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THE UNITED STATES—"CAPITAL" OF THE WORLD: AN ANALYSIS OF WHY THE UNITED STATES PRACTICES CAPITAL PUNISHMENT WHILE THE INTERNATIONAL TREND IS TOWARDS ITS ABOLITION

INTRODUCTION

Capital punishment is one of the most discussed and debated topics in both legal and social fora. Yet amidst a plethora of books, articles and columns authored by legal scholars discussing the death penalty, there has been virtually no examination as to why the United States practices capital punishment while the international trend is toward its abolition. Part of the reason for this scarcity of literature is the lack of one simple reason for the departure. Rather, the reasons are both complex and intertwined.¹

Thus, the purpose of this Note is to rectify the lack of discussion by formulating a hypothesis as to why the United States upholds this ostensibly divergent stance. Part I of this Note establishes that there is indeed an international trend towards the abolition of capital punishment. This is achieved by demonstrating that in recent years countries are joining the abolitionist ranks in exceptional numbers. In addition, the international disfavor towards capital punishment is further evidenced by numerous international treaties and resolutions that advocate abolition. Part II discusses the existence of capital punishment in the United States since the colonial period and provides a brief timeline of the death penalty in America. Part II goes on to observe that tradition itself can partially explain the thriving of capital punishment in certain areas of the United States. Part III examines the effect of public opinion on capital punishment. This section is divided into three

1. In fact, one author commented that the "reasons underlying this phenomenon (the United States aberration) are much too complex to be adequately explored here (in her paper)." Cheryl Aviva Amitay, Note, *Justice or "Just Us": The Anomalous Retention of the Death Penalty in the United States*, 7 MD. J. CONTEMP. LEGAL ISSUES 543, 544 (1996).

subparts—Part III A discusses public opinion's effect on the U.S. Supreme Court; Part III B elaborates on the role of public opinion in American politics; and Part III C speaks generally to the effect of public opinion on capital punishment in other countries. In conclusion this Note argues that the United States is at variance from its international counterparts in that public opinion has an effect on the three branches of government and consequently plays a prominent role in the retention of the death penalty in the United States.

I. INTERNATIONAL TREND TOWARDS THE ABOLITION OF CAPITAL PUNISHMENT

Simply stated, the United States has taken a "comparatively unorthodox approach"² with regard to capital punishment by being the only western democratic state to employ the death penalty for ordinary crimes during times of peace.³ Although this is a startling aberration by the United States, this trend in international law is indeed a modern phenomenon; in fact, the trend towards abolition is so recent that Canadian law professor William A. Schabas has noted that it "could not have been written [about] fifty years ago because its subject matter did not exist."⁴

2. Laurence A. Grayer, Comment, *A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, 23 DENV. J. INT'L L. & POLY 555, 555 (1995).

3. See Ursula Bentele, *Race and Capital Punishment in the United States and South Africa*, 19 BROOK. J. INT'L L. 235, 237 (1993). The retention of the death penalty for "ordinary crimes" means that the state may impose capital punishment for crimes of an extraordinary nature, such as offenses committed during wartime. *Id.* at 240 n.15.

Zimring & Hawkins also note the aberration of the United States in the commencement of their book by stating: "The pattern is so simple it is stunning. Every Western industrial nation has stopped executing criminals, except the United States." FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 3 (1986).

4. WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 1 (1993). This is not to say that steps towards abolition did not take place in much earlier years. In fact, in the nineteenth century and early twentieth century, there were several states which abolished the death penalty. For example, Venezuela in 1863, San Marino in 1865, Costa Rica in 1877, Ecuador in 1906, Uruguay in 1907, Colombia in 1910, and Iceland in 1928. See ROGER HOOD, *THE DEATH PENALTY—A WORLD-WIDE PERSPECTIVE* 1 n.1 (2d ed. 1996).

A. *A Vast Number of Countries Have Adopted an Abolitionist Stance*

The international trend against capital punishment is most starkly illustrated by the drastic number of countries which have adopted an abolitionist approach. For instance, since World War II, approximately one state has abolished the death penalty every year.⁵ Such a statistic has prompted one commentator to note that in recent years abolition has taken place at "an unprecedented rate."⁶

In fact, looking at Europe alone highlights the intensity of the trend. For instance, Italy abolished the death penalty in 1947, the Federal Republic of Germany abolished it 1949, and France proclaimed abolition in 1982.⁷ And of particular significance, as of 1996, only two countries in Western Europe—Belgium and Turkey—retained capital punishment for ordinary offenses.⁸ Furthermore, both countries are *de facto* abolitionist.⁹

In addition to the vast number of states which have adopted an abolitionist outlook, the trend is further illustrated by the fact that countries which have traditionally been scorned for violating human rights have also joined the abolitionist ranks.¹⁰ For example, in June 1995, eleven members of South

5. See Sonia Rosen & Stephen Journey, *Abolition of the Death Penalty: An Emerging Norm of International Law*, 14 HAMLINE J. PUB. L. & POL'Y 163, 180 (1993).

6. HOOD, *supra* note 4, at 229.

7. See Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72 IND. L.J. 7, 8 (1996). The relevant constitutional provisions are as follows: COSTITUZIONE [Constitution] art. 27(4) (Italy); GRUNDGESETZ [Constitution] art. 102 (F.R.G.). It should be noted that Portugal was the first western European country to abolish capital punishment, accomplishing this feat in 1867. See ZIMRING & HAWKINS, *supra* note 3, at 9. French President Mitterand realized the abolition of the death penalty in France in 1982. *Id.*

8. See HOOD, *supra* note 4, at 12. For a definition of ordinary offenses, see Bentele, *supra* note 3.

9. See HOOD, *supra* note 4, at 12. De facto abolitionist means that although a country retains capital punishment for particular offenses, it has not imposed the punishment for at least ten years. See Amitay, *supra* note 1, at 550 n.53. In fact, with only one exception in 1918, an individual has not been executed in Belgium for an ordinary crime since 1863. See HOOD, *supra* note 4, at 12.

10. South Africa has been known to infringe on both the civil and political rights of its citizens through "discriminatory and repressive legislation," such as restrictions on expression, association, and employment. ZIMRING & HAWKINS, *supra* note 3, at 6.

Africa's highest court unanimously ruled that capital punishment was unconstitutional.¹¹ This feat occurred despite the fact that in prior years, comparatively speaking, South Africa practiced capital punishment at a very high rate¹² as evidenced by approximately 1,100 individuals being executed between 1981 and 1990.¹³ Even more surprisingly, abolition took root in South Africa even though the country's murder rate is approximately five times higher than that of the United States.¹⁴

B. The Proliferation of Treaties and Resolutions Advocating Abolition of Capital Punishment

Coupled with numerous countries eliminating the death penalty, since World War II—a war whose devastation prompted the development of a system to protect human rights—several treaties and resolutions have strongly advocated abolition.¹⁵ One of the earliest reflections of such a stance is The Universal Declaration on Human Rights, (Universal Declaration)¹⁶ which was adopted by the United Nations Gen-

11. See [S. v. Makwanyane] 1995 (6) BCLR 665 (CC), available in LEXIS, 1995 SACLX LEXIS 218 (Const. Court June 6, 1995). The case came before the court on an appeal by two individuals who were convicted for the murder of four persons—two police officers and two bank security officers. The slayings occurred while the criminals attempted to rob a bank security vehicle. *Id.* at *319-20. At issue in the case was whether Section 227(1)(a) of the Criminal Procedure Act 51 of 1977, which called for the implementation of capital punishment for a murder conviction, was in accord with the newly enacted Republic of South Africa Constitution (1993). *Id.* at *41. The Constitution did not explicitly prohibit the death penalty. However, the court reasoned that several provisions implied abolition.

For example, the court noted that Section 11(2) of Chapter 3 of the Constitution prohibits "cruel, inhuman or degrading treatment or punishment." *Id.* at *46. Similarly, Section 9 of Chapter 3 states "every person shall have the right to life." *Id.* at *48. Analyzing these provisions, the court held that the death penalty was unconstitutional. *Id.* at *59 n.26. See S. AFR. CONST. ch. 3, §§ 9, 11(2).

12. See AMNESTY INTERNATIONAL, THE DEATH PENALTY: AMNESTY INTERNATIONAL REPORT 58 (1979).

13. See *Makwanyane*, 1995 (6) BCLR at *329 (O'Regan, J., concurring).

14. See Peter Norbert Bouckaert, Note, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J. INT'L L. 287, 324 (1996).

15. See SCHABAS, *supra* note 4, at 1.

16. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. The Universal Declaration was created by the Commission on Human Rights and was formed by the Economic and Social Council. See SCHABAS, *supra* note 4, at 29.

eral Assembly on December 10, 1948.¹⁷ In essence, this resolution is deemed to be the "cornerstone of contemporary human rights law."¹⁸ In the formation of the Universal Declaration, there was much debate with regard to the death penalty—specifically, whether its abolition should be listed as a goal to aspire to.¹⁹ No such position was articulated. However, Article 3 which states that "[e]veryone has the right to life, liberty and the security of person"²⁰ was the compromise reached.²¹

Even though abolition was not promulgated by the Universal Declaration, the abolitionist outlook of the document was evident. In fact, several resolutions of the United Nations General Assembly and Economic and Social Council advocating abolition cite Article 3 in their preambles.²² Thus, through eliciting debate on the subject of capital punishment in the context of international human rights, the Universal Declaration was the first step in the international trend towards abolition of the death penalty.²³

In the forum of the United Nations, evidence of this international trend further manifested itself through the International Covenant on Civil and Political Rights (ICCPR)²⁴ which was adopted by the General Assembly in 1966 but did not come into force until March 23, 1976, following its thirty-fifth ratification.²⁵ The ICCPR differs from the Universal Declara-

17. Though several countries abstained, no member state dissented from adoption of the Declaration. See 2 UNITED NATIONS RESOLUTIONS 17 (Dusan J. Djonvich ed., 1973).

18. SCHABAS, *supra* note 4, at 25.

19. *Id.* at 41-44.

20. Universal Declaration, *supra* note 16, at 72. As an aside, the drafters of Article 3 were not only referring to the death penalty, but also to abortion. See SCHABAS, *supra* note 4, at 27.

21. Interestingly, Eleanor Roosevelt did not want to use the term "death penalty." See SCHABAS, *supra* note 4, at 33. The underlying reasoning for her stance was that she felt the Universal Declaration was not an attempt to write criminal law and correspondingly, not the place for discussion of this issue. *Id.* at 42. Meanwhile, the Soviet Union argued to the contrary, for it wanted the Universal Declaration to clearly state that the death penalty should be abolished during peacetime. *Id.* at 40-41. Due to its view on capital punishment, the Soviet Union abstained from voting on the entire article. *Id.* at 44.

22. *Id.* at 49.

23. *Id.* at 50.

24. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

25. *Id.* This lengthy process is further illustrated by the fact that the Com-

tion in that the former binds all nations who become a party to it. The ICCPR is also distinguishable from the Universal Declaration in that this was the first time the United Nations explicitly noted its abolitionist stance.²⁶ For the purposes examined here, the most noteworthy section of the ICCPR is Article 6, which deals primarily with capital punishment.²⁷ Within Article 6, two paragraphs are of particular importance: paragraph (2) establishes the existence of abolitionist countries and invokes a relatively high standard for the imposition of the death penalty; and paragraph (6) sets out an abolitionist tone.²⁸ Both of these paragraphs strongly reflect the views of Uruguay and Colombia which ardently sought inclusion of an abolitionist approach.²⁹

The ICCPR is also particularly noteworthy due to its vivid

mission on Human Rights began drafting the ICCPR as early as 1947. MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS xvix (1987).

26. See Ariane M. Schreiber, Note, *States That Kill: Discretion and the Death Penalty—A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263, 276 (1996). Schabas describes the ICCPR as "[a] complement to the Universal Declaration of Human Rights [making] explicit two crucial concepts: first, that the death penalty, although not forbidden, could only be imposed for serious crimes after rigorous due process, and second, that abolition of the death penalty was a goal of international human rights law." SCHABAS, *supra* note 4, at 135.

27. The relevant provisions of Article 6 of the ICCPR read as follows:

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 crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death 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 to prevent the abolition of capital punishment by any State Party to the present Covenant.

ICCPR, *supra* note 24, at 53.

28. *Id.*

29. See SCHABAS, *supra* note 4, at 74, 80. Their proposed amendment read "[e]very human being has the inherent right to life. The death penalty shall not be imposed on any person." *Id.*

illustration of the U.S. position on capital punishment. Even though it faced international opposition, the United States did not assume the ICCPR in its entirety.³⁰ Rather, it ratified the ICCPR with effect from September 8, 1992, making a substantial reservation to Article 6.³¹ The reservation essentially enables the United States to utilize the death penalty as long as its use is in accord with the U.S. Constitution. Inclusive in this reservation is the lack of commitment to paragraph (5) of Article 6 which prohibits the use of capital punishment on a person less than eighteen years of age.³² Quite significantly, this reservation is so substantial that it has been considered to be "by far the most extensive reservation to the capital punishment provisions of any international human rights treaty."³³

The U.S. reservation was not without any impact. Eleven European nations, all of which had both ratified the ICCPR and abolished capital punishment under their own domestic law, noted that they found the U.S. reservation to be illegal due to its incompatibility with the spirit of the ICCPR.³⁴ Such

30. See Grayer, *supra* note 2, at 560.

31. The reservation declares that "[t]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645, 653 (1992). No other nation had a substantive reservation to Article 6. See Hugo A. Bedau, *International Human Rights Law and the Death Penalty in America*, in *THE DEATH PENALTY IN AMERICA* 246, 246 (Hugo A. Bedau ed., 1997). The only other reservations for Article 6 were issued by Norway and Ireland due to "purely technical reasons." *Id.*

32. At the time of the ratification, over twenty-four states permitted the death penalty to be imposed on juveniles. *Id.* Currently in the United States, any individual over the age of sixteen can be subject to execution. See *Stanford v. Kentucky*, 492 U.S. 361 (1989). This policy of applying the death penalty on juvenile offenders is in line with the practices of Iran, Iraq, Pakistan, Yemen, Bangladesh and Nigeria. See Ved Nanda, *U.S. Must Re-examine Executions*, *DENV. POST*, Feb. 13, 1997, at 7B.

For further discussion concerning the execution of juveniles, see Julian S. Nicholls, Comment, *Too Young To Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 *EMORY INT'L L. REV.* 617 (1991). See also Tanya M. Perfecky, Comment, *Children, the Death Penalty and the Eighth Amendment: An Analysis of Stanford v. Kentucky*, 35 *VILL. L. REV.* 641 (1990) (arguing that the U.S. Supreme Court should consider relevant international norms in its Eighth Amendment analysis).

33. SCHABAS, *supra* note 4, at 92.

34. See Bedau, *supra* note 31, at 246.

a stance by ratifying states to a reservation of another state is by no means common practice.³⁵ Indeed, the U.S. reservation was so problematic that in 1994 the Human Rights Committee, consisting of eighteen individuals appointed by nations who ratified the ICCPR,³⁶ ruled that the reservation was invalid due to its conflict with the purpose of the document.³⁷

The international trend disfavoring capital punishment was also evident in the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Second Optional Protocol)³⁸ which was adopted by the United Nations General Assembly in 1989 and entered into force on July 11, 1991, after the tenth ratification.³⁹ The resolution clearly enunciates the United

35. *Id.*

36. *Id.*

37. See HOOD, *supra* note 4, at 51. The U.S. practice with regard to the ICCPR continues to attract notice. In September 1997, a United Nations monitor, Bacre Waly Ndiaye, visited the United States in order to prepare a report on the death penalty for the General Assembly and the United Nations Human Rights Commission. See Barbara Crosette, *U.N. Monitor Investigates American Use of the Death Penalty*, N.Y. TIMES, Sept. 30, 1997, at A9. In commenting on the ICCPR, the Senegalese lawyer noted that "there are severe restrictions in terms of not extending the scope of the death penalty." *Id.* He further commented that "after China, where . . . 60 percent of crimes are now punishable by death, the United States has done more than any other nation to expand the use of the death penalty." *Id.*

38. Second Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 98, U.N. Doc. A/RES/44/128 (1990).

39. The most relevant clauses of the Second Optional Protocol are as follows:

The States Parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights adopted on 10 December 1948 and article 6 of the International Covenant on Civil and Political Rights adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty . . .

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the

Nations support of abolition.⁴⁰ This fervent goal is reflected by the fact that those who signed the Second Optional Protocol were prohibited from using capital punishment.⁴¹ And unlike the ICCPR, Article 2 of the Second Optional Protocol places a limitation on making a reservation. Consequently, it seems quite improbable that the United States will ratify this treaty any time in the near future.

The trend towards abolition is so strong that the General Assembly in the closing months of 1994 considered a draft resolution which would call for a worldwide ban on capital punishment by the year 2000.⁴² However, in the end the Social, Humanitarian and Cultural Committee rejected the resolution. Nonetheless, the fact that such a proposal even reached the bargaining table is indicative of this movement.

There is also evidence of the trend towards abolition at the regional level. For example, in Europe, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty⁴³ was signed on April 28, 1983 and came into force on February 1, 1985.⁴⁴ It is significant that Protocol No. 6 has been

death penalty within its jurisdiction.

Article 2

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 war-time . . .

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant

Id.

40. This approach was not wholeheartedly adopted. For instance, some states, particularly those with a large Moslem population, were opposed to the formation of the Second Optional Protocol. See SCHABAS, *supra* note 4, at 165.

41. See G.A. Res. 44/128, *supra* note 38.

42. U.N. GAOR 3d. Comm. 49th Sess., Agenda Item 100(e), at U.N. Doc. A/C.3/49/L.32 (1994).

43. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, 1983 Europ. T.S. No. 114, 32 [hereinafter Protocol No. 6].

44. The relevant parts of Protocol No. 6 are as follows:

Article 1

The death penalty shall be abolished. No one shall be condemned to such a penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect

ratified in quite large numbers given that it contains relatively strong language calling for the abolishment of capital punishment.⁴⁵ In fact, Schabas notes the great success of Protocol No. 6 by stating that "[t]he day appears not far off when capital punishment will be eradicated from the European continent."⁴⁶

A similar trend is occurring in the Western Hemisphere. For example, the American Convention on Human Rights⁴⁷ which was signed on November 22, 1969 and entered into force on July 18, 1978, placed considerable limitations on the imposition of the death penalty.⁴⁸ Consistent with its view on capital punishment, the United States did not ratify the American Convention. Subsequently, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty⁴⁹ developed by the Inter-American Commission on Human Rights, called upon all American governments to abolish capital punishment.⁵⁰

of acts committed in time of war or imminent threat of war

Id.

45. *Id.*

46. SCHABAS, *supra* note 4, at 247.

47. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

48. The relevant provision of the American Convention is as follows:

Article 4 Right to Life

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 states that have abolished it.

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

5. Capital punishment shall not be imposed upon a person 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 . . .

Id. art. 4.

49. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 29 I.L.M. 1447 (1990) [hereinafter American Convention Protocol].

50. The relevant provisions of the American Convention Protocol are as follows: Preamble: "[t]he tendency among the American States is to be in favor of abolition of the death penalty"

With such resolutions and treaties in mind, it should be noted that the trend towards abolition has not been completely ignored by the United States. The U.S. Supreme Court has in the past looked to international norms when analyzing "cruel and unusual" punishment and the death penalty.⁵¹ For instance, in *Trop v. Dulles*⁵² which initiated the notion of "evolving standards of decency"⁵³ the Court augmented its decision by looking at "the civilized nations of the world"⁵⁴ and by citing a United Nations survey.⁵⁵ Similarly, in *Coker v. Georgia*⁵⁶ the Court also looked to international opinion when it stated "out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."⁵⁷ Finally, in *Enmund v. Florida*⁵⁸ the Court made reference to the international stance on capital punishment⁵⁹ when it determined that imposing the death penalty

Article 1 states: "The States Parties to this *Protocol* shall not apply the death penalty in their territory to any person subject to their jurisdiction."

Article 2 announces that "[n]o reservation may be made to the *Protocol*. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature." *Id.* The American Convention Protocol was adopted on June 8, 1990.

51. U.S. CONST. amend. VIII.

52. *Trop v. Dulles*, 356 U.S. 86 (1957). At issue in this decision authored by Chief Justice Warren was whether the sanction of denationalization for wartime desertion violated the Eighth Amendment's cruel and unusual punishment clause. *Id.* at 99. The Court held that such a sanction was cruel and unusual punishment because denationalization "is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development." *Id.* at 101.

53. *Id.* at 100-101.

54. *Id.* at 102.

55. The United Nations survey noted that out of 84 nations, merely two countries—Turkey and the Philippines—used denationalization as a form of punishment for wartime desertion. *Id.* at 103.

56. *Coker v. Georgia*, 433 U.S. 584 (1976) (analyzing the constitutionality of a Georgia statute in which the death penalty was a sentencing option for a person convicted of rape. The court held that the statute was unconstitutional).

57. *Id.* at 596 n.10.

58. *Enmund v. Florida*, 458 U.S. 782 (1981) (deciding whether the death penalty could be imposed for felony murder).

59. *Id.* at 796 n.22. The court stated: "[T]he climate of international opinion concerning the acceptability of a particular punishment is an additional consideration which is not irrelevant." (citing *Coker*, 433 U.S. at 596 n.10). "It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe." *Id.* (citing MODEL PENAL CODE

on an individual who "neither took life, attempted to take life, nor intended to take life" would be violative of the Constitution.⁶⁰

Recently though, the Court has taken quite a different approach. By not addressing the international arena with regard to capital punishment, the Court implies that in this area, the Constitution should not be interpreted in light of international norms.⁶¹ Justice Brennan, in his dissent in *Stanford v. Kentucky*, recognized this shift by the Court and urged a resort to past international analysis by stating "the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society."⁶²

II. THE UNDERLYING REASONS FOR THE U.S. ABERRATION FROM THE INTERNATIONAL TREND TOWARDS ABOLITION

Since it has been determined that there is a trend towards abolition,⁶³ an essential question is why the United States has taken such a divergent stance? For as one commentator noted, "[n]ot only does the United States retain the death penalty, but she pursues it with such tenacity as to place herself in very suspect company."⁶⁴ Moreover, from the standpoint of political

§ 210.2, at 39-40 (Official Draft and Revised Comments 1980)).

60. *Id.* at 787.

61. See generally *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that imposing the death penalty for an individual of either ages sixteen or seventeen was not violative of the Eighth Amendment).

62. *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting). Brennan further added: "Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis" and cited the previously discussed cases such as *Trop*, *Coker* and *Enmund*. *Id.* at 389.

Interestingly, in finding the death penalty unconstitutional, unlike the U.S. Supreme Court, the South African Constitutional Court cited the international trend towards abolition. The Court noted that "capital punishment has been abolished as a penalty for murder either specifically or in practice by almost half of the countries of the world including the democracies of Europe and our neighboring countries, Namibia, Mozambique and Angola. In most of those countries where it is retained . . . it is seldom used." *Makwanyane*, 1995 (6) BCLR 665 at 71 (Chaskalson, P.).

63. For a list of abolitionist and retentionist states, see HOOD, *supra* note 4, at 241-47 (providing an extensive and thorough discussion of each country's stance on capital punishment).

64. Amitay, *supra* note 1, at 545.

repressiveness,⁶⁵ it is evident that the United States has many more similarities with abolitionist countries than with those who utilize the death penalty.⁶⁶

As of now, the U.S. view on capital punishment is aligned with most of the Middle East and North Africa.⁶⁷ These areas typically explain the retention of capital punishment on the influence of religion,⁶⁸ hailing it as the result of a "clear commandment of Islam."⁶⁹ The U.S. view is also in accord with India which attributes retention to political assassinations,⁷⁰ and India's stance is quite similar to South America in that it tends to reinstate capital punishment during times of political turmoil.⁷¹ Similarly, China justifies the practice of capital punishment as a way of maintaining societal stability,⁷² and chooses to accomplish this goal by punishing numerous political offenses such as "provoking dissension, conducting counter-revolutionary propaganda, agitation and spreading rumors."⁷³

65. See ZIMRING & HAWKINS, *supra* note 3, at 6.

66. See Bentele, *supra* note 3, at 237-38.

67. See HOOD, *supra* note 4, at 23. Within these countries capital punishment is thriving. For example, in response to a 1987 United Nations survey, numerous countries—such as Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Morocco, Qatar, Sudan, Syria and the United Arab Emirates—noted that they did not plan to abolish the death penalty for any offense. *Id.* at n.34. In fact, *thousands* of executions take place in Iran each year. ZIMRING & HAWKINS, *supra* note 3, at 8 (emphasis added). Saudi Arabia, which beheads persons convicted of either murder or drug smuggling, is yet another example of the great disparity between the United States and the Middle East. See Youssef M. Ibrahim, *Nurse's Murder Throws Britain and Saudi Arabia Into Crisis*, N.Y. TIMES, Sept. 25, 1997, at A8.

Israel is one exception to the flourishing of the death penalty in this area. Zimring and Hawkins highlight this point by noting that:

For more than two decades, in the face of external force and domestic terror, Israel has not used the death penalty. The discretionary death penalty is available for genocide, crimes against humanity, crimes against the Jewish people, and 'acts of inhuman cruelty,' but no death sentences have been imposed and no executions carried out since the hanging of Adolf Eichmann in 1962.

ZIMRING & HAWKINS, *supra* note 3, at 6.

68. See HOOD, *supra* note 4, at 25.

69. *Id.* at 213.

70. *Id.* at 37.

71. *Id.* at 44.

72. See ZIMRING AND HAWKINS, *supra* note 3, at 7.

73. *Id.* In China, one could even be subject to execution for "selling the skins of endangered giant pandas." RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 685 (1994). For further discussion of the death penalty in the Far East, see Daniel H. Foote, "The Door That Never Opens": *Capital Punishment and Post-Conviction Review of Death Sentences in the United*

Yet with the United States lacking either a single and pervasive religious dogma which justifies the death penalty or a newly installed revolutionary government, the dissimilarity between the United States and other retentionist countries begs the question of why the United States practices capital punishment while most of its international counterparts take the abolitionist route?

A. *A Brief History of Capital Punishment in the United States and the Effect of Tradition on the Death Penalty in Particular Regions of America*

Before exploring the reasons for such an aberration by the United States, a brief discussion of the historical setting of capital punishment in America from colonial to modern times is in order. This section of the Note has a dual purpose: (1) to provide the background needed for further discussion of the death penalty, which follows, and (2) to establish that tradition itself can partially explain the flourishing of capital punishment in certain areas of the United States.

Capital punishment has been in existence in the United States since colonial times,⁷⁴ with the criminal law in the States being only a slight variant from the motherland of England.⁷⁵ In the seventeenth century, within all of the colonies, public hanging was the obligatory punishment for crimes against the state, the person, and property⁷⁶ and was conducted under the auspices of local officials.⁷⁷ The earliest record

States and Japan, 19 BROOK. J. INT'L L. 367 (1993).

74. The first execution in the United States occurred in 1608 to a councilor of Jamestown Colony—Captain George Kendall. See RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 3 (1991). Captain Kendall was the first of many to experience this fate. In the 1600's there were 162 executions, in the 1700's 1,391, and in the years 1800-1865 there were 2,451 individuals put to death. *Id.* at 4.

75. See Bedau, *supra* note 31, at 3.

76. *Id.* at 4. Hanging was a major public spectacle both in Great Britain and the northern colonies. See Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811, 814 (1995). According to Fletcher, "crowds behaved like spectators at today's soccer matches, drinking and carousing to such an extent that executions were finally moved inside the prison walls in the mid-nineteenth century to preserve public order." *Id.* The first law prohibiting public hangings was passed in Pennsylvania in 1834. See PATERNOSTER, *supra* note 74, at 7.

77. See PATERNOSTER, *supra* note 74, at 7. Capital punishment continued to be under the province of local officials until the early twentieth century when it was then succeeded by state authority. *Id.* In the 1890s, 86% of all executions

notes that thirteen capital crimes existed in the States: "idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion."⁷⁸

The Framers exhibited their tolerance of capital punishment through several clauses of the Constitution—including the Fifth and Eighth Amendments (condonance was later expressed by the Fourteenth Amendment). For example, the Fifth Amendment explicitly notes the existence of capital punishment by stating "[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"⁷⁹ Moreover, the double jeopardy clause of the Fifth Amendment espouses that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."⁸⁰ A similar approval of capital punishment exists in the Fourteenth Amendment, for implicit in the wording that no state shall "deprive any person of life, liberty, or property, without due process of law" is the notion that as long as an individual receives due process, one's life can be taken.⁸¹ In addition to condoning capital punishment,

were conducted by local officials, whereas in the 1920s approximately 80% were under the guidance of the state. *Id.*

78. *Furman v. Georgia*, 408 U.S. 238, 335 (1972). Buggery was often used as a synonym for sodomy. See MELLINKOFF'S *DICTIONARY OF AMERICAN LEGAL USAGE* 140 (1992). Manstealing was another word for kidnapping. See WEBSTER'S *THIRD NEW INTERNATIONAL DICTIONARY* 1377 (1981).

After the American Revolution, especially in Massachusetts, there were fewer crimes for which capital punishment could be imposed. See *PATERNOSTER*, *supra* note 74, at 5. In addition, the crimes were more of a secular nature. They included offenses such as murder, burglary, arson, rape and treason. *Id.*

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

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

81. U.S. CONST. amend. XIV, § 1.

It should be noted that the judges of the South African Constitutional Court contend that part of the explanation for retention of the death penalty in the United States is precisely due to its mention in the Constitution (which quite plausibly can be part of the explanation). See *Makwanyane*, 1995 (6) BCLR 665 at 77-78. For example, Judge Ackermann stated: "The United States Supreme Court has been obliged to follow the route it did because, so it seems to me, their Constitution postulates [by implication] that it is possible to devise due process mechanisms which can deal with the arbitrary and unequal features of death sentence imposition. We are not so constrained." *Id.* at 181 (Ackermann, J., concurring). Similarly, Judge Kentridge noted that the U.S. "written constitution expressly contemplates the legitimacy, subject to safeguards, of the death penalty It is therefore understandable that the Supreme Court . . . found themselves unable to hold that the death penalty is per se unconstitutional." *Id.* at 232-33 (Kentridge,

under the Eighth Amendment⁸² the Framers only viewed "cruel and unusual" punishment⁸³ to exist when an extreme form of torture was used, such as burning at the stake or crucifixion.⁸⁴

Yet even with such an extreme view of "cruel and unusual" punishment,⁸⁵ the U.S. approach to the death penalty was mild in comparison to Great Britain.⁸⁶ In the nineteenth century, for instance, while British criminal law had over two hundred capital offenses,⁸⁷ and imposed the death penalty for numerous crimes ranging in severity from the stealing of linens to treason, the colonial states tended to implement capital punishment for only the most extreme crime—namely, murder.⁸⁸

However, as with any general statement, there are always

A.J., concurring).

82. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

83. The phrase "cruel and unusual" punishment was borrowed directly from the English Declaration of Rights of 1688 and the principle it represents can be traced back to the Magna Carta. *See Trop*, 356 U.S. at 99-100.

84. *See* Bedau, *supra* note 31, at 4. *See also* Cohen & Kaplan's description of the Eighth Amendment: "Since the Amendment was passed with almost no debate at all, all we can say with certainty is that the framers thought they were proscribing torture and other barbarous punishments." WILLIAM COHEN & JOHN KAPLAN, *BILL OF RIGHTS* 726 (1976).

85. U.S. CONST. amend. VIII.

86. *See* ALEXIS DE TOCQUEVILLE, *II DEMOCRACY IN AMERICA* 166 (Phillips Bradley ed., Henry Reeve, Esq., trans., 1993). de Tocqueville observed:

In no other country is criminal justice administered with more mildness than in the United States. While the English seem disposed carefully to retain the bloody traces of the Middle Ages in their penal legislation, the Americans have almost expunged capital punishment from their codes. North America is, I think, the only country upon earth in which the life of no one citizen has been taken for a political offense in the course of the last fifty years.

Id.

Lawrence M. Friedman supports this point in observing "[b]y the standards of the times, and by English standards, the colonies were far from bloody." LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 41-43 (1993) (discussing the practice of capital punishment in the New England states).

87. *See* Sherri Ann Carver, Note, *Retribution—A Justification for the Execution of Mentally Retarded and Juvenile Murderers*, 16 OKLA. CITY U.L. REV. 155, 159 (1991). *See also* Fletcher, *supra* note 76, at 813.

88. *See* Bedau, *supra* note 31, at 6. Yet the prospects for British criminals guilty of capital offenses were not always so bleak, for some escaped death by being exiled to the American colonies or to Australia. *See* Fletcher, *supra* note 76, at 813.

some exceptions; in certain areas of the United States, capital punishment was utilized for much more than murder. For instance, in the western states, hanging was frequently used as a punishment for "[h]orse thievery, claim jumping, and cattle rustling,"⁸⁹ while in the South, the death penalty was imposed upon rapists⁹⁰ and upon unruly slaves who attempted to run away from their masters, as well as those who assisted in the escape.⁹¹ The death penalty was quite pervasive in the latter region as is evident by the fact that the type of crimes for which slaves faced capital punishment far exceeded the offenses for which a free man could be put to death.⁹²

In more recent times, in the year of 1957 alone, sixty-five

89. Bedau, *supra* note 31, at 6.

90. *Id.* Within the years of 1930 through 1977, 10% of all executions in the United States were for rape. *Id.* Capital punishment for rape was deemed unconstitutional in 1977. See *Coker*, 433 U.S. at 600 (stating that "[i]t is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim"). Thus, when no loss of life was involved, the death penalty was viewed as an excessive penalty.

Before the death penalty was abolished for rape, however, between 1930 and 1967, 97% of all the executions for this crime occurred in the South. Out of the 443 executions inflicted upon rapists which took place in this region during this time period, 400 of the executions were performed upon blacks. See *PATERNOSTER*, *supra* note 74, at 15-16.

As these statistics illustrate, racial discrimination may play a prominent role in the use and retention of the death penalty. Due to limited space, discussion of racial discrimination will not be further explored in this Note. For a discussion of racial discrimination and retention of the death penalty in the United States, see Bentele, *supra* note 3. For a discussion of the implementation of the death penalty in a discriminatory manner see *PATERNOSTER*, *supra* note 74, at 115-58. For examples of racial discrimination during capital trials in the United States, see Stephen B. Bright, *Legalized Lynching: Race, the Death Penalty and the United States Courts*, in *THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT* 3-20 (William A. Schabas et al. eds., 1997).

91. See *PATERNOSTER*, *supra* note 74, at 8.

92. *Id.* Amidst the discussion of capital punishment in the history of the United States, the existence of both individual and state attempts at abolition are noteworthy. For a thorough discussion of the early abolition movement in the United States, see Bedau, *supra* note 31, at 7-13; Rudolph J. Gerber, *Death is Not Worth It*, 28 ARIZ. ST. L.J. 335, 338-40 (1996).

The success of this movement is reflected by Michigan abolishing capital punishment in 1846 for all offenses except treason. See *PATERNOSTER*, *supra* note 74, at 8-9. In fact, not only was Michigan the first state to abolish the death penalty, but it was also "the first political jurisdiction in the English-speaking world to do so." *Id.* at 9. The abolitionist movement also had an effect on other states. For example, Rhode Island abolished capital punishment in 1852, Wisconsin in 1853, Iowa in 1872 and Maine in 1876. *Id.*

people were executed in the United States.⁹³ But capital punishment came to a drastic halt in 1972 with the U.S. Supreme Court decision of *Furman v. Georgia*,⁹⁴ in which the Court held, in a 200 page opinion, that capital punishment as then implemented was unconstitutional since jural discretion in imposing the death penalty was unlimited, capricious, and arbitrary, and thus a violation of both the Eighth and Fourteenth Amendments.⁹⁵

B. The Legal Landscape in the United States Following the U.S. Supreme Court's Decision of Furman v. Georgia

Furman, by invalidating the capital punishment laws of thirty-nine states, the federal government and the District of Columbia,⁹⁶ obviously had a profound effect. Under this rule, executions ceased⁹⁷ until January 17, 1977.⁹⁸ But this decree by the Supreme Court did not curb legislative activity at the state level for long. Within one year of *Furman*, twenty states had enacted new capital punishment statutes.⁹⁹

93. See James Brooke, *Executions Spread from South, Becoming Part of U.S. Landscape*, N.Y. TIMES, Oct. 14, 1997, at A1.

94. 408 U.S. 238 (per curiam). *Furman* was a consolidation of three cases in which the sanction of capital punishment was ordered. In two of the cases, the penalty was being imposed for rape, while in the third case it was being administered for murder. *Id.* at 240 (Douglas, J., concurring). For a brief history of the death penalty cases leading up to *Furman*, see PATERNOSTER, *supra* note 74, at 37-53.

95. See *Furman*, 408 U.S. at 253. Justice Douglas noted that:

[W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Id. at 253 (Douglas, J., concurring). Similarly, Justice White in his concurrence stated "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).

96. *Id.* at 411 (Blackmun, J., dissenting).

97. The hanging of Louis Jose Monge on June 2, 1967 in Colorado marked the date for the last execution to take place for almost ten years to come. See PATERNOSTER, *supra* note 74, at 18.

98. See Welsh S. White, *Capital Punishment's Future*, 91 MICH. L. REV. 1429, 1429 (1993) (reviewing RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* (1991)).

99. See Amitay, *supra* note 1, at 547. Zimring and Hawkins claim that numerous states enacted death penalty statutes after *Furman* in an effort to demon-

With these new and improved death penalty laws,¹⁰⁰ by a vote of 7-2, the Supreme Court in 1976, in *Gregg v. Georgia*, held that capital punishment was constitutional.¹⁰¹ Soon afterwards executions recommenced¹⁰² with Gary Gilmore voluntarily being put to death before a firing squad in Utah.¹⁰³ However, few people were actually executed until the mid-1980s.¹⁰⁴

In 1984, the resurgence of capital punishment was demonstrated by the execution of twenty-one individuals.¹⁰⁵ By 1990, approximately two executions occurred each month,¹⁰⁶ with the numbers continually on the rise. In 1993, there were thirty-eight executions,¹⁰⁷ in 1995, fifty-six executions,¹⁰⁸ and by the close of 1997 there were seventy-four executions implemented—the highest figure since the death penalty was reinstated.¹⁰⁹ As one would surmise, with the increase in the number of executions, there has been a corresponding increase in the number of individuals on death row.¹¹⁰ Thus, in 1983 there were approximately one thousand individuals awaiting

strate state sovereignty, for it essentially was a "state response to a federal slight." ZIMRING & HAWKINS, *supra* note 3, at 44 (emphasis in original).

100. The new laws rectified the flaws of *Furman* "by providing checklists of aggravating (and sometimes mitigating) factors" which the judge and the jury would examine when deciding whether the death penalty should be implemented. See Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 118 (1983).

101. Justice Stewart, delivering the opinion of the Court, noted that "the punishment of death does not invariably violate the Constitution." *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

102. See HOOD, *supra* note 4, at 75.

103. See ZIMRING & HAWKINS, *supra* note 3, at 64.

104. See White, *supra* note 98, at 1429.

105. See HOOD, *supra* note 4, at 75.

106. See Gerber, *supra* note 92, at 340 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 712 (Timothy J. Flanagan & Kathleen Maguire eds., 1991)).

107. Steven H. Jupiter, Comment, *Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty in American Democracy*, 23 FORDHAM URB. L.J. 437, 438 n.11 (1995).

108. *Id.*

109. George Lardner Jr., 1997 Had Most Executions Since Penalty's Return: Texas Led National Increase to 74 from 45 Last Year; All Involved Were Men, Murderers, WASH. POST, Dec. 15, 1997, at A6. To put this high rate of executions in a comparative light, in Saudi Arabia, from January to September 1997, one-hundred and seven individuals were beheaded. See Ibrahim, *supra* note 67, at A8.

110. See HOOD, *supra* note 4, at 75-76.

execution, and in 1995 the figure skyrocketed to reach over three thousand inmates facing the death sentence.¹¹¹ By August 1997 the number of prisoners on death row totaled 3,269.¹¹²

Yet, considering the high rate of executions, the actual use of the death penalty is not evenly dispersed throughout the country. Rather, executions continue to be more prevalent in the South.¹¹³ Bedau highlights this phenomenon by dividing the States into three tiers running from east to west, with each segment's composition formed by the regularity of use of the death penalty.¹¹⁴ In the northern tier, extending from Maine to Alaska, capital punishment is either abolished or used infrequently.¹¹⁵ The second tier, which stretches from Pennsylvania to California, utilizes capital punishment more frequently than the former tier, but executions are still relatively low in number. The third and final tier runs from Virginia and the Carolinas west to Texas and Arizona.¹¹⁶ It is in this tier where "the death penalty thrives—many executions amidst clamor for more, hundreds on death row and more on the way."¹¹⁷ In fact, as of May 1996, two-thirds of all executions since *Furman* have been performed solely within five southern states—Texas, Florida, Virginia, Louisiana, and Georgia.¹¹⁸ Furthermore, within this time frame, Texas alone has contributed to approximately one-third of the executions.¹¹⁹

111. *Id.*

112. See Brooke, *supra* note 93, at A24.

113. *Id.*

114. See Bedau, *supra* note 31, at 21.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. See Brooke, *supra* note 93, at A24. By the year end of 1997, Texas had implemented the death penalty on thirty-seven occasions. See Carrie Hedges, 1997 *A Record Year For Executions*, USA TODAY, Dec. 29, 1997, at 3A. Virginia trailed in second place with a total of nine executions for 1997. See Lardner Jr., *supra* note 109, at A6. However, this was the highest number of executions for Virginia since 1909, when it used this form of punishment seventeen times. *Id.*

In addition to the high number of executions in Texas, the Lone Star State also received attention in connection with another aspect of the death penalty. Karla Faye Tucker was the first woman in Texas since the 1860s to be subject to capital punishment and only the second woman "in the modern death penalty era" to receive this fate. Kathy Walt, *Path Clear for Woman's Execution; Karla Faye Tucker Loses Court Appeal*, HOUS. CHRON., Dec. 9, 1997, at 1A. Tucker was found guilty for the pickax slaying of two individuals. *Id.*

It is contended here that to some extent the thriving of capital punishment in the South can be explained by the relatively early expansion of the death penalty in this region. As stated previously, in the colonial era, while the death penalty was used as a form of punishment primarily for murderers, the South also utilized the death penalty for rapists¹²⁰ and to punish runaway slaves and their accomplices.¹²¹ It is plausible that such an early expansion of the death penalty in the South has aided in both its retention and growth. Bedau emphasizes this point by noting that "in this region (the third tier) the death penalty is as firmly entrenched as grits for breakfast."¹²²

However, it should be noted that although executions have traditionally taken place in the South, in recent years the use of capital punishment is spreading to other regions.¹²³ For example, Kentucky and Oregon have recently performed their first executions since 1962.¹²⁴ Similarly, with the execution of Gary Davis in October 1997, Colorado implemented its first execution in thirty years.¹²⁵

In the same vein, expansion of capital punishment throughout America is also illustrated by the vast amount of legislation proposed on the subject matter throughout the states.¹²⁶ For instance, in 1994 seven out of the then fourteen abolitionist states introduced bills with regard to capital punishment.¹²⁷ Even more stunning, in the same year, over one hundred and eighty bills were initiated by retentionist states in an attempt to expand the death penalty's current use.¹²⁸ In fact, one commentator in the state of Washington recently noted that "[d]eath-penalty bills have become perennial items in the Legislature over the past decade."¹²⁹

120. See Bedau, *supra* note 31, at 6.

121. See PATERNOSTER, *supra* note 74, at 8.

122. Bedau, *supra* note 31, at 21.

123. See Brooke, *supra* note 93, at A1.

124. *Id.*

125. *Id.*

126. See HOOD, *supra* note 4, at 47.

127. *Id.*

128. *Id.*

129. Douglas Fischer, *Supporters Say Time Is at Hand for Death Penalty*, THE ASSOCIATED PRESS POL. SERVICE, Apr. 28, 1997, available in 1997 WL 2520752. The death penalty was reinstated in Washington in 1993. As of this date, three people have been executed since reinstatement, one of which was by lethal injection.

The thriving of the death penalty in the United States is also exhibited by the fact that within recent years two states that were previously abolitionist have now changed their stance—Kansas reinstated the death penalty in 1994,¹³⁰ as did New York in 1995.¹³¹ As of date, only the District of Columbia and twelve American states prohibit capital punishment.¹³²

Yet this low figure of abolitionist states may dwindle down even further due to recent legislation on the east coast. For example, in Massachusetts, due to the brutal rape and murder of a 10 year-old boy in the Boston vicinity, there was a "close call" on the issue of capital punishment.¹³³ Essentially, one representative held the fate of the death penalty in his hands and switched late in the hour to an abolitionist vote.¹³⁴ But in Massachusetts, retention may not last long, for proponents of capital punishment note that they will push the issue to the

tion. See Rebekah Denn & Scott Sunde, *Sagastegui Executed*, SEATTLE POST-INTELLIGENCER, Oct. 13, 1998, at A1.

130. See *Support for Death Penalty Grows in U.S.*, FIN. TIMES (U.S.A. edition), Nov. 11, 1997, at 7. The political appeal of the death penalty is so pervasive that in Kansas, the governor was opposed to capital punishment but nevertheless allowed a death penalty bill to pass into law without her signature. See HOOD, *supra* note 4, at 48.

131. See James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1.

132. See Brooke, *supra* note 93, at A1.

133. See *Support for Death Penalty Grows in U.S.*, *supra* note 130, at 7.

134. *Id.* A partial reason for the close election in Massachusetts on the issue of capital punishment was due to the extensive lobbying effort on the part of the slain boy's parents. *Id.* This reaction may not come as such a surprise, for as Rosen & Journey note, "[t]he feelings of helplessness, frustration, and anger are often at the core of why people believe that the death penalty should be either re-introduced or retained . . . [c]rime rates . . . are almost certain to arouse public sentiment toward invoking the death penalty." Rosen & Journey, *supra* note 5, at 179. This belief is further supported by another commentator who stated that:

Random violence is terrifying because of its very randomness—it can strike anyone at anytime. It not only spurs a general feeling of chaos but also an intensely personal fear. It creates the feeling that *no one* is safe. Thus, the death penalty is one of the symbolic ways that communities attempt to order this chaos, creating a narrative in which the breach of the norm can be healed by the execution of the condemned.

Christopher J. Meade, Note, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 743 (1996) (emphasis in original). In his Note, Meade elaborates on narrative works with regard to the death penalty, such as the tragic story of the Clutter family in Truman Capote's *IN COLD BLOOD*, to underscore why Americans support capital punishment. *Id.*

forefront.¹³⁵ With Governor Paul Cellucci urging representatives to pass a capital punishment bill, the tide in Massachusetts may change relatively soon.¹³⁶

The flurry of legislation in Massachusetts has also sparked second guessing by the neighboring state of Rhode Island, where a voter referendum will be held.¹³⁷ In fact, those in favor of abolition, explicitly acknowledge that "approval in neighboring Massachusetts, a heavily Roman Catholic state whose demographics resemble Rhode Island, will only make their cause more difficult."¹³⁸ A similar transformation may occur in the District of Columbia. In 1997, the federal government which acquired authority over the city's administration, put a capital punishment bill before Congress which is expected to garner approval.¹³⁹

With all of this recent state legislative activity over the issue of capital punishment, the only true vocal support for abolition has come from the legal forum of the American Bar Association which called for a moratorium on the death penalty—hailing the current practice "a haphazard maze of unfair practices."¹⁴⁰ With the passage of this resolution by the American Bar Association House of Delegates by a vote of 280 to 119,¹⁴¹ and with the support of twenty of the twenty four prior bar association presidents,¹⁴² officials of the legal organiza-

135. See *Support for Death Penalty Grows in U.S.*, *supra* note 130, at 7.

136. See Wayne Woodlief, *Reps Face Wrenching Death Decision*, B. HERALD, Oct. 26, 1997, at 31. However, one group that may impinge on the chances of a death penalty bill being enacted in Massachusetts is the Catholic Church, which views such legislative implementation as "perpetrat[ing] the culture of death." *Id.*

137. See Scott MacKay, *Bay State Support for Death Penalty Renews R.I. Debate*, THE PROVIDENCE J. BULL., Oct. 31, 1997, at A1.

138. *Id.* at A1, A12. However, with the death penalty not being used in Rhode Island since 1845, a change to retention may not come with ease. The state's last implementation was the hanging of Irish immigrant, John Gordon, who many believe to be erroneously charged with the murder of a mill owner. *Id.* at A12.

139. See *Support for Death Penalty Grows in U.S.*, *supra* note 130, at 17.

140. *Bar Association Leaders Urge Moratorium on the Death Penalty*, N.Y. TIMES, Feb. 4, 1997, at A20. Underlying this statement is the bar association's belief that the current use of the death penalty is applied against minorities in a discriminatory manner, and used inappropriately for the execution of juveniles and the mentally retarded. See Henry Weinstein, *ABA Calls for a Halt to Executions*, L.A. TIMES, Feb. 4, 1997, at A1. The bar association, in addition, urged for the handling of capital punishment cases by lawyers educated on the matter and a review of state cases by the federal courts. See Ved Nanda, *supra* note 32, at 7B.

141. See Weinstein, *supra* note 140, at A11.

142. See *Bar Association Leaders Urge Moratorium on the Death Penalty*, *supra*

tion will now have the ability to lobby both state legislatures and Congress for change in the fairness of procedures, as well as the authority to submit amicus curiae briefs in capital punishment cases.¹⁴³

III. THE EFFECT OF PUBLIC OPINION UPON THE RETENTION AND EXPANSION OF CAPITAL PUNISHMENT IN AMERICA

Yet can support from one legal organization have enough impetus to provide change when so many Americans support the death penalty? With only a slight exception, within the past forty years the U.S. populace has been greatly in favor of capital punishment. For example, in 1953 more than six out of ten Americans noted their support for the death penalty.¹⁴⁴ In the more liberal sixties, public support dropped, with only four out of ten Americans noting their approval.¹⁴⁵ This decline in support reached a dramatic turnaround after *Furman*.¹⁴⁶ Since the seminal decision, public opinion has "soared."¹⁴⁷ In fact, by 1991 seven out of ten Americans sup-

note 140, at A20.

143. See Weinstein, *supra* note 140, at A11.

144. See GEORGE GALLUP, JR., THE GALLUP POLL 252 (1988) (noting that 68% of Americans were in favor of capital punishment in 1953). As an aside, the first public opinion poll addressing the death penalty was conducted in 1936. See Robert M. Bohm, *American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls*, in THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH 113, 115, (Robert M. Bohm ed., 1991). This inquiry, which took place during the time of the execution of Bruno Hauptmann for the murder of the Lindbergh baby, revealed that 61% of Americans noted their approval of capital punishment. *Id.*

145. See Gallup, *supra* note 144, at 252. Gallup notes that in 1965, only 45% of Americans favored the death penalty. Similarly, in 1966, support was only at 42%. *Id.*

146. See Amitay, *supra* note 1, at 547.

147. *Id.* The increase in support is evident by the following statistics: in 1976, 65% of the public favored the death penalty, in 1981, 66% announced their approval, and in 1985, 72% of Americans favored capital punishment. See GALLUP, *supra* note 144, at 252. For a further discussion of public opinion during this time period, see James Alan Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE (1990-1991).

It should be noted that statistics consistently illustrating a high public opinion may be partially explained by the fact that once an individual firmly holds a particular stance, it will be difficult to rouse a change. de Tocqueville noted this phenomenon in his analysis of the United States by observing:

When once an opinion has spread over the country and struck root there, it would seem that no power on earth is strong enough to eradicate it. In the United States general principles in religion, philosophy, morality, and even politics do not vary, or at least are only modified by a hidden

ported capital punishment.¹⁴⁸ And by 1994, it was stated that "[t]he best known fact about American attitudes toward capital punishment is that support for the death penalty (is) at a near record high."¹⁴⁹

With the rise of support for capital punishment in general has come a corresponding increase in the number of Americans who advocate execution of younger criminals. In 1936, forty-six percent of Americans supported capital punishment for an individual under twenty-one.¹⁵⁰ This approval rate dropped to fifteen percent by 1957.¹⁵¹ However, in the mid-sixties, while public support for capital punishment was at a low, support for the execution of the young increased to twenty-one percent.¹⁵² Public support was indeed on the rise. By 1989, fifty-seven percent of Americans advocated capital punishment for an individual between the ages of sixteen and seventeen.¹⁵³

and often an imperceptible process; even the grossest prejudices are obliterated with incredible slowness amid the continual friction of men and things.

DE TOCQUEVILLE, *supra* note 86, at 257.

148. See HOOD, *supra* note 4, at 48. See also Grayer, *supra* note 2, at 559 (citing similar statistics). Although the majority of commentators believe that the American public greatly supports capital punishment, not all authors are in unanimity as to the validity of such high approval rates. One recent article claims that there is evidence that the "prevailing wisdom" of 'strong,' 'deep seated' public support for the death penalty is mistaken and that the polls have been misinterpreted." William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 79 (1994). The authors of the article further propose that "pollsters and politicians have mistaken the public's acceptance of the death penalty as a preference for it and have missed the indications that the public actually prefers an alternative." *Id.* at 79-80.

149. Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 19 (1994). In 1994, between 70 and 75% of the American people supported the death penalty. *Id.* at 21. As a result, "[s]upport for the death penalty is at an all time high, both in the proportion of Americans who favor capital punishment and in the intensity of their feelings." *Id.* at 40.

150. See 1 DR. GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-1971 45 (1972).

151. See 2 DR. GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-1971 1518 (1972).

152. See 3 DR. GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-1971 1922 (1972).

153. See Ellsworth & Gross, *supra* note 149, at 39. Ellsworth and Gross insightfully analyze this turn in statistics by noting that "the former reluctance to execute adolescents has been muted, perhaps because people's current image of a violent killer is an adolescent." *Id.* (emphasis in original).

Who, then, are most ardent supporters of capital punishment? Generally stated, the death penalty has been favored more by males than by females, more by whites than by African-Americans, more by Republicans than by Democrats, more by the middle class than by the impoverished,¹⁵⁴ and more by Catholics than by Protestants.¹⁵⁵ However, one should note that although fewer African-Americans than whites support the death penalty, a majority of African-Americans still favor capital punishment.¹⁵⁶

This leads to the next logical question: What is the reason cited for the high support of the death penalty? The answer can be reduced to one word—retribution.¹⁵⁷ As one authority succinctly states, "[p]eople want to be absolutely sure that vicious murderers never ever have a chance to victimize anyone else (outside of prison), and they do not believe 'life imprisonment' currently provides that sort of guarantee."¹⁵⁸

This high level of public support is not without an impact. In fact, countries often cite public opinion as influencing either the retention or abolition of the death penalty.¹⁵⁹ This Note contends that the extremely high amount of public support in the United States undoubtedly influences the country's stance on capital punishment. Substantiating this position, Bedau notes the vast impact of public opinion in the United States by stating that "[b]eginning in the mid 1970s, probably no other factor regarding the death penalty in America has been so prominent, important, and enduring as the popular support for capital punishment."¹⁶⁰

154. *Id.* at 21.

155. See THE DEATH PENALTY IN AMERICA 72 (Hugo A. Bedau ed., 1982).

156. See Ellsworth & Gross, *supra* note 149, at 45.

157. *Id.* at 29. One commentator notes that those who claim deterrence as their reason for support, proclaim such a stance because "they may think this is more socially acceptable." Samuel Cameron, *The Demand for Capital Punishment*, 13 INT'L REV. L. & ECON. 47, 55 (1993).

158. Ellsworth & Gross, *supra* note 149, at 31.

159. See HOOD, *supra* note 4, at 213 (citing Japan as one example).

160. Bedau, *supra* note 31, at 16. This belief is further sustained by Fitzpatrick and Miller's noting that retention in the United States has more to do with "public opinion polls than by any enduring cultural values or assessment that capital punishment is a concretely valuable penological tool." Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT'L L. 273, 365-66 (1993). In fact, the view of the people has such an impact on the issue of the death penalty that in Massachusetts abolitionists "vowed to spend more time wooing public opinion and less time battling the law

A. *The Interplay of Public Opinion and the U.S. Supreme Court*

At first glance, one may assume that public opinion does not have an effect on the U.S. Supreme Court since it is a body comprised of non-elected judges with life tenure. To the contrary, public opinion often does have an extensive effect on the Court; and the issue of capital punishment in particular highlights this point.¹⁶¹ As one commentator has noted: "One function of the Supreme Court is the preservation of social order. To achieve this end, the Court must determine the public mood, develop a mode of rhetoric that the public finds acceptable, and make decisions that the public at least tolerates."¹⁶² It is within this setting that proponents of the death penalty have a profound effect on the highest court in the United States.

According to James G. Wilson, for over a century both state and federal courts have examined public opinion when evaluating the death penalty, and particularly, when defining the scope of 'cruel and unusual punishment.'¹⁶³ This was especially evident in *Furman* in which the Court stated that the definition of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened"¹⁶⁴ Thus, in *Furman*, the justices agreed that contemporary standards affected the constitutionality of the death penalty.¹⁶⁵ Looking to public opinion, the Court further noted that the public at large did not advocate the death penalty and that "its rejection by contemporary society is virtually total."¹⁶⁶ In fact, Justice Brennan relied on public opinion polls to demonstrate that, at that time, the

in the courts." *Support for Death Penalty Grows in U.S.*, *supra* note 130, at 7.

161. As Ellsworth & Gross remark, general opinion is important because "the legal status of the death penalty in the United States depends on popular support, actual and perceived." Ellsworth & Gross, *supra* note 149, at 21-22.

162. James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1083 (1993). Ellsworth and Ross support this point by stating: "Although ordinarily the Supreme Court is supposed to remain impervious to the demands and complaints of the public, by precedent the Eighth Amendment has become a somewhat special case in which the society's views and morality cannot easily be ignored." Ellsworth & Ross, *supra* note 100, at 118.

163. See Wilson, *supra* note 162, at 1084.

164. *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

165. *Id.*

166. *Id.* at 305 (Brennan, J., concurring).

country was slightly in favor of abolishing capital punishment.¹⁶⁷ The populace's opinion on the issue of the death penalty was so relevant to Brennan's analysis that he stated:

The objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute. At the very least, I must conclude that contemporary society views this punishment with substantial doubt.¹⁶⁸

A few years later, Justice Stewart in *Gregg* cited public opinion polls to establish the exact opposite—namely, that the American people were clearly in favor of capital punishment.¹⁶⁹ Yet public opinion was not only used to support the justices' arguments. Rather, public opinion was an essential component of their arguments. For example, in *Gregg*, one of the prongs of the test applied by the Court was whether society has come to view the punishment under consideration as cruel and unusual. In other words, if society was evaluating the Eighth Amendment today, would it see it as cruel and unusual punishment?¹⁷⁰ The Court answered this question in the negative by examining legislative enactments (such as the death penalty statutes promulgated by thirty-five states subsequent to the *Furman* decision)¹⁷¹ as well as trends in jury sentencing.¹⁷²

167. *Id.* at 299-300. Justice Brennan wrote, "the availability of this punishment through statutory authorization, as well as the polls and referenda, . . . simply underscores the extent to which our society has in fact rejected this punishment." *Id.*

168. *Id.* at 300 (Brennan, J., concurring).

169. *See Gregg*, 428 U.S. at 181 n.25. The Court stated: "[I]t is now evident that a large proportion of American society continues to regard (capital punishment) as an appropriate and necessary criminal sanction." *Id.* at 179.

170. *Id.* at 182. The other prong of *Gregg* analyzes the excessiveness of the punishment to ensure that it is in accord with the "basic concept of human dignity." *Id.* Thus, the first prong looks to see whether capital punishment itself is constitutional, while the second prong determines the constitutionality for the situation at hand.

171. *Id.* at 179-80.

172. *Id.* at 181-82. The effect of public opinion on the U.S. Supreme Court is in much divergence to South African constitutional analysis, which paid little heed to the populace's support of the death penalty. For instance, President Chaskalson stated:

The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the

Thus, in *Gregg*, public opinion was an essential component in determining the constitutionality of the death penalty. And since the landmark decision, the Court has maintained this position.¹⁷³ So, in essence, even the Supreme Court cannot ignore public opinion when interpreting the Bill of Rights.¹⁷⁴ Yet should this notion be so astounding? Wilson remarks, "[i]t should not be very surprising that the Court has paid so much attention to public opinion over the years (since) our democratic system is premised upon popular sovereignty and public participation."¹⁷⁵

B. *The Effect of Public Opinion on the Elected Branch*

It was not until recent years that capital punishment was placed at the forefront of American politics.¹⁷⁶ By 1968, the death penalty issue is said to have helped propel Richard Nixon into the Presidency and, similarly, in 1972 it played a prom-

Constitution allows the sentence. Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication.

Makwanyane, 1995 (6) BCLR 665 at 120. The President further stated, "[t]he assessment of popular opinion is essentially a legislative, and not a judicial, function." *Id.* at 122.

Similarly, Judge Didcott noted that "[t]o allow ourselves to be influenced unduly by public opinion would, in any event, be wrong." *Id.* at 221 (Didcott, J., concurring). Finally, Judge Madala stated "[i]n order to arrive at an answer as to the constitutionality or otherwise of the death penalty or any enactment, we do not have to canvass the opinions and attitudes of the public. Ours is to interpret the provisions of the Constitution as they stand and if any matter is in conflict with the Constitution, we have to strike it down." *Id.* at 271 (Madala, J., concurring).

173. See Ellsworth & Gross, *supra* note 149, at 23 (noting that the justices continually take into account "contemporary standards" but disagree over the weight to accord opinion polls).

174. For a further discussion of the effect of public opinion on the U.S. Supreme Court, see THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 32-33, 50-51 (1989).

175. Wilson, *supra* note 162, at 1134. On the issue of capital punishment, the Court has continued to look toward public opinion. For example, in *Stanford*, Justice Scalia stated "[w]e discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment." *Stanford*, 492 U.S. at 380 (emphasis added).

176. See Bedau, *supra* note 31, at 17.

inent role in aiding Ronald Reagan to become governor of California.¹⁷⁷ Concomitantly, in 1994, the issue of the death penalty was said to be a "decisive" factor in the Grand Old Party's electoral dominance.¹⁷⁸

The following example underscores the significance the issue of the death penalty has on politics. During the 1994 New York gubernatorial election, one in five voters cited capital punishment as the most important issue.¹⁷⁹ This view by the electorate did not go unheard. George Pataki, in almost every public appearance during the campaign, voiced his support for the death penalty.¹⁸⁰ And even though Mario Cuomo vetoed legislation on capital punishment twelve times while in office,¹⁸¹ he greatly changed his stance when the pressure was on. Cuomo decided that instead of holding the fate of capital punishment in his own hands, he would ask the Legislature to pass a constitutional amendment that would enable voters to make the final decision on the issue.¹⁸² With his consistent disfavor toward the death penalty, this change by Cuomo was too late. Consequently, by making the death penalty a central issue in the campaign, Pataki was able to prevail over the incumbent.¹⁸³

It should be noted, however, that on the heated issue of capital punishment, a change in stance for a politician is not uncommon. In Colorado, former Governor Roy Romer was "an avowed foe of the death penalty."¹⁸⁴ Yet as a majority of Colorado citizens' support for capital punishment grew, so did the governor's. In fact, Romer was elected three times for "touting

177. *Id.*

178. See William H. Rentschler, *The Death Penalty—A Pivotal Issue*, CHI. TRIB., Nov. 29, 1994, at A1 (stating that "[v]irtually every major winner, in upsetting incumbents, promised, in effect, to kill more human beings for an ever wider assortment of crimes, and to kill them deadlier and quicker").

179. See Todd S. Purdum, *Voters Cry: Enough, Mr. Cuomo!*, N.Y. TIMES, Nov. 9, 1994, at B11.

180. See Ian Fisher, *Clamor Over Death Penalty Dominates Debate On Crime*, N.Y. TIMES, Oct. 9, 1994, at 45.

181. James Dao, *Cuomo's Shift on Execution*, N.Y. TIMES, July 10, 1994, at A1.

182. *Id.*

183. See Purdum, *supra* note 179, at B11. See also Fisher, *supra* note 180, at 45. ("A central paradox of Mr. Cuomo's 12-year tenure is that no matter what he has done on crime, he is judged most often by his opposition to the death penalty, even though crime rates are down, jail time is up and police forces have grown").

184. Mark Obmascik, *Death Penalty Politics*, DENV. POST, Sept. 21, 1997, at H1.

his belief in the state's ultimate punishment."¹⁸⁵ But such a transformation is not surprising, for as one commentator notes, "[p]olitically, it's easier for any governor to execute a criminal than spare him."¹⁸⁶

Yet politicians are not the only elected officials at the mercy of the voters. Elected judges also face the consequences of public opinion. The recent events in Tennessee highlight this point. Justice Penny White, who was a member of the Tennessee Supreme Court since 1995, was one of the presiding judge's who reversed a lower court's decree for the death penalty.¹⁸⁷ To much of White's dismay, she was the only judge of the five person panel who faced re-election two months after the decision.¹⁸⁸ With the governor hailing White as "soft" on the death penalty," her defeat was inevitable.¹⁸⁹

But Penny White's situation does not only have repercussions for her own career as a judge, rather the effect is much greater felt. As U.S. Supreme Court Justice Steven's recently stated: "The higher authority to whom present day capital judges may be 'too responsive' is political climate, in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty."¹⁹⁰

As demonstrated by the examples above, both politicians and elected judges place themselves in a precarious position by vocalizing disfavor toward capital punishment.¹⁹¹ One running for office "knows that his or her public objection to the death penalty risks instant exploitation by the opposition as proof positive that the candidate is hopelessly 'soft on crime.'"¹⁹² Thus, with this backdrop in mind, public opinion

185. *Id.*

186. *Id.*

187. See Gerald F. Uelman, *Judges Hear the Crocodiles Snapping; Justice: Nationwide, the Trend is to Stifle Correct but Politically Unpopular Rulings*, L.A. TIMES, Feb. 19, 1997, at B9.

188. *Id.*

189. *Id.*

190. *Id.*

191. Yet opposition to the death penalty does not at all times guarantee defeat. For example, in 1978 Jerry Brown, who strongly opposed the death penalty, won re-election as governor in California despite the fact that on the same ballot, seventy-two percent of the electorate voted for a capital punishment referendum. See Ellsworth & Gross, *supra* note 149, at 44.

192. Bedau, *supra* note 31, at 18.

vastly impacts the elected branch of government.¹⁹³

C. *The Effect of Public Opinion Upon Capital Punishment in Other Countries*

Although initially one would posture that public opinion undoubtedly has an effect on the retention of the death penalty in the United States, several countries that have abolished capital punishment did so with public opinion strongly favoring its continuance. In fact, Zimring and Hawkins note that "in most abolitionist countries, if the issue had been decided by direct vote rather than by the legislature, the death penalty probably would not have been repealed."¹⁹⁴ This section elaborates on this point by discussing several countries in which this phenomenon has taken place.

Following World War II, both government officials and the public at large advocated capital punishment in England.¹⁹⁵ And at the time, unlike in the United States, Britain's capital punishment laws were mandatory for all convicted murderers.¹⁹⁶ Nonetheless, by 1956 England became de facto abolitionist,¹⁹⁷ and by 1983, the country upheld an abolitionist stance for all civilian offenses.¹⁹⁸

As early as the 1940s, the British Parliament had attempted to abolish the death penalty.¹⁹⁹ In fact, such attempts led to a trial abolition period in the 1950s in which the death penalty could only be utilized for the murder of a police officer or a killing by an inmate fulfilling a life sentence.²⁰⁰ After the success of the trial abolition period, both Houses of Parliament passed abolitionist legislation.²⁰¹

193. This configuration poses a serious problem to some, for as Amnesty International notes "respect for human rights must never be dependent on public opinion." AMNESTY INTERNATIONAL, *WHEN THE STATE KILLS—THE DEATH PENALTY: A HUMAN RIGHTS ISSUE* 22 (1989).

194. ZIMRING AND HAWKINS, *supra* note 3, at 12.

195. See LEON SHASKOLSKY SHELEFF, *ULTIMATE PENALTIES: CAPITAL PUNISHMENT, LIFE IMPRISONMENT, PHYSICAL TORTURE* 24 (1987).

196. See JAMES B. CHRISTOPH, *CAPITAL PUNISHMENT AND BRITISH POLITICS* 21 (1962).

197. For a definition of de facto abolitionist, see *supra* note 9.

198. See SHELEFF, *supra* note 195, at 182.

199. See CHRISTOPH, *supra* note 196, at 35.

200. See SHELEFF, *supra* note 195, at 184.

201. See Amitay, *supra* note 1, at 550-51. With the passage of a Criminal Justice Bill in England, in July 1998, treason and piracy were removed from their

One of the most fascinating aspects of Britain's abolitionist stance is that it was achieved despite the fact the population was still much in favor of capital punishment's retention.²⁰² Furthermore, even after Britain abolished the death penalty, the populace still strongly supported capital punishment.²⁰³ For instance, in 1990, seventy percent of the people supported capital punishment for the committing of a terrorist act.²⁰⁴ Similarly, sixty-seven percent favored retention for the murder of a policeman, and sixty-one percent noted their support for all other murders.²⁰⁵ As of 1994, the statistics noting public support for capital punishment remained virtually the same in Britain—very strong.²⁰⁶

The British experience is similarly replicated in France, Germany and Austria. In 1982, France's President Mitterrand, who noted his plan for eliminating the death penalty during his election campaign, instituted abolition while sixty-two percent of the people favored its retention.²⁰⁷ Similarly, two-thirds of the population were in favor of retention in the Federal Republic of Germany when abolition took root.²⁰⁸ Likewise,

capital offense status. As a result, in Great Britain, the death penalty can only be instituted under military law. Yet even this provision is due to change with the renewal of the Armed Forces Act in 2001, which would make England an abolitionist country for all offenses. See DEATH PENALTY NEWS (visited Nov. 19, 1998) <<http://www.amnesty.org/ailib/aipub/1998/ACT/A5300498.htm>>.

202. In 1962, when asked in a Gallup poll if the British government should reinstitute capital punishment, 73% responded that the death penalty should be re-enacted. See 1 DR. GEORGE H. GALLUP, *THE GALLUP INTERNATIONAL PUBLIC OPINION POLLS: GREAT BRITAIN 1937-1975* 638 (1976). Similarly, when questioned in 1964, only 21% of the public believed that the death penalty should be abolished in its entirety. *Id.* at 774.

203. See HOOD, *supra* note 4, at 15 n.20.

204. *Id.*

205. *Id.*

206. *Id.*

207. See Dando, *supra* note 7, at 8. Upon taking the presidential seat, Mitterrand appointed Robert Badinter as Justice Minister, who effectively implemented the plan for abolishing the death penalty. *Id.* France's success with abolition is highlighted through the juxtaposition of a recent French trial to one in the United States. While Terry Nichols was found guilty of both manslaughter and conspiracy for the Oklahoma City bombing, and questions loomed over whether he would be subject to the death penalty, across the Atlantic, the infamous Carlos the Jackal was convicted for the murder of a Lebanese informant and two French police officers. In France, however, there was no discussion with regard to the death penalty. Rather, a sentence for life imprisonment was immediately announced. See Kevin Simpson, *Death Penalty Needs a Society's Blessing: U.S. More Apt Than Other Nations To Use It*, DENV. POST, Dec. 28, 1997, at 1A.

208. See ZIMRING & HAWKINS, *supra* note 3, at 21-22. In the Federal Republic

Austria remains abolitionist even though a large portion of the population still favors the death penalty.²⁰⁹ To a lesser extent, a similar phenomenon occurred in Canada. The country remained abolitionist²¹⁰ despite the fact that, as of 1995, forty-four percent of Canadians still strongly supported the death penalty.²¹¹ Hood summarizes these countries point of view by stating that they believe "popular sentiment alone should not determine penal policy, that task being the responsibility of elected representatives exercising *their own judgement*."²¹²

CONCLUSION

Perhaps a partial explanation for retention of the death penalty in the United States is precisely due to popular sentiment. Unlike Italy²¹³ or the Federal Republic of Germany,²¹⁴ which denounce the death penalty in their constitutions, with strong public support, it is quite improbable that our Constitution will be amended any time in the near future to reflect such a stance. Similarly, with the U.S. Supreme Court using the populace's view of the sanction as a barometer on the issue,²¹⁵ change does not appear likely to come from this route.²¹⁶ A similar improbability exists at the

of Germany, capital punishment was entirely abolished in its Constitution. See GRUNDGESETZ [Constitution] art. 102 (F.R.G) ("Capital punishment is abolished").

209. See HOOD, *supra* note 4, at 214.

210. In Canada, beginning December 29, 1967, there was a five-year moratorium on the death penalty, yet the moratorium did not spare an individual who murdered either a police officer or a prison official on duty. See C.H.S. JAYEWARDENE, *THE PENALTY OF DEATH: THE CANADIAN EXPERIMENT 1* (1977). Capital punishment was eventually abolished in 1976 for ordinary crimes. See HOOD, *supra* note 4, at 46. In June 1987, there was an attempt to reinstate the death penalty, but a majority of Parliament favoring abolition prevailed. *Id.* at 46-47. For further discussion of Canada and the death penalty, see Jayne Seagrave, *The Death Penalty: Will Canada Restore This Punishment?*, 29 CAN. J. CRIMINOLOGY 405 (1987); Neil Vidmar & Tony Dittenhoffer, *Informed Public Opinion and Death Penalty Attitudes*, 23 CAN. J. CRIMINOLOGY 43 (1981).

211. See HOOD, *supra* note 4, at 214 n.5.

212. *Id.* at 213-14 (emphasis added). This view is quite antithetical to that of Japan which retains the death penalty and cites extensive public support for its survival. *Id.* at 36. Approximately 70% of the Japanese are in favor of capital punishment, although the author contends that such studies were conducted with a bias towards retention. See Dando, *supra* note 7, at 10.

213. See discussion *supra* note 7.

214. See discussion *supra* note 7.

215. For a discussion of the South African Supreme Court's non-inclusion of public opinion in its constitutional analysis, see discussion *supra* note 172.

216. It is interesting to note that in *McCleskey v. Kemp*, Justice Powell stated

presidential level. Can one even imagine an American presidential candidate announcing an abolitionist agenda in his pre-election speeches as did President Mitterrand of France?²¹⁷ The only other vestige of hope left for abolition is in the legislative branch. Yet, by multiplying the improbability of change coming from one elected official (the President) by several hundred elected officials,²¹⁸ coupled with the tradition of capital punishment in the United States, it is likely that the status quo will remain in the United States on the issue of the death penalty for some time to come.²¹⁹

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that abolition should not come from the Supreme Court, but rather from the legislature. See *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987). Nonetheless, Zimring and Hawkins believe abolition will take hold by means of the federal courts. See ZIMRING & HAWKINS, *supra* note 3, at 153.

217. For a discussion of President Mitterrand's implementing abolition in France, see text *supra* note 207. Both the Bush and Clinton administrations have voiced their support for the retention of the death penalty. See Grayer, *supra* note 2, at 561. President Clinton even supported the death penalty while he was governor of Arkansas. See Bill Nichols, *Campaigns Take Bite Into Crime: Police Groups Line Up Behind Clinton*, USA TODAY, Sept. 17, 1996, at 3A.

218. Zimring and Hawkins agree that the legislative branch will not be the forum for change: "Congress is characterized by consistent timidity, lacking a tradition of moral leadership such as that evinced in the British Parliament . . . Congress is thus an unlikely place to look for the initiation of federal abolition." ZIMRING & HAWKINS, *supra* note 3, at 153.

219. This contention is shared by one commentator who notes that "prognosticating abolition on the basis of the experience of Western European democracies seems dubious in view of the significant cultural and demographic differences between the United States and the countries of Western Europe. Given the present legal and political climate in this country, the pace of executions will continue to accelerate" White, *supra* note 98, at 1440.

