Book Review. The Death Penalty: Abolition in Europe

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BOOK REVIEW ESSAY

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In 1998 no executions were carried out in any of the then 40 member states of the Council of Europe. This moratorium was achieved in part because of legal developments within the Council. In particular, one may point to the 1985 entry into force of Protocol No. 6 of the European Convention on Human Rights, which directly abolishes the death penalty in those countries that ratify the Protocol. Perhaps even more important was the decision taken by the Parliamentary Assembly of the Council of Europe in 1994 to require ratification of Protocol No. 6 by all future applicants for membership in the Council. These developments, as well as either _de jure_ or _de facto_ abolition of the death penalty by many member states on their own initiative, implement a broad consensus that has been emerging in western Europe for some time.

To celebrate this milestone the Council of Europe published this essay collection in May, 1999. Like many collections _The Death Penalty: Abolition in Europe_ suffers from a number of minor, congenital defects, such as redundancy and unevenness. Many of the essays are more journalistic than scholarly; most lack adequate footnotes, which will be an annoyance to those seeking citations to the more obscure documents discussed. More important, the collection fails to cover certain topics that would have complemented the material that is included. For example, many of the contributions allude to the "fact" that the deterrence argument in favor of capital punishment has been entirely discredited, without actually providing any support for this

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claim.\footnote{Several authors do make anecdotal references. For example, Renate Wohlwend notes that the homicide rate in Canada fell after abolition of the death penalty in 1976, while the rate rose in the United States after resumption of capital punishment in 1977 (p. 58). However, without placing these figures in the context of a more comprehensive and systematic study, Wohlwend fails to persuade. Based on the facts she presents, it is certainly possible that the homicide rate would have fallen in Canada even faster if the death penalty had not been abolished, and conversely, that it would have risen even faster in the United States without the resumption of capital punishment.} Therefore, a chapter summarizing the literature on this question would have been welcome, and presumably would have strengthened the other contributions. Another, minor fault worth note is the poor quality of translation. Phrases frequently used, such as "execution of the death penalty" (meaning 'use of the death penalty'), require a good bit of deciphering before making sense, and some sentences fail to yield any sense at all, even upon multiple re-readings. Finally, there are a few factual gaffes, such as a reference to "His Holiness Jean Paul XXIII."

Despite problems of this sort, The Death Penalty: Abolition in Europe offers a number of thought-provoking chapters, as well as certain overarching themes. There are 13 short chapters in all (including the introduction and conclusion), which fall into several categorical types. Four of the chapters recount the chronology of legal events leading to the current state of affairs in Europe.\footnote{These include "The Efforts of the Parliamentary Assembly of the Council of Europe" by Renate Wohlwend; "Protocol No. 6 to the European Convention on Human Rights" by Hans Christian Krüger; "The Death Penalty and the Case-law of the Institutions of the European Convention on Human Rights" by Caroline Ravaud and Stefan Trechsel; and "The United Nations and the Abolition of the Death Penalty" by Roberto Toscano.} Another four chapters discuss the historical path towards abolition and the current situation in particular countries.\footnote{These include "The Abolition of the Death Penalty in France" by Michel Forst; "The Death Penalty in Slovakia" by Robert Fico; "A Vast Place of Execution: The Death Penalty in Russia" by Anatoly Pristavkin; and "Abolishing the Death Penalty in Ukraine: Difficulties Real or Imagined?" by Serhiy Holovatiy.} The remaining articles deal in some way with arguments for and against the death penalty, or with strategic concerns of the abolition movement.\footnote{These include "The Death Penalty Versus Human Rights" by Eric Prokosch; "The Death Penalty and the 'Fairy Ring'" by Philippe Toussaint; "Victims of Crime and the Death Penalty" by Peter Hodgkinson; as well as the introduction by Roger Hood, and the conclusion by Sergei Kovalev.} As one might imagine, assessment of the situation in the United States looms large in these
essays. Of course, there is some overlap between the categories outlined here. For example, Robert Toscano’s contribution on the role of the United Nations summarizes the arguments against abolition of the death penalty that have been raised in the context of international law.

One of the interesting themes to emerge from the collection is a persistent worry about the relationship between the abolition movement and democratic decision-making. Several of the authors note that public opinion surveys, even in western Europe, continue to show that a majority of respondents favor retention of the death penalty. Their response is to view this democratic deficit as the result of insufficient public education on the issue. As Michel Forst states:

If the opinion polls are to be believed, after more than twenty years without an execution, the majority of the French public are still not convinced. Yet is this a well-informed opinion, is there a thorough understanding of the facts and the risks involved in the death penalty? Finally, what value and significance should be given to opinion polls?

Sergei Kovalev agrees with Forst that abolition of the death penalty must proceed rapidly, despite the fact that it runs “counter to the will of the majority,” but he also finds a way to reconcile this goal with the demands of liberal democracy. He makes the interesting argument that surveys of opinion on individual issues are not as important as the fact that the public clearly accepts a “system of values” that has been “package[d]” in western Europe to include “freedom, democracy, and human rights.” Hans Christian Krüger states this even more assertively, in claiming that the death penalty is incompatible with the “choices of a civilised, democratic society.” According to this view, abolition and democratic decision-making are not only compatible, but complementary, despite the evidence of opinion polls. Wondering who packaged western European liberalism, and why commitment to human rights necessarily implies abolition of the death penalty, one might be more than a bit skeptical that these authors are truly committed to democratic decision-making, at least when it comes to the issue of abolition. Better to state forthrightly their belief that abolition of the death penalty embodies a moral imperative too important to be left to the vagaries of democratic political institutions. To admit as much obviously does not undermine their commitment to democracy altogether.

Another issue running through the entire collection is whether it is appropriate at this point to require newly democratic nations to ratify Protocol No. 6 in order to obtain admission to the Council of Europe. As a member
of the Parliamentary Assembly, Renate Wohlwend considers this to be perhaps the single most important step taken to date. On the other hand, in his report on the situation in Slovakia, Robert Fico warns that there is now a dangerous gap between official policy and public opinion. Caroline Ravaud and Stefan Trechsel agree that it is "premature and unrealistic" to require ratification by countries making the transition to democracy. And in their eye-opening chapters on the current situation in Russia and Ukraine, Anatoly Pristavkin and Serhiy Holovatiy make it very clear just how far attitudes must change in those countries before abolition can possibly become a practical goal. Indeed, Holovatiy states flatly that "executions in Ukraine continue unabated and with seemingly renewed vigour," thus debunking the very fact this book was published to celebrate. Undoubtedly the catastrophic rise of organized crime in eastern Europe has cooled the ardor there for the particular "package deal" on offer in western Europe.

The issue of whether to insist that eastern European countries join the Council of Europe on the same terms adhered to by western European nations is closely related to the general issue of whether abolition can proceed without popular support. If the reports on the current situation in eastern Europe are to be believed, it is clear that legal developments have dangerously outpaced the social situation there. Where legal norm and social reality diverge so clearly, one wonders whether insistence on ratification of Protocol No. 6 might not undermine legitimate, but fragile regimes, as well as the rule of law in general.

Several of the chapters in this book merit special mention for their particularly thought-provoking arguments. In his very fine essay on "Victims of Crime and the Death Penalty," Peter Hodgkinson argues that abolition of the death penalty cannot be achieved at the expense of victims, but that the abolition movement has in fact failed to take crime victims into account. This failure has contributed to the rise of an overtly political victims' rights movement, devoted to retention of the death penalty, as well as to procedural "rights," such as the right to provide "victim impact statements." In Hodgkinson's view, rights-based advocacy often ignores the real needs of victims, as in the questionable policy of permitting them to be present at executions. One might add that advocacy of this type personalizes retribution in a way that runs counter to the idea that criminal law is designed to protect the public's interest, and ought not to be put at any individual's service.

The particular merit of Hodgkinson's essay is to offer an alternative model of victim support focused squarely on the practical and emotional needs of victims and those close to them. Victim support along these lines avoids political entanglement in the criminal justice system because it is not focused on penal reform. For Hodgkinson, it is important that this model of victim
support is compatible with abolitionism. However, regardless of one's views on abolition of the death penalty, this model will be especially interesting to American readers because it offers an attractive vision of victim support quite alien to our experience.

Another particularly interesting essay is the conclusion by Sergei Kovalev, who attempts to understand the true nature of the disagreement between the so-called abolitionists and retentionists. Surprisingly, Kovalev locates the source of disagreement in political history. According to his view, political objections to the death penalty arose in a two-stage process. First, with the rise of powerful states, government appropriated to itself a monopoly on revenge. Then, in the Enlightenment, deification of the state was replaced by a democratic conception of public authority, which emphasized the threat it poses to individual freedom. Then "[i]t took the tragic experience of the French Revolution...to make us realise that any "absolute" abstraction that puts itself above the individual and his rights invariably degenerates into a form of legalised despotism." In other words, there is in liberal democracy an inherent objection to the ultimate control by any public agency of "human destinies."

Although clearly aimed at totalitarian states, this argument is intriguing because it suggests a quite plausible explanation for the wide gulf between western Europe and the United States on the issue of the death penalty. Having been forged in a far different revolutionary experience, the United States has much less reason to fear the totalitarian excesses of ideology. With less fear of public authority, Americans are perhaps less concerned about the ultimate control of human destiny that the death penalty represents. This explanation for the gulf between western Europe and the United States is made even more fascinating by the fact that it turns on its head the usual characterization of Europe as government-friendly and the United States as hostile to government.

Whatever one might think of Kovalev's argument, one must admire his honest effort to understand the retentionist view. With this sole exception, The Death Penalty: Abolition in Europe lacks any hint that it understands, or even respects, the complexity of the retentionist position. This is perhaps inevitable in a book that is polemical in nature, but nonetheless regrettable. As a result, the book is unlikely to live up to the promise in the accompanying brochure that it will be "invaluable for our campaign against the death penalty in the United States." Equally disappointing is the loss of what could have been a very engaging philosophical discussion. The potential reader will have to look elsewhere for that.
Perhaps most irksome is the book’s persistent, obtuse caricature of the just retribution argument as primitive, unenlightened, primordial, etc.\(^5\) Whether or not one agrees that application of the death penalty is ever justified, one ought to recognize that the just retribution argument embodies a very profound belief about the nature of human evil and the best method of confronting it. This belief amounts to a claim that human actors are responsible for their own wicked acts and must therefore be held accountable. Diametrically opposed to this is the view, succinctly expressed in a statement quoted by Serhiy Holovaty, that “society... is largely to blame for the crimes committed in it, for it is the environment which fills the human will with evil and criminal tendencies, and is the cause of crimes rather than an individual evil will.” In other words, the human will is naturally free of evil. Recognizing the depth of disagreement here, I nevertheless find it disappointing that no contributor to this volume was able to engage the just retribution argument in a constructive fashion.

It is also worth noting that the contributors fail to understand, or at least do not make clear, that the just retribution argument and the deterrence argument are mutually exclusive. The former treats the actor as an end in himself, justifying punishment exclusively in terms of the actor’s desert, while the latter justifies punishment exclusively in terms of its impact on subsequent actors. Retentionists who defend the death penalty on the basis of the just retribution principle ought to be horrified by an argument to impose the death penalty (or any other penalty) on any basis other than the actor’s merit. Nevertheless, the contributors to this volume proceed as if they can discredit retentionists in general by impugning either of these approaches.

Despite the book’s lack of depth, and the less serious failings mentioned earlier, *The Death Penalty: Abolition in Europe* can still be recommended as a reasonable addition to research collections. By providing a snapshot of the abolitionist movement in western Europe today, it furnishes

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\(^5\) This misunderstanding is most clearly revealed in Peter Hodgkinson’s statement about the relationship between the retribution principle and the mode of execution used. He states: “The mode of execution debate goes to the heart of the modern purpose of the death penalty - retribution. The move towards the more sanitised and clinical lethal injection represents an interesting dilemma; on the one hand it is an attempt to make the execution process more civilised and therefore more acceptable, whilst on the other it represents a dilution of the retributive justification.” In other words, retribution is equated with the infliction of pain. But the retribution principle is completely indifferent to the level of pain; in fact, there is no inconsistency between seeking retribution to redeem society’s moral outrage, while at the same time being concerned to do so in a manner that is as painless as possible.
a useful reminder of the depth of the cultural divide that persists between Europe and the United States on the issue of capital punishment.