Cruel and Unusual Punishment, the Death Penalty, and the Influence of Foreign Law on U.S. Constitutional Jurisprudence

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Cruel and Unusual Punishment, the Death Penalty, and the Influence of Foreign Law on U.S. Constitutional Jurisprudence

Joan Young Hee Kim

A Thesis in the Field of International Relations for the Degree of Master of Liberal Arts in Extension Studies

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Abstract

The death penalty has a long and established history inclusive of almost every society since the beginning of time. As society advanced, so did the way people came to understand capital punishment. This thesis explores that change in sentiment within the American context and advances a prediction: the Supreme Court of the United States will abolish the death penalty under the Cruel and Unusual Punishment Clause of the Eighth Amendment. The plausibility of this prediction is substantiated by a case method investigation on the influence of foreign law on United States Supreme Court’s decisions interpreting cruel and unusual standards and the degree to which this clause constrains the death penalty.

The resolute position capital punishment has commanded in American politics, law, and society as well as the standards governing its imposition has evolved. Concurrently, a growing majority of independent countries in the international community today have chosen to utilize different methods to deter crime, a position the United States has not taken—yet. The two are not mutually exclusive, as developments in the international community are increasingly affecting American culture and values. The direct and indirect reliance of foreign materials by the court in informing their legal reasonings and decisions has ushered in a new era of death penalty jurisprudence—its movement towards abolition.
Preface

I chose to write my thesis on the intersections between cruel and unusual punishment, the death penalty, and the tangible influence of entire communities outside U.S. constitutional jurisdiction because the position of the justice system within the intricate system of U.S. governance has been a fascinating enigma that I wanted to understand more about. The judicial branch in the U.S. is not the facilitator of a representative democracy, that is the exclusive position reserved for the legislature, so when legal decisions are made that seem to push a specific agenda or viewpoint on topics of deep-seated contention within the American public like the death penalty, abortion, and marriage rights I needed learn more about the role the court actually assumes and the validity of those assumptions in U.S. government before coming to terms with what my expectations were as a citizen.

I think we have two very different conflicting conceptions of public servants and what general obligations they have. One view is that public servants are people embedded in the public bureaucracy; their obligation is to do what the mandate of their job says. Their role is to make the machine of governance work and that’s it--pull the lever and keep the machine well oiled, high functioning, and moving. They are not there to question the workings of the machine, not because the machine shouldn’t be questioned but because the questioning should happen in the electorate with elections. The public servants subscribed to this view actualize the will of the people through the facilitation of their job.
The other view is that public servants should be individuals who reflect on the morality of what they are being asked to do. This is not a unique or radical concept because we expect public servants to think and question what they are doing. This is not to paralyze themselves with self-doubt, not to become philosophers, but if, in their service, they come across situations of substantive moral misgivings to follow the protocols sensitive to procedures available for creative solution building.

It seems as if the justice system should be very much in the first view because judges are representatives of the law and not representations of themselves or public opinion. Their duty and prescribed role is to determine what the law is not what the law should be—devoid of personal opinions and bias. However, in this country, it can be said that the law has been used pervasively and continuously to support the existence of prejudice, discrimination, and antagonism against minority groups. Jurisdictional differences between the federal and state governments, as one of many examples, have often been used as a means of suppressing justice and civil rights. It is remarkable and frightening how applicable this is to some of the darkest moments of U.S. history—how the law has been used time and time again as a tool in perpetuating discrimination.

The problem with bureaucracy is: if you have substantive moral misgivings as a public servant what do you do? It becomes complicated because we want public servants who subscribe to both views; those who actualize the will of the people but also reflective individuals who sometimes question and sometimes do what the electorate can’t, wont, or didn’t do.
The trajectory of capital punishment jurisprudence this thesis presents conceptually illustrates the evolution that has taken place in trying to balance the two conflicting views on a public servants role in governance. A big part in choosing to write a thesis like this was not to just look at the history and results of these interesting cases but to seek and reflect on how SCOTUS reasoned when engaged with the vastness of the law; where did they stand, how did they organize their thoughts when they approached these types of cases, what sources did they draw on, and how might they have used information to challenge the way we think about the way we hold our elected officials accountable.

I think the way that SCOTUS has positioned itself today--asking what the protection of law should be achieving and if that protection reflects the will of the people--has moved the legal space to be more inclusive of pursuits of justice by people inundated with problems and situations where the law favors predicaments that perpetuate and protects unjust outcomes; and rightfully so.
About the Author

Joan Kim is a Los Angeles native who was raised in Laredo, Texas. She went to Sarah Lawrence College in Bronxville, New York where she received her Bachelor of Arts degree in Political Science with a concentration in Latin American Politics. Forced to relocate to Texas with her family after the complete destruction of Koreatown Los Angeles in the 1992 Rodney King riots has fueled Joan’s professional goals to develop effective solutions to combat issues of social justice affecting people of color. Having lived in Seoul, South Korea and Buenos Aires, Argentina as a political analyst, Joan made the move to Cambridge, Massachusetts to pursue her Master of Liberal Arts degree. Taking her first law class at Harvard profoundly reshaped her thoughts on how to best achieve change— that sometimes the only avenue available to bring about change is judicially. Joan will combine her newfound appreciation for the subtle but formidable political agency of the justice system with her commitment to social justice this summer in California as she campaigns for Hillary Clinton to be the forty fifth President of the United States.
Dedication

The success of this thesis, of everything I have achieved, is a reflection my parents and I dedicate this thesis to them. Mom and Dad, thank you for allowing me to experience, pursue, and accomplish to my heart’s desire. A very special thank you to my Aunt Alvina, without whom I would not be here about to graduate from Harvard. I will never forget all the days you so fiercely prayed for the things I have now. Sis we somehow always manage to find solutions and make things work during impossible times. I am convinced that our luck in life stems from our bond times infinity that is perfectly us, thank you for being my number one fan. Finally, I want to thank my Cambridge family who was the core of all things good throughout this demanding journey. What began at 469 and is soon to end in 12 has shaped the infrastructure of my adult life and I am proud to say that I have become the best version of myself in tandem with you. You replenished what the trials and tribulations of pursuing this degree depleted and made the things I yearned for seem more attainable. I am so incredibly fortunate to have learned, laughed, cried, and adventured with you.
감사의 글

어렸을 때부터 엄마가 자기전에 매일 한말이 있습니다. 큰 꿈을 가져라——

“have a big dream.” 엄마 아빠 덕분에 큰 꿈이 이루어졌습니다. 성공적으로 끝낸 이번 논문 뿐만 아니라 제 인생에 성취한 모든것은 엄마 아빠의 현신적인 희생과 용기 그리고 지원이 있어서 가능했습니다. 지금까지 제가 가진 기회, 경험, 용기, 꿈, 또 그 꿈을 이루 수 있게 도와 주셔서 감사합니다. 엄마 아빠 사랑합니다!

이모, 제가 제일 힘들었을 때 도와 주시고, 쟁겨 주시고, 응원해 주시고, 매일 기도해 주신 것을 평생 잊지 못할 것입니다. 하늘만큼 떨만큼 사랑하고 감사합니다.

사랑하는 엄마 아빠 이모에 하버드 졸업생,

김조언
Acknowledgments

The ALM thesis process was long, complex, and challenging. It was never going to be easy, but at its conclusion I can truly say that this has been the most rigorous yet rewarding experience of my academic career. Professor Doug Bond, this sentiment is a testament to your leadership, guidance, and instruction. Thank you for being the best thesis advisor this school has ever seen. The timeline set for this project was extremely ambitious--the miraculous, successful, and timely completion of this thesis was only achievable because of my thesis director Professor Christopher Taggart. There are no words in the English vocabulary sufficient enough to convey the depth of my utter gratitude. Thank you for being incredibly supportive and open minded about idealistic deadlines, thank you for being understanding and patient when they couldn’t be met, and thank you for the countless hours of effort and energy spent reading, editing, and shaping my thesis at every stage. Your commitment to this project has been the greatest gift for which I am beyond grateful. Thank you.
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List of Acronyms

ACHR- American Convention on Human Rights
CUPC- Cruel and Unusual Punishment Clause of the Eighth Amendment
ECHR- European Convention on Human Rights
ECOSOC- United Nations Economic and Social Council
EU- European Union
ICCPR- International Covenant on Civil and Political Rights
OAS- Organization of American States
RO- Regional Organizations
SCOTUS- Supreme Court of the United States
U.S.- United States of America
UDHR- Universal Declaration of Human Rights
UN- United Nations
Introduction

The United States originated in light of a foreign connection. Once subjects of the British Empire, the American colonists were able to gain their independence in 1776.\(^1\) The U.S. adopted Britain’s death penalty—a popular and frequently employed form of punishment in Britain at the time,\(^2\) and the death penalty has existed in the U.S. ever since. It took 103 years for the Supreme Court of the United States (“SCOTUS”) to hear Wilkerson v. Utah,\(^3\) its first death penalty case challenging the constitutionality of execution methods as impermissible under the Cruel and Unusual Punishment Clause of the Eighth Amendment (“CUPC”). While SCOTUS reaffirmed a state’s right to execute in a manner that its legislature deemed fit, it did recognize that some execution methods were “atrocities.”\(^4\)

Formerly, the death penalty was not a “cruel and unusual” punishment, but as society advanced, so did the way Americans came to understand capital punishment. This thesis explores that change in sentiment and advances a prediction: considering the

---

1 U.S. Declaration of Independence.

2 Crimes committed that imposed death as punishment in England at that time were “treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, and theft.” These capital crime categories transferred to the American colonies then to the United States. While colonial Americans agreed that there was a crime hierarchy, i.e. murder and rape was a more severe crime than theft and counterfeiting, there was a consensus that death was an appropriate punishment of almost all crimes. Stuart Banner, The Death Penalty: An American History (Cambridge: Harvard University Press, 2002), 5.


4 “Other circumstances of terror, pain, or disgrace were sometimes superadded. Cases mentioned by the author are where the prisoner was drawn or dragged to the place of execution, in treason; or where he was emboweled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female. History confirms the truth of these atrocities.” Wilkerson at 135.
developments capital punishment jurisprudence has made over time, international and foreign legal materials will influence SCOTUS to categorically ban the death penalty under the CUPC. The evolution of cruel and unusual standards, as witnessed by the trajectory of capital punishment jurisprudence, reveals that international and foreign legal materials have informed SCOTUS decisions in direct and indirect ways.

Today, capital punishment is federally mandated to be limited to aggravated murders of the worst kind that have been committed by the mentally competent. This position is the culmination of SCOTUS decisions reinterpreting the CUPC, relying on precedents with direct references to international and foreign legal materials. The present American position on capital punishment—permissible with reservations, is also reflective of foreign influence on American values. Developments in the international community pointing to the increasing and consistent decline, illegality, and reluctance towards the use of capital punishment have had an increasing effect on American culture. Now, most Americans consider the penalty of death to be atrocious for most crimes.

Calls for a constitutional ban of the death penalty as cruel and unusual have been overruled by SCOTUS so far; however, the evolution of cruel and unusual standards reveals a shift in SCOTUS identity and ideology. More recently, SCOTUS has been deciding cases using independent judgments vis-à-vis an American consensus to interpret the CUPC. This approach to resolution has restructured the strength of *stare decisis*, a "doctrine of precedent under which a court must follow earlier judicial decisions when

5 *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Hall v. Florida*, 572 US _ (2014). This will be detailed in an evolutionary trace of U.S. Supreme Court CUPC decisions regarding the death penalty in Chapter II.

the same points arise again in litigation,” to be more inclusive of the values of the American people, reflected by a national consensus. While a categorical prohibition of capital punishment has not yet reached the U.S. at the federal level, a national consensus of state legislatures, reflective of the values of the American people and informing SCOTUS decisions, is ushering in a new era of death penalty jurisprudence—its movement towards abolition.

Chapter Overview

Chapter I explores the multifaceted American tradition of capital punishment through a trajectory of SCOTUS cases tracing the legal history of the CUPC, beginning with Weems v. United States and Trop v. Dulles, the foundational cases that recognized the evolving nature of the CUPC. Subsequent SCOTUS decisions to apply, contribute, and limit the Trop standard are detailed under three categories: (1) decisions involving sentencing procedures and administration, (2) decisions involving the nature of the crime, and (3) decisions involving the nature of the defendant.

Chapter II and III detail the direct and indirect effect foreign materials have had in SCOTUS decisions interpreting the CUPC. Foreign materials cited directly, becoming precedents, helps articulate the indirect effect manifested in SCOTUS decisions resolving death penalty contentions by interpreting the CUPC through independent judgments. The indirect effect of foreign materials is also assessed with a general overview of the de facto8 and de jure9 legal positions of the international community at large on this issue.

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7 Garner and Black, Black's Law Dictionary, 1626

8 Latin for “in point of fact.” Defined as “having effect even though not formally or legally recognized.” Garner and Black, Black's Law Dictionary, 506.
The global strength of the campaign for the protection and enforcement of human rights is indicative of global action affecting domestic values to change domestic policies.

This thesis concludes by substantiating the prediction advanced by this thesis: the impact of direct and indirect foreign influence will push SCOTUS to find the imposition of capital punishment categorically unconstitutional under the CUPC. The plausibility of this prediction is deduced from the patterns and trends materialized from the development and evolution of the CUPC.

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9 Latin for “as a matter of law.” Defined as “existing by right or according to law.” Garner and Black, *Black’s Law Dictionary*, 518.
Chapter I

The Evolution of United States Capital Punishment Jurisprudence

The Eighth Amendment guarantees that no “cruel and unusual punishments” shall be inflicted.\(^\text{10}\) Although the Eighth Amendment prohibits cruel and unusual punishment, it does not specify which punishments are cruel and unusual. Thus, there has been a long history of legal contestation regarding issues of capital punishment as cruel and unusual in the United States. Due to federalism, a unique constitutional relationship between the U.S. federal government and state governments, the legality of, eligibility for, and method(s) approved for capital punishment have varied by state and continues to be susceptible to change on a case by case basis. Hence, it has largely been tasked to SCOTUS\(^\text{11}\) to develop a more specific standard to determine which punishments are unconstitutional under the CUPC of the Eighth Amendment.

The Cruel and Unusual Clause of the Eighth Amendment

*Weems v. United States*

SCOTUS took the first steps in establishing the parameters of cruelly excessive

\(^\text{10}\) U.S. Constitution Amendment VIII.

\(^\text{11}\) This is, in part, a result of the U.S. legal system being a “common law” system where judicial decisions and opinions are recognized, referenced, cited, and used as powerful primary authorities in decision making due to SCOTUS being the ultimate authority in deciding what the law is. Also, SCOTUS is the highest court of the land, the court of last resort, and the court of final authority. States are required to be complicit in all and any relevant SCOTUS decisions as mandated by the Supremacy Clause of the U.S. Constitution. Graham Hughes, “Common Law Systems,” in *Fundamentals of American Law* (New York: Oxford University Press, 1996), 9.
punishments in 1910 with *Weems v. United States*. SCOTUS granted certiorari to petitioner Weems, a government official convicted by a Philippine court of falsifying official payment records that amounted to a total of 616 pesos. Petitioner asked the Court to find his sentence of incarceration by iron chains for fifteen years while enduring “hard and painful labor,” a fine of 4,000 pesos, suspension of civil rights while incarcerated, a subsequent permanent loss of all political rights upon release, and loss of privacy due to surveillance upon release as cruel and unusual under the CUPC.

SCOTUS was explicit that it was not the judiciary’s place to restrict the legislative process and that SCOTUS’s power to determine the boundaries of crime and punishment was limited. However, when it was so obvious that a sentence given for a crime far exceeded examples of similar sentences, even those sentences given to

---


13 *Weems* at 351.

14 Petitioner was able to appeal to SCOTUS because the Islands of the Philippines, at the time this case was adjudicated, was under the governance of the U.S. Government. The Philippines are referenced accordingly in the case as “The United States Government of the Philippine Islands.” *Weems* at 357.

15 *Weems* at 364.

16 *Weems* at 351.

17 The trial court did not consider intent or injury, as it was not (to them) relevant to the action of crime committed. “The [trial] court said: ‘It is not necessary that there be any fraud, nor even the desire to defraud, nor intention of personal gain on the part of the person committing it, that a falsification of a public document be punishable; it is sufficient that the one who committed it had the intention to pervert the truth and to falsify the document, and that by it damage might result to a third party.’” *Weems* at 363. Issues of intent and mitigating factors will play an important part in limiting the applicability of capital punishment, as we will see later on in this chapter under the sections of action and individual issues in cases challenging the CUPC post *Trop v. Dulles*.

18 *Weems* at 379. The court extended this thought further by commenting on the improper usage of the judicial station: “[T]he function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety.” *Ibid*.

19 Examples of crimes calling for similar (or even lesser) sentences included: “degrees of homicide that [were] not punished so severely . . . misprision of treason, inciting rebellion, conspiracy to destroy the
criminals convicted of crimes similar to the petitioner’s crime,\textsuperscript{20} it then became the duty of the Court to judge the constitutionality of that sentence.\textsuperscript{21}

Justice Joseph McKenna, writing for the court, found the punishment of Weems to be cruel and unusual. He opined that “the fault [was] in the law”\textsuperscript{22} explaining that when the minimum mandatory punishment for a given crime\textsuperscript{23} is considered grossly “repugnant to the Bill of Rights,”\textsuperscript{24} and there are no legal alternatives provided for resentencing, then it is the law that is at fault. With this reasoning, Justice McKenna invalidated the law, rendering punishments authorized by this impermissibly law cruel and unusual.\textsuperscript{25}

Additionally, the Court ruled that the legislature failed to work within the confines of constitutional boundaries when presented with evidence of lesser

\begin{quote}
\textit{government by force, recruiting soldiers in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, larceny, and other crimes.”}\textit{Weems} at 380.
\end{quote}

\textsuperscript{20} The penalty for the criminal act of misrepresenting government payment at a profit, in other words being “guilty of embezzlement,” was penalized with a “fine in double the amount so withheld, and imprisoned not more than two years.” \textit{Weems} at 380 as cited in the Penal Laws of the United States, 35 Stat. 1088 (1909), § 86.

\textsuperscript{21} \textit{Weems} at 379.

\textsuperscript{22} \textit{Weems} at 350.

\textsuperscript{23} The minimum punishment for a crime of this station was detailed to be “confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council.” \textit{Weems} at 366. In addition to the aforementioned minimum punishment, which details punishment to be sustained during imprisonment, after serving their time inmates were permanently under the authority of the criminal magistrate. \textit{Ibid.}

\textsuperscript{24} \textit{Weems} at 350. “[The sentenced] is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted.” \textit{Weems} at 366. To the \textit{Weems} majority, the harshness of this particular law was not justified in any acceptable civilized manner.

\textsuperscript{25} \textit{Weems} at 382.
punishments administered for far more serious crimes.\textsuperscript{26} This led to an expansion of the ways to think about the Eighth Amendment that became firmly established at the center of Justice McKenna’s majority opinion:

\begin{quote}
Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.\textsuperscript{27}
\end{quote}

Through this interpretation, the \textit{Weems} Court established that there was “a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice”\textsuperscript{28} Elaborating on this theory of criminal justice, the \textit{Weems} majority emphasized that when power is righteously exercised through a constitutional lens it is a win-win for all: “The state thereby suffers nothing, and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.”\textsuperscript{29} For the first time in U.S. jurisprudential history, \textit{Weems v. United States} firmly endorsed a new precedent, which required a given punishment to be appropriately calibrated to the severity of the crime committed.

\textit{Weems} established that a defendant’s punishment could be considered cruel and unusual because it was disproportionate to the crimes that the defendant committed. The \textit{Weems} Court emphasized the progressive nature of the Eighth Amendment, stating that it

\footnotesize
\begin{itemize}
\item \textsuperscript{26} See footnote 19.
\item \textsuperscript{27} \textit{Weems} at 373.
\item \textsuperscript{28} \textit{Weems} at 381.
\item \textsuperscript{29} \textit{Ibid.}
\item \textsuperscript{30} Barry Latzer, \textit{Death Penalty Cases: Leading U.S. Supreme Court Cases on Capital Punishment} (Elisevier/Butterworth Heinemann, 2011).
\end{itemize}
“does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice.”

Weems widened the jurisprudential scope of the CUPC and posited a malleable perspective of law that took into consideration changing notions of excessiveness. The new precedent set by Weems set the stage for what was to come in 1958 with Trop v. Dulles.

**Trop v. Dulles**

The current standard of interpreting the CUPC was established by *Trop v. Dulles*. In the five-four majority opinion of *Trop*, Chief Justice Earl Warren recognized that whatever arguments might exist on either side, moral or otherwise, the death penalty is accepted as a legally valid form of punishment (not cruel and unusual and therefore not a violation of an individual’s Eighth Amendment rights). However, it was equally recognized that the government lacked free reign “to devise any punishment short of death within the limit of its imagination.” The question before the Court – “whether [a given punishment] subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment” – established the modern basis of the jurisprudence of the cruel and unusual punishment:

31 *Weems* at 350.


33 *Trop* at 99.


35 *Trop v. Dulles* was about whether the “deprivation of citizenship” violated the CUPC. *Trop* at 93. However, the *Trop* standard for interpreting the CUPC is also applicable and widely cited in capital offense cases.

36 *Trop* at 99.
The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.

Justice Warren elaborated by citing Weems, noting that although SCOTUS “has had little occasion to give precise content to the Eighth Amendment,” this was a circumstance brought to the attention of the court in which Eighth Amendment boundaries had been tested and a punishment was given that “was cruel in its excessiveness and unusual in its character.” The Weems decision clarified that the specific words that made up the CUPC were not definitive “and that their scope is not static.” Instead, “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” In SCOTUS using this line of reasoning to find for the petitioner, the Trop Court established an important precedent in interpreting the CUPC – what society considers decent is transient – societal standards can and do evolve.

**Applications of the Trop v. Dulles Standard**

The foundational cases of Weems and Trop had a lasting impact in shaping the CUPC of the Eighth Amendment. The Weems Court widened its definitive role and

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37 Trop at 100.
38 Ibid.
39 Ibid.
40 Trop at 100-101.
41 Trop at 101.
meaning, and although SCOTUS was not precise about what counted as “cruel and unusual,” the Trop Court created a general framework for its subsequent consideration.\textsuperscript{42} Both Weems and Trop established that the punishment parameters acceptable under the CUPC were not definitive, but variable to society’s evolving standards of decency.\textsuperscript{43}

At present, SCOTUS has yet to declare the death penalty to be categorically cruel and unusual. However, the decisions of Weems and Trop created an opening for those on death row to appeal their sentence on CUPC grounds. This ushered in new opportunities for traction to be made towards invalidating capital punishment as a constitutionally acceptable form of punishment. Since then, the courts have had a lot to say about the limitations on imposing the death penalty.

The following section will discuss how SCOTUS’s application of the CUPC has evolved and affected the use of the death penalty as punishment post Trop. Landmark and specific capital punishment cases that track the history of SCOTUS decisions interpreting the death penalty under the CUPC of the Eighth Amendment are identified and SCOTUS’s evolving standards of what constitutes as cruel and unusual, developed by Weems and Trop, is traced. The trajectory of cases identified are organized into three categories based on the following divisions: (1) procedural, the manner in which the death penalty is applied; (2) action, seeking the death penalty as punishment due to the nature of the crime(s) committed; and (3) individual, the death penalty as applied to certain groups of people.

\textsuperscript{42} “The exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.” Trop at 99.

\textsuperscript{43} Weems at 350. Trop at 101.
Category One: Procedure

SCOTUS’s application of the CUPC under the precedents of Weems and Trop has evolved and affected the use of the death penalty as punishment. Fourteen years after Trop, SCOTUS granted certiorari\textsuperscript{44} to the 1972 landmark death penalty case of Furman v. Georgia,\textsuperscript{45} a decision that would usher in a new era of death penalty jurisprudence. SCOTUS explored the question of whether the death penalty was cruel and unusual based on how it was applied in two main cases: (1) *Furman v. Georgia* and (2) *Gregg v. Georgia*.\textsuperscript{46}

Furman v. Georgia

The petitioners in *Furman v. Georgia* were three similarly situated individuals, who asked the Court to review the constitutionality of their respective death sentences: (1) William Henry Furman convicted for murder,\textsuperscript{47} (2) Lucious Jackson Jr. convicted for rape\textsuperscript{48} and (3) Elmer Branch convicted for rape.\textsuperscript{49} The defendants presented the same argument--the method used to impose the death penalty was arbitrary and capricious.\textsuperscript{50} SCOTUS granted certiorari to consider the matter limited to the following question:

\textsuperscript{44} Latin for “to be more fully informed.” Defined as “an extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review.” Garner and Black, *Black's Law Dictionary*, 275. Certiorari is used by SCOTUS to determine what cases to hear. Supreme Court of the United States, http://www.supremecourt.gov/.

\textsuperscript{45} *Furman v. Georgia*, 408 U.S. 238 (1972).


\textsuperscript{47} Petitioner Furman accidently shot and killed a man through a closed door attempting to flee after his discovery by the deceased during an attempted robbery of his house. *Furman* at 239.

\textsuperscript{48} Petitioner Jackson raped a woman while holding a pair of scissors to her throat. *Ibid.*

\textsuperscript{49} Petitioner Branch raped a woman during the course of a robbery at the victim’s house. *Ibid.*

\textsuperscript{50} *Furman* at 240.
“[D]oes the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?”51

The answer was a complicated “yes” with the court issuing a per curium opinion because all nine justices wrote separate opinions.52

The five-four decision of Furman v. Georgia made history as the first SCOTUS case to evaluate the death penalty under the Trop standard of the CUPC, with its ruling against the death penalty.53 Of the majority faction, the opinions of Justices Stewart, White, and Douglas expressed an acute apprehension with the uneven application of capital punishment, while the opinions of Justices Brennan and Marshall declared capital punishment to be categorically impermissible under the CUPC.54

The main concern of the Furman majority was the procedural irregularity under which capital punishment was administered.55 Before the Furman decision, most death sentences were imposed on criminal offenders in the following three ways: (1) being convicted of a crime eligible for the death penalty which in most jurisdictions included variations of murder (other heinous crimes such as rape, armed robbery, and kidnapping were also death eligible in some jurisdictions);56 (2) in a unitary trial where a separate opportunity to consider any evidence pertinent to the sentence is not given and juries

51 Ibid.


54 Furman at 240.

55 Ibid.

56 Latzer, Death Penalty Cases, 37.
would simultaneously issue a verdict of guilt and punishment;\(^{57}\) (3) by juries who generally were not given any substantial guidance by the court on how to determine whether a defendant deserved to be penalized with incarceration for life or death.\(^{58}\)

This concern was best reflected in Justice Stewart’s opinion, which classified death as a form of criminal punishment that was unique.\(^{59}\) In consideration of the specific cases brought before the \textit{Furman} court, Stewart opined that the minimum expectation one would expect in mandating such a severe and ultimate punishment is for its imposition to be objective and fair.\(^{60}\) There were times when lawmakers codified specific categories of criminal conduct in which a legal conviction would call for an immediate death sentence.\(^{61}\) For example, convicted criminals for crimes of treason or espionage during times of war, or for the successful assassination of a President of the United States or State Governor would receive the death penalty as punishment.\(^{62}\) In comparison, the imposition of capital punishment by the States of Georgia and Texas seemed biased and unfair because legislators in Georgia and Texas did not prescribe capital punishment to

\(^{57}\) \textit{Ibid.}

\(^{58}\) \textit{Ibid.}

\(^{59}\) “The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.” \textit{Furman} at 306.

\(^{60}\) \textit{Furman} at 310.

\(^{61}\) “Legislatures -- state and federal -- have sometimes specified that the penalty of death shall be the mandatory punishment for every person convicted of engaging in certain designated criminal conduct.” \textit{Furman} at 307.

\(^{62}\) The example given above of a successful assignation of POTUS or Governor is specific to the state of Ohio. Justice Stewart also gives other examples. \textit{Furman} at 307.
all convicted murders or rapists.\textsuperscript{63}

Furthermore, the disparate nature of state-by-state procedural irregularities regarding the implementation of capital punishment worked against the two reasons given as to why the death penalty was a legal and legitimized avenue of punishment, “society’s interest in deterrence and retribution.”\textsuperscript{64} Neither respondent in the \textit{Furman} cases “made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses.”\textsuperscript{65} Nor have the states contemplated the major transgression with the principle of retribution when like cases do not have a like outcome. The evidence referenced by Justice Stewart revealed that “of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners \[were\] among a capriciously selected random handful upon whom the sentence of death ha[d] in fact been imposed.”\textsuperscript{66}

The death sentences brought before the court proved to be “the product of a legal system that brings them within the very core of the Eighth Amendment’s guarantee against cruel and unusual punishments, a guarantee applicable against the States through

\textsuperscript{63}“Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder.” \textit{Furman} at 308.

\textsuperscript{64}In considering theories of justice and the death penalty, Justice Stewart seems to subscribe to a retributive/utility camp. To him, retribution as a reason to warrant capital punishment seems just because it is intrinsic to want to punish when punishment is deserved and warranted. The facilitation of retribution reinforces the paramount structures of law and order. “I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law.” \textit{Furman} at 308.

\textsuperscript{65} \textit{Furman} at 308-309.

\textsuperscript{66} \textit{Furman} at 309-310.
the Fourteenth Amendment.”67 An obvious procedural defect was found to exist, and Justice Stewart affirmed the Court’s central holding, “the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”68

Despite differences in reasoning, the Furman majority found the inconsistent sentencing methods of Georgia and Texas to reflect the workings of an unfair legal system and concluded that it was cruel and unusual for death sentences to be imposed as punishment under those conditions. The Furman Court held that death sentences could no longer be arbitrarily and capriciously applied. This outcome was not only unanticipated,69 but also had a profound effect, temporarily nullifying all death sentences and establishing a nationwide moratorium on the further usage of capital punishment.70 It was the first time in U.S. history in which its citizenry was free from state-sanctioned death.

This ruling, while clear in its holding, did not categorically ban the death penalty. Immediately following the Furman decision, state legislators worked to amend their capital punishment procedural rules and administration accordingly. The states now had three options: (1) take Justice Stewart’s contrasting examples into consideration and legislate to impose an even application of the death penalty across same or similar categories; (2) heed Justice White and Douglas’s concerns and minimize juror discretion

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67 Furman at 309.
68 Furman at 310.
69 SCOTUS in the preceding year had, by a six-three vote, rejected a claim that the death penalty was unconstitutionally arbitrary under the Due Process Clause in McGautha v. California, 402 U.S. 183 (1971). Yet it accepted the same argument and reversed the precedent set by McGautha by a 5-4 vote in Furman under the Eighth Amendment. The difference between the two outcomes was the Justice Stewart and White switched sides.
70 This decision reduced about 600 death sentences to prison terms. “Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution.” Furman at 316.
by developing definitive guidelines; or (3) follow Justices Brennan and Marshall in abolishing capital punishment all together. The constitutionality of these new efforts would be put to the test four years later in *Gregg v. Georgia*.

**Gregg v. Georgia**

On July 2, 1976, the Supreme Court ended the nationwide moratorium brought upon by *Furman* with its seven-two decision of *Gregg v. Georgia*.71 *Gregg* was the lead case of four other cases72 (from Florida, Texas, North Carolina, and Louisiana) that were grouped together due to their shared procedural history. After *Furman* held death sentences arbitrarily and capriciously imposed to be unconstitutional, the legislatures of the aforementioned states passed new laws in accommodation.

Under the new statutes, all five petitioners were charged, found guilty of murder, and given the death penalty in their respective states. Believing their death sentences to be in violation of the rights afforded to them by the CUPC, the defendants appealed to SCOTUS, asking the court to find the death penalty unconstitutional and therefore categorically impermissible as a form of punishment. SCOTUS granted certiorari limited to clarifying whether the imposition of capital punishment, in light of revised standards, was a violation of the CUPC.

SCOTUS found the sentencing procedures of two states, North Carolina and Louisiana, to be unconstitutional.73 In revising their capital sentencing laws, both states

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71 *Gregg* at 158.


73 *Woodson* at 305. *Roberts* at 638.
opted for option number one (Justice Steven’s suggestion from his Furman opinion), literally imposing the death penalty as the required punishment across the board for all convicted criminals guilty of first-degree murder in North Carolina and for all those convicted of first-degree murder of an active and on-duty police officer in Louisiana. Correspondingly, the petitioners from these states were automatically sentenced to death for committing first-degree murders under the forenamed specifications.

Both cases were decided by five votes; the plurality opinion was written by Justice Stewart for North Carolina and by Justice Stevens for Louisiana. The Woodson and Roberts Courts found that a blanket application of the death penalty, the most severe form of state sanctioned punishment in existence, would create a different kind of defect if left unchecked—diminishing the efforts primarily made to fix the arbitrariness and capriciousness of the uneven applications of death sentences. The complete removal of discretion from the decision makers, judge or jury, would be “incompatible with contemporary values” and would upset the “requirement that the State’s power to punish ‘be exercised within the limits of civilized standards.’” Both were struck down as unconstitutional because these new statues, among other reasons, did not allow juries to consider any mitigating factors, a constitutional requirement of the sentencing process.

SCOTUS found the sentencing procedures of the remaining three states, Georgia,

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74 Woodson at 295.

75 Woodson at 301.

76 The Eight Amendment requires consideration of various aspects of the character of the individual offender and the circumstances of the particular offense as a “constitutionally indispensable part of the process of imposing the ultimate punishment of death.” Woodson at 281. The North Carolina statute did not allow such a particularized approach. The Court noted that “the fundamental respect for humanity” underlying the Eighth Amendment required such considerations. Woodson at 304.
Florida, and Texas, constitutional; death penalties administered under the modified statutes of these states were not cruel and unusual. The distinguishing difference between these states and North Carolina/Louisiana was that Georgia, Florida, and Texas selected to revise their statutes under option two (addressing Justice White and Douglas’s *Furman* concerns with the development of definitive guidelines), implementing a detailed and multifaceted system to control for arbitrarily and capriciously given death sentences.

Georgia amended its sentencing procedures by leaving behind its unitary trial system; death sentences were imposed on criminals convicted of eligible capital crimes by separate trial and sentencing courts. In addition to this structural change, to determine if death was indeed warranted, the jury had to complete a three-step process, considering a combination of evidence presented regarding the nature of the defendant (mitigating factors) and the severity of the crime committed (aggravating factors). Then, if the final verdict was determined to be the imposition of capital punishment, this sentence would need to be juxtaposed with other similarly situated cases and their punishment.

The improved sentencing system of Florida saw judges as the sole sentencing authority. The way in which Florida judges made capital punishment decisions, under revised Florida statutes, assured SCOTUS of its constitutionality because it required the sentencing judge to cross-reference a specific number of statutory aggravating factors with a specific number of statutory mitigating factors before a determination of punishment could be made. All death sentences imposed under this new system were

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77 *Gregg* at 197.

78 SCOTUS approved Florida’s sentencing procedure in a seven-two decision with a plurality opinion written by Justice Powell. *Proffitt* at 260.
subsequently required to be submitted in writing for an automatic review by Florida’s Supreme Court. The adjusted sentencing system of Texas\textsuperscript{79} was held as constitutional on the grounds that all mitigating factors could be presented to the jury, giving the jury the ability to fully consider whether a convicted criminal should or should not receive the death penalty.

SCOTUS’s decision in \textit{Gregg} et. al. reinforced and validated the constitutionality of capital punishment by determining that the death penalty, while not permissible in all circumstances, was permissible under specific circumstances and therefore did not violate the CUPC. The revised sentencing procedures brought before the court were of “such strict requirements[,] sufficiently safeguard[ing] against the presence of any constitutional deficiencies arising from an arbitrary and/or capricious imposition of the death penalty.”\textsuperscript{80} SCOTUS declined to categorically ban the death penalty because they could not ignore the evidence presented by respondent Georgia--that capital punishment was an effective deterrent of crime and an appropriate means of retribution against those who warrant it.\textsuperscript{81}

\textbf{Category Two: Action}

As seen by the varying sentencing policies from the state respondents of \textit{Gregg}, SCOTUS had not been very specific about defining terms and limits, preferring to give states the autonomy to modify and comply with the implications of SCOTUS decisions.

\textsuperscript{79} SCOTUS approved Texas’s sentencing procedure in a seven-two decision with a plurality opinion by Justice Stevens. \textit{Jurek} at 277.


\textsuperscript{81} \textit{Gregg} at 186-187.
SCOTUS explored the limitations of such state autonomy in four cases: (1) *Coker v. Georgia*,\(^82\) (2) *Godfrey v. Georgia*,\(^83\) (3) *Enmund v. Florida*,\(^84\) and (4) *Kennedy v. Louisiana*.\(^85\) In deciding whether it was cruel and unusual to impose a death sentence upon those convicted of crimes that did not involve the loss of life, SCOTUS began to fix the categories of crime that allowed for the imposition of capital punishment under the CUPC.

**Coker v. Georgia**

In 1977, SCOTUS granted *certiorari* to hear arguments for *Coker v. Georgia*, the first case to be adjudicated by SCOTUS on whether states could constitutionally impose the death penalty upon those whose crimes did not cause the loss of life.\(^86\) Justice White, writing for the seven-two plurality, reminded the Court that the *Gregg* decision settling the constitutionality debate over the legality of capital punishment rested upon a two-step test: (1) Did the punishment make a “measurable contribution to acceptable goals of punishment?”\(^87\) and (2) Was the punishment proportionate to the severity of the crime committed?\(^88\)

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\(^86\) *Coker* at 584.

\(^87\) *Coker* at 592. Under *Gregg*, a punishment is excessive and unconstitutional if it “(1) makes no measurable contribution to acceptable goals of punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.” *Coker* at 584.

\(^88\) *Coker* at 592.
The petitioner, Coker, was sentenced to death for the rape of a woman committed during his escape from prison, where he was already serving a sentence for crimes of murder, rape, kidnapping, and assault. Upon sentencing, it was noted that while there were no further physical injuries to the victim after this singular incident, the jury felt the death penalty was an appropriate punishment due to supplementing aggravating factors. During mandatory review of all death sentences imposed, the Supreme Court of Georgia affirmed the sentence. Dissatisfied with that outcome petitioner appealed to SCOTUS, who granted *certiorari* to resolve whether it was constitutional under the CUPC to punish someone with death for the crime of rape.

SCOTUS applied the *Gregg* test to evaluate the strength of the petitioner’s claim. The first step was to decide whether imposing capital punishment for rape contributed to furthering the overall goals of criminal justice. The majority found that it did not. The second step was to decide whether capital punishment was a proportionate repercussion and a deserving sanction for the crime of rape. The majority found that it was not. The respondent’s application of capital punishment failed both steps of the *Gregg* test so SCOTUS held that to condemn a convicted offender to death for the sole crime of rape

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89 “In Georgia, a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. He also commits that crime when, in the commission of a felony, he causes the death of another human being, irrespective of malice. But even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It 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.” *Coker* at 600.

90 Because crimes of rape differ in scale and severity to crimes of murder crimes should be reprimanded accordingly. “Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape, by definition, does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over, and normally is not beyond repair. We have the abiding conviction that the death penalty, which ‘is unique in its severity and irrevocability,’ is an excessive penalty for the rapist who, as such, does not take human life.” *Coker* at 598. Inner quote from *Gregg* at 187.
was “grossly disproportionate and excessive . . . and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”  

SCOTUS finding for the petitioner meant that to impose a death sentence for the crime of rape without causing death was constitutionally out of bounds. Such use of capital punishment would be inherently cruel and disproportionate, unaccepted by society and against evolving standards of decency.

**Godfrey v. Georgia**

A Georgia statute allowed the death penalty to be imposed if, beyond any reasonable doubt, a murder was committed that was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.” In 1980, SCOTUS granted *certiorari* to petitioner Godfrey’s challenge to the constitutionality of this statute.

The petitioner had a history of spousal domestic violence that eventually resulted in the end of his marriage. During a period of dispute, the petitioner’s soon-to-be ex-wife and their daughter sought refuge at the wife’s parent’s house. Armed with a gun, petitioner went to his mother-in-law’s home, injured his startled and fleeing daughter by hitting her with his gun and killed his wife and mother-in-law. Afterwards, he called the local authorities to confess to his crimes and turned himself in. At trial, petitioner was found guilty of two counts of murder and one count of aggravated assault and sentenced to death. The jury found the crimes committed particularly “outrageous and wantonly

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91 *Coker* at 592.

92 *Godfrey* at 420. “Under a provision of the Georgia Code, a person convicted of murder may be sentenced to death if it is found beyond a reasonable doubt that the offense ‘was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.’ In *Gregg*, this court held that this statutory aggravating circumstance is not unconstitutional on its face.” *Ibid.*
vile,”93 worthy of the death penalty. Upon review by the Supreme Court of Georgia, the sentence was declared valid.

Petitioner appealed to SCOTUS to invalidate his death sentence because sentencing him on the grounds that his murder was “outrageous and wantonly vile”94 was arbitrary and capricious and therefore a violation of the CUPC. Justice Stewart, writing for a six-three plurality finding for the petitioner, referred to the *Gregg* precedent to make his case. The *Gregg* Court allowed the imposition of capital punishment as a constitutionally acceptable form of punishment only if state legislatures passed laws that fixed procedural defects deemed unconstitutional by *Furman*. Georgia’s revised sentencing procedures passed constitutional inspection. Georgia argued that petitioner’s sentence was not imposed in an arbitrary and capricious way because his crimes were “outrageously or wantonly vile, horrible or inhuman,”95 narrowed and specified to mean crimes that demonstrated “torture[,] depravity of mind,96 or aggravated battery [of] the victim.”97

SCOTUS rejected Georgia’s contention because “there [was] no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.”98 It was “of vital importance to the defendant and to the community

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96 “The phrase ‘depravity of mind’ comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim, and the word ‘torture’ must be construed in pari materia with ‘aggravated battery,’ so as to require evidence of serious physical abuse of the victim before death.” *Ibid.*


that any decision to impose the death sentence be, and appear to be, based on reason, rather than caprice or emotion. 99 SCOTUS found that even by Georgia’s own established standard, Georgia failed this test because there was no evidence presented to the jury to suggest that the petitioner “did not torture or commit an aggravated battery upon his victims, or cause either of them to suffer any physical injury preceding their deaths." 100 Nor did he kill his victims with “depravity of mind." 101 Finding for the petitioner, SCOTUS held that a death sentence administered on these grounds was arbitrary and capricious in violation of the CUPC. The decision of this case declared imposing the death penalty for “ordinary” 102 crimes no longer permissible.

**Enmund v. Florida**

Petitioner Enmund was sentenced to death for being involved in a robbery scheme gone wrong. 103 Petitioner, with two accomplices, planned to rob an elderly couple. The petitioner’s role in this crime was to wait in a getaway car parked nearby and help his accomplices get away once the robbery was committed. During the robbery, petitioner’s

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100 *Godfrey* at 421.

101 “No claim was made, and nothing in the record before us suggests, that the petitioner committed an aggravated battery upon his wife or mother-in-law or, in fact, caused either of them to suffer any physical injury preceding their deaths. Moreover, in the trial court, the prosecutor repeatedly told the jury -- and the trial judge wrote in his sentencing report -- that the murders did not involve ‘torture.’ Nothing said on appeal by the Georgia Supreme Court indicates that it took a different view of the evidence. The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself.” *Godfrey* at 432.

102 “The petitioner’s crimes cannot be said to have reflected a consciousness materially more ‘depraved’ than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. These factors certainly did not remove the criminality from the petitioner's acts.” *Godfrey* at 433.

103 *Enmund* at 782.
two accomplices ended up killing both victims via gunshot. Florida law declared aiding
and abetting a crime where a life is taken qualifies the charge of first-degree murder.104
Petitioner was convicted of first-degree murder and given the same sentence as his
accomplices, who played a much more active role in the robbery and killing of the
victims.105 Petitioner appealed to SCOTUS asking them if his sentence of death under the
CUPC was valid considering he did not kill, attempt to kill, or intended to kill the
victims; in 1982, SCOTUS granted certiorari. Justice White, writing for the 5-4 majority
found for the petitioner.106

We have no doubt that robbery is a serious crime deserving serious
punishment. It is not, however, a crime “so grievous an affront to
humanity that the only adequate response may be the penalty of death.”107
Here, the robbers did commit murder; but they were subjected to the death
penalty only because they killed as well as robbed. The question before us
is not the disproportionality of death as a penalty for murder, but rather the
validity of capital punishment for Enmund’s own conduct. The focus must
be on his culpability, not on that of those who committed the robbery and
shot the victims. Enmund did not kill or intend to kill, and thus his
culpability is plainly different from that of the robbers who killed; yet the
State treated them alike, and attributed to Enmund the culpability of those
who killed the Kerseys. This [is] impermissible under the Eighth
Amendment.108

It was ruled in Coker that the death penalty was not an appropriate punishment for
the rape of a woman. To execute petitioner Enmund, considering his personal culpability,
would have been a disproportionate punishment and comparable to the punishment
imposed upon Weems.

104 Enmund at 784-785.
105 Enmund at 785.
106 Enmund at 801.
107 Ibid as cited in Gregg at 184.
108 Enmund at 798.
Kennedy v. Louisiana

*Coker, Godfrey,* and *Enmund* were all adjudicated by SCOTUS within two to three years from each other. The final SCOTUS decision to limit the applicability of the death penalty considering the nature of the crime committed came much later in 2008 with *Kennedy v. Louisiana*. Petitioner Kennedy was found guilty of the aggravated rape of his eight-year-old stepdaughter. Death was a permissible punishment under Louisiana state statute for the rape of a child twelve years of age and under. During sentencing, the jury unanimously determined that petitioner be sentenced to death. On appeal SCOTUS granted certiorari to determine whether the *Coker* ruling, which established the unjustifiable use of death as punishment for the rape of an adult woman, was applicable for the rape of a child.

To Louisiana, the extreme aggravating factors composed by this type of crime warranted a death sentence “because children [were] a class that need[ed] special protection.” Respondent argued that petitioner’s death sentence was legal because it was a punishment imposed non-arbitrarily nor capriciously, proportionate to the gravity and personal culpability of the crime committed. Extremely sensitive and sympathetic to the horror, trauma, and suffering of the victim, the five-four majority led by Justice Kennedy respectfully responded:

> It might be said that narrowing aggravators could be used in this context, as with murder offenses, to ensure the death penalty’s restrained

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109 *Kennedy* at 407.

110 The supreme court of Louisiana affirmed, rejecting *Coker* because “children are a class that need special protection.” *Ibid.* The state court reasoned, the rape of a child is unique in terms of the harm it inflicts upon the victim and our society. “Reasoning that children are a class in need of special protection, the state court held child rape to be unique in terms of the harm it inflicts upon the victim and society and concluded that, short of first-degree murder, there is no crime more deserving of death.” *Ibid.*

application. We find it difficult to identify standards that would guide the decision maker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way. Even were we to forbid, say, the execution of first-time child rapists or require as an aggravating factor a finding that the perpetrator’s instant rape offense involved multiple victims, the jury still must balance, in its discretion, those aggravating factors against mitigating circumstances. In this context, which involves a crime that in many cases will overwhelm a decent person’s judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be “freakish.” We cannot sanction this result when the harm to the victim, though grave, cannot be quantified in the same way as death of the victim.

The majority tactfully expressed that the Court was duty bound to do their part in restricting the potential expansion of death penalty jurisprudence. The resulting imprecision and the tension between evaluating individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not, the Court reasoned, be introduced into the justice system when death has not occurred. Doing so would go against evolving standards of our society’s decency and the necessity to constrain the use of the death penalty.

If SCOTUS were to decide to make an exception and affirm the judgment of the Louisiana Supreme Court to include cases where the victim’s life was spared, a chain reaction beginning with a significant “number of executions that would be allowed under respondent’s approach” would completely undo the restrictive measures reflective of society’s evolving standards of decency currently paved in precedent. Respectfully,

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112 Ibid as cited in Furman at 310.
113 Ibid.
114 Ibid.
115 Ibid.
116 Ibid.
117 Ibid.
SCOTUS ruled in favor of the petitioner. States could no longer seek the death penalty for a crime committed in which there was no loss of life.

**Category Three: Individual**

The salience of the proportionality standard established by the *Weems* Court and progressive interpretation of the CUPC permitted by the *Trop* Court, coupled with the *Furman* Court’s need for rigorous assessments of capital punishment procedures and the *Gregg* Court’s qualifications and prerequisites for access to the constitutional permissibility of the death penalty as punishment, is most observable in death penalty cases involving specific classes of criminal defendants. SCOTUS has categorically barred capital punishment as unconstitutional under the CUPC for two specific types of defendants: the mentally disadvantaged and minors. Three cases for each type of defendant highlight how the interpretation of the CUPC has manifested. Resolving constitutional issues of capital punishment for the mentally disadvantaged are (1) *Ford v. Wainwright*, 477 U.S. 399 (1986). (2) *Penry v. Lynaugh*, 492 U.S. 302 (1989) and (3) *Atkins v. Virginia*. Resolving constitutional issues imposing the death penalty to minors are (1) *Thompson v. Oklahoma*, 487 U.S. 815 (1988). (2) *Stanford v. Kentucky*, 492 U.S. 361 (1989). and (3) *Roper v. Simmons*.  

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Mental Capacity

Ford v. Wainwright 1986

The first SCOTUS case to consider the issue of mental capacity as a legitimate cause for challenging the constitutionality of the applicability of capital punishment came in 1986 with Ford v. Wainwright. Petitioner Ford was sentenced to death in Florida for first-degree murder. Ford was mentally competent from the time he committed murder through the time that the death sentence was imposed, however as more time passed for the petitioner on death row, indications of diminishing mental capacity became increasingly apparent. During mandatory mental evaluations, Florida determined that petitioner’s decline of mental competency neither invalidated his death sentence nor hindered his upcoming execution. SCOTUS granted certiorari to determine if the execution of the “mentally insane” was permissible under the CUPC of the Eighth Amendment.

Justice Marshall, writing the majority opinion, justified the five-four vote finding for the petitioner, holding it unconstitutional under the CUPC to execute the mentally insane. To execute such a person, Marshall reasoned, “has questionable retributive value, presents no example to others, and thus has no deterrence value, and simply

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124 Banner, The Death Penalty.

125 This case asked two questions. Ford at 418. The other question was about due process, because Florida had denied petitioner habeas corpus. “On the second question, Marshall observed that no state court had heard arguments that Ford was insane. In addition, Florida’s competency procedures were inadequate.” Chicago-Kent College of Law at Illinois Tech. "Ford v. Wainwright." Oyez. https://www.oyez.org/cases/1985/85-5542. Florida also violated petitioner’s 14th amendment due process rights.

126 Ford at 405.

127 Ford at 418.
offsends humanity – have no less logical, moral, and practical force at present." This decision meant that the protection given to the mentally insane extended to those who were initially competent when committing their crimes and found responsible and punished for their culpability during conviction and sentencing.

Justice Powell joined the majority’s ultimate decision to reverse the petitioner’s sentence of death but did not agree with Justice Marshall’s opinion that the death penalty was categorically cruel and unusual. In particular, Justice Powell did not agree with Justice Marshall’s proposal requiring a “full-scale sanity trial” to determine a defendant’s competency. In his concurrence, Powell opined that while the decision made by the court limited the prohibition against imposing capital punishment to “a category of defendants defined by their mental state,” this was not a categorical ban on imposing the death penalty on such persons under the CUPC.

The Eighth Amendment claim at issue can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. Thus, in this case, the State has a substantial and legitimate interest in taking petitioner’s life as punishment for his crime. That interest is not called into question by petitioner’s claim. Rather, the only question raised is not whether, but when, his execution may take place. This question is important, but it is not comparable to the antecedent question whether petitioner should be executed at all.

Evolving standards of decency, as determined by SCOTUS, has mandated states to become hypersensitive and specific about the procedural laws governing the

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128 *Ford* at 400.

129 *Ford* at 425.

130 *Ford* at 419.

131 *Ford* at 425.
administration of capital punishment.\textsuperscript{132} As such, current state methods had constitutional approval and were capable to qualify “the bounds of that category”;\textsuperscript{133} a categorical ban from SCOTUS was not necessary.

What was necessary was to qualify “the kind of mental deficiency that should trigger the Eighth Amendment prohibition.”\textsuperscript{134} A precise definition of “insane” that would trigger CUPC protections was needed to determine whether a petitioner asking for such protections could satisfy the retributive measures of criminal justice.

If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.\textsuperscript{135}

While it can be said that the execution of the insane “impose[s] a uniquely cruel penalty and [is] inconsistent with one of the chief purposes of executions generally”\textsuperscript{136} this did not mean a categorical ban. States were given the autonomy to determine who counted as “insane” in the relevant sense.\textsuperscript{137}

\textsuperscript{132} Now “modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review.” \textit{Ford} at 420. Criminal defendants had much more access in general to their rights. “Throughout this process, the defendant has access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process whenever the defendant raises substantial claims. These guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free.” \textit{Ibid.}

\textsuperscript{133} \textit{Ford} at 419.

\textsuperscript{134} \textit{Ford} at 422.

\textsuperscript{135} \textit{Ibid.}

\textsuperscript{136} \textit{Ford} at 421.

\textsuperscript{137} \textit{Ford} at 416-417.
Penry v. Lynaugh

Three years later, in 1989, SCOTUS revisited the issue, this time to determine whether it was constitutional to execute the “mentally retarded.”\(^\text{138}\) Petitioner Penry brutally raped, beat, and stabbed his victim, who later died of injuries sustained, crimes for which he was eventually sentenced to death. Before his trial, a competency hearing required by the state of Texas emphasized that petitioner was “mild to moderate[ly] retarded,”\(^\text{139}\) possessing the mental capacity of a six and a half year old with the social maturity of a nine or ten year old. Still, the jury found petitioner competent enough to stand trial.

At trial, the petitioner’s defense team advanced an insanity defense. Medical professionals were called from both sides to testify to petitioner’s mental limitations. While the extent of petitioner’s mental capacity could not be agreed upon, both sides acknowledged that Penry was “a person of extremely limited mental ability, and that he seemed unable to learn from his mistakes.”\(^\text{140}\) The jury was not convinced and convicted petitioner for his crimes believing him to be more antisocial than insane. During the sentencing phase, petitioner requested that the jury be given specific instructions on how to define the three “special issue” category questions\(^\text{141}\) Texas required to be answered to

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\(^{138}\) *Penry* at 302-303.

\(^{139}\) *Penry* at 308.

\(^{140}\) *Penry* at 310.

\(^{141}\) The *Penry* Court applied what was conditional from *Gregg*: “at the penalty phase of the trial, the sentencing jury was instructed to consider all the evidence introduced at trial in answering the following ‘special issues’: (1) whether petitioner's conduct was committed deliberately and with the reasonable expectation that death would result; (2) whether there was a probability that he would be a continuing threat to society; and (3) whether the killing was unreasonable in response to any provocation by the victim The jury answered ‘yes’ to each special issue, and, as required by Texas law, the court therefore sentenced petitioner to death. A ‘no’ answer to any of the special issues would have required a sentence of life imprisonment.” *Penry* at 302.
impose a death sentence. Petitioner’s request for the consideration of his mitigating circumstances was denied, and Penry was sentenced to death.

Texas courts believed it was not cruel and unusual to impose capital punishment on convicted criminals, even those with mental deficiencies, if the punishment imposed was given righteously in adherence with their procedures. Penry did not agree and filed a federal habeas corpus petition challenging his death sentence as cruel and unusual under the CUPC. SCOTUS granted certiorari to answer the following two questions: (1) Was petitioner’s death sentence cruel and unusual because the jury did not consider the full extent of Penry’s mitigating evidence combined with the lack of guidance given to the jury on special issue questions required by Texas?; (2) Did executing the mentally challenged violate the CUPC? In a five-four majority opinion given by Justice O’Connor, the court found that (1) given the lack of information and guidance for the jury, Penry’s punishment violated the CUPC, but (2) this did not mean that capital punishment for the mentally challenged categorically violated the CUPC.

SCOTUS found Penry’s petition requesting the jury to consider his mental deficiencies when answering Texas’s special issue questions should have been granted and specific instructions given. The majority reasoned that petitioner, being mentally challenged, could be less culpable than others, and because past precedent required punishment to be “directly related to the defendant’s personal culpability” the jury needed to consider and give full effect to such mitigating factors. Only then, with all appropriate factors considered, would a sentence given by a jury be reliable and just.

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142 Penry at 307.

143 Penry at 340.

144 Penry at 304.
SCOTUS determined that proceeding with the execution of a mentally challenged person, like petitioner, with a reasoning capacity of a six-and-a-half-year-old would be cruel and unusual under the CUPC because such an ultimate punishment would be disproportionate to the degree of personal culpability.

The respondent argued that to require states to inform juries that capital punishment was optional would be a slippery slope into an “unbridled discretion prohibited by Furman.” SCOTUS determined that this argument did not counter the fact that “the punishment imposed should be directly related to the personal culpability of the defendant [and that] the sentencer must be allowed to consider and give effect to mitigating evidence relevant to a defendant’s background, character, and crime.”

SCOTUS, in agreement with the medical community and an emerging national consensus, declared that the execution of the mentally challenged served no valid retributive purpose because their disability prevented such individuals from feeling the moral culpability required for death penalty justification.

Petitioner’s death sentence was found unconstitutional by SCOTUS because Texas did not permit their juries to consider critical mitigating factors. But this finding for the petitioner did not mean a categorical ban on imposing the death penalty on the mentally challenged justly convicted and deserving of such a punishment. Justice O’Connor reasoned that while it was true that the mentally challenged did not possess the

\begin{footnotesize}
\begin{enumerate}
\item\textit{Ibid.}
\item\textit{Ibid.}
\item\textit{Penry at 337.}
\item\textit{Penry at 306.}
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same culpability, this alone did not create a new category because the definition, scale, and implication of “retarded” was variable.\textsuperscript{149}

On the record before the Court today, however, I cannot conclude that all mentally retarded people of Penry’s ability – by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility – inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty. Mentally retarded persons are individuals whose abilities and experiences can vary greatly. In addition to the varying degrees of mental retardation, the consequences of a retarded person's mental impairment, including the deficits in his or her adaptive behavior, “may be ameliorated through education and habilitation.”\textsuperscript{150} Although retarded persons generally have difficulty learning from experience, some are fully “capable of learning, working, and living in their communities.”\textsuperscript{151} In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty.\textsuperscript{152}

An individual consideration of the person and circumstance of every case seeking special protection under issues of mental capacity was essential because the mental capacity of an individual and the circumstances surrounding his or her crime was variable from person to person, which meant that degrees of culpability could vary.

In response, petitioner suggested that a “mental age”\textsuperscript{153} of seven years old and under should be the threshold measure for determination of proportionate culpability and imposition of the death penalty. The court rejected this suggestion,

\textsuperscript{149} Penry at 306.


\textsuperscript{151} Ibid as cited in the Brief of American Association on Mental Deficiency (now Retardation) (AAMR) et. al. as Amici Curiae supporting Petitioner Penry.

\textsuperscript{152} Penry at 339.

\textsuperscript{153} Ibid.
finding such an implementation problematic.\textsuperscript{154} Justice O’Connor concluded by saying that someday the national consensus against the execution of the mentally challenged could be great enough for SCOTUS to declare the imposition of the death penalty to this category of people unconstitutional under the \textit{Trop} standard of decency under the CUPC, but there was “insufficient evidence of such a consensus today.”\textsuperscript{155}

Mental retardation is a factor that may well lessen a defendant’s culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone. So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether “death is the appropriate punishment” can be made in each particular case.\textsuperscript{156}

So even though the petitioner’s death sentence was invalidated due to procedural concerns, it cannot be overlooked that the court and jury declared petitioner to have met the necessary threshold of moral culpability justifying his death sentence. Petitioner was declared competent enough to stand trial, consult with his lawyers, and his insanity defense was rejected. If not for the procedural defect overlooked by Texas, petitioner

\textsuperscript{154} Mental age is “calculated as the chronological age of nonretarded children whose average IQ test performance is equivalent to that of the individual with mental retardation. As a more general matter, the ‘mental age’ concept, irrespective of its intuitive appeal, is problematic in several respects. The ‘mental age’ concept may underestimate the life experiences of retarded adults, while it may overestimate the ability of retarded adults to use logic and foresight to solve problems. Beyond the chronological age of 15 or 16, the mean scores on most intelligence tests cease to increase significantly with age. Moreover, reliance on mental age to measure the capabilities of a retarded person for purposes of the Eighth Amendment could have a disempowering effect if applied in other areas of the law. Thus, on that premise, a mildly mentally retarded person could be denied the opportunity to enter into contracts or to marry by virtue of the fact that he had a ‘mental age’ of a young child. In light of the inherent problems with the mental age concept, and in the absence of better evidence of a national consensus against execution of the retarded, mental age should not be adopted as a line-drawing principle in our Eighth Amendment jurisprudence.” \textit{Ibid.}

\textsuperscript{155} \textit{Penry} at 340.

\textsuperscript{156} \textit{Ibid.}
could have been constitutionally sentenced to death.


The Penry Court determined that, while mitigating factors mattered, the execution of the mentally challenged could be constitutional under the CUPC. Atkins, a “mildly mentally retarded”\textsuperscript{157} offender with an IQ of 59, was sentenced to death for abduction, armed robbery, and murder. The extent of his mental capacity was comprehensively deliberated during two sentencing hearings and ensuing appeal to the Supreme Court of Virginia.\textsuperscript{158}

The jury of both sentencing hearings and the majority decision made by the Supreme Court of Virginia determined that the death penalty was an appropriate punishment for his crimes. The Virginia court denied the petitioner’s appeal because the proportionality of his punishment connecting his mental deficiency to diminishing culpability was not argued. Instead, the sole argument advanced was a constitutional claim that he could not be executed because he was “mentally retarded”\textsuperscript{159} under the CUPC of the Eighth Amendment. The court cited SCOTUS’s ruling in Penry to deny reversal, unwilling to “commute Atkins’ sentence of death to life imprisonment merely because of his IQ score.”\textsuperscript{160} The compelling dissents given in response\textsuperscript{161} piqued the

\textsuperscript{157} On evaluation before the penalty phase of the trial, a forensic psychologist evaluated petitioner. Atkins at 308.

\textsuperscript{158} However, due to the usage of a misleading verdict form during the initial sentencing trial, the Virginia Supreme Court required a second sentencing hearing. The mental capacity of the petitioner was again questioned, but the State presented an expert rebuttal witness who testified that Atkins was of average intelligence with an antisocial personality disorder. Atkins at 309.

\textsuperscript{159} Atkins at 310.

\textsuperscript{160} Atkins at 321.
interest of SCOTUS and certiorari was granted to explore whether “the dramatic shift in the state legislative landscape that has occurred in the past 13 years”\textsuperscript{162} meant the reversal of \textit{Penry}.

A six-three majority found the shift in the national consensus convincing enough to declare the execution of the mentally challenged categorically unconstitutional under the CUPC. In thirteen years, the national consensus “unquestionably reflect[ed] widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.”\textsuperscript{163} It would be, Justice Stevens opined writing for the majority, against “evolving standards of decency”\textsuperscript{164} to execute such individuals. This landmark decision categorically banned the imposition of the death penalty on the mentally challenged, overturning \textit{Penry v. Lynaugh}.

The categorical ban should be instituted, SCOTUS reasoned, because to execute the mentally challenged undermined the two fundamental reasons given by the \textit{Gregg} Court for imposing capital punishment: retribution and deterrence. The Court made clear that “unless the imposition of the death penalty on a mentally retarded person ‘measurably contributes to one or both of these goals,’ it is nothing more than the

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\textsuperscript{161} Justice Hassell and Justice Koontz dissented. They rejected Dr. Samenow’s opinion that Atkins possesses average intelligence as "incredulous as a matter of law," and concluded that "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive," \textit{Atkins} at 310. In their opinion, "it [was] indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way." \textit{Ibid.}
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\textsuperscript{162} \textit{Atkins} at 310.
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\textsuperscript{163} \textit{Atkins} at 317.
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\textsuperscript{164} \textit{Atkins} at 321. \textit{Trop} at 101.
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purposeless and needless imposition of pain and suffering,” and hence an unconstitutional punishment.\footnote{165}

The first of two important goals of criminal justice is “the interest in seeing that the offender gets his ‘just deserts.’”\footnote{166} Retribution required the severity of punishment to match the severity of the crime committed. Severity depended on an offender’s culpability:

The severity of the appropriate punishment necessarily depends on the culpability of the offender. For example, in Godfrey, we set aside a death sentence because the petitioner’s crimes did not reflect “a consciousness materially more ‘depraved’ than that of any person guilty of murder.”\footnote{167} If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.\footnote{168}

The second important goal of criminal justice is “the interest in preventing capital crimes by prospective offenders.”\footnote{169} The court found executing the mentally challenged would not significantly advance the goal of deterrence:

It seems likely that “capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.”\footnote{170} The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable that also make[s] it less likely that they can process the information of the

\footnote{165} Atkin at 319 as cited in Enmund at 798.

\footnote{166} Atkin at 319.

\footnote{167} Ibid as cited in Godfrey at 433.

\footnote{168} Atkin at 319.

\footnote{169} Ibid.

\footnote{170} Ibid as cited in Enmund at 799.
possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution.\(^{171}\)

The mentally retarded have less personal culpability because their impairment hinders the capacity “to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”\(^{172}\) Those with limited mental capacity know the difference between right and wrong and as such are considered to be “competent”\(^{173}\) to stand trial. However, in criminal situations there is “abundant evidence”\(^{174}\) that such people act on impulse, not in a premeditated way, and are followers, not leaders, in group settings. This does not mean that they are exempt from all consequences that stem from their criminal actions. But these are big factors that work against personal culpability.

In addition to the *Gregg* test analysis, SCOTUS gave supplementary reasons for establishing the necessity of special protections for the mentally challenged. First, “mentally retarded defendants in the aggregate face a special risk of wrongful execution.”\(^{175}\) The death penalty punishment system did not control for the wrongful convictions of offenders with low to no mental competency. The mentally challenged made unreliable witnesses, were unable to persuasively express why their sentences

\(^{171}\) *Atkins* at 320.  
\(^{172}\) *Atkins* at 318.  
\(^{173}\) *Atkins* at 321.  
\(^{174}\) *Atkins* at 318.  
\(^{175}\) *Atkins* at 321.
should be mitigated, had difficulty conveying their true remorse, and were less likely to be helpful to their counsel in making a persuasive case. Furthermore, to categorically exclude the mentally challenged from execution would align the Court with the national consensus formed by state legislatures.

While a national consensus against the executions of the mentally challenged existed, there were significant disagreements on a categorical ban because of the difficulty and disparate determination of “which offenders are in fact retarded” from state to state. Still, the Atkins Court categorically banned the execution of the mentally retarded as unconstitutional under the CUPC. But SCOTUS followed Gregg and Ford precedents in leaving the determination of the classifications of such persons up to the states. It became the responsibility of states to appropriately police claims of mental impairment within an appropriate range.

**Minors**

**Thompson v. Oklahoma**

In 1983, Thompson was sentenced to death for ruthlessly murdering his former brother in law. Because Thompson committed the crime when he was 15 year old, the District Attorney of Oklahoma filed a petition to try Thompson as an adult. The trial court agreed with the district attorney because of the brutality shown by the petitioner in committing his crime and the gravity of which he should be fully accountable, and

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176 Atkins at 320-321.
177 Atkins at 317.
178 Ibid.
179 Thompson at 815.
because the court found that petitioner would have “no reasonable prospects”\textsuperscript{180} for rehabilitation in the juvenile system. During the penalty phase of the petitioner’s trial, the jurors was asked whether they believed the murder committed was “especially heinous, atrocious, or cruel.”\textsuperscript{181} They voted affirmatively, and the petitioner was placed on death row.

Thompson appealed the validity of his penalty to Oklahoma’s Court of Criminal Appeals, which upheld the decision of the lower court because no laws had been broken. Despite his actual age and legal status as a “child”\textsuperscript{182} under Oklahoma state law, once confirmed as an adult for the purposes of trial, any punishments imposed, even punishments strictly categorized for adults, were constitutionally acceptable.\textsuperscript{183} Even though petitioner was ineligible for the death penalty because of his legal status as a minor under Oklahoma state law, this protection was voided once Thompson was tried as an adult. Because the death penalty was imposed on petitioner, tried as a legal adult, the appeals court found it constitutionally valid.\textsuperscript{184} SCOTUS granted certiorari to review whether the execution of a 15-year-old minor was a violation of the CUPC.

The court, by a five-three majority, ruled that to execute an adolescent for a crime committed when younger than the age of 16 was unconstitutional under the Eighth and Fourteenth Amendments.\textsuperscript{185} This was a revolutionary decision, not just for advocates of

\textsuperscript{180} Thompson at 819.
\textsuperscript{181} Thompson at 862.
\textsuperscript{182} Thompson at 824.
\textsuperscript{183} Thompson at 819-820.
\textsuperscript{184} Thompson at 820.
\textsuperscript{185} Thompson at 838.
children’s rights but for capital punishment jurisprudence. *Thompson v. Oklahoma* was the first capital punishment case to categorically ban capital punishment for an entire class of people.\(^{186}\) Children, specifically minors below the age of sixteen, were in a class of their own that warranted special protections.

A plurality opinion written by Justice Stevens contended that there were fundamental differences between an adult and a child.\(^{187}\) States differed in drawing the legal line, but a “complete or near unanimity among all 50 States and the District of Columbia”\(^{188}\) considered children under the age of sixteen to be minors for important societal functions,\(^{189}\) the respondent state of Oklahoma included.

Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct, while, at the same time, he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.\(^{190}\)

This sentiment was “consistent with the experience of mankind, as well as the long history of our law,”\(^{191}\) the most relevant example pertinent to this case was the existence of a separate criminal justice system specifically for policing and rehabilitating juvenile criminal behavior.\(^{192}\) The fact that every state had set the jurisdiction of their

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\(^{186}\) *Banner, The Death Penalty.*

\(^{187}\) *Thompson* at 834-385.

\(^{188}\) *Thompson* at 838.

\(^{189}\) Minors under 16 could not participate in the following “important societal functions”: vote, serve on a jury, drive, marry without parental consent, purchase pornographic materials, and could not gamble. *Ibid.*

\(^{190}\) *Thompson* at 835.

\(^{191}\) *Thompson* at 824- 825.

\(^{192}\) *Thompson* at 837.
juvenile courts “at no less than 16”\textsuperscript{193} informed the court that “the normal 15-year-old
[was] not prepared to assume the full responsibilities of an adult.”\textsuperscript{194}

Giving a death sentence to a 15-year-old offender did not meet the criminal
justice goals of retribution or deterrence constitutionally mandated by \textit{Gregg}.\textsuperscript{195} It was
already determined by the courts that youth was a mitigating factor because crimes
committed by juveniles involved less culpability in comparison to adults.\textsuperscript{196} Retributive
goals are not met “given the lesser culpability of the juvenile offender, the teenager’s
capacity for growth, and society’s fiduciary obligations to its children.”\textsuperscript{197} The deterrence
rationale also fell short because the “likelihood that the teenage offender has made the
kind of cost-benefit analysis that attaches any weight to the possibility of execution is so
remote as to be virtually nonexistent.”\textsuperscript{198} SCOTUS was not convinced that executing
minors would significantly further retributive and deterrent goals.\textsuperscript{199} Thus, the Court
declared that capital punishment could not be assigned to minors under the age of sixteen
because to do so was “nothing more than the purposeless and needless imposition of pain
and suffering.”\textsuperscript{200}

\textsuperscript{193} \textit{Thompson} at 824.

\textsuperscript{194} \textit{Thompson} at 825.

\textsuperscript{195} “The death penalty is said to serve two principal social purposes: retribution and deterrence of capital
crimes by prospective offenders.” \textit{Thompson} at 836 as cited in \textit{Gregg}.

\textsuperscript{196} \textit{Thompson} at 833.

\textsuperscript{197} \textit{Thompson} at 836.

\textsuperscript{198} \textit{Thompson} at 837.

\textsuperscript{199} \textit{Thompson} at 835.

\textsuperscript{200} \textit{Thompson} at 838 as cited in \textit{Coker} at 433.
Stanford v. Kentucky

One year later, petitioners Stanford and Wilkins asked SCOTUS to consider redrawing the line to under eighteen. Petitioner Stanford was seventeen years old when he repeatedly raped, sodomized, then killed his 20-year-old victim by shooting her pointblank to the head preceding the robbery of her workplace with an accomplice. Petitioner Wilkins was sixteen years old when he stabbed and killed his victim, a 26-year-old mother of two, during a planned robbery of the place where she worked. The severity of the crimes committed combined with the unsuccessful attempts at rehabilitation in the juvenile system for past offenses caused petitioners to be tried as adults. Both were convicted, sentenced to death, appealed, and lost. Then, SCOTUS decided in Thompson to institute a categorical constitutional protection against the capital punishment of minors under sixteen years of age. Petitioners made a final appeal to SCOTUS, claiming that to execute them would also violate the CUPC. SCOTUS granted certiorari.

Justice Scalia, writing for the court, affirmed the state supreme court judgments of Kentucky and Missouri, concluding that imposing the death penalty to deserving offenders age sixteen and seventeen did not violate the CUPC. Gregg required a death

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201 SCOTUS consolidated the petitions of appeal from Stanford and Wilkins v. Missouri, 109 S. Ct. 2969 (1989). Both petitions asked if the imposition of the death penalty on those whose crimes were committed when they were minors under the age of 18 was cruel and unusual under the CUPC. The consolidated petitions were granted certiorari and is referred to as Stanford v. Kentucky.

202 Stanford at 365.

203 Stanford at 366.

204 Stanford at 365, 367.

205 Thompson at 838.

206 Stanford at 380.
sentence to bring value to “the legitimate goals of penology,“\textsuperscript{207} deterrence and retribution. Petitioners argued the execution of sixteen and seventeen year-olds did not further these goals because “juveniles, possessing less developed cognitive skills than adults, [were] less likely to fear death”\textsuperscript{208} and “being less mature and responsible”\textsuperscript{209} they were also “less morally blameworthy.”\textsuperscript{210} In response, Justice Scalia articulated that even if there was evidence conveying that juvenile offenders did “lack deterrent effect and moral responsibility,”\textsuperscript{211} because evidence could not be conclusive for the entirety of the juvenile class it could not be said that all sixteen year olds were unable to be “adequately responsible or significantly deterred.”\textsuperscript{212}

Furthermore, the Enmund Court required individualized considerations of culpability for the constitutional validity in imposing capital punishment;\textsuperscript{213} this included the culpability of criminal offenders under eighteen. The categorical inclusion of sixteen and seventeen year old offenders into the class of minors distinguished by Thompson would only be constitutionally mandated if there was a consensus “not that seventeen or eighteen is the age at which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder[,] but that seventeen or eighteen is the

\textsuperscript{207} Stanford at 377.
\textsuperscript{208} Ibid.
\textsuperscript{209} Ibid.
\textsuperscript{210} Ibid.
\textsuperscript{211} Stanford at 378.
\textsuperscript{212} Ibid.
\textsuperscript{213} Stanford at 375.
age before which no one can reasonably be held fully responsible." A five-four majority resolved that “neither a historical nor a modern societal consensus forbid the imposition of capital punishment on any person who murders at 16 or 17 years of age.”

Roper v. Simmons

In 1993, the respondent, Simmons, was seventeen when he entered his victim’s house through an open window, kidnapped her, used electrical wire to tie her hands and feet together, duct taped her face, and threw her off a bridge resulting in her death by drowning. During his trial, respondent provided testimony admitting his crimes were premeditated and planned with two of his younger friends, aged fifteen and sixteen, who were assured (by respondent) that they could “get away with it” because they were minors. They did not; respondent was convicted and sentenced to death by the jury when he was eighteen years old.

The respondent’s death sentence was valid because even though he was under the age of eighteen when he committed his crime and was, in a very general legal sense—a minor, the Missouri legislature determined the jurisdiction of the Missouri juvenile court system to end at sixteen years of age. Being tried as an adult resulted in the imposition of the adult only punishment of the death penalty, a punishment not allowed to be given

214 Stanford at 376.
215 Stanford at 380.
216 Crimes were committed by respondent together with a 15-year-old accomplice. Roper at 543.
217 Ibid.
218 Ibid.
219 Ibid.
to minors under the *Thompson* precedent. The decision of the *Stanford* Court in 1989 confirmed that respondent’s death sentence was constitutional.

Respondent filed a motion for post conviction relief to the Missouri Supreme Court when the *Atkins* Court categorically barred the executions of the intellectually disabled as unconstitutional under the CUPC in 2002. He argued that his impending execution was unconstitutional because “the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.”\(^{220}\) The Missouri Supreme Court found evidence of a national consensus against the execution of minors and ruled in favor of Simmons reversing his death sentence to life in prison without parole.\(^{221}\) Missouri appealed, and SCOTUS granted *certiorari* for the third and final time to resolve the constitutionality of executing juvenile offenders.

Six years after a divided court in *Stanford* on where to draw the line, SCOTUS ruled, by a five-four majority, that the constitutional threshold age for inclusion in the protected class of minor, previously set at fifteen in *Thompson*, was seventeen.\(^{222}\) To “execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime”\(^{223}\) was a cruel and unusual punishment prohibited by the CUPC. Justice Kennedy, writing for the court, confirmed an evolved national consensus different from the one present during the adjudication of *Stanford*.\(^{224}\) The majority of

\(^{220}\) Ibid.
\(^{221}\) Ibid.
\(^{222}\) Ibid.
\(^{223}\) Ibid.
\(^{224}\) Ibid.
states “reject[ting] the imposition of the death penalty on juvenile offenders under 18”\(^{225}\) together with precedents provided by *Coker*, *Godfrey*, and *Enmund* restricting the use of capital punishment for categories of crimes “that beyond question are severe in absolute terms”\(^{226}\) and case histories made by *Ford*, *Atkins*, and *Thompson* instituting categorical bans on imposing the death penalty as punishment for crimes committed by certain classes of offenders “no matter how heinous the crime”\(^{227}\) called for a reinterpretation of CUPC that was more representative of contemporary standards of decency.

For the majority in the *Roper* Court, this meant the line for categorical protections needed to be inclusive of sixteen and seventeen year-old minors.

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach . . . however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality’s conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.\(^{228}\)

Protecting minors under the age of eighteen from the imposition of capital punishment “vindicated the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.”\(^{229}\)

\(^{225}\) *Ibid.*  
\(^{226}\) *Ibid.*  
\(^{227}\) *Ibid.*  
\(^{228}\) *Ibid.*  
\(^{229}\) *Ibid.*
Chapter II

The Direct Effect of Foreign Materials on the CUPC

The trajectory of cases, detailed in Chapter I, tracing the development of U.S. capital punishment jurisprudence vis-à-vis the CUPC has revealed that the legal interpretations of the CUPC have evolved. Evolving standards of decency have led SCOTUS to significantly alter the way capital punishment is imposed in the U.S. These progressive developments have been made with the help of the international community, as international and foreign legal materials have been cited in SCOTUS decisions, becoming precedent. If the progress made thus far is indicative of what is to come, SCOTUS will join “other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.”

Before substantiating the effect the international community has had, it is important to readdress that this thesis establishes definitional differences between “international materials” and “foreign legal materials.” The term “international materials” refer to all documents, legally enforceable or not, from the jurisdictions of recognized international legal organizations. The bulk of international legal materials referenced will be from the United Nations (“UN”) and its various subsidiaries. “Foreign legal materials” refer to “document(s) that originated in, w[ere] prepared, or executed in a foreign state or country.” The majority of referenced foreign legal materials will be

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230 Furman at 371.

231 Garner and Black, Black's Law Dictionary, 588.
from the western world with strong Anglo-Saxon traditions. Although foreign legal materials are international legal materials, not all international materials are foreign materials. The difference is constructed to better ascertain the impact international materials have had in influencing foreign law.

Foreign materials have a long and history of affecting U.S. domestic law. The direct effect foreign materials have had on SCOTUS decisions interpreting the CUPC has been particularly strong within death penalty cases. Foreign materials directly affected SCOTUS interpretations of the CUPC from the very beginning with *Trop*.

The *Trop* Court declared the subjugation of an individual to a punishment that was “offensive to cardinal principles for which the Constitution stands”\(^{232}\) was “a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.”\(^{233}\) This finding established the main standard used by SCOTUS in judging whether state administered punishments were constitutionally acceptable under the CUPC. The *Trop* precedent required petitions contesting the permissibility of a particular punishment under the CUPC to be evaluated for “decency,”\(^{234}\) a decency that “mark[ed] the progress of a maturing society”\(^{235}\) in accordance with “the dignity of man.”\(^{236}\)

Had the court decided that the petitioner’s punishment was acceptable under the CUPC, it would be “a fate universally decried by civilized people.”\(^{237}\) In finding for the

\(^{232}\) *Trop* at 102.

\(^{233}\) *Trop* at 99.

\(^{234}\) *Trop* at 101.

\(^{235}\) *Ibid.*

\(^{236}\) *Trop* at 100.

\(^{237}\) *Trop* at 102.
petitioner, the Trop Court used foreign materials to help determine what and who was “civilized.”238 SCOTUS, citing a survey conducted by the UN on “the nationality laws of 84 nations of the world”239 concluded that “the civilized nations of the world”240 were in “virtual unanimity that statelessness is not to be imposed as punishment for crime.”241 For a country to determine otherwise would be “deplored in the international community of democracies.”242 Because the U.S. was a democracy of “civilized people”243 with “civilized standards”244 SCOTUS determined “in this country, the Eighth Amendment forbids this to be done.”245

The Trop majority rationalized their decision with the help of foreign materials; the determination of “civilized treatment” was made by connecting the actions of “civilized people”246 to the “civilized nations of the world.”247 While the issue adjudicated by the Trop Court was not specific to the constitutionality of the death penalty,248 using foreign materials to supplement the legal reasoning behind their ultimate decision constructed an important bridge between the use foreign materials and a

238 Ibid.
239 Trop at 103.
240 Trop at 102.
241 Ibid.
242 Ibid.
243 Ibid.
244 Trop at 100.
245 Trop at 103.
246 Trop at 102.
247 Ibid.
248 The death penalty as punishment is cited in the decision as constitutional. Trop at 99.
SCOTUS decision. *Trop* is the main precedent used by SCOTUS today to refine the constitutional protections provided by the Eighth Amendment. SCOTUS decisions on death penalty cases that have used *Trop* to legitimize evolving interpretations of the CUPC accentuate the connection between foreign materials and SCOTUS decisions.

**Procedure and Action**

This direct connection is subsequently seen in the SCOTUS decisions of *Coker*, *Godfrey*, *Enmund*, and *Kennedy*—cases regarding the nature of the crime committed limiting the constitutional applicability of the death penalty to aggravated murders of the worst kind. The precedent established by *Coker*, determined that the penalty of death for the crime of rape if the victim’s life was still intact violated the CUPC. Justice White, writing for the Court,\(^{249}\) made note of the foreign connection in *Trop* and its relevance in making a similar connection for the adjudication of the case at hand.

> In *Trop v. Dulles*, the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that, out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.\(^{250}\)

The views and laws of other countries were relevant in assessing whether the death penalty was a permissible punishment for rape.

> The SCOTUS decisions in *Weems* and *Coker* relied on judgment “informed by objective factors to the maximum possible extent.”\(^{251}\) These factors were “the historical

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\(^{249}\) This was a plurality opinion. Justice White wrote for the majority which Justices Stewart, Blackmun, and Stevens joined. *Coker* at 584.

\(^{250}\) *Coker* at 595 (footnote 10) as cited in UN Department of Economic and Social Affairs. *Capital Punishment* (1968), 40, 86.

\(^{251}\) *Enmund* at 788 as cited in *Coker* at 592.
development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter.”252 The Enmund Court “proceed[ed] to analyze the punishment at issue in this case in a similar manner.” Justice White, writing for the court, reiterated that “the climate of international opinion concerning the acceptability of a particular punishment” is an additional consideration which is “not irrelevant.”253

    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.254

    Had the concurring opinion of Justice Marshall in Furman established the central holding of the majority, capital punishment would have long been declared unconstitutional under the CUPC. Justice Marshall would have banned the death penalty across the board to join the position of the majority of civilized foreign nations.

    At a time in our history when the streets of the Nation’s cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system. In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute.255

252 Enmund at 788-789.

253 Enmund at 796 (Footnote 22) as cited in Coker at 596.


255 Furman at 371.
Even though Marshall’s opinion was not the controlling opinion, and SCOTUS has not yet interpreted the CUPC to mean the categorical abolishment of capital punishment, the foreign materials cited in *Trop, Furman, Gregg, Coker, Godfrey,* and *Enmund* specifically commented on the cruel and unusual nature of capital punishment. The foundation created by foreign material usage in the aforementioned cases, propelled abolition efforts further entrenching the influence of international communities on SCOTUS decisions.

**Individual: Mental Capacity and Minors**

The direct connection between foreign materials and the CUPC has had the greatest effect in connection the nature of the defendant. Foreign materials have directly influenced the *Atkins* Court to categorically ban capital punishment for the “mentally retarded” and the *Ford* decisions controlling state definitions of mental capacity. They influenced SCOTUS to consider the death penalty cruel and unusual for the mentally disabled, and worked to ensure that capacity determinations were flexible and inclusive of all relevant mitigating factors.

Foreign materials have directly affected U.S. legal history since the beginning with its foundation shaped by the common law traditions of Britain. As the *Ford* Court confirmed, “This ancestral legacy has not outlived its time.” Interpreting the CUPC to protect, at minimum, against the cruel and unusual punishments that existed at the time

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256 *Ford* at 409.
the Bill of Rights was written and adopted, SCOTUS identified “impressive historical credentials” substantiating that British common law thought it “savage and inhuman” to execute the mentally insane. Concurrently, a national consensus revealed that no state allowed the mentally insane to be executed. “It is clear that the ancient and humane limitation upon the State’s ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England.” The complementary connection between British common law and the unanimous accord of U.S. state legislatures led SCOTUS to rule that executions of the mentally insane were unconstitutional.

British common law had a direct bearing on SCOTUS’s legal reasoning and decision in *Penry*. In *Penry*, SCOTUS was asked to determine if the CUPC allowed the execution of the “mentally retarded.” The decision of the *Ford* Court established that what was unlawful punishment in British common law was unlawful punishment under the CUPC; British common law did not allow the executions of “idiots” thus executions of the insane were prohibited under the CUPC.

It was well settled at common law that “idiots,” together with “lunatics,” were not subject to punishment for criminal acts committed under those

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257 “Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection.” *Ford* at 406 as cited in *Solem v. Helm*, 463 U.S. 277 (1983), 286.


259 *Ford* at 408 as cited in Sir Edward Coke, *4 W. Blackstone Commentaries* (1680), 24-25. Sir Edward Coke had earlier expressed the same view of the common law of England: “[B]y intendment of Law, the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extreme inhumanity and cruelty, and can be no example to others.” *Ibid.*

260 *Ford* at 409.

261 *Penry* at 305. This was a term “generally used to describe persons totally lacking in reason, understanding, or the ability to distinguish between good and evil.” *Ibid.*
incapacities. In its emphasis on a permanent, congenital mental deficiency, the old common law notion of “idiocy” bears some similarity to the modern definition of mental retardation. The common law prohibition against punishing ‘idiots’ for their crimes suggests that it may indeed be ‘cruel and unusual’ punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions.

The court needed to ascertain if, in light of Ford, “retarded” was the modern day’s equivalent to common law’s “idiot.” If the definitions were found to be analogous, then the CUPC would categorically prohibit such executions.

When SCOTUS categorically banned capital punishment for the mentally disabled in Atkins, the U.S. finally joined the world community in its disapproval of such penalties. Citing a brief for the EU, Justice Stevens notes, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”

Given that SCOTUS had “previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual,” the Thompson Court surveyed the death penalty laws of the international community to aid in their determination of whether the execution of minors less than sixteen years of age was permissible under the CUPC. Evidence disclosed capital punishment could be imposed in the Soviet Union and within some regions of the United Kingdom and New


263 Penry at 333.

264 Atkins at 316 (Footnote 21) as cited in Brief for European Union as Amicus Curiae supporting Petitioner Atkins, 4.

265 Thompson at 830 (Footnote 31) as cited in Trop at 102, Coker at 596, and Enmund at 796-797.

Zealand, but not for minors.\textsuperscript{267} West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries categorically abolished the death penalty as a method of punishment. Capital punishment in Canada, Italy, Spain, and Switzerland was reserved for “exceptional crimes” like treason.\textsuperscript{268}

In addition, SCOTUS cited three leading human rights treaties that were absolute in prohibiting the executions of minors: Article 6(5) of the International Covenant on Civil and Political Rights (“ICCPR”),\textsuperscript{269} Article 4(5) of the American Convention on Human Rights (“ACHR”),\textsuperscript{270} and Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.\textsuperscript{271} The ICCPR and ACHR were both signed by the U.S. but not yet ratified; the Geneva Convention was ratified thus having legal force in U.S. jurisprudence mandated by the Supremacy Clause\textsuperscript{272} of the U.S. Constitution.

The ability given to U.S. legislatures to execute fifteen-year-old children was inconsistent with the views that had been expressed by other nations.

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her

\begin{footnotesize}

\textsuperscript{268} Thompson at 830-831.

\textsuperscript{269} The ICCPR has been signed but not ratified by the U. S. Thompson at 831 (Footnote 34).

\textsuperscript{270} The ACHR has been signed but not ratified by the U. S. Thompson at 831 (Footnote 34).

\textsuperscript{271} The Geneva Convention Relative to the Protection of Civilian Persons in Time of War has been ratified by the U. S. Thompson at 831 (Footnote 34).

\textsuperscript{272} This clause establishes federal law as the law of the land and takes precedence over state law. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Constitution, “Supremacy Clause,” Article VI, § 2. Treaties when ratified by the U.S. hold the same precedence as domestic law.
\end{footnotesize}
offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.273

The *Stanford* majority also utilized foreign materials to support of their decision, and noted that the execution of minors was commonplace by British common law.

Common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7. In accordance with the standards of this common law tradition, at least 281 offenders under the age of 18 have been executed in this country, and at least 126 under the age of 17.274

Using *Ford* as precedent and making comparisons to British common law worked to support the *Stanford* majority’s interpretation of the CUPC.

The *Stanford* dissent written by Justice Brennan advocated for the *Trop* approach in using foreign materials, asserting that the precedents used in making the ultimate decision should have been the precedents established in previous CUPC death penalty cases; precedents that examined the actions of American legislatures and juries in conjunction with other evidence relevant to standards of decency. “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.”275 Using the precedents of *Thompson, Enmund, Coker* and *Trop* was appropriate because “the views of organizations with expertise in relevant fields and the choices of governments

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273 *Thompson* at 815.

274 *Stanford* at 368.

275 *Stanford* at 389.
elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society.” 276

Executing juvenile offenders was not acceptable conduct for a civilized society. Justice Brennan echoed sentiments proven through surveyed evidence in Thompson, “within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.” 277 This was evidenced by scrupulous limitations placed on the imposition of capital punishment, available only to crimes of treason or similar “exceptional crimes” 278 or the complete legal abolishment of it all together in over 50 countries, including almost all of Western Europe. An additional 27 countries were abolitionist in practice. Of the countries that freely imposed it, only a small minority allowed its imposition on minors with the majority, 65 countries, forbid its imposition on minors. 279 “Since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world.” The U.S. executed three of the eight with Pakistan, Bangladesh, Rwanda, and Barbados carrying out the rest. 280

There were 61 countries continuing to retain capital punishment, without legal restrictions put in place for minors, “though some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles.” 281 The Thompson court specified three human rights treaties ratified or signed by the U.S. prohibiting the capital

276 Stanford at 384.

277 Stanford at 390.

278 Ibid. at 389.

279 Ibid.

280 Stanford at 389 as cited in Brief for Amnesty International as Amicus Curiae supporting Petitioner Stanford.

281 Ibid.
punishment of minors. Justice Brennan cited them again along with the resolutions and decisions of the United Nations Economic and Social Council ("ECOSOC") endorsed by the UN General Assembly. Adopted by the seventh United Nations ("UN") Congress on the Prevention of Crime and the Treatment of Offenders for "safeguards guaranteeing protection of the rights of those facing the death penalty," this included the safeguard that "[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death."

The Roper decision was made in "determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." At least since Trop, and subsequently with Coker, Enmund, Thompson, and Atkins, SCOTUS has "referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’." Thus it was "proper" for SCOTUS to "acknowledge the overwhelming weight of international opinion" found in opposition of executing juvenile offenders. "The opinion of the world community . . . does provide respected and significant confirmation for our own

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282 Stanford at 389-390.

283 Stanford at 390 (Footnote 2/10) as cited in UN General Assembly, Human Rights in the Administration of Justice (1984), Res. 39/118.

284 Roper at 551.

285 Ibid.

286 Ibid.

287 Ibid.
conclusions.”

Like the cases that came before them, the *Roper* majority sifted through foreign materials to better understand the instability and emotional imbalance of young people that may often be a factor in the crime. Every country in the world, except for the U.S. and Somalia, had ratified the United Nations Convention on the Rights of the Child (“CRC”). The CRC is held in high regard as no ratifying country has entered a reservation to Article 37, which prohibits the execution of juvenile offenders for crimes committed when they were less than 18 years of age. Article 6(5) of the ICCPR, Article 4(5) of the ACHR, and Article 5(3) of the African Charter on the Rights and Welfare of the Child were “significant international covenants” parallel to the CRC. “In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”

Only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these

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290 *Ibid*. The ICCPR prohibits capital punishment for anyone under 18 at the time of offense and is signed and ratified by the United States subject to a reservation regarding Article 6(5). This is further detailed in Chapter III.


293 *Ibid*. 
countries has either abolished capital punishment for juveniles or made public disavowal of the practice. ²⁹⁴

The direct effect of foreign materials on SCOTUS decisions interpreting the CUPC has affected the outcomes of death penalty cases. Foreign materials cited directly on cases will have a prevailing effect on death penalty jurisprudence because they become precedents. It is evident that SCOTUS has positioned itself to be more authoritative with their decisions, using precedents from Weems and Trop to navigate through capital punishment questions employing independent judgments. The direct effect of foreign materials helps to articulate the indirect effect manifested from more contemporary decisions made in this way. The following chapter is an exploration of the indirect effect of foreign materials and the strength of the international position on the U.S.

²⁹⁴ Ibid. Petitioner does not contest Respondent and his submitted amici, Brief for Respondent Roper, 48-50.
Chapter III

The Indirect Effect of Foreign Materials on the CUPC

Worldwide trends and patterns are pointing to the increasing and consistent decline of capital punishment. The debate over legalizing the death penalty implicates issues concerning justice and human rights, domestic and international law, and moral and ethical codes. This chapter explores the indirect influence the international community has had on the contemporary capital punishment debate in the U.S. This chapter details the indirect effect foreign materials have had in SCOTUS decisions interpreting the CUPC. Foreign materials cited directly, becoming part of precedents, helps articulate the indirect effect manifested in SCOTUS decisions resolving death penalty contentions by interpreting the CUPC through independent judgments.

To effectively show the impact of foreign influence this chapter is divided into four parts: (1) international materials, (2) foreign legal materials, (3) worldwide impact of influence, and (4) U.S. connection. The first two parts identify (1) international materials and (2) foreign legal materials specific to the issue of the death penalty. Part three provides a snapshot of the international community’s current legal position and standing on capital punishment. The campaign for human rights is the main element for which impact is realized across the world. Last, part four works to connect the significance of the international and foreign influences to the U.S. and detail why this connection matters. International and foreign legal materials identified are influencing society and legal jurisprudence worldwide—including the U.S.
International Materials

The United Nations, considered among the most reputable of all international organizations in the world, comprises 193 member states. Membership is classified into three tiers: (1) states, its backbone; (2) associated states, such as Puerto Rico; and (3) observer status “entities” such as the Holy See and Palestine. In the UN’s General Assembly, representation is afforded equally to states—one state equals one vote. In addition to the General Assembly, there are five other main organs of the UN, including the ECOSOC, comprising 54 revolving member states, and the International Court of Justice. One of the UN’s primary missions is to protect human rights and uphold international law. The UN has taken an active role in addressing the problems and concerns arising from capital punishment. The UN’s position is reflected in its major resolutions and decisions, detailed below in chronological order.

The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (“UDHR”), codified in 1948, first


296 Of all the countries in the world, only three countries: Kosovo, Taiwan, and the Holy See are not members. Kosovo is not internationally recognized as a sovereign state; the People’s Republic of China (Mainland China) replaced Taiwan (Republic of China) as the UN member representative of the sovereign state of China; and the Holy See because they declined to join. Ibid.

297 At least officially, there are de facto factions of power within the organization (example: Security Council). Margaret P. Karns, International Organizations: The Politics and Processes of Global Governance (Boulder: Lynne Rienner Publishers, 2010).

298 The other organs include the Security Council, the Trusteeship Council (now defunct), and the UN Secretariat—all of which were established at its founding in 1945. UN, “Main Organs,” http://www.un.org/en/sections/about-un/main-organs/index.html.

299 This includes maintaining international peace and security, promoting sustainable development, and delivering humanitarian aid—a total of five objectives. Ibid.
articulated that “fundamental” human rights were universal, guaranteed, and protected.

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom[;] Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms[;] Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge[;] THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.  

Capital punishment violates two specific “rights”—(1) “the right to life,” declared by Article 3, and the right not to “be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” declared by Article 5. The UDHR was a landmark declaration because it declared state sovereignty to be secondary to these inalienable rights, thought to be universal and intrinsic to human-ness. However, while these general concepts were definitely concepts to strive for, states continue to face a disparity of opinions among a diverse citizenry and judicial committees on what these rights legally amount to.

300 UN General Assembly, Universal Declaration of Human Rights (1948), Preamble.
301 UN General Assembly, UDHR, Article 3.
302 UN General Assembly, UDHR, Article 3.
303 Philosophically, these rights were born from natural law not positive law and are intrinsic to being. Hughes, “Common Law Systems.”
The International Covenant on Civil and Political Rights

The ICCPR, ratified in 1966 and effective since 1976, expanded on the concepts of the UDHR, constructing a working ethical, moral, and political framework necessary to protect inalienable rights. Article 6 specified capital punishment standards:

(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 ... this penalty can only be carried out pursuant to a final judgment rendered by a competent court. (3) 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.

Article 7 ensured that a human being could not be “subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

The ICCPR solidified the superior importance of relationships between people to relationships between governments. It was now a duty that states owed to other states to maintain and police these inalienable rights. The most important element that differentiated the UDHR and ICCPR was the ICCPR’s legal enforceability. Signatories

304 “[In] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family...Recognizing that these rights derive from the inherent dignity of the human person[;] Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.” UN General Assembly, International Covenant on Civil and Political Rights (United Nations, 1966), Preamble.

305 Actually number 4 in the covenant but 3 sequentially in the block quote. Number 3 is not relevant to this thesis

306 UN General Assembly, ICCPR, Article 6.

307 UN General Assembly, ICCPR, Article 7.
were obligated to take administrative, judicial, and legislative measures to enforce the ICCPR’s articles. The U.S. signed and ratified the ICCPR in 1992 with reservations, including a refusal to be subject to liability for any failure to uphold any rights guaranteed by this treaty.\footnote{American Civil Liberties Union, “FAQ: The Covenant on Civil & Political Rights (ICCPR).” https://www.aclu.org/faq-covenant-civil-political-rights-iccpr.} In 1989, a Second Optional Protocol to the ICCPR refreshed its position on capital punishment, calling for its abolition.\footnote{UN General Assembly, \textit{Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty} (1989), A/RES/44/128.}

**UN Convention on the Rights of the Child**

In 1984, the ECOSOC adopted “Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty.”\footnote{UN Office of the High Commissioner for Human Rights, \textit{Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty} (1984), Economic and Social Council Resolution 1984/50.} This resolution set to safeguard the life of minors from the death penalty and protected their rights to appeal sentences of death. In 1989, these safeguards were firmly expressed in the CRC. The CRC stated that children have specific needs separate from others and concretely addressed the protection of their rights—not just civil and political rights, but economic, social, and cultural rights as well.\footnote{UN General Assembly, \textit{Convention on the Rights of the Child} (United Nations, 1989), 3.} The CRC became effective in 1995, and of all UN international materials, is the most acknowledged and accepted human rights treaty. The CRC is the only human rights treaty ratified by all but two member nations.\footnote{Ibid.} Article 37 of the CRC prohibits “capital punishment [and] life imprisonment without possibility of release”\footnote{Ibid.} for those aged 18...
and under, in addition to “torture and other cruel, inhuman or degrading treatment or punishment.” The U.S. signed the CRC in 1995 but has yet to ratify it. The U.S., along with Somalia, at present considered a failed state, are the only two countries that are not parties to this convention.

**Protocol to the ACHR to Abolish the Death Penalty**

In addition to inclusive international organizations like the UN, there are region specific organizations (“RO”) that require its members to be geographically located within their predetermined borders. The world’s oldest RO, the Organization of American States (“OAS”), was founded in 1948. The Protocol to the ACHR to Abolish the Death Penalty was introduced in 1990 and called for the absolute abolition of capital punishment for its member states, making only one concession for use in punishing war crimes, and only if specifically requested by a signing state. The U.S. has yet to sign this protocol.

**Foreign Legal Materials**

The European Union (“EU”) is the most powerful RO that exists today. It is the world’s foremost example of a functioning, stable, supranational, and political

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314 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (United Nations, 1984), 85.


association. A comprehensive bond secured by a legal system, parliament, bureaucracy, currency, and a court exists between member states despite differences in ideals.\textsuperscript{318}

**Protocol No. 13 of the European Convention on Human Rights**

In 2002, the Council of Europe’s Committee of Ministers added Protocol No. 13 to the European Convention on Human Rights ("ECHR").\textsuperscript{319} This protocol “bann[ed] the death penalty in all circumstances, including for crimes committed in times of war and imminent threat of war [with] no derogation or reservation[s] allowed.”\textsuperscript{320} Protocol 13 made history as the first legally binding international treaty to abolish the death penalty in all circumstances with no exceptions.\textsuperscript{321}

Because the European Court of Justice ruled in 1964 that EU law takes precedence over domestic law even when the two are in conflict,\textsuperscript{322} the application of this protocol was immediate and without exception. Furthermore, this protocol mandated abolition as a pre-condition for a new state to enter into the Union.\textsuperscript{323} The EU has left no

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\textsuperscript{318} The basic structure of EU institutions are: the European Council, the EU’s strategic and crisis body; the European Commission, neo-functional, main bureaucratic body; the Council of Ministers, intergovernmental and most powerful body that makes law and policy; European Parliament, consists of directly elected representatives and is the main legislative body; and the European Court of Justice, the EU’s judicial branch. Karns, *International Organizations*, 167.


\textsuperscript{320} Ibid.


\textsuperscript{322} Karns, *International Organizations*, 171.

base uncovered; if a question or objection arises during a state’s journey to abolition, the EU “intervenes both on individual cases and at a general policy level.”

**Worldwide Impact of Influence**

Every region in the world has, at one time or another, allowed capital punishment but now the world is moving towards abolition.

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Figure 1 illustrates this fact—the countries in shades of purple are in the minority. The foreign materials directly cited by SCOTUS have powerfully affected the worldwide community. Now, more than eighty percent of the world’s countries have either abolished the death penalty or are *de facto* abolitionists.\(^{327}\)

As of July 2015, 101 countries out of the 196 independent countries\(^{328}\) in the world have categorically abolished the death penalty for all crimes.\(^{329}\) Of the ninety five countries left, seven are abolitionist for “ordinary crimes” only,\(^{330}\) thirty five are *de facto* abolitionist with no executions for at least the past ten years,\(^{331}\) leaving only fifty three countries left that retain capital punishment in law and practice.\(^{332}\)

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\(^{326}\) Columbia Law School Magazine, “Interactive Map.”

\(^{327}\) Thirty-three countries are abolitionist in practice, no executions or none for at least ten years. This calculation includes Taiwan. Amnesty International, *Death Sentences and Executions 2014* (London: Amnesty International Ltd., 2015), 65.

\(^{328}\) This count includes Taiwan. Amnesty International, *Death Sentences and Executions 2014*.


\(^{331}\) Ibid.

\(^{332}\) Ibid.
In their most recent annual report, Amnesty International recorded twenty two countries of the fifty three retentionist countries to have carried out capital punishment in 2013 and 2014. While the number of countries that have executed defendants did not diminish from year to year, a closer look at seven countries present some developments: Bangladesh, Botswana, Indonesia, India, Kuwait, Nigeria and South Sudan did not execute anyone in 2014. The overall number of executions worldwide has decreased almost twenty two percent from the last reporting year. The only reported trend that has decreased is the number of countries who lifted long-standing moratoriums in response to terrorism.

Generally, with the exception of the Central Asia region, Amnesty International has documented strong trends towards capital punishment abolition in all regions of the world with particular advancements made in Sub-Saharan Africa. Europe leads the industrialized western world as the regional block with the strongest abolitionist stance. Only six leading industrialized nations have not evolved in law or practice: the United States, Japan, Singapore, China, India, and Taiwan, all geographically located in Asia except for the United States.

A global survey of comparative data shows that while the number of executions in the U.S. is generally on the decline, as of 2014, it was the only advanced democracy

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333 The most current version of this report on the year 2015 was published after the submission of this thesis on April 6, 2016. For updated facts and figures from the 2015 report see Appendix F.

334 Numbers do not reflect China or Syria where data on capital punishment is considered to be highly classified and inaccessible. Ibid.

335 “The number of executions recorded in the Middle East and North Africa region decreased by approximately 23%--from 638 in 2013 to 491 in 2014. In the Americas, the USA is the only country that executes, but executions dropped from 39 in 2013 to 35 in 2014, reflecting a steady decline in executions over recent years. Fewer executions were recorded in the Asia-Pacific region, excluding China, and debates on abolition began in Fiji, South Korea and Thailand.” Amnesty International, Death Sentences and Executions 2014.

336 Death Penalty Information Center, “Abolitionist and Retentionist Countries.”
listed as one of the top five in the ranking of the world’s top executioners (listed in order) with China, Iran, Saudi Arabia, and Iraq.\textsuperscript{337}

![Figure 3. Top Five Leading Executioners of the World\textsuperscript{338}]

Before the \textit{Roper} decision and since 1990, the U.S. was one of only nine documented countries in the world and the only advanced democracy that administered the death penalty to minors. The other countries permitting the execution of minors were Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Democratic Republic of Congo, China, and Sudan.\textsuperscript{339} The U.S., together with Iran, have each executed more juvenile offenders than the other eight countries combined.\textsuperscript{340} This has changed with the \textit{Roper} decision and Iran has now surpassed the U.S. in this category.\textsuperscript{341} The U.S. is the only country in the

\begin{itemize}
\item[\textsuperscript{337}] Amnesty International, \textit{Death Sentences and Executions 2014}, 36
\item[\textsuperscript{338}] This figure by Amnesty International seems incomplete, but this is an artistic choice. The number of individuals executed in China has not been counted and included in Amnesty International data due to their government refusing to declassify important information on this issue. Amnesty International, \textit{Death Sentences and Executions 2014}.
\item[\textsuperscript{340}] \textit{Ibid.}
\item[\textsuperscript{341}] \textit{Ibid.}
\end{itemize}
Americas,\textsuperscript{342} one of two countries in the Organization for Security and Co-operation in Europe,\textsuperscript{343} and one of two countries in the G8 to continue to employ capital punishment.\textsuperscript{344}

**Human Rights**

Throughout the world the protection and defense of human rights is the main reason cited in favor of abolition; the campaign for human rights has been an influential determinant and persuasive authority in judicial decisions. The usage of the death penalty worldwide has drastically declined in large part due to foreign materials, influencing society and legal jurisprudence worldwide.

The notion of human rights, intrinsic to human dignity,\textsuperscript{345} is a recent political concept and controversial phenomenon due to its foundation subscribing from a variety of sources across ethical, moral, philosophical, and religious lines. In some areas adherence to “human dignity,”\textsuperscript{346} has been gaining ground—genocide, the plight of political refugees, gender and issue-specific protections for women and children, and so forth. However, as with all problems faced by an international society, while the community can agree that preservation and protection of human rights is central to its goals, there is little headway on the enforcement mechanisms and specific definitional categories of human rights.


\textsuperscript{343} The other country is Belarus. *Ibid.*


\textsuperscript{345} A concept advanced by the ACHR, CRC, ECHR, ECOSOC, EU, ICCPR, OAS, ADHR and the UN.

\textsuperscript{346} See the UDHR and ICCPR above under “International Materials.”
Capital punishment currently is and has been an area of contention. This is because, consistent across all international and applicable foreign materials, protecting and enforcing human rights meant that the right to life was absolute. From a human rights perspective, there are no possible situations in which a human being could be morally or ethically stripped of their right to life by a state power. And no state could determine what a person “deserves” in respect to life. No state can justify policing inherent rights of life afforded to persons by birth. It could be said that those countries who advocate the death penalty as a form of punishment have not been as influenced by international materials as countries that have abolished the death penalty. But even in countries that have the death penalty, international materials have been influential in a number of ways.

The first is a shift in the world order toward international communities centered on the ultimate principles of state sovereignty, created by the global recognition of human rights. Kofi Annan, in a well-known 1999 address to the UN General Assembly said:

State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The state is now widely understood to be the servant of its people, and not vice versa—and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter -- has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny…The [UN] Charter is a living document, whose high principles still define the aspirations of peoples everywhere for lives of peace, dignity and development. Nothing in the Charter precludes a recognition that there are rights beyond borders . . . Indeed, its very letter and spirit are the affirmation of those fundamental human rights. In short, it is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era; an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms.

Second, globalization has opened territorially drawn borders where traditional ties to physical territory is disappearing as technology gets more advanced and the way in which human beings are able to interact and communicate with each other have become increasingly mobile with advances and improvements being made continuously at a rapid rate.

The weakening of state sovereignty and globalization has championed international organizations, whose mission has been to advance human rights. It used to be that the only rights you had were the rights afforded to you by your state. If your state did not afford its citizenry the right to freedom of speech, then you did not have that right. But even if a state declared its objection to human rights, such rights were inherent to being human, and the state lacked the authority to disregard or qualify laws to restricting them. The shift toward human rights was a game changer, as it shifted primary authority from the state, long thought to be the ultimate authority, to a higher one. Because the world in which we live today is not limited by geography, the influence of these international and foreign materials reaches even to the most retentionist of death penalty countries.

**U.S. Connection**

The U.S., considered by many to be the world’s superpower, is a prominent player on the international stage. The U.S. vote in global matters, while technically equal to any other state’s votes, holds enormous influence, power, and authority. Votes are cast by a representative of the U.S. government in deference to U.S. foreign policy goals. It is widely noted that, despite the U.S. being a “nation, indivisible, with liberty and justice for
all,” the U.S. often refuses to be a significant party of almost all UN standards governing human rights. Given the weight of this fact, it would be easy to infer that the influence of international and foreign materials have not made much of an impact on U.S. law and policy. The selectiveness of U.S. support for specific resolutions at the UN does show that at times, it is nation states that control the agenda and determine what is enforced, to promote their national self-interest.

Thankfully, the U.S. is an advanced liberal democracy that champions the spirit of “life, liberty, and the pursuit of happiness.” Conversely, not even the reality of U.S. inconsistencies can negate the fact that “we live in an era of complex interdependence.” Thus far, the effects of international and foreign influences have been evaluated on a global scale. Indirect effects are possible because there are prevalent issue areas of the international community that carry effective solutions beyond the confines of the nation state. Economic, technological, and social aspects through globalization have facilitated and increased the international community’s dependence upon multilateral solutions. After all, a state cannot solely engage in economic trade within its borders and so it was evident fairly quickly that an arena needed to be designated.

Nation states want to, and in today’s reality need to, join and be in good standing with international organizations because they legitimize and provide neutrality, stability, and consistency to the affairs of their member states. International organizations facilitate

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349 Some states have more influence than others. Karns, International Organizations, 256.

350 U.S. Declaration of Independence. This is a general and personal observation and not committed or a comment on any specific issue.

agreements for and between many countries in which all terms and categories are fixed.\textsuperscript{352} Such agreements, when signed, are unwavering, as they are interminable, because treaties are bound by states not governments. International organizations are the sole legitimate providers specifically for nation states, where states can communicate with other states. The importance of international organizations to a member state is illustrated by how powerful the organization has become in this contemporary society due to the many benefits a membership brings to a state. While the U.S. may not be in accordance with UN policies at all times, the U.S. by virtue of continuing membership, endorses its connection and commitment to their charter.

Stronger precedent exists, upon closer investigation, that concretely connects the U.S. to the UN. In 1945 the UN replaced the League of Nations, the first international effort of its kind, inspired in part by a President Woodrow Wilson, who won the Nobel Peace Prize for his efforts. The U.S. was a founding charter member of the UN and is a permanent member of its Security Council, holding veto power. The U.S. is also the host of the UN headquarters located in New York City and the largest financial contributor to the UN and its cause, underwriting twenty two percent of the UN’s entire budget.\textsuperscript{353} This connection is illustrative of U.S. investment in the UN and its exposure to its influence, vis-à-vis its international materials, in a direct and tangible way.

\textsuperscript{352} Because the IO specifies desirable and undesirable conduct, this gives the state the advantage of knowing the consequences should they break a rule or law.

Conclusion

The historical trajectory of SCOTUS decisions detailing the evolution of the CUPC has shown that standards of decency have changed over time. What is “proportionate” and “appropriate” has been and continues to be a deep-seated point of contention between the majority and dissenting justices, creating a profound ideological divide. Although dissenting parties, over the entire case trajectory of CUPC evolution, have strongly positioned the legal reasoning produced by the majority for making these decisions to be beyond SCOTUS capabilities dangerously advancing independent moral judgment, larger patterns and trends signify that capital punishment will soon be unconstitutional under the CUPC. This has been a work in progress, with gains over three main stages of CUPC development: (1) early, (2) modern, and (3) contemporary.

The early era refers to the colonial period until the end of the Furman moratorium in 1976. Borrowing death penalty traditions from British common law, most of the early years considered capital punishment to be generally acceptable for almost all crimes. SCOTUS was far from declaring the death penalty as categorically cruel and unusual in this time period, however, the decisions of Weems and Trop in 1910 and 1958, created an opening for those on death row to appeal their sentence on CUPC grounds.

The decisions of Weems and Trop had a lasting impact in shaping the CUPC of the Eighth Amendment. The Weems Court widened the definitive role and meaning of the
Eighth Amendment’s CUPC, and although SCOTUS was not precise about what counted as “cruel and unusual,” the Trop Court created a general framework for subsequent consideration of the CUPC.⁵⁵⁴ Both Weems and Trop established that which punishments the CUPC permitted varied with society’s evolving standards of decency.⁵⁵⁵

The characterization of the death penalty as “cruel and unusual” punishment became popular in the U.S. with the Furman decision. Historically, the Court had “both assumed and asserted the constitutionality of capital punishment” when assessing whether legally contested methods of execution were constitutional under the Eighth Amendment.⁵⁵⁶

In 1972, the Furman made history as the first SCOTUS case that addressed the specific question of whether the death penalty was categorically unconstitutional.⁵⁵⁷ The early era ended strong with the Furman Court imposing guidelines to the procedural administration of capital punishment, taking the first judicial step in mandating regulation.

The modern era of death penalty jurisprudence began by ending the moratorium established in Furman with Gregg.⁵⁵⁸ In Furman, the court was inconclusive in their finding with four justices opining its constitutionality, two justices opining the opposite, and three justices recommending a narrow ruling applicable only to the procedural

⁵⁵⁴ “The exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.” Trop at 99.


⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid.

⁵⁵⁸ Banner, The Death Penalty, 258.
methods of death penalty imposition of the states in question at that time.\textsuperscript{359} Petitioners of the \textit{Gregg} cases asked the court once more to determine whether the death penalty as punishment for murder was cruel and unusual under the CUPC of the Eighth Amendment.\textsuperscript{360} The \textit{Gregg} Court affirmed the constitutionality of capital punishment but in consideration of the CUPC precedents set by the Courts of \textit{Weems}, \textit{Trop}, and \textit{Furman}, the majority qualified their decision to be appropriate to the principles and reflections of an evolving Amendment. This was the tone of the modern era, a transformational time for death penalty jurisprudence.

\textit{Weems} and \textit{Trop} ushered in new opportunities for trying to invalidate capital punishment as a constitutionally acceptable form of punishment under the CUPC. With Gregg reestablishing the legality of the death penalty, subsequent cases adjudicated in this era were careful to distinguish and hone its permissibility. SCOTUS decisions in \textit{Woodson}, \textit{Coker}, \textit{Godfrey}, \textit{Enmund}, \textit{Ford}, and \textit{Thompson} was telling on how much the Court had to say about limiting the imposition of capital punishment, mandating all death sentences to be proportionate and appropriate to the crime(s) committed.

What is significant about the \textit{Coker} verdict to this thesis does not come from its \textit{prima facie} understanding that SCOTUS found for the defendant due to Georgia’s failure to pass the \textit{Gregg} standards;\textsuperscript{361} it is when the court’s assurance of their decision on the

\textsuperscript{359} \textit{Gregg} at 169.

\textsuperscript{360} \textit{Gregg} at 168.

\textsuperscript{361} It is in my understanding of the text that technically, Georgia courts actually did not automatically determine Georgia’s Supreme Court’s decision to uphold Coker’s death sentence as unconstitutional because they had followed the constitutionally approved procedural rules as determined by \textit{Gregg}--the petitioner was not sentenced to death arbitrarily nor capriciously.
addition of a third step to supplement the Gregg test, a survey of public attitude. The addition of which is mandated by the “firmly embraced the holdings and dicta from prior cases” set by Furman supra Robinson, Trop, and Weems that requires the court to consider an additional measure beyond the more traditional standards of whether a punishment was excessive or disproportionate.

The SCOTUS decisions of the contemporary era were the results of the groundwork established by the decisions in the early and modern era. It was in 2002, with the landmark decision of Atkins v. Virginia that ushered in the contemporary period. Up until then, all of SCOTUS’s decisions had never explicitly and categorically barred the application of the death penalty to a criminal defendant for eligible crimes committed, but the Atkins decision declared executions of the mentally handicap cruel, unusual, and unconstitutional. 2005 brought another categorical ban, the five-four decision of landmark case Roper v. Simmons categorically barred the capital punishment of minors, for crimes committed by a criminal defendant less than eighteen years of age.

There has been a steady decline in the use of capital punishment in the U.S. in the contemporary time period. As of October 1, 2015, the death penalty is considered a legal form of punishment in thirty one states. Four states out of thirty one have a governor-imposed moratorium; an additional twelve states, alongside the federal and US military

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362 “A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.” Coker at 592.

363 Atkins at 304.

364 Roper at 551.

jurisdictions, have *de facto* moratorium; and Arizona in 2014 joined this group with a moratorium imposed by the Attorney General pending the review and investigation of the lethal injection method. That leaves a total of fourteen states currently applying and enforcing capital punishment. Out of the fourteen practicing states (fifteen in 2013), nine executed in 2013, decreasing to seven in 2014, and five (so far) in 2015. Death row is also minimizing, with ninety five sentences in 2013, seventy seven in 2014, and thirty three as of April 1, 2015. The negative trend continues with the total number of executions: thirty nine executed in 2013, decreasing to thirty five executions in 2014, and twenty one as of October 1, 2015.

This thesis advanced that foreign influence will push SCOTUS to find the imposition of capital punishment categorically unconstitutional under the CUPC. There has been a direct effect of foreign influence on SCOTUS and the U.S. has been moving towards the categorical abolition of capital punishment. Similarly, while the indirect

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366 The 12 states are: Arkansas, California, Indiana, Kansas, Kentucky, Louisiana, Montana, Nevada, New Hampshire, North Carolina, Tennessee, and Wyoming. *De facto* Moratorium for this thesis means: no executions or at least five years since the last execution. This does not include those executed due waiving their rights to further appeal. Death Penalty Information Center, “Death Penalty in Flux,” http://www.deathpenaltyinfo.org/death-penalty-flux.

367 Ibid.


371 Ibid.

effect has been much more difficult to demonstrate, just like SCOTUS has used their independent judgment to protect class categories of individuals with mental disabilities and minors, the human rights campaign of the international community in an era of globalization has expanded and redefined capital punishment in the U.S. Speaking to the values that resonate with human dignity and the value of life has influenced the sentiments of the American people and their valued compelling the notion that protecting human rights is innate. The U.S. has certainly evolved and is securely on the trajectory towards abolition.
Appendix

Appendix A: Chart of SCOTUS Decisions

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Question</th>
<th>Cruel and Unusual</th>
<th>Decision</th>
<th>Majority Opinion</th>
<th>Holding</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>Furman v. Georgia</td>
<td>Death Penalty Sentencing Procedure</td>
<td>Yes</td>
<td>5-4</td>
<td>Per Curiam Opinion</td>
<td>TEMPORARILY BANNED Pending Review</td>
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<tr>
<td>1976</td>
<td>Gregg v. Georgia</td>
<td>Review of Revised Sentencing Procedures</td>
<td>No</td>
<td>7-2</td>
<td>Stewart, Plurality Opinion</td>
<td>Mandatory Lifted, Revised Sentencing Procedures are Constitutional</td>
</tr>
<tr>
<td>1976</td>
<td>Woodson v. North Carolina</td>
<td>Mandatory Death Sentence for First-Degree Murder</td>
<td>Yes</td>
<td>5-4</td>
<td>Stewart, Plurality Opinion</td>
<td>Unconstitutional</td>
</tr>
<tr>
<td>1977</td>
<td>Coker v. Georgia</td>
<td>Death Penalty for Rape</td>
<td>Yes</td>
<td>7-2</td>
<td>White, Plurality Opinion</td>
<td>Unconstitutional if life of victim intact</td>
</tr>
<tr>
<td>1980</td>
<td>Godfrey v. Georgia</td>
<td>Death Penalty for &quot;Ordinary&quot; Murder</td>
<td>Yes</td>
<td>6-3</td>
<td>Stewart, Plurality Opinion</td>
<td>Unconstitutional, only exceptional crimes warrant death</td>
</tr>
<tr>
<td>1982</td>
<td>Enmund v. Florida</td>
<td>Death Penalty for Minor Participants</td>
<td>Yes</td>
<td>5-4</td>
<td>White</td>
<td>Unconstitutional, Considerations of Individual Capability Required</td>
</tr>
<tr>
<td>2008</td>
<td>Kennedy v. Louisiana</td>
<td>Death Penalty for Rape of a Child</td>
<td>Yes</td>
<td>5-4</td>
<td>Kennedy</td>
<td>Unconstitutional if life of child is intact</td>
</tr>
</tbody>
</table>

**Main Standard**

**Procedure**

**Action**

**Individual**

**Issue: Mental Capacity**

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Question</th>
<th>Decision</th>
<th>Majority Opinion</th>
<th>Holding</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986</td>
<td>Ford v. Wainwright</td>
<td>Execution of the Mentally Insane</td>
<td>Yes</td>
<td>5-4</td>
<td>Marshall</td>
</tr>
<tr>
<td>1989</td>
<td>Perry v. Lynam</td>
<td>Execution of the Mentally Retarded</td>
<td>No</td>
<td>5-4</td>
<td>O'Connor</td>
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<tr>
<td>2002</td>
<td>Atkins v. Virginia</td>
<td>Execution of the Mentally Retarded</td>
<td>Yes</td>
<td>6-3</td>
<td>Stevens</td>
</tr>
</tbody>
</table>

**Issue: Minors**

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Question</th>
<th>Decision</th>
<th>Majority Opinion</th>
<th>Holding</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>Thompson v. Oklahoma</td>
<td>Execution of a Minor, 15 Years Old</td>
<td>Yes</td>
<td>5-3</td>
<td>Stevent</td>
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<tr>
<td>1989</td>
<td>Stanford v. Kentucky</td>
<td>Execution of a Minor, 17 Years Old</td>
<td>No</td>
<td>5-4</td>
<td>Scalia</td>
</tr>
<tr>
<td>2005</td>
<td>Roper v. Simmons</td>
<td>Execution of a Minor, 17 Years Old</td>
<td>Yes</td>
<td>5-4</td>
<td>Kennedy</td>
</tr>
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</table>
Appendix B: Preamble, Article 1 and 2 of the Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty

**Preamble**
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,
Have agreed as follows:

**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 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 wartime.

2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.
Appendix C: ECOSOC Resolution--Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty

1. Notes that, during the period covered by the report of the Secretary-General on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, an increasing number of countries abolished the death penalty and others followed a policy reducing the number of capital offences, and declared that they had not sentenced any offender to that penalty, while still others retained it and a few reintroduced it;

2. Calls upon Member States in which the death penalty has not been abolished to effectively apply the safeguards guaranteeing protection of the rights of those facing the death penalty, in which it is stated that capital punishment may be imposed for only the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences;

3. Encourages Member States in which the death penalty has not been abolished to ensure that each defendant facing a possible death sentence is given all guarantees to ensure a fair trial, as contained in article 14 of the International Covenant on Civil and Political Rights, and bearing in mind the Basic Principles on the Independence of the Judiciary, 5/ the Basic Principles on the Role of Lawyers, 6/ the Guidelines on the Role of Prosecutors, 7/ the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 8/ and the Standard Minimum Rules for the Treatment of Prisoners; 9/

4. Also encourages Member States in which the death penalty has not been abolished to ensure that defendants who do not sufficiently understand the language used in court are fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence deliberated in court;

5. Calls upon Member States in which the death penalty may be carried out to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency, in order to effectively apply rules 5 and 8 of the safeguards guaranteeing protection of the rights of those facing the death penalty;

6. Also calls upon Member States in which the death penalty may be carried out to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question;

7. Urges Member States in which the death penalty may be carried out to effectively apply the Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering.
Appendix D: Preamble and Article 37 of the CRC

Preamble
The States Parties to the present Convention,
Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care,
including appropriate legal protection, before as well as after birth”,
Recalling the provisions of the Declaration on Social and Legal Principles relating to the
Protection and Welfare of Children, with Special Reference to Foster Placement and
Adoption Nationally and Internationally; the United Nations Standard Minimum Rules
for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the
Protection of Women and Children in Emergency and Armed Conflict, Recognizing that,
in all countries in the world, there are children living in exceptionally difficult conditions,
and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people
for the protection and harmonious development of the child, Recognizing the importance
of international co-operation for improving the living conditions of children in every
country, in particular in the developing countries,
Have agreed as follows:

Article 37
States Parties shall ensure that:
(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment
or punishment. Neither capital punishment nor life imprisonment without possibility of
release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest,
detention or imprisonment of a child shall be in conformity with the law and shall be used
only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the
inherent dignity of the human person, and in a manner which takes into account the needs
of persons of his or her age. In particular, every child deprived of liberty shall be
separated from adults unless it is considered in the child's best interest not to do so and
shall have the right to maintain contact with his or her family through correspondence
and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal
and other appropriate assistance, as well as the right to challenge the legality of the
deprivation of his or her liberty before a court or other competent, independent and
impartial authority, and to a prompt decision on any such action.
Appendix E: Protocol to the ACHR to Abolish the Death Penalty

Preamble
The States, parties to this protocol, considering:
that Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty; that everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason; that the tendency among the American States is to be in favor of abolition of the death penalty; that application of the death penalty has irrevocable consequences, forecloses the correction of judicial error, and precludes any possibility of changing or rehabilitating those convicted; that the abolition of the death penalty helps to ensure more effective protection of the right to life; that an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights, and that States Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas, have agreed to sign the following protocol to the American Convention on Human Rights to abolish the death penalty.

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

Article 2
1. No reservations may be made to this 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.

2. The State Party making this reservation shall, upon ratification or accession, inform the Secretary General of the Organization of American States of the pertinent provisions of its national legislation applicable in wartime, as referred to in the preceding paragraph.

3. Said State Party shall notify the Secretary General of the Organization of American States of the beginning or end of any state of war in effect in its territory.
Appendix F: Amnesty International Global Report--Death Sentences and Executions in 2015

EXECUTIONS IN NUMBERS

1,634+ people executed in 25 countries
54% more executions recorded than in 2014
89% of all executions happened in 3 countries

TOWARDS ABOLITION

4 countries totally abolished the death penalty in 2015
102 countries have completely abolished the death penalty in total
Reported Executions and Death Sentences in 2015

This report only covers the judicial use of the death penalty. Amnesty International only reports figures for which it can find reasonable confirmation, although the true figures for some countries are significantly higher. Some states intentionally conceal death penalty proceedings; others do not keep or make available data on the numbers of death sentences and executions.

Where “+” appears after a figure next to the name of a country – for instance, Egypt (22+) – it means that Amnesty International confirmed 22 executions or death sentences in Egypt but believes there were more than 22. Where “+” appears after a country name without a figure – for instance, Iran (+) – it means that Amnesty International has corroborated executions or death sentences (more than one) in that country but had insufficient information to provide a credible minimum figure. When calculating global and regional totals, “+” has been counted as 2, including for China.

**REPORTED EXECUTIONS IN 2015**

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</tr>
<tr>
<td>Iran</td>
<td>977+</td>
</tr>
<tr>
<td>Pakistan</td>
<td>326</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>158+</td>
</tr>
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<td>USA</td>
<td>28</td>
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<tr>
<td>Iraq</td>
<td>26+</td>
</tr>
<tr>
<td>Somalia (Federal Government of Somalia 17+; Somaliland 6+; Jubaland 2+)</td>
<td>25+</td>
</tr>
<tr>
<td>Egypt</td>
<td>22+</td>
</tr>
<tr>
<td>Indonesia</td>
<td>14</td>
</tr>
<tr>
<td>Chad</td>
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</tr>
<tr>
<td>Yemen</td>
<td>8+</td>
</tr>
<tr>
<td>Taiwan</td>
<td>6</td>
</tr>
<tr>
<td>South Sudan</td>
<td>5+</td>
</tr>
<tr>
<td>Country</td>
<td>Death Sentences</td>
</tr>
<tr>
<td>---------</td>
<td>----------------</td>
</tr>
<tr>
<td>China +</td>
<td>Myanmar 17+</td>
</tr>
<tr>
<td>Egypt 538+</td>
<td>South Sudan 17+</td>
</tr>
<tr>
<td>Bangladesh 197+</td>
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<tr>
<td>Nigeria 171</td>
<td>Sierra Leone 13</td>
</tr>
<tr>
<td>Pakistan 121+</td>
<td>Afghanistan 12+</td>
</tr>
<tr>
<td>Cameroon 91+</td>
<td>Palestine (State of) 12+</td>
</tr>
<tr>
<td>Iraq 89+</td>
<td>Tunisia 11</td>
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<td>Chad 10</td>
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<td>Mali 10</td>
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<tr>
<td>Sri Lanka 51+</td>
<td>Morocco/Western Sahara 9</td>
</tr>
<tr>
<td>Viet Nam 47+</td>
<td>Qatar 9</td>
</tr>
<tr>
<td>Indonesia 46+</td>
<td>Taiwan 9</td>
</tr>
<tr>
<td>Malaysia 39+</td>
<td>Trinidad and Tobago 9</td>
</tr>
<tr>
<td>Kenya 30</td>
<td>Bahrain 8</td>
</tr>
<tr>
<td>DRC 28</td>
<td>UAE 8</td>
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<tr>
<td>Lebanon 28</td>
<td>Thailand 7+</td>
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<tr>
<td>Laos 20+</td>
<td>Zambia 7+</td>
</tr>
<tr>
<td>Syria 20+</td>
<td>Saudi Arabia 6+</td>
</tr>
<tr>
<td>Ghana 18</td>
<td>Somalia 5+ (Federal Government of Somalia 4+; Somaliland 1+)</td>
</tr>
<tr>
<td>Sudan 18</td>
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</tr>
</tbody>
</table>
Abolitionist and Retentionist Countries as of December 31, 2015

More than two thirds of the countries in the world have now abolished the death penalty in law or practice. As of 31 December 2015 the numbers were as follows:

Abolitionist for all crimes: 102
Abolitionist for ordinary crimes only: 6
Abolitionist in practice: 32
Total abolitionist in law or practice: 140
Retentionist: 58

The following are lists of countries in the four categories: abolitionist for all crimes, abolitionist for ordinary crimes only, abolitionist in practice and retentionist.

1. ABOLITIONIST FOR ALL CRIMES

Countries whose laws do not provide for the death penalty for any crime:

Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Bhutan, Bolivia, Bosnia and Herzegovina, Bulgaria, Burundi, Cambodia, Cabo Verde, Canada, Colombia, Cook Islands, Congo (Republic of), Costa Rica, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Estonia, Finland, Fiji, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malta, Marshall Islands, Mauritius, Mexico, Micronesia, Moldova, Monaco, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niue, Norway, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, Samoa, San Marino, Sao Tome and Principe, Senegal, Serbia (including Kosovo), Seychelles, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Suriname, Sweden, Switzerland, Timor-Leste, Togo, Turkey, Turkmenistan, Tuvalu, Ukraine, UK, Uruguay, Uzbekistan, Vanuatu, Venezuela.
2. ABOLITIONIST FOR ORDINARY CRIMES ONLY

Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances:

Brazil, Chile, El Salvador, Israel, Kazakhstan, Peru.

3. ABOLITIONIST IN PRACTICE

Countries that retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the last 10 years and are believed to have a policy or established practice of not carrying out executions:

Algeria, Benin, Brunei Darussalam, Burkina Faso, Cameroon, Central African Republic, Eritrea, Ghana, Grenada, Kenya, Laos, Liberia, Malawi, Maldives, Mali, Mauritania, Mongolia, Morocco, Myanmar, Nauru, Niger, Papua New Guinea, Russian Federation, Sierra Leone, South Korea, Sri Lanka, Swaziland, Tajikistan, Tanzania, Tonga, Tunisia, Zambia.

4. RETENTIONIST

Countries that retain the death penalty for ordinary crimes:

Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Chad, China, Comoros, Democratic Republic of the Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Gambia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Lesotho, Libya, Malaysia, Nigeria, North Korea, Oman, Pakistan, Palestine (State of), Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Somalia, South Sudan, Sudan, Syria, Taiwan, Thailand, Trinidad and Tobago, Uganda, United Arab Emirates, USA, Viet Nam, Yemen, Zimbabwe.
Appendix G: Death Penalty Information Center—Facts about the U.S. Death Penalty

Updated: April 13, 2016

### NUMBER OF EXECUTIONS SINCE 1976: 1,434

<table>
<thead>
<tr>
<th>State</th>
<th>Number of Executions</th>
</tr>
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<tbody>
<tr>
<td>Alabama</td>
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<tr>
<td>Arizona</td>
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<tr>
<td>Arkansas</td>
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<tr>
<td>California</td>
<td>16</td>
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<tr>
<td>Colorado</td>
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<tr>
<td>Delaware</td>
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<td>Florida</td>
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<tr>
<td>Georgia</td>
<td>31</td>
</tr>
<tr>
<td>Hawaii</td>
<td>45</td>
</tr>
<tr>
<td>Idaho</td>
<td>31</td>
</tr>
<tr>
<td>Indiana</td>
<td>56</td>
</tr>
<tr>
<td>Iowa</td>
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<tr>
<td>Kansas</td>
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<tr>
<td>Kentucky</td>
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<td>Louisiana</td>
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<tr>
<td>Maine</td>
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<tr>
<td>Maryland</td>
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<td>Montana</td>
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<td>North Carolina</td>
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<td>North Dakota</td>
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<td>Tennessee</td>
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<tr>
<td>Texas</td>
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<td>Utah</td>
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<td>Washington</td>
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<td>West Virginia</td>
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<tr>
<td>Wyoming</td>
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</table>

### RACE OF DEFENDANTS EXECUTED

- **White**: 795
- **Black**: 495
- **Hispanic**: 120
- **Other**: 24

### RACE OF VICTIMS IN DEATH PENALTY CASES

- **White**: 76%
- **Black**: 15%
- **Hispanic**: 7%
- **Other**: 2%

Over 75% of the murder victims in cases resulting in an execution were white, even though nationally only 50% of murder victims generally are white.
**RECENT STUDIES ON RACE**

- Jurors in Washington state are three times more likely to recommend a death sentence for a black defendant than for a white defendant in a similar case. (Prof. K. Beckett, Univ. of Washington, 2014).
- In Louisiana, the odds of a death sentence were 97% higher for those whose victim was white than for those whose victim was black. (Pierce & Radelet, Louisiana Law Review, 2011).
- A study in California found that those who killed whites were over 3 times more likely to be sentenced to death than those who killed blacks and over 4 times more likely than those who killed Latinos. (Pierce & Radelet, Santa Clara Law Review, 2005).
- A comprehensive study of the death penalty in North Carolina found that the odds of receiving a death sentence rose by 3.5 times among those defendants whose victims were white. (Prof. Jack Boger and Dr. Isaac Unah, University of North Carolina, 2001).
- In 96% of states where there have been reviews of race and the death penalty, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both. (Prof. Baldus report to the ABA, 1998).

**INNOCENCE**

- Since 1973, more than 150 people have been released from death row with evidence of their innocence. (Staff Report, House Judiciary Subcommittee on Civil & Constitutional Rights, 1993, with updates from DPIC).
- From 1973-1999, there was an average of 3 exonerations per year. From 2000-2011, there was an average of 5 exonerations per year.

**DEATH ROW INMATES BY RACE**

- Black: 43%
- White: 44%
- Hispanic: 10%
- Other: 3%

**DEATH ROW INMATES BY STATE: January 1, 2016**

<table>
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<tr>
<th>State</th>
<th>Inmates</th>
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<td>71</td>
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<td>U.S. Gov't</td>
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</table>

Race of Death Row Inmates and Death Row Inmates by State: Source: NAACP Legal Defense Fund, “Death Row USA” (January 1, 2016). When added, the total number of death row inmates by state is slightly higher than the given total because some prisoners are sentenced to death in more than one state.
EXECUTIONS BY STATE SINCE 1976

<table>
<thead>
<tr>
<th></th>
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<th></th>
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<td>WA</td>
<td>5</td>
<td>0</td>
<td>CT</td>
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<tr>
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<td>28</td>
<td>0</td>
<td>0</td>
<td>NE</td>
<td>3</td>
<td>0</td>
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</table>

EXECUTIONS BY REGION*

<table>
<thead>
<tr>
<th>Region</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>South</td>
<td>1168</td>
</tr>
<tr>
<td>Midwest</td>
<td>177</td>
</tr>
<tr>
<td>West</td>
<td>85</td>
</tr>
<tr>
<td>Northeast</td>
<td>4</td>
</tr>
</tbody>
</table>

*Federal executions are listed in the region in which the crime was committed.

DEATH SENTENCING

The number of death sentences per year has dropped dramatically since 1999.

<table>
<thead>
<tr>
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<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Sentences</td>
<td>296</td>
<td>279</td>
<td>223</td>
<td>153</td>
<td>166</td>
<td>151</td>
<td>138</td>
<td>140</td>
<td>123</td>
<td>126</td>
<td>120</td>
<td>118</td>
<td>114</td>
<td>85</td>
<td>82</td>
<td>83</td>
<td>73</td>
<td>49</td>
</tr>
</tbody>
</table>


MENTAL DISABILITIES

- Intellectual Disabilities: In 2002, the Supreme Court held in Atkins v. Virginia that it is unconstitutional to execute defendants with 'mental retardation.'
- Mental Illness: The American Psychiatric Association, the American Psychological Association, the National Alliance for the Mentally Ill, and the American Bar Association have endorsed resolutions calling for an exemption of the severely mentally ill.

DETERRENCE

- A report by the National Research Council, titled Deterrence and the Death Penalty, stated that studies claiming that the death penalty has a deterrent effect on murder rates are "fundamentally flawed" and should not be used when making policy decisions (2012).
- Consistent with previous years, the 2014 FBI Uniform Crime Report showed that the South had the highest murder rate. The South accounts for over 80% of executions. The Northeast, which has less than 1% of all executions, had lowest murder rate.
- According to a survey of the former and present presidents of the country’s top academic criminological societies, 88% of these experts rejected the notion that the death penalty acts as a deterrent to murder. (Radelet & Lacocke, 2009)

EXECUTIONS SINCE 1976 BY METHOD USED

<table>
<thead>
<tr>
<th>Method</th>
<th>Count</th>
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</thead>
<tbody>
<tr>
<td>Lethal Injection</td>
<td>1259</td>
</tr>
<tr>
<td>Electrocution</td>
<td>158</td>
</tr>
<tr>
<td>Gas Chamber</td>
<td>11</td>
</tr>
<tr>
<td>Hanging</td>
<td>3</td>
</tr>
<tr>
<td>Firing Squad</td>
<td>3</td>
</tr>
</tbody>
</table>

34 states plus the US government use lethal injection as their primary method. Some states utilizing lethal injection have other methods available as backups. Though New Mexico and Connecticut have abolished the death penalty, their laws were not retroactive, leaving prisoners on the states’ death rows and their lethal injection protocols intact.

JUVENILES

- In 2005, the Supreme Court in Roper v. Simmons struck down the death penalty for juveniles. 22 defendants had been executed for crimes committed as juveniles since 1976.

WOMEN

- There were 56 women on death row as of Dec. 31, 2014. This constitutes less than 2% of the total death row population. (NAACP Legal Defense Fund, Jan. 1, 2015). 16 women have been executed since 1976.
FINANCIAL FACTS ABOUT THE DEATH PENALTY

- Defense costs for death penalty trials in Kansas averaged about $400,000 per case, compared to $100,000 per case when the death penalty was not sought. (Kansas Judicial Council, 2014).
- A new study in California revealed that the cost of the death penalty in the state has been over $4 billion since 1978. Study considered pre-trial and trial costs, costs of automatic appeals and state habeas corpus petitions, costs of federal habeas corpus appeals, and costs of incarceration on death row. (Alarcon & Mitchell, 2011).
- In Maryland, an average death penalty case resulting in a death sentence costs approximately $3 million. The eventual costs to Maryland taxpayers for cases pursued 1978-1999 will be $186 million. Five executions have resulted. (Urban Institute, 2008).
- Enforcing the death penalty costs Florida $51 million a year above what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out since 1976, that amounts to a cost of $24 million for each execution. (Palm Beach Post, January 4, 2000).
- The most comprehensive study in the country found that the death penalty costs North Carolina $2.16 million per execution over the costs of sentencing murderers to life imprisonment. The majority of those costs occur at the trial level. (Duke University, May 1993).
- In Texas, a death penalty case costs an average of $2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years. (Dallas Morning News, March 8, 1992).

PUBLIC OPINION AND THE DEATH PENALTY

Support for Alternatives to the Death Penalty

- A 2010 poll by Lake Research Partners found that a clear majority of voters (61%) would choose a punishment other than the death penalty for murder.

What Interferes with Effective Law Enforcement?

<table>
<thead>
<tr>
<th>Percent Ranking Item as One of Top Two or Three</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of law enforcement resource</td>
</tr>
<tr>
<td>Drug/Alcohol abuse</td>
</tr>
<tr>
<td>Family problems/child abuse</td>
</tr>
<tr>
<td>Lack of programs for mentally ill</td>
</tr>
<tr>
<td>Crowded courts</td>
</tr>
<tr>
<td>Ineffective prosecution</td>
</tr>
<tr>
<td>Too many guns</td>
</tr>
<tr>
<td>Gangs</td>
</tr>
<tr>
<td>Insufficient use of the death penalty</td>
</tr>
</tbody>
</table>

- A 2009 poll commissioned by DPIC found police chiefs ranked the death penalty last among ways to reduce violent crime. The police chiefs also considered the death penalty the least efficient use of taxpayers' money.
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