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# On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty

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# ON THE ABOLITION OF MAN: A DISCUSSION OF THE MORAL AND LEGAL ISSUES SURROUNDING THE DEATH PENALTY

THOMAS J. WALSH<sup>1</sup>

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## I. INTRODUCTION

In his popular novel *The Chamber*, John Grisham introduces the reader to a character who is the warden of a Mississippi prison and in charge of carrying out executions. The irony of this character is that despite the fact that he understands society's desire to execute certain criminals and that his job is to carry out that desire, he dislikes the death penalty:

He hated the death penalty. He understood society's yearning for it, and long ago he had memorized all the sterile reasons for its necessity. It was a deterrent. It removed killers. It was the ultimate punishment. It was biblical. It satisfied the public's need for retribution. It relieved the anguish of the victim's family. If pressed, he could make these arguments as persuasively as any prosecutor.<sup>2</sup>

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<sup>2</sup>JOHN GRISHAM, *THE CHAMBER*, 120 (1994).

As sentiment in favor of the death penalty spreads throughout the country and as several states, including Wisconsin, prepare to reinstate the death penalty, arguments such as those made in the above passage need to be more fully explored. This is especially true in light of the fact that this nationwide trend runs counter to the international trend away from the death penalty, leaving the United States in the company of such death penalty countries as Iran, Iraq, and Libya.<sup>3</sup>

This article examines the moral and practical arguments supporting the death penalty in an effort to show why the United States should join other Western nations in the abolition of the death penalty. First, this article explores the historical context of the death penalty in the United States and examines the current status of constitutional doctrine on the death penalty. Next, because an analysis of the arguments for and against the death penalty are invariably charged with moral issues, an effort will be made to examine the moral aspects of the death penalty. The arguments offered in support of the death penalty will then be scrutinized to determine which arguments are sound, and those which are not, given the constitutional and moral context in which they are made. Finally, an effort will be made to determine which constitutional arguments remain viable to challenge the constitutionality of the death penalty.

## II. THE DEATH PENALTY IN THE UNITED STATES

### A. *History of the Death Penalty in the United States*

Human beings have a long history of imposing the penalty of death as punishment for certain actions which violate society's norms.<sup>4</sup> This long history accompanied the English to their colonies in the New World.<sup>5</sup> The common law in England during the American colonial period required mandatory imposition of the death penalty for certain crimes.<sup>6</sup> After the American revolution, the newly formed United States of America adopted this mandatory death penalty, but there were not as many capital crimes as in England.<sup>7</sup> Despite the fewer number of capital offenses, there were problems with the death penalty in the United States. The mandatory nature of the death penalty often caused problems in obtaining convictions for capital offenses when juries, who believed the defendant was guilty, felt that the defendant did not deserve death.<sup>8</sup> This, of course, caused many guilty men to go free. As a

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<sup>3</sup>Welsh S. White, *Capital Punishment's Future*, 91 MICH. L. REV. 1429, 1440 (1993).

<sup>4</sup>See *infra* notes 40-73 and accompanying text for a discussion of the death penalty in human history.

<sup>5</sup>Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman*, 24 COLUM. HUM. RTS. L. REV. 395, 396 (1992-93).

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

solution to the problem, statutes were enacted, which allowed for a discretionary death penalty. This reform was first introduced in Tennessee in 1838,<sup>9</sup> and by the early twentieth century virtually every state that retained the death penalty had a discretionary death penalty statute.<sup>10</sup>

In addition to the discretionary death penalty, the early twentieth century ushered in the progressive era in the United States.<sup>11</sup> That era included an effort by some to abolish the death penalty. Between the years of 1897 and 1917 ten states abolished the death penalty as a form of punishment.<sup>12</sup> One commentator opines that there is a direct correlation between the improved socio-economic condition of the United States at that time and the abolitionist movement of the progressive era.<sup>13</sup> Essentially, the improved economic conditions turned peoples minds away from such issues as job shortages and unemployment and allowed those who opposed the death penalty to push for abolition.<sup>14</sup> It is further alleged that socio-economic problems were the driving force behind the reinstatement of the death penalty in eight of those ten states by the end of the progressive era.<sup>15</sup> Hence, when people's economic fortunes declined they sought scape goats and harsh penalties for those that did not conform. The death penalty continued to be used throughout the next several decades until the 1960's when the imposition of the death penalty slowed due to legal battles in the courts.<sup>16</sup>

Another round of abolition, albeit forced abolition, occurred in the United States in 1972. Rather than being the product of any sociological condition, however, this round of abolition was forced upon all fifty states by the Supreme

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<sup>9</sup>*Id.* at 397.

<sup>10</sup>Hintze, *supra* note 5, at 397.

<sup>11</sup>For a complete discussion of the progressive era and the economic and social changes that occurred in the United States during the early years of the Twentieth Century, see generally RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955).

<sup>12</sup>The ten states were Colorado (1897), Kansas (1907), Minnesota (1911), Washington (1913), Oregon (1914), South Dakota (1915), North Dakota (1915), Tennessee (1915), Arizona (1916), Missouri (1917). John E. Galliher, et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 541 (1992).

<sup>13</sup>*Id.* at 560 (noting that the origins of abolition laws demonstrate the importance of the social context in which they were passed).

<sup>14</sup>*Id.* at 576.

<sup>15</sup>*Id.* The authors opined that in reinstating death as a punishment, "society used the death penalty not only to oppress minorities and protect the majority, but also as a repressive response to depression-era conditions of social dislocation and economic turmoil." The states which reinstated were: Colorado (1901), Arizona (1918), Tennessee (1919), Missouri (1919), Washington (1919), Oregon (1920), Kansas (1935), and South Dakota (1939).

<sup>16</sup>White, *supra* note 3, at 1429. See also, *McGautha v. California*, 402 U.S. 183, n.8 (1971) (citing various law suits occurring during the 1960s).

Court in the case of *Furman v. Georgia*.<sup>17</sup> In that case the court determined that, as currently imposed in the various states, the death penalty violated the United States Constitution.<sup>18</sup> The court used the Eighth Amendment's prohibition on cruel and unusual punishment to support its holding. Although an exact "holding" in *Furman* is difficult to discern since each of the nine justices wrote a separate opinion, the actual "holding" of *Furman* was perhaps summed up best in *Gregg v. Georgia*:<sup>19</sup> "*Furman* held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."<sup>20</sup>

*Furman* prompted several state legislatures to fashion death penalty statutes that addressed the procedural concerns of the Supreme Court. Georgia's legislature adopted a bifurcated trial approach whereby the guilt portion of the trial was separate from the penalty portion of the trial.<sup>21</sup> This method was approved by the United States Supreme Court in *Gregg v. Georgia*.<sup>22</sup> Several more states followed suit and the tidal wave of abolition from *Furman* was turned back. On January 17, 1977, the first execution in the United States, since the *Furman* decision, took place<sup>23</sup> before a Utah firing squad.<sup>24</sup> Currently, 38 states have the death penalty<sup>25</sup> compared to 12 which do not.<sup>26</sup> These death penalty statutes, in addition to providing for various methods of execution,<sup>27</sup>

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<sup>17</sup>408 U.S. 238 (1972).

<sup>18</sup>*Id.* at 239-40.

<sup>19</sup>428 U.S. 153 (1976).

<sup>20</sup>*Id.* at 188.

<sup>21</sup>G.A. CODE ANN. § 26-1101 (1972).

<sup>22</sup>428 U.S. 153 (1976).

<sup>23</sup>White, *supra* note 3, at 1429.

<sup>24</sup>Erik Eckholm, *Studies Find Death Penalty Often Tied to Victim's Race*, N.Y. TIMES, Feb. 24, 1995, at A1.

<sup>25</sup>DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY (1995) [hereinafter FACTS ABOUT THE DEATH PENALTY]. States with the death penalty are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming. *Id.*

<sup>26</sup>*Id.* States with no death penalty are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, District of Columbia.

<sup>27</sup>Currently, lethal injection is allowed in thirty-two states, electrocution is allowed in eleven states, the gas chamber is allowed in seven states, hanging is allowed in four states and firing squad is allowed in two states. FACTS ABOUT THE DEATH PENALTY, *supra* note 24.

only apply to crimes wherein the life of the victim is taken.<sup>28</sup> The Federal Government and the United States military also have death penalty provisions.<sup>29</sup> New York, with a death penalty law effective September 1, 1995, is the newest member of the death penalty club<sup>30</sup> while Wisconsin may be next.<sup>31</sup>

### *B. Status of Constitutional Doctrine on the Death Penalty*

The most obvious constitutional challenge to the death penalty, as was discussed above, is based upon the Eighth Amendment which states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>32</sup> This clause has been held applicable to the states through the Fourteenth Amendment.<sup>33</sup>

The Eighth Amendment's prohibition against cruel and unusual punishment was the clause used in *Furman* to strike down existing death penalty statutes based upon defects in procedural safeguards.<sup>34</sup> Nevertheless, after *Gregg*, it seemed as if this avenue of constitutional argument had been foreclosed. In *Gregg*, the court stated that the death penalty is not "per se" unconstitutional: the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.<sup>35</sup> Thus, the Supreme Court supports the constitutionality of the death penalty as long as appropriate procedures are met. Further, the court itself will decide what procedures are appropriate. Note, however, that while approving Georgia's death penalty statute, the court suggests that the Eighth Amendment doctrine remains open to the possibility that the death penalty might some day be held unconstitutional "per se."<sup>36</sup> The court stated that when analyzing the death penalty under the Eighth

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<sup>28</sup>*Coker v. Georgia*, 433 U.S. 584, 598 (1977). In *Coker* the Supreme Court noted that the death penalty "is an excessive penalty for the rapist who, as such, does not take human life."

<sup>29</sup>FACTS ABOUT THE DEATH PENALTY, *supra* note 25.

<sup>30</sup>*Id.*

<sup>31</sup>Wisconsin Senate Bill 1 provides for the death penalty for first degree intentional homicide of anyone under 16 years of age committed by anyone over 16 years of age.

<sup>32</sup>U.S. CONST. amend. VIII.

<sup>33</sup>*Robinson v. California*, 370 U.S. 660, 666 (1962).

<sup>34</sup>*See Furman v. Georgia*, 408 U.S. 238, 351 (1972). The court noted that "[i]t would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Id.*

<sup>35</sup>*Gregg*, 428 U.S. at 169.

<sup>36</sup>*Id.* at 173 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

Amendment, "evolving standards of decency that mark the progress of a maturing society" must be considered.<sup>37</sup> It was further stated that while an "assessment of contemporary values concerning the infliction of a challenged sanction is relevant" in examining a given punishment under the Eighth Amendment, the punishment "also must accord with the dignity of man, which is the basic concept underlying the Eighth Amendment."<sup>38</sup> Thus, the court apparently reasoned that when examining our "evolving standards of decency," popular opinion on the death penalty is important, but that there is a higher principal than popular opinion (i.e. "the dignity of man") and that dignity must also be considered.

Therefore, while current Eighth Amendment constitutional doctrine supports the constitutionality of the death penalty, it is possible to make capital punishment unconstitutional by the manner in which such a penalty is imposed. It is also evident that the court looks mainly to a nebulous "evolving standard of decency" when analyzing the death penalty. Therefore, the status of the death penalty itself, as an acceptable form of punishment under the Eighth Amendment, might also be evolving.

Despite the strong evidence that the death penalty is meted out in a discriminatory and racist fashion,<sup>39</sup> the Supreme Court all but foreclosed a challenge to the death penalty based upon the Equal Protection Clause in *McCleskey v. Kemp*.<sup>40</sup> The Court in *McCleskey* stated that in order to succeed in an attack upon the death penalty using this clause, the defendant would have to prove that the sentencer acted with discriminatory purpose in his particular case.<sup>41</sup> Such intentional efforts at targeting racial minorities for the death penalty would be difficult, if not impossible, to prove in any case.<sup>42</sup>

The Supreme Court has also addressed the death penalty in the context of the Due Process Clause. In *McGautha v. California*,<sup>43</sup> the court stated that the Fourteenth Amendment Due Process Clause was not violated by leaving the decision of imposing the death penalty to the jury.<sup>44</sup> This argument is essentially a procedural due process argument and seems to foreclose, at least for the time being, further analysis under this clause. Thus, current constitutional doctrine on the death penalty is quite well developed, but seems to leave open the possibility of constitutional attack based upon the Eighth

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<sup>37</sup>*Id.*

<sup>38</sup>*Gregg*, 428 U.S. at 173.

<sup>39</sup>See Eckholm, *supra* note 24, at A1; see also, FACTS ABOUT THE DEATH PENALTY, *supra* note 25.

<sup>40</sup>481 U.S. 279 (1987).

<sup>41</sup>*Id.* at 292.

<sup>42</sup>*Supra* note 5, at 421.

<sup>43</sup>402 U.S. 183 (1971).

<sup>44</sup>*Id.* at 204.

Amendment while at the same time foreclosing attack based upon the Due Process Clause or Equal Protection Clause.

### III. MORALITY AND THE DEATH PENALTY

The moral issues surrounding the death penalty are far from being resolved. One commentator has noted that most Americans "continue to believe that those who show utter contempt for human life by committing remorseless, premeditated murder justly forfeit the right to their own life."<sup>45</sup> However, it may be said that there is no right answer to the question of whether the death penalty is moral or immoral. Most of the moral precepts that are held by humans derive from religious doctrines and philosophical arguments. Therefore, a determination of the moral status of the death penalty depends somewhat on which religious text or which philosopher a person decides to turn for guidance.

The oldest written example of religious support for capital punishment is the story of the great flood found in the Epic of Gilgamesh.<sup>46</sup> In that tale, the gods determined that "[t]he uproar of mankind is intolerable and sleep is no longer possible by reason of the babel."<sup>47</sup> As a punishment, the gods "agreed to exterminate mankind."<sup>48</sup> The story of the flood followed with only a few members of the human race surviving by constructing a huge boat. If religion can be said to be a source of moral imperatives, such action on the part of a god suggests that killing for the purpose of punishment is permissible.

The Jewish Torah, which has a "flood story" of its own,<sup>49</sup> also suggests that capital punishment is appropriate in certain circumstances. The Torah is the source of the well known phrase "an eye for an eye,"<sup>50</sup> which suggests that the punishment for killing someone is to be killed yourself. The Torah is also the source of much more specific references to capital punishment:

If a man strikes another with an iron instrument and causes his death, he is a murderer and shall be put to death. If a man strikes another with a death-dealing stone in his hand and causes his death, he is a murderer and shall be put to death. If a man strikes another with a death-dealing

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<sup>45</sup>Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, N.Y. TIMES, March 8, 1995, at A15.

<sup>46</sup>See THE EPIC OF GILGAMESH (N.K. Sandars ed., 1972). More than 1,500 years older than Homer's *Iliad*, *The Epic of Gilgamesh* was found on a collection of clay tablets unearthed in the Palace of Nineveh. *Id.* at 7-13. The Epic contains a story of the "Great Flood" which is similar in many respects to the biblical story of Noah. *Id.* at 108-113.

<sup>47</sup>*Id.* at 108.

<sup>48</sup>*Id.*

<sup>49</sup>Genesis 6:5-9; 29.

<sup>50</sup>Exodus 21:24.



club in his hand and causes his death, he is a murderer and shall be put to death.<sup>51</sup>

These passages suggest that, at least with regards to those who murder another human being, capital punishment is in accord with what God expects.

In the Koran, Allah reminds Mohammed that "[w]e laid it down for the Israelites that whoever killed a human being, *except as punishment for murder or other wicked crimes*, should be looked upon as though he had killed all mankind."<sup>52</sup> Further evidence that capital punishment is approved of by Islam is that Allah directly relates to Mohammed that "[t]hose that . . . spread disorders in the land shall be put to death or crucified or have their hands and feet cut off on alternate sides . . ."<sup>53</sup>

The Koran also cites the Torah's "eye for an eye" phrase regarding capital punishment. "In the Torah We decreed for them [the Jews] a life for a life, and eye for an eye, a nose for a nose, and ear for and ear, a tooth for a tooth, and a wound for a wound."<sup>54</sup> However, the Koran later states that "if a man charitably forbears from retaliation, his remission shall atone for him,"<sup>55</sup> suggesting that to refrain from capital punishment might be favorably looked upon by God.

In his English translation of the Bhagavad Gita,<sup>56</sup> A.C. Bhaktivedanta Swami Prabhupada noted that the Hindu religion's most sacred text "does not at all encourage killing of the body. The Vedic injunction is *Ma him - syat sarva - bhutami*, never commit violence to anyone."<sup>57</sup> However, Swami Bhaktivedanta opined that the Bhagavad Gita also supported the idea of capital punishment.

Although the justice of the peace awards capital punishment to a person condemned for murder, the justice of the peace cannot be blamed because he orders violence to another according to the codes of justice. In the Manu-samhita, the law book for mankind, it is supported that a murderer should be condemned to death so that in his next life he will not have to suffer for the great sin he has committed.<sup>58</sup>

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<sup>51</sup>*Numbers* 35:16-18.

<sup>52</sup>THE KORAN, 390 (N.J. Dawood trans., 1988) (emphasis added).

<sup>53</sup>*Id.* at 391.

<sup>54</sup>*Id.* at 392.

<sup>55</sup>*Id.*

<sup>56</sup>Meaning in Sanskrit 'The Song of the Lord,' the Bhagavad Gita is a poem forming part of the Hindu battle epic, the Mahabharata. THE CAMBRIDGE ENCYCLOPEDIA 136 (1990). Most Hindus regard this poem, with its discussions of the ways to salvation, as "the supreme expression of their religion." *Id.*

<sup>57</sup>A.C. BHAKTIVEDANTA SWAMI PRABHUPADA, BHAGAVAD GITA AS IT IS, 27 (1972).

<sup>58</sup>*Id.*

Lao tse<sup>59</sup> also expressed the idea that capital punishment might be an acceptable penalty in certain circumstances: "The violent man shall die a violent death."<sup>60</sup> However, Lao tse also indicates that there are dangers in such a penalty: "(Even if) Heaven dislikes certain people, who would know (who are to be killed and) why?"<sup>61</sup> Furthermore, Lao tse expresses a "turn the other cheek" preference when he states "[R]equite hatred with virtue."<sup>62</sup>

The New Testament of the Christian Bible emphasizes love and forgiveness rather than retribution and punishment.<sup>63</sup> One might argue, therefore, that the Christian religion believes that the death penalty is immoral. This, however, is not necessarily the case. Thomas Aquinas, a Christian theologian prior to the Protestant reformation, has been described as making a "classic defense of the death penalty."<sup>64</sup> He states that "it is no infringement of justice to put to death criminals or the states enemies."<sup>65</sup> Aquinas lists as capital offenses: sins against God, murder, slave raiding, disrespect to parents, adultery, incest,<sup>66</sup> unrepentant heretics, forgers,<sup>67</sup> thieves,<sup>68</sup> "those who execute criminals without due authority, and those who kill accidentally during the course of committing some other crime."<sup>69</sup>

Thomas More, who was martyred on July 6, 1535 for his defense of the Catholic Church in England, points out in *Utopia* the contradiction between God's commandments and the death penalty:

God does not allow us the right to kill either ourselves or others, but men get together and agree that under certain conditions they may kill each other. This agreement implies that men are released from God's commandment (but without his sanction) when human law demands

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<sup>59</sup>Lao tse is the reputed author of the Tao Te Ching or the Lao Tzu, "the most venerated of the three classical texts of Taoism." THE CAMBRIDGE ENCYCLOPEDIA 682 (1990).

<sup>60</sup>LIN YUTANG, THE WISDOM OF LAO TSE 214 (1948).

<sup>61</sup>*Id.* at 300.

<sup>62</sup>*Id.* at 282.

<sup>63</sup>*See*, 5:38-39. "You have heard the commandment, 'An eye for an eye, a tooth for a tooth.' But what I say to you is: offer no resistance to injury. When a person strikes you on the right cheek, turn and offer him the other." *Id.*

<sup>64</sup>Brian Calvert, *Aquinas on Punishment and the Death Penalty*, 37 AM. J. JURIS. 259 (1992).

<sup>65</sup>*Id.* at 261-62 (citing *Summa theologiae* IaIIae, q. 100 a. 8, ad 3).

<sup>66</sup>*Id.* at 261 (citing *Summa theologiae* IaIIae, q. 105, a. 2, ad 10).

<sup>67</sup>*Id.* (citing *Summa theologiae* IIaIIae, q. 11, a. 3).

<sup>68</sup>*Id.* (citing *Summa theologiae* IaIIae, q. 87, a. 4, ad. 2).

<sup>69</sup>*Id.* (citing *Summa theologiae* IIaIIae, q. 64, a. 3 and 8).

the death penalty. Does this not mean that God's commandment has only as much legal force as human law allows?<sup>70</sup>

Thomas More states that "[i]f one can explain away the divine commandment against killing whenever human law demands the death penalty, why should men not agree when to allow rape, adultery and perjury?"<sup>71</sup>

In Plato's Socratic dialogue *Gorgias*, Socrates makes an argument in support of the death penalty as follows:

such a man [a wrongdoer] must force himself and others not to play the coward, but to submit to the law with closed eyes like a man, . . . ignoring the pain for the sake of the good result which it will bring. Whatever the punishment which the crime deserves he must offer himself to it cheerfully, whether it be flogging or imprisonment or a fine or banishment or *death*. [B]y having their misdeeds brought to light wrong-doers are delivered from the supreme evil of wickedness.<sup>72</sup>

Thus, Plato makes an argument similar to that seen in the *Bhagavad Gita* suggesting that capital punishment benefits the criminal because it relieves that criminal of the evil of the crime. However, Socrates also expresses the notion that inflicting injury in return for injury is not right. In his dialogue with Crito, Socrates inquires, "[w]ell then, if one is oneself injured, is it right, as the majority say, to inflict an injury in return, or is it not?"<sup>73</sup> Crito responds that such a punishment is not right.<sup>74</sup> Socrates continues, "[o]ne should never do wrong in return, nor injure any man, whatever injury one has suffered at his hands."<sup>75</sup>

John Locke, a philosopher very familiar to the founders of this country, notes that:

every man, in the state of nature, has a power to kill a murderer, both to *deter* others from doing the like injury, which no reparation can compensate . . . and also to secure men from the attempts of a criminal, who having renounced . . . the common rule and measure God hath given to mankind . . . hath . . . declared war against all mankind.<sup>76</sup>

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<sup>70</sup>THOMAS MORE, *UTOPIA*, 40 (John Sheehan, S.J. and John P. Donnelly, S.J. trans. 1984).

<sup>71</sup>*Id.*

<sup>72</sup>PLATO, *GORGAS*, 73 (Walter Hamilton, trans. 1960) (emphasis added).

<sup>73</sup>PLATO, *Crito*, in, *FIVE DIALOGUES* 52 (G.M.A. Grube trans., Hackett Publishing, 1981).

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, 11 (C.B. Mac Pherson ed., 1980).

Furthermore, in his discussion of politics, Locke included in his definition of political power: "a *right of making laws with penalties of death . . .*"<sup>77</sup>

Pope John Paul II, the spiritual leader of the world's Roman Catholics, has expressed grave misgivings about the death penalty.

. . . the nature and extent of the punishment must be carefully evaluated and decided upon and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.<sup>78</sup>

It appears, therefore, that while most religious and philosophic doctrines place a high value on human life and upon restraint in punishment, there is a recognition that the death penalty is acceptable in some circumstances. However, the one universal truth, which appears in most religious and philosophical doctrines, and which seems to give rise to all discussion surrounding morality and the death penalty, is that human life is to be valued. Should anyone not accept that as a universal truth, the death penalty as an issue disappears because such a person would have no qualms about putting someone to death regardless of whether they were found guilty of a crime or not. Given this basic precept, it seems appropriate that the old legal argument that "to those who seek to change the status quo belong the burden of proof" ought to apply in death penalty cases. The status quo, of course, is that a given life has value and ought to be preserved. Thus, the burden of overcoming the presumption in favor of preserving life belongs to those who consider that taking a life is an appropriate punishment in certain circumstances.

Hence, the moral question seems to boil down to this: For those that hold to the belief that the death penalty is not violative of any moral precept, what circumstances are sufficient to overcome "*the presumption*" that human life has intrinsic value and should be preserved? The arguments in the following section are the ones most frequently advanced by death penalty advocates.

#### IV. ARGUMENTS IN FAVOR OF THE DEATH PENALTY

Many arguments are advanced to support the notion that although human life has value, its value is somehow changed once a given crime has been committed. Those arguments, however, can be distilled into five broad categories: Deterrence for others who may contemplate similar acts; incapacitation of the perpetrator so such acts are not committed by the same person again; cost, i.e., it is not worth the financial cost to society to keep such people alive; retribution for the victim, the victims family and for society as a whole; and, punishment for the perpetrator for violation of societies' norms. These arguments will be discussed seriatim.

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<sup>77</sup>*Id.* at 8.

<sup>78</sup>Encyclical Letter of Pope John Paul II, *The Gospel of Life*, in Cardinal Roger Mahony, *Reflection and Summary*, March 25, 1995.

### A. Deterrence

The State of New York recently reinstated the death penalty making it the 38th state to do so.<sup>79</sup> New York had not executed anyone since 1963<sup>80</sup> and several critics were concerned that the financial cost to the state would ultimately be too high.<sup>81</sup> In response to such concerns, however, New York's governor, George Pataki, refused to obtain a financial analysis because he felt that "capital punishment would actually reduce state spending on prisons by deterring crime."<sup>82</sup> He stated that "I think we could amend the budget to reduce the number of cells we have because I think this will reduce crime."<sup>83</sup>

This type of argument is very common. Indeed, after the above mentioned ten states abolished the death penalty during the progressive era, efforts to reinstate capital punishment in Oregon, Washington, Missouri, Arizona and South Dakota revived at least partly because in each state a convicted murderer publicly acknowledged that he might not have committed the crime if the death penalty had been in existence.<sup>84</sup>

However, despite these statements, it has never been shown conclusively that there is any correlation between the availability of the death penalty and a decrease in crime.<sup>85</sup> In fact, a comparison of the homicide rates in states with the death penalty and those without suggests that there is no such correlation. For example, New York had no death penalty law until recently, but had a high rate of homicide.<sup>86</sup> Similarly, although California has a death penalty law, it also has a high homicide rate.<sup>87</sup> Likewise, Maine has no death penalty law and has a low homicide rate<sup>88</sup> while New Hampshire has the death penalty and also has a low homicide rate.<sup>89</sup> These statistics obviously suggest that other

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<sup>79</sup>James Dao, *Pataki and State Leaders Agree on Details of a Plan to Restore Death Penalty*, N.Y. TIMES, Feb. 16, 1995, at A1.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

<sup>82</sup>*Id. Id.*

<sup>83</sup>*Id.*

<sup>84</sup>Galliher, et al., *supra* note 12, at 574.

<sup>85</sup>Hintze, *supra* note 5, at 406.

<sup>86</sup>In 1993 New York State had 13.3 murders for every 100,000 people. DEATH PENALTY INFORMATION CENTER, *FBI Uniform Crime Reports: Murder Rates Per 100,000 Population* (1985). This was a decrease from 14.2 per 100,000 in 1991. *Id.*

<sup>87</sup>In 1993 California had 13.1 murders for every 100,000 people. *Id.* This was an increase from 12.7 per 100,000 in 1991. *Id.*

<sup>88</sup>In 1993 Maine had 1.6 murders for every 100,000 people. *Id.* This was an increase from 1.2 per 100,000 in 1991. *Id.*

<sup>89</sup>In 1993 New Hampshire had 2.0 murders for every 100,000 people. *Id.* This was down from 3.6 per 100,000 in 1991. *Id.*

factors, rather than the availability of the death penalty, contribute to crime levels in various communities.

In addition to these statistical factors, the infrequency and arbitrariness in which the death penalty is imposed denigrates the deterrent value because no criminal is ever able to rationally conclude that "if I commit this murder, then I get the death penalty." The clearest example of this is found in *State v. Smith* and *State v. Simpson*. In each case two murders were committed, but in the Smith case the prosecutor decided to pursue the death penalty while in the Simpson case the prosecutors did not seek such a penalty.<sup>90</sup> Regardless of the outcome of each of these two cases, the lack of consistency denigrates the deterrent value of the death penalty. In fact, in his concurring opinion in *Furman*, Justice White noted this very fact:

[C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.<sup>91</sup>

Therefore, given the arbitrariness of its imposition and the length of time it takes before it is imposed, the death penalty may have the effect of not deterring crime, but merely of increasing the excitement of the crime—if that. As one commentator noted: "[A]fter all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this 'deterrent' effect may be."<sup>92</sup> Thus, deterrence of crime seems factually insufficient to overcome "the presumption" in favor of life.

### B. Incapacitation

Perhaps one of the most eloquent defenses of the death penalty was offered in closing argument by Gerry Spence, a Wyoming attorney who was hired to prosecute a death penalty case against a defendant who, from his prison cell, put out a contract on a man and had him killed.<sup>93</sup> In the penalty portion of the trial, Spence discounted all arguments in favor of the death penalty except one:

And so, what do we do with him? If he's in prison for a lifetime, he has . . . an opportunity to arrange murders as you have found he's done in

<sup>90</sup>Tamar Lewin, *Who Decides Who Will Die? Even Within States, It Varies*, N.Y. TIMES, Feb. 23, 1995, at A1.

<sup>91</sup>*Furman*, 408 U.S. at 312.

<sup>92</sup>White, *supra* note 3, at 1431 (citing CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 33 (2d ed. 1974)).

<sup>93</sup>Gerry Spence, Closing Argument in *State v. Hopkinson*, cited in Judge R.A. Randall, *The Death Penalty*, 14 HAMLIN J. PUB. L. & POL'Y 154, 159 (1993) [hereinafter Randall].

this case. [I]n that context alone, I can and I do . . . condone killing for survival, for self-defense.<sup>94</sup>

Gerry Spence essentially made the argument that the only just cause for killing someone in the context of a criminal trial is for self-defense. If the criminal is still dangerous to the public, then the death penalty is acceptable because it is the only sure way to completely incapacitate that criminal.

The problem with that argument is that it assumes there is no way to prevent such "contract" murders from a prison cell. This is clearly not the case. Certainly it is possible to insulate such people from contact with the outside world if contract murders are a concern. In his concurrence in *Furman*, Justice White addressed the incapacitation argument. He stated that "[i]t would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime."<sup>95</sup> However, he went on to state that the need for incapacitation does not necessarily support the punishment of death:

Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.<sup>96</sup>

Due to the fact that life imprisonment without parol is a possible sentencing tool available to legislatures and courts and that inmates in a prison can be insulated from the public sufficiently to prevent contract murder, the incapacitation argument also fails to overcome "the presumption" in favor of preserving life.

### C. Cost

An argument can certainly be made that society should not bear the cost of housing those that commit murder. Certainly there is a cost associated with apprehending, trying, convicting and housing a murderer.<sup>97</sup> What is also certain, however, is that the studies conducted on this issue tend to show that it is more costly to convict an individual of capital murder and execute that person than it is to convict them and keep them in jail.<sup>98</sup> One study in North Carolina noted that "it cost taxpayers an average \$329,000 more to try, convict and sentence a defendant to death than it did to obtain a first-degree murder

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<sup>94</sup>*Id.*

<sup>95</sup>*Furman*, 408 U.S. at 311.

<sup>96</sup>*Id.*

<sup>97</sup>Hintze, *supra* note 5, at 412-13.

<sup>98</sup>Sam Howe Verhovek, *Across the U.S., Executions Are Neither Swift Nor Cheap*, N.Y. TIMES, Feb. 22, 1995, at A12.

conviction with a sentence of 20 years to life.<sup>99</sup> This cost is mainly due to "the constitutional protections embodied in the judicial determination that death, as a punishment, is different."<sup>100</sup>

There exists very little dispute that imposing the death penalty is more costly if for no other reason than prison guards are cheaper than appeals attorneys.<sup>101</sup> It could be argued that to solve this problem and reduce cost, society should reduce the number of appeals allowed for death row inmates and reduce the amount of time between conviction and execution. However, reducing costs by cutting back on procedural safeguards can not be the answer because they exist to prevent the possibility of putting an innocent person to death.<sup>102</sup>

The real problem with the argument that it costs too much to keep convicted murderers alive is that we find ourselves placing monetary value on the lives of people based upon their particular status, i.e., you are sitting in jail and not productive and therefore deserve to die. The argument seems to suggest that because a person sitting in prison is not a productive member of society, the cost-benefit scale tips against keeping them alive. Certainly, however, there are other members of society who do not contribute economically as much as they take from society. Certain people with severe disabilities or retardation do not generate for society the resources that are required to support them, but no thought would or should be given to taking their lives. Arguably, the difference is that people with disabilities have not committed a crime. However, if that factor is considered then the argument is no longer about cost.

Cost, as a determining factor in death penalty case, should be viewed as a smokescreen for other arguments, and such a smokescreen seems insufficient to overcome the moral precept that human life has a high value. Indeed, one Assemblyman from New York, when speaking in favor of the death penalty in that state, noted that, "I don't look at it as a money save or money waste or whatever . . . I don't care if it costs more. I don't care, as long as the guy pays with his life."<sup>103</sup> Whether you support that argument or oppose it, that is the proper way to address the death penalty. Letting cost enter the equation—on either side—does a disservice to the very basic moral precepts to which everyone desires to hold.

#### *D. Retribution and Punishment*

Retribution is society's attempt to do what little it can to make things right. In his defense of the death penalty, Gerry Spence exposed the weakness of the notion that retribution requires the death penalty:

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<sup>99</sup>*Id.* at B2.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.*

<sup>102</sup>See FACTS ABOUT THE DEATH PENALTY, *supra* note 24.

<sup>103</sup>*Id.*



I want you to hear me say clearly that . . . I'm *not* asking for his life to avenge the death of my friends *my* friends were more beautiful and more valuable than that, and I would not desecrate their memories with a request for vengeance. Vincent Vehar [The victim] . . . would have fought for Mark Hopkinson's [the perpetrator] life to keep from spoiling his own with the blood of vengeance. I don't ask for Mark Hopkinson's life out of hate or anger, although I despise what he's done and I have a deep anger that has slowly turned to sadness . . .<sup>104</sup>

Vengeance and retribution are products of anger and emotion rather than reason and logic. The taking of someone's life is too serious a matter to place at the feet of an angry person. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."<sup>105</sup>

One attorney, who has represented inmates on death row, noted that "I'm a lawyer working in a very imperfect legal system that can only reach imperfect judgments, and capital punishment is, by definition, perfect."<sup>106</sup> Given that capital punishment is "the perfect punishment," it seems contrary to justice to place someone on death row based upon anger and vengeance, which, as with Gerry Spence, often changes to sadness after a lapse of time that is usually shorter than the time taken to carry out the sentence.<sup>107</sup> In an evaluation of the death penalty, the father of a rape and murder victim addresses the retributive value of a murderer's execution. "[N]o healing or comfort is available to me from the prospect of any murderer's execution,"<sup>108</sup> because "I see only sorrow and no sweetness in further violence."<sup>109</sup> A statement such as that from one who would be most likely to realize the retributive value of the death penalty suggests that the "retribution" argument is insufficient to overcome "the presumption" in favor of preserving a life.

Gerry Spence also offered a negative evaluation of the punitive nature of capital punishment when he said, "[i]t's obvious to me that the death penalty is a misnomer."<sup>110</sup> He went on to state, "[o]ne cannot punish Mark Hopkinson

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<sup>104</sup>Gerry Spence, Closing Argument in *State v. Hopkinson*, cited in Randall, *supra* note 93, at 160.

<sup>105</sup>*Gardner v. Florida*, 430 U.S. 349, 358 (1977).

<sup>106</sup>David Tenenbaum, *Dead-set Against the Death Penalty*, 68 WIS. LAWY. 33, 34 (1995).

<sup>107</sup>Verhovek, *supra* note 97, at A12 (noting that the average time between sentence and execution is seven years, ten months).

<sup>108</sup>Donald E. Streufert, *Letter From a Father*, 14 HAMLINE J. PUB. L. & POL'Y 143 (1993).

<sup>109</sup>*Id.*

<sup>110</sup>Gerry Spence, Closing Argument in *State v. Hopkinson*, cited in Randall, *supra* note 93, at 158.

[the perpetrator] by killing him. That's silly. Somebody has to be alive to punish him. One doesn't punish the dead."<sup>111</sup>

Spence's statement reaches to the crux of the pro-punishment argument and shows its flaw. A dead person is no longer capable of appreciating the punishment which has been imposed upon him or her. Most people have an intrinsic desire to remain alive. Therefore, taking a criminal's life is a brief punishment which that criminal will no longer appreciate once inflicted. Once the life is taken the punishment has ceased. For those that seek severe and long lasting punishment, the death penalty seems insufficient.

It might be considered that in addition to valuing their lives, most people also value their freedom. Therefore, to take away a person's freedom by incarcerating them for life is a severe punishment that has a longer duration. For someone that takes a life by murder, it seems that society would want a punishment of longer duration. Because a sentence of death seems to be too much of an "easy out" for a convicted murder, it fails to overcome "the presumption."

#### V. THE CONSTITUTION REVISITED

The above discussion suggests that there may be some other motive for favoring the death penalty besides those that are normally advanced. Currently, the vast majority of Americans believe that there is sufficient reason to overcome "the presumption" in favor of allowing a death row inmate to live because studies show that a vast majority of Americans favor the imposition of the death penalty for certain crimes.<sup>112</sup> Whether the motive behind that sentiment derives from the feeling that crime is out of control,<sup>113</sup> or from a desire to go with the political wind,<sup>114</sup> or from some unexpressed motive, it is clear that if the sentiment of the country changes to opposition to the death penalty, then the above arguments supporting the death penalty will not provide much of an obstacle. If such a change occurs in the political wind, the legislatures of the various states could, of course, adopt the appropriate legislation. Until then, the Supreme Court has been and will continue to be the most active forum for a discussion of the death penalty and the Eighth Amendment will continue to be the most appropriate vehicle for determining that it is unconstitutional.

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<sup>111</sup>*Id.*

<sup>112</sup>Kozinski & Gallagher, *supra* note 45, at A15 (noting that roughly 70 percent of the American public favors the death penalty).

<sup>113</sup>Sonia Rosen & Stephen Journey, *Abolition of the Death Penalty: An Emerging Norm of International Law*, 14 *HAMLIN J. PUB. L. & POL'Y* 163, 179 (1993).

<sup>114</sup>Lewin, *supra* note 90, at B6. In noting that politics plays a role in the imposition of the death penalty, Victor Streib, a law professor at Cleveland State University stated that "it may depend less on the crime than on whether the prosecutor sees the case as a viable vehicle to ride into a higher elective office." *Id.*

The Eighth Amendment prohibition of cruel and unusual punishment is the best clause to address this issue because it directly addresses the notion of punishment in a way other clauses do not. However, the Due Process Clause of the 14th Amendment and the Equal Protection Clause have also been used to argue against the constitutionality of the death penalty and these will be discussed first.

As mentioned above, the Due Process Clause has been used in the past as a method of constitutional attack on the death penalty. Although such an avenue has essentially been shut down by the court, most constitutional arguments are revisited at some time and often times find favor with the court after first being rejected. However, regardless of the court's willingness to re-examine the death penalty in the context of the Due Process Clause, this clause is an inappropriate vehicle for addressing the death penalty.

The Due Process Clause of the 14th Amendment states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."<sup>115</sup> The problem with using this clause is that its plain language suggests that if due process *is* provided to a person then that person *may* be deprived of his or her life. Given the structure of this clause, a constitutional argument using the Due Process Clause would have to be based on the propriety of the procedure rather than on the propriety of the death penalty itself. Therefore, the very structure of this clause suggests that it should not be used as a vehicle to address the "per se" constitutionality of the death penalty. Indeed, the court should not use the Due Process Clause for such a holding because it unnecessarily complicates Due Process doctrine when the Eighth Amendment directly addresses punishment issues and would be just as effective.

When addressing the death penalty, the Equal Protection Clause has been as unsuccessful as the Due Process Clause. The Equal Protection Clause states that "[n]o State shall . . . Deny to any person within its jurisdiction the equal protection of the laws."<sup>116</sup>

The death penalty has already been addressed in the context of the Equal Protection Clause. In the case of *McCleskey v. Kemp*,<sup>117</sup> the argument was advanced that the Equal Protection Clause was being violated on the grounds that people who murder whites are receiving the death penalty more often than those who murder African Americans, and that African Americans were receiving the death penalty on a more frequent basis than white Americans.<sup>118</sup>

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<sup>115</sup>U.S. CONST., amend. XIV.

<sup>116</sup>*Id.* The Equal Protection Clause is constructed as a comparison type of clause. That is, if a "suspect class" of people are being denied a right that another group is being granted or if a "non-suspect class or individual is being denied a fundamental right, then the law in question is unconstitutional. Thus, if it is determined after comparison that neither a suspect class nor a fundamental right is being adversely affected by a given law, then that law has satisfied the Equal Protection Clause.

<sup>117</sup>481 U.S. 279 (1987).

<sup>118</sup>*Id.* at 291.

This fact, of course, can be supported by statistical evidence.<sup>119</sup> The argument failed, however, to persuade the Court on the grounds that the defendant needed to show discriminatory intent on the part of the decision makers in *his* case before the Court would strike down the statute,<sup>120</sup> which the defendant could not do.<sup>121</sup>

In fact, as with the Due Process Clause, the Equal Protection Clause is an inappropriate clause for addressing the issue of the death penalty. The clause suggests that if groups of people and their rights are treated equally by a given law, then that law meets the requirements of the Equal Protection Clause. This does not address the penalty itself, but rather the effect of the penalty. If the penalty treats people equally then equal protection analysis is completed, according to *McCleskey*.<sup>122</sup> Furthermore, the Equal Protection Doctrine should not be skewed by attempting to address more than it was designed to address, especially when the Eighth Amendment is available.<sup>123</sup>

The Eighth Amendment's prohibition against cruel and unusual punishment is the Constitutional clause that seems the most appropriate for death penalty arguments, and the clause that has been given the most chance of success by the Supreme Court.<sup>124</sup> Although the Eighth Amendment argument has not been successful in the past, the Supreme Court acknowledged the possibility that it will be successful in the future.<sup>125</sup> The Court stated that it looked to an "evolving standard of decency," when determining the status of the death penalty under the Eighth Amendment.<sup>126</sup>

The Eighth Amendment, therefore, will be continually re-evaluated by the court regarding the constitutionality of the death penalty. In making such a re-evaluation, the Court has stated that it evaluates the positions taken by the various state legislatures and sentencing juries.<sup>127</sup> Of course, such an analysis does not provide a great deal of hope for the abolition of the death penalty

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<sup>119</sup>FACTS ABOUT THE DEATH PENALTY, *supra* note 25.

<sup>120</sup>*McCleskey*, 481 U.S. at 292.

<sup>121</sup>*Id.* at 297.

<sup>122</sup>*Id.* at 292.

<sup>123</sup>*See Shapiro v. Thompson*, 394 U.S. 618, 659 (Harlan, J., dissenting):  
And when . . . a classification is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution, then there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause.

*Id.* at 659.

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*Trop v. Dulles*, 356 U.S. 86,101 (1958).

<sup>127</sup>*Thompson v. Oklahoma*, 487 U.S. 815, 821-23 (1988).

considering the fact that New York's legislature just passed a death penalty statute and Wisconsin's legislature may not be far behind.<sup>128</sup> It is evident, therefore, that at least with regard to state legislatures, the imposition of the death penalty comports with this country's "evolving standard of decency."

By limiting its analysis of the death penalty to a survey of legislative actions, the Court has placed the status of the death penalty and the lives of capital offenders in the hands of the majority in the electorate. This is contrary to past Supreme Court decisions<sup>129</sup> and calls for a broader view. One method of expanding the range of the Court's analysis of an "evolving standard of decency" marking "the progress of a maturing society," is to examine what is occurring in the international realm and in other countries.<sup>130</sup> In fact, in the recent case of *Thompson v. Oklahoma*<sup>131</sup> the Supreme Court noted "the relevance of the views of the international community in determining whether a punishment is cruel and unusual"<sup>132</sup>

In the international realm, there is an increasing trend toward abolishing the death penalty.<sup>133</sup> In addition to the various nations which have abolished the death penalty, various international organizations have echoed the trend away from the death penalty. In December 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR),<sup>134</sup> which expressed a belief in the inherent value of human life as a principal of international law.<sup>135</sup> The preamble of that document states that "[w]hereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. . . ."<sup>136</sup> This declaration also lays down the fundamental belief that "everyone has the right to life."<sup>137</sup>

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<sup>128</sup>See also, *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989).

<sup>129</sup>See *West Virginia State Bd. of Ed. v. Burnette*, 319 U.S. 624, 638 (1942) ("One's . . . fundamental rights may not be submitted to vote; they depend on the outcome of no election. . . ."); *Lucas v. Forty-Fourth Gen. Assem. of Colo.*, 377 U.S. 713, 736-37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.")

<sup>130</sup>See *supra* note 35.

<sup>131</sup>487 U.S. 815 (1988).

<sup>132</sup>*Id.* at 830 n. 31.

<sup>133</sup>See *The Death Penalty List of Abolitionist and Retentionist Countries*, in *Amnesty International Report* (Amnesty International ed., 1994) (noting that as of December 1994 there were 54 countries whose laws do not provide for the death penalty; 15 countries whose laws provide for the death penalty only for exceptional crimes, e.g., crimes during wartime; and 27 countries and territories which still had death penalty laws but had not executed anyone for at least ten years).

<sup>134</sup>I. OUIS B. SOHN & THOMAS BUERGENTHAL, *BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 30 (1973).

<sup>135</sup>*Id.*

<sup>136</sup>*Id.*

In 1966, the International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations.<sup>138</sup> That covenant expressly lays down the notion that the death penalty should only be imposed "for the most serious crimes."<sup>139</sup> The Second Optional Protocol to the ICCPR, adopted in 1989, expressed in very clear language, that the international community is moving away from the death penalty: "[T]he abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights, and that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life."<sup>140</sup>

In the realm of regional organizations, abolitionist sentiment has run equally as high. In Europe in 1982, the member states of the Council of Europe enacted Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.<sup>141</sup> That protocol states that: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."<sup>142</sup> On March 12, 1992 the European Parliament adopted a resolution stating that "no state, and in particular no democratic state, may dispose of the lives of its citizens or other persons on its territory by having its law impose the death penalty."<sup>143</sup>

The Organization of American States has adopted the Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty. The preamble of that protocol outlines the reasons why the signatory states oppose the death penalty.

[T]he American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty; That everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason; That the tendency among the American States is to be in favor of abolition of the death penalty; That application of the death penalty has irrevocable consequences, forecloses the correction of judicial error, and precludes any possibility of changing or rehabilitating those convicted; That the abolition of the death penalty helps to ensure more effective protection of the right to life. . . .<sup>144</sup>

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<sup>137</sup>*Id.* at 31.

<sup>138</sup>*Id.* at 44.

<sup>139</sup>*Id.* at 47.

<sup>140</sup>Rosen & Journey, *supra* note 113, at 165 (citing 29 INT'L LEGAL MATERIALS at 1466-67).

<sup>141</sup>*Id.* at 166.

<sup>142</sup>*Id.* (citing, 22 Int'l Legal Materials 538 (1983)). Of the 27 member states of the Council of Europe, 19 have ratified protocol No. 6 while two others have signed. *Id.*

<sup>143</sup>*Id.* at 166 (citing AMNESTY INTERNATIONAL REPORT 345 (1993)).

<sup>144</sup>Rosen & Journey, *supra* note 113, at 169 (citing 29 INT'L LEGAL MATERIALS 723 (1990)).

Given this sentiment in the international arena, extradition from death penalty countries to non-death penalty countries has become an issue in some international criminal matters.

In several instances, European nations have refused requests by the United States to extradite criminals until the United States agrees that they will not be subjected to the death penalty.<sup>145</sup> The fact that some nations are willing to allow their opposition to the death penalty to cause strained relations over extradition, suggests that their opposition to the death penalty is not merely cosmetic. In the Western Hemisphere, the Inter-American Convention on Extradition states:

parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment unless . . . sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced.<sup>146</sup>

The United States, therefore, finds itself on an increasingly short list of death penalty countries and these countries are taking steps, such as refusing extradition, to prevent the United States' death penalty statutes from affecting them in any way.

The United States Supreme Court has expressed the view that "it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant."<sup>147</sup> The Supreme Court should re-examine this view and follow more closely the line of reasoning it set down in *Thompson*. International norms are relevant to the laws of this nation because this country does not live in a vacuum and countries are becoming ever more interdependent. Furthermore, if the United States intends to maintain world leadership in the area of human rights, it should consider the trends of other nations and the perceptions those nations have regarding the death penalty.

## VI. CONCLUSION

The moral issues surrounding the death penalty are many and unresolved. It is clear, however, that the foundations upon which the world's moral views are laid allow for the possibility of death as a punishment for certain wrongs. At the same time, these moral foundations hold that human life has great value and ought not be disposed of without careful consideration.

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<sup>145</sup>*Id.* at 167 (noting that in 1988 the Netherlands refused to turn over an American serviceman suspected of murder unless guarantees were received that he would not be subjected to the death penalty).

<sup>146</sup>*Id.* at 169 (citing INT'L LEGAL MATERIALS 1447 (1990)).

<sup>147</sup>*Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989).

In undertaking this careful consideration, the arguments of deterrence, incapacitation, cost retribution and punishment are most often weighed. It is clear that if the mood of the country regarding the death penalty ever changes, these arguments are not so overwhelming that they will stand in the way of abolition. Furthermore, given the fact that none of these arguments is overwhelming, they should not be viewed as sufficient to overcome the presumption that human life is to be preserved.

At the present time, the Supreme Court has the key role to play in addressing this presumption. The Court should look toward the evolving standard of decency in the world as a whole rather than just the United States when it addresses the death penalty under the Eighth Amendment. Without exploring all of the views on the world stage, the United States remains much like the hangman in John Grisham's book—recognizing the discomfort in imposing the death penalty, but nevertheless going through the motions based upon arguments that are not sound.



