-1992* (Cambridge, Blackwell, 1992)

has been exerted by the Council of Europe, the European Union, and the United Nations.¹³

The state's control imperatives have shaped the death penalty at every turn. But the nature of these imperatives has changed over time: from the brutal assertion of violent power in the formative phase; to a more restrained use once state power was well established; to an attenuated, ambivalent deployment when the death penalty became embroiled in problems of legitimacy and efficacy.

The penalty of death was made inessential by the formation of a stable bureaucratic state, secure in its monopoly of violence, supported by a criminal justice apparatus of police and prisons, and relatively effective in its control of interpersonal violence. It was made problematic by the development of liberal-democratic and welfare state institutions, and by an associated culture of civilized refinement and humanism all of which worked to limit state violence and surround it with prohibitions and taboos.¹⁴

That capital punishment was long considered an indispensable tool of state-craft meant that it was spared critical attacks: an essential practice could hardly be abolished. But once capital punishment became inessential

¹³ Hood and Hoyle, *The Death Penalty*

¹⁴ Garland, *Peculiar Institution*

to state maintenance, the politics of the death penalty were fundamentally transformed. We can date from that moment in the 18th century the emergence of a powerful anti-gallows critique and the modern anti-death penalty movement. And right from the beginning, that critique had practical as well as ideological dimensions.¹⁵

Early modern authorities used executions to project state power. But these public events brought dangers for officials, since they put the state's power and authority on the line. The great ritual of state could be spoiled by an executioner's incompetence, a condemned man's recalcitrance, or by a disruptive, unruly crowd. Instead of affirming state sovereignty the execution could undermine it. An execution's meaning was inherently unstable, always vulnerable to resistance and re-appropriation.

State officials have always been motivated to increase their control over these difficult events – to minimize opportunities for disruption, to limit the impact of other actors, to develop protocols that can be carried through without fail. And a large part of capital punishment history can be understood in these terms. Consider, for example the changing pattern of public access to executions. At a certain point in the 19th century, the benefits of public executions came to be outweighed by their attendant costs,

¹⁵ Hunt, *Inventing Human Rights*

and state authorities began to move scaffolds behind prison walls. (Public executions were first abolished in the northeastern states of America – several decades before the UK and the Netherlands followed suit, and a whole century before France gave them up.)¹⁶

This process of “privatizing” the execution, of reducing its visibility and the extent of public involvement is best understood not as a result of more refined sensibilities, or a reaction to unruly urban crowds, though both of these played a role. It is best viewed as the ongoing effort of government officials to exert ever-tighter control over a fraught undertaking and to manage the meanings that it put into circulation. Time after time from the 17th century onwards, officials moved to reduce the extent of the ritual, the size of its audience, the performative role of the condemned, the time taken to die, and the opportunities for viewing and communicating about what was seen. Official concern to avoid spoiled public rituals eventually ended both ritual and publicity.¹⁷ This same process continues today in places as far apart as China and Iran, where authorities recently declared an end to public executions and in the USA, where executions are increasingly contained and concealed.

¹⁶ Garland, *Peculiar Institution*; Banner, *The Death Penalty*; Randall McGowen, “The Body and Punishment in the Eighteenth Century,” *Journal of Modern History* 59 (1987); V.A.C. Gatrell, *The Hanging Tree: Executions and the English People 1770-1868* (Oxford: Oxford University Press, 1994)

¹⁷ Philip Smith, *Punishment and Culture* (University of Chicago Press, Chicago 2008)

Political Processes of Reform

State institutions and state interests dictate the character and use of the death penalty. But these institutions and interests are shaped, in their turn, by political and cultural forces. The most important of these forces were liberalism, democracy, civilized manners and humanitarian sentiment.¹⁸

Most western nations today are liberal democracies of one kind or another and modern liberal thought has become infused with democratic ideals. But liberalism and democracy, for all their modern overlap, are *distinct* political traditions with different histories, values and priorities. And we need to stress this distinction because, when it comes to the death penalty, liberalism and democracy have sometimes pressed in different directions.¹⁹

At the core of classical liberalism are two essential commitments: a conception of social order that values individual freedom and autonomy; and a commitment to limiting governmental power by means of the rule of law. Liberal institutions aim to restrain the coercive power of the state and uphold

¹⁸ Garland, *Peculiar Institution* Chapter 5

¹⁹ Starr, *Freedom's Power*

the rights and freedoms of individuals. Little wonder, then, that liberals have always been among the death penalty's chief critics.²⁰

The growing power of liberal ideas and social forces impacted the death penalty from the 18th century onwards. In early modern Europe, punishments would sometimes be collective, as when in 1757 the relatives of the regicide Robert Damiens were deprived of their family name and banished from France.²¹ Against this, liberals insisted that crimes were an individual responsibility and only the offender ought to be subject to official punishment. Reacting against the arbitrariness of personalistic rule, liberal opponents of absolutism demanded procedural protections for those accused of crimes and the establishment of legal rules and principles that would limit the reach of state power.²²

As early as the 13th century, English nobles pressed for *habeas corpus* and trial by jury and by the 17th century these “rule of law” principles – together with rights to counsel and to public indictment – had become central to liberalism's agenda.²³ Liberal demands for procedural propriety

²⁰ Stephen Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

²¹ John McManners, *Death and the Enlightenment: Changing Attitudes to Death among Christians and Unbelievers in Eighteenth Century France* (New York: Oxford University Press, 1981).

²² Cesare Beccaria, *On Crimes and Punishments and other Writings*, ed., R. Bellamy (New York: Cambridge University Press, 1995, first published in 1764),

²³ These rights were embodied in the English Bill of Rights of 1689 and the Treason Trials Act of 1696. Later they featured in most of the new constitutions of the late 18th and 19th centuries.

and due process remain a mainstay of death penalty opposition in American today.

The rise of liberalism also changed how capital punishment was justified. The early modern death penalty had been phrased in the language of tradition, of religion, and of the Divine Right of Kings, none of which invited criticism or argument. From the 18th century onwards, liberals applied tests of utility and reason to the ancient institution and argued that if it could not be justified in these terms it ought not to exist at all.

The age of liberal revolutions (roughly from 1774 to 1848) coincided with the first abolitions – most often in small states and principalities such as Tuscany, San Marino, and Prussia. This earliest age of reform forged an association between liberal states and abolitionism that has persisted up to the present day.²⁴

Anti-liberalism forged the opposite association. Wherever authoritarian governments emerged, the turn against liberalism brought with it a return to capital punishment. 20th century Fascism revived the deployment of death as an instrument of state policy. And the criminal justice system of Nazi Germany made massive use of executions.²⁵ But the dominant tendency of the modern west has been to institutionalize liberal

²⁴ Garland, *Peculiar Institution* chapter 4

²⁵ Richard Evans, *Rituals of Retribution: Capital Punishment in Germany 1600-1987* (Oxford: Oxford University Press, 1996)

forms of law and government and to extend these protections to all social groups. And as the rule of law, procedural protections, and civil rights spread over the course of the 19th century, so too did death penalty reforms. By the late 20th century, death penalty abolition had become a tenet of modern liberalism, and a principle of the international movement for human rights.²⁶

Democratic rule means the “government of the people by the people for the people” (to quote Abraham Lincoln.) But democracy is understood in different ways and implemented through different arrangements. In America, democracy is institutionalized in a radically localist and populist form, which is one reason why the death penalty survives there today. Elsewhere, democracy is off-set by other values and institutions that set limits on majority rule and permit counter-majoritarian reforms.

Democratic writers and theorists of democracy have mostly been unenthusiastic about capital punishment, seeing it as a degrading practice emblematic of absolutist power and repressive rule. Like the lash, capital

²⁶ Hood and Hoyle, *Death Penalty*. Protocols 6 and 13 of the European Convention on Human Rights (1983 and 2002) prohibit the death penalty, as does the United Nations’ 2nd Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which was passed in 1989.

punishment suggests a kind of tyranny, an utter subordination of the punished by the punisher.²⁷

The development of modern democracy closely parallels that of death penalty abolition, with the nations of northern Europe and Scandinavia (and parts of the USA) being in the lead in both respects. In many respects, democracy did not fully come of age until the late 20th century, the period in which abolition became normative across the western nations.²⁸

Although a few abolitions occurred during the 19th and early 20th centuries, the majority took place in the decades after World War II, with the abolitionist trend accelerating in the 1990s. The temporal pattern of death penalty reform matches the temporal pattern of democratization. The end of Fascism in the 1940s prompted constitutional abolition in Italy, Germany, and Austria. The Iberian transition from authoritarian corporatism to democracy in the 1970s led to abolition in Spain and prompted Portugal to repeal all its residual capital offenses. And the Soviet Union's collapse in the late 1980s led to abolition in East Germany (GDR), Romania, Hungary, and the Czech and Slovak Republics, and later in countries such as Poland, Serbia, Croatia, Macedonia, Slovenia (though this last group was also

²⁷ Garland, *Peculiar Institution*

²⁸ A time-series study by Neumayer finds that capital punishment abolition coincided with the rise of democracy and that the widespread abolition after World War II was a fundamentally political process. Eric Neumayer, "Death Penalty: The Political Foundations of the Global Trend Toward Abolition" (Unpublished manuscript, 2006).

motivated by a desire for European Union membership). The same pattern is visible outside Europe: South Africa and the Philippines both marked the commencement of democracy by ending capital punishment.²⁹

At the level of values and ideals, then, there is an affinity between democracy and death penalty abolition. But the link is by no means straightforward. A nation such as France, which led the European continent in its march towards democracy, was the last European nation to give up its death penalty. (The French authorities were still decapitating offenders as late as 1977.) And no one denies that the USA is a democratic nation – and *fully* democratic since the 1960s and the end of Jim Crow – but its commitment to capital punishment continues. Indeed, that commitment is nowadays justified in the name of democracy and the “will of the people.”³⁰

The fact is that death penalty abolition did not occur because the newly enfranchised masses demanded it. Rather, their parliamentary representatives – whose background, education, and culture were generally more elite than those of their constituents – felt an elective affinity between democracy and death penalty reform and were able to act upon it, with or without popular support.

²⁹ Hood and Hoyle, *Death Penalty*

³⁰ Garland, *Peculiar Institution* chapter 2

Cultural Processes of Reform

The decline of capital punishment is commonly viewed as an effect of cultural change. If we no longer hang, draw and quarter offenders, or execute them in the public square it is because our society has become more civilized and our sensibilities more refined.³¹

Nor is this understanding a recent one. For more than two centuries now the standard reform narrative has been a story of how cultural change – more refined manners, less tolerance for violence, more sensitivity to the pain of others – has led to changes in capital punishment.

From Beccaria onwards, critics of capital punishment have viewed themselves as aligned with “the cause of humanity” – expressed in both religious and secular terms – and viewed each reform as a progressive step in the advance of civilization. And from the Enlightenment to the present, the language of civilization and humanitarianism has framed the reform effort, with each step towards abolition being viewed as the result of our “evolving standards of decency.”

³¹ On the rise of humanitarian sensibilities, see Thomas Haskell, “Capitalism and the Origins of Humanitarian Sensibility,” in Tom Bender, ed., *The Antislavery Debate Capitalism and Abolitionism as a Problem in Historical Interpretation* (Berkeley: University of California Press, 1992); John Bender, *Imagining the Penitentiary: Fiction and the Architecture of Mind in 18th Century England* (Chicago: University of Chicago Press, 1989); Karen Halttunen, *Murder Most Foul: The Killer and the American Gothic Imagination* (Cambridge: Harvard University Press, 1998); Evans, *Rituals of Retribution*; Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Explorations* (London: Blackwell, 2000); Spierenburg, *Spectacle of Suffering*.

Historians agree about the civilization idiom and humanistic understandings in which death penalty reform has been articulated but there is no consensus about the causal weight to be given to this language and the cultural currents to which it refers. When we turn from describing normative debates to developing historical explanations, the status of “culture” becomes more problematic. The question becomes how to assess the causal role of cultural currents such as humanism and the refinement of sensibility. Should we regard culture as a real cause of action or merely a glossy surface that overlays more basic causal processes? Are civilizing and humanizing sentiments distinctive engines of historical change or merely the incidental music that accompanies the real action?³²

In my view, the conventional wisdom is largely correct: cultural change did indeed prompt death penalty reform. But a closer look adds some nuance to this standard account: (i) The cultural shifts that mattered affected social elites and not the mass of the people; (ii) Processes of reform operated on and through state actors, so cultural preferences had to be aligned with political realities; (iii) Different strands of enlightened culture had quite different implications for capital punishment reform.

³² Spierenburg argues the former position, Foucault the latter. Spierenburg, *Spectacle of Suffering* and Foucault, *Discipline and Punish*. The “civilizing process” account has been taken up by Pratt (2002) and Garland, *Punishment and Modern Society*. Smith makes a strong case for a “culturalist” account of punishment and penal change. Smith, *Punishment and Culture*. The skeptical view of humanitarian sentiment can be found in Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (New York: Russell and Russell, 1968) and, in a more sophisticated form, in Gatrell, *The Hanging Tree*.

The emergence of modern bourgeois culture, which became increasingly widespread during the 18th and 19th centuries in both secular and religious forms, had important consequences for the place of physical violence in social life – consequences made all the more forceful because they reinforced the state’s efforts to subdue the old warrior classes and their aristocratic culture.³³

Private feuding and dueling declined, as did the routine use of violence to chastise wives, children, and servants. Torture was prohibited. Corporal punishments such as maiming, branding, flogging, and whipping were used less widely. Punishments involving bodily exposure or suffering – the stocks, the pillory, flogging, birching and branding – were mostly abandoned. The death penalty grew less frequent and less violent so that from the 18th century onwards, execution practices that disfigured, dismembered or displayed the condemned’s body became much less common and the suffering of the condemned on the scaffold was greatly reduced. By the middle of the 19th century, long after scaffold tortures had been abolished, middle class commentators complained that the sight of a person being put

³³ Spierenburg, *Spectacle*; Elias, *Civilizing Process*

to death was too disturbing to watch and criticized the callous vulgarity of those who continued to attend public hangings.³⁴

From the late 18th century onwards, western elites denounced public executions in the name of civilization, criticizing state officials for staging such “barbaric” displays and providing occasions for “vulgar” despicable conduct. By the mid 19th century, a practice once supported by ruling groups everywhere was now being criticized by them.³⁵

But if a civilized aesthetic of refinement helped form the sensibility of the anti-gallows movement, it was not its only cultural foundation. An equally important strand in the movement’s make-up has always been humanitarianism: a moral – and often religious – sensibility that regards human life as sacred, presses for an end to cruelty, and aims to extend compassion to all fellow creatures. This sensibility has been a constant theme of penal reformers: from Beccaria and his “cause of humanity” in the 18th century, to Norval Morris and his “decency, empathy” and concern for “human suffering” in the 20th.³⁶

³⁴ Banner, *The Death Penalty*; Spierenburg, *Spectacle*

³⁵ Randall McGowen, “History, Culture and the Death Penalty: The British Debates, 1840-70,” *Historical Reflections/Réflexions Historique* 29 (2003)

³⁶ The “motive force of penal reform” is, according to Morris, “Decency, empathy, the ability to feel at least to a degree the lash on another’s back, the removal occasionally of our customary blinkers to human suffering, a respect for each individual springing from religious or humanitarian beliefs.” Norval Morris, “Impediments to Penal Reform,” *University of Chicago Law Review* 33 (1966): 627.

Humanitarianism has many sources – the Enlightenment writings of Montesquieu and Voltaire; the moral individualism of liberalism; the credos of 18th century Quakers and 19th century Evangelicals; the Romantic Movement in fiction and poetry. Its characteristic sentiments of empathy and identification with others were acquired and transmitted through cultural practices such as reading novels, keeping diaries, and putting oneself in the position of others. But its central principle is the simple moral imperative that human life is sacred and ought not to be violated – and this imperative has emerged most fully as an organizing principle of governance and social life in modern liberal democracies and as the central value in the reform discourse of human rights.³⁷

Humanitarianism has at its core a fundamental respect for individuals and for personhood. Such values may seem obvious and unavoidable today, but their emergence marked a new phase in western history: an epochal revaluation of morals in which the claims of kin, tribe, sect, and state were downgraded and those of autonomous individual persons made paramount. In its implacable opposition to killing and violence, humanitarianism is a decidedly anti-military sensibility, grounded in peaceable forms of life and

³⁷ Hunt, *Inventing Human Rights*

commercial social relations. In contrast to the warrior ethos of the preceding era – with its history of blood and cruelty, its idea of honorable violence, and its enjoyment of killing and blood sports – humanitarianism regards human suffering as unconscionable and utterly deplores violence. Its horror of cruelties even extends to those perpetrated by God: it is the New Testament doctrine of compassionate forgiveness that appeals to the humanitarian, not the fire and brimstone vengeance of the Old.³⁸

With the decline of traditional honor codes and the spread of humanitarian ideals, physical violence became the new taboo of liberal democratic societies – the more peaceful and stable the society, the more problematic the violence. The rise of humanitarian sensibilities had clear and direct consequences for capital punishment. Humanitarianism generated a new sympathy for the scaffold's victims and their suffering. Members of the governing classes who once regarded the sacrifice of felons as a necessary tonic for social order began to consider the suffering of the man facing death. Their moral horizons were extended and with them their moral imagination and ability to empathize. Humanitarian concerns helped put an end to torture and afflictive executions and prompted the search to develop a painless execution technique. Humanitarian sentiments changed the attitudes

³⁸ Holmes, *Passions and Constraints*

of legislators, judge and juries, encouraging them to recognize the defendant as a fellow human being where they had once seen only a lower class felon.³⁹

By the second half of the 19th century, the humanitarian sensibility was so widespread that even supporters of capital punishment were phrasing their arguments in these terms. But if “sanctity of life” arguments could be made for *and* against the death penalty for murderers, the sacred place now accorded to human life discredited the use of capital punishment for lesser offences. Capital codes narrowed accordingly. By the 20th century, the opposition between humanitarian sentiment and capital punishment was being expressed in a new and more powerful form by a human rights movement that viewed the death penalty as a violation of the most fundamental right of man.⁴⁰

From the 18th century to the present, death penalty debates have been framed in the language of civilization and humanity. Civilized sensibilities might best be understood as an aesthetic of refinement, delicacy and self-restraint, combined with social norms designed to minimize unpleasant encounters with vulgar and disturbing behavior. Humanitarian sensibilities, in contrast, are feelings of human sympathy and compassionate

³⁹ Garland, *Peculiar Institution*

⁴⁰ Hunt, *Inventing Human Rights*; Hood and Hoyle, *Death Penalty*

identification with others, and the moral imperatives that flow from such identification. These two sensibilities may run alongside one another, and draw on the same language of refined feeling, but at a certain point their effects diverge. One is concerned to reduce the aesthetic affront involved in putting a person to death while the other fundamentally objects to human suffering. One aims to reduce the sight of pain, the other aims to reduce its infliction. One is primarily about manners and appearances, the other about underlying moral substance.⁴¹

Like liberalism and democracy, civilizing sentiments and humanizing sentiments are often run together. But they are not the same thing. Civilized sensibilities push to reduce the aesthetic affront involved in putting a person to death, humanitarian ones object to the unnecessary human suffering that capital punishment involves. One aims to reduce the sight of pain, the other aims to reduce its infliction. One is primarily about manners and appearances, the other about underlying moral substance. We could say that death by lethal injection is highly civilized in form, but it is not exactly humanitarian.

Conclusion

⁴¹ Garland, *Peculiar Institution* chapter 5

The movement of western states towards the complete abolition of capital punishment began, haltingly, in a few small jurisdictions in the late 18th century. It spread to a handful of larger nation-states in the course of the 19th and early 20th centuries, often producing complete abolitions only for “ordinary” crimes (not “extraordinary” or political ones) with many of these abolitionist developments subsequently being reversed. Then, in the last third of the 20th century, the movement greatly expanded until it encompassed all of the western nations with the exception of the USA, each of which had abolished the death penalty entirely by the end of the century.

The restriction of the death penalty was a process that unfolded over an entire region and over a long period of time. In the great majority of cases where sustained and comprehensive abolition occurred, it emerged as the final phase in a reform process that had already restricted, restrained, and refined the practice and greatly reduced its frequency. Except in a very few instances, complete and sustained abolition has been a late 20th century development that capped a much longer process of transformation.

The majority of western European abolitions occurred in the second half of the 20th century, either in the years immediately after the 2nd World War or else in the 1960s and 70s. Italy, Germany, and Austria included abolitionist provisions in the new liberal constitutions they enacted

following the end of the war and the collapse of fascism. After the Second World War, nations such as Britain, Spain, France, Ireland, Australia, New Zealand and Canada experienced a decline in the frequency of executions though legislative attempts failed to bring about complete abolition for decades thereafter. In several nations where capital punishment had long been abolished for “ordinary” crimes, the death penalty remained on the books for political offences against the state – a reminder of capital punishment’s historic role in the maintenance of state power. In the relative stability of western Europe in the post-war years, these “extraordinary” penalties were never invoked, and they too were eventually abolished: by Portugal in 1976, Denmark in 1978, Luxemburg and Norway in 1979, the Netherlands in 1982, Ireland in 1990, Italy in 1994, Spain in 1995, Belgium in 1996, and the UK in 1998.⁴²

Between the 1980s and the present, anti-death penalty provisions have increasingly been embodied in human rights conventions, transnational treaties and international law. Protocols 6 and 13 of the European Convention on Human Rights (1983 and 2002) prohibit the death penalty, as does the United Nations’ 2nd Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which was passed in 1989 and also

⁴² Hood and Hoyle, *Death Penalty*; Garland, *Peculiar Institution*

the American Convention on Human Rights Protocol to Abolish the Death Penalty adopted in 1990 by the General Assembly of the Organization of American States.

The emergence of these international legal norms has changed the nature of the death penalty as a political issue. Their existence exerts abolitionist pressure on other states and in some cases provides states with political and economic incentives to abandon the death penalty. They have internationalized death penalty politics, transforming a domestic matter into an issue that has a bearing on international relations. They “lock in” death penalty abolition in those nations that are signatories to the ICCPR, or members of the European Union and the Council of Europe, making continued abolition an international obligation rather than merely a domestic policy choice. As a result, capital punishment has tended to fade from national political debate in these nations and popular opinion in some countries has begun to loosen its attachment to the death penalty. The new reform movement has succeeded in elevating death penalty abolition to the status of an international human rights principle.

The long-term history of the death penalty in the west thus approaches its absolute antithesis: what was once an unproblematic institution, universally embraced, is fast becoming a violation of human rights,

universally prohibited. Except, of course, in the United States, where capital punishment remains constitutionally permissible and executions continue to be carried out.