

## States that Kill: Discretion and the Death Penalty—A Worldwide Perspective

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# States That Kill: Discretion and the Death Penalty—A Worldwide Perspective

Ariane M. Schreiber \*

Introduction .....	264
I. International Trends and Attitudes Regarding Capital Punishment .....	267
A. Why Compare the Use of the Death Penalty Around the World? .....	267
B. International Use of the Death Penalty .....	270
C. International Standards for the Death Penalty .....	274
1. <i>Efforts by the United Nations Towards the Worldwide           Abolition of Capital Punishment</i> .....	275
2. <i>Recent Efforts by the United Nations</i> .....	279
3. <i>Efforts by Other International Organizations</i> .....	281
II. Discretion in the United States .....	284
A. Constitutional Treatment of the Death Penalty in General .....	284
B. Constitutional Treatment of Discretion in Death Sentencing .....	289
1. <i>Furman v. Georgia – Protection Against Arbitrary           and Inconsistent Sentencing</i> .....	289
2. <i>Mandatory Death Sentences</i> .....	291
3. <i>Guided Discretion – Aggravating and Mitigating           Factors Designed to Guarantee Both Consistency and           Individualized Consideration</i> .....	295
C. Executive Clemency as an Essential Final Backstop .....	297
D. Summary of Discretion in the Use of Capital Punishment in the United States .....	301
III. Discretion in India .....	305
A. History of the Use of Capital Punishment in India .....	305
B. Constitutionality of the Death Penalty .....	308
C. Discretion in Death Sentencing .....	310
D. Executive Clemency in India .....	314
E. Summary of Discretion in the Use of Capital Punishment in India .....	316

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IV. Discretion in the Philippines .....	317
A. Political History of the Philippines .....	317
B. Constitutionality of the Death Penalty .....	321
C. Discretion in Death Sentencing .....	324
D. Summary of Discretion in the Use of Capital Punishment in the Philippines .....	325
Conclusion .....	326

## Introduction

Every election year, the issue of the death penalty comes to the forefront of American political discourse. Each candidate feels compelled to explain and to justify his or her stance on whether or not his or her state, or the United States as a whole, should employ the death penalty as a means of criminal punishment. Candidates who support the death penalty use intimidating crime statistics to increase the fear and frustration in the hearts of voters. They assure the voters that capital punishment acts as a deterrent, thereby reducing the incidence of violent crime. They focus on the characteristics of crime in the United States, the reality of over-crowded prisons, the fact that felons are released on parole after serving mere fractions of their original sentences, and the recidivism rates for violent criminals.<sup>1</sup> Those candidates who believe that the United States should

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1. The 1994 New York gubernatorial campaign between Mario Cuomo and George Pataki vividly illustrates how capital punishment has become one of the most influential and divisive campaign issues during recent election years. Throughout his three terms as Governor of New York, Mario Cuomo maintained a firm stance against the death penalty on both moral and practical grounds. *How the Candidates for Statewide Offices See Major Issues on Election Eve*, N.Y. TIMES, Nov. 6, 1994, § 13WC, at 12. During the 1994 campaign, Governor Cuomo vehemently criticized plans for reestablishing the death penalty in New York, calling the death penalty "an abomination, especially for this state—the last great voice for civility." Ian Fisher, *Clamor Over Death Penalty Dominates Debate on Crime*, N.Y. TIMES, Oct. 9, 1994, at 45. Noting poll data which showed that New York residents were not content with current crime statistics and that a majority believed the death penalty was the appropriate punishment for murder, George Pataki made reintroduction of the death penalty one of his primary campaign platforms. *Id.* Although some poll data indicated that over 70% of New York voters opposed Cuomo on the death penalty, other polls demonstrated that the public was more closely divided on the question of whether the death penalty is more appropriate than life sentences without chance for parole. John Riley, *Cuomo Urges Death Penalty Vote; Calls for Legislation to Set Up Referendum*, NEWSDAY, July 8, 1994, at A21. Pataki repeatedly criticized Cuomo for standing in the way of death penalty legislation. *Id.*

The death penalty remained a controversial issue up to the final hours of the campaign. Pataki held frequent news conferences and rallies on the death penalty to increase support for his candidacy. For example, in late October, Pataki held a press conference at a Long Island Railroad station near where Richard Moran murdered six people. Jim Dwyer, *Pataki Forgets Grieving Guests*, NEWSDAY, Oct. 26, 1994, at A2. Just a few days before the election, Pataki held a campaign event at the Staten Island house where Thomas Grasso, best known for Cuomo's refusal to extradite him to Oklahoma for execution, murdered an 81 year old woman in 1991. Pataki used this opportunity to return the campaign's focus to the issue of crime after having dealt with divisions within the Republican Party. Kevin Sack, *Pataki, Backing Executions, Assails Cuomo at Murder Site*, N.Y. TIMES, Nov. 5, 1994, at 1. Pataki dramatically stated: "There is no site that more indicates and is more symptomatic of how Mario Cuomo's policies and Mario

abolish the death penalty argue that empirical studies indicate that the use of the death penalty in the United States fails to have the desired deterrent effect.<sup>2</sup> Some opponents of capital punishment argue that its use actually encourages murder, rather than deterring it.<sup>3</sup> Opponents of capital punishment also argue that the death penalty is *per se* unconstitutional.<sup>4</sup>

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Cuomo's views are out of touch with the needs and desires of the people of this state." *Id.* at 28. Whether or not New York voters elected George Pataki solely based on the crime issue, capital punishment was undeniably a crucial issue in Pataki's campaign.

2. In 1978, a panel established by the U.S. National Academy of Sciences, comprised of criminologists, statisticians, political scientists, economists and other experts, found that "the current evidence on the deterrent effect of capital punishment is inadequate for drawing any substantive conclusions." AMNESTY INTERNATIONAL, *WHEN THE STATE KILLS: THE DEATH PENALTY: A HUMAN RIGHTS ISSUE* 13 (1989) [hereinafter *WHEN THE STATE KILLS*]. More recently, U.S. criminologists Franklin Zimring and Gordon Hawkins suggested that if the use of capital punishment actually deters homicide to a greater degree than imprisonment, such an effect would be seen in the empirical studies that have been conducted. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* (1986). In their view, the debate over deterrent effect is "only about whether the marginal deterrent effect is nil or very small in relation to total homicide volume." *Id.* at 180-81. But see Frank Carrington, *Inconclusive Evidence Does Not Invalidate Deterrence*, in *THE DEATH PENALTY: OPPOSING VIEWPOINTS* (David L. Bender & Bruno Leone eds., 1986) (supporting the deterrence rationale). When assessing the strength of the deterrence rationale, one must be careful when using empirical studies of the deterrent effect in other countries. This data is potentially misleading since the effect of capital punishment depends partially on the nature of the political system as a whole (e.g., dictatorship, military-controlled, theocracy, oligarchy, etc.). If citizens are not guaranteed the same kinds of protections as are contained in the U.S. Bill of Rights, and the citizens live in constant fear of repression, then the successful deterrence of crime cannot be solely attributed to the use of the death penalty. Regardless, American voters continue to believe that the death penalty deters violent crime. In December 1994, the *New York Times* reported that 57% of New York State registered voters believe that the death penalty deters criminals from committing murder. Anne Cronin, *Execution and Murder: Looking Hard at America's Deadly Numbers Game*, N.Y. TIMES, Dec. 4, 1994, § 4, at 1. However, on the same day, the *New York Times* reported that comparing murder rate statistics from 1973 to 1993 of states which use the death penalty and those which do not does not support the deterrent rationale. Tom Kuntz, *Killings, Legal and Otherwise, Around the U.S.*, N.Y. TIMES, Dec. 4, 1994, § 4, at 3.

3. Louis Joylon West, *Psychiatric Reflections on the Death Penalty*, in *THE DEATH PENALTY: OPPOSING VIEWPOINTS* 102 (David L. Bender & Bruno Leone eds., 1986). Dr. West explains that criminals who are likely to receive the death penalty are more likely to kill in order to avoid being apprehended. This is a particularly strong argument against employing the death penalty for crimes other than murder. MICHAEL KRONENWETTER, *CAPITAL PUNISHMENT: A REFERENCE HANDBOOK* 23 (1993).

4. One of the most eloquent arguments against the constitutionality of the death penalty is found in Justice Thurgood Marshall's concurrence in *Furman v. Georgia*, 408 U.S. 238, 314-371 (1972). In the conclusion of his opinion, Marshall explains:

At a time in our history when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But, the measure of a country's greatness is its ability to retain compassion in a time of crisis . . . . In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve 'a major milestone in the long road up from barbarism' and join the . . . other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

Although this debate may appear to be primarily a domestic concern, other countries around the world are also grappling with the question of whether or not to employ capital punishment. Nearly 100 countries and territories currently employ the death penalty.<sup>5</sup> However, many others have abolished the practice completely.<sup>6</sup> Some have abolished the death penalty for all but exceptional crimes,<sup>7</sup> and even more have *de facto* abolished the death penalty for ordinary crimes, as they have not executed anyone in at least ten years.<sup>8</sup> U.S. citizens can learn much about their own system and whether retention makes the most sense by studying the choices made by other countries.<sup>9</sup>

This Note focuses primarily on the general procedural issues of discretion in the application of the death penalty around the world and the legality of the exercise of this discretion.<sup>10</sup> Part I begins with a general discussion of the international use of the death penalty and international attitudes towards its continued use. It demonstrates that the United States is only one of the many countries which continue to employ capital punishment, although in the last fifty years the international movement towards abolition of the death penalty has gained significant momentum. Parts II-IV analyze the legality, scope and character of discretionary power in the application of the death penalty around the world. Part II specifically examines the use of the death penalty in the United States. Part III discusses capital punishment and discretion in India. Despite its very dif-

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*Id.* at 371. This has consistently been a minority position, as the Supreme Court has repeatedly refused to make capital sentencing *per se* unconstitutional. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (allowing states to admit "victim impact evidence" as part of the sentencing process).

5. There are 93 countries and territories which retain the death penalty for ordinary crimes. Most of these countries have carried out executions during the past 10 years. *See infra* note 30.

6. As of early 1996, 56 countries do not provide for the death penalty for any crime. *See infra* note 37.

7. This category includes crimes under military law or crimes committed in exceptional circumstances such as wartime. Currently there are 15 countries in this category. *See infra* note 35.

8. Currently, there are 30 countries and territories in this category. In many cases, these countries have not employed the death penalty for significantly longer than 10 years. *See infra* note 38.

9. Amnesty International argues that when one nation employs capital punishment, it becomes easier for other nations to use the death penalty with an appearance of legitimacy for almost any reason. *WHEN THE STATE KILLS*, *supra* note 2, at 5. The reverse (when one nation's abolition of capital punishment makes it more difficult for other nations not to abolish its use) has not been true where the United States is concerned.

10. This Note does not analyze all aspects of discretion. A thorough investigation of the existence, scope, and legality of discretion as applied in the United States and globally is beyond the scope of this Note. In addition, this Note does not discuss the moral acceptability of, or justifications for, the use of capital punishment. The death penalty debate involves many integrated issues and problems; consequently, it is impossible to isolate completely a single issue without touching on many other issues. Some important issues that have received considerable attention include: racial discrimination and the death penalty, the execution of minors, the execution of pregnant women and new mothers, the execution of the mentally ill, execution as a means of political repression, and the morality of capital punishment.

ferent political history, culture, and religious heritage, the Indian Government's use of the death penalty is strikingly similar to its use in the United States. Part IV addresses the use of the death penalty and discretion in the Philippines, a country that had been moving towards abolition but recently reintroduced the death penalty. Even though the Filipino Constitution is the only one of the three examined in this Note which explicitly addresses capital punishment and actually abolishes its use except in extreme circumstances, the current government has used it in the most extreme manner by designating some offenses as mandatory death penalty crimes. Thus, in the Philippines, individuals who are convicted of these designated crimes will be executed without regard to any of the unique circumstances leading to the particular crime.

A comparative study of the legality and use of capital punishment throughout the world helps one to understand the current international attitude towards the death penalty, to predict the role capital punishment might play in the future, and to assess the likelihood of an international standard calling for the eventual worldwide abolition of capital punishment. For those who are primarily concerned about the future of the domestic use of capital punishment, a comparative study can help demonstrate how other nations have dealt with similar problems. Most importantly, a comparative study of discretion in death sentencing throughout the world can help retentionist nations construct a system which avoids arbitrariness, inconsistency, and unfairness to capital defendants.

## I. International Trends and Attitudes Regarding Capital Punishment

### A. Why Compare the Use of the Death Penalty Around the World?

There are many lessons to be learned by analyzing the use of the death penalty within the United States in the larger context of worldwide attitudes towards capital punishment. At the same time that the United Nations General Assembly considered a draft resolution advocating worldwide abolition of capital punishment,<sup>11</sup> the use of the death penalty within the United States expanded.<sup>12</sup> How can both the United States and the rest

11. See *infra* part I.C.2.

12. On March 7, 1995, New York's Governor Pataki signed death penalty legislation making New York the 38th state authorizing capital punishment. See James Dao, *Death Penalty in New York is Restored After 18 Years; Pataki Sees Justice Served: A Vow Fulfilled*, N.Y. TIMES, Mar. 8, 1995, at A1. This new law took effect September 1, 1995. See Jan Hoffman, *Prepare for New York's Death Penalty*, N.Y. TIMES, Aug. 31, 1995, at A1. New York has not executed any prisoners since 1963. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 194 (1987). Other states, such as Connecticut and New Jersey, which have had legislation authorizing the death penalty but have not executed any criminals in many years, are expected to start using the death penalty. Stephanie Saul, *Executioner's Wait: New York Deaths May Be A Long Way Off*, NEWSDAY, Dec. 27, 1994, at A06. Although both states currently have convicts on death row (Connecticut has five and New Jersey has nine), neither New Jersey nor Connecticut has executed anyone since each state enacted death penalty legislation, in 1982 and 1980 respectively. *Id.* However, in April 1995, the Connecticut legislature passed a new death penalty bill designed to make it "significantly easier for juries to impose the death penalty and the state to carry it out." Kirk Johnson, *Connecticut Death Penalty Bills Would Ease*

of the world be correct? Since it appears that the death penalty is a fixture in countries like the United States, India, and the Philippines, it is crucial that discretion in death sentencing is channeled in order to avoid arbitrariness, inconsistency, and unfairness to the defendants.

Although the statistics indicating the number of countries which have abolished capital punishment and which retain its use are informative in themselves,<sup>13</sup> it is important to note that of the countries and territories which retain capital punishment, the United States and Japan are the only "westernized" nations which allow its use.<sup>14</sup> Why have these two nations retained the death penalty while other modern nations have taken affirmative steps to abolish its use? Why do the United States and Japan ignore the seemingly international trend towards abolition?<sup>15</sup>

Since there is no single international standard regarding the use of capital punishment, crucial issues arise when criminals accused or even convicted of crimes in death penalty retentionist nations flee to abolitionist nations.<sup>16</sup> Several countries which have abolished the death penalty, at least in part, have enacted laws imposing restrictions or safeguards on extradition in cases involving possible death penalties.<sup>17</sup> These restric-

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*the Way to Executions*, N.Y. TIMES, Apr. 10, 1995, at A1. Experts predict that executions are likely to resume in Connecticut in the near future. *Id.* In addition, in May 1995, Pennsylvania executed its first prisoner in 33 years. *Pennsylvania Executes First Since '62*, N.Y. TIMES, May 3, 1995, at A21. This trend is not limited to the states, as the federal government has also indicated that it intends to resume executions. *Federal Government Set to Resume Executions*, N.Y. TIMES, Mar. 14, 1995, at A26. Although officials had planned on executing a prisoner in 1995, the federal government has not executed any prisoners as of the date of publication.

13. See *supra* notes 5-8 and accompanying text.

14. AMNESTY INTERNATIONAL, *THE DEATH PENALTY: LIST OF ABOLITIONIST AND RETENTIONIST COUNTRIES* 5 (Dec. 1995). See also *WHEN THE STATE KILLS*, *supra* note 2, and KRONENWETTER, *supra* note 3, at 15.

15. For a discussion of the current use of capital punishment in Japan, see Nicholas D. Kristof, *Death Penalty Popular in Japan, but Rare Recently*, N.Y. TIMES, May 19, 1995, at 2. In the United States, 1995 witnessed the largest number of executions since 1957 and experts suspect that there will be an even larger number of executions in 1996. *Fifty-six Executions This Year Are Most Since 1957*, N.Y. TIMES, Dec. 30, 1995, at 28. See also *infra* note 29 and accompanying text.

16. For instance, can an abolitionist country be compelled to extradite a suspect or formally charged defendant to a retentionist country for a crime which may result in capital punishment? See John Pak, Note, *Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life*, 26 CORNELL INT'L L.J. 239, 240 (1993) (analyzing the Canadian Supreme Court's 1991 decision to confirm the unconditioned extradition of two American fugitives to the United States likely to face capital punishment upon their return). In 1989, the European Court of Human Rights considered the issue of extradition by signatories of the European Convention on Human Rights. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989) (holding that the United Kingdom could not extradite a prisoner to the United States to face charges on a capital offense because it would violate its responsibilities under the European Convention of Human Rights); Resolution on the Death Penalty in the United States, EUR. PARL. DOC. (COM 389) 4 (1992) (reiterating its rejection of the death penalty, calling for its worldwide abolition, and mandating affirmative actions communicating its opposition to capital punishment to the United States).

17. These countries include Austria, Denmark, the Netherlands, Switzerland, and the United Kingdom. *WHEN THE STATE KILLS*, *supra* note 2, at 85. The Italian legislature

tions then are incorporated in extradition treaties between the abolitionist and retentionist countries.<sup>18</sup> Thus, even when a crime is committed within a retentionist country and the trial and sentencing would typically depend only on its domestic law, if a suspect flees to an abolitionist country, the matter can become a question of international law.

During the last twenty years, the abolition of capital punishment has become an issue of international law as multi-national organizations and individual countries have established conventions and treaties designed to create an international standard against the use of capital punishment.<sup>19</sup> Although the United Nations has not yet advocated world-wide abolition of capital punishment, in December 1984, the General Assembly established safeguards protecting the rights of those facing the death penalty.<sup>20</sup> Additionally, at the close of 1994, the General Assembly considered a draft resolution calling for an international ban on capital punishment by the year 2000.<sup>21</sup> Thus, an international inquiry into the use of the death penalty is not merely a comparative study of the laws of various nations but also a study of public international law.

For retentionist countries and territories, one of the most crucial issues is determining who has the discretion to decide which prisoners shall live and which shall die. At what stage in the process is this decision

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has not enacted such a law, but the Constitutional Court has found extradition to a death penalty retentionist nation to be a constitutional violation. *Id.*

18. For example, Article IX of the most recent extradition treaty between the United States and Italy enables Italy, an abolitionist country, to refuse to extradite to the United States someone accused of an offense in the United States if that person could possibly be executed for the alleged offense. Specifically, Article IX states:

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not provide for such punishment for that offense, extradition shall be refused unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, Oct. 13, 1983, U.S.-Italy, art. IX, T.I.A.S. No. 10,837, at 9.

19. These treaties and conventions include the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, at 1 (entered into force July 18, 1978) [hereinafter American Convention] (limiting the use of capital punishment and establishing that signatory nations which have abolished the death penalty cannot reinstate it); Protocol No. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Nov. 4, 1950, E.T.S. 114 [hereinafter Protocol No. 6] (created by the member states of the Council of Europe for the purpose of abolishing the death penalty in signatory nations); Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 98, U.N. Doc. A/RES/44/128 (1990) [hereinafter Second Optional Protocol]. For a more thorough list of treaties, conventions, and other texts establishing international standards on both the use and the abolition of the death penalty, see *WHEN THE STATE KILLS*, *supra* note 2, at 241-57.

20. G.A. Res. 39/118, U.N. GAOR, 39th Sess., Supp. No. 12, at 19, U.N. Doc. A/RES/39/118 (1984). See *infra* part I.C.

21. *Weekend Edition: U.N. Resolution Calls for Abolition of Death Penalty* (National Public Radio broadcast, Nov. 27, 1994).



actually made and by what legal authority is this discretion permitted? This issue is by no means simple. For example, in the United States there is no single individual or institutional body entrusted with sole discretion over which convicted criminals will be given the death sentence for their crime(s), nor is there any single instance during the criminal justice process when such discretion is exercised.<sup>22</sup>

## B. International Use of the Death Penalty

For millennia, the death penalty has been used around the world as a means of preventing and punishing crime.<sup>23</sup> Some anthropologists attest to finding prehistoric cave drawings which depict executions.<sup>24</sup> Legal references to capital punishment can be traced back to 1750 B.C. with the Code of Hammurabi.<sup>25</sup> Both the Old and New Testaments of the Bible are replete with references to the use of death as the penalty for various crimes.<sup>26</sup> Perhaps one of the most notorious executions by a state of a perceived criminal was the crucifixion of Jesus Christ.<sup>27</sup> Subhash Gupta, Deputy Secretary of the Indian Red Cross Society, speculated that "[t]here is practically no country in the world where the death penalty has never existed."<sup>28</sup>

Even though the arguable historical trend has been towards the abolition of capital punishment,<sup>29</sup> ninety-three nations and territories still use it

22. See *infra* part II.A.

23. For a more thorough chronicle of the history of capital punishment, see WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 2 (1993). See also JOHN LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* (1960); JAN GORECKI, *CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION* 29-95 (1983).

24. SCHABAS, *supra* note 23, at 2-7.

25. *Id.* Hammurabi was the King of Babylonia from 1792-1750 B.C. THE COLUMBIA ENCYCLOPEDIA 1184 (Barbara A. Chernow & George A. Vallasi eds., 5th ed. 1993). His Code, known as one of the greatest of all ancient codes, addressed issues including business, family relations, labor, private property, personal injury, and punishment. *Id.* Although the code is generally humanitarian, its retributive attitude towards punishment is noteworthy. *Id.*

26. See, e.g., *Exodus* 21:14 (prescribing death as punishment for murder); *Exodus* 22:18 (prescribing death as penalty for witchcraft); *Leviticus* 24:14-23 (stoning prescribed for blasphemy and murder); *Deuteronomy* 22:21-26 (stoning prescribed for adultery and rape); *Esther* 7:10, 8:7, 9:25 (Haman, who had plotted against the Jews, was sentenced by King Ahasu-e'rus and hanged for his crimes); *Matthew* 14:10-11, (John the Baptist was beheaded by King Herod); *Matthew* 27:38 (two robbers were crucified beside Jesus for their crimes).

27. See *Matthew* 27:26; *Mark* 15:15; *Luke* 23:14-25; *John* 19:6-10. Not only do these passages show that capital punishment was used, but they also illustrate who had the power to choose whom would be subject to the punishment. *John* 19:10 (Prior to passing judgment on Jesus, Pilate explains that he has "the power to release [him], and the power to crucify [him].").

28. SUBHASH C. GUPTA, *CAPITAL PUNISHMENT IN INDIA* 17 (1986).

29. In 1945 there were only "a handful of abolitionist states;" however, in 1994 over 50 countries have entirely abolished the death penalty. SCHABAS, *supra* note 23, at 2. See also *infra* note 37. Approximately two countries abolish the death penalty each year. This trend suggests that it is possible that "by the year 2000, the majority of the states in this world will have abolished the death penalty, at least in time of peace." William A. Schabas, *International Law and the Death Penalty* (on file with author). See also WHEN THE STATE KILLS, *supra* note 2, at 1. The current pace of abolition is the fastest in history.

as a punishment for ordinary crimes with some degree of regularity.<sup>30</sup> Although the methods of execution, the crimes subject to the punishment, and the rationales supporting its use differ substantially,<sup>31</sup> the governments, and perhaps even the citizens, of each of these nations have concluded that the death penalty is a legitimate method of criminal punishment.<sup>32</sup> Despite the many differences, one common factor is that most executions performed by the state, under the designation of capital punishment, are not carried out in secret.<sup>33</sup> In fact, executions often are announced in advance, reported by the press after they have occurred, and in many cases, witnessed.<sup>34</sup> Fifteen countries have abolished the use of the

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Antonio Marchesi, *The Death Penalty in Wartime: Arguments for Abolition*, in REPORT ON THE DEATH PENALTY IN WARTIME I (Amnesty International, Jan. 1994).

30. Amnesty International's latest information shows that 93 countries and territories retain and use the death penalty for ordinary crimes. The majority of these countries and territories are known to have executed people during the last decade. The retentionist countries and territories include: Afghanistan, Algeria, Antigua and Barbuda, Armenia, Bahamas, Bangladesh, Barbados, Belarus, Belize, Benin, Bosnia-Herzegovina, Botswana, Bulgaria, Burkina Faso, Cameroon, Chad, Chile, People's Republic of China, Cuba, Dominica, Egypt, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Gabon, Georgia, Ghana, Grenada, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kazakhstan, Kenya, North Korea, South Korea, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Lithuania, Malawi, Malaysia, Mauritania, Mongolia, Morocco, Myanmar, Nigeria, Oman, Pakistan, Poland, Qatar, Russia, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, Sudan, Swaziland, Syria, Tadjikistan, Taiwan, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United States of America, Uzbekistan, Vietnam, Yemen, Yugoslavia (Federal Republic of), Zaire, Zambia, Zimbabwe. AMNESTY INTERNATIONAL, *supra* note 14, at 5. See also *WHEN THE STATE KILLS*, *supra* note 2. Although Ukraine is currently included in this list; Prime Minister Yevhen Marchuk has pledged to abolish the death penalty within three years. *Two Nations Join Panel for Rights in Europe*, N.Y. TIMES, Nov. 10, 1995, at A12. Mr. Marchuk has placed a moratorium on executions currently pending. *Id.*

31. Although this Note does not explore the different methods of execution, it is interesting to note that in addition to the methods commonly used in the United States (hanging, electrocution, poisonous gas and lethal injection) other nations and territories carry out death sentences through shooting (by either a single executioner or by a firing squad), beheading, stoning, and even pushing the victim off of a cliff. *WHEN THE STATE KILLS*, *supra* note 2, at 54-61.

32. It is not necessarily true that the general public in each of these countries or territories supports the use of capital punishment. However, one can infer that in those countries or territories which have representative governments, rather than dictatorships, theocracies, or oligarchies, the public supports the use of the death penalty.

33. *WHEN THE STATE KILLS*, *supra* note 2, at 4. Japan is an exception to this general rule. Executions in Japan are not announced either before or after they occur. *Id.* at 158. In addition, the Japanese press does not report executions. *Id.* The authorities do not even confirm the names of those who have been executed, although they occasionally release statistics on the number of executions during a particular period. *Id.* The condemned prisoner is notified of his execution the day before, provided he is sufficiently stable, otherwise he is not told. *Id.*

34. *WHEN THE STATE KILLS*, *supra* note 2, at 4. Although executions in the United States are not currently public, many people are in favor of televising executions. RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 6 (1994). Advocates of this position argue that televising executions will have a greater deterrent effect on violent crime. See generally Leigh B. Bienen, *A Good Murder*, 20 *FORDHAM URB. L.J.* 585 (1993).

death penalty for ordinary crimes, yet retain it for exceptional crimes, such as crimes under military law or crimes committed under exceptional circumstances such as during wartime.<sup>35</sup> Antonio Marchesi noted that many countries reach total abolition in two stages, where the first stage is abolition for ordinary crimes.<sup>36</sup>

On the side of total abolition, fifty-six countries have abolished entirely the use of the death penalty for any crime by repealing all laws that had authorized such punishment.<sup>37</sup> An additional thirty countries and territories are considered to be *de facto* abolitionist since they have not executed anyone for over ten years, although they still have laws providing for the death penalty for ordinary crimes.<sup>38</sup> Although most of the latter group of countries have not executed anyone in the last twenty years, they should not yet be viewed collectively as truly abolitionist in spirit. So long as the death penalty is still technically legal, the governments may attempt to activate it.

For example, in late 1993 the Philippine Congress passed legislation reinstating the death penalty for thirteen heinous crimes.<sup>39</sup> While there had not been an execution in the Philippines since 1976, death sentences were still imposed until late 1986.<sup>40</sup> In 1986, the Constitution of the Philippines was redrafted and the death penalty was abolished for all crimes except those which were considered to be heinous.<sup>41</sup> In April 1987, President Corazon Aquino announced that she would commute all of the existing death sentences to life imprisonment.<sup>42</sup> But after this notable trend towards abolition, the Philippines is expected to resume executions

35. These "semi-retentionist" countries include: Argentina, Brazil, Canada, Cyprus, El Salvador, Fiji, Israel, Malta, Mexico, Nepal, Paraguay, Peru, Seychelles, South Africa, United Kingdom. The majority of these countries have not executed anyone in over 30 years. AMNESTY INTERNATIONAL, *supra* note 14, at 3.

36. Marchesi, *supra* note 29, at 1. Whereas abolition for ordinary crimes is often not a lengthy process, the second stage, total abolition, can be significantly lengthy. For example, Austria took 18 years to reach total abolition after having elected partial abolition. *Id.* Denmark took 45 years, Finland took 23 years, the Netherlands took 112 years, New Zealand took 28 years, Norway took 74 years, Portugal took 110 years, and Sweden took 51 years. *Id.*

37. These countries include: Andora, Angola, Australia, Austria, Cambodia, Cape Verde, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, Finland, France, Germany, Greece, Guinea-Bissau, Haiti, Honduras, Hong Kong, Hungary, Iceland, Ireland, Italy, Kiribati, Liechtenstein, Luxembourg, Macedonia (the former Republic of Yugoslavia), Marshall Islands, Mauritius, Micronesia, Monaco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Palau, Panama, Portugal, Romania, San Marino, Sao Tome and Principe, Slovak Republic, Slovenia, Solomon Islands, Spain, Sweden, Switzerland, Tuvalu, Uruguay, Vanuatu, Vatican City State, Venezuela. AMNESTY INTERNATIONAL, *supra* note 14, at 2.

38. These countries and territories include: Albania, Bahrain, Belgium, Bermuda, Bhutan, Bolivia, Brunei, Burundi, Central African Republic, Congo, Comoros, Côte D'Ivoire, Djibouti, Gambia, Madagascar, Maldives, Mali, Moldavia, Nauru, Niger, Papua New Guinea, Philippines, Rwanda, Samoa (Western), Senegal, Sri Lanka, Suriname, Togo, Tonga, Turkey. *Id.* at 4.

39. REPUBLIC ACT No. 7659, Dec. 13, 1993. See *infra* part IV.B.

40. WHEN THE STATE KILLS, *supra* note 2, at 191.

41. PHIL. CONST. art. III, § 19. See *infra* part IV.B.

42. WHEN THE STATE KILLS, *supra* note 2, at 191-92.

at any time. This case study illustrates that one must be careful not to generalize about *de facto* abolitionist countries and must consider the particular history of both the legality and the application of the death penalty in each country when assessing the status of capital punishment in that country.<sup>43</sup>

Many countries have limited application of the death penalty to only those convicted of murder. According to Amnesty International, twenty-five of the sixty-three nations known to have executed criminals from the middle of 1985 to the middle of 1988 executed only convicted murderers.<sup>44</sup> The United States falls into this category.<sup>45</sup> However, a majority of the retentionist nations continue to execute people for offenses not resulting in the loss of life or even involving violence.<sup>46</sup> For example, Amnesty International reports that during the last decade prisoners have been executed for

adultery (Iran, Saudi Arabia), prostitution (Iran), running a brothel and showing pornographic films (China), taking bribes (USSR), embezzlement (China, Ghana, Somalia) . . . economic corruption (Iraq) . . . kidnapping (China, Malaysia), rape (China, Egypt, South Africa, Syria, Thailand, Tunisia, United Arab Emirates), robbery or armed robbery (China, Ghana, Iran, Kenya, Republic of Korea, Nigeria, Saudi Arabia, Syria, Taiwan, Tunisia,

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43. Belgium is an example of a country in this category that most closely resembles the true abolitionist stance. Although Belgium has failed to repeal its death penalty laws, no executions have occurred since August 1950. *Id.* at 107. In addition, Belgium has become a signatory party to both Protocol No. 6, *supra* note 19, and the Second Optional Protocol, *supra* note 19. Consequently, it is now fair to categorize Belgium as an abolitionist nation despite the legislation still on the books.

44. *WHEN THE STATE KILLS*, *supra* note 2, at 37.

45. Those states which authorize the use of capital punishment can only apply it to those who have been convicted of homicide. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 26.1, at 1088 (2d ed. 1992); *WHEN THE STATE KILLS*, *supra* note 2, at 227. Since 1972, the Supreme Court has upheld death sentences only for criminal homicide. Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 n.2 (1980). In 1977, the Supreme Court held that the death penalty as punishment for non-homicidal rape is unconstitutional, as it violates the Eighth Amendment. *Coker v. Georgia*, 433 U.S. 584, 597 (1977). Justice White explained that "the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." *Id.* at 592. The Supreme Court's test for excessive punishment considers whether the punishment "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion with the severity of the crime." *Id.* In his dissenting opinion, Chief Justice Burger wrote:

The clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim. This casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, e.g., treason, airplane hijacking, and kidnapping.

*Id.* at 621 (Burger, C.J., dissenting). Not all cases of homicide are capital crimes. Gillers, *supra*, at 2 n.2. For example, in California in order to be subject to the death penalty, a defendant must be found guilty of murder in the first degree, and one of 19 specifically enumerated special circumstances must be found. CAL. PENAL CODE § 190.2 (West 1995).

46. *WHEN THE STATE KILLS*, *supra* note 2, at 37.

Uganda, United Arab Emirates, Zaire, Zambia) and drug-trafficking (China, Iran, Malaysia, Saudi Arabia, Singapore, Syria, Thailand).<sup>47</sup>

While this data may surprise most Americans,<sup>48</sup> recent American debate over the death penalty has raised questions of whether the death penalty should be extended to crimes other than murder.<sup>49</sup> International experience with the use of capital punishment for other crimes can serve as a source of information for the justification and effect of applying the death penalty to crimes other than murder.

### C. International Standards for the Death Penalty

Although the death penalty has been used throughout the world for centuries, the concept of an international standard for the death penalty is relatively new.<sup>50</sup> In the past, whether a country chose to resort to capital punishment was solely a domestic concern. According to Professor Schabas, professor at the University of Quebec at Montreal and author of *The Abolition of the Death Penalty in International Law*, one of the most comprehensive analyses of the treatment of capital punishment in public international law, "[i]nternational norms addressing the limitation and the abolition of the death penalty are essentially a post-Second World War phenomenon."<sup>51</sup> The brutality of that war had a profound effect on those who were working towards building new international organizations designed to maintain peace among the nations of the world.<sup>52</sup> In 1948, the General Assembly of the newly-created United Nations proclaimed the Universal Declaration of Human Rights "as a common standard of achievement for all peoples and all nations" for the "observance of human rights and fundamental freedoms."<sup>53</sup> The drafters of the proclamation considered promoting abolition of the death penalty as a goal for civilized nations;<sup>54</sup> however, the final declaration made no reference to capital punishment and only

47. *Id.* Since the publication of this Amnesty International report, the Philippines has joined several of these lists. See *supra* note 39.

48. See *supra* note 45.

49. See, e.g., *Death Penalty: Hearings on S. 32 Before the Senate Judiciary Comm.*, 101st Cong., 1st Sess. (1989).

50. This Note presents a mere skeleton of some of the important international treaties and conventions addressing the legal status of the death penalty. For a thorough presentation and analysis of the trend towards confronting the issue of capital punishment as a matter of international law, see SCHABAS, *supra* note 23.

51. *Id.* at 1.

52. *Id.* See also *WHEN THE STATE KILLS*, *supra* note 2, at 1.

53. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. Although this international agreement is not binding, it has been labeled "[t]he cornerstone of contemporary human rights law." SCHABAS, *supra* note 23, at 25. Amnesty International believes that capital punishment cannot be separated from the broader category of human rights; consequently, the Universal Declaration and its pledge to observe human rights, including the right to life, requires total abolition of the death penalty. According to Amnesty International, continued use of the death penalty violates the pledge. *WHEN THE STATE KILLS*, *supra* note 2, at 1.

54. SCHABAS, *supra* note 23, at 1, 25-27.

explicitly recognized the "right to life."<sup>55</sup> During the drafting process, delegates from the United States and the United Kingdom submitted proposals urging that the death penalty should be viewed as an exception to the right to life, as it is in the United States with respect to the constitutionality of capital punishment.<sup>56</sup> Nevertheless, these delegates, joined by others, including the Soviet delegate, argued that the United Nations should not signify any approval of the use of capital punishment.<sup>57</sup> Even though the drafters refrained from addressing capital punishment in this initial declaration, the notion of abolishing the death penalty was not abandoned.<sup>58</sup>

### 1. *Efforts by the United Nations Towards the Worldwide Abolition of Capital Punishment*

Throughout the years following the Universal Declaration, the United Nations and other international organizations continued shaping the scope and dimensions of international human rights.<sup>59</sup> In the hopes of reaching a unified international standard, these organizations regularly discussed how capital punishment should be treated.<sup>60</sup> Although the Drafting Committee of the Commission of Human Rights discussed and crafted potential international covenants as early as 1947, it took nearly twenty years for the United Nations to adopt an international standard guiding the use of the death penalty. Article 6 of the International Covenant on Civil and Political Rights, adopted by the General Assembly in 1966, reiterates the inherent

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55. Article 3 states, "[e]veryone has the right to life, liberty and security of person." Universal Declaration, *supra* note 53, art. 3. Professor Schabas explains that although unequivocal abolition of the death penalty garnered considerable support among the delegates drafting the Universal Declaration, advocates were unable to convince the majority. SCHABAS, *supra* note 23, at 26-27. Fears of isolating nations which continued to use capital punishment led to the ultimate cautious language. *Id.* For a detailed discussion of the drafting by the Commission on Human Rights and subsequently by the Third Committee of the General Assembly, see *id.* at 30-45. See also John Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Judicial Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION (Martinus Nijhoff ed., 1984).

56. SCHABAS, *supra* note 23, at 33-34. Eleanor Roosevelt was one of the delegates representing the United States and a drafter of the Universal Declaration. *Id.*

57. *Id.*

58. Professor Schabas posits that the Universal Declaration was aimed at the ultimate abolition of the death penalty. *Id.* at 50. In support of this proposition he relies on the fact that article 3 has "retained its pertinence during the evolution of more comprehensive abolitionist norms over subsequent decades." *Id.*

59. One of the primary objectives of the United Nations is reaffirming "faith in fundamental human rights [and] in the dignity and worth of the human person." U.N. CHARTER pmbl. To that end, among the purposes of the United Nations is that of "achiev[ing] international co-operation in solving international problems of economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. CHARTER art. 1, ¶ 3. The General Assembly is responsible for initiating studies and making recommendations for the aforementioned purpose. U.N. CHARTER art. 13, ¶ 1(b). Chapter IX of the Charter sets forth the specific goals and responsibilities of the United Nations and its members in working towards international economic and social cooperation. U.N. CHARTER arts. 55-60.

60. SCHABAS, *supra* note 23, at 50.

right to life declared fundamental in the Universal Declaration, protects against arbitrary deprivations of this right, seeks to restrict the exercise of capital punishment in those countries which continue to use it, and encourages the ultimate abolition of capital punishment.<sup>61</sup> Unlike the Universal Declaration, the International Covenant on Civil and Political Rights is binding on all nations which become party to it.<sup>62</sup> While the United States ratified the Covenant in 1992,<sup>63</sup> it made a reservation as to Article 6.<sup>64</sup> This Covenant is the first affirmative indication that the United Nations approves of, if not advocates, an abolitionist position regarding the death penalty.<sup>65</sup>

In December 1984, the General Assembly, building upon the Covenant on Civil and Political Rights, passed a resolution which established

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61. International Covenant on Civil and Political Rights, G.A. Res. 2200 A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). Article 6 of the International Covenant on Civil And Political Rights states in relevant part:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious of crimes in accordance with the law in force at the time of the commission of the crime . . . This punishment can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate . . . from any obligation assumed under the . . . Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covenant.

*Id.*

62. By 1993, 115 countries had ratified the Covenant and two had signed it. Sonia Rosen & Stephen Journey, *Abolition of the Death Penalty: An Emerging Norm of International Law*, 14 *HAMLIN J. PUB. L. & POLICY* 163, 164 (1993).

63. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1994, at 348 (1994).

64. Multilateral Treaties Deposited with the Secretary General at 132, U.N. Doc. ST/LEG/SER.E/11, U.N. Sales No. E.93.V.11 (1993). Professor Schabas explains that the use of reservations is well recognized in international human rights law, as it allows states to ratify human rights treaties and covenants even though they cannot be held accountable for all of the provisions of the treaty or covenant. *Id.* at 9. Allowing reservations to international treaties encourages some degree of international cooperation and fosters continued discussion over the more controversial measures. *Id.* By making these reservations, the United States has indicated its continued reluctance to view the "right to life" as requiring abandonment of the death penalty. Eleven nations have opposed the U.S. reservations, insisting that they are not permissible because they are incompatible with the Covenant's purpose. *Id.*

65. Professor Schabas argues that the repetition of the word "abolition" in article 6 indicates that the covenant contemplates eventual abolition. SCHABAS, *supra* note 23, at 53. This position allowed retentionist nations to become party to the covenant without first having to abolish capital punishment. *Id.* This was important since the covenant was meant to affect far more than just capital punishment. For a detailed description of the drafting of this covenant and the process by which it was ultimately adopted by the full General Assembly, see *id.* at 53-135.

further measures, designed to protect the rights of those facing capital punishment around the world. The "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" enumerates the essential restrictions and safeguards on the exercise of capital punishment.<sup>66</sup> Although Amnesty International scholars believe that the provisions of this resolution represent restatements of the protections guaranteed under the Covenant on Civil and Political Rights,<sup>67</sup> these safeguards are significantly more specific and provide greater protection to those subject to capital punishment.<sup>68</sup> Even though the United Nations still has not adopted an abolitionist posture towards world-wide use of the death penalty, the new safeguards send an unambiguous message to retentionist nations that international organizations recognize capital punishment as a ripe area for human rights abuses and the need for it to be regulated and monitored.

At the close of 1989, the U.N. General Assembly took affirmative steps towards establishing an international standard advocating the world-wide abolition of the death penalty by adopting the Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at the Aboli-

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66. G.A. Res. 39/118, U.N. GAOR, 39th Sess., Supp. No. 12, at 19, U.N. Doc. A/RES/39/119 (1984) [hereinafter *Safeguards*].

67. *WHEN THE STATE KILLS*, *supra* note 2, at 35.

68. The resolution states in relevant part:

1. In countries which have not yet abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes, with lethal or extremely grave consequences.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death penalty be carried out on pregnant women, or on new mothers or persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial . . . including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceeding.

6. Anyone sentenced to death shall have the right to an appeal to a court of highest jurisdiction, and steps shall be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.



tion of the Death Penalty.<sup>69</sup> The preamble to the Protocol explicitly indicates the signatories' objective of attaining an international commitment to abolish the death penalty, asserting that "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>70</sup> Even though this protocol is optional, it unequivocally voices its opposition to the continued use of capital punishment.<sup>71</sup> In addition, unlike other international agreements, the Second Optional Protocol explicitly states that, as a general rule, signatory parties may not ratify the treaty or become signatory parties while also making reservations to it.<sup>72</sup> This international instrument is open to any member of the United Nations who previously signed the International Covenant on Civil and Political Rights.<sup>73</sup> Although the United States ratified the Covenant in 1993, the United States made a reservation to Article 6 dealing with the right to life and the use of capital punishment.<sup>74</sup> Because the United States may not make a similar reservation to the Optional Protocol, it is unlikely that it will ratify the supplemental treaty in the near future.

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Safeguards, *supra* note 66.

69. Second Optional Protocol, *supra* note 19, pmb. This protocol is a supplement to the International Covenant on Civil and Political Rights. See *supra* note 61 for article 6 of the International Covenant (pertaining to capital punishment). Traditionally, protocols were commonly regarded as the record of an agreement which is less formal than a treaty or convention. ERNEST SATOW, A GUIDE TO DIPLOMATIC PRACTICE 339 (1962). Protocols may be either an independent agreement or a supplement to a convention drawn up by the same negotiators explaining or interpreting the provisions of the convention. JAMES R. FOX, DICTIONARY OF INTERNATIONAL & COMPARATIVE LAW 356 (1992). Protocols are frequently used to amend multilateral international agreements, to prolong their existence, or to qualify their meaning. SATOW, *supra*, at 339. Since it is an optional protocol, all those nations which have signed or ratified the original covenant are not automatically bound to the supplementary protocol. *Id.* This enables a greater number of parties to be bound to the covenant as a whole. If a supplementary protocol was not optional, it is fair to assume that most retentionist nations probably would not remain signatories to the original covenant.

70. Second Optional Protocol, *supra* note 19, pmb.

71. Article 1 of the Second Optional Protocol states:

1. No one within the jurisdiction of a State party to the present Optional Protocol shall be executed.
2. Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Second Optional Protocol, *supra* note 19, art. 1.

72. *Id.* art. 2. Article 2 states in relevant part:

1. No reservation is admissible to the present protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.
2. The State party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

*Id.* For an explanation of how parties make reservations yet still ratify international agreements, see *supra* notes 64-65 and accompanying text.

73. Second Optional Protocol, *supra* note 19, art. 7. See *supra* note 61 for the relevant death penalty provisions of the International Covenant on Civil and Political Rights.

74. See *supra* note 61.

## 2. Recent Efforts by the United Nations

In the final months of 1994, the General Assembly considered a draft resolution calling for "a world-wide ban on capital punishment by the year 2000."<sup>75</sup> After active debates, several proposed drafts, no-action motions, and amendments, the General Assembly's Social, Humanitarian and Cultural Committee ultimately rejected the resolution.<sup>76</sup> The high number of death sentences imposed and executions carried out around the world motivated the original support of the draft resolution.<sup>77</sup> The proponents of the resolution believed that retentionist nations should amend their legislation to ensure full respect for the right to life.<sup>78</sup> They did not accept the position that the death penalty is an exception to the right to life. In addition, they believed that evidence suggesting capital punishment serves as a deterrent to future crime was unconvincing.<sup>79</sup>

The proposed draft resolution attempted to place a world-wide moratorium on executions.<sup>80</sup> To give effect to this resolution, the draft invited all nations which had not signed existing human rights treaties directed at the abolition of the death penalty to do so.<sup>81</sup> Germany's representative to the United Nations, Christian Mook, explaining the resolution's objective, stated that "[w]hat is involved is the human quality of everybody, even somebody who is an assassin. Of course we don't want to condone any murder or any heinous act, but human beings should never be the object of state's actions and especially not the object of retaliation or revenge."<sup>82</sup> Another fundamental objective of the draft resolution was to urge those countries which continue to use the death penalty to "exclude pregnant women and juveniles from capital executions."<sup>83</sup> Human rights organizations and abolitionist nations take firm positions that such executions dra-

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75. See *Weekend Edition*, *supra* note 21. General Assembly draft resolutions, like Security Council resolutions, are not binding on U.N. members. Consequently, these pronouncements are intended to indicate the relative positions of the Member States. *U.N. Postpones Vote on Death Penalty*, UPI, Dec. 7, 1994, available in LEXIS, Nexis Library, UPI File. Nevertheless, if this draft resolution had been passed and supported by an overwhelming majority of the Member States, it would have sent an affirmative message to those countries who continue to use the death penalty that they too should abolish its use.

76. Evelyn Leopold, *U.N. Panel Defeats Resolution on Capital Punishment*, Reuters Word Service, Dec. 10, 1994, available in LEXIS, Nexis Library, Reuters File.

77. *Weekend Edition*, *supra* note 21. Italy, Ireland and Germany led the abolitionist movement in the United Nations, and throughout most of the debates, they were joined by approximately 50 other nations. *Id.* See also *U.N. Postpones Vote on Death Penalty*, *supra* note 75. After an amendment sponsored by Singapore was added to the draft resolution, see *infra* notes 89-99 and accompanying text, approximately 40 states, mostly from Europe and Latin America, continued to support the draft resolution. Derwin Pereira, *Singapore Opposed Draft As It Was "Wrong and One-Sided,"* THE STRAITS TIMES (Singapore), Dec. 12, 1994, at 1.

78. *Weekend Edition*, *supra* note 21.

79. *Id.*

80. *Id.*

81. *U.N. Rejects Move to End Death Penalty*, UPI, Dec. 9, 1994, available in LEXIS, Nexis Library, UPI file.

82. *Weekend Edition*, *supra* note 21.

83. *U.N. Rejects Move to End Death Penalty*, *supra* note 81.

matically violate fundamental human rights.<sup>84</sup> Although the draft resolution itself would not have been binding, international treaties pertaining to civil and political rights and the rights of children nevertheless would have been used to enforce the ban on executions of pregnant women and children.<sup>85</sup>

Opponents of the resolution, led by Singapore and numerous Islamic countries,<sup>86</sup> sought to defeat the draft resolution on two grounds. First, Singapore's representative argued that because there was no clear consensus on the issue of capital punishment and because the death penalty had become such a divisive issue, the General Assembly should not enact a draft resolution condemning its continued use.<sup>87</sup> On the day that the General Assembly's Social, Humanitarian and Cultural Committee was scheduled to take action on the draft resolution, Singapore, supported by Algeria, Bangladesh, and Egypt, proposed a no-action motion aimed at forestalling a vote on the resolution by the committee and ultimately the full General Assembly.<sup>88</sup> Although the motion was defeated by a comfortable majority,<sup>89</sup> the Committee decided to postpone action so that opponents to the draft could propose amendments and all Members could consult with their governments regarding both the draft resolution and suggested amendments.<sup>90</sup>

The draft resolution opponents' second major objection was embodied in an amendment introduced by Singapore.<sup>91</sup> This amendment, which a majority of the Committee members voted to include in the draft resolution,<sup>92</sup> explicitly recognized the "sovereign rights of states to determine the legal measures and penalties which are appropriate in their societies to combat serious crimes effectively."<sup>93</sup> Singapore's Permanent Representative to the United Nations, Chew Tai Soo, explained that the resolution was overly one-sided, as it "ignored the plight of countless victims of murderers, drug traffickers and other serious criminals."<sup>94</sup> In his view, decisions of criminal justice constitute an essential part of the sovereign right of all nations.<sup>95</sup> Although he said that he respects the decisions of other governments to abolish the death penalty in their own nations, Chew Tai Soo firmly believes that nations should not force their values and systems of

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84. *WHEN THE STATE KILLS*, *supra* note 2, at 38-40.

85. Leopold, *supra* note 76.

86. *U.N. Rejects Move to End Death Penalty*, *supra* note 81.

87. Leopold, *supra* note 76.

88. *United Nations Package: Wednesday Highlights*, Federal News Service, Dec. 8, 1994, available in LEXIS, Nexis Library, Federal News Service File.

89. *Id.* Sixty-five nations supported the motion, while 74 voted against it, and another 20 abstained. *Id.*

90. *U.N. Postpones Vote on Death Penalty*, *supra* note 75.

91. *U.N. Rejects Move to End Death Penalty*, *supra* note 81.

92. Leopold, *supra* note 76. Seventy-one nations voted to adopt the amendment, while 65 nations voted against it, and 21 nations abstained. *Id.*

93. Pereira, *supra* note 77. In addition, the amendment deleted references to international law in all but one provision. Leopold, *supra* note 76.

94. Pereira, *supra* note 77.

95. *Id.*

justice on others.<sup>96</sup> He explained that “what works in other countries need not work in Singapore, and vice-versa.”<sup>97</sup> China’s representative, Wang Xuexian, took a more belligerent position against the original draft resolution, suggesting that it was another example of wealthy nations imposing their own values on developing nations.<sup>98</sup>

The draft resolution lost substantial support once Singapore’s amendment was adopted. All of the resolution’s original sponsors withdrew their sponsorship, and several of them abstained from the final vote, as they were unwilling to support the amendment.<sup>99</sup> The Social, Humanitarian and Cultural Committee defeated the draft resolution by a vote of forty-four to thirty-six, with seventy-four nations abstaining.<sup>100</sup> At present, it is unclear whether this defeat will have a significant effect in discouraging the United Nations from taking an affirmative role in the abolitionist movement in the near future. Nevertheless, the large number of abstentions from the final vote may signify that there is significant support for future resolutions.

### 3. *Efforts by Other International Organizations*

The United Nations was not the only international organization to work towards establishing an international standard against the continued use of capital punishment during the years following World War II. In 1978, the American Convention on Human Rights became the first international treaty to take an unequivocal abolitionist stand on the use of the death penalty.<sup>101</sup> Article 4 of the treaty, entitled “Right to Life,” specifically addresses capital punishment and delineates the international standards to which the parties agreed to adhere.<sup>102</sup> Unlike other U.N. treaties, this treaty established restrictive rules on the use of the death penalty instead

96. *Id.*

97. *Id.*

98. Leopold, *supra* note 76.

99. *Id.* Belgium, Denmark, France, Germany and Spain all withdrew their sponsorship and abstained from the vote while Italy and Ireland withdrew their sponsorship but did vote on the final resolution. *Id.*

100. Leopold, *supra* note 76. The United States voted against the resolution; however, the United States voted against the Singapore Amendment. *Id.*

101. American Convention, *supra* note 19. Although similar provisions are included in the United Nation’s International Covenant on Civil and Political Rights and in the General Assembly’s resolution establishing Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, this treaty predates each of them. *See supra* notes 61, 68 and accompanying text.

102. Article 4 states in relevant part:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in the states that have abolished it.

of merely advocating heightened respect for life and suggesting eventual abolition of the death penalty. It was particularly innovative in forbidding capital punishment for political offenses or related common crimes and forbidding the execution of individuals under the age of eighteen, individuals over the age of seventy, and pregnant women.<sup>103</sup> This treaty was also the first to limit the exercise of the death penalty to only "the most serious crimes," in those countries that have not abolished its use and to forbid the extension of capital punishment to new crimes. As of January 11, 1988, twenty countries had ratified the Convention.<sup>104</sup> Although the United States was an initial signatory, the U.S. Congress never ratified it.<sup>105</sup>

In February 1985, European nations took an even greater step towards an international standard promoting the abolition of the death penalty when they became parties to Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.<sup>106</sup> The European Convention on Human Rights,<sup>107</sup> which Protocol No. 6 supplements, was signed on November 4, 1950, and entered into force on September 3, 1953.<sup>108</sup> Article 2 of the European Convention recognizes capital punishment as an exception to the right to life, and it does not include the limitations and safeguards governing the use of capital punishment in retentionist nations

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

American Convention, *supra* note 19, art. 4.

103. *Id.*

104. RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: A COMPILATION OF TREATIES, AGREEMENTS AND DECLARATIONS OF ESPECIAL INTEREST TO THE UNITED STATES 190.26 (1983). These countries include: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Suriname, Uruguay, and Venezuela.

105. See *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. (1979).

106. Protocol No. 6, *supra* note 19. Austria, Belgium, Denmark, France, Germany, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, and Switzerland were the first signatories to this Protocol. All of the European nations signed the treaty on April 28, 1983. SCHABAS, *supra* note 23, at 237-38. Later in 1983, Greece and Italy became signatories. *Id.* at 238. Iceland, Finland, Liechtenstein, and San Marino signed in 1989. *Id.* In 1990, Hungary became a signatory party, the first of the former Eastern Bloc nations to do so. *Id.* In 1991, Czechoslovakia and Malta became signatories. *Id.* Belgium, Czechoslovakia, and Greece are the only signatory parties which have yet to ratify the Protocol. *Id.* Although they are signatory parties to the European Convention, the United Kingdom, Ireland, and Turkey have not signed Protocol No. 6. *Id.* For a more thorough description of the European Convention and the drafting of Protocol No. 6, see *id.* at 211-38.

107. Convention for the Protection of Human Rights and Fundamental Freedoms, 1955, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter European Convention].

108. *Id.*

that are found in subsequent international treaties.<sup>109</sup> Nevertheless, the European Convention served as a model for the International Covenant on Civil and Political Rights and the American Convention on Human Rights.<sup>110</sup> Because nearly all of Western Europe had become, at least in practice, abolitionist for ordinary crimes including murder, the Council of Europe recognized the need to take a more affirmative stance against the continued use of capital punishment.<sup>111</sup>

The preamble to Protocol No. 6 indicates that the motivation behind this addition to the European Convention on Human Rights was the recognition that several Member States of the Council of Europe had experienced an evolution which "expresses a general tendency in favour of abolition of the death penalty."<sup>112</sup> Article 1 explicitly states that "[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed."<sup>113</sup> Complete abolition under all circumstances is not advocated, because the framers of the protocol permitted signatory nations to maintain laws allowing imposition of death sentences for acts committed in time of war or during a time of imminent threat of war.<sup>114</sup> Those countries which ratify and/or become signatory parties to Protocol No. 6 may not make reservations as to any of its provisions,<sup>115</sup> which is also the case with the U.N. Second Optional Protocol to the International Covenant on Civil and Political Rights.<sup>116</sup> As of February 1, 1993, nineteen nations had ratified Protocol No. 6.<sup>117</sup> Some scholars have gone so far as to say that "for all intents and purposes, we can speak of Europe as being an abolitionist continent."<sup>118</sup>

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109. SCHABAS, *supra* note 23, at 212. See *supra* notes 61, 68, and 104 and accompanying text. Article 2 of the European Convention states in relevant part:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
  - a. in defence [sic] of any person from unlawful violence;
  - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

European Convention, *supra* note 107, art. 2. Turkey is the only country which is a signatory to the Convention and continues to use the death penalty. SCHABAS, *supra* note 23, at 213. For a more thorough discussion of Turkey's current use of capital punishment, see *infra* note 118.

110. SCHABAS, *supra* note 23, at 212. See *supra* notes 61 and 104 and accompanying text for discussion of these treaties.

111. SCHABAS, *supra* note 23, at 211-12.

112. Protocol No. 6, *supra* note 19, pmb1.

113. *Id.* art. 1.

114. *Id.* art. 2.

115. *Id.* art. 4.

116. See *supra* notes 69-73 and accompanying text.

117. SCHABAS, *supra* note 23, at 323.

118. Schabas, *supra* note 29, at 2-3. Turkey is the only country in Western Europe that continues to use the death penalty for all crimes. ROGER HOOD, *THE DEATH PENALTY*:

The evolution of international standards towards the abolition of capital punishment demonstrates that the issue of whether the death penalty should continue to be used is not only an important domestic concern for nations all over the world, but it has become an important consideration in public international law. In order to adequately assess whether retention of capital punishment is the correct course for one's own country, one must consider international trends both in individual countries and collectively in international organizations. It is inappropriate to focus on specific aspects of or problems with the death penalty without recognizing the broader context of world wide use and acceptance of capital punishment. More specifically, it is wrong to focus immediately on the details of discretionary power and the death penalty in those countries which retain the practice without noting the growing international trend towards the abolition of the death penalty on human rights grounds.

## II. Discretion in the United States

### A. Constitutional Treatment of the Death Penalty in General

In the United States, much of the decision of whether someone will receive the death penalty is made outside of the courtroom. Capital proceedings involve a complex process where many groups and individuals have the responsibility of determining who will live or die.<sup>119</sup> Actors in both the

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A WORLD-WIDE PERSPECTIVE 9 (1989). Although there had not been any executions in Turkey since 1984, the Turkish Parliamentary Judicial Commission approved a death sentence in November 1993. If the Turkish Parliament ever ratifies this sentence, the execution would likely occur within days. Memorandum from the Amnesty International Themes Team and Research Team to the Death Penalty Coordinators, *Turkey: Death Penalty Action Circular* (June 24, 1994) (on file with author). In March 1994, eight Kurdish members of the Turkish Parliament were arrested and charged with offenses which by law could have resulted in the death penalty. *Id.* However, at a hearing on November 24, 1994, the state security court dropped the charges and announced that the eight men would be charged for different offenses carrying sentences resulting in varying prison terms. *Court Changes Tack to Lift Death Penalty Threat to Kurdish MPs*, Agence France Presse, available in LEXIS, Nexis Library, Agence France Presse File. At the close of 1995, Turkey still had not carried out any executions. Even though the Turkish courts continue to impose death sentences on particular criminals, commentators suggest that such sentences are routinely reduced to life sentences. *Turkish Court Sentences Leftist Rebels to Death*, REUTERS WORLD SERVICE, Dec. 19, 1995, available in LEXIS, Nexis Library, Int'l News Service File.

The United Kingdom provides for capital punishment for a few exceptional crimes committed by members of the armed forces during wartime, such as treason and espionage. *WHEN THE STATE KILLS*, *supra* note 2, at 226. Nevertheless, there has not been an execution in the United Kingdom since 1964. *Id.* In accordance with Protocol 6, some signatory parties have laws which allow them to reintroduce capital punishment in times of war or imminent threat of war. *SCHABAS*, *supra* note 23, at 324. For example, articles 5 and 27 of Switzerland's Military Criminal Code allow for the use of the death penalty "in time of war or imminent threat of war, within the meaning of article 2 of Protocol No. 6." *Id.* The Swiss government may also use the death penalty during wartime on grounds of necessity according to legislation passed by the Federal Council. *Id.*

119. See BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 10-18 (1987). Nakell and Hardy illustrate the major discretionary stages of the capital punishment process using a flow chart. *Id.* at 12-13.

legislative and judicial processes play roles in deciding whether to impose a death sentence.

The legislature decides when it determines who is eligible for the death penalty by specifying which crimes warrant the death penalty, which special circumstances must be identified before the prosecutor may ask for the death penalty, and which aggravating circumstances and mitigating factors must be considered by the sentencing jury.<sup>120</sup> The prosecutor

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120. In the United States, trials for capital murder are usually bifurcated. In the first stage, the suspect's guilt or innocence is determined. If the suspect is found guilty, a separate sentencing proceeding is conducted to determine whether the defendant shall be sentenced to death or a term of imprisonment. Professor Sundby explained the rationale of a bifurcated trial:

Splitting the decision-making process into two distinct stages allows the Court to justify treating aggravating and mitigating factors differently by maintaining that they address distinct aspects of the sentencer's decision . . . . [The guilt] stage enhances reliability by ensuring that the sentencer has considered all relevant factors pertaining to the individual's culpability and character before making its "reasoned moral response."

Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1164 (1991). The jury at the second proceeding is usually, but not necessarily, the same jury that decided on the defendant's guilt. For example, current Texas death penalty legislation provides:

If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to [the] sentence . . . . The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3(a) (West 1994). Section 210.6(2) of the Model Penal Code also requires that a separate proceeding be held "to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death." MODEL PENAL CODE § 210.6(2) (Proposed Official Draft 1962). Professors LaFave and Israel explain that capital sentencing hearings are highly regulated and impose significantly more requirements on the parties than non-capital sentencing proceedings. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 26.1, at 1088 (2d ed. 1992). Specifically, capital sentencing hearings are subject to

burden of proof requirements similar to those imposed for the offense itself, to various restrictions regarding the type of evidence that can be introduced with respect to mitigating and aggravating factors, to special restrictions relating to the prosecution's argument to the jury and to the judge's charge to the jury regarding its sentencing function, to limitations on the process utilized where the judge has the authority to impose a sentence of death notwithstanding a jury recommendation of a life sentence, and to special requirements for appellate review of the death sentence. The end result is a sentencing procedure which is quite distinct from the typical sentencing procedure and which much more closely resembles the trial on the issue of guilt.

*Id.* The rules of procedure governing the conduct of capital cases are determined by state law, thus they may vary considerably from state to state. Although the U.S. Supreme Court has never held that a capital case must be bifurcated, the Court's holdings in both *Furman v. Georgia*, *infra* notes 146-51 and accompanying text, and *Gregg v. Georgia*, *infra* notes 166-72 and accompanying text, require that the death penalty not be imposed arbitrarily or capriciously and that the sentencing body is "apprised of the information relevant to the imposition of sentence and provided with standards to guide



decides when he or she determines whether to prosecute the crime as a capital offense and whether to offer or accept a plea bargain.<sup>121</sup> The judge decides with each pre-trial determination she makes and when she rules on the admissibility of evidence to be considered by the sentencing jury when it assesses aggravating and mitigating circumstances.<sup>122</sup> The trial jury decides when it finds the defendant guilty or innocent. The sentencing jury decides when it selects or rejects the death penalty. The appellate judges decide when they affirm, reverse, or dismiss a death penalty conviction on appeal, either on direct review or in a habeas corpus action. The governor decides when he considers, and responds to, a petition for clemency. The Supreme Court decides when it reviews death penalty statutes in light of the protections provided in the U.S. Constitution and the Bill of Rights. Finally, the American public decides when it puts political pressure on prosecutors, legislatures, and governors to seek the death penalty, to provide for the death penalty, and to ensure that death sentences are carried out or not.

This multi-phase procedure may be viewed as a beneficial and necessary protection of accused criminals because it provides many opportunities for the accused to escape the death penalty. However, this process also can be viewed as problematic, as the many opportunities for discretion can lead to inconsistent and arbitrary application of the death penalty. This Note does not analyze each discretionary stage separately or the processes through which each actor or group makes its decision. Rather, it focuses on the constitutional limitations and requirements on the exercise of discretion which have been established by the U.S. Supreme Court.

The U.S. Constitution does not address explicitly the legality or application of the death penalty in its text. The possibility of capital punishment, however, is suggested in the opening clause of the Fifth Amendment, which declares that "[n]o person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."<sup>123</sup> Since the death penalty was recognized as an available means of punishment at the time of the drafting of the U.S. Constitution and the Bill of Rights,<sup>124</sup> courts traditionally have assumed that capital

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its use of the information." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Justice Stewart, writing for the plurality in *Gregg* explained that "[a]s a general proposition these concerns are best met by a system that provides for a bifurcated proceeding . . . [However,] each distinct system must be examined on an individual basis." *Id.* The constitutional tests established by the court in *Gregg* and *Furman* are sufficiently particular such that it is unlikely that a different system would satisfy the requirements. DAVID PANNICK, *JUDICIAL REVIEW OF THE DEATH PENALTY* 155 (1982).

121. See *infra* part II.D.

122. For example, whenever a judge rules on a suppression motion, she affects the defendant's chances of being found guilty for a capital offense. Also, the judge's determinations during *voir dire* can affect the ultimate determination.

123. U.S. CONST. amend. V (emphasis added).

124. The European settlers brought capital punishment to the colonies. At that time, the death penalty was not prescribed by statute, but rather was part of the English common law. John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143,

punishment is not prohibited by either the Eighth Amendment<sup>125</sup> or the due process clauses of the Fifth and Fourteenth Amendments.<sup>126</sup> The Supreme Court never has held that capital punishment is *per se* unconstitutional. In fact, prior to 1968, the Supreme Court did not consider any cases where the validity of a death sentence was at issue, operating under the assumption that the death penalty was constitutional.<sup>127</sup> This fundamental assumption is best illustrated by Chief Justice Warren's majority opinion in *Trop v. Dulles*, in which he wrote:

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.<sup>128</sup>

In this and in other cases, the Court seems reluctant to mitigate its reliance on the notion that death is a valid mode of punishment under the Constitution. Even though the Court has played a significantly more active role in regulating the use of capital punishment during the last twenty-five years by applying the Eighth Amendment as a limit to state death penalty legislation,<sup>129</sup> there have been only occasional dissenting arguments in favor of finding the death penalty *per se* unconstitutional under the Eighth Amendment.<sup>130</sup>

146-47 (1986). By the time of the American Revolution, the common law established a mandatory death penalty for treason, murder, mayhem, arson, rape, robbery, burglary and larceny. *Id.* The British Parliament, at that time, extended the coverage of capital punishment to over 200 felonies. *Id.* See also PHILIP E. MACKEY, *VOICES AGAINST DEATH* xi (1976).

125. The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted.*" U.S. CONST. amend. VIII (emphasis added).

126. The Fifth Amendment's due process clause states that "No person shall . . . be deprived of life, liberty or property without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment's due process clause states that "no State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

127. WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES* 4 (1991).

128. 356 U.S. 86, 99 (1958).

129. See *infra* part II.B.

130. See, e.g., the opinions of Justices Brennan and Marshall in *Furman v. Georgia*, 408 U.S. 238, 269-306, 360-71 (1972). On February 22, 1994, Justice Blackmun's dissenting opinion from the Supreme Court's order denying the review of a Texas death penalty case, *Callins v. Collins*, 114 S. Ct. 1127 (1994), proclaimed that, after over 20 years of upholding the constitutionality of the death penalty, he had concluded that it was in fact unconstitutional. Linda Greenhouse, *Death Penalty is Renounced by Blackmun*, N.Y. TIMES, Feb. 23, 1994, at A1. Blackmun's opinion explained that:

[D]espite the effort of the States and Courts to devise legal formulas and procedural rules to meet this daunting challenge [of consistent, fair, and error-free determination of whether a person shall live or die], the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake . . . . From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority

Because the majority position on the Supreme Court consistently has been that capital punishment is permissible under the U.S. Constitution, prior to 1968 the Court left the issue of death penalty legality to the states. In 1968, however, the Court reversed its traditional approach in *Witherspoon v. Illinois*, in which the Court reversed a death sentence after finding an integral procedure in the state's sentencing process to be invalid.<sup>131</sup> For the first time, the Supreme Court elevated the question of the procedural application of the death penalty to the constitutional level.<sup>132</sup> Although the particular issue addressed in this case involved the question of when a trial court is permitted to exclude jurors and for what reasons it may so exclude,<sup>133</sup> this case opened the door to further Supreme Court review of closely related death sentencing procedures.<sup>134</sup> As a practical matter, *Witherspoon* had a significant effect on states' criminal procedure, vacating approximately 150 capital sentences throughout the United States.<sup>135</sup>

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of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed . . . [N]o combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies . . . The problem is that the inevitability of factual, legal and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution . . . "[T]he death penalty . . . must be abandoned altogether."

*Callins*, 114 S. Ct. at 1129-38 (Blackmun, J., dissenting) (quoting *Godfres v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring)). In response to Blackmun's surprise announcement, Justice Scalia's opinion in *Callins* reiterated the Court's belief that the death penalty is constitutional. Scalia wrote:

Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans . . . If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual and unhistorical contradictions within 'the Court's Eighth Amendment jurisprudence' should not prevent them.

*Callins*, 114 S. Ct. at 1128.

131. 391 U.S. 510 (1968). This case considered whether an Illinois statute that allowed the prosecution to challenge potential jurors who opposed or merely had conscientious scruples against capital punishment for cause in murder trials was constitutionally permissible. The Court found that even though the defense did not prove that the particular jury in this case was biased, "it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." *Id.* at 518.

132. WELSH S. WHITE, *LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES* 33 (1984).

133. See *supra* note 131. The Court held that a potential juror cannot be excluded for cause because of his views on the death penalty "unless (1) his views are unmistakably clear, and (2) his views would compel him to vote automatically against imposition of the death penalty or would prevent him from making the required impartial determination of guilt or innocence." *Id.* See also WHITE, *supra* note 132, at 34.

134. *Id.*

135. *Id.*

The impact of *Witherspoon* soon became obvious when, only three years later, the Court evaluated death penalty legislation in terms of whether it satisfied the requirements implicitly included in the U.S. Constitution. The Court considered whether the nearly universal practice of giving a sentencing jury virtually unlimited discretion in deriving its sentence was valid under the Eighth Amendment.<sup>136</sup> This new focus on capital sentencing procedures had a profound effect on the death penalty's constitutional status as the Eighth Amendment began to play a role in limiting how it was applied. Since 1972, the Court has tried strenuously to craft a workable constitutional standard governing state use of the death penalty.

## B. Constitutional Treatment of Discretion in Death Sentencing<sup>137</sup>

### 1. *Furman v. Georgia—Protection Against Arbitrary and Inconsistent Sentencing*

Sentencing discretion is one of several death penalty issues on which the Supreme Court has focused significant attention over the past twenty-five years.<sup>138</sup> Starting in 1972, the Court worked to establish meaningful

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136. In 1972, the Supreme Court granted *certiorari* on the question of whether "the imposition and carrying out of the death penalty in [these cases] constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Aikens v. California, Furman v. Georgia, Jackson v. Georgia and Branch v. Texas*, 403 U.S. 952 (1971). See *infra* notes 140-43 and accompanying text.

137. The constitutional development of this area of the law involves many cases, numerous interrelated issues, and many intermediary steps. A thorough investigation of Eighth Amendment law is beyond the scope of this Note. Justice Scalia summarized the history of the Supreme Court's Eighth Amendment jurisprudence in his partial concurrence to *Walton v. Arizona*, 497 U.S. 639, 656-64 (1990). For a more detailed presentation and analysis of the significant issues, see generally Sundby, *supra* note 120; Poulos, *supra* note 124; Sean Fitzgerald, *Walking a Constitutional Tightrope: Discretion Guidance and the Texas Capital Sentencing Scheme*, 28 Hous. L. Rev. 663 (1991); William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from its Death Penalty Standards*, 12 Fla. St. U. L. Rev. 737 (1985).

138. Another critical issue is race, gender, and the death penalty. See, e.g., *Turner v. Murphy*, 476 U.S. 28 (1986); *Spencer v. Georgia*, 500 U.S. 960 (1991) (denial of *certiorari*) (Kennedy, J., concurring). See also Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); Elizabeth Rapport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC'Y REV. 367 (1991); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, LAW & SOC'Y REV. 587 (1985).

The death penalty and the law of habeas corpus also has received considerable attention from both the Supreme Court and commentators. See, e.g., *Herrera v. Collins*, 113 S. Ct. 853 (1993) (holding that a showing of innocence does not entitle a petitioner to habeas relief); *Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that the adequate and independent state grounds doctrine bars federal habeas review when a state court's refusal to address petitioner's federal claims is based on a procedural default); Donald P. Lay, *The Writ of Habeas Corpus: A Complex Process for a Simple Procedure*, 77 MINN. L. REV. 1015 (1993); Vivian Berger, *Justice Delayed or Justice Denied? - A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). See generally COYNE & ENTZEROTH, *supra* note 34, at 495-583.

guidelines for capital sentencing that would satisfy the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>139</sup> In 1971, the Supreme Court granted certiorari for four death penalty cases<sup>140</sup> in order to consider whether "the imposition and carrying out of the death penalty in [these cases] constitutes cruel and unusual punishment."<sup>141</sup> In each case, the sentencing juries had exercised unlimited discretion in deciding whether to prescribe death or life imprisonment. As Justice Douglas explained in his concurrence in *Furman v. Georgia*, "[j]uries (or judges, as the case may be) ha[d] particularly untrammelled discretion to let an accused live or die."<sup>142</sup> Such unbridled discretion was not unique to the three states involved in these cases, but rather had become the general practice in capital sentencing throughout the country. Nearly all of the forty-one states whose laws provided for capital punishment conferred unfettered discretion on the sentencing body.<sup>143</sup>

The states had no reason to believe that there were constitutional difficulties with such a sentencing scheme. For this reason, the Supreme Court's holding in *Furman v. Georgia*<sup>144</sup> came as an enormous surprise, having the effect of "wiping the constitutional slate clean" and throwing the law of capital punishment "into a state of flux."<sup>145</sup> In a per curiam decision,<sup>146</sup> the Court held that "the imposition and carrying out of the death penalty in these cases constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."<sup>147</sup> Because there was no majority opinion, the decision had the stunning effect of invalidating the sentencing schemes of a majority of the states without providing any meaningful guidance as to how the states should rewrite their statutes. At the same time, the Court's holding removed the death sentences which had been imposed on approximately 600 prisoners awaiting execution across the country and changed the course of many capital prosecutions moving

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139. Justice Douglas' concurrence in *Furman v. Georgia* explained that, prior to 1972, the Supreme Court had consistently assumed that "punishment by death is not cruel, unless the matter of execution can be said to be inhumane and barbarous." *Furman v. Georgia*, 408 U.S. 238, 241 (1972).

140. *Aikens v. California*, *Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas*, 403 U.S. 952 (1971).

141. *Id.*

142. 408 U.S. 238 at 248. In a footnote, Justice Douglas repeated part of Justice Brennan's dissenting opinion in *McGautha v. California*, 402 U.S. 183, 248 (1970), in which Justice Brennan criticized current death penalty legislation noting that capital sentencing procedures . . . are purposely constructed to allow the maximum possible variation from one case to the next, and [that] provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice.

408 U.S. at 248-49, n.11.

143. Poulos, *supra* note 124, at 144, 248 (Table 2).

144. 408 U.S. at 238.

145. Sundby, *supra* note 120, at 1150.

146. The five justices who supported the judgment filed separate opinions, and the four dissenters filed their own opinions as well. As a result, the opinion is 232 pages long in the U.S. Supreme Court Reports.

147. 408 U.S. at 239-40.

through the judicial process at that time.<sup>148</sup> Scholars have called this result "the legal equivalent of the Big Bang for capital punishment."<sup>149</sup> After *Furman*, if state legislatures wished to continue to use the death penalty they had to draft new legislation which more carefully channeled the judge or jury's sentencing discretion in order to avoid arbitrariness and inconsistent sentencing. This proved to be a difficult task as state legislatures were given little guidance.

## 2. *Mandatory Death Sentences*

Between 1972 and 1976, state legislatures attempted to draft death penalty statutes that would pass constitutional muster under the newly yet vaguely articulated standard. Twenty-two states took the extreme approach of completely eliminating sentencer discretion and implementing mandatory capital sentencing for particular crimes.<sup>150</sup> Thus, rather than causing state legislatures to consider whether the death penalty was a suitable sentencing option, *Furman* had the opposite effect of causing states to avoid unfettered discretion by imposing inflexible sentencing guidelines. Under such a statute, if a defendant was found guilty of one of the specifically designated crimes, he or she would be sentenced to death, without exception.<sup>151</sup> Once the trial jury reached its verdict, the particular circumstances of the case or defendant could not be considered.<sup>152</sup> The legislature had sole discretion over who would be subject to the death penalty, and so long as the Supreme Court held that such statutes were constitutional, the judiciary was limited greatly in its discretion.<sup>153</sup> With the decision to adopt a policy of mandatory capital sentencing, state legislatures were required to categorize capital offenses more carefully. More specifically, legislatures had to parse carefully the criminal code and change the penalties for antiquated crimes or those which would not warrant mandatory death sentences.<sup>154</sup> If citizens of a state did not support capital punishment for

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148. *Id.* at 416-17 (Powell J., dissenting).

149. Sundby, *supra* note 120, at 1152.

150. Poulos, *supra* note 124, at 199-200. These states included California, Delaware, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, Washington, and Wyoming. *Id.*

151. Poulos, *supra* note 124, at 201. For example, post-*Furman* legislation in Louisiana provided that "Whoever commits the crime of the first degree murder shall be punished by death." LA. REV. STAT. ANN. § 14:30 (1986).

152. Poulos, *supra* note 124, at 201. Although juries were not supposed to consider any mitigating factors unique to a particular defendant, juries in the guilt phase of capital trials tended to consider whether or not specific defendants deserved death. Sundby, *supra* note 120, at 1172-73. Professor Sundby explains that history demonstrates that sentencing bodies faced with schemes which allow for zero discretion will consistently refuse to follow the law. *Id.* at 1173. This "renegade discretion" will result in inconsistent and arbitrary sentencing as different juries may disagree on whether the evidence presented warrants a death sentence. *Id.* See *infra* notes 161-63 and accompanying text.

153. Poulos, *supra* note 124, at 201. Judges retained some degree of discretion with respect to rulings on the admissibility of evidence and their influence during jury selection.

154. *Id.*

particular offenses, they had to work within the normal legislative process: urging their representatives to redefine such offenses and electing someone else if the representatives refused.

The twelve states that did not respond by drafting mandatory death sentencing legislation attempted to provide juries with greater guidance in order to channel their sentencing discretion.<sup>155</sup> They modeled their legislation on Model Penal Code section 210.6,<sup>156</sup> which set forth the circumstances under which the death sentence should be excluded.<sup>157</sup> Most significantly, these statutes delineated which aggravating circumstances must be found by the jury in order to impose a death sentence and which mitigating circumstances might call for leniency in sentencing.<sup>158</sup> In addi-

155. *Id.* at 203-26.

156. MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

157. Section 210.6(1) states in relevant part:

- (1) *Death Sentence Excluded.* When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:
- (a) none of the aggravating circumstances enumerated in Subsection (3) of this section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or
  - (b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
  - (c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilt to murder as a felony of the first degree; or
  - (d) the defendant was under 18 years of age at the time of the commission of the crime; or
  - (e) the defendant's physical or mental condition calls for leniency; or
  - (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

*Id.* Subsection (2) of § 210.6 describes the procedure for capital sentencing, but is too long to be reproduced here. In particular, it explains that the sentencing phase must be a separate proceeding from the guilt or innocence phase, what evidence may be presented during the sentencing proceeding, and the discretionary power held by the judge and jury. *Id.* § 210.6(2). This subsection also introduces the concepts of aggravating and mitigating circumstances. *Id.*

158. According to § 210.6, the death penalty can only be imposed in cases where the judge or jury is able to identify at least one of the enumerated aggravating factors. If none of these factors apply to the specific case at trial, the death penalty is not an available sentence. Subsection (3) states in relevant part:

- (3) *Aggravating Circumstances*
- (a) The murder was committed by a convict under sentence of imprisonment.
  - (b) The defendant was previously convicted of another murder or felony involving the use or threat of violence to the person.
  - (c) At the time the murder was committed the defendant also committed another murder.
  - (d) The defendant knowingly created a great risk of death to many persons.
  - (e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit a robbery, rape or deviate intercourse by force or threat of force, arson, burglary, or kidnapping.
  - (f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
  - (g) The murder was committed for pecuniary gain.

tion, those statutes which most closely followed the Model Penal Code provided that death sentencing would be excluded when "the defendant was under 18 years of age at the time of the commission of the crime."<sup>159</sup> When Texas was forced to redraft its legislation following *Furman*, its new legislation had language which seemed to establish mandatory sentencing. However, the Texas courts interpreted the legislation as allowing for some degree of individualized sentencing discretion.<sup>160</sup>

Perhaps if more of the states had drafted their death penalty legislation using the Model Penal Code as a guide, the courts, including ultimately the Supreme Court, would not have increased their involvement in capital sentencing discretion issues. More specifically, the Model Penal Code version of death penalty legislation strove to achieve a balance between providing guidance for sentencing juries (which protected against pre-*Furman* era arbitrariness and inconsistency), and allowing for discretion in considering factors specific to the particular case and defendant.<sup>161</sup> Mandatory capital sentencing proved to be inflexible and did not eliminate problems of inconsistency and arbitrariness.<sup>162</sup>

It did not take long for challenges to mandatory death penalty statutes to reach the Supreme Court. One argument against mandatory sentencing is that it does not eliminate sentencer discretion. Sentencers faced with a

(h) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

*Id.* § 210.6(3). The sentencing body is entitled to consider the enumerated mitigating factors in order to determine whether "circumstances are sufficiently substantial to call for leniency." *Id.* § 210.6(3). Subsection (4) states in relevant part:

(4) Mitigating Circumstances

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

MODEL PENAL CODE § 210.6(4) (Proposed Official Draft 1962).

159. *Id.* § 201.6(1)(d).

160. Poulos, *supra* note 124, at 199. This is an example of how the judiciary is able to construe legislation to protect against inconsistency and arbitrariness. However, it is clear that such active participation by the judiciary in death sentencing may infringe on the legislature's role.

161. Sundby, *supra* note 120, at 1147-56. Professor Sundby has labeled this balance as being one between "guided discretion" and "individualized consideration." *Id.* at 1148.

162. Poulos, *supra* note 124, at 201; Sundby, *supra* note 120, at 1173.



perceived impossible moral choice are likely to find indirect ways to get around such rigid guidelines. Professor Sundby observed that

the history of the mandatory death penalty is that of the sentencer seeking a means to evade the law's mandate . . . [w]hether through the development of legal escape routes . . . or through the refusal of the sentencer to follow the law, discretion has inevitably crept into mandatory death penalty schemes and has created fissures of uncertainty within the legal framework.<sup>163</sup>

This suggests that under such a sentencing regime, trial jurors who are uncomfortable with applying a death sentence to a particular set of facts and circumstances may be more likely to find the defendant not guilty in order to avoid the mandatory sentence.<sup>164</sup> Although mitigating evidence would not be brought into the court for sentencing purposes, the trial jury would be sufficiently familiar with the particular facts and circumstances of the crime and the defendant. Individual jurors would be unable to avoid considering the penalty when determining guilt or innocence, despite court rules to the contrary.<sup>165</sup>

In 1976, the Supreme Court held in *Gregg v. Georgia*<sup>166</sup> and *Woodson v. North Carolina*<sup>167</sup> that mandatory death penalties were invalid under the Eighth Amendment because they did "not fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."<sup>168</sup> The plurality in *Woodson* rejected mandatory death penalties explaining that the offender's character, record, and the circumstances of the particular offense must be considered whenever death is considered as a possible punishment.<sup>169</sup> Similarly, in its

163. Sundby, *supra* note 120, at 1170-71.

164. *Id.* at 1170-74. Justices Stewart, Powell and Stevens noted that history supports this claim. Specifically, they wrote:

At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict . . . . Nineteenth century journalists, statesmen, and jurists repeatedly observed that jurors were often deterred from convicting palpably guilty men of first-degree murder under mandatory statutes . . . . The actions of sentencing juries suggest that under contemporary standards of decency, death is viewed as an inappropriate punishment for a substantial proportion of convicted first-degree murders. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions.

*Woodson v. North Carolina*, 428 U.S. 280, 293-95 (1976).

165. Sundby, *supra* note 120, at 1170-74.

166. 428 U.S. 153 (1976).

167. 428 U.S. at 280.

168. *Id.* at 303.

169. *Id.* at 304. Justice Stewart explained that mandatory sentencing treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of death . . . . We believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender

majority opinion in *Gregg v. Georgia*, where the Court upheld Georgia's capital sentencing statute,<sup>170</sup> the same three judges explained that: "[s]o long as the evidence introduced and the arguments made at the pre-sentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."<sup>171</sup> Thus, *Woodson* and *Gregg* invalidated a majority of the states' response to *Furman's* rejection of unbridled discretion. However, unlike in *Furman*, the Court addressed the basic Eighth Amendment parameters for capital punishment; the sentencer's discretion must be limited in terms of when the sentence can be imposed, but adequate discretion must remain so that the sentencing body is able to consider the specific circumstances of the defendant and the crime for which he or she has been convicted before it imposes the death sentence.<sup>172</sup>

### 3. *Guided Discretion—Aggravating and Mitigating Factors Designed to Guarantee Both Consistency and Individualized Consideration*

The Supreme Court decision in *Lockett v. Ohio*<sup>173</sup> further articulated the requirement that sentencing bodies consider the facts of the particular case when making their sentencing decisions. In this way, the Court broadened the scope of Eighth Amendment jurisprudence. Not only did it hold that individualized sentencing is permissible, but the majority indicated that individualized sentencing is essential in capital cases.<sup>174</sup> The Court recognized that there is no perfect sentencing procedure capable of guaranteeing a total absence of arbitrariness and inconsistency. However, allowing a

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and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty.

*Id.*

170. Petitioner challenged the statute claiming that it gave the sentencing body too much discretion and consequently failed to remove the "elements of arbitrariness and capriciousness condemned by *Furman*." *Gregg*, 428 U.S. at 155. The Georgia statute resembled the Model Penal Code statute, *supra* notes 156-59, in that the sentencing authority is required to find beyond a reasonable doubt one of the enumerated aggravating circumstances. Even if the judge or jury finds such an aggravating circumstance, they are not obligated to impose the death penalty. *Gregg*, 428 U.S. at 164-65.

171. *Id.* at 203-04.

172. Sundby, *supra* note 120, at 1153.

173. 438 U.S. 586 (1978).

174. *Id.* at 604-05. More specifically, the majority stated:

We recognized that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but in public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due [to] the uniqueness of the individual is far more important than in noncapital cases . . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

judge or jury to consider relevant mitigating factors will protect against instances where the death penalty is imposed in spite of factors which may call for a less severe penalty.<sup>175</sup>

The Court found that the Ohio statute under review in *Lockett* was constitutionally inadequate because it failed to permit the individualized consideration required by the Eighth Amendment.<sup>176</sup> Under the Ohio statute, the sentencing judge or jury was required to impose the death penalty in the case of aggravated murder unless the sentencer was able to identify one of three mitigating factors.<sup>177</sup> The majority found that "[t]he limited range of mitigating circumstances which may be considered by the sentencer . . . is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."<sup>178</sup>

The Court's more recent decision in *Harmelin v. Michigan*<sup>179</sup> suggests that the current Supreme Court may be reconsidering its Eighth Amendment jurisprudence, putting the goal of individualized sentencing in jeopardy. In *Harmelin*, the Court held that mandatory sentencing of life without the possibility of parole, without allowing the jury to consider any mitigating factors, did not constitute cruel and unusual punishment.<sup>180</sup> This decision suggests that the Court is becoming increasingly reluctant to find mandatory sentences to be unconstitutional under the Eighth Amendment. As Justice Scalia, writing for the plurality, explained:

Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our nation's history . . . . [M]andatory death sentences abounded in our first Penal Code. They were also common in the several States—both at the time of the founding and throughout the 19th century . . . . There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is "mandatory."<sup>181</sup>

Justice Scalia did not explicitly state that he was against individualized sentencing in death penalty cases in this decision,<sup>182</sup> however, he made it

*Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 607. The enumerated factors included:

- (1) The victim of the offense induced or facilitated it.
- (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
- (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

*Lockett v. Ohio*, 438 U.S. 586, 607 (1978) (citing Ohio Rev. Code Ann. § 2929.04(B) (1975)).

178. *Lockett*, 438 U.S. at 608.

179. 501 U.S. 957 (1991).

180. *Id.* at 994-96.

181. *Id.* at 994-95.

182. Justice Scalia's partial concurrence in *Walton v. Arizona*, 497 U.S. 639, 656 (1990), more clearly demonstrates his objection to current Eighth Amendment jurisprudence with respect to the death penalty. In *Walton*, Scalia explained that *Furman's*

clear that the current Court would not extend the protection to sentences of mandatory life in prison.<sup>183</sup> The Court has drawn the constitutional line at death, due to its irrevocability and its rejection of convict rehabilitation, and "see[s] no basis for extending [this protection] further."<sup>184</sup>

At the present time, Justice Scalia's desire to overturn *Lockett* and thereby significantly limit a judge or sentencing jury's ability to consider mitigating circumstances has remained a minority position. Nevertheless, it is unclear whether the Court will continue ardently to protect a convict's right to introduce mitigating evidence.<sup>185</sup> After more than two decades of active Court involvement in regulating the use of the death penalty through its construction of the Eighth Amendment, the Court may start to retreat and grant greater discretion to the States. This pattern seems to be inconsistent with a growing trend among international organizations of moving towards total abolition of capital punishment.

### C. Executive Clemency as an Essential Final Backstop<sup>186</sup>

Virtually every state constitution in the United States confers upon a state governor the power to commute a death sentence into a sentence of life

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objective of "channeling and limiting . . . the sentencer's discretion in imposing the death penalty" and *Woodson* and *Lockett*'s objective of individualized discretion are incompatible. *Id.* at 657-66 (quoting *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988)). He rejected the majority's explanation that the two requirements serve different functions and steadfastly argued that the contradiction must be remedied. *Id.* at 665. Scalia further explained that "the *Lockett* rule represents a sheer 'about face' from *Furman*, an outright negation of the principle of guided discretion that brought us down the path of regulating capital sentencing procedures in the first place." *Id.* at 667. He warned that the Court's continued pursuance of these contradicting objections has resulted in significant confusion such that "[f]or state lawmakers, the lesson has been that a decision of [the] Court is nearly worthless as a guide for the future; though [they] approve or seemingly even require some sentencing procedure today, [they] may well retroactively prohibit it tomorrow." *Id.* at 668. Scalia indicated that he does not find mandatory capital sentencing to be cruel and unusual based on what was usual at the time the Eighth Amendment was ratified. *Walton v. Arizona*, 497 U.S. 639, 671 (1990). He explained that:

It is quite immaterial that most States have abandoned the practice of automatically sentencing to death all offenders guilty of a capital crime, in favor of a separate procedure in which the sentencer is given the opportunity to consider the appropriateness of death in the individual case. . . still less is it relevant that mandatory capital sentencing is (or is alleged to be) out of touch with 'contemporary community values' regarding the administration of justice.

*Id.* at 671-72. Finally, Scalia proposed that the Court overturn both *Woodson* and *Lockett* since they are "rationally irreconcilable with *Furman*." *Id.* at 672-73. See Sundby, *supra* note 120, for a more detailed discussion of Scalia's opposition to *Woodson* and *Lockett*.

183. *Harmelin*, 501 U.S. at 996.

184. *Id.*

185. Sundby, *supra* note 120, at 1207.

186. Many scholars have written extensively on the subject of executive clemency, both in general and within the context of the death penalty. For a more in depth analysis see generally Hugo Adam Bedau, *The Decline of Clemency in Capital Cases*, 18 *REV. L. & SOC. CHANGE* 255 (1990-91); Daniel T. Kobil, *Do The Paperwork or Die: Clemency, Ohio Style?*, 52 *OHIO ST. L.J.* 655 (1991); Note, *Executive Clemency in Capital Cases*, 39 *N.Y.U. L. REV.* 136 (1964); Michael B. Lavinsky, *Executive Clemency: Study of a*

imprisonment; however, governors rarely exercise this power. In the United States, the concept of clemency includes full pardons, conditional pardons, commutations to lesser sentences, remission of fines, and reprieves.<sup>187</sup> Article II of the U.S. Constitution confers upon the President the “[power] to grant reprieves and pardons for offenses against the United States.”<sup>188</sup> The nature of the American judicial system—in which the judge and jury are constrained in what they are permitted to hear by statute and procedural rules—requires some mechanism by which a defendant can describe his particular case and personal circumstances without limitation.<sup>189</sup>

The Constitution does not require that the states enact any clemency mechanisms. Nevertheless, every state that currently provides for the death penalty as punishment has constitutional or statutory clemency provisions.<sup>190</sup> The good will of the state legislature, procedural rule-makers, and drafters of the state constitution may be determinative in deciding whether or not clemency is provided. The Eighth Circuit recently noted that “[n]o procedural or fundamental constitutional right . . . creates a protected interest in clemency.”<sup>191</sup> The Court explained that the concept of federalism requires such a position.<sup>192</sup> Thus, a defendant’s Fourteenth

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*Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI. KENT L. REV. 13 (1965); Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889 (1981).

187. *Herrera v. Collins*, 113 S. Ct. 853, 866 (1993).

188. U.S. CONST. art. II, § 2, cl. 1. In 1833, Chief Justice John Marshall noted that:

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge see only with judicial eyes, and knows nothing respecting any particular case.

*United States v. Wilson*, 32 U.S. 150, 160-61 (1833).

189. In general, clemency does not flow merely from the will of the governor, as it did commonly in Chief Justice Marshall’s time. Today, most states have committees or boards which are entrusted with the power to grant pardons. See generally COYNE & ENTZEROTH, *supra* note 34, at 644. Each state legislature has discretion in how it chooses to structure its clemency procedures. Usually, the governor is one of the members of such committees or boards. For example, in Nebraska the members of the Board of Pardons include the Governor, the Secretary of State and the Attorney General. The Eighth Circuit in *Otey v. Stenberg*, 34 F.3d 635 (1994), found that the Attorney General may sit on this board despite the fact that she has a great interest in having the penalty stand. Nevertheless, in 29 states, clemency power rests solely with the governor. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 605 n.232 (1991). Even though many of these states establish advisory boards to make recommendations to the governor, such recommendations are non-binding. Sixteen other states require that an administrative panel or board share in clemency decisionmaking. *Id.* at 605 n.233. Five states have separated the governor from clemency decision-making by providing that an administrative panel has principal authority. *Id.* at 605 n.234.

190. *Herrera*, 113 S. Ct. at 867.

191. *Otey*, 34 F.3d at 637.

192. *Id.* at 638.

and Fifth Amendment rights of due process do not include a liberty interest in clemency hearings.

Despite the lack of a constitutional guarantee of state clemency provisions, the Supreme Court recently emphasized the importance of clemency. In *Herrera v. Collins*, the Court indicated that executive clemency is the "fail safe" mechanism in a fallible judicial system where it is possible for people to be wrongfully convicted.<sup>193</sup> The Court also noted that clemency procedures have been exercised when "demonstrations of actual innocence have been made."<sup>194</sup>

Although the Supreme Court has encouraged states to provide viable methods for convicted criminals to apply for clemency verbally, it has failed to require anything concrete. States have virtually unfettered discretion in constructing clemency procedures. The only real limitations on state autonomy are guarantees of due process and equal protection which require that procedures do not "shock the conscience of the reviewing court"<sup>195</sup> and that the procedures are equally available to all individuals. Consequently, the liberty interest in clemency proceedings are limited to whatever the state is willing to allow. The Eighth Circuit Court of Appeals explained that "when a commutation statute does not impose standards constraining the discretion of the board as to when clemency must be granted, the statute does not create a constitutional right or entitlement sufficient to invoke the Due Process Clause."<sup>196</sup> Many states merely recognize the right of a convicted defendant to apply for a pardon.<sup>197</sup> In such states, the pardoning board has complete discretion in reaching its decision.<sup>198</sup>

Despite the Supreme Court's recognition that the availability of clemency proceedings is important, and its respect for state autonomy in defining the parameters of such proceedings, the Court has created a potentially serious dilemma for those convicted defendants who obtain new exculpatory evidence after their case has completed direct review. In *Herrera v. Collins*, the Supreme Court held that a "claim of actual innocence based on newly discovered evidence is not ground for habeas relief."<sup>199</sup> The majority indicated that "the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has

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193. *Herrera*, 113 S. Ct. at 868.

194. *Id.*

195. *Otey*, 34 F.3d at 640 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)).

196. *Id.* at 637 (citing *Whitmore v. Gaines*, 24 F.3d 1032, 1034 (1994)).

197. The Nebraska statute analyzed in *Otey v. Stenberg* merely authorizes the creation and maintenance of a Board of Pardons, grants certain investigatory powers to the members of the Board (i.e., powers to issue subpoenas and compel attendance of witnesses), regulates how applications shall be filed, and guarantees that no death sentence will be carried out before the Board issues a ruling. Nebraska Treatment and Corrections Act, NEB. REV. STAT. §§ 83-170, 83-1127-1134 (1987).

198. There are "no specific criteria which an applicant must meet to earn a commutation from the Board of Pardons, no conditions which must first be met, no specific conduct which the applicant must have avoided, [and] no guidelines of any kind which must be followed by the Board." *Otey*, 34 F.3d at 637.

199. *Herrera*, 113 S. Ct. at 853.

been executive clemency.”<sup>200</sup> Because states are not even required to have clemency provisions in their statutes or constitutions, such defendants may never be able to present new evidence. The dissent in *Otey v. Stenberg* identified this problem and stated that the “newly recognized and emphasized significance of the clemency process illustrates the constitutional deficiencies in the clemency proceeding.”<sup>201</sup>

If executive clemency is going to serve as the safeguard measure that the Supreme Court suggests it should be, there must be some change. The privilege of executive clemency must have more force than mere Supreme Court rhetoric, giving it some real teeth. Regarding newly discovered evidence, either federal courts should be able to hear the evidence on habeas review or state clemency panels should be required to hear the evidence. This protection would be especially valuable in cases where a defendant has been found guilty solely on circumstantial evidence. The courts could use the Due Process Clause to justify either change.

A final problem with the executive clemency privilege in the United States is that governors are too often influenced by extra-legal pressures to grant or not grant petitions for clemency.<sup>202</sup> In an era when a candidate's position on the death penalty has become a political litmus test,<sup>203</sup> governors facing challenging reelection bids often are faced with significant pressure to refuse petitions for clemency. Rather than focusing on a petitioner's grounds for a pardon, a governor, as well as other elected members of a panel, cannot help but weigh the political consequences of her decision.<sup>204</sup> Governors often shy away from exercising their power to grant pardons. The governor may feel that, after the legislature has constructed a

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200. *Id.* at 869.

201. *Otey*, 34 F.3d at 639.

202. For example, in January 1992, Bill Clinton, who was then Governor of Arkansas and actively campaigning for the Democratic Party's nomination for the upcoming presidential election, refused Rickey Ray Rector's final petition for clemency. Rector had been sentenced to death for killing a police officer in 1981. *Rector v. State*, 659 S.W.2d 168 (Ark. 1983). By late 1991, Rector had virtually exhausted his judicial remedies and the question of whether he would live or die rested solely with Governor Clinton. Rector's case was particularly appropriate for clemency since immediately after murdering the policeman, he unsuccessfully attempted to commit suicide by shooting himself in the forehead. The bullet entered the front part of his brain; consequently, Rector suffered the equivalent of a frontal lobotomy. *Rector v. Clark*, 923 F.2d 570 n.2 (8th Cir. 1991). The clinical effect was that although Rector had the appearance of a “mature adult,” he “would have a near-total inability to conceptualize beyond a response to immediate sensations or provocations.” Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105, 111. The Arkansas Supreme Court explained that these circumstances were appropriate for clemency and indicated that the issue “should properly be addressed to the Governor, who has the facilities for investigating all the facts.” *Rector*, 659 S.W.2d at 175. Unfortunately for Rector, Governor Clinton's campaign was struggling to gain support. Gennifer Flowers had recently alleged that she had had an extra-marital affair with Clinton, and the Bush campaign was suggesting that Clinton was not sufficiently tough on crime. Some critics postulate that Clinton needed to demonstrate that he was strong on crime in order to solidify support, and Rector became that demonstration. See Frady, *supra*, at 107.

203. See *supra* note 1.

204. Frady, *supra* note 202, at 113.

penal statute through the rigors of the democratic process and after the judges and juries, following all of the established procedures, have reached a guilty verdict and decided on the death sentence, it is undemocratic for her to intervene.<sup>205</sup> However, as the Supreme Court has recognized, executive clemency is the final check in a process which is known to be fallible. As Chief Justice Rehnquist explained, “[h]istory is replete with examples of wrongly convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.”<sup>206</sup>

#### D. Summary of Discretion in the Use of Capital Punishment in the United States

In the United States, many different individuals and groups of people possess varying degrees of discretion in the death sentencing process.<sup>207</sup> So long as capital punishment is valid under the U.S. Constitution, state legislatures and governors have the ultimate discretion in deciding whether or not the state will employ the death penalty as a means of punishment,<sup>208</sup> States do not have to authorize the use of the death penalty just because capital punishment is constitutional. However, once a state adopts death penalty legislation, those entrusted with the power to apply such legislation are limited in the discretion they have in their exercise of this power.<sup>209</sup>

Prosecutors in jurisdictions which allow for the death penalty as punishment for particular crimes cannot ask for the death penalty arbitrarily.<sup>210</sup> So long as the law is not changed, all future cases which are similar

205. *Id.*

206. *Herrera v. Collins*, 113 S. Ct. 853, 868 (1993).

207. See *supra* notes 119-22 and accompanying text.

208. Although the state legislature passes legislation, each governor sets her own legislative agenda, much like the President of the United States, and then works with the legislature to achieve this agenda. New York's Governor Pataki set death penalty legislation as one of his legislative priorities for 1995. At a press conference just two days after the election, Governor Pataki reiterated his campaign promise of signing a bill to restore the death penalty within the next year, making New York the 38th state authorizing capital punishment. Jan Hoffman, *The 1994 Elections: New York State Issues; Law on Death Penalty is Likely by Next Fall*, N.Y. TIMES, Nov. 10, 1994, at B13. The New York State legislature had passed such legislation 18 times and those bills were vetoed that many times. *Id.* On March 7, 1995 Governor Pataki was able to fulfill his promise as he signed the state legislature's newest death penalty bill into law. See James Dao, *Death Penalty in New York is Restored After 18 Years; Pataki Sees Justice Served: A Vow Fulfilled*, N.Y. TIMES, Mar. 8, 1995, at A1.

Although the attorney general's office does not prosecute violent crimes, New York's newest Attorney General, Dennis Vacco also indicated that his first priority would be to ensure that the death penalty was reinstated. Elizabeth Wasserman, *Vacco Calls the Death Penalty a Priority*, N.Y. TIMES, Nov. 10, 1994, at A1. He attributed his tight victory to his reputation and record for being tough on crime from his career as a U.S. attorney for the Western District of New York. *Id.* The presence of this new political team in Albany is sure to result in a far stricter approach to handling crime than New York State has experienced in recent decades.

209. Death penalty legislation tends to require that a certain number of aggravating factors be identified in order for a murderer to be eligible for death. See *supra* part II.B.2-3.

210. The prosecutor faces a certain degree of political pressure to ask for the death penalty, particularly when the criminal or the crime is notorious. For example, in cases



must be treated the same way. Thus, although the prosecutor has some degree of choice, her power to choose whether or not to ask for the death penalty is limited. Nevertheless, the prosecutor has a significant amount of discretion in her power to offer and accept plea bargain agreements. One scholar has argued that "plea bargaining in capital cases makes it less likely that the death penalty will be applied even-handedly or that imposing it will achieve any of the penological goals it was intended to serve."<sup>211</sup> Finally, a prosecutor may elect never to seek the death penalty for crimes where capital punishment is statutorily authorized. Although such a prosecutor is satisfying the constitutional requirement of consistency in terms of how crimes in her district are prosecuted, such a decision may produce constitutional problems on the state-wide scale. More specifically, if prosecutors in other parts of the state seek the death penalty more aggressively, then those defendants who are charged with capital crimes may be able to challenge their sentences on grounds of arbitrariness since they might not have received a death sentence in other parts of the state.<sup>212</sup>

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where the crime (at least first degree murder) is perceived as being notably atrocious or heinous and where the accused is unknown or someone with whom people generally are unable to identify, the public is more likely to urge prosecutors to seek the death penalty. An excellent illustration of the prosecutor's decision making process is the seemingly inconsistent decisions of prosecutors in the O.J. Simpson case in California, where the death penalty was not requested, and the Susan Smith case in South Carolina (where a mother drowned her two sons, subsequently claimed that they had been kidnapped, and nine days later confessed her crime), where the death penalty was sought. Rick Bragg, *The Nation: O.J. Simpson and Susan Smith; Two Crimes, Two Punishments*, N.Y. TIMES, Jan. 22, 1995, § 4, at 1. Law professors and practicing lawyers have explained that these decisions are made based on the community's prejudices. *Id.* In cases where the public views the accused as "one of us" and the prosecutor has little chance of converting the accused into "one of them, the predators who would destroy [the human community]," prosecutors tend not to seek the death penalty. *Id.* The prosecutors have little chance of destroying O.J. Simpson's image as an American hero. One expert on capital murder trials explained that in Mr. Simpson's case "it is much more like having a friend or family member accused of a crime. Susan Smith is defined publicly only by her crime." *Id.* In addition, the Los Angeles prosecutors know that insisting on the death penalty is likely to result in an acquittal as the jury is unlikely to be willing to convict with death as an option. *Id.* Susan Smith is more likely to be a victim of political pressures. In an era where the public wants more than mere "tough on crime" rhetoric, Mrs. Smith's case is an excellent opportunity for local prosecutors to carry out the promises of the state attorney generals and governors. The day Mrs. Smith was charged for her crime, a "bloodthirsty crowd" demonstrated outside the courthouse voicing outrage and demanding that she be killed in the same manner by which she killed her children. *Id.* These contemporary cases suggest that so long as politics and community prejudice influence the decisions of prosecutors in whether they will seek the death penalty, the decision of who will live or die will continue to be inconsistent.

211. WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 69 (1991).

212. This problem has recently arisen in New York State. Upon passage of the current New York death penalty legislation, the Bronx District Attorney, Robert T. Johnson, indicated that he would not aggressively seek death sentences. Adam Nossiter, *Balking Prosecutors: A Door Opens to Death Row Challenges*, N.Y. TIMES, Mar. 11, 1995, at A27. Approximately one year later, Mr. Johnson was faced with deciding whether or not to go through with this assertion, after a New York City police officer was murdered. Jan Hoffman, *Death Penalty Raises Issue of Obligation of Prosecutor*, N.Y. TIMES, Mar. 17, 1996, § 1, at 33. Although Johnson publicly stated that he would consider seeking the

The sentencing jury's discretion is limited by legislation as well. Following the dictates of the Supreme Court's Eighth Amendment jurisprudence, the state legislatures attempt to channel the information which the jurors may consider by specifying categories of potential aggravating and mitigating circumstances. These sentencing statutes vary significantly among the states.<sup>213</sup> However, the categories of potential mitigating circumstances designated by the state legislatures tend to be relatively broad,<sup>214</sup> thereby reintroducing a considerable degree of discretion. In addition, because many states do not require that jurors explain how they arrived at their verdict, it is possible that other subjective influences affect their ultimate verdict. Thus, although the Supreme Court intended that these post-*Furman* statutes would guide juror discretion in capital sentencing, the Court's additional objective of ensuring individualized consideration results in considerable room for arbitrariness and inconsistency.<sup>215</sup>

Although the majority of states respect the jury's ultimate decision of life or death, Alabama, Florida, and Indiana allow trial judges to overrule a jury and impose a death penalty.<sup>216</sup> These states authorize judges to make such unilateral decisions even if the jury unanimously votes in favor of a life sentence.<sup>217</sup> In *Spaziano v. Florida*, the Supreme Court held that this process of jury override is constitutionally permissible.<sup>218</sup> The Supreme

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death penalty in this case, he did not retreat from his anti-death penalty stance. *Id.* Fearing that Johnson would exercise his unreviewable discretion to formally reject the death penalty, Governor Pataki asked him to tell his aides in advance whether or not he would decide against seeking the death penalty in this case. James Dao, *A Killing in the Bronx: The Governor*, N.Y. TIMES, Mar. 22, 1996, at B1. When Johnson refused to comply with this request, Governor Pataki removed Johnson. *Id.* He was concerned geographic discrepancies in application of the new death penalty law would result in a constitutional challenge in the law. *Id.* The New York Court of Appeals indicated that it would be willing to review the legislation on "geographic discrimination" grounds. Nossiter, *supra*.

213. The capital sentencing statutes of those states that have continued to employ the death penalty since *Furman*, *Woodson*, and *Gregg* vary with respect to the specificity of their lists of aggravating and mitigating circumstances. Nevertheless, the Florida statute is a good example of a very specific statute, designed to produce more consistent sentencing outcomes. See FLA. STAT. ANN. § 921.141 (West 1995).

214. For example, juries in Florida are instructed to consider whether:

- (a) The defendant has [any] significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (g) The age of the defendant at the time of the crime.

*Id.*

215. See *supra* part II.B.3.

216. COYNE & ENTZEROTH, *supra* note 34, at 404.

217. *Id.*

218. 468 U.S. 447 (1984). In his majority opinion, Justice Blackmun explained that:

Court also has indicated that the U.S. Constitution does not require that a jury's decision to impose a death sentence be unanimous.<sup>219</sup> Thus, although it is generally true that juries in the United States have a significant amount of discretion over the cases that have reached the sentencing phase, this discretion is already limited by constitutional and legislative guidelines and may continue to be limited if more states decide to authorize jury override and non-unanimous verdicts.

Because so many different groups and individuals play a role in death sentencing, it is easy for each party to shift the burden of the ultimate decision to another party. Thus, when a convicted criminal is executed, no one individual or group feels responsible for the death. Certainly it is easier for the state to justify the use of capital punishment when no one feels direct responsibility for the executions. Although the United States death sentencing process, involving many participants and opportunities for discretion, can protect the convicted criminal,<sup>220</sup> this ability to shift the ultimate responsibility of the execution has adverse effects on the criminal. The participants in the various stages of death penalty prosecutions can avoid feeling morally responsible for their decisions, which in turn makes it easier for them to reach a decision to authorize capital punishment.<sup>221</sup> Opponents of the death penalty should underscore this problem and require that someone take full responsibility for each judicially authorized death. This personal responsibility may deter some of the participants from imposing death sentences in the more questionable cases.

Finally, both advocates and opponents of capital punishment in the United States should look beyond the United States for guidance in their quest to achieve the most fair and consistent system of capital sentencing. Many nations have abolished capital punishment. Could this be a direct response to their inability to strike a workable balance in fairness and consistency in allocating discretion and responsibility among the various

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there is certainly nothing in the safeguards necessitated by the Court's recognition of the qualitative difference of the death penalty that requires that the sentence be imposed by a jury . . . . The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.

*Id.* at 460, 464.

219. See *Mills v. Maryland*, 486 U.S. 367 (1988); *Dobbert v. Florida*, 432 U.S. 282, 304 n.1 (1977) (Stevens, J., dissenting).

220. See *supra* notes 119-23 and accompanying text.

221. More specifically, prosecutors are able to shift the responsibility of a death sentence to the legislature, arguing that they were merely applying the law. The jury can avoid taking responsibility by arguing that it was merely following the sentencing laws set forth by statute. The legislature can avoid responsibility by arguing that the legislation reflected the will of the constituents. The governor can avoid responsibility by arguing that the prosecutors, judges, and juries carefully considered the case and found death to be an appropriate punishment for the particular case following statutory guidelines, and that overturning the sentence would be antidemocratic. This endless loop makes death sentencing easier since no single group feels personally responsible for the result.

groups involved in death penalty litigation? Have other retentionist nations found a better way of channeling discretion? What rationales are given by those nations which completely limit sentencer discretion? Because there is no indication that the United States will abolish the death penalty in the near future, it is essential to structure the capital sentencing system in such a way that arbitrariness and inconsistency are reduced as much as possible.

### III. Discretion in India

That the use of the death penalty in India is strikingly similar to the procedures practiced in the United States is surprising given the different histories and cultures of the two nations.<sup>222</sup> The fact that the legality and the use of capital punishment in two facially different nations is so similar despite differences in their history, constitutions, criminal law, governmental structures, and culture may suggest that it is possible to construct an international standard governing the use of the death penalty worldwide.

#### A. History of the Use of Capital Punishment in India

As is the experience elsewhere in the world, the area today known as India has used capital punishment throughout its recorded history.<sup>223</sup> Although Hindu law does not affirmatively advocate the use of the death penalty,<sup>224</sup> it does not reject its use. Furthermore, it justifies the use of capital punishment for certain serious offenses against individuals and the state.<sup>225</sup>

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222. Hindu, Muslim, and British Law have all played significant roles in shaping the current legal system in India. See GUPTA, *supra* note 28, at 17-25. However, despite this history the Indian courts appear to look to the United States for guidance concerning the constitutional limits on the use of capital punishment. For example, many of the Indian death penalty cases cite cases decided by the U.S. Supreme Court. See *infra* notes 260-66 and accompanying text. Thus, despite the fact that the Indian Constitution does not include explicit protections against cruel and unusual punishment, the Indian courts have limited the extent to which capital punishment may be legally employed. See *infra* part III.C.

223. GUPTA, *supra* note 28, at 17. See *supra* notes 23-28 and accompanying text for a discussion of worldwide evidence of the acceptance and use of the death penalty.

224. Subhash Gupta, former Deputy Secretary of the Indian Red Cross Society in New Delhi, explains that Hindu law traditionally governed the people of India. GUPTA, *supra* note 28, at 17, 21. The Charter of Vishnusena was compiled in the 6th century A.D. Unlike today, where religious law and the law of the government are distinct, religious law dominated the affairs of Indian men and women. *Id.*

225. GUPTA, *supra* note 28, at 20. The types of crimes for which Hindu law authorizes the death penalty evolved throughout history. *Id.* at 18-21. In the feudal period, different punishments were authorized depending on the caste of the offender. *Id.* at 20. Although Hindu Law has dominated in much of India, Muslims ruled India from the 12th Century until the British took over in the late 18th Century. *Id.* at 22-23. See also MODERN LEGAL SYSTEMS CYCLOPEDIA, THE LEGAL SYSTEM OF THE REPUBLIC OF INDIA, ch. 5, 9.80.9, § 1.2 (1990) [hereinafter LEGAL SYSTEM OF INDIA]. Muslim law has recognized capital punishment throughout history. GUPTA, *supra* note 28, at 20. Subhash Gupta explains that Muslim emperors who ruled India during the "Muslim [Mughal] times" ensured that capital punishment was not accompanied by "mutilation or other cruelty." *Id.* at 22. Capital sentencing under Muslim law is permitted in only three categories of cases:

Under Hindu law, punishment is designed to eradicate evil, rather than to inflict pain;<sup>226</sup> consequently, death is not designed merely to serve retributive or deterrent purposes.<sup>227</sup> Hindu law recognizes, however, that those determining the appropriate sentence for a particular act must consider both the objective circumstances of the offense and the subjective limitation of the offender.<sup>228</sup> Despite its general acceptance as a morally viable form of punishment, some Hindu rulers and members of the Hindu intelligentsia have rejected the use of capital punishment.<sup>229</sup>

Although capital punishment was used in India prior to British rule, the British were responsible for enacting "a systematized penal code which strictly limited the number of capital offences and laid down the procedure for criminal trials."<sup>230</sup> This criminal code was not created in a single effort. The British rulers crafted the code over nearly seventy years by making gradual adjustments to the Muslim Criminal Law. The first alteration occurred in 1793. The Bengal Resolution of 1793 dictated that the motives or intentions of one found to have committed murder controlled whether he might be subject to capital punishment.<sup>231</sup> In addition, the victim's

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- (i) when the next of kin of a murdered person demands the life of the murderer (*qisas*) and refuses to accept the alternative of money compensation (*ditya* or *price of blood*);
  - (ii) in certain cases of immorality; the woman owner is stoned to death in public;
  - (iii) on highway robbers.

*Id.* at 23. Subhash Gupta indicates that Muslim law was significantly less barbarous than the English law in force at the time. *Id.*

226. GUPTA, *supra* note 28, at 18.

227. Nevertheless, these and other "traditional" justifications for capital punishment are advanced in India. See generally *id.* at 37-73.

228. *Id.* at 18-19. Subhash Gupta notes that these are the same considerations developed in many of the "most advanced systems of today." *Id.* at 19. The U.S. Supreme Court has crafted these same safeguards in its current analysis of the Eighth Amendment's protection against cruel and unusual punishment by requiring that state sentencing schemes strive for both consistency and individualized consideration. See *supra* part II.B.3.

229. One Hindu prince explained:

Sometimes virtue assumes the form of sin and sin assumes the form of virtue. It is not possible that the destruction of individuals can ever be virtuous . . . . Without destroying the body of the offender, the King should punish him as ordained by the scriptures. The King should not act otherwise, neglecting to reflect upon the character of the offence and upon the science of morality. By killing the wrongdoer, the King kills a large number of innocent men. Behold, by killing a single robber, his wife, mother, father and children, all are killed. When injured by wicked persons, the King should, therefore, think seriously on the question of punishment, [sic] Sometimes a wicked person is seen to imitate good conduct from a pious man. It is seen that good children spring from wicked persons. The wicked should not, therefore, be exterminated. The extermination of the wicked is not in consonance with eternal law. By punishing them gently, by depriving them of all their riches, by chains and imprisonment, by disfiguring them, they may be made to expiate their offences.

GUPTA, *supra* note 28, at 21-2 (citing the study of Dr. P.K. Sen).

230. *Id.* at 25. Subhash Gupta suggests that in creating a more systematic code, the British were responsible for "partial abolition of capital punishment" in India. *Id.*

231. BENGAL RESOLUTION 9, §§ 50, 52, 55, 76, (1793), substituted by Regulation 4, 1797, reprinted in GUPTA, *supra* note 28, at 23-24.

next of kin lost the discretion to spare the murderer from capital punishment.<sup>232</sup> Other than this minor change, Muslim law continued to determine when capital punishment would be imposed. Starting in 1827, the British began drafting more specific laws regulating the use of the death penalty. The Bombay Regulation XIV of 1827 authorized the death penalty as one of several available punishments<sup>233</sup> for cases of murder where the offender had “purposely, and without justifiable or extenuating cause, deprive[d] a human being of life, or who . . . commit[ted] or assist[ed] in any unlawful act, the perpetration of which is accompanied with the death of human beings.”<sup>234</sup> The framers of this regulation stated that they were “convinced that [the death penalty] ought to be very sparingly inflicted, and [they] propose[d] to employ it only in cases where either murder or the highest of the offences against the State has been committed.”<sup>235</sup> Further drafts of this regulation and others dealing with the punishment for criminal acts were developed during the following decades.<sup>236</sup> Finally, on October 6, 1860, the Governor-General of India signed the new Criminal Code into law.<sup>237</sup> Although the governing penal code during British rule was amended periodically, the death penalty was retained until India gained independence in 1947.<sup>238</sup>

In the years immediately following independence, the Government retained the British policy on capital punishment, as the new Legislative Assembly found it to be “an inopportune time for [its] abolition.”<sup>239</sup> In 1956, the Legislative Assembly began considering whether it should abolish the death penalty. The federal government of India sought opinions on the issue from all of its States and learned that all were vehemently opposed to abolishing capital punishment.<sup>240</sup> Despite this unanimous sen-

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232. *Id.*

233. The other punishments included “transportation, imprisonment for life, or solitary imprisonment with flogging.” BOMBAY REGULATION XIV, § XXVI, cl. 4 (1827), reprinted in GUPTA, *supra* note 28, at 24.

234. *Id.* at cl. 1.

235. Notes appended to the BOMBAY REGULATION XIV.

236. GUPTA, *supra* note 28, at 25.

237. *Id.*

238. *Id.* at 88. In 1946, one member of the Legislative Assembly stated that “the Government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided.” *Id.* (citing *Legislative Assembly Debates*, Vol. IV, at 2770 (1946)).

239. *Id.* at 88.

240. *Id.* at 88-89. Like the United States, India’s government is a republic, comprised of 22 states and nine centrally administered territories. LEGAL SYSTEM OF INDIA, *supra* note 225, at 9.80.16, § 1.3(A). The framers of the Indian Constitution believed that federalism was the best solution to the potential problems of a “multi-racial, multi-lingual, and multi-communal country . . . with a vast area and huge population.” *Id.* at 9.80.24, § 1.3 (B)(2)(e). The federal government is made up of three branches: the executive, legislative, and judicial. *Id.* Unlike the United States, the executive branch is not separate from the legislature, because the President is responsible to the Legislature. *Id.* Under the Indian Constitution, the federal judiciary is free from both legislative and executive interference in order to ensure that the democratic freedoms guaranteed under the Constitution remain meaningful. *Id.* at 9.80.24, § 1.3(B)(2)(c). As in the United States, the states have the power to make laws and govern certain types of behavior. *Id.*

timent, the Legislature considered and debated whether to abolish the death penalty on three separate occasions from 1958 to 1962.<sup>241</sup> After conducting a thorough examination of the Code of Criminal Procedure and the Indian Penal Code, in September 1967 a special commission established by the Ministry of Home Affairs submitted a special report on capital punishment to the Government. This commission reported that after considering the many issues involved within the context of India's unique conditions, the Government could not "risk the experiment of abolition of capital punishment."<sup>242</sup> Although the Penal Code has been amended such that capital punishment is authorized for a more narrow class of offenses,<sup>243</sup> the death penalty has continued to be a commonly used method of punishment in India.<sup>244</sup>

### B. Constitutionality of the Death Penalty

As in the United States, capital punishment in India has not been viewed as *per se* unconstitutional. Article 21 of the Indian Constitution, entitled "protection of life and personal liberty," states that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."<sup>245</sup> This provision by itself provides little guidance as to the

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at 9.80.21, § 1.3(B)(2)(a). Nevertheless, the states are not entirely free in framing their laws and policies. States must direct their policy towards securing:

- (1) That the citizens, men and women equally, have the right to an adequate means of livelihood;
- (2) That the ownership and control of the material resources of the community are to so be distributed as best to subserve the common good;
- (3) That the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment;
- (4) That there is equal pay for equal work for both men and women;
- (5) That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength; and
- (6) That childhood and youth are protected against exploitation and against moral and material abandonment.

*Id.* For a more general discussion of the political and governmental structure of India, see generally ANIL CHANDRA BANERJEE, *THE CONSTITUTIONAL HISTORY OF INDIA* (1978); DHARAM CHAND GUPTA, *INDIAN GOVERNMENT AND POLITICS* (1978); J.C. JOHARI, *INDIAN GOVERNMENT AND POLITICS* (1974).

241. GUPTA, *supra* note 28, at 89-97.

242. *Id.* at 97-98. This language is particularly interesting in light of Justice Blackmun's language in *Callins v. Collins*. See *supra* note 130. For a more thorough discussion of the commission's report and the recommendations made therein, see GUPTA, *supra* note 28, at 97-101.

243. *Id.* at 102-07.

244. *WHEN THE STATE KILLS*, *supra* note 2, at 146-48. According to Amnesty International, although some of the most influential figures in Indian politics in recent years, such as Indira Gandhi, personally have favored abolishing the death penalty, the Government has not seriously considered its abolition. *Id.* at 148. There is no indication that this attitude will change in the near future.

245. *INDIA CONST. art. 21*. The Indian Constitution is an amalgam of the constitutions of the United States and Japan and the laws of the United Kingdom. GUPTA, *supra* note 28, at 191. Although the language guaranteeing fundamental rights has been borrowed from the constitutions of different nations, Subhash Gupta emphasizes that these rights are inalienable and indispensable, and thus are not created by any nation's constitution.

legality of the death penalty in India. The language seems to suggest that so long as a law provides for punishment by death, the death penalty is lawful. The Indian Constitution has neither a due process clause nor an article similar to that of the U.S. Constitution's Eighth Amendment protecting against cruel and unusual punishment. In addition, Article 72 of the Indian Constitution bestows on India's President the power to grant pardons "in all cases where the sentence is a sentence of death," as well as among other cases.<sup>246</sup> The Indian Supreme Court has indicated that the language of both Articles 21 and 72 implies that the use of capital punishment is constitutionally permissible if done according to a procedure established by law.<sup>247</sup> In *Jagmohan Singh v. State of Uttar Pradesh*, the Court stated that "[i]n the face of these indications of constitutional postulates it will be very difficult to hold that capital sentence was regarded *per se* unreasonable or not in the public interest."<sup>248</sup> Consistent with this prediction, the Indian Supreme Court to date has not found the death penalty to be *per se* unconstitutional.

Looking at the Constitution alone, the courts apparently have ample opportunity to apply the death penalty without significant restrictions. Surprisingly, however, even without explicit protection against cruel and unusual punishment, the Indian Supreme Court has played an active role in crafting limitations much like those applied in the United States. In *Sunil Batra v. Delhi Administration*,<sup>249</sup> the Supreme Court explained that Article 21 of the Indian Constitution could embrace the functions of the U.S. Constitution's cruel and unusual clause and invalidate "what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive."<sup>250</sup> Justice D.A. Desai explained that although there is no provision like the Eighth Amendment in the Indian Constitution, the Court "cannot be oblivious to the fact that the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary."<sup>251</sup> The Court agreed that Article 21 prohibited arbitrary procedures. Consequently, the Court deemed such "punitively outrageous" schemes unconstitutional.<sup>252</sup>

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*Id.* British scholar David Pannick noted that Article 21 is similar to the due process clauses of the U.S. Constitution. DAVID PANNICK, *JUDICIAL REVIEW OF THE DEATH PENALTY* 29 (1982). As with the due process clauses, Article 21 requires that the law be "right, just and fair, and not arbitrary, fanciful or oppressive." *Id.* In *Sunil Batra v. Delhi Administration*, Justice Desai wrote that it is "[t]rue [that the Indian] Constitution has no 'due process' clause or the [Eighth] Amendment . . . but in this branch of the law [i.e.: criminal justice] . . . the consequence is the same." AIR 1978 S.C. 1675, 1690. Thus, according to Pannick, the Indian Supreme Court has interpreted criminal law so that due process is implied in both procedural and substantive senses. PANNICK, *supra*, at 29.

246. INDIA CONST. art. 72.

247. *Jagmohan Singh v. State of Uttar Pradesh*, AIR 1973 S.C. 947, 952.

248. *Id.*

249. *Sunil Batra*, AIR 1978 S.C. 1675.

250. *Id.* at 1690.

251. *Id.* at 1735. In India, the Federal Legislature plays a far more influential role in this process than does the U.S. Congress since India has a separate Penal Code unlike the United States. See INDIA PEN. CODE (XIV of 1860).

252. *Sunil Batra*, AIR 1978 S.C. at 1719-20.



Thus, perhaps due to the Indian Supreme Court's use of the United States as a model, explicit protections against cruel and unusual punishment are not necessary in order to invoke judicial review of Indian sentencing schemes.<sup>253</sup>

### C. Discretion in Death Sentencing

Much like in the United States, both the Indian Legislature and Supreme Court have crafted guidelines specifying the degree of discretion a sentencer may exercise.<sup>254</sup> For example, the Indian Supreme Court has indicated that mandatory capital sentencing is unconstitutional in most situations.<sup>255</sup> However, it has rejected arguments on the constitutionality of the death penalty which are analogous to the plurality's decisions in *Furman v. Georgia*.<sup>256</sup> The Indian Court shares the belief that arbitrarily imposed death penalties are unconstitutional, yet it has "doubted the wis-

253. According to David Pannick:

[t]he American and Indian judiciary have expressed a surprising degree of unanimity as to the circumstances in which and the reasons why the death penalty is, on occasions, unconstitutional . . . . The death penalty is a denial of the rule of law where:

- (1) It is imposed in a cruel and painful manner; or
- (2) It is wantonly and freakishly imposed; or
- (3) It is mandatory for a defined offence; or
- (4) It is grossly disproportionate to the offence; or
- (5) It is otherwise based on caprice or procedural irregularity.

PANNICK, *supra* note 245, at 65.

254. Section 302 of the Indian Penal Code designates that judges shall determine the sentence. INDIA PEN. CODE § 302; *see also* GUPTA, *supra* note 28, at 191. The Criminal Procedure Code requires that after an individual has been convicted for a capital crime, there must be a sentencing hearing where the judge hears evidence and considers any "special reasons" which might indicate that death is the appropriate punishment. The hearing also serves to provide the legal framework relevant for the application of the death sentence. INDIA CODE CRIM. PROC. § 235(2); *see also* GUPTA, *supra* note 28, at 113-14.

255. GUPTA, *supra* note 28, at 200. In *Mithu v. State of Punjab*, AIR 1983 S.C. 473, Justice Chandrachud stated:

The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable [sic] is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised [sic] as arbitrary and oppressive.

*Id.* *See infra* notes 268-70 and accompanying text. The Indian Penal Code explicitly provides that a judge has the discretion to sentence eligible criminals either to death or life imprisonment. GUPTA, *supra* note 28, at 199.

256. PANNICK, *supra* note 245, at 104. In *Bachan Singh v. State of Punjab*, AIR 1980 S.C. 898, the Indian Supreme Court explained that:

The view taken by the plurality in *Furman v. Georgia* . . . to the effect, that a law which gives uncontrolled and unguided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in our Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness . . . . There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which

dom and the possibility of achieving total control of such discretion through legislative guidelines."<sup>257</sup> In *Bachan Singh v. State of Punjab*, the Indian Supreme Court explained that "[t]he impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment."<sup>258</sup> Towards the end of their opinion, the Court criticizes the U.S. Supreme Court decisions in *Gregg v. Georgia* and its companion cases,<sup>259</sup> explaining that:

[I]t is neither practicable nor desirable to imprison the sentencing discretion of a judge or jury in the strait-jacket of exhaustive and rigid standards. Nevertheless, these decisions do show that it is not impossible to lay down broad guidelines as distinguished from ironcased standards, which will minimise [sic] the risk of arbitrary imposition of death penalty for murder and some other offences under the Penal Code.<sup>260</sup>

Despite its rhetoric against rigid standards, the discretion afforded to Indian judges is not without restrictions.

The Indian judiciary is not alone in rejecting the impulse to codify in rigid guidelines what its judges may and may not consider when sentencing eligible criminals. In fact, the Royal Commission on Capital Punishment<sup>261</sup> considered the merits of codification of "the various considerations which weigh or should weigh with the court in the exercise of discretion"<sup>262</sup> long before the U.S. federal government began to place restrictions on capital sentencing.<sup>263</sup> After careful study, the Royal Commission concluded that it is both difficult and dangerous to attempt to enumerate the circumstances that judge's should not take into account in capital sentencing, the circumstances judges should take into account only in relation to other circumstances, and the circumstances judges may consider independently.<sup>264</sup> The Commission explained that:

the exercise of the discretion may depend on local conditions, future developments, evolution of the moral sense of the community, state of crime at a particular time or place and many other unforeseeable [sic] features . . . . [C]odification of these considerations may . . . be too wide and too narrow at the same time.<sup>265</sup>

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would be valid in respect of one area of the world may not hold good in respect of another area.

*Id.*

257. PANNICK, *supra* note 245, at 104.

258. *Bachan Singh*, AIR 1980 S.C. 898, 935.

259. *Woodson v. North Carolina* was one of the other cases decided with *Gregg*. See *supra* notes 166-72 and accompanying text.

260. *Bachan Singh*, AIR 1980 S.C. 898, 942.

261. The newly independent Indian government created the Commission in 1949. GUPTA, *supra* note 28, at 16.

262. *Id.* at 201.

263. The U.S. Supreme Court's decision in *Furman v. Georgia* began influencing state capital sentencing procedures. See *supra* part II.B.1. The U.S. Congress never has passed legislation designed to regulate state sentencing procedures.

264. GUPTA, *supra* note 28, at 201 (citing the Report of the Royal Commission on Capital Punishment (1949-53), Cmd. 8932, 193 para. 629-31).

265. *Id.*

The three branches of the Indian federal government continually have cautioned against rigidly guided discretion, particularly after witnessing the U.S. Supreme Court's efforts to construct a workable system.<sup>266</sup>

In rather lengthy dicta, the Court in *Bachan Singh* suggested ways in which the courts might channel sentencer discretion. Rather than attempting to formulate "exhaustive standards," the Court repeatedly admonished judges to look at each case as an individual unit.<sup>267</sup> More specifically, the Court explained that "simply in terms of blameworthiness or desert criminal cases are different from one another in ways that legislatures cannot anticipate."<sup>268</sup> In addition, the Court cautioned that "a standardization of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence [sic] category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity."<sup>269</sup> As a suggestion of how the judiciary might best channel discretion, the Court cites lists of aggravating and mitigating circumstances that can be found in many U.S. state penal statutes.<sup>270</sup>

Despite its lengthy admonitions and suggestions, the Court recognized that it is not authorized to establish rules. Rather it is the legislature's role to establish guidelines governing acts of the judiciary.<sup>271</sup> The Court recognized the importance of separation of powers and acknowledged that one of the most significant duties of the judiciary is to identify the areas of law which are handled more appropriately by the more representative branches of government.<sup>272</sup> Specifically, the majority opinion stated:

As Judges, we have to resist the temptation to substitute our own value choices for the will of the people. Since substituted judicial 'made-to-order' standards, howsoever painstakingly made, do not bear the people's imprimatur, they may not have the same authenticity and efficacy as the silent zones and green belts designedly marked out and left open by Parliament in its legislative planning for fair-play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised [sic] sentencing.<sup>273</sup>

Thus, except for truly flagrant inconsistency or arbitrariness in the exercise of discretion or where it can be found that the death penalty is freakishly imposed,<sup>274</sup> the Indian legislature has ultimate control over the degree of discretion allowed.

The Indian Penal Code does provide for a mandatory death penalty in cases where a convicted offender already serving a sentence of life imprisonment commits murder.<sup>275</sup> As the aforementioned cases demonstrate,

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266. *Id.* at 201-02.

267. *Bachan Singh*, AIR 1980 S.C. 898.

268. *Id.* at 937.

269. *Id.* at 938.

270. *Id.* at 943-44.

271. *Id.* at 938.

272. *Id.*

273. *Id.*

274. PANNICK, *supra* note 245, at 104.

275. *Id.* at 111-12.

the Indian Supreme Court seems to share the view of the U.S. Supreme Court that mandatory death penalties are unconstitutional in any circumstance despite this statute. The Indian Supreme Court has not explicitly condemned mandatory capital sentencing, but dicta in many of its death penalty decisions strongly suggests that the constitutionality of the death penalty is contingent upon the "valuable safeguards of the life and liberty of the subjects in the cases of capital sentences."<sup>276</sup> These decisions demonstrate that the Indian Supreme Court has construed the Constitution to permit capital punishment only in those situations where the crime is exceptionally despicable and the mitigating factors do not support a case for leniency. There is no room for mandatory death penalties under such a philosophy.

As in the United States, the Indian judiciary and legal establishment has been reluctant to create a system in which discretion is completely unguided. Subhash Gupta explains that "[i]t is clear from the study of the decisions of the higher courts on the life-or-death choice that judicial adhocism or judicial impressionism dominates the sentencing exercise and the infliction of death penalty suffers from the vice of arbitrariness [and] caprice."<sup>277</sup> Judges are not immune from the influence of their own "philosophies of law and life."<sup>278</sup> The risk of arbitrariness may be even greater in a system where the ultimate discretion in sentencing is left to a single individual after a person has been convicted of a capital crime. At least in theory, having a jury make this determination will have the effect of balancing the many personal philosophies involved, thereby fostering a more judicious result. In addition, as India is comprised of people of different races, religions, and socio-economic classes, there is a profound risk of unequal application of the death penalty.<sup>279</sup> Justice Krishna Iyer poetically wrote:

Who, by and large, are the men whom the gallows swallow? The white collar criminals and the corporate criminals whose willful economic and environmental crimes inflict mass deaths or who hire assassins and murder by remote control . . . [r]arely [face this fate]. The feuding villager heady with country liquor, the striking workers desperate with defeat, the political dissenter and sacrificing liberator intent on changing the social order from satanic misrule, the waifs and strays whom society has hardened by neglect

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276. *Id.* at 113. For example, in *Bachan Singh*, the Court stresses that: [t]he normal rule is that the offence [sic] of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death *only* if there are special reasons for doing so . . . . While considering the question of sentence . . . the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, *but not otherwise*, that the offence [sic] is of an *exceptionally depraved and heinous character* and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

*Bachan Singh*, AIR 1980 S.C. 898, 936 (emphasis added).

277. GUPTA, *supra* note 28, at 203.

278. *Id.* at 202.

279. Unequal application of the death penalty has been a controversial issue in the United States as well. See *supra* note 138.

into street toughs, or the poor house-holder—husband or wife—driven by dire necessity or burst of tantrums—it is this person who is the morning meal of the macabre executioner.<sup>280</sup>

Consequently, just as the U.S. Supreme Court and U.S. state legislatures have attempted to create guidelines which are thorough, workable, and fair, the Indian judiciary and legislature have constructed guiding principles to help judges produce consistent and fair sentencing determinations.

The Indian Government has followed the example of a majority of American states and has constructed lists of aggravating and mitigating circumstances which judges are required to consider.<sup>281</sup> Unlike the sentencing statutes in the American states authorizing capital punishment, neither the Indian Penal Code nor the Indian Criminal Procedure Code explicitly list the factors which judges must consider. However, these factors have been listed in many Indian Supreme Court decisions as well as unofficial compilations of Indian law.<sup>282</sup> The Indian judiciary and legal establishment appears to be in a dilemma because although the Court believes that the Legislature is the appropriate body to enact sentencing guidelines,<sup>283</sup> the Legislature is unwilling to codify any rigid rules that will impede individualized consideration.<sup>284</sup> Until one of these objectives gains prominence, unofficial rules and the piecemeal guidance contained in Supreme Court decisions will be the only guidance provided to Indian judges.

#### D. Executive Clemency in India

Article 72 of the Indian Constitution explicitly bestows on the President the power to grant pardons “in all cases where the sentence is a sentence of

280. *Rajendra Prasad v. State of U.P.*, AIR 1979 S.C. 916, 936.

281. *GUPTA*, *supra* note 28, at 122-23. The aggravating factors include:

- (1) The manner in which the offence is perpetrated: whether it be by forcible or fraudulent means, or by aid of accomplices;
- (2) The malicious motive by which the offender was actuated;
- (3) The consequences to the public or to individual sufferers; and
- (4) The special necessity which exists in particular cases for counteracting the temptation to offend, arising from the degree of expected gratification, or the facility of the perpetration peculiar to the case.

*Id.* The mitigating factors include:

- (1) The minority of the offender;
- (2) The old age of the offender;
- (3) The condition of the offender, e.g., wife, apprentice;
- (4) The order of a superior military officer;
- (5) Provocation;
- (6) When the offence was committed under a combination of circumstances and influence of motives which are not likely to recur either with respect to the offender or to any other;
- (7) The state of health and the sex of the delinquent.

*Id.* For a more detailed explanation of the particular significance of many of the aggravating and mitigating factors, see *id.* at 144-84.

282. *Id.* at 122. One of these unofficial sources is RATAN LAL, *LAW OF CRIMES* (1987).

283. See *supra* note 271 and accompanying text.

284. See *supra* notes 258-67 and accompanying text.

death,"<sup>285</sup> yet it says nothing about how this power is to be exercised. The Indian Supreme Court has indicated that the President has complete discretion and the courts shall not interfere with his actual decision on the merits.<sup>286</sup> As is the case with U.S. state governors, the President of India typically exercises his power to grant clemency on the advice of his cabinet.<sup>287</sup> Although the language of the Constitution suggests that the President's discretion in granting clemency is unfettered, the Indian Supreme Court has a limited power of judicial review. This power ensures that the President considers all relevant materials before reaching a decision. For example, in *Harbans Singh v. State of U.P.*,<sup>288</sup> the Indian Supreme Court exercised its power of judicial review in a case where the President granted a pardon for one perpetrator of a crime yet failed to grant a pardon for the prisoner's accomplice after having reviewed both petitions carefully. The President commuted the first prisoner's sentence to life imprisonment and approved the second prisoner's death sentence. The Court was hesitant to interfere with an explicit exercise of executive authority and indicated that "in the interest of comity between the powers of the Supreme Court and [those] of the President of India, it [would] be more [fitting] if the Court were to recommend that the President of India may be so good as to exercise his power under Art. 72 of the Constitution."<sup>289</sup> Nevertheless, the Supreme Court used its power of judicial review to commute the death sentence to life imprisonment.<sup>290</sup> Justice A. N. Sen's concurring opinion further explained that

[i]t would be a sheer travesty of justice . . . if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted . . . . Very wide powers have been conferred on the Supreme Court for due and proper administration of justice . . . [including] an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and prevention of manifest injustice . . . .<sup>291</sup>

Thus, the President's discretion over when a prisoner's sentence will be commuted from death to life imprisonment is limited by the Indian Constitution to such extent that manifest injustice may not result from the denial of a prisoner's petition.

The Indian Penal Code and the Code of Criminal Procedure also authorize clemency in capital cases. Section 54 of the Penal Code provides

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285. INDIA CONST. art. 72. Article 161 gives the governors of each state the power to grant pardons, reprieves, respites or remissions of punishment for crimes over which the executive power of the state extends. *Id.* at 161.

286. CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 88-89 (Albert P. Blaustein & Gisbert H. Flanz eds., 1994) [hereinafter CONSTITUTIONS OF THE COUNTRIES OF THE WORLD].

287. *Id.* at 89-90.

288. AIR 1982 S.C. 849.

289. *Id.* at 850.

290. *Id.*

291. *Id.*

that, “[i]n every case in which the sentence of death shall have been passed, the appropriate Government may, without the consent of the offenders, commute the punishment for any other punishment provided by this Code.”<sup>292</sup> The Indian Legislature has not qualified this power, leaving the reasons for commutation solely to the President or Governor’s judgment.<sup>293</sup> Although the Code of Criminal Procedure provides a significantly more detailed description of executive clemency power, the executive’s discretion remains virtually unlimited.<sup>294</sup>

The President is entitled to reject a petition for clemency without hearing the petitioner present his argument. The Constitution says nothing about the procedure by which the President makes his decisions; thus, the Supreme Court cannot require that each petitioner be given audience.<sup>295</sup>

In exercising his authority to grant or deny pardons, the President is entitled to examine any evidence *de novo*.<sup>296</sup> When he does consider the evidence afresh, the President is treated as independent from the judiciary. Consequently, he may grant relief if he finds that a mistake was made in the trial or at any other time in the trial process.<sup>297</sup> This power is different than merely having the ability to hear newly acquired evidence. In effect, the President acts as a final forum for appeal where the normal procedural rules are no longer binding.

#### E. Summary of Discretion in the Use of Capital Punishment in India

Even though India has a dramatically different history than that of the United States and it is comprised of vastly different cultures and traditions, the discretion in capital sentencing in India is remarkably similar to that in the United States. Although Indian judges generally have sole discretion once a person has been convicted of a capital crime, the Indian legal system has constructed nearly the same guidelines and precautionary measures designed to ensure that the death penalty is employed as fairly and consistently as possible. The similarity is not completely surprising given that the drafters of the Indian Constitution and Justices on the Indian Supreme Court relied on U.S. laws as models.<sup>298</sup> The fact that India looks to the U.S. “experiment”<sup>299</sup> with capital punishment for guidance suggests

292. INDIA PEN. CODE § 54; GUPTA, *supra* note 28, at 126-27.

293. GUPTA, *supra* note 28, at 126-27.

294. INDIA CODE CRIM. PROC. §§ 432-33. See GUPTA, *supra* note 28, at 128-31.

295. CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 286, at 89.

296. *Id.*

297. *Id.*

298. It is possible that India would have used the United Kingdom as a model if the latter had continued to use capital punishment for more than extraordinary crimes. However, when India gained its independence, those who structured the new government opted for a federal republic, much like the United States. LEGAL SYSTEM OF INDIA, *supra* note 225, at §§ 9.80.16-9.80.24.

299. The word “experiment” has been used in both the United States and India to describe the use of capital punishment. Justice Blackmun described the use of the death penalty as an experiment in his opinion in *Callins v. Collins*. 114 S. Ct. 1127, 1129-38 (1994). His use of the term was clearly intended to be negative. See *supra* note 130. In contrast, the 1967 Indian special commission used the word “experiment” to describe the

that if the United States were to join the growing international abolitionist movement, India might be willing to follow its lead.

Nevertheless, because there is no indication that capital punishment will be abolished in India in the near future, it is imperative that both the Indian Supreme Court and the Legislature continue their efforts to construct a death sentencing structure that is as fair and consistent as possible. They must continually analyze whether death penalties are imposed arbitrarily. Finally, they must continue to study other nations' experiences with capital sentencing and not just the U.S. experience in order to understand the inherent limitations in capital sentencing and help them construct the most judicious system.

#### IV. Discretion in the Philippines<sup>300</sup>

The situation in the Philippines contrasts sharply with that in both the United States and India. Although it is the only country of the three which has explicitly abolished capital punishment in its Constitution, the current Philippine government expressly supports the use of the death penalty. Unlike both the United States and India, Philippine authorizing legislation allows for mandatory death sentencing. The modern Philippine experience with the death penalty suggests that so long as political situations around the world remain volatile it may be unwise to trust the statistics which suggest a worldwide trend towards the abolition of capital punishment. The Philippine experience also may suggest that it will never be possible to reach an international consensus concerning the domestic use of capital punishment.

##### A. Political History of the Philippines

Like both the United States and India, the current Philippine governmental system is a republic.<sup>301</sup> This form of government is relatively new, as it was

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possibility of abolishing capital punishment. GUPTA, *supra* note 28, at 97-98. In this context, the absence of capital punishment was clearly intended to be a negative. See *supra* note 245 and accompanying text.

300. The Philippines is a particularly valuable country to study for several reasons. First, the status of the legality and the use of capital punishment in the Philippines has been uncertain in recent years. Although in the mid-1980s it appeared as if the Philippines was becoming an abolitionist nation, since Fidel Ramos came to power the death penalty has returned and has been authorized for crimes that many consistently retentionist nations refuse to authorize. See generally, WHEN THE STATE KILLS, *supra* note 2, at 191-92. Because the legal status of capital punishment has been so uncertain in Philippines, this Note does not analyze the Philippines in the same way as it analyzes the United States and India. Rather, the Philippine experience is used to demonstrate how some nations are moving in the opposite direction, instituting more rigid death penalty legislation despite the international trend towards limiting and even eliminating capital punishment.

301. MODERN LEGAL SYSTEMS CYCLOPEDIA, THE LEGAL SYSTEM OF THE PHILIPPINES, ch. 7(b), 9.290.5, § 1.2 (1990). [hereinafter LEGAL SYSTEM OF THE PHILIPPINES]. However, although it is a republic, the Philippines has a federal penal code. *Id.* Thus, unlike the United States where the individual states have some degree of discretion over defining and prosecuting particular crimes, in the Philippines, all crimes are federal. *Id.*



formed following the ouster of the Japanese occupation at the close of World War II.<sup>302</sup> Prior to 1946, the legal history of the Philippines was determined by successive periods of foreign domination. In 1521, Ferdinand Magellan came to the Philippines and claimed the islands as new Spanish territories.<sup>303</sup> The Spanish brought with them royal and civil laws which governed the Philippines until 1898.<sup>304</sup> Although an independent Philippine republic governed briefly in 1898, the Spanish ceded the Philippines to the United States at the close of the Spanish-American War.<sup>305</sup> The U.S. government completely redrafted the laws governing the Philippines to make them consistent with the U.S. Constitution and American principles.<sup>306</sup> The United States authorized the Philippines to create its own Constitution and elect its own leaders, which it did in 1935.<sup>307</sup> The U.S. government indicated it would grant the Philippines independence only after a Commonwealth government successfully governed for ten years.<sup>308</sup> The Philippine Commonwealth was interrupted by the Japanese occupation from 1941-1944;<sup>309</sup> however, on July 4, 1946, the Philippines finally became completely free from foreign domination.<sup>310</sup>

The new government's first order of business was rehabilitating the economic condition of the Philippines and restoring peace and order.<sup>311</sup> During this period, the government continued to use the U.S.-inspired

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302. *Id.* at 9.290.5, 9.290.7. The Japanese invaded the Philippines during World War II and imposed military rule over the islands for three years. *Id.* Although in their final year of occupation the Japanese attempted to create a Philippine republic, following the war the Filipino people rejected this government and opted to build their own republic. *Id.*

303. *Id.* at 9.290.6. Before the Spanish occupation, the Filipino people lived in numerous independent communities, or *barangay*. *Id.* at 9.290.5. The only laws in existence were customary and unwritten. These laws governed the areas of family relations, inheritance, divorce, usury, partnerships, loans, property rights, barter and sale, and crime and punishment. *Id.* at 9.290.5.

304. *Id.* at 9.290.6. The Spanish extended their laws to the Philippines either by royal decrees or by enacting special laws for the islands. *Id.* By the time of the Philippine Revolution (1898), several codes and special laws were in force. These laws include the 1870 Penal Code, the 1872 Code of Criminal Procedure, the 1856 Code of Civil Procedure, the 1886 Code of Commerce, the 1870 Marriage Law, the 1861 Mortgage Law, the 1859 Mining Law, the 1866 Law of Waters, the 1879 Copyright Law, the 1877 Railway Law, the 1870 Law of Foreigners for Ultramarine Provinces, and the Code of Military Justice. M. GAMBOA, AN INTRODUCTION TO PHILIPPINE LAW 69-71 (7th ed., 1969).

305. LEGAL SYSTEM OF THE PHILIPPINES, *supra* note 301, at 9.290.6.

306. *Id.*

307. *Id.* U.S. President Franklin Delano Roosevelt approved and signed the first Philippine Constitution on February 8, 1935, and the citizens of the Philippines ratified it through a plebiscite on March 14, 1934. *Id.* at 9.290.6-7. Soon thereafter the citizens elected their first President and Vice-President. *Id.* at 9.290.6.

308. *Id.* at 9.290.6.

309. *Id.* at 9.290.7. During World War II, the exiled Commonwealth continued to function in Washington, D.C. and on February 28, 1945, it was re-established in the Philippines. *Id.*

310. *Id.*

311. *Id.*

1935 Constitution.<sup>312</sup> In 1967, the Philippine Congress authorized the formation of a constitutional convention to redraft the Constitution to better suit the needs and goals of the Filipino people.<sup>313</sup> After years of work, a new Constitution was drafted and ultimately ratified by the Filipino citizens in 1973. Although this was the nation's first independently drafted constitution, it failed to protect individual citizens' essential civil and political rights explicitly. This omission enabled Ferdinand Marcos to establish a dictatorship which consistently denied citizens fundamental civil rights.<sup>314</sup>

In 1986, the Philippines underwent a "non-violent revolution" which ousted President Marcos and installed President Corazon Aquino.<sup>315</sup> Upon assuming office, Corazon Aquino immediately began to work towards restoring civil rights and promoting human rights in the Philippines.<sup>316</sup> One of the most significant actions of the Aquino government was the drafting of a new Constitution designed to afford Filipino citizens greater protection of civil and political rights. This new Constitution included a comprehensive Bill of Rights which explicitly and specifically recognizes the rights of all Filipino citizens.<sup>317</sup> In addition to rights similar to those granted in the U.S. Bill of Rights, the Philippine Bill of Rights contains: a separate due process clause for criminal prosecutions;<sup>318</sup> the guarantee that no person shall be detained solely by reason of political beliefs and aspirations;<sup>319</sup> the protection from torture, force, violence, threat, intimidation, or any means which vitiate free will; and the prohibition of secret, solitary, *incommunicado*, or similar forms of detention.<sup>320</sup> Although the Philippine equivalent to the U.S. prohibition of cruel and unusual punishments more significantly defines prisoners' rights, it leaves to the legis-

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312. *Id.* Thus, the government was divided into three branches: the executive branch, headed by the President, the legislative branch, constituting a bicameral Congress, and the judiciary branch, headed by a Supreme Court and a series of inferior courts. *Id.*

313. *Id.*

314. *Id.* This Note does not examine the presidency of Ferdinand Marcos. For purposes of this Note, it is important to understand that the harshness of the Marcos regime combined with the non-violent Philippine Revolution of 1986 led to the more progressive and liberal Aquino presidency. For a more thorough discussion of the rise and fall of President Ferdinand Marcos, see REFLECTIONS ON MARTIAL LAW AND THE MARCOS DICTATORSHIP (Senate of the Philippines eds., 1989); DICTATORSHIP & REVOLUTION: ROOTS OF PEOPLE'S POWER (Aurora Javate-de Dios et al. eds., 1988); JIM FOREST, FOUR DAYS IN FEBRUARY: THE STORY OF THE NONVIOLENT OVERTHROW OF THE MARCOS REGIME (1988); STERLING SEAGRAVE, THE MARCOS DYNASTY (1988); ROSCA NINOTCHKA, ENDGAME: THE FALL OF MARCOS (1987); JOHN LYONS, MARCOS AND BEYOND: THE PHILIPPINES REVOLUTION (1987).

315. See generally FOREST, *supra* note 314.

316. AMNESTY INTERNATIONAL, PHILIPPINES: THE KILLING GOES ON 87 (1992) [hereinafter THE KILLING GOES ON].

317. PHIL. CONST. art. III. This Bill of Rights is significantly more specific and detailed than the U.S. Bill of Rights and is comprised of 22 sections. The drafters of the new Philippine Constitution probably recognized that, given the power President Marcos had been able to wield, civil and political rights had to be explicitly defined so as to give future presidents less room to deny political and civil rights.

318. *Id.* § 14(1).

319. *Id.* § 18(1).

320. *Id.* § 12(2).

lature determination of remedies.<sup>321</sup>

The new Bill of Rights clearly demonstrates the Philippines' primary objective of protecting individual rights from future attack. As part of its efforts to afford greater protections of individual life and liberty, the drafters of the new Constitution included explicit provisions abolishing the death penalty, a punishment which had been used during the Marcos regime.<sup>322</sup> In addition to drafting a new Constitution, Aquino released political prisoners, repealed repressive decrees which had allowed indefinite detention of citizens accused without trial, and restored the right of habeas corpus.<sup>323</sup>

In 1992, Fidel Ramos, former Chief of Staff of the Armed forces, was elected President of the Philippines. Throughout Aquino's presidency, Ramos had been an ardent supporter of the reintroduction of the death penalty for particular crimes.<sup>324</sup> Once he became president, one of his primary objectives was to reinstate the death penalty for particularly "heinous" crimes.<sup>325</sup> To achieve this goal, Ramos did not seek to change the 1987 Constitution and the democratic government thereunder, rather he worked within the current system by manipulating the flexible language of the Constitution.<sup>326</sup> Thus, although the current Philippine Constitution and political structure is the most liberal in its history and most explicitly protects civil and political rights, the government is structured such that a President with a "crime-busting" and a military agenda has been able to provide for capital punishment for more crimes than were authorized under Marcos' martial law.<sup>327</sup>

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321. *Id.* § 19(2). This section states that "[t]he employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law." *Id.*

322. *WHEN THE STATE KILLS*, *supra* note 2, at 191. See *infra* part IV.B.

323. *THE KILLING GOES ON*, *supra* note 316, at 87.

324. *WHEN THE STATE KILLS*, *supra* note 2, at 191.

325. *13 Crimes Listed Under Death Penalty*, *THE MANILA BULLETIN USA*, Dec. 2-8, 1993, at 1. Due to the consistently high crime rate in the Philippines, Ramos, a graduate of the United States Military Academy, believed that the death penalty was necessary to reduce crime. He had been elected on a law and order platform and made it clear that, if elected, he would work towards the passage of a new death penalty law as a deterrent to violent crimes. *Philippines Restores Death Penalty for Heinous Crimes*, *JAPAN ECON. NEWSWIRE*, Dec. 13, 1993, available in LEXIS, Nexis Library, International News Service File. More specifically, at the time the Philippine Congress enacted the new death penalty legislation, the Philippines had the highest murder rate in Asia. Alex Dacanay, *Philippines Restores Capital Punishment*, *THE NIKKEI WKLY.*, Dec. 13, 1993, at 27. In addition, kidnapping had become an overwhelming problem as kidnapping syndicates targeted Chinese businessmen. *Philippines; Reviving Death*, *THE ECONOMIST*, Dec. 18, 1993, at 33. This problem is believed to have caused foreign investors to shun the Philippines, which in turn had drastic effects on the Philippine economy. *Id.* From March 1992 to August 1993, 191 wealthy Chinese-Filipinos were abducted by "kidnap gangs." *Philippines Restores Capital Punishment*, *supra*. Neighboring countries, such as Singapore, also had been pressuring the Philippine government to reintroduce the death penalty for drug-related crimes, as they were concerned that the softer Philippine penal regime encouraged the growth of the drug trade in the area. *Id.*

326. See *infra* part IV.B.

327. *Philippines; Reviving Death*, *supra* note 325, at 33.

## B. Constitutionality of the Death Penalty

Only a few years ago, the Philippines was among those countries advocating abolition of the death penalty.<sup>328</sup> The revised Bill of Rights in the 1987 Constitution<sup>329</sup> had abolished the use of the death penalty for all but "compelling reasons involving heinous crimes, [where] the Congress hereafter provides for it."<sup>330</sup> The Philippine Congress subsequently revised the Philippine Penal Code to incorporate this new Constitutional standard. The Congress redrafted every article in the Code which authorized sentences of death for particular crimes such that life imprisonment, or *reclusion perpetua*, was the most stringent penalty available.<sup>331</sup> The Code repeatedly instructs that the death penalty has been abolished and that all provisions relating to the death penalty have been superseded.<sup>332</sup>

In addition to abolishing the death penalty until such a time that the Congress passed valid legislation, the Constitution reduced all existing death sentences to life imprisonment.<sup>333</sup> When the new Constitution became effective in 1987, there were over 500 condemned prisoners, most of whom had been sentenced by military tribunals during President Marcos' most intense period of martial law (from 1972-1981).<sup>334</sup> In her first year as president, Aquino commuted the sentences of many of these prisoners; however, in January 1988, 360 prisoners still were under a sentence of death. The Philippine Department of Justice explained that the commutations could not go into effect without an official act of Congress.<sup>335</sup> Nevertheless, none of these prisoners were executed for their crimes.<sup>336</sup>

In 1989, the Philippine Supreme Court considered the effect of the constitutional abolition of capital punishment. In *People v. Munoz*,<sup>337</sup> three men, employed as bodyguards of a mayor, were found guilty of the murder

328. WHEN THE STATE KILLS, *supra* note 2, at 191.

329. *Id.* See *supra* notes 313-20 and accompanying text.

330. PHIL. CONST. art. III, § 19.

331. See PHIL. REV. PENAL CODE, Title 3 (Penalties), arts. 25-88 (1991). See *infra* note 333 for a more thorough explanation of the punishment of *reclusion perpetua*.

332. PHIL. REV. PENAL CODE, Title 3 (Penalties), arts. 25-88 (1991).

333. PHIL. CONST. art. III, § 19. Life-imprisonment in the Philippines is known as *reclusion perpetua*. Despite the title of the punishment, those who are convicted and sentenced to *reclusion perpetua* are only required to spend 30 years in prison, after which they are granted a pardon, unless they have engaged in extremely poor conduct during their imprisonment. PHIL. REV. PENAL CODE, art. 27. *Reclusion perpetua* includes additional punitive measures which last beyond the period of imprisonment. For example, people who receive this sentence are banned from holding any public office and employment which the offender may have held prior to their incarceration, even if conferred by popular election, and are deprived of the right to vote or be elected to any public office. *Id.* arts. 30-33. During the period of imprisonment, the offender is deprived of the rights of parental authority, of guardianship, either as to the person or property of any ward, of marital authority, of the rights to manage his property, and of the rights to dispose of such property by any act or any *inter vivos* conveyance. *Id.* art. 34.

334. WHEN THE STATE KILLS, *supra* note 2, at 191.

335. *Id.*

336. *Id.*

337. 170 SCRA 107 (1989).

of three people whom the bodyguards had suspected were cattle rustlers. The authorized penalty for murder under Article 248 of the Revised Penal Code ranged from the minimum punishment of *reclusion temporal*, imposing a prison sentence of twelve years and one day to twenty years,<sup>338</sup> to the maximum punishment of death.<sup>339</sup> The issue before the Court was the appropriate punishment for the crime, given that the abolition of capital punishment eliminated the current maximum sentencing option.<sup>340</sup> The Court found that Article III, Section 19(1) of the Constitution did not disrupt irreparably the existing sentencing scale authorized under Article 248 of the Revised Penal Code.<sup>341</sup> The maximum penalty merely had been changed from death to *reclusion perpetua*.<sup>342</sup> In four prior cases, the Court had required that penalty scales affected by the abolition of the death penalty had to be divided into three new periods in order to ensure consistent sentencing.<sup>343</sup>

Nevertheless, in *Munoz* the Court rejected this active interference in an area more appropriate for legislative determination. The Court noted that it has no authority to modify penalties or redraft their range, and that if the Congress wished to change sentencing guidelines, it must do so itself.<sup>344</sup> Thus, the *Munoz* case demonstrates that the Court fully embraced the abolition of capital punishment, and that the abolition did not require a full-scale overhaul of the penal code. The courts thereafter would use the existing sentencing guidelines, merely disregarding death as an option.

Because the drafters of the new Constitution dealt separately with capital punishment, the Philippine Supreme Court did not develop a separate body of law limiting its use under the due process clause or prohibition against excessive punishments. Such jurisprudence was unnecessary so long as the Philippine Congress opted not to exercise its power of reinstating capital punishment for cases involving heinous crimes.<sup>345</sup> However, once the Congress decided to reintroduce the death penalty for particularly heinous crimes, section 19(1) of the Bill of Rights no longer applied and the lack of Supreme Court jurisprudence limiting capital sentencing allowed the Congress to enact relatively strict legislation.<sup>346</sup> More specifically, because the Supreme Court had not yet been asked to consider the constitutionality of either mandatory death sentencing or sentencing schemes which gave sentencers unlimited discretion under the due process

338. PHIL. REV. PENAL CODE, art. 27.

339. *Id.* art. 248.

340. *Munoz*, 170 SCRA at 107.

341. *Id.* at 113.

342. *Id.* at 107.

343. *People v. Gavarra*, 155 SCRA 327 (1987); *People v. Masangkay*, 155 SCRA 113 (1987); *People v. Atencio*, 156 SCRA 242 (1987); *People v. Intino*, 165 SCRA 635 (1988).

344. See Vincente V. Mendoza, *The Constitution According to the Supreme Court: A Review of Cases in 1989-1990*, 64 PHIL. L.J. 66 (1989).

345. Recall that section 19(1) abolishes capital punishment except in those cases where the Congress provides for its use "for compelling reasons involving heinous crimes." PHIL. CONST. art. III, § 19 (1).

346. See *infra* part IV.C.

clause or specific protections against extreme punishment,<sup>347</sup> the Congress has had unbridled discretion in drafting its new legislation.

In August 1987, General Fidel Ramos, then Chief of Staff of the Armed Forces, now President of the Republic of the Philippines, urged Congress to reintroduce the death penalty for rebellion, murder, and drug-trafficking.<sup>348</sup> In December 1993, after more than a year of debate, the Philippine Congress enacted legislation that categorizes thirteen crimes as heinous offenses punishable by death, in accordance with the Constitution.<sup>349</sup> President Ramos explained that the nation "cannot stop violence and heinous crimes by simply trying to humanize criminals."<sup>350</sup> He further explained that "[i]n re-examining this provision of our constitution, we do not reject its spirit . . . . We only say that there are now compelling reasons for restoring capital punishment with respect to crimes which our people and our government consider so heinous or so inhuman that the ultimate penalty must be imposed."<sup>351</sup> The designated crimes include: treason, piracy and mutiny on the high seas, parricide, murder, infanticide, kidnapping for ransom and illegal detention, robbery with violence against or intimidation of persons, destructive arson, rape where the victim is a minor or the perpetrator has AIDS, drug trafficking or other drug-related crimes, auto theft with attendant homicide, plunder of government funds worth at least fifty million pesos (approximately \$1.8 million),<sup>352</sup> and bribery involving law enforcement officers.<sup>353</sup> This legislation did not merely authorize the use of capital punishment for these crimes; it had the much more dramatic effect of establishing mandatory death sentencing for certain offenses.<sup>354</sup> President Ramos signed the bill into law and it went into

347. In the United States these cases include *Furman v. Georgia*, *Gregg v. Georgia*, *Woodson v. North Carolina*, and *Lockett v. Ohio*. See *supra* part II.B. In India these cases include *Jagmohan Singh v. State of Uttar Pradesh*, *Sumil Batra v. Delhi Administration*, *Mithu v. State of Punjab*, *Bacham Singh v. State of Punjab*, see *supra* parts III.B and III.C. There are no analogous cases in the Philippines at present.

348. WHEN THE STATE KILLS, *supra* note 2, at 191.

349. REPUBLIC ACT No. 7659, Dec. 13, 1993. *13 Crimes Listed Under Death Penalty*, *supra* note 325. The bill passed by a vote of 123-26 in the House of Representatives, and 9-6 (with one abstention) in the Senate. *Philippine Congress Approves Death Penalty*, REUTERS, Dec. 8, 1993, available in LEXIS, Nexis Library, International News Service File.

350. *President Ramos Signs Death Penalty Act into Law After Six Years' Abolition*, BBC NEWS, Dec. 15, 1993, available in LEXIS, Nexis Library, International News Service File. Ramos justified this act based on the penological principle of future crime deterrence and on economic grounds, expressing grave concern over the flight of foreign investments due to the high crime rate. *Id.*

351. *Ramos Signs Law Restoring Death Penalty*, AGENCE FRANCE PRESSE, Dec. 13, 1993, available in LEXIS, Nexis Library, International News Service File.

352. This provision was included in direct response to the allegations of massive theft of public money by President Marcos and his wife Imelda during Marcos' 20 years in power. *Philippine Congress Approves Death Penalty*, *supra* note 349. The Marcos' and their business allies have been accused of stealing up to \$20 billion from the Philippine treasury. *Id.*

353. REPUBLIC ACT No. 7659, *supra* note 349. See also *13 Cases Listed Under Death Penalty*, *supra* note 325; *President Ramos Signs Death Penalty Act into Law After Six Years' Abolition*, *supra* note 350; *Ramos Signs Law Restoring Death Penalty*, *supra* note 351.

354. See *infra* part IV.C.

effect on January 1, 1994.<sup>355</sup>

Although the 1987 Constitution of the Philippines explicitly rejects the use of capital punishment except for those cases in which the Congress expressly authorizes its use due to the relative heinousness or atrociousness of the crime, it can be argued that the language used was merely aspirational.<sup>356</sup> The drafters of the Constitution made it relatively easy for Congress to reinstate the death penalty whenever it opted to do so. Because "heinous" was not specifically defined in the Constitution, section 19(1) conferred considerable discretion on the Congress in drafting its death penalty legislation. This discretion, coupled with the absence of separate death penalty jurisprudence, has caused the Philippines to transform itself from being one of the most progressive nations in the world in terms of explicitly rejecting the death penalty in its constitution into a firm advocate of the unhindered use of capital punishment.

### C. Discretion in Death Sentencing

Due to the unusual recent history of capital punishment in the Philippines, the Philippine Congress currently is able to determine which groups or individuals will have discretion in death sentencing and what degree of discretion shall be allowed. Until the Philippine Supreme Court is able to consider particular cases which have been brought to it on constitutional grounds, the Congress will continue to have ultimate discretion over the bounds of the death penalty's legality.<sup>357</sup> Ironically, it seems as if the decision to address capital punishment explicitly in the Bill of Rights without completely abolishing its use interfered with the development of Supreme Court case law delineating the death penalty's constitutional limits under broader constitutional principles. Thus, the drafters' decision to abolish the death penalty, while also granting the Congress broad powers to restore it, has enabled a new president to reintroduce the use of capital punishment for more crimes than were ever "death eligible" during the Marcos regime.<sup>358</sup>

It is difficult to draw any firm conclusions about sentencing discretion in Philippine death penalty cases, given that its Congress only recently has reintroduced capital punishment and that, therefore, this area of the law is presently undeveloped and particularly volatile. It is unclear whether the Supreme Court will limit the use of the death penalty based on other Bill of Rights protections. Perhaps the Philippine Supreme Court will follow the lead of either the U.S. Supreme Court or the Indian Supreme Court and

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355. *Death Penalty Returns to the Philippines*, REUTERS, Dec. 31, 1993, available in LEXIS, Nexis Library, International News Service File.

356. See *supra* note 321 and accompanying text.

357. Once a constitutional challenge is brought against a death sentence, the Supreme Court will be able to start developing its own death penalty jurisprudence, much like the Supreme Courts have done in the United States and India. Capital defendants might bring challenges under section 19(2) of the Bill of Rights, the rough equivalent to the U.S. Constitution's Eighth Amendment, or under the due process clause.

358. *Philippines; Reviving Death*, *supra* note 325.

will develop case law which allows sentencer discretion, yet at the same time channels it in order to achieve consistent sentencing and prevent arbitrariness. On the other hand, the Philippine Supreme Court may adopt Justice Scalia's view that individualized sentencing and guided discretion are inherently incompatible and consequently may find mandatory sentencing to be constitutionally permissible.<sup>359</sup> Perhaps the Filipino citizens will decide that capital punishment does not attain its intended objectives and will urge their legislators to repeal the legislation or even pass a constitutional amendment totally abolishing the death penalty. Given its relatively brief history of independent, representative government and its even briefer history of using capital punishment under such a political structure, Philippine history provides little guidance as to the potential future of capital sentencing discretion in the Philippines.

#### D. Summary of Discretion in the Use of Capital Punishment in the Philippines

Currently, death sentences are being imposed aggressively in the Philippines as part of President Fidel Ramos' campaign against violent crime and against continued flight of foreign investment.<sup>360</sup> Thus far, the Philippine Congress has unbridled discretion in crafting its death penalty legislation. As a result, the death penalty currently is authorized for a relatively broad array of offenses and in several cases death sentencing is mandatory once an individual has been convicted of such crimes. The constitutional abolition of the death penalty resulted in the eventual pardoning of approximately 500 prisoners who had been sentenced to death by Marcos' military tribunals and six years free from additional capital sentencing. However, the abolition ultimately proved to be mainly aspirational because the Philippine Congress was able to reverse the seemingly abolitionist trend and reinstate capital punishment with a vigor which never existed during President Marcos' dictatorship.

At present, it is unclear what role capital punishment will play in the future of Philippine criminal law. Whatever the future may bring, the Philippine experience may suggest that, contrary to Professor Schabas' hypothesis,<sup>361</sup> there is no worldwide trend towards absolute abolition of capital punishment. Even those nations which have abolished the death penalty already may revert to using it if the political climate changes or crime rates begin to rise uncontrollably. This theory is most plausible in countries like the Philippines, which do not have a long history of independent democratic rule. In addition, the Philippine experience may suggest that there is little hope in constructing a single international standard governing the continued use of capital punishment. Individual nations have strong ideas about what works best for their "unique" circumstances. They do not appreciate foreign governments or international organizations dictating

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359. See *supra* note 182 and accompanying text.

360. As of publication, no prisoner has been executed in the Philippines. See AMNESTY INTERNATIONAL, *supra* note 14, at 4.

361. See *supra* note 29.



how their criminal justice systems should be structured. Thus, perhaps the most valuable lesson that can be taken from comparing to other nations the legality and use of capital punishment in the Philippines is that general rules cannot be generated by such a comparative study.

## Conclusion

Comparing the degree of discretion permitted and exercised in retentionist nations around world teaches valuable lessons about both the current use of capital punishment in the United States and the future use of capital punishment throughout the world. Although the U.S. Supreme Court's decision to treat sentencing discretion as an area constrained by the Eighth, Fourteenth and Fifth Amendments has forced states to provide significant protections against arbitrariness in their capital sentencing schemes, many nations which share the same views on important rights of humanity, particularly the European nations, consistently and unifiedly have favored total abolition of capital punishment. What makes the United States different from its European allies? Why is it that India, a nation which has fewer constitutional protections than the United States, has developed virtually the same death penalty jurisprudence as exists in the United States? Because the United States has not experienced the same degree of political and civil instability experienced by most of the other staunch retentionist nations, it is difficult to understand why the death penalty is not only being retained in the United States, but is being used more widely and more aggressively.

Even if there are no clear explanations as to why the United States has thus far rejected the death penalty jurisprudence of its traditional allies, a study of the legality and use of capital punishment throughout the world reinforces the U.S. Supreme Court's objective of developing a capital sentencing system which allows some degree of sentencing discretion channeling, to guarantee consistency and fairness. India, a nation with a dramatically different political history, culture, and religious background, also has recognized that, given the finality of death sentences, it is essential to protect against arbitrariness. Although the Philippine legislature currently allows for mandatory death sentencing, which completely rejects individualized sentencing, it is likely that this legislation will be challenged in the near future. The volatile nature of the Philippine legal and political system makes the Philippines an interesting case study and an important country to watch; however, it currently is not an appropriate model for capital sentencing jurisprudence.

This comparative study indicates that the future of worldwide use of capital punishment is uncertain and unpredictable. Although Professor Schabas offers plausible evidence that there is a gradual abolitionist trend, most nations which continue to retain the death penalty have made no indications that they are even considering absolute abolition. Even those nations which have already abolished capital punishment, particularly those which lack a tradition of political and civil stability, should be

watched closely. The failure of the United Nations to reach a consensus in favor of advocating an aspirational goal of total abolition of capital punishment by the year 2000 most clearly demonstrates that it is at best optimistic to believe that worldwide abolition is likely to become a reality in the near future. Nevertheless, opponents of the death penalty should not abandon their cause. Consistent opposition to capital punishment will keep the abolitionist dialogue open and will continue to ensure that the most fair and consistent sentencing structures will be enacted. So long as the dialogue remains open, ultimate abolition will remain a possible outcome of the international experience with capital punishment.

