

HIGHWAY FUNDING, INTERNATIONAL COMMITMENTS, AND DEATH, OH MY!

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I. INTRODUCTION

It is important to have goals; this is as true for countries as it is for individuals. The United States articulates a respect for human rights as one of its main goals.¹ Yet in the United States there is no bar to state sanctioned murder. The state of Louisiana wants to murder Patrick Kennedy and waits only for him to fully exhaust his appeals before doing so. The Supreme Court could finalize this sentence in the 2007-2008 term. Somehow the question on everyone's lips is will it, not should it?

In 2003, Patrick Kennedy was convicted of raping his eight-year old stepdaughter in the early morning hours of March 2, 1998.² He then proceeded to wait several hours before calling an ambulance for the girl, whose perineum was completely torn from the violence of the rape.³ Why would one wait so long before calling for an ambulance for a child suffering from "the worst case . . . result[ing] from sexual assault" the attending physician had ever seen?⁴ Perhaps it was because the defendant was so busy. First, and in a time-frame that places it immediately after the rape, he called his boss and left a message that he would not be able to come into work.⁵ About an hour later, he again called his boss, this time speaking to him in person and inquiring how to get blood out of a white carpet because "his stepdaughter had just become a young lady."⁶ Almost immediately after he spoke to his boss, the defendant called a carpet-cleaning facility and ordered an emergency carpet-cleaning to remove the blood.⁷ In addition to all these

1. See U.S. Dept. of State, *Human Rights*, <http://www.state.gov/g/drl/hr/> ("The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises").

2. *Louisiana v. Kennedy*, 957 So. 2d 757, 760 (2007).

3. *Id.* at 761.

4. See *id.* ("The victim's predominate injury was vaginal with profuse bleeding. Her entire perineum was torn and her rectum protruded into her vagina . . . [An] expert in pediatric forensic medicine . . . testified that the victim's injuries were the most serious he had seen, within his four years of practice, that resulted from a sexual assault.").

5. *Id.*

6. *Id.* n.5 ("[Defendant's boss] testified that he could not remember whether the defendant said his niece or his daughter").

7. *Kennedy*, 957 So. 2d at 761. The defendant had apparently spent at least part of this time attempting to clean up the blood. In the garage, police found a large container of carpet cleaner, a

phone calls, he spent at least some time convincing the little girl to lie about who had attacked her.⁸ All of this took place before the rest of the community had started its workday. At 9:18, Mr. Kennedy called 911 and told the operator he needed an ambulance.⁹ By the time the rug-cleaner showed up after dropping his son off at work, the house was swarming with police.¹⁰

Mr. Kennedy was convicted of aggravated rape of a victim under the age of twelve.¹¹ In Louisiana, aggravated sexual assault of a minor under the age of twelve may be punishable by death.¹² Under the Supreme Court's decision in *Furman v. Georgia*,¹³ the existence of aggravating circumstances and the decision to sentence to death must also be determined by a jury. Patrick Kennedy was prosecuted under a statute requiring "life imprisonment at hard labor or the death penalty."¹⁴ In Patrick Kennedy's case, the aggravating circumstances found by the jury were simply that the victim was under twelve and that the defendant committed aggravated rape.¹⁵

Patrick Kennedy's case is currently before the Supreme Court of the United States.¹⁶ The brutality of this crime cannot be overstated, and a glance over the Louisiana Supreme Court's fact section leaves few details to the imagination.¹⁷ Though the defendant argued on appeal that the aggravating factors which permitted his sentence of death were the same as the elements of the crime and therefore unconstitutional,¹⁸ the gut-wrenching details will surely affect the

pail, and two towels from the bathroom nearest the child's room. *Id.* at 766 n.12. Subsequent forensic testing of sample of carpet taken from the victim's bedroom indicated attempts at cleaning through the liquid dilution of the bloodstains. *Id.* at 766.

8. *Id.* at 769. Patrick Kennedy has consistently maintained his factual innocence. The first story told by both Kennedy and the victim accused two teenage boys of raping the victim. Kennedy became a suspect after the calls to the carpet cleaner and his boss came to light, but the victim only began accusing Kennedy several months after the incident. The defense argued that the mother told the victim it was alright to say the defendant had done it. *Id.* at 771. Several months after the incident, "the victim was removed from [her mother's] custody for approximately one month because [the mother] had permitted the defendant, who was in jail, to maintain phone contact with the victim." *Id.* at 767. The defense presented evidence of this through the testimony of a close family friend and a private detective, both of whom spoke to the victim's mother and testified that she was afraid of losing custody of her daughter. *Id.* at 771-72. The family friend further testified that the victim's mother had confided that she told her daughter "it was ok to tell people that defendant raped [victim] because [the mother] was instructed to do so by 'them.'" *Id.* at 771.

9. *Id.* at 761.

10. *Id.*

11. *Id.* at 760.

12. La. Rev. Stat. § 14:42(D)(2) (The statute also provides that the prosecutor shall determine whether or not to seek the death penalty. If the death penalty is not sought, the available punishment is limited to life imprisonment at hard labor).

13. 408 U.S. 238, 314 (1972). See *Roberts v. Louisiana*, 428 U.S. 325, 329 (1976).

14. La. Rev. Stat. § 14:42(D)(1).

15. *Kennedy*, 957 So. 2d at 772.

16. *Kennedy*, 957 So. 2d 757 (2007), *cert. granted*, 128 S. Ct. 829 (U.S. 2008) (No.07-343, 2008 Spring Term).

17. *Id.* at 761-64.

18. *Id.* at 791 (rejecting this argument the Louisiana Supreme Court stated that "a death sentence does not violate the Eighth Amendment merely because the single statutory 'aggravating

proportionality analysis undertaken by the Supreme Court. At first, this seems like precisely the wrong case through which to seek abolition. However, this case contains two rallying fronts for opponents of the death penalty. The first is the camp arguing that overturning the death penalty on this case would be a powerful affirmation of the United States' rhetoric in support of human rights.¹⁹ The second front focuses on the death penalty's potential to ensnare the innocent;²⁰ the two boys whom the victim accused initially (and continued to accuse for several months) would have been at risk for the death penalty if the victim had not changed her story.

These rallying fronts cover the two main camps of death penalty opposition. In one, the death penalty is nothing more than state-sanctioned murder and degrades any state that participates. In the other, the risk of executing an innocent person is never acceptable. Proponents of abolition hope the Court will fall into one of these camps this summer.

Up to this point, however, the Court has limited its Eighth Amendment analysis to carving out exceptions relating to the particular circumstances of the defendant²¹ or the nature of the crime.²² This analysis will ultimately retard the ability of the Court to eliminate the death penalty. The tests that the Court applies, even in striking down the death penalty in certain circumstances, still assume the legitimacy of the death penalty. The definitional nature of these tests prevents the Court from fully protecting the citizenry from "cruel and unusual" punishment.²³ Although it is not facially apparent whether the definition of cruel and unusual includes the death penalty, the United States is increasingly isolated in its continued retention of the practice.

The U.S. Supreme Court is charged with interpreting the constitution and, therefore, is the federal body responsible for the imprimatur of legality that still marks the death penalty. If the Court took the Eighth Amendment seriously it would begin its analysis at a point that did not assume legitimacy. The United States' isolation as a western state that supports the execution of its own citizens indicates that its starting point is flawed.

This article will address how the Court has historically reached this determination of legality and how it should, prospectively, analyze the Eighth Amendment considerations in light of evolving norms of decency. Part I will

circumstance' found by the jury duplicates an element of the underlying offense") (citation omitted).

19. See, e.g., Amnesty International, *Death Penalty*, available at <http://www.amnesty.org/en/death-penalty> (last visited Mar. 5, 2008).

20. See, e.g., American Civil Liberties Union, *Death Penalty – Innocence*, <http://www.aclu.org/capital/innocence/index.html> (last visited Mar. 5, 2008).

21. See *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that execution of the mentally retarded violates the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that execution of juveniles under the age of eighteen violates the Eighth Amendment).

22. *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that rape of an adult woman where death does not occur violates the Eighth Amendment).

23. U.S. CONST. amend. VIII.

present three cases that illustrate the Court's methodology and reasoning for accepting or rejecting the death penalty challenges brought under the Eighth Amendment. Part II will present the European Union's history concerned with the death penalty and the analytical steps it took to abolish the death penalty.

Part III will argue that the United States should embrace the European Union's goal of eliminating the death penalty either through legislation or through court mandate. In order for the United States to achieve conformity with its global counterparts, it must eliminate the death penalty. The European Union's model suggests a top-down normative approach similar to that engaged in by Congress in legislating minimum drinking ages. However, there exist logistical concerns over this invasion of the state's domain. Therefore, the Court must abandon the flawed premise of death penalty legitimacy and similarly abandon the method of determining constitutionality through state legislative trends. The Court must embrace the re-emerging trend of considering international norms to define the modern standards of decency and extend this inquiry into the premises of other societies' moral legislation.

II. HISTORICAL EVOLUTION OF DEATH PENALTY LITIGATION IN THE U.S. SUPREME COURT

The primary control on the extent and method of execution in the United States is the Eighth Amendment that guarantees protection from "cruel and unusual punishment"²⁴. The Fourteenth Amendment applies this restriction to the states and, therefore, the Supreme Court's analysis of the "cruel and unusual" clause provides the outer bounds of permissible sanctions individual states may impose.²⁵ In *Trop v. Dulles*, the Court determined that to provide meaningful protection, the imprecise words of the Constitution require interpretation under "the evolving standards of decency that mark the progress of a maturing society."²⁶ In *Trop*, petitioner was convicted by a court-martial of wartime desertion from the United States Army and sentenced to a dishonorable discharge, three years of hard labor, and forfeiture of all pay and allowances.²⁷ Petitioner challenged a statute that deprived him of citizenship because of his dishonorable discharge for wartime desertion.²⁸ The Court held that expatriation was barred by the Eighth Amendment by virtue of being "a form of punishment more primitive than torture" because it deprived a person of "political existence."²⁹

Although the *Trop* Court rejected a static interpretation of such an important right and concluded that it was unconstitutional to strip citizenship as a punishment for deserting the military,³⁰ it included execution on a list of clearly acceptable

24. *Id.*

25. U.S. CONST. amends. VIII, XIV.

26. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

27. *Id.* at 114.

28. *Id.* at 89.

29. *Id.* at 101.

30. *Id.* at 101, 103.

punishments, along with fines and imprisonment.³¹ In deciding that the statute violated the Constitution, the Court referenced the foreign origin of the Eighth Amendment language³² and relied, in part, on international law's consensus opposing expatriation as a punishment for crime.³³ This decision places constitutional analysis in the context of international law and provides the "evolving standard" basis for most of the decisions restricting the power of the state to punish.

In the following opinions, the petitioners did not challenge newly expanded penal schemes, but asked the Court to evaluate whether enforcement of these punishments was cruel and unusual in light of the circumstances. The analysis of the Court includes both the modern evolving opinion of United States citizens and the opinion of the international community in general. While the analysis is neither simple nor short, and since no one factor can be wholly dispositive in a necessarily subjective analysis, the presence of both types of opinions is important to enforce the spirit of the Amendment. Though the Court is bound exclusively by United States law, the laws of our global brethren should be given appropriate weight under the precedent of *Trop*.

A. *Coker v. Georgia*

In *Coker v. Georgia*, the Court considered the imposition of the death penalty for the rape of an adult woman.³⁴ At the time of *Coker*, capital sentences in Georgia jury trials required a jury verdict both for a conviction of the crime and a finding of the presence of one or more statutorily defined aggravating circumstances.³⁵ In 1974, a jury convicted Erlich Coker of rape and sentenced him to death by electrocution.³⁶ The jury found the sentence to be warranted by the presence of two aggravating circumstances: the rape was committed by a person with a prior record of conviction for another capital felony, and the rape was committed in the course of committing another capital felony (armed robbery of the victim's husband).³⁷ After Coker exhausted his appeals at the state level, the

31. *Dulles*, 356 U.S. at 100 (with the obvious caveat "depending on the enormity of the crime").

32. *Id.*

33. *Id.* at 102-03.

34. 433 U.S. 584, 586 (1977) (plurality opinion).

35. Ga. Code § 26-3102 (1977); *see also* Ga. Code § 27-2534.1 (1977) (listing mitigating and aggravating circumstances permitting the imposition of the death penalty in rape cases as a prior conviction for a capital felony, the concurrent commission of another capital felony or aggravated battery, or when the rape "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim").

36. *Coker v. State*, 216 S.E. 2d 782, 787 (1975). Erlich Coker escaped from jail in Georgia and broke into a young couple's home. He broke the male's arm and then forced the female to tie her husband up. He then raped the female at knifepoint, forced her into the victims' car, and told the male that if he called the police, Coker would kill the female. Police apprehended Coker later that night and the female victim was released alive. *Id.*

37. *Coker v. Georgia*, 433 U.S. 584, 588-91 (1977).

Supreme Court granted certiorari in 1976,³⁸ limited to the question of “Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?”³⁹

The Court began its analysis with the conclusion that the death penalty is not *per se* cruel and unusual.⁴⁰ It pointed to recent decisions mandating changes in state death penalty proceedings in order to bring them into conformity with the Constitutional requirements laid out in *Furman v. Georgia*.⁴¹ It further discussed *Furman* and its progeny, explaining that the punishment is not unconstitutionally “excessive” unless it “(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.”⁴² The Court explicitly stated that public attitude must be considered when evaluating these requirements of purposefulness and proportion.⁴³

In compliance with the methodology it propounded, the Court looked to the states’ legislatures and their decision to make the death penalty available or unavailable for the crime of rape and concluded that the “upshot” is that Georgia is alone in providing the death penalty for the rape of an adult woman.⁴⁴ The Court then noted the relevance of international opinion and cited a United Nations’ report which found that as of 1965, only three of sixty “major nations” retained the death penalty for rape where “death did not ensue.”⁴⁵ The Court cited this report as evidence of “the climate of international opinion,” i.e. a global hesitancy to endorse capital punishment for rape in the absence of killing.⁴⁶

Justice White, writing for the plurality in *Coker* also considered the fact that Georgia juries imposed the death penalty only six times between 1973 and 1977.⁴⁷ The plurality characterized this as a low incidence of imposition that reflected a negative evaluation of the death penalty’s suitability for this type of crime.⁴⁸ The plurality reasoned that if jurors approved the use of the death penalty for rape, they

38. *Coker v. Georgia*, 429 U.S. 815 (1976).

39. Brief for Petitioner, *Coker v. Georgia*, 429 U.S. 815 (1976) (No. 75-5444).

40. 433 U.S. at 591.

41. 408 U.S. 238 (1972) (*per curiam*) (invalidating arbitrary and inconsistent imposition of the death penalty); *see, e.g.*, *Gregg v. Georgia*, 428 U.S. 153 (1976) (The Court upheld Georgia’s revised death penalty statute, reasoning that the Eighth Amendment’s meaning is informed by society’s “evolving standards of decency” and that the punishment must not be “excessive.” The Court described “excessive” as involving “the unnecessary and wanton infliction of pain” and being “grossly out of proportion to the severity of the crime.” The decision signaled an end to the post-Furman suspension of executions. States began to enact new death penalty statutes to conform to Gregg’s constitutional requirements.).

42. *Coker*, 433 U.S. at 592.

43. *Id.*

44. *Id.* at 594-95.

45. *Id.* at 596 n.10 (citing United Nations, Dep’t of Economic and Social Affairs, Capital Punishment, 40, 86 (1968)).

46. *Id.*

47. *Id.* at 597.

48. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

would have sentenced more than six convicts to death in four years.⁴⁹ Finally, the plurality looked to its own evaluation of the proportionality of the crime to punishment and concluded that all factors—legislative enactments, both state and international, jury evaluation, and the plurality’s own opinion—point to a conclusion of unconstitutionality.⁵⁰

Coker was a plurality decision, with three justices agreeing with one concurrence, two with another, and three justices dissenting.⁵¹ The criticisms of the dissents focus mainly on the broadness of the plurality’s opinion. All three dissenting justices disagreed with such an expansive holding, finding it unnecessary to bar the imposition of the death penalty for all instances of adult rape absent killing.⁵² The dissents all criticized the methodology employed by the plurality.⁵³ Justice Powell lauded the analysis that concludes that society’s disapprobation of rape absent excessive brutality or severe injury is not deserving of the death penalty, but pointed to the lack of inquiry regarding such circumstances.⁵⁴ He suggested that a more detailed and factual inquiry might yield the conclusion that the legislature and juries have in fact complied with Constitutional requirements. He also suggested that they engaged in an appropriate level of proportionality analysis that results in an infrequent, but wholly legitimate, exercise of the death penalty when the circumstances merit it.⁵⁵

Justice Burger disagreed with the general approach of the plurality and argued that this decision not only undermined the United States’ system of federalism, but also used a questionable approach to determine the appropriateness of penalties.⁵⁶ Justice Burger highlighted the primary flaw in analyzing legislative action as the fact that vantage point and scope of inquiry greatly affect any conclusion one could draw.⁵⁷ Limiting the analysis of changing consensus to the past five years of legislative history, he argued, is “myopic,” especially in light of the uncertainty

49. *Id.*

50. *Id.* at 600. The Court also seems troubled by the statutory requirement that imposition of the death penalty requires the “aggravating circumstances” analysis even when the crime is deliberate killing; and therefore the possibility that a rapist who does not take the life of his victim may be more severely punished than an intentional killer. *Id.* at 600. This analysis is confined to the final paragraph of the plurality’s opinion, but is troubling because its logic or lack thereof, undermines the rest of the opinion, especially coming, as it does, right before the announcement of the judgment. Inherent in the nature of sentencing is a lack of complete uniformity and therefore, from a distanced perspective penalties will at times seem disparate and illogical. The Court has, however, still deemed that the Constitution rejects the alternative of a mandatory guideline. *See United States v. Booker*, 543 U.S. 220 (2005).

51. *Coker*. 433 U.S. at 584-85 (plurality opinion).

52. *See, e.g., id.* at 601 (Powell, J., dissenting).

53. *Id.*

54. *Id.* at 603 (Powell, J., dissenting).

55. *Id.*

56. *Coker v. Georgia*, 433 U.S. 584, 612 (1977) (Burger & Rehnquist, J.J., dissenting) (“The process by which this conclusion is reached is as startling as it is disquieting.”).

57. *Id.* at 614.

that the *Furman* decision brought into the realm of death penalty legislation.⁵⁸ *Furman*'s mandate of expanded due process considerations invalidated a large number of death penalty statutes in the country, and therefore the amount of legislation that occurred in the five years prior to *Coker* was not unprovoked; it was necessitated by prior Supreme Court decisions.⁵⁹ Additionally, the analysis of public opinion through legislative enactments suffers from the infirmities surrounding all negative inferences: the plurality concluded disapprobation of the death penalty for rape based on the absence of legislation authorizing it.⁶⁰

Though couched in a judicial restraint argument, the basic issue presented by Justice Burger's dissent is the method of considering the country's judgment on the "decency" of execution for a particular crime by looking to states' legislative enactments or, more precisely, their lack of enactments. Such a circular approach is inherently flawed and unwise when dealing with matters of life and death.⁶¹ Justice Burger found that the seriousness of a death sentence counsels against accepting the enactments of the legislature as a pure reflection of society's judgment, despite the ideological arguments available that the approximation of society's intent is best gauged by looking to the laws passed by an elected body.

Additionally, if the plurality seeks to buttress their argument with a federalist perspective on the ability of society to manifest their will through the state legislature, then Justice Burger counters that it should not be allowed to so tightly restrict the scope of their will by broadly holding that rape, no matter how brutal, is insufficient to warrant the death penalty.⁶² Justice Burger rightly objects to the repugnant use of federalist principles to hinder the accomplishment of federalist objectives.⁶³

B. Atkins v. Virginia

In another six to three opinion, *Atkins v. Virginia* contemplated the execution of a mentally retarded man for a capital murder conviction.⁶⁴ Daryl Atkins and an accomplice kidnapped a man, robbed him, forced him to withdraw cash from an ATM, and drove him to an isolated area where they shot him eight times and left him to die.⁶⁵ After convicting Atkins of capital murder, the jury weighed the mitigating circumstance of mental retardation against the aggravating circumstances of future dangerousness and the vileness of the offense, before finding that a death sentence was appropriate.⁶⁶ Atkins argued his mental

58. *Id.*

59. *Id.*

60. *Id.*

61. In addition to potential defendants' lives, Burger stated that potential victims' lives may be affected by the absence of sufficient deterrents. *Coker v. Georgia*, 433 U.S. 584, 616-17 (Burger & Rehnquist, J.J., dissenting).

62. *See id.*

63. *See id.*

64. 536 U.S. 304, 307-08 (2002).

65. *Id.* at 307.

66. *Id.* at 309. Due to a procedural issue, the Virginia Supreme Court remanded for resentencing, however, on substantially the same information; the jury again sentenced him to death. *Id.*

retardation rendered him unavailable for the death penalty as it would constitute cruel and unusual punishment which is barred under the Eighth Amendment.⁶⁷ The Virginia Supreme Court relied on the United States Supreme Court's holding in *Penry v. Lynaugh*⁶⁸ and affirmed the sentence.⁶⁹ The United States Supreme Court granted certiorari in 2001⁷⁰ to determine if the sentence of death was "disproportionate and excessive" for an individual with an I.Q. placing him in the bottom one percent of the population⁷¹.

The Court had addressed the issue of whether execution of mentally retarded individuals violated the Constitution in *Penry v. Lynaugh*, thirteen years prior to considering Atkins's case.⁷² The Court remanded *Penry* for further proceedings in order to allow the sentencing jury to properly consider the potentially mitigating effect of mental retardation,⁷³ but held that mental retardation alone did not constitute an Eighth Amendment bar to the death penalty.⁷⁴ The Court granted certiorari in *Atkins* due to the ferocity of the dissents in *Penry* and "in light of the dramatic shift in the state legislative landscape" that occurred after the decision in *Penry* was announced.⁷⁵

The Court began its analysis by limiting the inquiry to whether or not the sentence of death was proportionate.⁷⁶ It established the necessity of using "'objective factors to the maximum possible extent,'"⁷⁷ but also clarified that the exercise of their reserved ability to bring the Court's opinion to bear on the controversy shall be limited to "asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."⁷⁸ This profession of deference represented a shift in the role the Court has defined for itself; typically, the components of Eighth Amendment analysis are given equal weight.

67. *Id.* at 310.

68. In *Penry v. Lynaugh*, the Court held that execution of a mentally retarded individual does not violate the Eighth Amendment as long as the penalty phase of the trial allows the jury to properly consider the mitigating effect of the defendant's mental retardation. 492 U.S. 302 (1989).

69. *Atkins v. Virginia*, 534 S.E.2d 312, 319 (Va. 2000).

70. *Atkins v. Virginia*, 534 S.E.2d 312, 319 (Va. 2000), *cert. granted*, 533 U.S. 976 (2001).

71. Brief for Petitioner, *Atkins v. Virginia*, 2001 WL 1663817 (U.S. 2001) (No. 00-8452)).

72. *Penry*, 492 U.S. at 303-04.

73. *Id.* at 308 n.1 (defining mentally retarded as those people who have "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period" (quoting American Association on Mental Deficiency, CLASSIFICATION IN MENTAL RETARDATION 1 (H. J. Grossman ed., 1983))).

74. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

75. *Atkins v. Virginia*, 536 U.S. 304, 310 (2002).

76. *Id.* at 311; *see also id.* at 311 n.7 (explaining that the Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishment that may or may not be excessive").

77. *Id.* at 312 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980))).

78. *Id.* at 313.

Yet here the Court reduced its judicial role to reviewing society's determination, and whether it shocks the conscience in its excessiveness or disproportionality. The threshold required to justify a ruling counter to the consensus of society is presumably higher than in cases where the Court weighs its own opinion equally with the goals of retributive or deterrent effect and proportionality as determined by society's opinion. The Court then reviewed the federal government and several states' explicit prohibitions of the execution of mentally retarded convicts, as well as the small number of mentally retarded convicts that are actually executed in states where it remains legal, finding that this punishment has become "truly unusual."⁷⁹

The Court found the "consistency of the direction of change" to be a significant indicator reflecting a social consensus; that is, because legislatures have consistently moved away from execution, the number of states that are in the sample population is less important due to the uniformity of their movement.⁸⁰ The Court also cited the numerous *amicus curiae* briefs filed in support of a ban on execution, including the brief filed by the European Union that expressed overwhelming disapproval within the "world community."⁸¹ There is thus a consensus opposing the death penalty that "unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty."⁸²

Having established that a consensus against execution exists, the Court then conducted its own independent evaluation of the constitutionality,⁸³ by first looking to whether either goal of retribution or deterrence, both permissible grounds for execution, are achieved through the execution of mentally retarded offenders.⁸⁴ Establishing a link between culpability and proportionality for the purpose of evaluating the retributive effect of execution,⁸⁵ the Court determined that the mentally retarded should be exempted due to limited culpability.⁸⁶ The deterrent effect of the death penalty only occurs where the prospective offender engages in premeditation and deliberation.⁸⁷ Applying the same factors that affect the mentally retarded individual's culpability, the Court found the threat of execution provides no deterrent effect upon mentally retarded prospective

79. *Id.* at 316.

80. *Id.* at 315-16, 315 n.18 (discussing comparison to *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

81. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

82. *Id.* at 317 (also concluding that mental retardation does not provide exemption from criminal sanctions but that the peculiarities of decision-making, lack of impulse control, and tendency to follow rather than lead that is attendant to mental retardation serve to diminish personal culpability).

83. *Id.* at 319.

84. *Id.* (citing *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

85. *Id.* (citing *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (holding that the defendant committed a murder not reflective of "a consciousness materially more 'depraved' than that of any person guilty of murder" and therefore should not be sentenced to death)).

86. *Id.*

87. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

offenders by virtue of their diminished ability to process the possibility of execution and control their conduct based on that possibility.⁸⁸

The Court also noted that the pool of normal intelligence prospective offenders' deterrence will remain unaffected by this exemption because, necessarily, any potential offender who engages in an analysis of the potential for the death penalty will likely not meet the mentally retarded exception.⁸⁹ A mentally retarded defendant's reduced ability to participate fully in their defense provides another justification for a "categorical" exemption.⁹⁰ The Court concluded that the absence of legitimate justification for execution, either as retribution or as an efficient deterrent, makes the punishment excessive in light of the Eighth Amendment.⁹¹

The dissents in *Atkins* primarily criticized the majority's analysis of legislative enactments and again argued that the method of total dependence on legislative action as a barometer for national opinion undermines the principles of federalism upon which the country was founded.⁹² Decisions such as *Atkins* impede the necessary freedom that states must have to fulfill their duty to make independent evaluations of legality.⁹³ Through this process, the evaluation of a majority of one state's citizens is negated by the combination of diverse majorities from other states into a statement that governs the whole country.

Justice Rehnquist specifically took issue with the complete and total reliance on legislative data that supports the majority's conclusion and completely rejected the execution of retarded individuals and the corresponding exclusion of contrary legislative action in states that leave the decision of mitigation through evidence of mental retardation to the judge or jury.⁹⁴ He also objected to the absence of any statistics supporting the contention that juries are hesitant to impose the death penalty on the mentally retarded⁹⁵ and the consideration of sources external to the nation's legislatures or juries.⁹⁶

88. *Id.* at 320.

89. *Id.*

90. *Id.*

91. *Id.* at 321.

92. *Id.* at 322 (Rehnquist, Scalia, & Thomas, J.J. dissenting).

93. *Id.*

94. *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Eighteen states limit death penalty eligibility on the basis of mental retardation alone, while twenty states "leave the question of proper punishment to the individualized consideration of sentencing judges or juries familiar with the particular offender and his or her crime.").

95. *Id.* at 324 n.8 (pointing to statistics that support the opposite conclusion, namely, that experts estimate as many as ten percent of the death row population is retarded (in contrast to *Atkins*'s own expert which estimated that one percent of the general population is retarded, *id.* at 309 n.5, and that juries are therefore not as reluctant to impose the death penalty for this particular type of offense as they were in *Coker*).

96. *Id.* at 325-28 (Scalia, Rehnquist, & Thomas, J.J. dissenting) (criticizing the use of international norms, opinion polls, and the official positions of professional and religious organizations as contrary to the dicta in *Stanford v. Kentucky*, 492 U.S. 362 (1989)).

Similarly, Justice Scalia's dissent focused on the majority's construction of a consensus and found it faulty because of both the linguistic sleight of hand required to characterize seemingly ambivalent legislation outlawing execution of *prospective* mentally retarded convicts but leaving existing convictions unaffected as "morally repugnant"⁹⁷ and the characterization of forty-seven percent of death penalty jurisdictions' prohibition (even accepting that questionable statistic) as evidencing a national consensus.⁹⁸ Justice Scalia continued to criticize the entirety of the majority's reasoning and logic, though ultimately his arguments may be summarized in his objection to the "incremental abolition [of the death penalty] by this Court."⁹⁹ Justice Scalia argued that this abolition exceeded the scope of judicial review as it is a decision appropriately left to the legislature. As in *Coker*, the valid concerns of the dissenters are exacerbated by the majority's failure to clearly apply the test that they simultaneously announced. Though the Court separated Eighth Amendment analysis into (1) an evaluation of the potential retributive or deterrent effects of the punishment, (2) the proportionality of the punishment to the crime, and (3) the Court's own analysis of whether the punishment is cruel and unusual, it concluded a discussion relating to retribution and deterrence with a determination that the punishment is *excessive*.¹⁰⁰ This blurring of the elements, despite the explicit distinction made between these two elements, makes the majority's reasoning uncomfortably susceptible to criticism and doubt.

C. *Roper v. Simmons*

Roper v. Simmons came to the Court under slightly different auspices than the prior two cases discussed.¹⁰¹ Simmons had exhausted all relief by the time *Atkins* was decided in 2002. Yet in light of the Court's decision in that case, he renewed his state appeal and filed a writ of *habeas corpus*, successfully arguing that execution of those who committed crimes when they were juveniles contradicts a national consensus that minors have a diminished degree of culpability.¹⁰² The state then appealed to the Supreme Court.¹⁰³ Simmons, therefore, was the subject of an appeal to reinstitute the death sentence that was previously set aside by the highest state court¹⁰⁴ as opposed to *Coker* and *Atkins* who appealed death sentences upheld by their respective state supreme courts.

Simmons, who was seventeen at the time of his crimes, was tried as an adult and convicted of murder in the first degree.¹⁰⁵ Simmons masterminded a break-in

97. *Id.* at 342.

98. *Id.* at 343.

99. *Id.* at 353.

100. *Atkins v. Virginia*, 536 U.S. 304, 353 (2002).

101. *Roper v. Simmons*, 543 U.S. 551 (2005).

102. *Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003) (*en banc*) (reasoning that "the imposition of the juvenile death penalty has become truly unusual over the last decade").

103. *See Simmons v. Roper*, 540 U.S. 1160 (2004) (*cert. granted*).

104. 112 S.W. 3d at 413.

105. *Id.* at 399.

and a murder that he committed with a fifteen-year-old friend.¹⁰⁶ Simmons and his accomplice tied their female victim's hands and feet with electrical wire, wrapped her entire face in duct-tape, and threw her into a river from a train trestle that spanned it.¹⁰⁷ Additionally, there was evidence that Simmons cajoled his friends into joining his plan by promising that they would experience leniency because they were minors, and that, post-murder, he was bragging about the killing.¹⁰⁸ The jury convicted Simmons and, during the penalty phase, found the presence of three aggravating circumstances that warranted the death penalty.¹⁰⁹

At trial, Simmons's lawyer argued that Simmons's age should affect the sentence because outside of the criminal justice system seventeen-year-olds are treated in a substantially different manner than within in it, due to the legislative determination that seventeen year-olds are less responsible than adults.¹¹⁰ The prosecution argued that the jury should consider the brutality of the crime and that Simmons's age should potentially be an aggravating factor (though not a statutorily aggravating factor) because if, as a seventeen year-old, he was capable of such a horrifying crime then what would he be capable of as an adult?¹¹¹

The Court began its analysis by declaring the rule to require both a "review of objective indicia of consensus" and the Court's own analysis of whether the punishment is proportionate to the crime it punishes.¹¹² The Court referred to *Atkins* as a frame of reference defining what evidence will constitute a "national consensus."¹¹³ The Court noted that though twenty states lack an official prohibition of the juvenile death penalty, only six of those states had executed a juvenile in the fifteen years since the Court upheld the constitutionality of such executions, and that in the ten years directly preceding this case, only three states had done so.¹¹⁴ The Court next looked to the rate of change in response to the holding that execution of sixteen year-olds was permissible under the Constitution; five states responded to the ruling in *Stanford* by legislatively or judicially

106. *Roper v. Simmons*, 543 U.S. 551, 556 (2005).

107. *Id.*

108. *Id.* at 556-57.

109. *Id.* at 558; *see also id.* at 557 (listing the aggravating circumstances as "committed for the purpose of receiving money; [] committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman").

110. *Id.* at 558.

111. *Id.*

112. *Roper v. Simmons*, 543 U.S. 551, 564 (2005). In *Stanford v. Kentucky*, the Court declared that its independent judgment of proportionality was inappropriate in Eighth Amendment analysis. 492 U.S. 361, 379-80 (1989). The Court clarifies here that it is returning to its traditional analysis that includes the Court's evaluation of proportionality in addition to the analysis of popular consensus. *Roper*, 543 U.S. at 563-64.

113. *Id.* at 564.

114. *Id.* The Court also notes that Kevin Stanford, the defendant appellant in *Stanford v. Kentucky*, which held such execution constitutionally permissible, has recently had his sentence commuted. The Court seems to find this persuasive of an "evolving" standard.

abandoning the juvenile death penalty.¹¹⁵ The Court admitted that this is a less impressive number than the sixteen states that outlawed execution of mentally retarded individuals between *Penry* and *Atkins*, but referenced the discussion in *Atkins* of “the consistency of the direction of change” to find that the smaller number is nonetheless significant.¹¹⁶ This smaller number is significant because the number of states that exempted juveniles from the death penalty prior to *Stanford*¹¹⁷ was larger than the number of states that exempted the mentally retarded prior to *Penry*¹¹⁸; therefore there were fewer states available to enact new restrictions. The Court refused to permit the execution of minors simply because state legislatures evinced opposition to the idea sooner than they evinced opposition to the execution of the mentally retarded.¹¹⁹ Additionally, because the state is the petitioner, the absence of evidence supporting a consensus *approving* juvenile execution was particularly relevant.¹²⁰

After concluding that a national consensus exists in opposition to juvenile execution, the Court turned to its own analysis of whether the punishment violates the Eighth Amendment. The Court looked to previous decisions and determined that Supreme Court jurisprudence requires that retributive capital punishment “must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”¹²¹ The Court also found that both of these components are necessary given previous holdings that heinous crimes such as rape or felony murder absent a murderous *mens rea* do not by themselves justify the death penalty.¹²² Given the exclusion of certain classes, such as those under the age of sixteen and the mentally retarded, the Eighth Amendment allows only a narrow class of offenders to be legally available for retributive capital punishment.¹²³

The Court concluded that juveniles are *per se* excluded from the class of “worst offenders” by virtue of three reasons supported by sociological and psychological research into youth and criminology.¹²⁴ First, youth correlates with a lack of maturity and a tendency toward impetuous decisions.¹²⁵ Second, juveniles

115. *Id.* at 565.

116. *Id.*

117. *Id.* at 566. Twelve states that allowed the death penalty expressly prohibited execution of any juvenile under eighteen at the time of *Stanford*.

118. *Roper v. Simmons*, 543 U.S. 551, 566 (2005). Two death penalty states prohibited execution of the mentally retarded at the time of *Penry*.

119. *Id.*

120. *Id.* at 567. The Court went of its way to remark that state’s observation that the United States ratified the International Convention on Civil and Political Civil Rights subject to reservation from Article 6(5) provided *at best* “faint support” for its argument. *Id.* Article 6(5) prohibited capital punishment for juveniles. *Id.*

121. *Id.* at 568 (citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

122. *Roper*, 543 U.S. at 568.

123. *Id.* at 568-69.

124. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

125. *Id.* at 569 (citing J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REVIEW 339 (1992)).

are more susceptible than adults to negative influences and external factors.¹²⁶ Third, juveniles' characters are more transitory and likely to change than adults' characters.¹²⁷ The Court reasoned that these differences support a conclusion that the irresponsible behavior of juveniles will never be as morally reprehensible as that of an adult.¹²⁸ These differences form the foundation for mitigation on the basis of age and immaturity, yet the Court found that the potential for mitigation does not match the certainty of diminished capacity for culpability. Therefore, juveniles must be legally exempt from the class eligible for capital punishment for the purposes of retribution.¹²⁹

The Court found the same sociological and psychological concerns about youthful lack of maturity and susceptibility to persuasion to militate against any deterrent effect the death penalty might have on minors.¹³⁰ Supposing an individual under the age of eighteen did engage in a cost-benefit analysis prior to committing a crime, the Court argued that any deterrent effect that the death penalty might have will be sufficiently matched by the deterrent effect of life imprisonment.¹³¹

The Court also assigned weight to the fact that psychiatry refuses to diagnose antisocial personality disorder to individuals under the age of eighteen and drew an unexplained corollary to eligibility for the death penalty. The unarticulated argument seems to be that the constellation of personality traits accompanying this disease are similar to those that society deems execution-worthy (when accompanied by a crime deserving of the death penalty): "callousness, cynicism, and contempt for the feelings, rights, and suffering of others."¹³² The conclusion the Court reaches from this is that if professionals are incapable of distinguishing which individuals displaying this constellation of symptoms will continue to display them their whole life and if the jury analysis in the penalty phase of capital cases is analogous to a determination of which individuals have antisocial personality disorder, then juries, which consist of untrained lay people, should be similarly restricted from making such a harsh judgment on minors.¹³³

Finally, the Court referenced the United States' isolation within the world community in officially sanctioning the juvenile death penalty.¹³⁴ The Court lists several multi-lateral treaties that prohibit the execution of juvenile offenders, some

126. *Id.* at 569 (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) ("legal minors lack the freedom that adults have to extract themselves from a criminogenic setting")).

127. *Id.* at 570 (citing ERIC HOMBURGER ERICKSON, *IDENTITY: YOUTH AND CRISIS* (Norton W. W. & Company, Inc. 1968)).

128. *Roper*, 543 U.S. at 570.

129. *Id.* at 571.

130. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

131. *Id.* at 572.

132. *Id.* at 573 (citing AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 701-06* (4th ed., text rev. 2000)).

133. *Roper*, 543 U.S. at 574-75.

134. *Id.* at 575.

of which the United States is a party to, subject to reservation from that prohibition.¹³⁵ The Court also referenced the Eighth Amendment's origin in the English Declaration of Rights and looked to the United Kingdom's interpretation of the "cruel and unusual punishment" restriction.¹³⁶ They reasoned that the United Kingdom's 1948 abolition of the death penalty for crimes committed by a person under the age of eighteen merits particular attention due to the similarity of the purported protections afforded citizens of both countries.¹³⁷

While the Court was careful to highlight the merely persuasive nature of this international law, it considered these treaties and the climate of international opinion and found that they "provide respected and significant confirmation for [its] own opinion."¹³⁸ The treatment the majority affords international opinion is significant because it is the first time the Court discusses international law in the body of its opinion in Eighth Amendment analysis. In earlier opinions, international law was mentioned solely in footnotes and dissents; in *Roper* international law comprises an entire section of the majority's opinion.

The dissenting justices in *Roper* objected to nearly every aspect of the majority's opinion. Justice O'Connor took particular issue with the affirmative evidence that state legislatures support juvenile capital punishment as evidenced in the adoption of statutes that specifically set the age of eligibility for execution at sixteen or seventeen.¹³⁹ Justice O'Connor objected to the categorical exclusion of seventeen year-olds from the class of morally reprehensible criminals based on the majority's reasoning as, in her opinion, Simmons is the clear exception to the assumptions they make.¹⁴⁰ He committed a pre-meditated murder that *he* talked his friend into after engaging in a cost-benefit analysis where he correctly determined that their age would protect them from society's harshest sanctions. As Justice O'Connor pointed out, the arbitrary nature of a broad age-based prohibition "quite likely will protect a number of offenders mature enough to deserve the death penalty and *may well leave vulnerable many who are not.*"¹⁴¹ Although Justice O'Connor affirms the potential confirmatory role of international law in instances where a national consensus has been reached, she found that there has been no national consensus reached and therefore would refuse to consider evidence of a newly emerging global standard in a determination of a wholly domestic issue.¹⁴²

On the other hand, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, fiercely opposed the inclusion of any foreign law.¹⁴³ According to Justice Scalia, the Court should categorically refuse to consider foreign law when

135. *Id.* at 576.

136. *Id.* at 577.

137. *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

138. *Id.* at 578.

139. *Id.* at 595 (O'Connor, J., dissenting) (distinguishing *Atkins* by the fact that all state legislatures that addressed the issue of the death penalty for the mentally retarded had opposed it, the states that permitted it had not addressed it and sanctioned it, as is the case here).

140. *Roper*, 543 U.S. 598-600.

141. *Id.* at 601-02 (emphasis added).

142. *Id.* at 605.

143. *Roper v. Simmons*, 543 U.S. 551, 624 (2005).

it opposes the Court's own opinion of proper interpretation, i.e. exclusionary rule,¹⁴⁴ First Amendment Anti-Establishment of Religion Clause,¹⁴⁵ and abortion jurisprudence¹⁴⁶. Despite the relative isolation of the United States' policies in all of these issues, it is only death penalty jurisprudence that the Court seeks to bring into conformity with the laws of the rest of the world. Justice Scalia in particular objected to the Court's selective reliance on the law of the United Kingdom in light of the Court's rejection of an originalist approach.¹⁴⁷ Justice Scalia's argument essentially rejected a piecemeal adoption of alien law.¹⁴⁸ He also criticized the Court's construction of foreign law "confirming" United States' jurisprudence when the Court is using foreign law as a reasoned basis to reject true United States' jurisprudence that embraces the juvenile death penalty.¹⁴⁹ Additionally, Justice Scalia took issue with the absence of inquiry into *actual* juvenile executions in other countries, given the intense scrutiny at the state level of not only what the legislature has permitted but the rate of implementation.¹⁵⁰ The Court evinces distrust of the state legislatures and domestic juries but is wholly open to the validity of foreign legislatures.¹⁵¹

III. ALTERNATIVES TO THE CONSENSUS DETERMINATION

Retributive and state-sanctioned executions have been a part of "human society" from the time of history. The death penalty was used as a punishment in ancient Babylonian,¹⁵² Greek,¹⁵³ and Jewish society.¹⁵⁴ Until recently, capital punishment has remained a penalty throughout the world, frequently imposed as a mandatory sentence for many crimes.¹⁵⁵ Widespread flexible application of the death penalty did not occur until roughly the mid-nineteenth century.¹⁵⁶ Even in

144. *Id.*

145. *Id.* at 625.

146. *Id.* at 626.

147. *Id.* (explaining that reliance on the British origins of the Eighth Amendment would lead to clear approval of the juvenile death penalty as 18th-century English law would clearly approve).

148. *Id.* at 627 (characterizing it as "sophistry").

149. *Roper v. Simmons*, 543 U.S. 551, 628 (2005).

150. *Id.* at 623.

151. *Id.*

152. CODE OF HAMMURABI (Robert Harper ed., trans., Univ. of Chicago Press 1904) (2250 B.C.).

153. RHETORIC AND THE LAW OF DRACO 147 (Edwin Carawan ed., trans., Clarendon Press 1998) (7th Cen. B.C.).

154. THE TORAH (Sol Scharfstein trans., Ktav Publ'g 2005).

155. Roger Hood, *Introduction* to INTRODUCTION TO THE DEATH PENALTY: ABOLITION IN EUROPE 9, 10 (Tanja Kleinsorge & Barbara Zatlökal eds., Council of Europe Publ'g 1999).

156. One such practice was the Benefit of Clergy which allowed many who would have been killed to instead be sentenced to Australia or the colonies, even as the crimes retained mandatory death sentence. This flexible application may be seen as a key stumbling block to abolition. A theoretical tolerance of execution for some but not others has allowed the proportionality doctrine to flourish in the United States.

nations that limited their practice of the execution, so-called evolved western European states, the world wars of the early twentieth century reinvigorated the clamor for the blood of war criminals.¹⁵⁷ Yet, in less than a hundred years, two-thirds of the world's nations have ended the death penalty.¹⁵⁸ This sudden trend towards abolition may be explained by a shift by government leaders away from consensus based legal decision-making towards a top-down normative approach to the death penalty. This shift has moved the government towards abolition primarily in an attempt to maintain legitimacy by forcing the state to abide by the rules applicable to its citizens and maintaining its neutral image as a "moral" state within the international community.

A. Movement towards state accountability commensurate with individual accountability

Contrary to popular rhetoric,¹⁵⁹ European countries have not experienced a general legislative trend toward eliminating the death penalty. Instead European countries have eliminated the death penalty through adherence to human rights treaties and economic incentives that reward its abolition.¹⁶⁰ The history of the death penalty in Europe is characterized by swings in polar directions; in many countries the death penalty was abolished and reinstated, only to be abolished again.¹⁶¹ The current tranquility of the European Union's legislation of the death penalty should not be misinterpreted as a reflection of the tolerance and compassion of the people of Europe.¹⁶² Rather, this tranquility represents a hard line drawn by abolitionists and enforced through the means of economic sanctions.

1. The development of a humanist political approach

Europe has struggled with legality of executions for at least the past two centuries.¹⁶³ In the eighteenth century humanism challenged the established system of executions and undermined the death penalty on two related fronts.¹⁶⁴ First, humanism represented a move toward secularism which decreased the acceptance of an Old Testament justification for a state's right to execute. Second, humanism

157. Hood, *supra* note 156, at 10.

158. See Amnesty International, Death Penalty Defies International Human Rights Standards, <http://www.amnestyusa.org/death-penalty/death-penalty-facts/death-penalty-and-human-rights-standards/page.do?Id.=1101089> (providing a figure for those states that maintain the legality of the death penalty but do not in practice execute).

159. See, e.g., Krista L. Patterson, *Acculturation and the Development of Death Penalty Doctrine in the United States*, 55 DUKE L.J. 1217, 1219-24 (2006).

160. See P.J. Van Koppen, D.J. Hessing, & C.J. de Poot, *Public Reasons for Abolition and Retention of the Death Penalty*, 12 INT. CRIM. JUSTICE REV. 77 (2002) (discussing why there is little public support for the death penalty in Europe).

161. Dick J. Hessing, Jan W. de Kiejser & Henk Elfers, *Explaining Capital Punishment Support in an Abolitionist Country*, 27 LAW & HUM. BEHAV. 605 (2003).

162. See Craig S. Smith, *Hanging Hussein; In Europe, It's East Vs. West on the Death Penalty*, N.Y. TIMES, Nov. 19, 2006, at 44.

163. M. MARC ANCEL, EUROPEAN COMM'N ON CRIME PROBLEMS, THE DEATH PENALTY IN EUROPEAN COUNTRIES 8 (1962).

164. See, e.g., CESAR BECCARIA, ON CRIME AND PUNISHMENT (1764).

increased respect for man as a rational and enlightened creature. The humanist perspective challenged the idea that the state had a right to decide something as crucial as the death penalty by suggesting that society was not necessarily more than a sum of its parts. If an individual did not have the right to take another's life, which is the situation representing the most palatable crime eligible for the death penalty, then a group of individuals who only have the power bestowed upon them by the population they govern, does not have the right to execute.¹⁶⁵

In a way, Lockean philosophy represents the first deconstructive attempt to explain *why* the state would even think that it had the right to kill. In some countries, the response to this increased reverence for the human condition was to eliminate the death penalty. Others manifested this discontent with capital punishment by developing alternative means of eliminating the criminals from the population at large. For example, England and Ireland both began deporting or exiling criminals that previously would have been executed.¹⁶⁶

The abolitionist movement, however, was soon reversed. The realities of crime and the brutality of populations soon convinced nineteenth century countries to employ a truly coercive measure. By 1810, the death penalty was available as punishment in all the countries of Europe.¹⁶⁷ The death penalty thereafter remained a popular form of punishment in Europe until the 1960's.¹⁶⁸ As human rights developed globally, so too did the pressure to further regulate the taking of human life; this is reflected in the gradual reduction in the number of crimes that were punishable by the death penalty.¹⁶⁹ Yet, Europe still experienced a period of circumscribed application of the death penalty, applying it in increasingly rare situations. The first half of the twentieth century made clear that European countries were in favor of executing war criminals, even while opposing the death penalty for their own citizens.¹⁷⁰ Indeed, the idea that Europe has been slowly moving to an execution-free finale is undermined by the extreme brutality of the concentration camps and the fascist regimes of the World War II era, in particular by the fact that the fascist countries were the first to call for abolition.¹⁷¹

If the argument of an "evolution" towards eliminating the uncouth death penalty were accurate, one would expect countries such as Germany to argue

165. *Id.*

166. The Transportation Act of 1718 made it possible to receive a commutation to deportation from a death sentence. However, the claim that this evinces dissatisfaction with the penalty is undermined by the fact that around the turn of the nineteenth century, around 200 crimes were punishable by death. Transportation Act of 1718 (1718) (Gr. Brit.). See JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 513-15 (4th ed. 2002).

167. This return to execution provoked a return of abolition rhetoric. Though authors and purveyors of the myth of a kinder gentler Europe like to disconnect these events, logically, in the absence of the death penalty, abolition movements will not exist. They would have nothing to argue for.

168. ANCEL, *supra* note 164.

169. *Id.*

170. See, e.g., Hans Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 AM. J. INT'L L. 223 (1949).

171. Smith, *supra* note 163.

against the abolition of the death penalty, either because of its recent fervor for it or because of the needed deterrent effect that was highlighted by Hitler. Yet Germany is not only complacent and content to abolish the death penalty, it was at one time a leading force. Instead it is Poland that has called for a reevaluation of a Union-wide abolition.¹⁷² In 2006, the president of Poland requested that the European Union revisit whether or not the abolition reflected the views of the populace.¹⁷³ Though the data is varied (and absent the reality of the reinstatement without EC permission, how many people are even thinking about the death penalty?) there is evidence that at least some member states are somewhat less committed to the abolition than others.¹⁷⁴ However, the EC flatly rejected any reconsideration, stating, in effect, that the popular view of the death penalty is of no concern as the issue is not up for debate.¹⁷⁵

2. Religion's Social and Political Influence

Religious dictates are generally interpreted both in favor of and against the retention of the death penalty with, from a cynical perspective, viewpoint being the sole determinative factor for which interpretation receives official sanction. Among the earliest proponents of abolition were members of the Amish and Mennonite Christian sects. Yet, the "eye for an eye" passage from the Gospel According to Luke is an oft-cited commendation of the death penalty amongst conservative Christians in the United States. Within the countries that are not feasibly interested in European Union accession, religion is the primary basis for rulings on the legality of capital punishment. The evolution of support or opposition to the death penalty on the basis of religious affiliation tracks the general evolution of culture from religious and brutal to secular and incarceration prone.

B. European Union Membership Requirement of Abolition

The process of joining the European Union begins with meeting the Copenhagen criteria established by the European Council in June, 1993, which require that the candidate country have basic institutions respecting human rights.¹⁷⁶ The European Council established these criteria as part of a plan to expand the Union to all of Europe. Therefore, it represents a vision, as early as 1993, of an execution-free continent. Several of these treaties, namely the

172. Amnesty International, *Poland Goes Backwards: No to the Restoration of the Death Penalty*, Aug. 8, 2008, available at <http://asiapacific.amnesty.org/library/Index/ENGEUR370022006?open&of=ENG-POL>.

173. *Id.*

174. See generally Van Koppen, et. al., *supra* note 161.

175. Amnesty International, *supra* note 173.

176. Presidency Conclusions, Copenhagen European Council, June 21-22, 1993, available at http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf ("Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.").

European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, require abolition of the death penalty. The European Union's top down approach differs dramatically from the United States' bottom up approach. The European Union has made the determination that decisions of life and death should not stem from the masses but that the government's responsibility to its constituents includes protection from the government.

The most effective mechanism for achieving abolition through political means is the requirement to sign binding treaties that eliminate the death penalty. As discussed below, the European Union requires that prospective members both generally agree to respect human rights and specifically become members of certain treaties. Initially, the United Nations simply declared the importance of basic human values.¹⁷⁷ In 1966, the International Covenant on Civil and Political Rights prohibited the "arbitrary" execution of any person and completely prohibited the execution of a pregnant woman or a juvenile.¹⁷⁸ It also provided basic protection from torture and "cruel, inhuman, or degrading treatment or punishment."¹⁷⁹ The first treaty requiring the abolition of the death penalty was signed in 1990 and limited its use to wartime crimes.¹⁸⁰ This requirement was in line with much of the *actual* practice of Europe at the time which maintained the death penalty but applied it only in circumstances involving war crimes or crimes committed during war. In May, 2002 Protocol 13 to the European Convention of Human Rights was opened for signing.¹⁸¹ This was the first legally binding treaty that eliminated capital punishment at all times, including wartime. The United Nations continues its advocacy for abolition by calling for all countries that maintain the death penalty to seek its abolition and to create a moratorium on executions until the appropriate political actions can be taken to eliminate the death penalty.¹⁸²

V. PROPOSED SYNTHESIS OF METHODS

The United States should be poised to abolish the death penalty. The European Union's model of abolition provides a roadmap to successful abolition because of the similarities between the two unions. This similarity is evident not only in the oft-explored realm of social history,¹⁸³ but in the similarity between the two systems of government. Additionally, there are parallels between the United

177. Universal Declaration on Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

178. International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, 999 U.N.T.S. 171, 174-75.

179. *Id.* at art. 7.

180. Protocol to the American Convention on Human Rights, O.A.S. Treaty Series No. 73 (1990) (adopted June 8, 1990).

181. European Convention on Human Rights, Protocol 13, E.T.S. 187.

182. *See* United Nations Commission on Human Rights, Human Rights Res. 2005/59, United Nations General Council, Resolution A/C.3/62/L.29.

183. *See, e.g.*, Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621 (2004).

States' federal government and the European Union's government in their ability to pass legislation and to force consensus through economic measures¹⁸⁴ are not all encompassing and one to one, there are useful parallels to be drawn between the United States Supreme Court and the European Council. Therefore, the United States has two distinct opportunities to follow in the footsteps of the European Council and abolish the death penalty through a top-down normative decision.

A. Applicability of a Top-down Approach to the United States "Unique" System of Governance

At first glance, it appears that the United States is ill-suited to an adoption of the European Union model of legislation because, at least initially, the comparison of the United States to the E.U. seems misplaced. However the characterization of both as unions of sovereign states designed to promote common goals, including economic development and military security, should illustrate the need for comparison of the United States with other systems of government. Rather, by allowing comparison the United States could use the European Union's experiences to influence its policy decisions by educating itself about the potential pitfalls associated with the enactment of so-called "progressive" legislation such as mandatory abolition of the death penalty.

The reinstatement of the death penalty for federal crimes in 1988 by the United States federal government may be regarded as a clear statement in support of the death penalty.¹⁸⁵ The federal government goes beyond mere tolerance for state sanctioned execution by choosing not to prohibit individual states from exercising that power. In order for Congress to abolish the death penalty *per se* there would first have to be a constitutional amendment that provided Congress with the power to do so. However, this type of expansion of federal power is not likely, and not even necessary. The legislation surrounding the minimum drinking age and federal highway money provides a model for legislative action in the realm of the death penalty. Absent a constitutional amendment the federal government has no explicit power to regulate alcohol which is why the Eighteenth Amendment was necessary to exert the desired control.¹⁸⁶ Yet through the application of economic incentives (or perhaps more accurately, disincentives) the government has been able to seize control of the legal drinking age.¹⁸⁷ The distinction between the conditioning of federal highway funding on compliance with federal regulation and conditioning access to the economic benefits associated

184. E.g., exclusion from the Union.

185. 21 U.S.C. 848(e) (2006). *See also* Death Penalty Information Center, *Federal Laws Providing for the Death Penalty*, available at <http://www.deathpenaltyinfo.org/article.php?scid=29&did=192> (listing all current capital offenses).

186. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

187. *See* 23 U.S.C. § 158 (2006) (effectively mandating the national minimum drinking age by allowing federal highway subsidies only to those states prohibiting alcohol sales to persons under 21). *See also* South Dakota v. Dole, 483 U.S. 203 (1987) (upholding the constitutionality of the federal program).

with membership in the E.U. is not as great as proponents of the death penalty might want you to think.

The exercise of the Commerce Clause may be to promote the “general welfare of the nation.”¹⁸⁸ If the United States is serious about its commitments to human rights¹⁸⁹ then Congress should exercise the power it has and condition some sort of federal funding on compliance with minimum standards of human treatment. The “commitment to human rights” referred to in United States rhetoric is defined by international standards of decency, not domestic standards. The bare minimum of a true commitment to human rights includes an elimination of the death penalty. The United States could gain confidence of the ultimate success of such reform by referring to the Copenhagen criteria which require the abolition of the death penalty in states in order for them to become candidates for membership. The success of the European Union’s initiative to abolish the death penalty¹⁹⁰ should create confidence within Congress that a progressive moral stance on killing will not result in mutiny amongst the states but, at worst, a grumbling acceptance so long as the requirement is tied to pecuniary benefit.

The concept of legislation that ties benefits to inclusion is not new for the United States. The very idea of a union is predicated on a transaction between the states and the union wherein, much as the individual cedes certain rights for the ability to participate in government, states cede control over certain areas in exchange for the benefits of membership in the union. Though the European Union’s example of this type of relinquishment in the context of the death penalty is the Copenhagen criteria, which is forward-looking in proposing changes that are necessary *prior* to application for accession, there is no reason that the same logic cannot be applied to remaining a fully benefitted member.¹⁹¹ Legislation passed by Congress in the period prior to abolition of slavery provides an example within our own government. Legislation that attempted to mandate whether or not new states would have slavery or not should provide the historical antecedents to legislation that similarly invades an area historically reserved to the states.¹⁹² The approach of

188. U.S. CONST. art. 1, § 8, cl.1.

189. See U.S. Dept. of State, *Human Rights*, available at <http://www.state.gov/g/drl/hr/> (“The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.”).

190. Amnesty International USA, *Death Penalty and International Standards*, available at <http://www.amnestyusa.org/death-penalty/death-penalty-facts/death-penalty-and-human-rights-standards/page.do?Id.=1101089> (evidencing the success through the large number of countries that are signatories to Protocol 13).

191. This argument is not intended to suggest that statehood should be in any way threatened by refusal to comply with federal directives. However, a fully benefitting member of the union also partakes in federal largesse.

192. The Missouri Compromise and the Kansa-Nebraska Act failed in part because the application was not wholesale; the United States was divided between slave states and non-slave

negotiating consensus within the European Council, the governing body of the European Union, and then simply issuing compulsory mandates to member states should be no different from the United States approach of negotiating consensus within Congress and then forcing states to comply.

Unfortunately, the primary flaw in this argument is that because the United States has passed its malleable formative period and has already ascertained of the allocation of powers, in order for Congress to pass legislation that conditions the federal money on the elimination of the death penalty there must be a legitimate purpose served.¹⁹³ In the case of highway funding and a minimum drinking age, empirical studies that linked age of driver with the number of accidents caused by drunk driving provided leverage not only for the passage of requirements but also supported the arguments that there was a reliable link. In the case of the death penalty, strong evidence exists that questions the deterrent effect of the death penalty, but only weak evidence exists to support the suggestion that elimination of the death penalty lowers the crime rate.¹⁹⁴ The invasion of states' domain on speculative, or at least questioned, evidence is unlikely to persuade Congress to create the economic sanctions necessary for this plan to work. Absent a legitimate purpose supported by empirical evidence, an attempt to recreate the European Union model of abolition will be fruitless. This does not mean that the separation of powers cannot be a useful tool in analogizing the European Union to the United States. To the contrary, elimination of the death penalty through the courts would be greatly aided by the inability of Congress to take meaningful action on the matter.

B. The Case for Judicial Legislation

The legitimacy of the Supreme Court and the federal legislature would be greatly enhanced if the Court took the Eighth Amendment as seriously as it takes the Fourteenth and outlawed the death penalty. Though there is a federalist argument that reserves certain rights to the states this argument is rejected in nearly every other context and the Constitution contains the Eighth Amendment for a reason. The *Carolene Products* argument is normally reserved for suspect class arguments that require immutable characteristics, but the sentiment of that type of protection should not be reserved exclusively to Fourteenth Amendment analysis.

states. The division between these two forces led to the failure of this act but is still applicable to demonstrate that the United States is not entirely opposed to legislation that removes popular democracy on all issues.

193. Potential options to tie money to include: prison funding (improved prisons could potentially reduce crime), police funding (improved prisons could potentially reduce crime), educational funding (improved education is correlated with a decreased risk of criminality), or even interstate funding (reduction in the quality of major highways might prevent potential killers from traveling interstate out of a death penalty state and into a non-death penalty state to kill).

194. K.L. Avio, *Measurement Errors and Capital Punishment*, 20 APPLIED ECON. 1253, 1260 (1988) (discussing the problems which plague and weaken econometric evidence regarding the death penalty's effect on the crime rate); see generally Samuel Cameron, *A Review of the Econometric Evidence on the Effects of Capital Punishment*, 23 J. OF SOCIO-ECON. 197, 209 (1994).

Death row inmates are a group that has basic constitutional rights denied to them upon their entrance into a class of the “worst offenders.” These inmates are caught in a legal bind, as the law that sentences them to death has been shown to be an imperfect deterrent (otherwise they would not have committed the crimes that they did) yet their legal challenges are cut short by an analysis that focuses primarily on a specific situation. The characteristic of being a death-row inmate is immutable, simply in a different and as yet unrecognized form; if you can’t do the time don’t do the crime. The solution should not be to kill more people.

Death row inmates make sense as a class for constitutional analysis purposes because as opposed to many of the classes that the court seeks to protect, the power of inmates comes as a class not as an individual. Additionally, the laws under which they are punished are designed to affect a class. Yet the Court’s method of protecting individuals from the death penalty has tended towards an analysis of the proportionality of the punishment to the crime with is a methodology that will never lead to abolition of the death penalty, rather it will categorically exclude more and more people. The current approach of categorical exclusion of segments of the population from the death penalty will foreclose the abolition of the death penalty because, even though it will make the death penalty a truly unusual punishment, the reliance on proportionality will nevertheless eliminate a change in analysis to rely on the “unusual” clause of the eighth amendment. Short of a watershed in Supreme Court jurisprudence, death penalty will have truly become unusual but the Court will be prevented from analyzing the issue that way because of the substantial precedent it has built around the Eighth Amendment. Rather it will subject a tiny minority of the population to an inhuman and archaic practice in the name of state’s rights.

A return to true Eighth Amendment analysis, even in the context of the death penalty would provide consistency as well as allow the court to remain true to principles of *stare decisis* and the court system while making the appropriate moral choice.

IV. CONCLUSION

The United States’ current regime of capital punishment ultimately weakens the United States, both domestically and internationally. The main harm on the domestic front is that the federal death penalty and the permissive standard that finds that state level death penalty does not violate the Eighth Amendment delegitimizes the government. Applying the death penalty to murderers has inherent logical issues. By refusing to enter the treaties that require its abolition, the United States undermines its typically strong positions on “human rights.” It appears disingenuous and sanctimonious to argue for regulation and control over other states conduct, as the United States has in conflicts like Bosnia and Iraq. It also aligns the United States with countries it normally is considered more advanced than and will eventually lead to the European Union limiting its contact with the United States. Ultimately this dissonance leads to the United States’ need to revise its capital punishment jurisprudence and abolish the death penalty.

The only viable route to achieving abolition is through the Supreme Court. The executive branch has refused to negotiate treaties with other countries on this singular front. The legislative branch has similarly refused to engage in the international treaty system and is foreclosed from applying a legislative withholding of money absent concrete data. This means that only the Supreme Court is left to protect all citizens from the threat of state execution. The Supreme Court should embrace this role in the same manner it has embraced its role in recent Fourteenth Amendment decisions. Though a decision abolishing the death penalty may be unpopular with a slim minority of the United States population, this only strengthens the argument that the Court is the appropriate body to enact this abolishment; there is no fear of voter reprisal. Finally, the Court is the appropriate body because so long as abolishment is but a mirage on the horizon it will, unfortunately, have no shortage of Eighth Amendment *habeas corpus* petitions just waiting for *certiorari*.