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I. INTRODUCTION

The death penalty debate has been raging in the United States for centuries. Since before the start of the Civil War abolition of the death penalty has been an important and controversial reform topic.[1] One can find volumes of material arguing both for and against the use of capital punishment in the United States. This paper will examine the evolution of capital punishment in the United States and argue that a historical trend toward abolition, coupled with a strong international movement, will cause the United States to reverse its present course and eventually abolish capital punishment.

The attitude of the public continually changes. In recent years a new international understanding of capital punishment has emerged; capital punishment is now viewed as a denial of the universal human right to life and freedom from tortuous, cruel, and inhuman punishment.[2] This new understanding has led to abolition in many countries and is evidenced by a multitude of human rights treaties and organizations calling to abolish the death penalty.[3] With the great weight of international sentiment against capital punishment the question becomes whether the United States will

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1. *See* David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787-1861*, 31 THE AM. HIST. REV. 23 (1957).

2. Rodger Hood & Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic,"* 38 CRIME & JUST. 1 (2009).

3. *Id.*

abolish the death penalty while a large number of citizens remain in favor of the practice.

Part II.A of this paper will briefly discuss the history of capital punishment in the United States.[4] Part II.B will examine capital punishment post-*Furman,*[5] a seminal 1972 Supreme Court decision that has shaped modern American death penalty jurisprudence. An examination of Supreme Court cases post-*Furman* will reveal a historical, continuing trend towards abolition.[6] Part II.C will examine the evolving justifications for capital punishment in the United States and argue that the justifications are decreasing in force making abolition more likely.[7] Part III.A explores the international trend toward abolition which has greatly expanded in the past several decades.[8] Part III.B will explore the effect of this international movement on retentionist countries other than the United States.[9] Part IV will conclude by examining the aforementioned and predicting that these international and historical trends will lead to the eventual abolition of capital punishment in the United States.[10]

II. CAPITAL PUNISHMENT IN THE UNITED STATES

A. A Brief History of Capital Punishment in America

In order to understand the origins of capital punishment in the United States, it is first necessary to examine the practice as adopted from England. During the sixteenth and seventeenth centuries, the number of capital offenses increased as the state's power grew.[11] The most frequent justifications advanced in support of the death penalty at that time were incapacitation, deterrence, and revenge.[12] By the eighteenth century, capital punishment was accepted by western nations under theories of societal self-defense and retributive justice, advocated by the likes of John Locke.[13] However, this retributive punishment theory clashed with the views of eighteenth century liberals who believed retributive punishment violated natural law and Christian sensibilities.[14]

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4. *See infra* Part I.A.
5. Furman v. Georgia, 408 U.S. 238 (1972).
6. *See infra* Part II.B.
7. *See infra* Part II.C.
8. *See infra* Part III.A.
9. *See infra* Part III.B.
10. *See infra* Part IV.
11. Davis, *supra* note 1, at 23.
12. *Id.*
13. *Id.* at 24.
14. *Id.*

Despite the fierce debate over capital punishment in Europe, the newly developed United States was reluctant to abandon a practice so firmly entrenched in tradition.[15] Prisons did not exist in colonial America so, by necessity, capital punishment became the criminal law's principle weapon against repeat offenders and those who threatened individual safety.[16] While the colonies opted to maintain the tradition of the death penalty, the practice did not rise to the level of punishment that existed in England, which defined over 200 crimes as capital offenses.[17] In general, the colonies tended to punish approximately twelve crimes by death including murder, rape, adultery, sodomy, and property crimes.[18]

Capital punishment policy differed greatly between the North and the South in colonial America.[19] Southern colonies not only tended to punish an increased number of crimes with death, but they were also willing to apply the punishment more often.[20] Also significant was the discriminatory use of capital punishment, with blacks frequently executed more often and for more crimes than whites.[21] In fact, Virginia allowed executions of slaves for any offense for which a free person would get a prison term of three years.[22]

In the mid to late eighteenth century, after the advent of prisons, there began an effective movement to limit the application of the death penalty.[23] Pennsylvania was a forerunner of reform, eliminating the death penalty for crimes such as robbery, burglary, sodomy, and buggery in 1786.[24] Further, in 1794 the Pennsylvania legislature adopted a law which divided murder into two degrees which provided a unique way to narrow the death-eligible class of offenders.[25] This later served as a model for other states to follow in limiting the class of death-eligible defenders.[26]

Many other states followed suit by taking steps that slowly, but consistently, chipped away at the death penalty as it was understood at that time. In 1834, Pennsylvania, followed by New York a year later, adopted measures that abolished public executions, signaling a further retreat from

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15. *Id.* at 26.
16. James R. Acker, Book Note, *The Death Penalty: An American History,* 6-2 CONTEMP. JUST. REV. 169, 170 (2003) (reviewing STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002)).
17. *Id.*
18. *Id.*
19. *Id.*
20. *See id.*
21. Acker, *supra* note 16, at 170.
22. *Id.*
23. *See id.* at 171.
24. *Id.*
25. *Id.*
26. Davis, *supra* note 1, at 26.

traditional conceptions of the death penalty.[27] Importantly, an 1847 Maine law virtually abolished the death penalty by requiring a written warrant executed at the discretion of the governor to commence an execution.[28] Michigan became the first state to abolish capital punishment for murder in 1846.[29] Rhode Island followed in 1852 and Wisconsin a year later.[30] In the South, many crimes remained punishable by death; however, most were only applied to blacks as a powerful method of racial oppression.[31] For instance, of the 771 people known to have been executed for rape between 1870 and 1950, 701 were black.[32] In the North, murder remained the principle crime punished by death.[33]

By the end of World War II there was a movement to abolish the death penalty in America coupled with weakening support for the sanction.[34] In 1966, a Gallup Poll reported that, for the first time, opponents of the death penalty outnumbered supporters.[35] By the end of the 1960's fourteen states repudiated the death penalty.[36] Significantly, all of the abolitionist or near-abolitionist states were located outside the South.[37] This movement occurred while support for capital punishment in European countries was dwindling, but while many states still supported and utilized it.[38]

Significant changes have occurred since colonial times, which have rendered the continued use of capital punishment unnecessary. For instance, the federal and state governments now have advanced prison systems; and with the emergence of life without the possibility of parole as a sentencing option, capital punishment is unnecessary as the primary defense for even the most atrocious crimes. On the same note, capital punishment is used much less frequently than in the past—both in terms of the frequency of use and death eligible crimes.[39] This suggests the death penalty is a vestige of the past that is hanging on by a thread. As the people come to realize that capital punishment imposes huge societal costs and is no longer necessary, eradication logically follows. Perhaps most importantly, society today values civil rights and human dignity more than

27. *Id.*
28. *Id.* at 33.
29. Hood & Hoyle, *supra* note 2, at 4-5.
30. *Id.* at 5.
31. Acker, *supra* note 16, at 171.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. Acker, *supra* note 16, at 171.
37. *Id.*
38. Hood & Hoyle, *supra* note 2, at 5.
39. *See infra* Part II.B.

in the past.[40] The death penalty served a unique purpose in colonial America and was justified by a number of factors.[41] However, society and societal understandings of civil rights have evolved much since colonial times, causing these justifications to lose most, if not all, of their support and rendering the death penalty a costly and unnecessary punishment that should be left in the past.

B. Post-Furman Developments in American Capital Punishment Jurisprudence

While a brief history of capital punishment was necessary to understand its future in American jurisprudence, the proper focus is on Supreme Court decisions after the seminal case of *Furman v. Georgia.*[42] This 1972 decision invalidated many capital punishment schemes across the United States due to the Court's conclusion that the imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[43] Through a fragmented decision, in which each justice wrote an opinion, the court expressed concern that state death penalty statutes conferred too much discretion in the jury, allowing for arbitrary and discriminatory application of the death penalty.[44] Of primary concern was the infrequency with which the death penalty was applied and the apparent arbitrary manner in which the decision was made.[45] Indeed, in the words of Justice Stewart, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[46]

The effect of the *Furman* decision was profound. The decision invalidated approximately forty state death penalty statutes and overturned approximately 600 death sentences.[47] While abolitionists likely thought this decision signaled the end of capital punishment, by the fall of 1974, thirty states had reinstated capital punishment; and by July of 1976, only two pre-*Furman* capital jurisdictions were without the death penalty.[48] In their rush to reenact death penalty statutes in accordance with *Furman's* mandate,

40. *See infra* Part III.A.
41. *See supra* Part I.
42. 408 U.S. 238 (1972).
43. *Furman,* 408 U.S. at 239.
44. *See id.*
45. *Id.*
46. *Id.* at 309.
47. NINA RIVKIND & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY 75 (3d ed. 2009).
48. Ruth D. Peterson & William C. Bailey, *Murder and Capital Punishment in the Evolving Context of the Post-Furman Era,* 66 SOC. FORCES 774, 779 (1988).

states focused almost exclusively on murder, with only a few states punishing other crimes by death.[49] As these new capital punishment schemes were put into effect, their constitutionality began to be challenged across the country, giving the Supreme Court ample opportunity to guide the discretionary use of capital punishment.[50] As will be explained, the gradual progression of past Supreme Court cases reveal a progressive narrowing of the applicability of the death penalty, setting the stage for eventual abolition of capital punishment altogether.

Significantly, the guidance handed down by the Court post-*Furman* sustained the constitutionality of the death penalty for murder, as long as the jury receives guidance that limits the likelihood of imposing a capricious or arbitrary sentence.[51] For instance, although the court upheld the constitutionality of Georgia's death penalty statute in *Gregg v. Georgia*,[52] the Court laboriously reviewed the additional safeguards the state had implemented in order to prevent arbitrariness in capital punishment sentencing.[53] Therefore, it was clearly relevant that Georgia had "narrowed the class of murderers subject to capital punishment" by requiring additional safeguards such as the finding of an aggravating factor, consideration of mitigating factors, and mandatory review by the state supreme court of every death sentence imposed.[54]

However, the score was not one-sided. While the Court often adopted a position that limited the applicability of the death penalty in some meaningful manner, the Court also upheld many state statutes despite constitutional challenges from those sentenced to death under their regime.[55] Through these decisions, the Supreme Court demonstrated their realization of the need to ensure that the death penalty is applied in a consistent and fair manner. The Court's post-*Furman* decisions have taken the position that this goal is best served when the class of death eligible defendants is narrowed by some meaningful standard.[56] The continuous narrowing of the applicability of the death sentence via standards imposed by the Court should lead to the eventual abolition of capital punishment in the United States, especially because history demonstrates that once a country

49. Acker, *supra* note 16, at 172.
50. Peterson & Bailey, *supra* note 48, at 779.
51. *See* Gregg v. Georgia, 428 U.S. 153 (1976).
52. 428 U.S. 153 (1976).
53. *Gregg,* 428 U.S. at 196-207.
54. *Id.* at 204.
55. *See* Agrave v. Creech, 507 U.S. 463 (1993) (upholding "utter disregard for human life" aggravating circumstance); Pulley v. Harris, 465 U.S. 37 (1984) (rejecting argument the state supreme court must compare the sentence imposed to those imposed in similar cases to assess proportionality); McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting racial discrimination challenge bolstered by substantial study).
56. *See Furman,* 408 U.S. at 310-11.

minimizes the use of capital punishment, it is only matter of time until it is discarded altogether.[57]

Evidence of a decreasing tendency to impose the death penalty is seen in *Woodson v. North Carolina.*[58] In *Woodson,* the North Carolina legislature enacted a capital punishment statute that mandated the death penalty for murder in the first degree as defined by the statute.[59] Drawing on the familiar maxim that the Eighth Amendment draws much of its reasoning from "the evolving standards of decency that mark the progress of a maturing society[,]"[60] and relying on society's universal rejection of "inexorably imposing a death sentence upon every person convicted of a specified offense[,]" the Court went on to hold that the mandatory death penalty statute "depart[ed] markedly from contemporary standards respecting the imposition of the punishment of death" and therefore violated the Eighth and Fourteenth Amendments.[61] This holding constituted another marked departure from historical capital punishment practices where mandatory death sentences were commonplace.

Further evidence of the progressive narrowing of capital punishment is found in other post-*Furman* decisions as well. In an effort to limit the scope of the death penalty, the Supreme Court now requires individualized penalty determination.[62] In other words, the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[63] This reflects the view that the death penalty is the ultimate criminal sanction, which cannot be undone, and accordingly should be reserved for the worst of all criminals.[64] In effect, the individualized consideration standard is not without costs, as it requires the court to consider each defendant as an individual as well as the particular circumstances of the crime.[65] In death penalty cases this evidence is often plentiful, and counsel for a death-eligible defendant conducts detailed investigations into the background of the defendant in order to present as much mitigating evidence as possible.[66]

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57. Hood & Hoyle, *supra* note 2, at 4.
58. 428 U.S. 280 (1976).
59. Woodson v. North Carolina, 428 U.S. 280, 286 (1976).
60. Trop v. Dulles, 356 U.S. 86, 100 (1958).
61. *Woodson,* 428 U.S. at 301.
62. *See* Lockett v. Ohio, 438 U.S. 586, 601 (1978) (citing *Woodson,* 428 U.S. at 301).
63. *Id.*
64. *See id.*
65. *See id.*
66. *See* Wiggins v. Smith, 539 U.S. 510 (2003) (holding that failure to investigate background and present evidence of a traumatic life history amounted to ineffective assistance of counsel).

For example, in *Lockett v. Ohio,*[67] the Court invalidated Ohio's death penalty statute because it limited the discretion of the jury in considering mitigating factors.[68] There, the relevant statute "narrowly limit[ed] the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors."[69] Focusing on the requirement of an *individualized penalty determination*, the Court held that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[70] Not surprisingly, the Court found the need of treating each defendant as a unique individual far more important in capital cases than noncapital cases.[71]

Similar results were achieved in subsequent cases where the Court made clear that the jury must be given the discretion to consider relevant mitigating evidence.[72] In *Eddings v. Oklahoma*,[73] the Court held that state courts must consider all mitigating evidence when weighing aggravating and mitigating factors.[74] The Court determined it was error to consider only that mitigating evidence that would tend to support a legal excuse from criminal liability.[75] Similarly, in *Smith v. Texas*,[76] the Court invalidated Texas' sentencing scheme for failing to empower the jury to consider relevant mitigating evidence.[77] As these cases demonstrate, the crux of the Supreme Court's individualized penalty determination requirement is that the circumstances surrounding each defendant and the commission of their crime must be considered in imposing the death penalty in order to assure that death is reserved for the worst of all criminals.

The Court also sought to limit the applicability of the death penalty by requiring that the punishment (ultimately death) be proportionate to the crime committed, otherwise known as the proportionality requirement.[78] A look at the relevant case law shows that the Court has used the proportionality requirement to make advances in capital punishment

67. 438 U.S. 586 (1978).
68. *Lockett,* 438 U.S. at 604.
69. *Id.* at 589.
70. *Id.* at 604 (emphasis in original).
71. *Id.* at 605.
72. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982); Smith v. Texas, 543 U.S. 37 (2004).
73. 455 U.S. 104 (1982).
74. *Eddings*, 455 U.S. at 113.
75. *Id.*
76. 543 U.S. 37 (2004).
77. *See Smith*, 543 U.S. 37.
78. *See e.g.* Coker v. Georgia, 433 U.S. 584 (1977) (holding that punishment of death is disproportionate to the crime of rape and is therefore unconstitutional).

jurisprudence, namely by further narrowing the reach of the death penalty.[79] A prime example is *Coker v. Georgia,*[80] in which an escaped convict broke into a house and raped and threatened to kill a female occupant.[81] While the crime was unarguably reprehensible, the Court held that the penalty of death was disproportionate to the crime of rape of an adult woman and, therefore, violative of the Eighth Amendment.[82] Significantly, Georgia was not the only state that made the crime of rape eligible for the death penalty; however, despite the fact that North Carolina and Louisiana also had done so, the Court held that the death penalty was disproportionate to the crime of rape.[83] In a more recent decision, the Court went on to hold that the death penalty is disproportionate to the crime of rape of a child where the crime did not result, and was not intended to result, in the death of the victim.[84]

The proportionality requirement's effect does not end there. As discussed above, whole categories of crimes (*e.g.* rape) have been found disproportionate to the penalty of death.[85] Additionally, whole categories of defendants have been found ineligible for the death penalty due to the proportionality requirement.[86] For example, in *Atkins v. Virginia,*[87] the Court held that it violated the Eighth Amendment to put to death a mentally retarded defendant.[88] The Court questioned the applicability of the traditional justifications for the death penalty, namely retribution and deterrence, to mentally retarded defendants.[89] Further, the Court was concerned that the impairment of the defendant may cause the "'death penalty to be imposed in spite of factors which may call for a less severe penalty.'"[90]

In *Roper v. Simmons,*[91] the Court held that it was unconstitutional to sentence to death an offender who was between the ages of fifteen and eighteen when he committed a capital crime.[92] The Court analogized the case to *Atkins* and recognized a "national consensus" against applying the

79. *See infra* notes 80-95 and accompanying text.
80. 433 U.S. 584 (1977).
81. *Coker*, 433 U.S. at 587.
82. *Id.* at 592.
83. *Id.*
84. Kennedy v. Louisiana, 554 U.S. 407 (2008).
85. *See supra* note 78 and accompanying text.
86. *See* Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005); *Kennedy*, 554 U.S. 407.
87. 536 U.S. 304 (2002).
88. *See Atkins,* 536 U.S. at 321.
89. *Id.* at 319.
90. *Id.* at 320 (citing *Lockett,* 438 U.S. at 605).
91. 543 U.S. 551 (2005).
92. *Roper*, 543 U.S. at 555-56.

death penalty to juveniles.[93] Interestingly, the Court came to this conclusion despite the fact that twenty states did not have a formal practice against executing juveniles and that three states had carried out executions of juveniles in the past ten years.[94] This increased willingness to disregard and invalidate state statutes, which contain more traditional views toward capital punishment, suggests that the Court may be paving a path towards eventual abolition. Furthermore, if the Court is willing to find a "national consensus" without widespread consent from states, it could be argued that capital punishment should be abolished at the present time as four states accounted for approximately 78% of executions carried out in the United States in 2012.[95]

The Supreme Court's decision in *Furman* made clear that the Court thought the time was right for abolition of capital punishment for a variety of reasons: the infrequent and arbitrary manner in which it was applied, the unguided discretion given to the jury, the uncertainty of its deterrent effects, and its moral ramifications, among other reasons.[96] Despite this decision, a majority of death-penalty states reenacted death penalty statutes shortly after they were invalidated.[97] Since those statutes went into effect, the Supreme Court has spent valuable judicial resources ruling on the constitutionality of these statutes and states have spent countless resources and funds prosecuting and defending their death penalty regimes. The Supreme Court's concerns expressed in *Furman* remain and the Court continues to promulgate restrictions on the use of capital punishment.[98] This continuous narrowing of the death penalty will eventually lead to its extinction; and as a positive consequence, the state and federal governments will save judicial resources and valuable taxpayer dollars that can be used to combat crime in other ways.

When the evolution of capital punishment is viewed from a historical perspective, one cannot help but notice a long, slow, but continuous line of cases adding barriers to the imposition of the death penalty under what Justice Scalia characterized as an invented "death-is-different jurisprudence."[99] Under this death-is-different regime, the Court has adopted prohibitions on applying the death penalty to "ordinary" murder, rape of an adult woman, felony murder absent a showing of a sufficiently

93. *Id*. at 564.

94. *Id.*

95. Tracey L. Snell, *Capital Punishment 2011 – Statistical Tables*, BUREAU OF JUSTICE STATISTICS 3 (July 2013), http://www.bjs.gov/content/pub/pdf/cp11st.pdf (Texas, Mississippi, Oklahoma, Arizona).

96. *See Furman,* 408 U.S. 238.

97. Peterson & Bailey, *supra* note 48, at 779.

98. *See supra* notes 47-54 and accompanying text.

99. *Atkins,* 536 U.S. at 352-53 (Scalia, J., dissenting).

culpable mental state, juveniles, and the mentally retarded, among others.[100] The death penalty in the United States has come a long way since mandatory death sentences and public executions. Furthermore, a 2011 Gallup Poll showed that public support for the death penalty *had fallen to a thirty-nine year low, the lowest level since the Court's decision in Furman.*[101] The combination of this incremental abolition in the United States, especially post-*Furman,* and the fact that the abolition movement has become mainstream internationally, has set the stage for the abolition of capital punishment in the United States.[102]

C. Evolving Justifications for Capital Punishment in the United States

Social studies show that public opinion of the death penalty has varied widely over the years.[103] In the 50's and 60's approximately 47% of the American public supported capital punishment, and since as early as 1982 approximately 75% of Americans supported the death penalty.[104] Recent data shows that support for capital punishment may have peaked around 1994 at 80%.[105] While the American public's attitude towards capital punishment has changed over time, so too have the justifications advanced by supporters of the death penalty.

In recent history, deterrence was the justification of choice for supporters of the death penalty.[106] The argument is two-fold; society punishes offenders to discourage them from committing further offenses and to deter others from committing similar offenses.[107] Importantly, the deterrent effect of punishment has decreasing marginal utility, meaning that after a while increasing the severity of punishment will no longer add to its deterrent effects.[108] Unfortunately, the deterrence justification is largely undercut by the findings that capital punishment does not have more of a deterrent impact than long term imprisonment.[109] Opinion polls

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100. *See* Godfrey v. Georgia, 446 U.S. 420 (1980) ("ordinary" murder"); *Coker,* 433 U.S. 584 (rape of adult woman); Enmund v. Florida, 458 U.S. 782 (1982) (felony murder absent sufficiently culpable mental state); *Roper,* 543 U.S. 551 (juveniles); *Atkins,* 536 U.S. 304 (mentally retarded).

101. Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low,* GALLUP (Oct. 13, 2011), http://www.gallup.com/poll/150089/Support-Death-Penalty-Falls-Year-Low.aspx.

102. *See infra* Part III.

103. *See* Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. OF SOC. 43, 44 (2000).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 45.

108. Radelet & Borg, *supra* note 103, at 45.

109. *Id.*

demonstrate this, as a 1997 Gallup Poll showed that only 45% of Americans thought the death penalty had deterrent effects.[110]

Other prominent arguments over the death penalty include incapacitation, caprice and bias, and the potential for miscarriages of justice.[111] With the emergence of the possibility of life without the possibility of parole as an increasingly popular form of punishment, the justification of incapacitation has lost most of its force.[112] Indeed, if citizens are convinced that convicted murderers will not be released from prison, support for the death penalty drops significantly.[113] One commentator found executing murderers in the name of incapacitation to be "drastically overinclusive" and similar to "burning down the barn to rid it of field mice," due to the fact that maximum security prisons do an excellent job of assuring societal safety.[114]

Further, post-*Furman* sentencing schemes have failed to achieve the objective of eliminating bias.[115] Numerous studies, including the Baldus study at issue in *McCleskey v. Kemp*,[116] have documented racial disparities in the imposition of the death penalty.[117] Evidence of disparate racial impact is seen in data from The Innocence Project, which documented 311 post-conviction DNA exonerations as of November 2013.[118] Significantly, of these 311 exonerations, 193 of the individuals were African American.[119] In other words, 62% of post-conviction DNA exonerations were of African Americans with *all other races* accounting for only 38%.[120] Unfortunately, the public continues to support the death penalty despite knowledge of this discrimination, which suggests that minority defendants need protection that the majority of the public is unwilling to provide through traditional democratic channels.[121]

Attempts to prevent miscarriages of justice under death penalty sentencing schemes have proved equally unsuccessful. Proponents of the penalty have come to realize that innocent defendants will unavoidably be executed and the debate has turned to whether the benefits of the death

110. *Id.*
111. *Id.* at 46-52.
112. *Id.* at 47.
113. Radelet & Borg, *supra* note 103, at 46.
114. Acker, *supra* note 16, at 174.
115. Radelet & Borg, *supra* note 103, at 47-51.
116. 481 U.S. 279 (1987).
117. Radelet & Borg, *supra* note 103, at 48.
118. DNA Exonerations Nationwide, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Nov. 13, 2013) (these numbers encompass all crimes, not just death penalty cases).
119. *Id.*
120. *See id.*
121. Radelet & Borg, *supra* note 103, at 49.

penalty outweigh the cost of these errors.[122] In the United States, many organizations have emerged that advocate on behalf of inmates on death row.[123] One such organization, The Innocence Project, has proven the innocence of eighteen individual death row defendants through recent breakthroughs in DNA evidence.[124] These defendants were wrongfully convicted under the state's capital punishment sentencing system. Astoundingly, eighty people have been released from death row since 1970 *because they were innocent* of the crime(s) charged.[125]

With the rise of the Innocence Project and increased exonerations due to DNA evidence, it appears the American public is losing faith in the death penalty system. A 2007 report from the Death Penalty Information Center ("DPIC") reported that "the American public is losing confidence in the death penalty as doubts about innocence and the purpose of capital punishment increase."[126] The DPIC reports a dramatic decrease in confidence in the death penalty over the past ten years and attributes this directly to the increasing prevalence of DNA exonerations.[127] Other key findings include: almost 40% of the American public believed themselves unqualified to sit on a death penalty jury due to moral beliefs, 69% of the public believed reform will not eliminate all wrongful convictions and executions, 87% of the public believed that an innocent person has been executed in recent years, and 55% say that fact has affected their views on the death penalty.[128] Significantly, the increasing number of exonerations of defendants on death row has already led other countries to determine the sanction is not worth the cost of potential wrongful convictions.[129] Americans, who so highly value civil liberty, will certainly come to the same conclusion as more defendants are exonerated and their stories spread across the nation.

The more recent justification advanced in support of capital punishment is retribution, but even this justification is flawed.[130] While undoubtedly some victim's families may feel life in prison is insufficient punishment, the

122. *Id.* at 50.

123. *The Innocent and the Death Penalty*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/The_Innocent_and_the_Death_Penalty.php (last visited Nov. 13, 2013).

124. *Id.*

125. Radelet & Borg, *supra* note 103, at 50.

126. *NEW DPIC REPORT and POLL: "A Crisis of Confidence,"* THE DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/new-dpic-report-and-poll-crisis-confidence (last visited Nov. 13, 2013).

127. *Id.*

128. *Id.*

129. *See* Minister of Justice v. Burns, 1 S.C.R. 283, 2001 SCC 7.

130. Radelet & Borg, *supra* note 103, at 52-54.

feeling is not uniform across the board.[131] Indeed, groups of homicide survivors and victims' families have formed groups opposed to capital punishment such as the Murder Victims' Families for Reconciliation and Murder Victims' Families for Human Rights.[132] These organizations argue that the death penalty is inappropriate because it causes additional trauma to the families of those executed and that the funds used to put people to death could better be used to support the victims of crimes.[133] It appears as though a change in societal perception of capital punishment is taking place as the popular justifications proffered by its supporters are losing favor.[134] Furthermore, retribution, the most frequently offered modern justification, is being rejected by some of the very people it was meant to support—the victims' families.[135] As more defendants are exonerated and their stories spread, ignorance will no longer be able to protect the application of the death penalty in American society.

III. THE INTERNATIONAL APPROACH TO ABOLITION

A. The Burgeoning International Trend

As the title of this section suggests, the abolition movement has generated great success in the international arena in recent decades. Overall, it is hard to characterize the nature of this movement as the path each country takes to abolition is often unique.[136] While the abolition movement has been prominent in American history at three or four separate periods of time, never before has there been more of an international consensus as to the impropriety of the death penalty.[137]

In 1966, the year the International Covenant on Civil and Political Rights ("ICCPR") was approved by the United Nations, there were only twenty-six abolitionist countries.[138] At that time, most countries followed one of two paths to abolition.[139] First, was "de facto abolition," which began by limiting the applicable crimes until gradually only murder remained, followed by a suspension of executions for a considerable period

131. *See id.*
132. *See id.* at 53; *For victims, against the death penalty*, MURDER VICTIMS' FAMILIES FOR HUMAN RIGHTS, http://www.mvfhr.org/sites/default/files/MVFHRbrochure2012.pdf (last visited Oct. 5, 2013).
133. *Id.*
134. *See* Radelet & Borg, *supra* note 103.
135. *See For victims, against the death penalty, supra* note 132.
136. Hood & Hoyle, *supra* note 2, at 5.
137. *Id.* at 6.
138. *Id.* at 4.
139. *Id.*

of time, after which the death penalty would be formally abolished.[140] A country is considered de facto abolitionist when it has not performed an execution in over ten years.[141] Once a country reaches de facto abolitionist status, history demonstrates that it is generally only a matter of time until formal abolition occurs.[142] The second method, not followed as consistently as the former, was to eliminate capital punishment quickly and in one fell swoop.[143] Countries that followed this path include Venezuela, Ecuador, Uruguay, and France.[144]

Significantly, on the eve of World War II, a mere eight countries had completely abolished the death penalty and another six had abolished it for ordinary crimes.[145] Fast-forward to 2008, where ninety-two countries had prohibited capital punishment for all crimes, ten for ordinary crimes, and thirty-three countries were considered de-facto abolitionist.[146] Since World War II, international law has widely restricted the applicability of the death penalty with an eye toward its abolition.[147] The European Union requires abolition for all members.[148] International treaties call for abolition and a World Coalition Against the Death Penalty, 99 organizations strong, was founded in 2002.[149] But most significantly, governments and human rights organizations across the globe are calling for abolition of capital punishment and they continue to grow in number, power, and influence.[150]

The rate of international abolition has gradually increased from the 1950's into the 2000's, with eleven countries abolishing capital punishment for all crimes in the 1980's and thirty-four countries abolishing it for all crimes in the 1990's.[151] This international trend is largely explained by the development of a broader human rights regime after World War II.[152] Commentators have observed that human rights organizations have two important impacts on the global abolition trend.[153] First, these organizations place "explicit institutional pressures" on states and governments, which

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140. *Id.*
141. Hood & Hoyle, *supra* note 2, at 4.
142. *Id.* at 38.
143. *Id.* at 5.
144. *Id.*
145. Anthony McGann & Wayne Sandholtz, *Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors,* 56 INT'L STUD. Q. 275 (2012).
146. *Id.*
147. *Id.*
148. Matthew D. Mathias, *The Sacralization of the Individual: Human Rights and the Abolition of the Death Penalty*, 118 AM. J. OF SOC. 1246, 1251 (2013).
149. McGann & Sandholtz, *supra* note 145, at 276-77.
150. *See id.*; Mathias, *supra* note 148, at 1258-60.
151. McGann & Sandholtz, *supra* note 145, at 275.
152. *Id.*
153. *See* Mathias, *supra* note 148, at 1257-58.

may compel abolition.[154] Second, human rights organizations have significant influence because they carry cultural ideas and requirements that resonate with the world and that promote the safeguards and privileges of the individual.[155] It is no surprise that an explosion in the number of global human rights organizations began around 1950 and continues to the present day, correlating with the increase in international abolition of the death penalty.[156] In the 1950's there were well under 500 human rights organizations globally.[157] By the year 2000, this number had increased fourfold to over 2000.[158] This increase is significant because, according to at least one study, holding other variables constant, a yearly increase of ten international human rights organizations or human rights documents will lead to a 3% increase in the probability that any given country will completely abolish the death penalty.[159]

With the explosion of human rights organizations and their impact on global abolition of capital punishment, at least two commentators have concluded that a "new dynamic" has emerged since the end of the 1980's.[160] This new dynamic is characterized by a rapid increase in abolitionist countries as capital punishment has become viewed as a fundamental denial of the universal human right to be free from tortuous, cruel, or inhuman punishment, rather than a rational and justified state response to its perceived crime problems.[161] As such, the human rights position on abolition rejects the traditional justifications for capital punishment, especially retribution.[162] Proponents of abolition contend that it is precisely when strong reactions to serious crimes are expected that use of the death penalty is most dangerous.[163] The major problem identified by abolitionists is their belief that no system could ever be devised that would work perfectly and guarantee no innocent person would be sentenced to death.[164] This concern is bolstered by the fact that, as mentioned above, The Innocence Project has advocated successfully on behalf of eighteen convicted death row defendants who were found innocent of their crimes due to the emergence of DNA evidence.[165]

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154. *Id.*
155. *Id.*
156. *Id.* at 1257-1260.
157. *Id.*
158. Mathias, *supra* note 148, at 1257-60.
159. *Id.* at 1267.
160. Hood & Hoyle, *supra* note 2, at 3.
161. *Id.* at 7.
162. *Id.* at 17.
163. *Id.*
164. *Id.* at 18.
165. *The Innocent and the Death Penalty, supra* note 123.

Central to the international abolition movement has been the prominence of treaties and resolutions calling for the universal abolition of capital punishment. In fact, international treaties and resolutions have increasingly been used to advocate for abolition of capital punishment.[166] One of the earliest documents reflecting this view is The Universal Declaration of Human Rights ("UDHR") which was adopted by the United Nations General Assembly in 1948.[167] Much debate on the topic of capital punishment went into formulating the UDHR; and, ultimately, the compromised reached is embodied in Article 3, which states that "everyone has the right to life, liberty and the security of person."[168] This document did not purport to abolish the death penalty, but rather is significant for its abolitionist outlook.[169]

The international trend toward abolition is further evidenced in the ICCPR, which was adopted by the United Nations General Assembly in 1976.[170] This document is particularly significant because it is the first time the United Nations explicitly noted its abolitionist stance.[171] Significantly, the United States did not adopt the ICCPR in its entirety. Rather, it made a reservation to Article 6, which established the existence of abolitionist countries, invoked a high standard for applying the death penalty, and set out an abolitionist tone.[172] The United States' reservation stated that "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person . . . duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."[173] The United States' reservation caused backlash including eleven European nations noting they found the reservation illegal and the 1994 Human Rights Committee ruling that the reservation is invalid due to its conflict with the purpose of the document.[174]

Additional international agreements provide further evidence of the international trend disfavoring capital punishment. For instance, Protocol No. 6 to the Convention for Protection of Human Rights and Fundamental

166. Kristi Prinzo, Note, *The United States – "Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend is Towards Its Abolition,* 24 BROOKLYN J. INT'L L. 855, 858 (1999).

167. *Id.* at 858-59.

168. *Id.* (citing Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. Mtg., U.N. Doc. A/810 (1948)).

169. *Id.*

170. *Id.* at 860.

171. Prinzo, *supra* note 166, at 860.

172. *Id.* at 860-61.

173. *Id.* (citing United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645, 653 (1992)).

174. *Id.* at 861-62.

Freedoms Concerning the Abolition of the Death Penalty was adopted in Europe in 1985.[175] Protocol No. 6 contains strong language calling for the abolition of capital punishment and has been ratified in large numbers.[176] Further, the Second Optional Protocol to the ICCPR, which is aimed at the abolition of capital punishment, was adopted by the United Nations in 1991.[177] Those who signed the Second Optional Protocol were prohibited from using capital punishment.[178] The international norm of abolition is significant because, when formalized in treaties and institutionalized in organizations, the trend may greatly affect further international decisions to abolish.[179] In other words, this is an effective way for the growing ranks of abolitionist countries to exert pressure collectively and in concrete terms on retentionist countries such as the United States.[180]

What generated this new dynamic and brought capital punishment to the forefront of the international arena? Apart from the emergence and establishment of the global human rights regime, central to the strength of the modern abolitionist movement was the political force provided by the Council of Europe and later the European Union, who both advocate for continental and worldwide abolition.[181] According to this strong position, in 1994 the Council of Europe called for all countries that have not yet abolished the death penalty to do so and made all countries seeking admittance agree to implement an immediate moratorium on executions.[182] Four years later, the European Union followed suit by making abolition a precondition to membership.[183] Needless to say, these policies had an enormous impact on the international scene by influencing those countries who hoped to gain membership and by pushing the issue to the forefront for other counties.[184] The European Union has gone as far as to adopt the *Guidelines to EU Policy towards Third Countries on the Death Penalty* which states the objectives of the Union as working towards *universal* abolition of capital punishment.[185]

The attitudes of the Council of Europe and the European Union have had important effects because they spread abolitionist theories and ideas and can influence other countries' decisions through membership

175. *Id.* at 863-64.
176. Prinzo, *supra* note 166, at 864.
177. *Id.*
178. *Id.* at 863.
179. McGann & Sandholtz, *supra* note 145, at 277.
180. *See id.*
181. Hood & Hoyle, *supra* note 2, at 22.
182. *Id.*
183. *Id.*
184. *Id.* at 22-23.
185. *Id.* at 24.

requirements.[186] Further, abolitionist countries may put political pressure on retentionist countries by refusing to cooperate to extradite an offender charged with a capital crime unless they are guaranteed the death penalty will not be imposed.[187]

This international pressure through refusal to cooperate is prevalent in international case law as well as through international treaties and resolutions.[188] In *Soering v. United Kingdom and Germany,*[189] a case before the European Court of Human Rights, the court prohibited extradition of Soering from the United Kingdom to the state of Virginia on the theory that in facing the death penalty he would suffer from an inevitably long period on death row.[190] This informal policy of refusing to extradite a capital defendant without assurances that the death penalty will not be imposed has since been solidified in Article 19 section 2 of the Charter of Fundamental Rights.[191] Further, Canada, which expressed no opposition to extraditing criminal defendants in 1991, has since reversed course in a mere ten year period, holding in 2001 that to extradite a capital defendant to the United States without assurances that the death penalty would not be imposed would violate the Canadian Charter of Rights and Freedom.[192]

Besides refusal to cooperate in extraditing capital defendants, international attitudes, especially those in Europe, have increasingly made American diplomats aware of how much the United States' retention of the death penalty has caused its reputation for civil values to suffer.[193] The United States has been criticized for its administration of the death penalty by several international bodies, including the International Association of Jurists, the Special Rapporteur of the United Nations Commission on Human Rights, and the United Nations Committee on the Elimination of Racial Discrimination.[194] Through its retentionist policies, the United States continues to alienate itself from some of its most important allies, who have abolished capital punishment.[195] The United States, grounded in democratic principles and proud of their advances in human rights and freedoms, have yet to be perturbed by this international take on American civil rights policy, and consequently, its reputation has suffered.

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186. Hood & Hoyle, *supra* note 2, at 25.
187. *Id.*
188. *See id.*
189. 161 Eur. Ct. H.R. (ser. A) (1989).
190. *See id.*
191. Hood & Hoyle, *supra* note 2, at 25.
192. *See* United States v. Burns, 1 S.C.R. 283, 2001 SCC 7.
193. Hood & Hoyle, *supra* note 2, at 29.
194. Rivkind & Shatz, *supra* note 47, at 867.
195. *See infra* Part IV.

B. The Effect of the International Trend on Retentionist Countries

Even though the call to abolish the death penalty has not been answered in every country, those that continue to retain the death penalty have been noticeably impacted by the international, human rights driven, movement towards abolition.[196] The resulting effects include: restricting the number of death eligible crimes, restricting the categories of persons who may be put to death, making the death penalty discretionary rather than mandatory, and generally adding additional safeguards to limit the application of the penalty to the most deserving of criminals.[197]

These impacts on retentionist countries are easily identifiable. In 1999, Belarus greatly reduced the number of capital crimes in its new criminal code and announced that the death penalty may only be imposed when special aggravating factors are found.[198] In 2001, North Korea reported to the Human Rights Committee that it reduced the number of capital crimes from thirty-three to five.[199] Perhaps most significantly, China, who sentences to death an estimated 10,000 people a year, has instituted a policy aimed at reducing the application of the death penalty.[200] In accordance with this policy, the Chief Justice of The Supreme People's Court, the highest court in China, stated that the court would begin announcing a national set of standards to apply in capital cases in an attempt to limit the arbitrary application of the death penalty across different courts in the country.[201]

The international trend toward abolition played an important role in these countries' decision to limit the death penalty. In particular, European countries have been significantly influenced by the abolitionist policies advocated by the European Union and the Council of Europe.[202] China, who is responsible for approximately nine out of every ten executions worldwide, has also been effected by this international trend. In 1998, China signed the ICCPR, which purports to restrict the death penalty to the most serious of crimes.[203] Significantly, the debate over the death penalty in China is now focused on its understanding of the term "most serious crimes," with a movement to limit its understanding of the definition.[204] In

196. *See* McGann & Sandholtz, *supra* note 145, at 275.
197. *See* Hood & Hoyle, *supra* note 2, at 31.
198. *Id.* at 33.
199. *Id.*
200. Susan Trevaskes, *The Death Penalty in China Today: Kill Fewer, Kill Cautiously*, 48-3 ASIAN SURV. 393, 400 (2008).
201. *Id.*
202. Hood & Hoyle, *supra* note 2, at 22.
203. Trevaskes, *supra* note 200, at 412.
204. *Id.*

1984, the Economic and Social Council of the United Nations promulgated *Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty*, in which Safeguard 1 specifies that the scope of the term "most serious crimes" should not extend beyond international crimes with lethal or other extremely grave consequences.[205] While China still punishes sixty-eight crimes by death, this movement to limit the application of the death penalty represents a major step forward for the most active death penalty country in the world.[206]

Importantly, international abolition of capital punishment for crimes other than homicide is nearly complete.[207] Between 2002 and 2006, only fifteen countries carried out a single execution for a crime other than homicide.[208] In this respect, the United States Supreme Court's decision in *Kennedy v. Louisiana,*[209] which held that the Eighth Amendment barred imposing the death penalty for rape of a child where death was not intended to result, is fully in line with the policies established in article 2 section 6 of the ICCPR, which calls to restrict capital punishment where it exists to the gravest cases of intentional and culpable murder.[210] One could argue that this narrowing is a direct result of international policies on abolition, especially since some members of the Court have looked to international trends in order to define evolving standards of decency under the Eighth Amendment.[211]

This trend has also impacted the issue of whether the death sentence may be mandatorily imposed or whether discretion to sentence to death must be vested in the trial judge or jury.[212] As the United States Supreme Court, United Nations Human Rights Committee, and the Inter-American Commission on Human Rights have decided, mandatory death penalty sentencing schemes violate the right to life.[213] These decisions include cases arising out of the Bahamas, Barbados, Jamaica, the Philippines, Trinidad and Tobago, and the Commonwealth Caribbean.[214] Similar arguments against mandatory death penalties have been met with success in Uganda and Malawi in Africa.[215] In 2005, the Constitutional Court of Uganda found their mandatory death penalty unconstitutional in a case

205. *Id.*
206. *Id.* at 398.
207. Hood & Hoyle, *supra* note 2, at 33.
208. *Id.* (China, Egypt, Indonesia, Iran, North Korea, Kuwait, Malaysia, Pakistan, Saudi Arabia, Singapore, Sudan, Syria, Thailand, Uzbekistan, and Vietnam).
209. 554 U.S. 407 (2008).
210. *See id.*; Hood & Hoyle, *supra* note 2, at 34.
211. *See Roper,* 543 U.S. at 575-76; *Atkins*, 536 U.S. at 325.
212. Hood & Hoyle, *supra* note 2, at 34-35.
213. *Id.* at 35.
214. *Id.*
215. *Id.* at 36.

brought by 417 prisoners on death row.[216] The narrowing trend is further demonstrated in regard to the execution of juveniles, where an international consensus against capital punishment has emerged.[217]

Thus, it is clear that retentionist countries have been influenced by the international trend. This influence varies by country and may manifest itself in different forms, but it is significant that even the countries that routinely apply the death penalty have begun to limit its use.[218] How long these countries can continue to resist the international trend is yet to be seen. What is clear, however, is that the United States takes a uniquely distinct approach to capital punishment compared to its allies, as Mexico, Canada, and all of Europe (with the exception of Belarus), have abolished capital punishment.[219] The United States stands with the People's Republic of China, the Democratic Republic of Congo, and Iran as the world leaders in executions.[220] Significantly, these are not countries with which the United States normally shares international or domestic ideals or policies.

IV. THE FUTURE OF THE DEATH PENALTY IN THE UNITED STATES

The death penalty may seem firmly entrenched in American politics, society, and tradition. However, many factors influence a country's probability of abolishing the death penalty and tradition and public opinion are not always controlling.[221] This section will explore factors that influence abolition, as applied to the United States, and will conclude that consistent with historical and international trends, and influenced by serious problems, the death penalty will become a draconian punishment of the past.

The death penalty has become hard to defend based on traditional justifications.[222] With the emergence of prisons and, more importantly, life without parole as a sentencing option, justifications such as incapacitation apply with less force.[223] Furthermore, justifications such as deterrence and retribution have proved to be inaccurate justifications for the reasons discussed above.[224] The elusive benefits of the death penalty are clearly

216. *Id.*
217. Hood & Hoyle, *supra* note 2, at 36.
218. *See generally* Trevaskes, *supra* note 200.
219. Acker, *supra* note 16, at 182.
220. *Id.*
221. *See* Prinzo, *supra* note 166, at 886; McGann & Sandholtz, *supra* note 145.
222. *See generally* Radelet & Borg, *supra* note 103.
223. *Id.* at 46-47.
224. *See supra* Part II.C.

outweighed by the serious administrative and social problems it causes, and will continue to cause, for the United States.[225]

The death penalty is not under attack merely because it is no longer *necessary,* but rather because its benefits have come to be outweighed by the administrative and social costs it imposes.[226] Continually reoccurring problems with the death penalty include its potential for racial oppression, problems with inadequate representation of counsel, potential miscarriages of justice, and the high cost of putting someone to death.[227] Racial disparities in regard to capital punishment have been a reoccurring problem since the Civil War.[228] Significantly, the Supreme Court has responded with relative indifference to arguments and studies demonstrating such disparities.[229] The same disparities also apply to indigent defendants.[230] Wealthy defendants can hire a team of the best defense lawyers, while those without money are often appointed lawyers lacking the experience, resources, or training required to provide adequate assistance in a capital punishment case.[231]

As if the problems mentioned above were not enough to do away with capital punishment, there has been an increased realization of the potential for miscarriages of justice under death penalty sentencing schemes.[232] Such realization is due largely to organizations such as The Innocence Project, who are dedicated to proving wrongfully convicted defendants innocent of their crimes.[233] The stakes are higher in death penalty cases than in any other type of criminal action, and since mistakes are unavoidable, erring on the side of caution is the appropriate way to avoid the unwanted social cost of innocent death penalty convictions.[234] Punishment of life without the possibility of parole allows for correction of these errors while still protecting society from defendants who pose an actual risk.[235]

Perhaps the modern shortfalls of the death penalty are becoming increasingly visible in the United States. As discussed, when viewed from a historical perspective there is an unavoidable trend toward abolition.[236] The death penalty no longer applies automatically, is no longer carried out in public, and does not apply to juveniles, the mentally retarded, or to ordinary

225. *See* Acker, *supra* note 16, at 181.
226. *Id.*
227. *See id.* at 180-82.
228. *Id.* at 181.
229. Acker, *supra* note 16, at 181*; see McCleskey*, 481 U.S. 279.
230. Acker, *supra* note 16, at 181.
231. *Id.*
232. Radelet & Borg, *supra* note 103, at 50-52.
233. *The Innocent and the Death Penalty*, *supra* note 123.
234. *See* Acker, *supra* note 16, at 181.
235. *Id.*
236. *See supra* Part II.B.

crimes other than murder.[237] Even when the death penalty does apply, capital defendants are afforded many procedural safeguards and reversal of death sentences are becoming commonplace.[238] In the rare situation where the death penalty is imposed, the majority of sentences are not carried out due to the sentence being overturned, the prisoner being exonerated, or the authorities refraining from setting an execution date.[239] When a conviction is upheld, defendants can spend upwards of two decades on death row awaiting their sentence.[240] Despite all these precautions, the United States has proven it impossible to ensure that only guilty defendants are sentenced to death, leading to the ultimate conclusion that the American death penalty system is indeed broken.[241] When carried to its logical end, this historical trend leads to only one outcome—the abolition of capital punishment in the United States.

International attitudes have influenced abolition through international treaties and resolutions, as well as through the incentive of membership in key regional institutions such as the European Union.[242] While the United States admittedly is not influenced by membership in coalitions such as the European Union, it is still susceptible to being influenced by international agreements and attitudes. As mentioned before, international attitudes have exposed every country to the idea of abolition and countries that become a party to such an agreement are much more likely to abolish.[243] The United States continues to remain firm in its position, despite international sentiments, and even withdrew from the Optional Protocol to the Vienna Convention so that it would not be subject to adjudications by the International Court of Justice in the future.[244]

The United States' attitude toward capital punishment is significant on an international level because it unquestionably tarnished the United States' international reputation for its commitment to treaty obligations, as well as its commitment to basic human rights.[245] It does not help that all of Europe (with the exception of Belarus), Canada, and Mexico, some of the United States' more significant allies, have abolished capital punishment.[246]

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237. *Id.*

238. Acker, *supra* note 16, at 183.

239. DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 11 (2010).

240. *See id.*

241. Nicholas Petersenmona Lynch, *Criminology: Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, 102 J. CRIM. L. & CRIMINOLOGY 1233, 1234 (2012).

242. Prinzo, *supra* note 166, at 885.

243. *Id.* at 281.

244. Hood & Hoyle, *supra* note 2, at 51-52.

245. *Id.* at 52.

246. Acker, *supra* note 16, at 182.

Indeed, American diplomats have voiced concerns that the United States' reputation for civilized values has suffered from its retention of capital punishment.[247] Recently, several former U.S. diplomats filed an *amicus curiae* brief with the Supreme Court in *McCarver v. North Carolina*,[248] in order to inform the Court how the continued use of capital punishment could result in "diplomatic isolation and inevitably harm other United States foreign policy interests."[249] Of added concern is the fact that Germany, a significant ally of the United States, was willing to jeopardize its relations and sue the United States in the ICJ over the breach of a treaty that resulted in two of its citizens being executed, indicating just how damaging the continued use of capital punishment could be to future diplomatic relations.[250]

Increasingly, countries attempt to influence abolition through refusing to extradite capital defendants, sending diplomats to plead for reprieves for capital defendants, and providing *amicus curiae* briefs to the Supreme Court in capital cases.[251] These influential policies have been met with success in other countries. For example, Rwanda abolished the death penalty after European countries refused to extradite those responsible for genocide in order to protect them from the death penalty.[252] Further, since the United States has increasingly offered assurances to Mexico that it will not pursue the death penalty in regard to extradited "drug lords," the United States has seen increased cooperation in the number of offenders extradited.[253] Additionally, countries outside the United States may enjoy more influence on this trend toward abolition in the United States, as some members of the Supreme Court are increasingly willing to look to foreign countries to determine what standards should apply domestically.[254]

Another significant, and often overlooked, international influence on abolition is the fact that international drug manufacturers will often refuse to sell their drugs in states that plan to use it for the purpose of carrying out death sentences.[255] British, Danish, and other European manufacturers have

247. Hood & Hoyle, *supra* note 2, at 29.

248. 533 U.S. 975 (2001).

249. Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. 1115, 1223 (2002) (citing Brief of Amici Curiae Diplomats Morton Abramowitz et al. in Support of Petitioner at 7-8, *in McCarver v. North Carolina*, 462 S.E.2d 25 (N.C. 1995), *cert. dismissed*, 533 U.S. 975 (2001)).

250. *Id.* at 1224.

251. Hood & Hoyle, *supra* note 2, at 29.

252. *Id.* at 28.

253. *Id.* at 28.

254. *See Roper,* 543 U.S. at 575-76; *Atkins*, 536 U.S. at 325.

255. *British drug company acts to stop its products being used in US executions*, THE GUARDIAN.COM (May 15, 2013), http://www.theguardian.com/world/2013/may/15/death-penalty-drugs-us-uk.

refused to sell their drugs to American states that plan on using the product to put criminals to death.[256] These countries, having abolished the death penalty themselves, simply want nothing to do with end-users who plan on using their drugs for such purposes.[257] This influence is successful because states are reluctant to cut off their supply of these drugs, which are also used for legitimate anesthetic purposes.

While global and international factors may influence the United States' decision to abolish, public support in the United States cannot simply be ignored. Abolition is a product of democracy, as authoritarian governments often refuse to do away with the death penalty.[258] Only democracies abolish capital punishment and they do so according to varying timetables; the Netherlands abolished as early as 1870, while Canada did not abolish until 1976.[259] Significantly, abolition in democracies is not merely a response to public opinion, as abolition frequently occurs in countries where the majority of the public still favors the punishment.[260] In fact, two commentators observed that "in most abolitionist countries, if the issue had been decided by direct vote rather than by the legislature, the death penalty probably would not have been repealed."[261]

A century ago only three countries had completely abolished the death penalty; but by the time *Furman* was decided in 1972, this number had risen to nineteen. Currently the number stands at over 120.[262] Despite these international numbers, public support for the death penalty in America remains relatively strong.[263] While this support undoubtedly influences the decision to retain the death penalty, standing alone it should not be enough to overcome the other factors inching the United States towards abolition.[264] In most instances, a public majority in a given democracy favors the death penalty, but this has certainly not stopped other countries from abolishing at an unprecedented rate in recent years.[265] This phenomenon can be observed in countries such as Britain, France, Germany, and Austria.[266] Britain, for example, was considered de facto abolitionist by 1956 and by 1983 had

256. Alan Greenblatt, *Death Penalty Delayed But Not Denied By Drug Problems*, NPR (Nov. 12 2013), http://www.npr.org/2013/11/12/244779168/death-penalty-delayed-but-not-denied-by-drug-problems?ft=1&f=1014.

257. *Id.*

258. McGann & Sandholtz, *supra* note 145, at 275-76.

259. *Id.* at 278.

260. *Id.*

261. FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 3 (1986).

262. *See* Radelet & Borg, *supra* note 103, at 55; Mathias, *supra* note 148, at 1249.

263. Prinzo, *supra* note 164, at 880.

264. *See generally id.* at 886; McGann & Sandholtz, *supra* note 145, at 276.

265. *Id.*

266. Prinzo, *supra* note 166, at 886.

abolished capital punishment for all civilian offenses.[267] This occurred despite the fact that the public favored retention and continued to oppose abolition even after it was formally adopted.[268] Similar results occurred in the other countries, with abolition occurring in France when 62% of the public supported retention and in Germany when two-thirds of the public supported the death penalty.[269]

Based on the foregoing analysis, one cannot help but conclude that the time to abolish the death penalty in the United States has come. The issue may be resolved by the legislature or the courts, but if one does not take action the other body should answer the call. The legislature has many reasons to abolish: the disparate racial impact the death penalty has on African Americans, the social costs placed on society, and the proven execution of innocent individuals.[270] Further, retention of the death penalty has negative international consequences, alienating our allies and causing our reputation for civil rights and treaty commitments to suffer.[271] If the legislature fails to act, the Supreme Court has many reasons to invalidate the penalty as it did in *Furman.* When analyzed under the Eighth Amendment's evolving standards of decency test, the death penalty cannot continue to survive. A limited number of states still apply the death penalty, with a mere four states accounting for 78% of the executions in 2012.[272] Further, as the Court continues to look to international norms, it cannot help but be influenced by the international trend toward abolition. As a country committed to civil values and individual freedom, retention of a penalty that is being rejected around and the globe, and by a majority of states domestically, cannot be justified on the theory that it is concurrent with evolving standards of decency.

Public support for the death penalty has always been high in the United States and directly contributes to its retention. For example, in 1990 a majority of the public in every state favored capital punishment.[273] However, support for the death penalty in the United States has declined, hitting a thirty-nine year low in 2011.[274] This may be evidence that public sentiment in the United States is changing. It will continue to change as the

267. *Id.*
268. *Id.* at 887.
269. *Id.*
270. *See supra* Part IV.
271. *Id.*
272. *See supra* Part II.B. at 10.
273. Barbara Norrander, *The Multi-Layered Impact of Public Opinion on Capital Punishment Implementation in the American States,* 53-4 POL. RES. Q. 771, 782 (2000) (In 1990, the state with the lowest support was Rhode Island with 61% supporting the death penalty; Florida had the country high with 91% of the public favoring the death penalty).
274. Newport, *supra* note 101.

debate rages on and as more information detailing the true costs imposed by the death penalty comes to light.

V. CONCLUSION

History has not been kind to the death penalty. The United States' post-*Furman* death penalty jurisprudence has been characterized as "a compromise between adopting and abolishing the death penalty that embodies the worst of both options."[275] In the past, the death penalty was both applied automatically upon conviction of roughly a dozen crimes and carried out in public forums.[276] Today, the death penalty remains a vestige of its former self. It is only applied to the most egregious of murders, imposed only after careful weighing of aggravating and mitigating factors, and then only after overcoming many procedural hurdles.[277] In other words, reversal of death sentences has become the rule, rather than the exception.[278] This progression, when carried to its logical conclusion, can lead the United States in only one direction—towards abolition.

The death penalty imposes many types of social and administrative costs on the United States. Accordingly, it is only a matter of time until the death penalty is viewed as a "racially biased, arbitrarily administered, costly and error prone enterprise that too often places innocent people at risk."[279] As the majority of citizens come to realize this truth and weigh the costs of the death penalty against the purported advantages, it is clear that the death penalty must be abolished for what it does to, not for, the American public.[280]

275. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 310 (2002).
276. *See* Davis, *supra* note 1, at 33; Acker, *supra* note 16, at 182.
277. Acker, *supra* note 16, at 183.
278. *Id.* at 182.
279. *Id.* at 183.
280. AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 30 (2001).