

March 2008

Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?

Frederick C. Millett
Franklin Pierce Law Center, Concord, NH

Follow this and additional works at: https://scholars.unh.edu/unh_lr



Part of the [Law Commons](#)

Repository Citation

Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 *Pierce L. Rev.* 547 (2008), available at http://scholars.unh.edu/unh_lr/vol6/iss3/11

This Notes is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact sue.zago@law.unh.edu.

Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?

FREDERICK C. MILLETT*

The execution may have passed into British history, but it is an enduring if infrequent spectacle in the United States. The parallels between the British past and the American present are striking.¹

TABLE OF CONTENTS

I. Introduction	548
II. The Death Penalty in England.....	551
A. The Bloody Code and Early History.....	551
B. Execution Procedures and Public Hanging	555
C. Early Attempts to Abolish the Death Penalty	560
D. The Trilogy: “Evans-Bentley-Ellis”.....	564
E. The Homicide Act 1957 and Final Attempts to Abolish	576
III. The Death Penalty in the United States	584
A. Early History	585
B. <i>Furman & Gregg</i> : The Eighth Amendment Analysis	590
C. Restricting the Reach of Capital Punishment for Crimes.....	598
D. Restricting the Reach of Capital Punishment for Types of Offenders	602
E. Miscarriages of Justice in the United States.....	609
IV. Analysis: Expanding on <i>Roper v. Simmons</i>	613
A. English Law v. American Law	614
B. International Trend of Abolishing the Death Penalty.....	633
C. The Death Penalty Debate in the States	636
V. Conclusion: Looking Forward	644

* B.S., Michigan State University, 2004; J.D. Candidate, Franklin Pierce Law Center, 2008. The author is the creator of the *End the Death Penalty Now!* website, author of the article: *The Death Penalty Increases Murder*, in *WRITING THE CRITICAL ESSAY: THE DEATH PENALTY* 37–44 (William Dudley ed., Thomson Gale 2006), has worked for the New England Innocence Project, and has recently finished an externship with the Southern Center for Human Rights in Atlanta, GA. The author is indebted to Steve Bright and Professor Chris Johnson for their invaluable comments and suggestions on drafts of this article. The author also wishes to thank Professor Barry Shanks, for his research assistance in finding even the most obscure repealed British statutes, Sara Lentini, Kate Winstanley, Justin Maleson, and the *Pierce Law Review* staff for all their help and support in publishing this article.

1. See Victor Bailey, *The Death Penalty in British History*, 2 *PUNISHMENT & SOC’Y* 106, 112 (2000) (Professor of Modern British History at the University of Kansas).

I. INTRODUCTION

Walking down Nanjing Road in Shanghai, you will not only pass by the foreign clothing stores that seem to be taking over the area, but also Pepsi signs every fifty feet, a McDonald's, and a KFC—all with the backdrop of Chinese characters and the Oriental Pearl TV Tower. Along your way, you can stop in The Chopstick Shop to find the perfect set of chopsticks, buy a smoothie from a vendor, or just sit on a bench and watch the thousands of Chinese people walk by wearing Nike hats and Levi's jeans. Just across the river is the Pudong New Area, ten years ago just farmland—now one of the most recognized skylines in China, indeed, in the world. These skyscrapers showcase foreign investment in China like nothing else. Foreign banks, companies, and law firms are all flocking to this area to compete in the Chinese marketplace.

There is no doubt that even China, a country halfway across the world and so fundamentally different from the United States, is influenced by our business and culture. American culture is no longer limited to the fifty states, but is a way of life throughout most of the world. The way we dress, the way we act, even the way we think is becoming the global norm. However, this is not just a one-way road; the United States is also slowly adapting to the way the rest of the world thinks.

One area where this can be seen is in the recent Supreme Court cases relying on international precedent.² Much like the streets in China that are no longer free from foreign influences, our own Constitution is now being interpreted using international authority. Justices Scalia and Thomas disapprove. In his dissent in *Lawrence v. Texas*, Scalia went so far as to state that the use of international authority is meaningless and dangerous dicta.³ Justice Thomas, referencing international precedent on capital punishment, has stated that “this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”⁴ But do we not as Americans impose our fashions, fads, and moods on the rest of the world? The irony is thick—our globalization mentality is coming back to haunt us.

This is not unexpected. Most of what is in our Constitution was written over 200 years ago based on foreign influences. For instance, our first ten amendments were derived from the English Bill of Rights of 1688.⁵

2. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003).

3. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

4. *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari).

5. See Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.).

The question should not be whether international precedent should be used as persuasive authority, but rather in what way it should be used.⁶ While this debate rages on in the background, the fact remains that international precedent is currently being used to interpret the Constitution—for better or for worse. One key area of interpretation where international precedent has been greatly felt is the Eighth Amendment.⁷

In 2005, the Supreme Court decided *Roper v. Simmons*, which held unconstitutional the juvenile death penalty in the United States. Relying on both the recent state trend of abolishing the juvenile death penalty and international authority showing the abolition of the juvenile death penalty, Justice Kennedy ruled that the juvenile death penalty violated the Eighth Amendment right against cruel and usual punishment.⁸

Since reinstating the death penalty in 1976, the United States has limited its use and extent. For example in 1977, in *Coker v. Georgia*,⁹ the Supreme Court limited the use of capital punishment by ruling it unconstitutional to impose capital punishment for the rape of an adult woman when the victim was not killed. Further, the Supreme Court in *Enmund v. Florida*¹⁰ and *Tison v. Arizona*¹¹ ruled unconstitutional the imposition of capital punishment on an individual who participates in a felony in which killing takes place, but the individual does not intend to kill or does not show reckless indifference to life during the course of the felony. The Supreme Court has also barred the execution of insane persons,¹² mentally retarded persons,¹³ and juveniles under the age of eighteen at the time of the crime.¹⁴

Comparatively, the British also restricted the use and extent of capital punishment before abolishing it in 1965.¹⁵ For example, the Children Act

6. Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 359 (2005). Glensy discusses that using international law as persuasive authority to interpret domestic laws is not a new phenomenon—it has been used in this country and abroad for centuries. *Id.* Glensy further states that not all nations are equal when it comes to comparative analysis and deciding which nations' laws to use can be difficult. *Id.* at 405.

7. *Id.* at 373. Glensy points out, though, that this is not the only area of the Constitution where comparative analysis has been applied—it has also been widely used in substantive due process cases, federalism cases, and equal protection cases. *Id.* at 382–87.

8. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

9. 433 U.S. 584 (1977).

10. 458 U.S. 782 (1982).

11. 481 U.S. 137 (1987).

12. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

13. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

14. *Simmons*, 543 U.S. at 578.

15. Furthering the debate to abolish the death penalty were statistics and reports from other countries in Europe showing that the death penalty was not actually a deterrent to murder. In a letter to *The Times* in 1946, English lawyer Derek Curtis-Bennett wrote that England should not use these sources from other countries, showing a parallel to what America is currently debating:

of 1908¹⁶ and the Children and Young Persons Act of 1933¹⁷ abolished capital punishment for juveniles under sixteen and eighteen years of age, respectively. A further limitation of capital punishment was the Sentence of Death (Expectant Mothers) Act of 1931,¹⁸ which abolished capital punishment for pregnant women. Finally, before abolishing capital punishment for all murder cases temporarily in 1965, England issued the Homicide Act of 1957, which limited the sentence of capital punishment to only five types of murder.¹⁹ England then abolished capital punishment for murder in 1965²⁰ and later for all crimes in 1998.²¹

In recent years, there has been a lot of comparative analysis between American law and foreign law, especially England, without much in-depth discussion of the similarities and differences between them.²² This article will discuss in depth the British death penalty and explain the similarities and differences between England's abolition of the death penalty and the current movement in the United States to abolish the death penalty. In Part II, this article will discuss the history of capital punishment and its abolition in England, discussing the major statutory provisions and reasons for England's decision to abolish the death penalty. In Part III, this article will discuss the history of capital punishment in the United States, focusing on the period between 1976 and leading up to the *Simmons* decision in 2005.

Derek Curtis-Bennett considered that to abolish capital punishment would be "an act of the greatest folly." He could not understand how "anyone with experience in criminal law" could say it was not a deterrent. Life imprisonment would not stop criminals going armed to avoid capture—and as for other countries, he concluded, laying claim to being the first Eurosceptic, we did not "need any lessons on criminal justice from outside."

BRIAN P. BLOCK & JOHN HOSTETTLER, *HANGING IN THE BALANCE: A HISTORY OF THE ABOLITION OF CAPITAL PUNISHMENT IN BRITAIN* 107 (1997).

16. 8 Edw. 7, c. 67 (Eng.).

17. 23 Geo. 5, c. 12 (Eng.).

18. 21 & 22 Geo. 5, c. 24 (Eng.).

19. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11 (Eng.). This Act restricted the use of capital punishment to five types of murder: (1) murder in the course or furtherance of theft, (2) murder by shooting or causing an explosion, (3) murder while resisting arrest or during an escape, (4) murder of a police officer, and (5) murder of a prison officer by a prisoner. It further mandated the death penalty for murderers who commit two murders on different occasions and created three defenses that would lower a murder charge to that of manslaughter. *Id.*

20. Murder (Abolition of Death Penalty) Act, 1965, c. 71 (Eng.). England abolished the death penalty in 1965 temporarily for five years. The act was made permanent in December 1969. *Id.*

21. Crime and Disorder Act, 1998, c. 37 (Eng.).

22. This is not just confined to Eighth Amendment jurisprudence, either. For example, in *Miller-El v. Dretke*, 545 U.S. 231 (2005), a Fourteenth Amendment equal protection peremptory challenge case, Justice Breyer, in concurrence, wrote that peremptory challenges should be abolished and to back up this point, mentioned that England abolished peremptory challenges back in 1988, and seemed to be doing fine without them. *See id.* at 272 (Breyer, J., concurring). However, just a quick review of the jury selection system in England shows that the system in England is completely different from that of the United States, thus making comparative analysis difficult, if not impossible. *See, e.g.,* Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 LAW & CONTEMP. PROBS. 7 (1999).

In Part IV, this article will then compare and contrast the process with which England abolished capital punishment to that of the United States. Further, following the analysis in *Simmons*, Part IV will look at the international trend of abolishing the death penalty since 1976 and the trend the states are heading in the use of the death penalty. Finally in Part V, this article will attempt to predict where the United States is headed in the death penalty debate and whether *Simmons* and the abolition of the juvenile death penalty is the first step, similar to the United Kingdom, toward the complete abolition of the death penalty, or if this trend will end with *Simmons*.

II. THE DEATH PENALTY IN ENGLAND

The public imagination is fired by the particular rather than the general, and capital punishment had the effect of always concentrating things on the particular. The question was not “is there a danger of miscarriages of justice?” but “was Evans innocent and executed?” Not, “should adolescent accomplices be hanged?” but “should Bentley have been?” Not, “should women go to the gallows?” but “should Ruth Ellis have gone?”²³

A. *The Bloody Code and Early History*

The first execution was recorded in England in 695 AD for theft.²⁴ While William the Conqueror abolished the death penalty in 1066 (not for mercy, but because he favored bodily mutilations such as castration), executions were reinstated by Henry I in 1108 and were not again abolished until 1965.²⁵

Throughout the early history of the death penalty and until its abolition, the main reason for judicial executions in England was its supposed deterrence of crime.²⁶ During the Middle Ages, the majority of executions were for property offenses²⁷—a peasant farmer could even be executed for leaving his home without explanation²⁸—and it was believed that the death penalty could deter these types of offenses. To maximize its deterrent ef-

23. HARRY POTTER, *HANGING IN JUDGMENT: RELIGION AND THE DEATH PENALTY IN ENGLAND FROM THE BLOODY CODE TO ABOLITION* 167 (1993).

24. *Id.* at 2.

25. BLOCK & HOSTETTLER, *supra* note 15, at 18.

26. POTTER, *supra* note 23, at 7.

27. *Id.* at 2.

28. BLOCK & HOSTETTLER, *supra* note 15, at 18 (“Whereas the runaway thief would have been seen committing the offense, and often had the stolen property with him, it would simply be assumed that the farmer had committed a crime. Explanations were not regarded as useful.”).

fect, a variety of methods of execution were used: hanging, decapitation, and even burning and boiling.²⁹

As of 1688, there were fifty capital crimes in England; however, this number would rise to over 200 in the next 130 years during a time referred to as the Bloody Code in England.³⁰ “Even stealing fruit from trees and damaging ponds to allow fish to escape became capital crimes” during this period.³¹ This trend, the opposite to that of other European countries, “was largely due to the political, economic and social changes accompanying the rise of Parliamentary supremacy and the early days of the Industrial Revolution.”³² Mass urbanization, the development of “middle-class prosperity,”³³ and the lack of a sufficient alternative punishment to death³⁴ were all factors in the expansion of the death penalty in England.

Despite this large increase in statutory capital crimes, the punishment of hanging for most of these crimes was rare. Fewer people were executed per year at the end of the eighteenth century than at the end of the sixteenth century. Most people were hanged for crimes against the person; the “only property offence for which the capital sentence was regularly executed and rarely commuted was forgery.”³⁵ The reasons for this result were a jury’s

29. POTTER, *supra* note 23, at 3. Some of the methods were reserved for specific groups of people: [H]anging was considered the most degrading form of death, probably because it was more messy and squalid Decapitation was regarded as a right reserved for the wealthy, and burning at the stake was considered to be suitable for women. As Sir William Blackstone expressed it, “For as the decency due to the sex forbids the exposing and publicly mangling of their bodies, their sentence is, to be drawn to the gallows and there to be burnt alive.”

BLOCK & HOSTETTLER, *supra* note 15, at 18. It is interesting to note that the guillotine was in use until 1710 and the burning of women at the stake was not abolished until 1790. *Id.* at 19.

30. POTTER, *supra* note 23, at 4 (“All felonies except petty larceny and mayhem (maiming) were capital.”); *see also* BLOCK & HOSTETTLER, *supra* note 15, at 20–21.

31. BLOCK & HOSTETTLER, *supra* note 15, at 21.

32. POTTER, *supra* note 23, at 4. During this time, both the political order and property were considered of critical importance. BLOCK & HOSTETTLER, *supra* note 15, at 21. John Locke, in his *Second Treatise of Government*, did not think any punishment was too severe for property offenses:

He emphasized again and again that the state had “no other end but the preservation of property,” and could employ whatever punishment it would in its protection without infringing the civil rights and liberties of its people. Although every citizen had an inalienable right to life this right could be “forfeited” if he committed a criminal act that threatened the fabric of the social compact and so “deserved” death.

POTTER, *supra* note 23, at 10–11.

33. POTTER, *supra* note 23, at 4. *The Times* wrote in 1872, referring to the Bloody Code: “It was not justice that was administered; it was a war that was waged between two classes of the community.” BLOCK & HOSTETTLER, *supra* note 15, at 21 (internal quotations omitted).

34. POTTER, *supra* note 23, at 4. The common alternative to the death penalty in the seventeenth and eighteenth centuries was transportation. Fifty thousand people convicted of felonies during the 1700s received transportation as a punishment. Bailey, *supra* note 1, at 111. One reason for the increase in the use of the death penalty could have been “the curtailment of transportation at the outbreak of the American war.” *Id.* This left only one reasonable alternative—life imprisonment—which in the eyes of retentionists “was both too lenient and too damaging.” *Id.* at 112.

35. POTTER, *supra* note 23, at 9 (“Few of the capital statutes were regularly employed: between 1749 and 1819 there were only twenty-five sorts of felony for which any individuals were executed and

reluctance to convict petty criminals if they were to receive death and the regular use of mercy. The pervading thought in England's criminal law system was that the "power of the deterrent was supposed to lie in the uncertainty of the threat, not in its constant implementation."³⁶

This theory was later questioned in 1764 in *Of Crimes and Punishments*, a book by Italian nobleman Cesare Beccaria, which "gave birth to the crusade against capital punishment."³⁷ Beccaria argued that to be a more effective deterrent, punishments should be small and inevitable, instead of severe and irregular.³⁸

Around the time of Beccaria's book, British Archdeacon William Paley published *Principles of Moral and Political Philosophy* in 1786.³⁹ In contrast to Beccaria, Paley believed the death penalty should be a possible punishment for every crime deserving of death, but should only be inflicted upon a few examples of each type of crime.⁴⁰ This remained the prevailing view in England; nearly fifty years passed until the number of capital crimes was significantly reduced.

The Reform Act of 1832, due in most part to the efforts of Sir Samuel Romilly,⁴¹ reduced the number of capital crimes, but the death penalty could still be used for "rape, buggery, murder, robbery, some types of forgery, attempted murder resulting in injury and housebreaking with larceny

about one hundred and seventy capital felonies for which no one suffered death. Only a small and declining proportion of those capitally condemned were actually executed.").

36. *Id.*

37. BLOCK & HOSTETTLER, *supra* note 15, at 23.

38. *Id.* at 24. Beccaria also argued that capital punishment was not a deterrent to criminals and instead was an unjust, "barbarous" act of violence: "Countries and times most notorious for the severity of punishments were always those in which the most bloody and inhuman actions and the most atrocious crimes were committed; for the hand of the legislator and the assassin were directed by the same spirit of ferocity." CESARE BECCARIA, *OF CRIMES AND PUNISHMENTS* 39 (1764).

39. BLOCK & HOSTETTLER, *supra* note 15, at 25 ("This remarkable work ran through fifteen editions in Paley's own lifetime and was adopted as a textbook by Cambridge University. Its influence remained prevalent for nearly a century.").

40. *Id.*

41. *Id.* at 41-44.

Born in Frith Street, Soho, in 1757, [Romilly] was the son of a Huguenot immigrant from France. . . .

Although totally opposed to the death penalty, he believed that when it existed it should at least be made clear to precisely what crimes it applied. . . .

Unusually for the time, Romilly saw the principal aim of punishment as the reformation of the criminal—and he believed that the excessive severity of the criminal law, far from acting as a deterrent . . . was the main cause of the increase in crime.

Id. at 41-42. Romilly argued for reform and was an inspiration to many others in the fight for the abolition of the death penalty. POTTER, *supra* note 23, at 34-39. He died in 1818, committing suicide shortly after the death of his wife, unable to see the fruits of his labor—the 1832 Reform Act. BLOCK & HOSTETTLER, *supra* note 15, at 45; *see also* POTTER, *supra* note 23, at 38-39 ("If others would reap the harvest, it was Romilly who had sown the seeds and nurtured the young plants in often hostile terrain.").

to any value,” among other offenses.⁴² By 1837, only fifteen capital offenses remained.⁴³ In 1840, an attempt was made in the House of Commons to abolish the death penalty—it received over ninety votes and was praised by the press, but ultimately failed.⁴⁴

By 1841, only seven capital offenses remained, with the abolition of capital punishment for rape being a major one to go.⁴⁵ In 1861, this number was further reduced to four: “murder, treason, piracy with violence, and arson in Her Majesty’s dockyards.”⁴⁶ These were the only offenses punishable by death going into the twentieth century—the final era of capital punishment in England.

42. BLOCK & HOSTETTLER, *supra* note 15, at 49.

43. Victor Bailey, *The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945–51*, 18 LAW & HIST. REV. 305, 311 (2000).

44. POTTER, *supra* note 23, at 42. However, British poet William Wordsworth had a different viewpoint:

The ageing Wordsworth . . . , worried that the continuing restriction would lead to the ultimate abolition of the death penalty, penned a series of fourteen sonnets on the subject which reflected both a considerable empathy with those condemned to die on “Weeping Hill” and a concern that legislators might be tempted to abrogate their duty to the nation to maintain deterrent measures by their tenderness for the suffering of their fellow human beings.

Id. at 43; see also Sharon M. Setzer, *Precedent and Perversity in Wordsworth’s Sonnets Upon the Punishment of Death*, 50 NINETEENTH-CENTURY LITERATURE 427, 429 (1996) (analyzing the sonnets and finding that they are “not a cogent argument for retaining the death penalty but rather a dizzying and highly provocative study in perspective”).

45. BLOCK & HOSTETTLER, *supra* note 15, at 57; POTTER, *supra* note 23, at 43. For a recount of the history of rape as a capital crime in England, see Barbara Clare Morton, *Freezing Society’s Punishment Pendulum: Coker v. Georgia Improperly Foreclosed the Possibility of Capital Punishment for Rape*, 43 WILLAMETTE L. REV. 1, 2 (2007). The common law penalty for rape in England was death; however, this was changed by the 1275 Rape Act, which punished rape by short imprisonment and a fine. *Id.* at 3. The death penalty for rape was reinstated in 1547, where it remained until 1841. *Id.* at 4–6.

The author’s conclusion, however, that “[t]hroughout British . . . history the crime of rape has been punishable by death,” seems to be misstating the facts. *Id.* at 1. Death seems to have been brought back as a punishment for rape during the Bloody Code, when nearly every offense imaginable was punished by death in England. Further, the punishment of death for rape was abolished in 1841, only nine years after the death penalty was abolished for forgery and robbery, and many years before the death penalty was abolished for murder. Looking at the history of capital punishment in England, it seems clear that the punishment of death for rape was found very early to be an unjust punishment, like that for robbery and forgery, and the conclusion that “British . . . legal history demonstrates grave uncertainty and lack of unanimity on the question of the appropriateness of this sentence for this offense” is inaccurate. *Id.* at 28. The death penalty for rape was abolished over 120 years before the death penalty for murder was abolished in Britain, over ninety years before the punishment of death for juveniles was abolished, and even over twenty years before public executions were prohibited in England. See *infra* Part II(B). The legal history in England seems to show, conclusively, that the penalty of death for rape is inappropriate.

46. POTTER, *supra* note 23, at 43; see also Bailey, *supra* note 43, at 307.

B. Execution Procedures and Public Hanging

1. Execution Procedures in England

Hanging was the most popular method of capital punishment in England until the death penalty was abolished.⁴⁷ By the mid-1700s, most other execution methods were discontinued, although the punishment for women of burning at the stake was not abolished until 1790.⁴⁸ The Murder Act of 1752 allowed judges to dissect or gibbet⁴⁹ the bodies of murderers after execution to increase the alleged deterrent effect and distinguish murderers from other petty criminals who received the death penalty.⁵⁰

Further, the 1752 Act set the timeline for the execution of murderers. Criminals convicted of murder would be hanged “within forty-eight hours of being sentenced.”⁵¹ This differed from other condemned felons who were generally hanged within a week following sentencing.⁵² This procedure was not changed until 1836, when the period between sentencing and execution was changed from fourteen to twenty-seven days for murderers.⁵³ The Court of Criminal Appeal in England was not even established until 1907; before its establishment, a convicted murderer could only hope for a reprieve that was very seldom given.⁵⁴

Until the mid-1800s, hanging was a prolonged public spectacle. The gallows at Tyburn, in use until 1783, could hang up to twenty-four criminals at once, usually with crowds of 100,000 watching.⁵⁵ This macabre spectacle had the purpose of preventing murder and causing fright and

47. BLOCK & HOSTETTLER, *supra* note 15, at 18.

48. POTTER, *supra* note 23, at 7. The last recorded execution by burning of a woman was in 1789, for the offense of petty treason. “From then on women would receive the same deserts as men, and be hanged.” *Id.*

49. BLOCK & HOSTETTLER, *supra* note 15, at 30.

The Murder Act 1752 . . . encouraged judges to order the use of the gibbet, until then not recognized by statute, in which many tar-soaked bodies were publicly exhibited in iron cages, often for months, as a grisly warning to the lower orders. Sometimes the cages would be hung on posts 30 feet high and spiked with thousands of nails to prevent the recovery of the bodies by relatives under cover of darkness. Following the 1752 Act, at Newgate after an execution the body would be taken to “The Kitchen” where it was put into a cauldron of boiling pitch prior to being placed in chains described as its “last suit.” It was then gibbeted.

Id. Gibbeting would not be abolished until 1834. POTTER, *supra* note 23, at 74.

50. POTTER, *supra* note 23, at 7–8.

51. *Id.* at 19.

52. *Id.*

53. *Id.* at 44.

54. BLOCK & HOSTETTLER, *supra* note 15, at 66; Bailey, *supra* note 43, at 312.

55. BLOCK & HOSTETTLER, *supra* note 15, at 28.

terror in the minds of the people watching, although it sometimes produced the opposite effect.⁵⁶

Criminals awaiting the gallows had various reactions to their impending fate: while some “flaunted their defiance and dressed as if on the way to a wedding,” others were not so brave.⁵⁷ In one case, Walter Moore, convicted of a domestic murder and sentenced to death, was dissatisfied with his trial and did not follow the usual routine of admitting his sins and “finding God” before execution.⁵⁸ On the eve of his execution, Moore climbed up a water closet and “plunged head first into a cistern a little more than a yard deep,” preferring suicide to judicial execution. After a three day investigation, the chaplain in charge of Moore was severely reprimanded because he allowed suicide to “compound[, rather than judicial sacrifice [to] expiate[, [Moore’s] sin.”⁵⁹ Due to this affair, “[t]he gallows had been cheated of its prey.”⁶⁰

Around 1760, a new method of hanging was introduced—the long drop technique.⁶¹ This refinement made executions more efficient and more humane by making death supposedly instantaneous—death being by broken neck instead of asphyxiation. This technique placed the criminal on top of a trap door on a scaffold, and when the trap door opened below, the criminal fell a predetermined length, based on his weight, thus breaking

56. *Id.* at 30 (the public execution “often provoked a self-protective reaction of irreverence and defiance in the watching crowds”).

57. *Id.* at 29.

58. POTTER, *supra* note 23, at 49–50.

59. *Id.* at 50.

60. *Id.* This incident is similar to a case in the United States. In 1999, the State of Washington attempted to seek the death penalty for inmate Mitchell Rupe for a third time:

For Thurston County prosecutors, it simply doesn’t matter how Mitchell Rupe dies—just so long as he does. That’s why the county is pressing ahead with its efforts for a third sentencing hearing for Rupe, who has twice escaped death penalties on appeal for the 1981 slaying of two Tumwater, Thurston County, bank tellers during a robbery. Rupe’s attorneys find the process unseemly at best, and downright bizarre at its worst. Rupe, originally saved from the gallows by his obesity, now is dying of liver disease. Indeed, says Olympia defense lawyer Roger Hunko, Washington has put forth “Herculean efforts” to save Rupe from a natural death just so it can kill him. Rupe has been the beneficiary of medical treatments that have slowed the liver disease that was so serious two years ago that doctors then predicted he would not live 18 months.

Mike Carter, *Elusive Inmate Targeted for Execution—Again*, SEATTLE TIMES, Mar. 12, 1999, at B1. Rupe was sentenced to be hanged, since at the time of his conviction, hanging was the only method of execution in Washington. *Id.* A year later, after his third sentencing trial, Mitchell Rupe was given a sentence of life imprisonment after one juror refused to vote for a death sentence. Nancy Bartley, *Rupe Spared Death Penalty for Final Time 1 Juror Holds Out for Life Term for the Killer of Two Bank Tellers*, SEATTLE TIMES, Mar. 11, 2000, at A1. In 2006, Rupe died in prison at the age of fifty-one. Jennifer Sullivan & Maureen O’Hagan, *Convicted Killer Dies in Prison: Rupe Originally Sentenced to Death but Court Ruled He Was Too Heavy to be Hanged*, SEATTLE TIMES, Feb. 8, 2006, at B3. Once again, the “gallows had been cheated of its prey.”

61. POTTER, *supra* note 23, at 72.

his neck. This method of execution would be used in England until the death penalty was abolished.⁶²

2. *Juveniles and the Death Penalty*

Throughout early British history, children under seven years old could not receive the death penalty since they were thought too young to distinguish right from wrong. Children between seven and fourteen could only be executed if malice was proved. However, children over the age of fourteen were treated as adults and could be executed under the law.⁶³

Although children under fourteen could be sentenced to death, this sentence was rare and when given, was usually followed by a reprieve. Only one person under the age of fourteen was executed in England in the nineteenth century, a thirteen-year-old for murder in 1831.⁶⁴ In 1833, a fourteen-year-old was hanged for stealing, the last juvenile executed in England until the death penalty was abolished for children under sixteen by the Children Act of 1908.⁶⁵ After 1887, it was standard practice in England to grant a reprieve to those under eighteen.⁶⁶ The Children Act of 1908 and the Children and Young Persons Act of 1933, which abolished the death penalty for all persons under eighteen, codified what had been the practice in England since the beginning of the twentieth century.⁶⁷

A number of attempts were made to abolish the death penalty for persons under twenty-one. One of those attempts, a 1948 amendment made in the House of Commons to raise the minimum age for the death penalty, was quickly withdrawn for lack of support.⁶⁸ The 1948 amendment was introduced in response to a 1930 report of the select committee, which stated that if Parliament decided to maintain the death penalty, “no-one

62. BLOCK & HOSTETTLER, *supra* note 15, at 36–37. This technique would be further refined throughout the years of hanging and the following procedure became commonplace:

At each prison, the engineer, who looked after the scaffold and its equipment, handed the executioner details of the condemned man’s height and weight. Tables were provided by the Home Office which calculated the drop needed based on the condemned man’s size, but the final decision was the executioner’s.

When the drop was correct the neck was broken cleanly and death, or at least unconsciousness, was instantaneous. If the drop was too short the neck would not break and the man would be strangled; too long and the head would be torn off. Most drops were about six feet. Before the precise length of the drop was decided the executioner would need to view the prisoner.

Id. at 13.

63. *Id.* at 22; POTTER, *supra* note 23, at 6–7.

64. POTTER, *supra* note 23, at 7.

65. *Id.*; *see also* Children Act, 1908, 8 Edw. 7, c. 67 (Eng.).

66. POTTER, *supra* note 23, at 109; Bailey, *supra* note 43, at 305 n.1.

67. POTTER, *supra* note 23, at 109; Bailey, *supra* note 43, at 305 n.1; *see also* Children and Young Persons Act, 1933, 23 Geo. 5, c. 12 (Eng.).

68. BLOCK & HOSTETTLER, *supra* note 15, at 113.

should be sentenced to death below the age of 21, the age of full responsibility.”⁶⁹

During the eighteenth, nineteenth, and early twentieth centuries, ninety percent of convicts executed were under the age of twenty-one.⁷⁰ However, by the 1930s, persons under twenty-one were rarely executed. Between 1926 and 1931, only one person under twenty-one was executed.⁷¹ Despite this trend not to execute those under twenty-one, the minimum age of hanging was never raised after 1933 and remained at eighteen until the death penalty was completely abolished.

3. *Dickens and the Prohibition of Public Hanging*

In 1840, a man went to see the hanging of Francois Courvoisier, “one of the most celebrated murderers of the time,” outside Newgate Gaol in London.⁷² Watching the hanging from above in a private balcony, this man later described the incident as void of emotion: “No sorrow, no salutary terror, no abhorrence, no seriousness, nothing but ribaldry, debauchery, levity, drunkenness and flaunting vice in 50 other shapes. I should have deemed it impossible that I could have ever felt any large assemblage of my fellow-creatures to be so odious.”⁷³ He was disgusted with what he saw, but this did not keep him away from other public hangings.⁷⁴ Five years later he witnessed a beheading in Rome⁷⁵ and in 1849 another hanging in London.⁷⁶ This man, Charles Dickens, would later become a major proponent for the prohibition of public executions.⁷⁷

69. *Id.* at 93. This was not the main finding of the report, though—the under twenty-one finding was only conditional on Parliament retaining the death penalty. *Id.* The report gave three other conditional recommendations: the insanity rules should be revised, the death penalty should apply equally to women as to men, and the royal prerogative of mercy should be extended. *Id.* The definite recommendations of the committee were that the death penalty should be abolished for an experimental period of five years during peace time and that life imprisonment should be substituted as punishment. *Id.* at 94. The fact of Parliament’s compromise in 1933 in view of the 1930 report, abolishing the death penalty for those under eighteen in the Children and Young Persons Act, was only a minor victory for abolitionists since no juvenile had been executed in England for some time. *Id.* at 98.

70. POTTER, *supra* note 23, at 7. In fact, in 1785 it was stated that “out of every 20 offenders executed in London, 18 were under the age of 21.” BLOCK & HOSTETTLER, *supra* note 15, at 23.

71. BLOCK & HOSTETTLER, *supra* note 15, at 97.

72. POTTER, *supra* note 23, at 64. The site for hangings in London was moved from Tyburn Tree to outside Newgate Gaol in 1783, where public executions would be performed until 1868. BLOCK & HOSTETTLER, *supra* note 15, at 28.

73. BLOCK & HOSTETTLER, *supra* note 15, at 60.

74. *Id.*; see also POTTER, *supra* note 23, at 66.

75. POTTER, *supra* note 23, at 66.

76. BLOCK & HOSTETTLER, *supra* note 15, at 60. “It looks as though Dickens himself was one of those attracted to the sight of seeing people hang, and at the same time repelled by his own fascination.” POTTER, *supra* note 23, at 70.

77. BLOCK & HOSTETTLER, *supra* note 15, at 60. William Thackeray (another British literary legend) was also present at this same execution and would later write the essay *Going to See a Man*

Although Dickens did not necessarily believe the death penalty should be abolished, he strongly favored private executions.⁷⁸ His beliefs were not the result of sympathy for the criminal,⁷⁹ but due to the effect public executions had on the general population.⁸⁰ Dickens argued that public hangings did not have a deterrent effect on criminals, but in fact had a brutalizing effect on society:

Present this black idea of violence to a bad mind contemplating violence; hold up before a man remotely compassing the death of another person, the spectacle of his own ghastly and untimely death by man's hands; and out of the depths of his own nature you shall assuredly raise up that which lures and tempts him on.⁸¹

This brutalization theory was backed up by several reports saying that the most regular attendees of public executions were thieves and felons.⁸² In one report from a prison chaplain who had talked to 167 criminals awaiting the gallows, only three were found to not have attended a previ-

Hanged as a result of his outrage and revulsion with what he witnessed. POTTER, *supra* note 23, at 64–65.

78. BLOCK & HOSTETTLER, *supra* note 15, at 61. In 1845, Dickens wrote advocating the “total abolition of the Punishment of Death, as a general principle, for the advantage of society, for the prevention of crime, and without the least reference to, or tenderness for any individual malefactor whatever.” POTTER, *supra* note 23, at 67.

79. *Id.* at 77. Dickens was quick to dissociate himself with people who were “soft” on criminals. *Id.* He believed that one “danger of hanging or at least of public hanging was that it engendered pity for those who were contemptible.” *Id.*

80. *Id.* at 66. Writing about public executions, Dickens said that the hangings themselves were worse than the crimes committed: “[I]t was so loathsome, pitiful, and vile a sight, that the law appeared to be as bad as he, or worse.” *Id.*

81. *Id.* at 69. A brutalization effect is also discussed regarding the death penalty in the United States. In a study done by Joanna M. Shepherd, published in 2005, she found that whether capital punishment produces a deterrent or brutalization effect depends on how many executions are performed in the state—few executions and the murder rate either stays the same or increases, but when the number of executions reaches nine, the murder rate decreases. Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 240 (2005). She writes:

It has been theorized that executions might increase murder, not deter them, and that the brutalization effect is the consequence of the beastly example that executions present. Executions devalue human life and “demonstrate that it is correct and appropriate to kill those who have gravely offended us.” Thus, the lesson taught by capital punishment may be “the legitimacy of lethal vengeance, not of deterrence.”

My results suggest that a substantial brutalization effect is generally present after an execution, regardless how many executions the state has already conducted recently.

Id. Shepherd further states that in Oregon, results indicated that a single execution induced 175 murders. *Id.* at 241; *see also* Frederick C. Millett, Part II: Practical Reasons, Apr. 8, 2002, <http://www.msu.edu/~millett/DeathPenalty/practical.html> (discussing a brutalization effect for the death penalty found in Oklahoma, Texas, and California).

82. They were “‘drawn by a fascination or attraction for scenes of blood, or strong excitement.’ They came ‘to see their late associates die, as they call it, manfully, and to learn how to die in like manner themselves.’” POTTER, *supra* note 23, at 69.

ous public execution.⁸³ For these reasons, Dickens argued for private executions, since the “issue now was how to refine capital punishment, not how to abolish it.”⁸⁴

Others did not agree with Dickens. Retentionists thought public hangings were a deterrent to murder and could ensure “useful terror and a convenient humility.”⁸⁵ Abolitionists preferred total abolition of the death penalty instead of the switch to private executions, thinking that private executions would jeopardize total abolition and cause the abolitionist movement to lose steam.⁸⁶

Because of this controversy, the House of Lords appointed a select committee in 1856, which recommended private executions.⁸⁷ The Royal Commission on Capital Punishment (1864–1866) was appointed by the government in 1864 after public pressure increased, which again recommended private executions.⁸⁸ Public executions were finally prohibited in 1868.⁸⁹

C. Early Attempts to Abolish the Death Penalty

The abolition of capital punishment in England is a story of adversity, of overcoming centuries of tradition, as well as centuries of thought about religion, retribution, and deterrence. It is a story about a slow reform of criminal justice—reform that would take many years, many governments, and many attempts in Parliament to change. But most importantly, this is a story about a few men who believed that change could be made—a few men, who rose up outnumbered, against public opinion, and made it their mission to abolish capital punishment in England. It would take many years and many failures, but these men would eventually reach their goal.

83. *Id.* In other reports, a governor of Newgate said that “in his fifteen years experience he had never known but one criminal hanged for murder who had not witnessed an execution.” *Id.* Another person reported that out of forty men executed at Winchester Gaol, thirty-eight of them had previously attended an execution. *Id.*

84. *Id.* at 79.

85. BLOCK & HOSTETTLER, *supra* note 15, at 61.

86. POTTER, *supra* note 23, at 78. Roger Hood says the following about this theory:

The question of right of access . . . has provoked considerable controversy. Indeed, some advocates of abolition believe, just as abolitionists in Britain believed when the Capital Punishment within Prisons Act was passed in 1868, that it would speed the cause of abolition if the general public were to be allowed to witness what was being done in their name: the cold and deliberate judicial execution of an offender. This view has recently received the imprimatur of a leading campaigner for abolition in the United States, Professor Austin Sarat. . . . But, as David Garland has pointed out, one cannot think of anywhere in the world where such shock tactics have worked.

ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 103 (3d ed. 2002).

87. BLOCK & HOSTETTLER, *supra* note 15, at 61.

88. *Id.* at 63.

89. *Id.* at 73–74.

1. 1868–1918: A Time of Little Progress

The story of abolition got off to a slow start in the twentieth century, with little progress after public hangings were prohibited in 1868. The other finding of the royal commission in 1864 that recommended private executions, was to divide murder into degrees—where only the most egregious murderers would receive death—all others would get life imprisonment. Several attempts in Parliament to divide murder into degrees in the late nineteenth century failed.⁹⁰ One event of importance during this period was the formation of a new political party, the Labour Party in 1906—which would become the principal opponent to the Conservative Party, especially on the issue of capital punishment.⁹¹ Little happened during the First World War—with millions of men dying in the battlefield, no one cared about a few criminals per year being hanged.⁹²

2. The Report Between the Wars

After World War I, the issue of capital punishment took center stage with the first Labour governments of the 1920s.⁹³ In 1928, a bill to abolish the death penalty was introduced in the House of Commons and was carried to a second reading by a vote of 119–118.⁹⁴ This led to a select com-

90. POTTER, *supra* note 23, at 97; Bailey, *supra* note 43, at 307.

91. Bailey, *supra* note 43, at 307.

92. *Id.*; see also POTTER, *supra* note 23, at 120.

93. Bailey, *supra* note 43, at 307.

94. *Id.* at 314; see also BLOCK & HOSTETTLER, *supra* note 15, at 90–91. It might be worthwhile here to explain a little bit about the structure of government in England:

The business of Parliament takes place in two Houses: the House of Commons and the House of Lords. Their work is similar: making laws (legislation), checking the work of the government (scrutiny), and debating current issues. . . . Generally, the decisions made in one House have to be approved by the other. In this way the two-chamber system acts as a check and balance for both Houses. . . . The Commons is publicly elected. The party with the largest number of members in the Commons forms the government. Members of the Commons (MPs) debate the big political issues of the day and proposals for new laws. It is one of the key places where government ministers, like the Prime Minister and the Chancellor, and the principal figures of the main political parties, work. . . . Members of the House of Lords are mostly appointed by the Queen, a fixed number are elected internally and a limited number of Church of England archbishops and bishops sit in the House. The Lords acts as a revising chamber for legislation and its work complements the business of the Commons. The House of Lords is also the highest court in the land: the supreme court of appeal. A group of salaried, full-time judges known as Law Lords carries out this judicial work.

UK Parliament—The Two-House System, <http://www.parliament.uk/about/how/role/system.cfm> (last visited Feb. 19, 2007); see also UK Parliament—Acts, <http://www.parliament.uk/about/how/laws/acts.cfm> (last visited Feb. 19, 2007) (“An Act of Parliament creates a new law or changes an existing law. An Act is a Bill approved by both the House of Commons and the House of Lords and formally agreed to by the reigning monarch (known as Royal Assent). Once implemented, an Act is law and applies to the UK as a whole or to specific areas of the country.”). For more information on British Parliament, visit <http://www.parliament.uk/>.

mittee⁹⁵ appointment in 1930 to consider the issue of abolishing the death penalty in England. The committee, in a controversial report, recommended the abolition of the death penalty for a temporary period of five years.⁹⁶ However, the only immediate parliamentary responses to the report were the Sentence of Death (Expectant Mothers) Act of 1931, abolishing the death penalty as a punishment for pregnant women, and the Children and Young Persons Act of 1933, abolishing the death penalty for those under eighteen. The report recommended, in the least, to raise the minimum age for the death penalty to twenty-one and impose it equally to women as to men; however none of these recommendations were taken.⁹⁷

In 1938, a motion to consider legislation to abolish the death penalty in the House of Commons was passed, by a vote of 114–89, but with “the onset of war less than a year away and the change of government to a national coalition, the Bill progressed no further.”⁹⁸ An amendment to the Criminal Justice Bill of 1938 was then proposed, but it did not get past committee. A poll taken at about the same time suggested that public opinion was split on the death penalty debate. The poll showed that forty-nine percent wanted the death penalty retained, forty percent wanted it abolished, while eleven percent were undecided. However, with the start of the Second World War, no further action was taken for some time.⁹⁹

3. *Silverman's First Attempt to Abolish*

After World War II, there was “a floodtide of popular support for a juster, more humane society.”¹⁰⁰ In fact, this was the opinion throughout Europe. The death penalty was abolished in Italy in 1944 and in Germany in 1949—due in large part to the grief and horror caused by the governments in those countries during the war.¹⁰¹

In 1945, the first Labour government with a majority in Parliament was elected and in 1947, the Criminal Justice Bill, which was originally debated before the war, was reintroduced in the Commons.¹⁰² Sydney

95. “Select Committees work in both Houses. They check and report on areas ranging from the work of government departments to economic affairs. The results of these inquiries are public and many require a response from the government. . . . There is a Commons Select Committee for each government department, examining three aspects: spending, policies and administration.” UK Parliament—Select Committees, <http://www.parliament.uk/about/how/committees/select.cfm> (last visited Feb. 19, 2007).

96. BLOCK & HOSTETTLER, *supra* note 15, at 93–94.

97. *Id.*

98. *Id.* at 100.

99. BLOCK & HOSTETTLER, *supra* note 15, at 100; POTTER, *supra* note 23, at 141.

100. Bailey, *supra* note 43, at 307.

101. HOOD, *supra* note 86, at 23.

102. BLOCK & HOSTETTLER, *supra* note 15, at 109–10; Bailey, *supra* note 43, at 307.

Silverman¹⁰³ proposed inserting a clause to the bill, which would suspend the death penalty for five years.¹⁰⁴ Around this time, public opinion polls showed a high percentage of the population supported capital punishment—sixty-nine percent agreed that hanging should be retained for murder.¹⁰⁵ Nonetheless, the Criminal Justice Bill was passed by a free vote¹⁰⁶ in the Commons, with the clause to abolish the death penalty passing by a vote of 215–74.¹⁰⁷ When the bill went to the Lords, however, it met strong resistance, and the amendment to abolish the death penalty was rejected by a vote of 181–28.¹⁰⁸

Silverman's first attempt failed; as a compromise, the government set up a royal commission to research the issue, but limited the scope of the commission's inquiries solely to modifications of the death penalty.¹⁰⁹ However, while the commission was sitting, three controversial executions in a span of seven years changed the debate on capital punishment.

103. Lord Callaghan, *Foreword* to BLOCK & HOSTETTLER, *supra* note 15, at vii (“The undoubted hero of the campaign was Sydney Silverman—small in stature, uptilted head, erect carriage, a quick pattering footstep and a prominent pointed beard which was almost a weapon in itself. In the Commons he always perched himself (perched is the word) on the corner seat just below the gangway adjoining the Government Front Bench, his feet hardly touching the ground. From that advantageous position he was always ready to jump to his feet at any moment. He was fearless in the face of hostility, of which there was plenty, and coupled this with great skill as a Parliamentarian and with considerable legal knowledge and practical experience, brought from his profession as a solicitor. He carried a formidable armoury that convinced many of us just back from the war in the late 1940s that hanging should go.”).

104. BLOCK & HOSTETTLER, *supra* note 15, at 109–10.

105. POTTER, *supra* note 23, at 145; Bailey, *supra* note 43, at 328.

106. “If a free vote is announced, MPs and Members of the Lords are allowed to vote as they wish and are not controlled by the parties’ whips.” UK Parliament—Glossary: Parliamentary Jargon Explained, http://www.parliament.uk/about/glossary.cfm?ref=freevot_4177 (last visited Oct. 10, 2007). “Whips are MPs or Lords appointed by each party in Parliament to help organise their party’s contribution to parliamentary business. One of their responsibilities is making sure the maximum number of their party members vote, and vote the way their party wants.” See UK Parliament—Whips, <http://www.parliament.uk/about/how/principal/whips.cfm> (last visited Oct. 10, 2007).

107. BLOCK & HOSTETTLER, *supra* note 15, at 114. During the debates in the Commons, the events/experiences of World War II were at the forefront of discussion. Retentionists based their arguments on the Nuremberg trials, “if it was morally right to hang war criminals, then it was right to use the death penalty for murderers at home.” Bailey, *supra* note 43, at 333. Abolitionists countered this argument with one of their own: “‘It is not insignificant,’ said Elwyn Jones, who had been a member of the prosecution team at Nuremberg, ‘that one of the first acts of the Nazi Government was to restore the death penalty. . . . Our democracy is a democracy that does not need the terror of the death penalty.’” *Id.* at 333–34. “[T]he capital punishment debate in 1948 had a strong moral tone, whether retributive or humanitarian in sentiment.” *Id.*

108. BLOCK & HOSTETTLER, *supra* note 15, at 119; Bailey, *supra* note 43, at 340.

109. BLOCK & HOSTETTLER, *supra* note 15, at 122.

D. *The Trilogy: "Evans-Bentley-Ellis"*¹¹⁰

The 1950s was a critical decade for the death penalty in England. Not only was significant progress made in Parliament for abolition, but three sensational murder cases shocked the public conscience and changed the attitudes of many politicians.¹¹¹ Each of these three cases raised a different problem with capital punishment. Timothy Evans was possibly executed for a crime he did not commit. However, in the other cases, guilt was not a question. Derek Bentley and Ruth Ellis were both guilty of the crime they committed—the question was whether the punishment of death was too severe.

1. *Timothy Evans*

In December 1949, Beryl Evans and her baby daughter, Geraldine, were found strangled at 10 Rillington Place in London.¹¹² The prime suspect, who was later convicted for the murder of his daughter,¹¹³ was Timothy Evans, Beryl's husband. Evans was convicted and sentenced to death based primarily on his confession,¹¹⁴ his testimony,¹¹⁵ and the testimony of

110. See *id.* at 164 ("The night before the scheduled execution police reinforcements were called to control the crowds outside Holloway gaol who were 'demanding to see' Ruth Ellis, and a further petition had been presented to the home secretary signed by 35 members of the London County Council. One section of the crowd began chanting 'Evans-Bentley-Ellis' and the chorus was taken up by all those watching, which indicated that the public were realising that some executions were unjust and possibly that they should be done away with altogether. The crowd did not disperse until 11.30 p.m. and Ruth Ellis was duly hanged at 9 a.m. next morning.").

111. James B. Christoph, *Capital Punishment and British Party Responsibility*, 77 POL. SCI. Q. 19, 26 (1962).

112. BLOCK & HOSTETTLER, *supra* note 15, at 143.

113. Evans was only tried for the death of his daughter, "for under English law even if a man has been committed for trial on more than one charge of murder he is only tried for one such offense at a time." F. Tennyson Jesse, *Introduction to TRIALS OF EVANS AND CHRISTIE*, at lvi (F. Tennyson Jesse ed., 1957). "The Prosecution had decided to proceed only with the charge concerning the baby Geraldine. The assumption was that for the murder of Beryl Evans there might have been provocation, whereas the murder of a helpless baby could have no excuse." *Id.* at xxi. This would be an important point in the later debates of Evans's innocence, since John Christie would later admit to murdering Beryl Evans, but not the child. BLOCK & HOSTETTLER, *supra* note 15, at 144–45.

114. See Jesse, *supra* note 113, at xvii ("Evans up till then had shown no emotion, no signs of distress, but, with the two piles of familiar clothing at his feet, he stared and the tears came into his eyes and he picked up the tie. Mr. Jennings went on: 'Later to-day I was present at Kensington Mortuary when it was established that the cause of death was strangulation in both cases. I have reason to believe you were responsible for their deaths.' Without any hesitation, Evans said 'Yes.' Then he started to pour out a confession. It was as though he said to himself: 'Oh well, they are on to me, the game is up.' With the air of getting something off his chest with enormous relief he confessed to both murders.").

115. See *Id.* at xxiv ("Timothy Evans was the sole witness called for the Defence. He was most patently a liar, and though lying does not establish that a man is a murderer it does add to the difficulties of establishing that he is not a murderer. I have seen innocent people save themselves in the box and guilty men hang themselves. Innocent or guilty, Evans hanged himself.").

John Christie, his neighbor at 10 Rillington Place.¹¹⁶ Three years after the execution of Evans, Christie was found to be a serial murderer. He was convicted of murdering his wife and five other women both before and after the deaths of Beryl and Geraldine Evans.¹¹⁷

On November 30, 1949, Timothy Evans walked into the police station at Merthyr Vale in South Wales and told the detective that he had “disposed” of his wife and “put her down the drain.”¹¹⁸ This was only the first of many lies Evans would tell the police.¹¹⁹ When the London police went to 10 Rillington Place, they did not find any body in the drain and found it impossible for one person to lift the manhole—it took three police officers to do it that night.¹²⁰ When told that the body was not there, Evans then said he was protecting “a man called Christie.”¹²¹

In Evans’s second statement he told the detective that he talked to his neighbor, John Christie, about his wife wanting an abortion. Christie told Evans that he could perform a procedure because he was training to be a doctor before the war. When Evans got back from work the next day, Christie met him and said: “It’s bad news. It didn’t work.” Christie then showed the body of Beryl to Evans, and told Evans that he would get rid of the body for him. The next day, Christie told Evans that he knew of a couple that could look after his baby, Geraldine, for him and that they would take the baby away in a few days.¹²² He would later correct this second statement and say that he helped Christie remove Beryl’s body from the apartment.¹²³

On December 2, London police searched the premises of 10 Rillington Place and found the bodies of Beryl and Geraldine Evans in a wash-house in the backyard. The police again questioned Evans, told him the bodies were found, and showed him the clothes of his wife and daughter. He then confessed to both murders and told the police that he lost his temper, strangled his wife and daughter, and hid both bodies in the wash-house.¹²⁴

Evans’s trial began on January 11, 1950 for the murder of his daughter, Geraldine.¹²⁵ The main witness for the prosecution was Christie; the only

116. *Id.* at xxi (“The chief witness for the Prosecution was Mr. John Reginald Halliday Christie and, without waiting for his character to be impugned, the unusual course was taken by Counsel for the Crown of presenting Christie immediately to the jury as a man who had done honour both to the Army and the Police Force, a man to be trusted.”).

117. *Id.* at lviii.

118. *Id.* at viii.

119. *Id.* at ii.

120. *Id.* at x.

121. *Id.*

122. *Id.* at x–xii.

123. *Id.* at xiv.

124. *Id.* at xv, xvii.

125. *Id.* at xxi.

witness for the defense was Evans. Evans reverted back to his second statement and implicated Christie at trial—the jury had to decide whether to believe Evans, who had lied so often that no one could know if he was telling the truth, or Christie, who had a criminal record twenty years ago, but had “done honour both to the Army and the Police Force” since that time.¹²⁶ Malcolm Morris, Evans’s counsel, had the impossible task of pinning the murder on Christie at trial,¹²⁷ but in the end the jury chose to believe Christie and found Evans guilty of murder on January 13.¹²⁸ Evans was hanged on March 9, 1950.¹²⁹

On March 24, 1953, over three years after Evans was hanged, the body of Mrs. Christie was found at 10 Rillington Place along with three other

126. *Id.* Christie had, in fact, been convicted four times in the 1920–30s for offenses of dishonesty—for stealing postal orders in 1921, for false pretenses in 1923, for stealing material and goods in 1924, and for stealing a motor car in 1933. He was also convicted and imprisoned six months for a malicious wounding charge in 1929. However, all these offenses occurred nearly twenty years earlier. TRIALS OF EVANS AND CHRISTIE 38–39 (F. Tennyson Jesse ed., 1957). More importantly, Christie served in the army in World War I and, since those charges, served in the War Reserve Police for many years during World War II and was commended on two occasions. *Id.* at 40.

127. The following critical (and ironic) exchange took place during Evans’s cross-examination by prosecutor Christmas Humphreys during his trial:

MR. HUMPHREYS: [questioning Evans about Christie] And therefore you make an allegation in terms through your counsel against a perfectly innocent man that he caused the murder—

MR. MALCOLM MORRIS: Well, my lord, is that the proper way of asking the question, with the greatest respect?

MR. JUSTICE LEWIS: Presumably it was done on his instructions, Mr. Morris.

MR. MALCOLM MORRIS: Yes, certainly, my lord; this witness now says that he was not responsible for the murder of his wife and his child, and my learned friend says, “Therefore you make an allegation against a perfectly innocent man.” My learned friend has no right to say that.

MR. JUSTICE LEWIS: He wishes to know whether or not it was owing to his being upset he was making an allegation against an innocent man.

MR. MALCOLM MORRIS: My lord, it was nothing of the kind.

MR. JUSTICE LEWIS: Well, the jury can judge as to that. They have listened to your cross-examination of Mr. Christie, and if they think that is not a suggestion that Mr. Christie murdered the wife and the daughter I do not know what is.

MR. MALCOLM MORRIS: Of course, it is, and I hope I never shirk any issue of that sort; but for my learned friend to say now, “You make an allegation against a perfectly innocent man,” can only be a question which is based on the assumption that his witness is innocent and my witness is not. My friend has no right to incorporate that into a statement. He can say, “And now you make an allegation that Mr. Christie had done it,” but he cannot describe Mr. Christie as a perfectly innocent man.

MR. JUSTICE LEWIS: Why not?

MR. MALCOLM MORRIS: Well, it can only be done for the purpose of prejudice, in my submission.

MR. HUMPHREYS: I crave leave not to have to believe that everything the accused says is true.

Id. at 76–77. Morris definitely had the evidence stacked against him to try and convince a jury that Evans was innocent.

128. Jesse, *supra* note 113, at xxviii.

129. *Id.* at xxx.

bodies.¹³⁰ All four women were strangled.¹³¹ Later, two more skeletons were found buried in Christie's garden—their deaths dating back to before Beryl and Geraldine's deaths.¹³² The main suspect was John Christie.¹³³

Christie's trial began on June 22, 1953. It "lasted four days and it was interesting simply because it was unexampled in the history of British crime."¹³⁴ His defense was Guilty but Insane, and although he was only being tried for the murder of his wife, his defense attorney attributed every murder to Christie.¹³⁵ Christie testified to murdering Beryl Evans, but never admitted to killing the child.¹³⁶ On June 22, 1953, Christie was found guilty but *not* insane and sentenced to death; he did not appeal his conviction.¹³⁷

Shortly after Christie's trial ended, an unease which had been creeping up since all the bodies were found at 10 Rillington Place about a possible miscarriage of justice took center stage.¹³⁸ Home Secretary Sir David Patrick Maxwell Fyfe¹³⁹ appointed John Scott Henderson to review the evidence from the two cases and write a report. This controversial report was written in less than two weeks, was referred to as "unsatisfactory,"¹⁴⁰ "official whitewashing,"¹⁴¹ and "carried little conviction with the educated public."¹⁴² Henderson concluded that no doubt existed as to the guilt of Timothy Evans and that Evans was responsible for both the deaths of Beryl and Geraldine.¹⁴³

Very few people believed this report and it only caused more debate and unrest about Evans's execution.¹⁴⁴ It took many years before the Brit-

130. *Id.* at xxxiv–xxxv.

131. *Id.*

132. *Id.* at xxxviii–xxxix.

133. *Id.* at xxxix.

134. *Id.* at lvi; *see also* BLOCK & HOSTETTLER, *supra* note 15, at 144.

135. Jesse, *supra* note 113, at lvi–lviii.

136. BLOCK & HOSTETTLER, *supra* note 15, at 144–45.

137. Jesse, *supra* note 113, at lxiv.

138. *Id.* at lxv.

139. "The nearest thing to death in life" as the jingle went, probably because of his strong pro-death penalty stance. POTTER, *supra* note 23, at 167. Fyfe was also home secretary (the Secretary of State for the Home Department, responsible for internal affairs including the criminal justice system) when Derek Bentley was executed, the man "who had let the law take its course" with Bentley, and who believed that Timothy Evans was guilty despite all the evidence showing otherwise. BLOCK & HOSTETTLER, *supra* note 15, at 154; POTTER, *supra* note 23, at 201. Later, as Lord Kilmuir, he was instrumental in the House of Lords defeating numerous bills from the Commons that would have abolished the death penalty. In 1965, he opposed the Murder (Abolition of Death Penalty) Bill in the Lords and debated heavily against it becoming law. BLOCK & HOSTETTLER, *supra* note 15, at 246.

140. *Id.* at 148.

141. Jesse, *supra* note 113, at lxvii.

142. POTTER, *supra* note 23, at 167.

143. Jesse, *supra* note 113, at lxvii.

144. BLOCK & HOSTETTLER, *supra* note 15, at 148 ("It is possible that if Scott Henderson had had more time the report would have been more thorough but the main criticism was that even on the evi-

ish government admitted there was a problem with the Evans case. In November 1965, a new inquiry was opened and an October 1966 report concluded that Evans probably murdered his wife, but not his baby. This report was referred to as “scarcely credible” since Evans was not even tried for the murder of his wife.¹⁴⁵ Later in 1966, Evans received a posthumous free pardon.¹⁴⁶

Was Evans innocent? Sir David Maxwell Fyfe thought it impossible that an innocent man could be hanged.¹⁴⁷ Chuter Ede,¹⁴⁸ the home secretary during Evans’s trial and execution, who decided not to give Evans a reprieve, thought it not only possible, but that Evans and other innocent people had been executed.¹⁴⁹ It is hard to believe that there could be two murderers who lived in the same house at the same time who killed in the same identical way, but then again, it is also hard to believe that Evans was completely innocent.¹⁵⁰ The British public and politicians were more concerned with the fact that a miscarriage of justice *could* happen. The case against Evans during his trial was overwhelming, yet because of facts discovered years later, it is very probable that Evans did not murder his wife and child.

2. Derek Bentley

While the case of Evans was a potential failure of the British court system, the case of Bentley was a failure of the government reprieve system.¹⁵¹ Bentley was guilty, but his crime did not deserve death.¹⁵²

dence that Scott Henderson had accumulated in the time available he had come to some bizarre conclusions. Also, he did not seem to have addressed the possibility that if Christie had been lying at Evans’ trial—he had, after all, strangled at least six women and had a considerable criminal record—then Evans may have been telling the truth.”)

145. *Id.* at 154–55.

146. *Id.* at 155.

147. *Id.* at 154.

148. See Bailey, *supra* note 43, at 331 (“Ede was a moderate, cautious, and practical politician, certainly no innovator, and, as such, likely to listen to his permanent officials. He tended to steer clear of controversy within the party, preferring the part of conciliator, and the capital punishment debate cannot have been to his liking. It is a telling point against him, moreover, that he was abolitionist both before and after his stint as home secretary, but retentionist when in office.”). After refusing to give Timothy Evans a reprieve, Ede became a staunch abolitionist. BLOCK & HOSTETTLER, *supra* note 15, at 154. He later said that he made a mistake in the Evans case and “hoped that no future home secretary would ever have to feel as he did: that he had done his best but had sent an innocent man to the gallows.” *Id.* at 162. Later, Lord Chuter Ede was instrumental in the vote in the House of Lords to abolish the death penalty. *Id.* at 246.

149. *Id.* at 154.

150. Jesse, *supra* note 113, at lxxx–lxxxii.

151. POTTER, *supra* note 23, at 168.

152. There was no question of his guilt during trial and afterwards; however, questions of a mistrial based on the inaccurate summing up by the judge to the jury would come up many years later. On appeal in 2001, the court found:

On November 2, 1952, policeman Sydney Miles was shot dead on the roof of a warehouse in London. Christopher Craig, age sixteen, and Derek Bentley, age nineteen, would later be convicted of the murder of Miles, although Craig was the only one to shoot.¹⁵³ The police were responding to a call from a neighbor who saw two suspicious young men climb over a gate and try to break in to a warehouse.¹⁵⁴

When the police arrived, the suspects were on the roof of the warehouse and the police had to climb up the warehouse to apprehend them. Detective Fairfax was the first one up and he rushed over and grabbed Bentley. Craig got away and Bentley allegedly yelled to Craig, "Let him have it, Chris," which was followed by Craig shooting at Fairfax and injuring him.¹⁵⁵ When more officers arrived on the roof, they asked Fairfax what kind of gun he thought Craig had—to which Bentley allegedly interjected: "He's got a .45 Colt and plenty of bloody ammunition, too" and "I told the silly bugger not to use it."¹⁵⁶ A few more police went up to the roof via an internal staircase and when they opened the door that led to the roof, Craig fired at them, hitting Miles between the eyes, killing him instantly. The police then took Bentley down the stairs, to which Bentley shouted: "They're taking me down, Chris." Craig fired once more and then jumped off the roof, fracturing his spine, breastbone, and left forearm.¹⁵⁷

At trial, Bentley and Craig were tried simultaneously for murder.¹⁵⁸ The prosecution's theory was that Bentley and Craig were on a joint venture; that Craig "deliberately and willfully murdered" Miles; that Bentley "incited Craig to begin the shooting; and, although technically under arrest at the time of the killing of Miles, was party to that murder and equally responsible in law."¹⁵⁹

For all the reasons given in this section of the judgment we think that the conviction of the appellant was unsafe. We accordingly allow the appeal and quash his conviction. It must be a matter of profound and continuing regret that this mistrial occurred and that the defects we have found were not recognised at the time.

R v. Bentley (Deceased), [2001] 1 Crim. App. 307, 332 (Eng.).

153. *Id.* at 308; BLOCK & HOSTETTLER, *supra* note 15, at 139–40.

154. *Bentley*, [2001] 1 Crim. App. at 310–11.

155. *Id.* at 311. There was some dispute at trial among the officers about how far away Craig was when he shot at Fairfax and how long a period elapsed after Bentley yelled "Let him have it, Chris" that Craig fired the gun. The time varied between a few seconds and a matter of minutes depending on the testimony. It was most likely under a minute. Craig was also most likely six feet away from Fairfax when firing the gun. *Id.* at 311–12.

156. *Id.* at 314.

157. *Id.* at 314–15.

158. *Id.* at 308–10.

159. *Id.* at 309. The judge's summing up on this law was:

[W]here two people are engaged on a felonious enterprise,—and warehouse-breaking is a felony—and one knows that the other is carrying a weapon, and there is agreement to use such violence as may be necessary to avoid arrest, and this leads to the killing of a person or

Craig insisted at trial that the killing of Miles was only an accident and that, although he fired his weapon, he only intended to scare the police, and thus should only receive a manslaughter charge, not murder.¹⁶⁰ However, under the doctrine of constructive malice (a few years later to be changed by the Homicide Act 1957), “malice aforethought sufficient to support a charge of murder was in certain circumstances imputed to a defendant who committed an act causing death in the course of committing a felony or when resisting an officer of justice.”¹⁶¹ This was one of those circumstances—the case against Craig was overwhelming and “any verdict other than guilty of murder in this case would have been perverse.”¹⁶² Craig was convicted of murder, but because he was only sixteen, was not sentenced to death.¹⁶³

Bentley’s case was a little more complicated. His use of the phrase, “Let him have it, Chris” was thought to be a “deliberate incitement to murder.”¹⁶⁴ However, he denied saying this and all other phrases at trial. He further said that he did not know Craig had a gun until the first shot was fired and did not know that they were going to break into a warehouse until Craig jumped over the gate. Finally, Bentley did not participate in the murder—he was in fact in the custody of the police when Craig shot Miles.¹⁶⁵ On the other hand, Bentley was found to have two knives in his

results in the killing of a person, both are guilty of murder, and it is no answer for one to say I did not think my companion would go as far as he had.

Id. at 328.

160. *Id.* at 309.

161. *Id.* at 327. Constructive malice is the equivalent of felony murder in the United States.

162. *Id.* at 309. Under constructive malice, even if Craig’s account was believed by the jury, he would still have no defense to murder. *Id.*

163. *Id.* at 308; see also Children and Young Persons Act, 1933, 23 Geo. 5, c. 12 (Eng.).

164. *Bentley*, [2001] 1 Crim. App. at 309. Similarly, in a case decided in 1940, *R v. Appleby*, (1940) 28 Crim. App. 1 (Eng.), the phrase “Let him have it” was used by the defendant before the other shot a police officer. *Bentley*, [2001] 1 Crim. App. at 312. The facts were eerily similar to the present case. In that case, the defendants were committing the same offense, warehouse-breaking, and were surprised by police officers. They attempted to escape, one of the defendants yelled “Let him have it,” and the other defendant killed one of the officers. The only distinguishable fact seemed to be that neither defendant was in custody of the police when the shot was fired. *Id.* at 329. This coincidence was brought up at trial, that the police made up the piece of evidence of Bentley saying, “Let him have it, Chris” based on the *Appleby* case. However, the court ruled that this was a common expression and there was no reliable evidence that the police were lying about that statement. *Id.* at 312.

Further, the 1991 British film, *Let Him Have It*, which gives a reasonably accurate description of the facts of the *Bentley* case, portrays the phrase “Let him have it” said by Bentley to mean that Bentley wanted Craig to let the policeman have the gun. There is no proof of this meaning of the phrase, but it does make for a good film. See *id.* at 313 (“[The phrase] could bear an innocent meaning, being an encouragement by the appellant to Craig to hand over his weapon. That is admittedly an improbable construction if it was said when the appellant moved away from D.C. Fairfax . . .”).

165. *Id.* at 310.

pockets,¹⁶⁶ more than likely knew that Craig had a gun,¹⁶⁷ and likely lied to the jury about his intentions.¹⁶⁸ On December 11, 1952, the jury found Bentley guilty of murder by joint venture and because he was over eighteen, he was sentenced to death.¹⁶⁹ The jury recommended mercy, but that was up to the current British Home Secretary, Sir David Maxwell Fyfe.¹⁷⁰

A few days later, Bentley appealed his conviction, arguing that the law on joint venture did not apply to him and that the judge's summing up was prejudicial to him.¹⁷¹ His appeal was dismissed on January 13, 1953¹⁷² and a week later, the home secretary announced that he would not give Bentley a reprieve, finding no sufficient grounds for one.¹⁷³ This decision created much public unrest. After Bentley's arrest, an IQ test revealed that he was "borderline feeble-minded" with a score of seventy-seven, he was said to be illiterate, and his mental age was much lower than his actual age.¹⁷⁴

Despite pleas for mercy and demonstrations outside Parliament,¹⁷⁵ Bentley was executed on January 28, 1953.¹⁷⁶ The public and politicians would not rest easy about this execution for over forty years—how could a

166. *Id.* at 316 ("Although he did not attempt at any time to make use of either of the weapons, his possession of them coupled with the decidedly feeble explanations for such possession could well have persuaded the jury that the pair of them had had violence in mind that night.").

167. *Id.* at 313.

168. *Id.* at 316 ("The appellant faced the problem that the jury was likely to find that he had told some lies. His evidence that he was wholly unaware that Craig was intent on any warehouse breaking until he climbed over the gate was difficult to reconcile with the evidence . . . and in our view unlikely to be believed.").

169. *Id.* at 308.

170. *Id.*

Goddard [the judge] had had no choice, fettered by the law, he had to sentence Bentley to death. But in pointing out publicly that he would tell the home secretary how dangerous Craig was, and that he was the more guilty of the two, he was implicitly stating that Bentley had taken a lesser role. Sir David Maxwell Fyfe had total, unfettered choice: he chose death.

BLOCK & HOSTETTLER, *supra* note 15, at 142.

171. *Bentley*, [2001] 1 Crim. App. at 316.

172. *Id.* at 308. *But see infra* note 179 and accompanying text (finding that the judge's summing up to the jury was unsound).

173. BLOCK & HOSTETTLER, *supra* note 15, at 141–42 ("Of course, had he been inclined to find grounds there were plenty to be found: Bentley's age, his mental age, the fact that he did not fire the shot and had no gun, the fact that he was under arrest when the shot was fired, and, not least, the jury's recommendation for mercy. Singly, any one of these could be considered as a ground, but collectively they could have been considered irresistible.").

174. *Bentley*, [2001] 1 Crim. App. at 337. Tests done in 1948, when Bentley was fifteen years old, revealed that he had an IQ of sixty-six, a mental age of ten, and a reading age of four. *Id.* at 335.

175. BLOCK & HOSTETTLER, *supra* note 15, at 142 ("A demonstration of about 300 people gathered outside Parliament chanting 'Bentley must not die'; they then marched to the Home Office and finally to Sir David's home in Great Peter Street.").

176. *Id.*; *see also Bentley*, [2001] 1 Crim. App. at 308. "Derek Bentley had to die for the sins of his generation, to deter other hoodlums from hiding their murderous intent behind perpetrators too young to hang. . . . He had been executed as an example, and had become a martyr." POTTER, *supra* note 23, at 168.

man be executed when he did not even pull the trigger?¹⁷⁷ The fact that Bentley was hanged for being nineteen and being present at the scene in a joint venture, while Craig was only imprisoned, despite murdering the officer, because he was only sixteen years old seemed an injustice to most people.

In 1993, Bentley was given a royal pardon for his sentence of death.¹⁷⁸ Later, in 2001, his case was reheard on appeal and it was found that there were significant problems with the judge's summing up to the jury during his trial.¹⁷⁹ As a result, Bentley's conviction was quashed—a just end for an unjust execution.¹⁸⁰

177. A similar case to Bentley's almost occurred in the United States—the case of LaSamuel Gamble in Alabama. Gamble was involved in an armed robbery in 1996 where his accomplice, Marcus Pressley, murdered the owner and employee of a pawnshop. *Gamble v. State*, 791 So. 2d 409, 415–16 (Ala. Crim. App. 2000). Both defendants were sentenced to death in 2000, but after *Roper v. Simmons*, which ruled the death penalty unconstitutional for juveniles, Pressley, who was sixteen at the time of offense, had his sentence reduced to life imprisonment. *Gamble*, 791 So. 2d at 416 n.1; *A Question of Fairness*, BIRMINGHAM NEWS, June 11, 2006, at 2 [hereinafter *Fairness*].

Unlike Bentley, Gamble was not in police custody at the time of the murder and was arguably more involved in the killings. Nancy Wilstach, *D.A. Backs Off Death Sentence Stance*, BIRMINGHAM NEWS, June 8, 2006, at 1 (“Owens [the prosecutor] described how calm Gamble appeared on the videotape and how he carefully picked up shell casings and then leaned over a railing to look at Burleson’s splattered brains without reacting.”). However, video evidence conclusively proved that Gamble was not the triggerman. *Id.* Similar to Bentley, Gamble was on death row because he was nineteen at the time of offense, while his accomplice, who actually pulled the trigger, was not on death row because he was only sixteen. Further, Gamble had no prior criminal convictions before he committed this robbery, while Pressley was wanted, and convicted, for a previous murder in addition to the two committed during the 1996 robbery. *Gamble*, 791 So. 2d at 416 n.1; *Appeals Panel Backs Death Row Verdicts*, BIRMINGHAM NEWS, Feb. 5, 2000, at 11. After Pressley’s sentence was commuted to life, the prosecutor for both defendants back in 2000 said he did not think that it is “fair to execute Gamble if Pressley can’t also be put to death. ‘Both deserve to be on Death Row, but it is simple equity—it is not fair to leave the person on Death Row who didn’t kill anyone and take the person off Death Row who did.’” *Fairness*, *supra*.

Thanks to the attorneys at the Southern Center for Human Rights, Gamble’s death sentence was reversed on September 7, 2007, based on the lesser sentence given to Pressley and an ineffective assistance of council claim. *See Gamble v. State*, No. CC-96-813.60 (Ala. Cir. Ct. Sept. 7, 2007). This decision has caused much controversy in Alabama—Troy King, the Alabama Attorney General, removed the district attorney from the case who stated that it would not be fair to execute Gamble and has promised an appeal of the circuit court’s decision. Nancy Wilstach, *Shelby D.A. Gets Support After Blast by State A.G.*, BIRMINGHAM NEWS, Sept. 14, 2007, at 1; *see also* Kim Chandler, *D.A. Group Leader Takes Aim at King Says A.G. ‘Has No Idea’ on Death Penalty Cases*, BIRMINGHAM NEWS, Sept. 21, 2007, at 5; Troy King, *Alabama Voices: DAs Wrong on Law*, MONTGOMERY ADVERTISER, Sept. 27, 2007. On this issue, the United States may be learning from England’s past mistakes.

178. *Bentley*, [2001] 1 Crim. App. at 308.

179. *Id.* at 320–22, 327. The court found problems with the judge’s statement of the standard of proof, statement of the burden of proof at trial, the balance of the summing up, and about the judge’s observations on the treatment of police evidence. *Id.*

The killing of PC Miles had, very understandably, aroused widespread public sympathy for the victim and his family and a strong sense of public outrage at the circumstances of his death. This background made it more, not less, important that the jury should approach the issues in a dispassionate spirit if the defendants were to receive a fair trial, as the trial judge began by reminding them. In our judgment, however, far from encouraging the jury to ap-

3. Ruth Ellis

If the executions of Evans and Bentley were not enough, after the execution of Ruth Ellis, the last woman to be executed in England, the British public had had enough. Ruth Ellis was hanged for the impulsive murder of her ex-lover, David Blakely. In France, such crime was called a “crime passionnel,” punishable by a sentence of two or three years imprisonment at most.¹⁸¹ Even at trial, Ruth Ellis did not deny her guilt, but that did not make her punishment fit her crime.

On April 10, 1955, Ruth Ellis fired four shots from a pistol into the body of David Blakely, killing him outside of Magdala’s—a London public house.¹⁸² The murder was in cold blood and there was no disputing Ellis’s intention—however, the story behind the murder is what makes it so fascinating.

Ruth Ellis was a club hostess for most of her life—at an early age she learned that she could use her good looks to attract men and make money.¹⁸³ It is at these clubs where she met most of her lovers throughout the years: the Canadian soldier Clare, her first love;¹⁸⁴ George Ellis, the alcoholic dentist and her first husband;¹⁸⁵ David Blakely, the man she would kill; and Desmond Cussen, the man that possibly gave her the gun. Of these last three relationships, Cussen was the only one who did not physically abuse Ruth—she seemed to be a magnet for abusive relationships and was not unknown to hit back.¹⁸⁶ Her relationship with Blakely was particularly violent. They were known to quarrel with each other in public, yelling and hitting each other throughout their relationship.¹⁸⁷ It was these violent encounters and Blakely’s infidelity that would drive Ellis to kill him—two of these encounters are worth mentioning here.¹⁸⁸

A few days before the murder, Ruth called Blakely, who was staying with his friends, the Findlaters, and allegedly heard a woman giggling on

proach the case in a calm frame of mind, the trial judge’s summing up . . . had exactly the opposite effect.

Id. at 327. Although, the court also mentioned the following about Bentley’s conviction, if the summing up had been correct: “On the evidence presented to the court we conclude that a properly directed jury would have been entitled to convict. The case against [Bentley] was, as it seems to us, a substantial one, albeit not, in contrast to that of Craig, overwhelming.” *Id.* at 316.

180. *Id.* at 332.

181. BLOCK & HOSTETTLER, *supra* note 15, at 164.

182. *Id.* at 163–64; LAURENCE MARKS & TONY VAN DEN BERGH, RUTH ELLIS: A CASE OF DIMINISHED RESPONSIBILITY? 87–88 (1977).

183. MARKS & VAN DEN BERGH, *supra* note 182, at 13, 22, 41.

184. *Id.* at 10.

185. *Id.* at 29.

186. *Id.* at 30, 32.

187. *Id.* at 37.

188. *Id.* at 79–82, 122–23.

Blakely's end of the line. Having already suspected Blakely of cheating on her, hearing this made her furious.¹⁸⁹ She immediately drove to the Findlaters's home, knocked on their door, and insisted on talking to Blakely. When no one answered, she broke the windows of his car. The police were called, and Ellis was told to go home.¹⁹⁰ This was not the first time something like this happened between the two of them, and it was not the last.

On a second occasion, shortly after Ellis discovered she was pregnant, they got into another violent fight. Blakely hit her, as he usually did, but this time struck her in the stomach. Ellis would testify at trial that she would later miscarry—the likely reason being this incident with Blakely.¹⁹¹

Desmond Cussen's role in this story is disputed. He and Ruth met when Blakely was on a trip in Europe—their affair was anything but ordinary and developed into a fatal love triangle between Ellis, Blakely, and Cussen.¹⁹² It was disputed whether Cussen was involved in the murder of Blakely, as there was evidence that Cussen was the one who gave Ellis the gun, taught her how to hold it, trained her how to shoot it, and even drove her to the public house where she would murder Blakely.¹⁹³ It was also disputed whether Cussen gave Pernod, a form of absinthe, to Ellis right before she was driven out to kill Blakely—which would have put her in a state of mind where she was not responsible for her actions.¹⁹⁴

This evidence, though, was not presented at her trial—it was said that Ellis's trial was “one of the most one-sided legal battles that was ever to be heard in the famous number one court.”¹⁹⁵ Ruth Ellis wanted it this way. She was guilty and wanted to die so she could be with the man she loved.¹⁹⁶ During her confession, she lied about where she got the gun and did not mention Desmond Cussen at all.¹⁹⁷ During his cross-examination of Ruth Ellis, Christmas Humphreys asked only one question, and the an-

189. *Id.* at 82 (“And all the time whilst she had been doing everything he wanted, *he* had been sleeping and playing about with other women. There had been the usherette; the girl to whom he had become engaged; the American model; several hostesses who were friends of Ruth, and when he had promised marriage, he had only been acting out a farce without any intention of keeping his promises.”).

190. *Id.* at 79–81.

191. *Id.* at 122–23.

192. Peter Williams, *Epilogue to MARKS & VAN DEN BERGH*, *supra* note 182, at 164.

193. MARKS & VAN DEN BERGH, *supra* note 182, at 41.

194. *Id.* at 42.

195. *Id.* at 105–06 (“For those that have never been to the Old Bailey, Number One Court resembles a television set with a fourth wall. The judge's bench dominates the setting. To the right of this is the witness box and the jury and press boxes. To the left sit counsel. Above them, in the gods as it were, is the public gallery. Directly beneath are the ‘City Lands,’ a collection of green leather upholstered benches to which admission is by ticket only. These are usually reserved for relatives of counsel—both prosecuting and defending. Opposite the judge's bench is the vast dock in which the defendant is placed, and it is reached by stairs connecting the cells below.”).

196. *Id.* at 99.

197. *Id.* at 92–93.

swer was all he needed: “Mrs. Ellis, when you fired that revolver at close range into the body of David Blakely, what did you intend to do?”¹⁹⁸ To which she replied: “It is obvious that, when I shot him, I intended to kill him.”¹⁹⁹ This would be Humphrey’s shortest cross-examination ever and would cause the most damage.²⁰⁰ In one sentence, Ruth Ellis proved the prosecution’s case that she was guilty of murder.

The jury deliberated for twenty-three minutes and came back with a verdict of guilty of murder.²⁰¹ On June 21, 1955, after a two-day trial, Ellis was sentenced to death.²⁰² She did not appeal her conviction. She did not even want a reprieve; she just wanted to die. It was not until a few days before her execution date that she finally thought about her son, and thought about staying alive. By that time, it was too late.²⁰³

As in the other two trials, there was much public unease about Ruth’s trial and death sentence. Despite petitions signed by thousands of people delivered to the Home Office, the home secretary did not grant Ellis a last minute reprieve.²⁰⁴ The night before her execution hundreds of people gathered outside Holloway (HM Prison) demanding to see Ruth Ellis while chanting the phrase “Evans-Bentley-Ellis.”²⁰⁵ These people would not get

198. Williams, *supra* note 192, at 161. Humphreys was also the prosecutor for the trials of Evans and Bentley. MARKS & VAN DEN BERGH, *supra* note 182, at 108.

199. Williams, *supra* note 192, at 161.

200. MARKS & VAN DEN BERGH, *supra* note 182, at 125.

201. *Id.* at 130; BLOCK & HOSTETTLER, *supra* note 15, at 164.

202. R v. Ellis, [2003] EWCA (Crim.) 3556, [1] (Eng.).

203. MARKS & VAN DEN BERGH, *supra* note 182, at 136. Should Ellis’s counsel have pushed her to give more evidence at trial and forced her to appeal her conviction? In the United States, the issue about who should have decisional control of criminal cases—the defendant or the lawyer—is still being debated. In one article, Professor Chris Johnson gives arguments for both sides, and concludes that a rule where the lawyer has authority would be most fitting for criminal cases where the objective is the “discovery of truth” and where the lawyer generally will “recognize the best course of defense better than defendants.” Christopher Johnson, *The Law’s Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 132 (2004–05).

In the balance of harms, the least damage is done by a rule committing all decisions to the lawyer, with the exception of those decisions invoking or waiving the adversary process and those decisions involving the defendant’s direct personal participation. So long as we rely on a system of adversary trials, and so long as prosecutors manage the government’s case unhindered by the commitment of decisions to victims or other emotionally-invested laypeople, maintenance of the system’s delicate partisan balance precludes giving to defendants any greater authority to decide.

Id. at 140–41. Johnson notes that this is particularly true in capital cases in the United States, where defendants, for a variety of reasons, might not want to give evidence of mitigating circumstances to the jury to reduce their sentence from death to life imprisonment. *Id.* at 136. A rule where the lawyer has the right to choose what is best for the defendant may have helped Ruth Ellis either at trial, or after, to make an appeal or ask for a reprieve earlier.

204. BLOCK & HOSTETTLER, *supra* note 15, at 164 (“Because of her age—she was 28—her children and the fact that the killing was impulsive rather than planned and, of course because she was a woman, there was a great deal of public sympathy for Ruth Ellis and many people believed that the home secretary would relent at the last moment.”). However, he did not relent. *Id.*

205. *Id.*; MARKS & VAN DEN BERGH, *supra* note 182, at 149.

their wish. On July 13, 1955, Ruth Ellis, only twenty-eight years old, would become the last woman executed in England.²⁰⁶

A few years later, the Homicide Act 1957 was passed in England—it introduced a doctrine of diminished responsibility that may have saved Ellis from the gallows had she committed her crime at a later date.²⁰⁷ As the Court of Appeal said in 2003, during a posthumous appeal of her conviction, “[i]f her crime were committed today, we think it likely that there would have been an issue of diminished responsibility for the jury to determine but we are in no position to judge what the jury’s response to such an issue might be.”²⁰⁸ However, the court did not overturn her conviction, noting that “Ellis was properly convicted of murder according to the law *at the time* when she committed her offence.”²⁰⁹

E. *The Homicide Act 1957 and Final Attempts to Abolish*

1. *The Royal Commission & Silverman’s Further Attempts*

In July 1953, during the time the Royal Commission on Capital Punishment (1949–1953) was determining possible modifications to the death penalty, Sydney Silverman introduced a bill to suspend the death penalty for five years.²¹⁰ Silverman had new evidence that an innocent man was executed in Evans and wanted to take immediate action; however, many viewed his actions as premature because the royal commission’s report had not yet been published.²¹¹ Silverman’s motion failed in the House of Commons by a vote of 256–195.²¹²

Finally, in September 1953, the royal commission’s report was presented to Parliament. Since the report’s scope did not allow it to recommend the abolition of capital punishment, it did not make this recommen-

206. MARKS & VAN DEN BERGH, *supra* note 182, at 149.

207. R v. Ellis, [2003] EWCA (Crim.) 3556, [47], [89] (Eng.). A British case of 1979 analyzed the doctrine of diminished responsibility under the Homicide Act 1957 for the murder of a wife by a jealous husband. R v. Vinagre, [1979] 69 Crim. App. 104 (Eng.). In that case, a husband was convicted of murdering his wife after suspecting that she was cheating on him with a police officer. *Id.* at 104–05. The defendant’s defense at trial was that he was suffering from “Othello syndrome,” a “morbid jealousy for which there was no cause.” *Id.* at 105. The court ruled that this satisfied the test under diminished responsibility as long as it could be proven that the husband’s jealousy would not be a recurring illness. *Id.* at 107. Thus, the defense of jealousy as a mental imbalance was used to successfully lower the defendant’s conviction to manslaughter. *Id.* Looking at the facts of Ruth Ellis’ case, it would seem that her case would fall under this theory as well, and her sentence could have been manslaughter under the Homicide Act 1957.

208. *Id.* at [89] (Eng.).

209. *Id.* (emphasis added).

210. BLOCK & HOSTETTLER, *supra* note 15, at 145.

211. *Id.*

212. *Id.* at 146.

dition, although one could assume that abolition was the position the commissioners were taking.²¹³ The report was 500 pages long and made many recommendations. It recommended that the power to give the death sentence should rest with the jury and the jury should allow for extenuating circumstances to justify a lesser sentence than death in individual cases. It also recommended that England's insanity rules should be changed so that the jury could decide if the defendant was of unsound mind and that lethal injection should be looked into as a possible substitute for hanging.²¹⁴ Finally, it recommended, once again, that the minimum age for hanging should be raised from eighteen to twenty-one. On the issue of deterrence, the report stated that there was no statistical evidence that existed showing that the death penalty actually deterred murder.²¹⁵

Silverman demanded a debate in the Commons; a debate in the House of Lords occurred in December, in which the Lords, as expected, rejected all recommendations of the report.²¹⁶ Almost two years went by before Parliament seriously considered the report's findings.²¹⁷

In February 1955, the Commons finally debated the royal commission report. After a long debate, all the report's recommendations were rejected.²¹⁸ The debate then turned to the abolition of the death penalty. Silverman, for the third time, introduced an amendment that would temporarily abolish the death penalty for five years. At the forefront of the discussion was the issue of miscarriages of justice and the fact that there was

213. POTTER, *supra* note 23, at 159. Referring to the Commissioners, the author indicated:

They had looked for a compromise and found none. In so doing they had rendered the division between retention and outright abolition all the starker. Only with abolition, they seemed to be hinting, would all the anomalies and ambiguities of the present system, which the Commission had been set up to rectify, be put right.

Id. Sir Ernest Gowers, chairman of the Commission, entered the Commission with no feelings either way toward the death penalty, but ended as an abolitionist. *Id.*

214. BLOCK & HOSTETTLER, *supra* note 15, at 151.

215. *Id.*; see also POTTER, *supra* note 23, at 158 ("the commissioners came down as near as they could in favour of abolition, but ultimately could only *tinker with the edifice of the criminal law*") (emphasis added). The report rejected electrocution and the gas chamber as alternative methods. It also rejected separating murder into two degrees and giving the judge discretion to impose the death sentence. Finally, the report recommended abolishing the doctrine of constructive malice, the English common law doctrine where a killing committed during the act of another felony was deemed to be murder. BLOCK & HOSTETTLER, *supra* note 15, at 151; POTTER, *supra* note 23, at 158.

216. BLOCK & HOSTETTLER, *supra* note 15, at 152–54.

217. *Id.* at 160.

218. *Id.* at 160–63. The first two recommendations, jury discretion to impose the death sentence and alternative insanity rules, were both rejected as unworkable. The minimum age increase was rejected because the murder rate for young men between seventeen and twenty-one was very high at the time. *Id.* at 161. The method of lethal injection was also rejected for three main reasons: (1) likely complications due to physical abnormalities of the inmates, (2) non-cooperation of the inmates, and (3) non-cooperation of the medical profession, whose expertise was needed to successfully implement the procedure. See Ellen Kreitzberg & David Richter, *But Can It Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 SANTA CLARA L. REV. 445, 451–52 (2007).

no proof that society would be harmed by abolition—that there was no evidence that an equally effective deterrent did not exist.²¹⁹ Silverman's amendment was again rejected in the Commons by a vote of 245–214.²²⁰

2. *The Homicide Act 1957*

In February 1956, the Commons once again debated the issue of capital punishment.²²¹ Many MPs still did not believe an innocent man could be executed in England, stating that the risk was unlikely to occur because “the same mistake would have to be made by the police, the judge, the Court of Criminal Appeal and the home secretary. . . . If there was a scintilla of doubt the home secretary would recommend a reprieve.”²²² The other issues debated were deterrence, of course, and retribution: “[T]he reservation of the gravest punishment for the gravest crime” should be reserved for those who murder, to show the country's abhorrence to that crime.²²³

This time, Chuter Ede introduced an amendment that would suspend the death penalty for an experimental period. To everyone's surprise, the amendment passed after a free vote in the Commons by 293 votes to 262. Forty-eight Conservative MPs voted for the bill along with almost all the Labour MPs.²²⁴ The Conservative government now had to introduce legislation for the abolition of the death penalty—a proposal which it did not believe in.²²⁵ Instead of introducing its own bill, the government strategically decided to resurrect Silverman's Death Penalty (Abolition) Bill, which would suspend the death penalty for ten years.²²⁶

219. BLOCK & HOSTETTLER, *supra* note 15, at 162–63. Further, the fact that the death penalty presents a potential brutalization effect on society was brought up in the debate, since details about executions were published in newspapers around the country in depth. *Id.*

220. *Id.* at 163.

221. *Id.* at 172.

222. *Id.* at 173.

223. *Id.*

224. *Id.* at 175. Only seven Labour MP's, out of over 200, did not vote for the amendment (MP: Member of Parliament). *Id.*; see also POTTER, *supra* note 23, at 173; Christoph, *supra* note 111, at 27.

225. BLOCK & HOSTETTLER, *supra* note 15, at 175.

226. *Id.* at 175–76. This action by the government was its best remaining option to retain the death penalty:

Two courses were open to the Government. It could follow the expressed sentiment of the Commons by bringing in its own bill embodying the principle of abolition and giving it the full weight of its authority through all stages in both Houses, or it could refuse to sponsor legislation designed to implement a policy it considered abhorrent but instead give facilities to the almost-forgotten Silverman abolition bill that was now at the foot of the Private Members' Bill queue. To choose the second option would give the House a chance to carry an abolition bill forward, but at the same time it would deprive the measure of the usual whipping machinery and, if it passed the Commons at all, leave it defenseless in the Lords. After some soul-searching, the Government finally chose the latter course, exhumed the Silverman bill, gave it Government time, and promised a free vote on all its stages.

A second reading of Silverman's bill was passed in the Commons by a vote of 286–262.²²⁷ The bill survived its third reading by a vote of 152–133 and was on its way to the House of Lords.²²⁸ The main debate of the bill in the Lords focused on the death penalty's deterrent effect. Most people still considered the death penalty to be an effective deterrent to murder.²²⁹

Public opinion polls released in 1956 also showed strong public support for the death penalty's retention—although the percentage of the public in support of the death penalty had declined. Opinion polls in 1956 showed support for the trial suspension of the death penalty at thirty-four percent. This was up from thirteen percent in 1948. Disapproval of suspension had also declined from sixty-nine percent in 1948 to forty-five percent in 1956.²³⁰ Nevertheless, the abolition of the death penalty was again stopped in the House of Lords—the bill was rejected by a vote of 238–95.²³¹

The government now had two options: it could reintroduce Silverman's bill for another free vote in the Commons or it could introduce its own legislation, retaining the death penalty but amending it.²³² This time, the government chose the second option.²³³ The government introduced the Homicide Bill, a “skilful, lawful, desperate and shameful attempt by the government to scupper Silverman's Bill and override the will of the Commons.”²³⁴ However shameful, the attempt worked and the Homicide Bill passed both houses of Parliament and became law in 1957.²³⁵

The Homicide Act 1957 separated murder into two degrees—capital and non-capital. It retained the death penalty for six types of murder: (1) murder done in the furtherance of theft, (2) murder by shooting or explosion, (3) murder done in resisting arrest or escaping custody, (4) murder of a police officer, (5) murder of a prison officer by a prisoner, and (6) murder of more than one person. All other murders were punishable by life

Christoph, *supra* note 111, at 27–28.

227. BLOCK & HOSTETTLER, *supra* note 15, at 177.

228. *Id.* at 181 (“There were handshakes and back-slapping all round for Silverman, for his skilful handling and what many believed his ultimate victory.”).

229. *Id.* at 182–83.

230. POTTER, *supra* note 23, at 179; Christoph, *supra* note 111, at 27.

231. BLOCK & HOSTETTLER, *supra* note 15, at 184; Christoph, *supra* note 111, at 28.

232. BLOCK & HOSTETTLER, *supra* note 15, at 186; Christoph, *supra* note 111, at 28.

233. Christoph, *supra* note 111, at 28–29 (“The situation had gone so far that it had become essentially a question of who was to make policy in this area—the majority party or a coalition of back-benchers. Once the nation's political leaders came to see the problem in this light, they soon decided to bring in their own bill and give it top priority, and easily discovered ways to carry along the abolitionists on their side.”).

234. BLOCK & HOSTETTLER, *supra* note 15, at 191.

235. *Id.* at 196; *see also* Christoph, *supra* note 111, at 31.

imprisonment.²³⁶ It also introduced three defenses to a charge of murder that, if successful, would lower the charge to manslaughter: provocation, diminished responsibility, and suicide pact.²³⁷

3. *Murder (Abolition of Death Penalty) Act 1965*

In the 1964 general election, the Labour Party won a majority of fifteen seats over the Conservatives in the Commons.²³⁸ Further, two well-known abolitionists were appointed to prominent positions in government: Gerald Gardiner²³⁹ was appointed Lord Chancellor,²⁴⁰ and Sir Frank Soskice was named home secretary.²⁴¹ It was only a few months before another bill to abolish the death penalty was debated in the Commons.²⁴²

During the period since the Homicide Act 1957 became law and the election of 1964, twenty-nine people were executed under the Act—an average of three to four people a year.²⁴³ If anything, the Act helped show the arbitrariness of the death penalty in England, and even produced some notable findings on deterrence:

[The Act] was not having the desired and expected deterrent effect on those categories of murder which were still capital. The 1961 Government Red Book, *Murder*, showed that the proportion of capital murders had gone up from 12.1% in 1952 to 18.7% in 1960. Nor had the fears of those who predicted an increase in the murder rate as a result of partial abolition been realised. The Red Book showed no increase in murder and manslaughter on the grounds of diminished responsibility since 1957. Indeed the proportion of non-capital murders declined from 87.9% in 1952 to 81.3% in 1960.²⁴⁴

236. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11 (Eng.); see also Bailey, *supra* note 43, at 346 n.101.

237. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11 (Eng.); see also BLOCK & HOSTETTLER, *supra* note 15, at 190 (“The first part of the Bill would abolish the doctrine of constructive malice and deal with the legal effects of provocation. Killing as part of a suicide pact would become manslaughter rather than murder.”).

238. BLOCK & HOSTETTLER, *supra* note 15, at 230.

239. As Lord Chancellor, Gardiner gave a key speech during the debate of the Murder (Abolition of Death Penalty) Bill in the House of Lords that led to a vote for a second reading. This eventually led to the bill becoming law, abolishing the death penalty for murder in England. *Id.* at 246–47.

240. “The Lord Chancellor sits in the House of Lords and presides over its proceedings from her or his position on the woolsack.” BBC News—Lord Chancellor, http://news.bbc.co.uk/1/hi/uk_politics/82530.stm (last visited Feb. 23, 2007).

241. BLOCK & HOSTETTLER, *supra* note 15, at 230.

242. *Id.* at 234–35.

243. POTTER, *supra* note 23, at 192.

244. *Id.* at 191–92.

In December 1964, Silverman presented a bill to the Commons for the abolition of capital punishment in England.²⁴⁵ The Murder (Abolition of Death Penalty) Bill passed through its second reading in the Commons by a vote of 355–170.²⁴⁶ The bill was both an achievement for Silverman and the British Labour Party.²⁴⁷ At the committee stage of the bill, it was pointed out that nearly seventy percent of the public still favored the death penalty. This was quickly brushed aside, though, as it was said that “the public had no great depth of understanding of the problems surrounding the death penalty” and therefore, in essence, their opinion did not matter.²⁴⁸

Despite a few minor problems in committee, the bill went to its third reading debate in the Commons, where it was carried by a vote of 200–98.²⁴⁹ Later that same day the bill was taken to the House of Lords and read for the first time. During the debate, the main issues on the table were deterrence, retribution, and public opinion. This time, however, the Lords voted 204–104 for a second reading, and later passed the bill.²⁵⁰ On November 8, 1965, the Murder (Abolition of Death Penalty) Act 1965 received royal assent and became law.²⁵¹ It abolished the death penalty for all crimes except high treason and piracy with violence for a temporary period of five years.²⁵² For all extensive purposes, the death penalty was finally abolished in England.²⁵³

However, the death penalty debate was far from finished. Public opinion polls taken shortly after the death penalty was abolished showed that as high as eighty-five percent of the public favored reinstating hanging.²⁵⁴ Perhaps this is why it was decided that before the temporary period ended, the abolition issue would once again be debated in Parliament. It was decided to debate it one year early so it would not become an election issue in 1970.²⁵⁵ Home Secretary James Callaghan²⁵⁶ led the debate in the

245. BLOCK & HOSTETTLER, *supra* note 15, at 234.

246. *Id.* at 239.

247. *Id.* at 238–39 (“The debate on the second reading lasted for seven hours. It was opened by Sydney Silverman who spoke for 74 minutes without notes. He admitted that he had nothing new to say as all the arguments had been advanced many times before, and concluded by asking whether it was worth taking so much trouble over a Bill which might save two lives a year in a century that had already killed 80 million, and answering by saying ‘We can at least light this small candle and see how far its tiny gleam can penetrate the gloom.’”). *Id.* at 239.

248. *Id.* at 240.

249. *Id.* at 244–45.

250. *Id.* at 246–48.

251. *Id.* at 249; POTTER, *supra* note 23, at 202.

252. Murder (Abolition of Death Penalty) Act, 1965, c. 71 (Eng.).

253. BLOCK & HOSTETTLER, *supra* note 15, at 249 (“The whole ghastly business was finished.”); Bailey, *supra* note 43, at 346 (“The shadow of the gallows no longer fell across the land.”).

254. POTTER, *supra* note 23, at 202.

255. BLOCK & HOSTETTLER, *supra* note 15, at 262.

256. See Callaghan, *supra* note 103, at vii–viii (“I cannot say that . . . hanging had impinged on my thinking, and it was only when I reached Parliament in 1945 and was confronted by the need to take a

Commons and the vote to eliminate the five-year experimental period was carried 343–185.²⁵⁷ Lord Gardiner led the debate in the Lords and the experimental period once and for all was eliminated. The Murder (Abolition of Death Penalty) Act 1965 became permanent in 1969.²⁵⁸

4. *Crime and Disorder Act 1998*

Thirteen attempts were made after 1965 to reinstate the death penalty in England. Two notable attempts were the attempt to reinstate the death penalty for acts of terrorism in 1982 and the murder of a child in 1987.²⁵⁹ These attempts were defeated

for the same reasons that the Homicide Act was scrapped; namely that to pick one or two classes of murder out as deserving of death, when there might be equally heinous offenses committed in categories of murder not subject to capital punishment, would inevitably produce anomalies and a sense of injustice.²⁶⁰

A number of wrongful convictions also helped keep the death penalty from being reinstated. In 1974, a number of bombings by the IRA in response to “Bloody Sunday” put British police under a lot of pressure to find those responsible.²⁶¹ In October 1974, bombings of public houses in

position, that I concluded that hanging should be abolished. In the debates of 1948, I voted for abolition for the first time and after that decision, did so steadily thereafter, whenever the issue came before the House.”). Lord Callaghan was also home secretary in 1965 when the death penalty was abolished temporarily for five years. *Id.*

257. BLOCK & HOSTETTLER, *supra* note 15, at 266.

258. *Id.* at 267; POTTER, *supra* note 23, at 203.

259. HOOD, *supra* note 86, at 26; Robin Oakley, *Parliament: Tory MPs Call for a New Look at the Death Penalty*, TIMES (London), Nov. 14, 1986 (“More than 50 Tory MPs, led by the former Solicitor General, Sir Ian Percival, backed a Commons motion last night calling for another look at the reintroduction of the death penalty. . . . But, although the Prime Minister favours the death penalty, there is little prospect of any change in the law. . . . In July 1979, shortly after Mr Airey Neave was murdered by IRA terrorists, blown up in the Commons car park, the call for the return of the death penalty was defeated by 362 votes to 243, a majority of 119.”). The Bill that would have made the killing of a child a capital offense was defeated by a vote of 175–110. *Parliament: Hanging Bill Is Rejected*, TIMES (London), Jan. 14, 1987; *see also MPs Reject Hanging by 123 Votes; Parliament*, TIMES (London), June 8, 1988 (“MPs rejected the reintroduction of capital punishment. . . . The debate came during the report stage of the Criminal Justice Bill when Mr. Roger Gale . . . moved a clause to introduce capital punishment as the maximum sentence for murder and providing for juries to recommend the punishment.”); Philip Webster, *Death Penalty Rejected by 112 Majority*, TIMES (London), Apr. 2, 1987 (“The House of Commons decisively rejected the restoration of capital punishment last night, with a 112-vote majority against introducing the death penalty for ‘evil’ murders. Loud cheers greeted the announcement of the sound rejection, by 342 votes to 230, of the second attempt by Conservative backbenchers in the present Parliament to restore capital punishment.”).

260. HOOD, *supra* note 86, at 26.

261. Lord Scarman, *Justice in the Balance*, TIMES (London), Mar. 5, 1991. On January 30, 1972, British troops opened fire on Catholic civilians in Londonderry, Northern Ireland, killing thirteen people, an event later known as “Bloody Sunday.” *Army Kills Thirteen in Civil Rights Protest*, BBC

Guildford and Woolwich killed seven people and injured eighty-nine.²⁶² Seven weeks later, in November, two more bombings of public houses in Birmingham killed twenty-one people and injured 150.²⁶³ The police arrested four people, later called the “Guildford Four,” in connection with the Guildford bombings and six people, later called the “Birmingham Six,” in connection with the Birmingham bombings. The ten men were convicted and sentenced to life imprisonment based on questionable forensic evidence, police testimony, and confessions.²⁶⁴

In 1989, after fourteen years in prison, all of the Guildford Four’s convictions were quashed and they were freed.²⁶⁵ Evidence later suggested that the police had lied during their trial and that the confessions were false due to brutal police interrogations of the four.²⁶⁶ In 1991, the Birmingham Six were freed after sixteen years in prison based on similar evidence.²⁶⁷ These ten men, including others, probably would have been sentenced to death and executed if the punishment was available.²⁶⁸

The most recent debate on the reinstatement of the death penalty for murder occurred in 1994.²⁶⁹ The death penalty for all murders was rejected in the Commons by a vote of 403–159; it was also rejected for the murder

NEWS, Jan. 30, 1972, http://news.bbc.co.uk/onthisday/hi/dates/stories/january/30/newsid_2452000/2452145.stm.

262. Lord Devlin & Lord Scarman, *Justice and the Guildford Four; Alleged IRA Bombers*, TIMES (London), Nov. 30, 1988; Richard Ford et al., *Guildford Pub Bomb Police Face Charges*, TIMES (London), Oct. 18, 1989.

263. Devlin & Scarman, *supra* note 262.

264. *Id.*; Long Road of the Law; *Birmingham Six*, TIMES (London), Mar. 15, 1991; *see also* Devlin & Scarman, *supra* note 262 (“It is the task of the police to first find suspects and then to find the evidence that will convict them. When they arrested the [Guildford Four] they had been searching for seven weeks during which the murders multiplied, the most shocking being at Birmingham on 21 November when 21 persons were killed and 150 injured. The police were under the pressure of events to get results and, when they arrested the Guildford Four, they still had nothing.”).

265. Richard Ford et al., *Appeal Reform Hint as Hill Is Free on Bail; Guildford Pub Bombings*, TIMES (London), Oct. 21, 1989; Frances Gibb et al., *Three Bomb Case Police Suspended; Guildford Pub Bombings*, TIMES (London), Oct. 20, 1989.

266. Devlin & Scarman, *supra* note 262; Frances Gibb et al., *supra* note 265.

267. *See* Stewart Tandler, *Judges Accuse Birmingham Six Police of Lying in Court*, TIMES (London), Mar. 28, 1991; *An Urgent Commission*, TIMES (London), Mar. 15, 1991.

268. *Hanging Is Laid to Rest Once and for All, Say MPs; Parliament*, TIMES (London), Oct. 20, 1989 (“The argument for capital punishment has been laid to rest once and for all by the miscarriage of justice for the Guildford Four, MPs said after the Home Secretary’s statement.”); Lord Scarman, *A Safer Kind of Justice; Review of Legal System*, TIMES (London), Oct. 20, 1989 (“First, thank God and Parliament for the abolition of the death penalty for murder. Had it existed in 1975, some, if not all, of the Guildford Four would have been hanged. The posthumous righting of a cruel wrong is not good enough. How many people today remember the case of Timothy Evans, executed for a crime the murder of his baby which he did not commit?”).

The Maguire Seven and Judith Ward were also released after many years in prison for terrorist offenses which they did not commit. Richard Ford, *“I Was Weak and Immature, a Bit of an Idiot”*; *Judith Ward*, TIMES (London), June 5, 1992 (spending eighteen years in prison before released); *see also An Urgent Commission*, *supra* note 267.

269. HOOD, *supra* note 86, at 26.

of a police officer by a vote of 383–186.²⁷⁰ The main issues debated were the deterrent effect of the death penalty and the possibility of miscarriages of justice.²⁷¹ The home secretary at the time, Conservative Michael Howard, who previously voted to restore the death penalty, changed his mind in this last debate, citing the recent cases of miscarriages of justice.²⁷²

In 1986, an amendment to the Armed Forces Bill abolishing the death penalty for military offenses was rejected in the House of Lords by a vote of 116–76.²⁷³ In 1991, another attempt to abolish the death penalty for military offenses of “mutiny, serious misconduct in action and other serious wartime offences” was rejected in the Commons, 228–124.²⁷⁴

Further, public opinion still favored reinstating capital punishment for murder. According to one survey, sixty-six percent of the British public was in favor of the death penalty for murder in 1985; sixty-one percent in 1990.²⁷⁵ The Police Federation in England overwhelmingly was in favor of bringing back capital punishment for murder as well.²⁷⁶ Nevertheless, in May 1998, the House of Commons voted 294–136 in a free vote to adopt two clauses of a European protocol that would abolish the death penalty in England completely.²⁷⁷ The resulting Crime and Disorder Act 1998 put an end to the death penalty in England for good, since reinstatement of capital punishment would now require England to denounce the European Convention on Human Rights and the treaties of the European Union.²⁷⁸

III. THE DEATH PENALTY IN THE UNITED STATES

A recent study . . . has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.²⁷⁹

270. *Id.*

271. Alice Thomson, *Commons Rejects Return of Death Penalty for Killers; Politics & Government*, *TIMES* (London), Feb. 22, 1994, at 9.

272. *Id.*

273. *Parliament: Death Penalty Retained*, *TIMES* (London), May 20, 1986.

274. *Forces Death Penalty to Remain; Parliament*, *TIMES* (London), June 18, 1991.

275. HOOD, *supra* note 86, at 26 n.14.

276. Stewart Tendler, *Police Reaffirm Support for Hanging*, *TIMES* (London), May 22, 1992, at 3.

277. Andrew Pierce, *Rebel MPs Rule Out Hanging*, *TIMES* (London), May 21, 1998, at 2.

278. Crime and Disorder Act, 1998, c. 37 (Eng.); *see also* HOOD, *supra* note 86, at 24.

279. Justice Thurgood Marshall. *Gregg v. Georgia*, 428 U.S. 227, 232 (1976) (Marshall, J., dissenting).

A. Early History

The earliest known set of capital offenses in the United States dates back to 1636, from the Massachusetts Bay Colony:

This early codification, titled “The Capitall Lawes of New-England,” lists in order the following crimes: idolatry, witchcraft, blasphemy, murder (“manslaughter, committed upon premeditate malice, hatred, or cruelty, not in a man’s necessary and just defense, nor by mere casualtie, against his will”), assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape (punishment of death optional), man-stealing, perjury in a capital trial, and rebellion (including attempts and conspiracies). Each of these crimes was accompanied in the statute with an Old Testament text as its authority.²⁸⁰

Massachusetts would later reduce this list to nine capital offenses by 1785. On the other hand, states such as North Carolina had a much stricter capital code. Even in 1837, North Carolina required the death penalty for stealing bank notes, dueling if death ensues, concealing a slave with intent to free him, the second offense of forgery, or circulating seditious literature among slaves, among the more typical capital offenses.²⁸¹

The Southern colonies during the early years of our history typically had more capital offenses than the Northern colonies. Since property was distributed similarly as that of England and “Southerners also tended to come from regions of England that were more violent than the regions from which northerners emigrated,” the Southern colonies followed the same capital code as England during the 1600s and 1700s.²⁸²

The types of capital offenses often varied as well—because of the religious origins of many of the Northern colonies, many of the capital crimes were for crimes against morality.²⁸³ In the South, because of the large number of slaves, “[h]arsh punishments were obviously useful to those in power for disciplining a captive labor force.”²⁸⁴ Hence, it was a capital offense for a slave to burn or destroy any manufactured good, entice other slaves to run away, or to maim or bruise whites. In Virginia, it was even a capital crime for a slave to prepare or administer medicine.²⁸⁵

280. Hugo Adam Bedau, *General Introduction* to THE DEATH PENALTY IN AMERICA 5 (Hugo Adam Bedau ed., rev. ed. 1967).

281. *Id.* at 6–7.

282. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 7 (2002).

283. *Id.* at 6. Examples of these offenses included blasphemy, idolatry, sodomy, and bestiality. *Id.*

284. *Id.* at 9.

285. *Id.*

However, by the time of the Revolutionary War, when England's Bloody Code listed over 200 capital crimes, the colonies recognized only the following crimes as capital offenses: murder, treason, piracy, arson, rape, robbery, burglary, sodomy, counterfeiting, horse-theft, and slave rebellion.²⁸⁶ History indicates that "capital punishment was carried from Europe to America but, once here, was tempered considerably."²⁸⁷

Around the same time Dickens and England were debating about whether the death penalty should be performed in public or private, Michigan became the first jurisdiction in modern times to completely abolish the death penalty for murder.²⁸⁸ Six years later, in 1852, Rhode Island abolished the death penalty for all crimes, as did Wisconsin in 1853.²⁸⁹ Four other states abolished the death penalty during the 1800s: Iowa, Colorado, and Kansas in 1872 and Maine in 1876. Each of these states restored it shortly after, though, and only Maine completely abolished the death penalty again in 1887.²⁹⁰

By the start of the twentieth century, four states had abolished the death penalty for all practical purposes (Michigan, Rhode Island, Maine, and Wisconsin) and many more states strictly limited its use. However, the disparity between North and South became much wider. While the Northern states were abandoning the death penalty or limiting its use, the Southern states still used capital punishment for a wide range of offenses.²⁹¹ Slavery caused the South to not debate the imposition of capital punishment and "produced a wide cultural gap between the northern and southern states in attitudes toward capital punishment."²⁹²

Four reforms to the death penalty in the United States helped to temper it and maintain its use, even in the Northern states: (1) the use of more humane methods of execution, (2) the prohibition of public executions to protect the public from exposure to the death penalty, (3) the development of "degrees" of murder where only the highest degree of murder received

286. Bedau, *supra* note 280, at 6.

287. *Furman v. Georgia*, 408 U.S. 238, 341 (1972) (Marshall, J., concurring).

288. *Id.* at 338; *see also* HOOD, *supra* note 86, at 9; POTTER, *supra* note 23, at 71. Michigan still retained the death penalty for treason—they completely abolished the death penalty in 1963. HOOD, *supra* note 86, at 63.

289. *Furman*, 408 U.S. at 338 (Marshall, J., concurring); *see also* Bedau, *supra* note 280, at 9. Rhode Island would restore the death penalty in 1882 for the murder by a prisoner serving a life sentence—they would completely abolish it again in 1984. HOOD, *supra* note 86, at 63.

290. *Furman*, 408 U.S. at 339 (Marshall, J., concurring); *see also* Bedau, *supra* note 280, at 10. Maine restored the death penalty in 1883, Iowa restored it in 1878, and Colorado restored it only a few years after abolishing it. *Furman*, 408 U.S. at 339 (Marshall, J., concurring); *see also* Bedau, *supra* note 280, at 10. Kansas abolished the death penalty by law in 1907 and later restored it in 1935. *Furman*, 408 U.S. at 339, 339 n.72 (Marshall, J., concurring).

291. BANNER, *supra* note 282, at 143.

292. *Id.*

the death penalty, and (4) the use of jury discretion to choose the death penalty instead of the mandatory sentence of death.²⁹³ It is disputed whether these were actual improvements to the death penalty, but there is no question that these modifications allowed the death penalty to remain a part of criminal law during the early years of this country.

The most common form of execution in the early years of the colonies and the United States was hanging.²⁹⁴ However, even in the eighteenth century, the death penalty was also inflicted by pressing to death, drawing and quartering, and burning at the stake.²⁹⁵ In 1888, the electric chair was introduced in New York “on the theory that in all respects, scientific and humane, executing a condemned man by electrocution was superior to executing him by hanging.”²⁹⁶ In 1890, after the Supreme Court declared it constitutional, William Kemmler was the first to die by electrocution.²⁹⁷ The electric chair would continue to be a popular method of execution, used by as many as twenty-four states by the 1960s.²⁹⁸ Along with the methods of firing squad,²⁹⁹ hanging, and electrocution, Nevada introduced the gas chamber in 1921.³⁰⁰ These methods were the most widely used

293. Bedau, *supra* note 280, at 15.

294. *Id.* at 6.

295. *Id.* at 15. These punishments would practically disappear by 1789 and were never really popular in the States. *Id.* at 16–17. The punishment of pressing to death, in particular, was rarely used:

Originally, the purpose of *peine forte et dure* (pressing to death) was to force an accused person to plead to an indictment. Such tactics became necessary because anyone who refused to plead to a felony indictment (that is, refused to plead either guilty or innocent) could avoid forfeiture even if he was later found guilty. The effect of pressing on an uncooperative accused was, and was intended to be, fatal. As early as 1426, pressing was used in England, though it never seems to have enjoyed wide popularity with the courts. Its sole recorded use in this country seems to have been during the notorious Salem witchcraft trials, in 1692, when one Giles Cory was pressed to death for refusal to plead to the charge of witchcraft.

Id. at 15–16.

296. *Id.* at 17.

297. *Id.*; see also *In re Kemmler*, 136 U.S. 436, 447 (1890) (upholding New York’s finding that while electrocution may be unusual because it had never been used before, it was not cruel because it was a more humane method than hanging); *infra* Part II(B)(1).

298. Bedau, *supra* note 280, at 18. Nine states still allow death by electrocution today, even when new studies and several botched executions have put in to doubt the constitutionality of this punishment. In fact, the Nebraska Supreme Court recently declared the electric chair “cruel and unusual punishment” on February 8, 2008—Nebraska was the only state requiring that method of execution. Adam Liptak, *Nebraska’s Top Court Forbids Electrocution*, N.Y. TIMES, Feb. 9, 2008, at A9; Death Penalty Information Center, *Methods of Execution*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=245> (last visited Feb. 10, 2008). No method of execution is currently in place for the death penalty now in Nebraska. Liptak, *supra*.

299. Death by shooting was used for certain military offenses, and after *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878), its use was held constitutional as a method of execution for all offenses. Bedau, *supra* note 280, at 16–17 n.24.

300. See Bedau, *supra* note 280, at 18 (“Not satisfied with shooting, hanging, or electrocution, the Nevada legislature passed a bill in 1921 to provide that a condemned person should be executed in his cell, while asleep and without any warning, with a dose of lethal gas. . . . Nothing much was done one

execution methods in the United States until lethal injection was introduced in 1977, used in all but one state today.³⁰¹

Public executions were also popular during the early history of the United States, as capital punishment was thought to serve three main purposes: deterrence, retribution, and repentance.³⁰² This was the reason for having speedy trials and short periods between trial and execution—if the crime was still in the memory of the community, the purposes of deterrence and retribution were fulfilled.³⁰³ Further, making an execution a public spectacle was typically thought to deter people from committing crimes.³⁰⁴ Finally, executions were thought to expedite a criminal's repentance of their sins, so therefore public executions always had a religious aspect to them.³⁰⁵

In 1830, Connecticut became the first state to prohibit public executions, with Rhode Island, Pennsylvania, New Jersey, New York, Massachusetts, and New Hampshire all following suit by 1836. Other states, however, especially those in the South, would not prohibit public executions until many years later.³⁰⁶ For example, in 1878 in *Wilkerson v. Utah*, the Supreme Court upheld as constitutional public shooting as a valid method of execution.³⁰⁷ In fact, the last recorded public execution in the United States was not until 1936.³⁰⁸ Even today, a limited number of witnesses, including families of the accused and the victim are allowed to

way or the other until one Gee Jon was found guilty of murder and sentenced to death. When the Nevada Supreme Court upheld the constitutionality of lethal gas, a chamber was hurriedly constructed after practical obstacles were discovered in the original plan for holding the execution in the prisoner's cell. On February 8, 1924, Jon became the first person to be legally executed with a lethal dose of cyanide gas." The gas chamber is still used by five states today. Death Penalty Information Center, *Methods of Execution*, *supra* note 298.

301. Death Penalty Information Center, Part I: History of the Death Penalty, <http://www.deathpenaltyinfo.org/article.php?scid=15&did=410> (last visited Feb. 25, 2007). Oklahoma introduced the method of lethal injection in 1977, which is the most common method of execution used today. It was first used in Texas in 1982. *Id.*

302. BANNER, *supra* note 282, at 23.

303. *Id.* at 16 ("The link between cause and effect, between the commission of the crime and the imposition of the death sentence, was made as conspicuous as it could be.")

304. *Id.* at 10.

305. *Id.* at 16.

306. *Id.* at 154.

307. *Wilkerson*, 99 U.S. at 131; *see also infra* Part II(B)(1).

308. Bedau, *supra* note 280, at 21.

The execution that drew the greatest attention, and the one that ended the practice of public hanging in the United States, was that of Rainey Bethea, hanged for rape in Owensboro, Kentucky, in the summer of 1936. Estimates of the crowd ran between ten and twenty thousand. The town's hotels were so full that thousands had to camp out overnight at the execution site. Hot dog and drink vendors set up near the gallows. Spectators jeered throughout, even while Bethea prayed. As soon as the trap was sprung, before Bethea had been pronounced dead, souvenir hunters tore off pieces of the hood that covered his face. The event gave rise to a whirlwind of criticism in the national press.

BANNER, *supra* note 282, at 156.

watch an execution.³⁰⁹ However, switching from public to private executions was generally seen as a better way to carry out the death penalty.

Another modification to the death penalty in the United States was the separation of murder into “degrees.” The common law of murder was carried over from England to the colonies and defined as “all homicide not involuntary, provoked, justified or excused.”³¹⁰ Under English law at the time, all murder carried the mandatory sentence of death. Pennsylvania, in 1794, was the first state to adopt degrees of murder, with only first degree murder punishable by death. Virginia and Ohio would follow suit, in 1796 and 1815 respectively. By the 1960s, most states used this method as distinguishing between capital and non-capital murder.³¹¹

The last important early modification to the death penalty in the United States was the use of jury discretion in imposing the death penalty. Instead of murder carrying a mandatory death sentence as the common law prescribed, many states decided to allow the jury discretion in sentencing the accused to death or life imprisonment.³¹² This “optional death penalty” became widely accepted both with legislatures and the public and later was the reason for abolishing (and reinstating) the death penalty.³¹³

By 1917, twelve states had abolished the death penalty, though “under the nervous tension of World War I, four of those States reinstated” it.³¹⁴ By the end of World War II, “[t]he manner of inflicting death changed, and the horrors of the punishment were, therefore, somewhat diminished in the minds of the general public” and, as a result, nothing much happened until many decades later.³¹⁵ Between the years 1900 and 1966, an estimated 7226 judicial executions were carried out in the United States.³¹⁶ In addition, by the end of the 1960s, forty-one states, the District of Columbia, and the federal government all allowed the death penalty for at least one crime.³¹⁷ As late as the 1960s, crimes punishable by the death penalty in at least two states included the following crimes: murder, treason, kidnapping, rape, statutory rape, robbery, bombing, assault with a deadly weapon

309. Bedau, *supra* note 280, at 22.

310. *Id.* at 24.

311. *Id.* Also included in the definition of first degree murder was the concept of “felony murder,” a doctrine carried over from English law similar to constructive malice, defined as “killings in the course of a felony.” *Id.* at 26.

312. *Furman v. Georgia*, 408 U.S. 238, 339 (1972) (Marshall, J., concurring).

313. Bedau, *supra* note 280, at 30; *see also infra* Part II(B)(2).

314. *Furman*, 408 U.S. at 339–40 (Marshall, J., concurring).

315. *Id.* at 340.

316. This may be an underestimate. Hugo Adam Bedau, *Introduction: The Laws, The Crimes, and The Executions, in THE DEATH PENALTY IN AMERICA*, *supra* note 280, at 35–36.

317. *Furman*, 408 U.S. at 341 (Marshall, J., concurring). The States that had abolished the death penalty by the end of the 1960s were: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin. *Id.* at 340 n.79.

by a life term prisoner, train wrecking, burglary, arson, perjury in a capital case, espionage, machine gunning, and other particular forms of assault.³¹⁸ Notwithstanding, the number of executions in the 1960s began to decline: twenty-one in 1963, fifteen in 1964, seven in 1965, and only three between 1966 and 1967.³¹⁹ After the Supreme Court heard two cases in the 1960s on the death penalty, an unofficial moratorium on executions in the states began in 1967.³²⁰

B. Furman & Gregg: *The Eighth Amendment Analysis*

1. *Early Eighth Amendment Cases*

The Eighth Amendment of the U.S. Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³²¹ Two Supreme Court cases in the nineteenth century, *Wilkerson v. Utah*³²² and *In re Kemmler*,³²³ addressed the constitutionality of the death penalty in terms of the Eighth Amendment. In *Wilkerson*, the Court ruled that public shooting was a common method of execution, as it had been used for many years as a

318. Hugo Adam Bedau, *Offenses Punishable by Death*, in THE DEATH PENALTY IN AMERICA, *supra* note 280, at 40–44. Fifteen other offenses were punishable by death in only one state as late as the 1960s: insurrection (Georgia), forcing a woman to marry (Arkansas), second conviction for selling narcotics to a minor (Colorado), intentionally interfering with the war effort (Florida), committing any felony on a train after boarding with such intent (Wyoming), desecration of a grave (Georgia), castration (Georgia), attempt to kill the President or a foreign ambassador (Connecticut), instigation of a minor by a relative or spouse to commit a capital crime (Texas), destruction of vital property by a group during wartime (Vermont), abducting anyone during a bank robbery (federal), third conviction of any offense (South Carolina), piracy of interstate or foreign commercial aircraft (federal), supplying heroin to a minor (federal), and certain espionage violations of the Atomic Energy Act (federal). *Id.* at 44–45.

319. *Furman*, 408 U.S. at 293 (Brennan, J., concurring); see also HOOD, *supra* note 86, at 62.

320. HOOD, *supra* note 86, at 62–63. The two Supreme Court decisions were *United States v. Jackson*, 390 U.S. 570 (1968) and *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In *Jackson*, the Federal Kidnapping Act, which permitted only the jury to render a death sentence and not the judge, was held unconstitutional because it effectively discouraged a defendant from exercising his Fifth and Sixth Amendment rights. By pleading guilty to an offense under the Act, a defendant could escape the possibility of receiving the death penalty if convicted by a jury. *Jackson*, 390 U.S. at 581. In *Witherspoon*, the prosecution challenged forty-seven potential jurors for cause because of the mere fact that they had reservations about the death penalty. 391 U.S. at 514. The Supreme Court ruled this action unconstitutional:

Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

Id. at 522–23.

321. U.S. CONST. amend. VIII (emphasis added).

322. 99 U.S. 130 (1878).

323. 136 U.S. 436 (1890).

form of punishment in the military.³²⁴ *Wilkerson* seemed to suggest that a severe punishment is not cruel and unusual if it had been commonly performed in the past.³²⁵

On the other hand, *In re Kemmler* seemed to suggest that although an execution method is unusual, or uncommon, it is still constitutional if enacted by the legislature as a more humane way to administer the death penalty. *In re Kemmler* addressed the constitutionality of the electric chair as a method of execution; the Court held that the Eighth Amendment did not apply to the states and, therefore, reviewed the case only for due process violations of the defendant.³²⁶ In dicta, the Court stated that “[p]unishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous,—something more than the mere extinguishment of life.”³²⁷

The next Supreme Court decision addressing the death penalty, *Louisiana ex rel. Francis v. Resweber*,³²⁸ was not decided until 1947. In *Resweber*, the defendant was sentenced to death by electrocution, but because of a botched execution, did not die. Louisiana scheduled a second execution for the defendant and he appealed, citing violations of the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.³²⁹ Eight Justices acknowledged the Eighth Amendment’s applicability to the states; however, they split 5–4 on whether that case was cruel and unusual punishment. The majority ruled that it was not—seeming to adopt the reasoning in *In re Kemmler* that if a punishment is thought to be humane, then inadvertent suffering would not render a method of execution cruel and unusual.³³⁰

In *Weems v. United States*,³³¹ the Court addressed the question of whether the punishment of *cadena temporal*, twelve to twenty years imprisonment with hard and painful labor while wearing a “chain at the ankle, hanging from the wrists,” was cruel and unusual punishment within

324. *Wilkerson*, 99 U.S. at 134–35.

325. *Id.* (“Cruel and unusual punishments are forbidden by the Constitution, but . . . the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.”).

326. *In re Kemmler*, 136 U.S. at 447.

327. *Id.*

328. 329 U.S. 459 (1947).

329. *Id.* at 460–61.

330. *Id.* at 463–64 (“Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.”).

331. 217 U.S. 349 (1910).

the Eighth Amendment for creating a false entry in a public record.³³² The Court ruled that it was—citing for the first time the proposition that not only torturous and inhuman punishments are forbidden by the Constitution, but also punishments that are disproportionate to the crime.³³³

In *Trop v. Dulles*,³³⁴ a plurality opinion, the Court ruled that denationalization for the crime of desertion during war time was prohibited by the Eighth Amendment.³³⁵ Citing *Weems*, the Court held that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³³⁶ The Court looked to two facts to aid their decision. First, the Court noted that this was a relatively new, and therefore unusual, punishment since it was not enacted until 1940 and its constitutionality was never tested until this decision.³³⁷ Second, the Court looked to international modes of punishment and noted that denationalization for desertion during war time was only a crime in two countries in the world: the Philippines and Turkey.³³⁸ Based on this analysis, the Court ruled that the punishment was cruel and unusual.³³⁹

2. *The Furman Decision*

By 1972, the de facto moratorium on the death penalty in the United States was already in its fifth year. Forty states plus the District of Columbia and the federal government maintained the death penalty in their statute books for at least one offense, though no one had been executed since 1967. In 1971, the Supreme Court held that there was no Fourteenth Amendment due process violation in giving the jury discretion in a capital trial to determine a defendant’s guilt and punishment within a single trial and a single verdict.³⁴⁰ Further, the death penalty was assumed to be constitutional based on previous dicta by many Supreme Court Justices. So when *Furman v. Georgia*³⁴¹ was decided in 1972, basically invalidating forty-two death penalty statutes in the United States, it was anything but an ordinary decision by the Supreme Court.

In a one paragraph *per curiam* opinion, the Supreme Court held that the death penalty statutes of Georgia and Texas were unconstitutional, in

332. *Id.* at 363–64.

333. *Id.* at 368.

334. 356 U.S. 86 (1958).

335. *Id.* at 101.

336. *Id.*

337. *Id.*

338. *Id.* at 102–03.

339. *Id.* at 126–27.

340. See *McGautha v. California*, 402 U.S. 183, 221 (1971).

341. 408 U.S. 238 (1972).

violation of the Eighth and Fourteenth Amendments.³⁴² The decision was 5–4; each Justice wrote a separate opinion and none of the Justices in the majority joined in the opinion of another Justice.³⁴³ Justices Douglas, Stewart, and White found that as applied, the death penalty in the United States was unconstitutional, but did not believe the death penalty was per se unconstitutional. Justices Marshall and Brennan concluded that the death penalty constituted cruel and unusual punishment.

Justice Douglas traced the history of the Eighth Amendment and the recent precedent discussing the amendment and concluded that the death penalty, as it was currently being imposed, carried an unconstitutional risk of discrimination against those who are poor and those who are of a minority because there existed no limit on jury discretion.³⁴⁴ He held that the statutes were cruel and unusual in their operation, but failed to say whether he believed mandatory death penalty statutes would be constitutional.³⁴⁵

Justice Brennan also traced the history of the Eighth Amendment and concluded that to be constitutional, a punishment must not be degrading to human dignity. Brennan's test required four principles: (1) the punishment must not be unusually severe, (2) the punishment must not be arbitrarily inflicted, (3) the punishment must not be unacceptable to contemporary society, and (4) the punishment must not be excessive.³⁴⁶ Brennan then concluded that the punishment of death, based on the cumulative principles above, was cruel and unusual.³⁴⁷

Justice Marshall traced the history of capital punishment from England to the early history of the United States and noted that the use of the death penalty had been dwindling year by year.³⁴⁸ Marshall then reiterated the four-part test from the prior case law established by Brennan used to determine whether a punishment is cruel and unusual.³⁴⁹ To determine whether capital punishment is excessive or unnecessary, he listed six purposes allegedly served by the death penalty: retribution, deterrence, pre-

342. *Id.* at 239–40.

343. *Id.*

344. *Id.* at 255–56 (Douglas, J., concurring).

345. *Id.* at 256–57.

346. *Id.* at 282 (Brennan, J., concurring) (“The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.”).

347. *Id.* at 286.

348. *See generally id.* at 333–41 (Marshall, J., concurring).

349. *Id.* at 330–32.

vention of recidivism, encouragement of confessions and guilty pleas, eugenics, and economic reasons.³⁵⁰

First, Marshall concluded that retribution by itself could not justify the death penalty since it “has been condemned by scholars for centuries.”³⁵¹ Further, looking at all the studies and statistics, Marshall found no evidence of a deterrent effect of the death penalty.³⁵² On the issue of recidivism, Marshall pointed out studies demonstrating that most murderers are first-time offenders, tend to be model prisoners, and usually are not repeat offenders.³⁵³ Further, if the death penalty was used to encourage confessions and guilty pleas, it would be unconstitutional under the Fifth and Sixth Amendments. If used for eugenic goals, then the death penalty would disregard all modern thought of a civilized society.³⁵⁴ Also, the belief that the death penalty is used because it is cheaper to execute a criminal than to imprison him is not only incorrect, but it is also not a constitutional consideration.³⁵⁵

Finally, Marshall threw out the public opinion polls showing that the American public supports the death penalty, stating that “American citizens know almost nothing about capital punishment”³⁵⁶ and if they did know all the facts, “the average citizen would, in my opinion, find it shocking to his conscious and sense of justice.”³⁵⁷ The reasons the public would find it shocking are varied, but the main reasons are that the death penalty is not foolproof (there exists the possibility of executing the innocent) and the death penalty is race and gender biased.³⁵⁸ Based on all the facts above, Marshall concluded that the death penalty should be abolished, es-

350. *Id.* at 342.

351. *Id.* at 343–45 (“The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.”).

352. *Id.* at 353.

353. *Id.* at 355.

354. *Id.*

355. *Id.* at 355–58. Even speaking at a time before bifurcated capital trials in the United States, studies showed that the death penalty is more expensive than life imprisonment for a number of reasons. *Id.* at 357–58. Reasons include automatic appeals, extended and costly selection of jurors, costs for detecting and curing mental illness of an inmate before execution, and “an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency.” *Id.*; see also Millett, *supra* note 81 (“In a study done in North Carolina, the death penalty costs them \$2.16 million more than a sentence of life imprisonment without parole. In Texas, the death penalty costs around \$2.3 million, nearly three times the cost of imprisoning someone in a maximum security jail for forty years.”).

356. *Furman*, 408 U.S. at 362.

357. *Id.* at 369.

358. *Id.* at 364–66.

pecially in a nation like the United States that stands for “justice and fair treatment for all its citizens.”³⁵⁹

Justices Stewart and White found the death penalty “unusual” because it was infrequently imposed.³⁶⁰ Justice Stewart stated: “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”³⁶¹ Justices Blackmun, Powell, Rehnquist, and Chief Justice Burger dissented, finding the death penalty was not a cruel and unusual punishment.³⁶² Although he personally abhorred the death penalty, Justice Blackmun dissented because he believed the decision to abolish it should rest with the legislature, not the judiciary.³⁶³

After *Furman* only one thing was known for certain: as it currently stood, the death penalty was unconstitutional. The reason for its unconstitutionality was still in doubt—either it was applied discriminatorily, in a “wanton” or “freakish” manner, too infrequently, or all of the above.³⁶⁴ The answer would not come until four years later with another string of Eighth Amendment capital punishment cases.

3. *The 1976 Decisions*

In response to *Furman*, the states had three practical options: (1) get rid of the death penalty completely; (2) rewrite their death penalty statute, making the death penalty a mandatory punishment for those convicted of a capital crime; or (3) rewrite their death penalty statute so that it was imposed in a less discriminatory, less “freakish” manner.

Seven states decided not to rewrite their statutes on capital punishment;³⁶⁵ ten other states decided to rewrite their statutes to impose a mandatory sentence of death for those convicted of a capital crime.³⁶⁶ The

359. *Id.* at 371. By abolishing capital punishment, Marshall concludes: “We achieve ‘a major milestone in the long road up from barbarism’ and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity.” *Id.*

360. *Id.* at 308–10 (Stewart, J., concurring).

361. *Id.* at 309.

362. *Id.* at 380 (Burger, C.J., dissenting).

363. *Id.* at 410 (Blackmun, J., dissenting). Justice Burger expressed this sentiment as well. *Id.* at 375–76 (Burger, C.J., dissenting).

364. *Id.* at 415 (Powell, J., dissenting).

365. Four states rewrote their statutes after 1976: Oregon (1978), South Dakota (1979), New Jersey (1982), and Kansas (1994). Three other states plus the District of Columbia never rewrote their statute and completely abolished the death penalty after *Furman*: Massachusetts, North Dakota, and Vermont. See Death Penalty Information Center, State by State Information, <http://www.deathpenaltyinfo.org/state/> (last visited Dec. 23, 2007) (click on each state in drop-down menu). Eight states had abolished the death penalty before the *Furman* decision: Wisconsin (1853), Maine (1887), Minnesota (1911), Alaska (1957), Hawaii (1957), Michigan (1846, except for treason, complete abolition: 1963), Iowa (1965), West Virginia (1965). HOOD, *supra* note 86, at 63.

366. *Woodson v. North Carolina*, 428 U.S. 280, 313 (1976) (Rehnquist, J., dissenting).

other twenty-five states adopted statutes which allowed juries to impose the death penalty, but guided this discretion.³⁶⁷ In 1976, a string of Supreme Court cases addressed the constitutionality of these statutes.

In *Woodson v. North Carolina*, the Court held that the mandatory capital punishment statutes enacted after *Furman* were unconstitutional and in violation of the Eighth Amendment.³⁶⁸ The plurality opinion traced the history of jury discretion in imposing the death penalty in the United States, noting that while the common law made death the exclusive and mandatory punishment for many offenses, many states, including North Carolina, enacted statutes giving juries discretion to impose the death sentence.³⁶⁹ By 1963, every jurisdiction had replaced the mandatory death sentence with jury discretion.³⁷⁰ Further, the plurality explained that the mandatory death sentence did not allow consideration of individual factors.³⁷¹ Thus, the Court ruled this statutory scheme violated the Eighth Amendment.³⁷²

Decided on the same day, *Gregg v. Georgia*,³⁷³ the plurality opinion of Justices Stewart, Powell, and Stevens, held that for the crime of murder, “the punishment of death does not invariably violate the Constitution.”³⁷⁴ The plurality stated, however, that the punishment must accord with human dignity, meaning the death penalty must not be “excessive” for the crimes for which it was imposed.³⁷⁵ The plurality laid out the following two-part test for excessiveness: “First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.”³⁷⁶

Since the death penalty was already assumed valid by the legislature, a presumption of validity existed that it was constitutional. As a result, “a heavy burden rests on those who would attack the judgment of the representatives of the people.”³⁷⁷ This, the plurality noted, was because legisla-

367. See *Gregg v. Georgia*, 428 U.S. 153, 179 (1976); *Woodson*, 428 U.S. at 313.

368. 428 U.S. at 305.

369. *Id.* at 289.

370. *Id.* at 291–92. North Carolina enacted their statute in 1949. *Id.* at 293.

371. *Id.* at 303–04.

372. *Id.* at 305; see also *Roberts v. Louisiana*, 428 U.S. 325, 331–32, 336 (1976) (ruling that although Louisiana’s mandatory death penalty statute differed from North Carolina’s, the Eighth Amendment “simply cannot tolerate the reintroduction of a practice so thoroughly discredited”).

373. 428 U.S. 153 (1976).

374. *Id.* at 169. The plurality ruled that the death penalty was not cruel and unusual per se. They noted two key facts: the death penalty had been presumed valid in the past and after *Furman*, thirty-five states and the U.S. government rewrote their death penalty statutes to abide by that decision. *Id.*

375. *Id.* at 173.

376. *Id.*

377. *Id.* at 175.

tive standards are an important assessment of contemporary thought on a form of punishment.³⁷⁸

The plurality listed two key social purposes of the death penalty: retribution and deterrence.³⁷⁹ Retribution was a valid social purpose, because, though unappealing to some people and not the dominant objective of punishment, the death penalty was the only adequate response to some crimes that are “so grievous an affront to humanity.”³⁸⁰ The plurality then stated that in some cases, “the death penalty undoubtedly is a significant deterrent” even though no statistics exist showing that the death penalty actually deters murderers.³⁸¹

The plurality next considered whether the death penalty statute in Georgia had safeguards to prevent arbitrary and less capricious imposition of the death penalty.³⁸² The new Georgia statute called for a “bifurcated procedure,” where the sentencing phase was determined by a jury in a separate proceeding after the defendant was convicted, based on certain statutory aggravating circumstances.³⁸³ Further, the statute required that the Georgia Supreme Court promptly review every death sentence and conduct a “proportionality review” to make sure the death penalty was not being applied in an excessive manner.³⁸⁴ This statutory scheme was deemed by the plurality to meet the constitutional requirements of the Eighth Amendment.³⁸⁵

In *Proffitt v. Florida*,³⁸⁶ the plurality upheld the statutory scheme of Florida finding the statute constitutional despite Florida not conducting any proportionality review.³⁸⁷ Florida also required a bifurcated proceeding but placed the determination of imposing a death sentence on the trial judge.³⁸⁸ Based on eight statutory aggravating circumstances and seven statutory mitigating circumstances, the statute required the jury to vote on whether to recommend the sentence of death to the trial judge.³⁸⁹ The trial judge must then put in writing his reasons for sentencing death, which is reviewable by the Florida Supreme Court.³⁹⁰

378. *Id.*

379. *Id.* at 183.

380. *Id.* at 183–84.

381. *Id.* at 185–86. The plurality specifically mentioned two types of murders that would be deterred by the death penalty: murder for hire and murder by a life prisoner. *Id.*

382. *Id.* at 194–95.

383. *Id.* at 190–91, 195.

384. *Id.* at 206.

385. *Id.* at 207.

386. 428 U.S. 242 (1976).

387. *Id.* at 250–51.

388. *Id.* at 252.

389. *Id.* at 250.

390. *Id.* at 251–52.

In *Jurek v. Texas*,³⁹¹ the Texas statutory sentencing procedure was also held to be constitutional, even though Texas did not provide any statutory aggravating circumstances.³⁹² Instead, the Texas statute required a bifurcated trial where in the sentencing phase, the jury was required to answer three questions: (1) whether conduct that caused death was committed deliberately; (2) whether defendant would be a continuing threat to society; and (3) if raised by evidence, whether defendant's conduct was an unreasonable response to provocation.³⁹³ If the answer to all three questions was "yes," a sentence of death was imposed.³⁹⁴ The decisions of *Gregg*, *Proffitt*, and *Jurek* provided the framework for a constitutionally valid death penalty statute.

In sum, the 1976 Supreme Court cases allowed the death penalty for murder. The death penalty was not unconstitutional per se as long as a state allows jury discretion and enacts specific guidelines for a jury/judge to follow in imposing a death sentence. The ten-year moratorium on executions ended in 1977 with the execution of Gary Gilmore in Utah by firing squad.³⁹⁵

C. Restricting the Reach of Capital Punishment for Crimes

1. Capital Punishment for Rape

In *Coker v. Georgia*,³⁹⁶ the Supreme Court, in a plurality opinion written by Justice White, held that the punishment of death for the rape of an adult woman is cruel and unusual punishment where the rape does not result in death.³⁹⁷ In reaching its conclusion, the plurality found the punishment of death excessive for a crime that did not result in the death of the victim: "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."³⁹⁸

The plurality based its decision primarily on recent legislative action. After the decision in *Furman*, thirty-five states enacted statutes to address the defects identified in *Furman*. Only three states chose to include rape as

391. 428 U.S. 262 (1976).

392. *Id.* at 270.

393. *Id.* at 269.

394. *Id.*

395. See Death Penalty Information Center, *supra* note 301.

396. 433 U.S. 584 (1977).

397. *Id.* at 592-93; see also *Eberheart v. Georgia*, 433 U.S. 917 (1977) (death penalty unconstitutional for kidnapping where the victim was not killed).

398. *Coker*, 433 U.S. at 598.

a capital offense in their new statutes.³⁹⁹ While noting that the legislative action was not unanimous, “it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.”⁴⁰⁰ Citing *Trop*, the plurality also noted the importance of international opinion on the acceptability of a punishment, stating 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.”⁴⁰¹ Thus, for the second time in an Eighth Amendment case, international opinion was used to confirm the conclusions of the Court.

The importance of the *Coker* decision was that it more or less abolished the death penalty in the United States for all offenses that did not result in the death of the victim.⁴⁰²

2. Capital Punishment for Felony Murder

The doctrine of felony murder was adopted from the common law of England and found its way into the definition of first degree murder in the 1794 Pennsylvania statute.⁴⁰³ Felony murder was first defined as all “homicides in or in the attempt to perpetrate arson, rape, robbery or burglary.” However, many states, when enacting their first-degree murder

399. *Id.* at 593–94. Two of those states were North Carolina and Louisiana, which enacted mandatory death penalty statutes after *Furman* that were ruled unconstitutional in *Woodson*. When re-enacting their statutes after *Woodson*, both of these states only included murder as a capital offense, thus leaving Georgia as the only state still with rape on the books as a capital offense. *Id.* at 594.

400. *Id.* at 596.

401. *Id.* at 596 n.10.

402. Florida, Mississippi, and Tennessee statutes at the time authorized the death penalty for rape when the victim was a child—the plurality failed to address the constitutionality of the death penalty for that offense. *Id.* at 596. After *Coker*, though, these three states abolished the death penalty for the rape of a child. David W. Schaaf, Note, *What if the Victim Is a Child? Examining the Constitutionality of Louisiana's Challenge to Coker v. Georgia*, 2000 U. ILL. L. REV. 347, 354–55 (2000); see also *Leatherwood v. State*, 548 So. 2d 389, 402–03 (Miss. 1989) (finding the Mississippi statute at the time of offense precluded the sentence of death for rape of a child).

In 1995, Louisiana enacted a statute providing the sentence of death for the rape of a child under the age of twelve. Schaaf, *supra* at 348. The Supreme Court has yet to rule on this issue and as of July 2007, six states now have a similar statute on the books. Adam Liptak, *Death Penalty in Some Cases of Child Sex Is Widening*, N.Y. TIMES, June 10, 2006, at A9 (“Oklahoma became the fifth state to allow the death penalty for sex crimes against children yesterday, a day after South Carolina enacted a similar law.”); Death Penalty Information Center, *Death Penalty for Offenses Other than Murder*, <http://www.deathpenaltyinfo.org/article.php?&did=2347> (last visited Nov. 10, 2007) (Texas passed a bill on July 16, 2007, making the second conviction for rape of a child under fourteen eligible for the death penalty—the two other states with similar laws are Florida and Montana).

On June 29, 2007, the Louisiana Supreme Court agreed with the Louisiana legislature and declared the death penalty a proportional punishment for the offense of child rape. See *State v. Kennedy*, 957 So. 2d 757, 793 (La. 2007). The U.S. Supreme Court just granted certiorari on January 4, 2008 and will hear the case to decide whether to expand or limit its decision in *Coker*. See *Kennedy v. Louisiana*, 128 S. Ct. 829 (2008) (granting petition for certiorari).

403. Bedau, *supra* note 280, at 26.

statutes, decided to allow the doctrine to encompass all possible felonies. Hence, if a killing occurred during the course of another felony, the “wilful, deliberate and premeditated” nature of a first-degree murder charge was assumed and the defendant was charged with a more serious offense.⁴⁰⁴ In most states, this more serious offense was death.⁴⁰⁵

In *Enmund v. Florida*,⁴⁰⁶ the Court held that when a defendant “aids and abets a felony in the course of which a murder is committed by others but does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed,” the death penalty, as a punishment to that defendant, violates the Eighth Amendment.⁴⁰⁷ Aiding its decision, the majority relied on the analysis provided by *Coker*: research (1) the historical development of the punishment at issue, (2) legislative judgments on the issue, (3) international opinion on the punishment, and (4) decisions juries have made on the punishment.⁴⁰⁸

The majority first noted that out of the thirty-six state and federal jurisdictions that currently authorize the death penalty, only eight jurisdictions authorize the death penalty where a defendant participated in a robbery where a murder was committed but who did not intend a killing to take place.⁴⁰⁹ The Court then stated that this was not as compelling a situation as the legislative judgments in *Coker*, where only three states maintained the death penalty for rape, but it “nevertheless weighs on the side of rejecting capital punishment for the crime at issue.”⁴¹⁰ The majority stated that jury sentencing decisions showed that very few people were actually sentenced to death for this offense and that no one over the past quarter century had been executed in the United States for felony murder.⁴¹¹

The majority then turned to international opinion on felony murder:

“The climate of international opinion concerning the acceptability of a particular punishment” is an additional consideration which is “not irrelevant.” It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely re-

404. *Id.*

405. The doctrine of felony murder has been highly criticized both by scholars in this country and in England. *Id.* at 26–27.

406. 458 U.S. 782 (1982).

407. *Id.* at 797.

408. *Enmund*, 458 U.S. at 788–89.

409. *Id.* at 789, 792.

410. *Id.* at 792–93.

411. *Id.* at 795–96.

stricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.⁴¹²

Looking at all the facts, the majority concluded that the punishment of death for a robber who does not take life is an excessive penalty.⁴¹³

To further its conclusion, the majority noted that the two primary social purposes of capital punishment, deterrence and retribution, were not served by punishing felony murder with death. Imposing the death penalty on a defendant that had no intention of killing would not have a measurable deterrent effect.⁴¹⁴ Further, retribution was usually based on a defendant's intention—absent “intentional wrongdoing,” the death penalty for the sake of retribution alone was excessive in this case.⁴¹⁵

In *Tison v. Arizona*,⁴¹⁶ the Court held that when a defendant is a knowing, major participant in a felony that carries a grave risk of death, and shows a “reckless disregard for human life,” the death penalty does not violate the Eighth Amendment even when the defendant personally did not intend to kill.⁴¹⁷ The Court acknowledged that the defendants in *Tison* did not intend for a killing to take place when committing their felony. However, the Court determined that the defendants were “major participants” in the felony of breaking their father out of prison and hence were more culpable for their actions.⁴¹⁸

To support this conclusion, the Court looked to recent legislative judgments on the issue to see if the state legislatures regarded the death penalty an excessive punishment for this crime. After a controversial look at the state legislative decisions in the United States, the Court concluded that twenty-one jurisdictions authorize the death penalty for felony murder where the defendant had no intent to kill.⁴¹⁹ Finding this number a major-

412. *Id.* at 796 n.22. O'Connor dissented, noting the following about its use of international opinion: “As the petitioner acknowledges, the felony-murder doctrine, and its corresponding capital penalty, originated hundreds of years ago, and was a fixture of English common law until 1957 when Parliament declared that an unintentional killing during a felony would be classified as manslaughter.” *Id.* at 816 (O'Connor, J., dissenting). She further mentioned in a footnote: “The English attitude toward capital punishment, as reflected in recent legislation, differs significantly from American attitudes as reflected in state legislation; in 1965, England abolished the death penalty for all murders.” *Id.* at 817 n.29.

413. *Id.* at 797 (majority).

414. *Id.* at 798–99.

415. *Id.* at 800.

416. 481 U.S. 137 (1987).

417. *Tison*, 481 U.S. at 157–58.

418. *Id.* at 150–51.

419. *Id.* at 154.

Four States authorize the death penalty in felony-murder cases upon a showing of culpable mental state such as recklessness or extreme indifference to human life. Two jurisdictions require that the defendant's participation be substantial and the statutes of at least six more,

ity,⁴²⁰ the Court then held the death penalty was not a disproportionate penalty where the defendant was a major participant and showed reckless indifference to life.⁴²¹

D. Restricting the Reach of Capital Punishment for Types of Offenders

1. Capital Punishment for the Insane

In *Ford v. Wainwright*,⁴²² the Supreme Court held that the death penalty for an inmate who had become insane awaiting his execution was cruel and unusual punishment in violation of the Eighth Amendment.⁴²³ The Court noted that the Eighth Amendment banned cruel and unusual punishments that were either: (1) “condemned by the common law in 1789” when the Bill of Rights was adopted, or (2) punishments that would now be condemned by “evolving standards of decency that mark the progress of a maturing society.”⁴²⁴ The Court then concluded that “virtually no authority condoning the execution of the insane at English common law” existed.⁴²⁵

English common law forbade the execution of the insane for two reasons: it served no deterrent purpose, and had no retributive value. The Court stated that the deterrent nature of capital punishment did not exist because the action offended humanity and provided no worthwhile example to others.⁴²⁶ Further, the Court noted that “the community’s quest for ‘retribution’—the need to offset a criminal act by a punishment of equiva-

including Arizona, take minor participation in the felony expressly into account in mitigation of the murder.

Id. at 152–53. Further, six states permit “capital punishment for felony murder *simpliciter*,” and another three states “require some additional aggravation before imposing the death penalty upon a felony murderer” such as a showing of major participation. *Id.* at 153–54.

420. As Justice Brennan’s dissent pointed out, twenty-one jurisdictions in the United States is not a majority. The majority opinion did not consider the jurisdictions that have completely abolished the death penalty in its analysis. If it had, the majority would have found that as many as three-fifths of the jurisdictions in the United States do not allow the death penalty for nontriggermen. *Id.* at 175 (Brennan, J., dissenting).

421. *Id.* at 157–58. Since intent is not required after *Tison* to impose the death penalty, *Enmund* now only stands for the proposition that when a defendant does not intend to kill *or does not show reckless indifference to life* during the course of a felony, the death penalty violates the Eighth Amendment when imposed on that defendant. Addressing international opinion in a footnote, Justice Brennan noted: “Since *Enmund* was decided, the Netherlands and Australia have abolished the death penalty for all offenses, and Cyprus, El Salvador, and Argentina have abolished it for all crimes except those committed in wartime or in the violation of military law.” *Id.* at 177 n.15.

422. 477 U.S. 399 (1986).

423. *Id.* at 408. The holding of *Ford* applies to all insane persons, but since the Court has already held that a person must be competent to stand trial, the holding in *Ford* basically applies to those who were sane when tried, but became insane awaiting execution. *See id.* at 421 (Powell, J., concurring).

424. *Id.* at 406 (majority).

425. *Id.* at 408.

426. *Id.* at 407–08.

lent ‘moral quality’—is not served by execution of an insane person.”⁴²⁷ Finally, the Court mentioned that no U.S. state currently allowed the execution of the insane, and twenty-six states expressly prohibited it.⁴²⁸

However, what is the meaning of insanity and at what level of insanity is capital punishment prohibited by the Eighth Amendment? Justice Powell addressed this question in his concurrence which the Court failed to answer. In answering this question, Powell looked to English common law and the purposes of the death penalty as a punishment.⁴²⁹ He noted that the retributive aim of capital punishment would be satisfied if the defendant recognized the connection between his punishment and crime. Therefore, Powell held 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.”⁴³⁰ This opinion was not the ruling of the Court, however, and only provides a guideline that lower courts may use to determine whether an inmate has become insane.

2. Capital Punishment for the Mentally Retarded

The definition of mental retardation varies depending on the source being referenced, but it is usually described as a deficiency in both intelligence and social behavior. Generally, a person who has an IQ lower than seventy, which correlates to a mental age of under ten years, is considered to be mentally retarded.⁴³¹ Four categories of mentally retarded individuals exist—mild, moderate, severe, and profound⁴³²—out of which eighty-nine percent of mentally retarded individuals fall within the “mild” category.⁴³³ Under early English and American common law, it was a principle that “‘idiots,’ together with ‘lunatics,’ were not subject to punishment for criminal acts committed under those incapacities. . . . Idiocy was understood as ‘a defect of understanding from the moment of birth,’ in contrast to lunacy, which was ‘a partial derangement of the intellectual faculties, the senses returning at uncertain intervals.’”⁴³⁴ However, if a person could be found to understand the difference between right and wrong, they could be tried and executed under the common law.

427. *Id.* at 408.

428. *Id.* at 408 n.2.

429. *Id.* at 419–21 (Powell, J., concurring).

430. *Id.* at 422.

431. See *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002); *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989); HOOD, *supra* note 86, at 128.

432. An individual is considered mildly retarded with an IQ between 50–55 to 70; moderately retarded with an IQ between 35–40 and 50–55; severely retarded with an IQ between 20–25 and 35–40; and profoundly retarded with an IQ below 20–25. *Penry*, 492 U.S. at 308 n.1.

433. *Id.*

434. *Id.* at 331.

The execution of the mentally retarded, while rare in the United States throughout its history, still occurred from time-to-time. Between 1976 and 1989, eight mentally retarded individuals were executed in the United States.⁴³⁵ Despite its rarity (or maybe because of its rarity), many state legislatures did not address the issue of executing the mentally retarded for some time. In Georgia, for example, the high profile execution of Jerome Bowden, who had an IQ of only sixty-five, caused public outrage that a person with mental retardation could be executed in that State.⁴³⁶ In response to public opinion polls condemning the execution, Georgia became the first State to enact a law prohibiting the death penalty for the mentally retarded in 1988.⁴³⁷ Maryland and the federal government would pass similar legislation within the next year.⁴³⁸ In 1989, the Supreme Court took up the question whether the Eighth Amendment bars the execution of any mentally retarded individual.

In *Penry v. Lynaugh*, the Court concluded that the Constitution did not bar the execution of the mentally retarded.⁴³⁹ The opinion written by Justice O'Connor traced the history of capital punishment for the mentally retarded through the common law and noted that the common law only prohibited the execution of those individuals who were severely or profoundly retarded—those that could not understand right from wrong.⁴⁴⁰ She then applied the “evolving standards of decency” test and concluded that since only two states have rejected the death penalty for the mentally retarded, no national consensus among the legislatures existed to prohibit the punishment as excessive under the Eighth Amendment.⁴⁴¹

O'Connor then conducted a proportionality review, looking into the social purposes of retribution and deterrence and determined that the goals of the death penalty would at least be furthered as to some mentally retarded offenders.⁴⁴² Therefore, she concluded that the death penalty for the mentally retarded was not cruel and unusual punishment.⁴⁴³

By 2000, many state legislatures were enacting laws banning the death penalty for the mentally retarded. By December 2001, eighteen states and

435. Death Penalty Information Center, List of Defendants with Mental Retardation Executed in the United States, <http://www.deathpenaltyinfo.org/article.php?did=1858> (last visited Mar. 2, 2007).

436. *Atkins*, 536 U.S. at 313 n.8; see also HOOD, *supra* note 86, at 127–28.

437. *Atkins*, 536 U.S. at 313 nn.8–9; see also HOOD, *supra* note 86, at 127–28.

438. *Atkins*, 536 U.S. at 314; *Penry*, 492 U.S. at 334.

439. 492 U.S. at 340.

440. *Id.* at 332–33.

441. *Id.* at 334.

442. *Id.* at 338.

443. *Id.* at 340. As for defendant *Penry*, his case was remanded because the Court found that Texas's sentencing procedure of not specifying any mitigating circumstances was now unconstitutional. *Id.* at 328.

the federal government had enacted such statutes.⁴⁴⁴ In 2002, the Supreme Court decided *Atkins v. Virginia*, which held unconstitutional the death penalty for the mentally retarded.⁴⁴⁵ The Court started by noting the recent trend of legislation abolishing the death penalty for the mentally retarded—since *Penry*, sixteen more states abolished the death penalty for the mentally retarded, bringing the total to eighteen states plus the federal government.⁴⁴⁶ The majority concluded that this showed a national consensus of legislatures against the practice.⁴⁴⁷

The Court then observed that international opinion, though not dispositive on the subject, may lend support to the Court's conclusions. In a footnote they noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."⁴⁴⁸ As a single sentence inside a long footnote, this fact would have probably gone unnoticed if it was not for the dissents of Rehnquist and Scalia specifically repudiating the use of international authority on this issue.⁴⁴⁹ Finding that the death penalty did not satisfy the purposes of retribution or deterrence, the Court held that the death penalty was excessive for the mentally retarded and therefore violated the Eighth Amendment.⁴⁵⁰

Since *Atkins*, the states have struggled with a proper definition for "mentally retarded" under the law. Some states specify an IQ level, others do not. Some states require an age limit after which one may no longer claim to be mentally retarded while others specify that mental retardation is a rebuttable presumption.⁴⁵¹ The matter remains unresolved, unfortunately, and "shortly after the *Atkins* decision was handed down, a Texas jury found John Paul Penry, at his third trial, not to be mentally retarded and sentenced him once again to death, despite the fact that he had never tested above an IQ level of 70."⁴⁵²

444. HOOD, *supra* note 86, at 128–29.

445. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

446. *Id.* at 314–315. These sixteen states were: Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina. *Id.*

447. *Id.* at 316.

448. *Id.* at 316 n.21.

449. *Id.* at 324–25 (Rehnquist, J., dissenting); *id.* at 347–48 (Scalia, J., dissenting).

450. *Id.* at 321 (majority).

451. HOOD, *supra* note 86, at 130.

452. *Id.* In October 2005, Penry once again got his death sentence reversed (for the third time) by the Texas Court of Criminal Appeals. He is now undergoing his fourth sentencing trial. *See Death Sentence Overturned*, N.Y. TIMES, Oct. 6, 2005, at A29.

3. *Capital Punishment for Juveniles*

The first known execution of a juvenile in the United States occurred in 1642. Since that time, at least 366 juvenile offenders have been executed in the United States—twenty-two of those after 1976.⁴⁵³ Further, the last juvenile executed in the United States who was under the age of sixteen when committing the crime occurred in 1948.⁴⁵⁴ Hence, when the issue of the constitutionality of the death penalty for juveniles under sixteen reached the Supreme Court, it should have been a routine decision like that of *Ford*. The decision, however, was anything but simple.

The decision in *Thompson v. Oklahoma* consisted of three separate opinions. A plurality opinion written by Justice Stevens (in which three other Justices joined), expressed the view that the death penalty was unconstitutional for juveniles who committed their crimes when under the age of sixteen.⁴⁵⁵ Justice Scalia, in a dissenting opinion (which two other Justices joined), expressed the view that the death penalty was constitutional for that category of offenders.⁴⁵⁶ The deciding vote was Justice O'Connor's concurrence in the judgment,⁴⁵⁷ ruling that the death penalty was unconstitutional as imposed on defendant Thompson because no age requirement was specified in Oklahoma's death penalty statute.⁴⁵⁸

The plurality looked to international opinion on the issue of juvenile executions. In the first use of international opinion outside a footnote since *Trop*, the plurality mentioned that the leading European countries prohibited juvenile executions:

Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as

453. VICTOR L. STREIB, 77 THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973–FEBRUARY 28, 2005, at 3 (2005), http://www.law.onu.edu/faculty_staff/faculty_profiles/coursematerials/streib/juvdeath.pdf.

454. *Thompson v. Oklahoma*, 487 U.S. 815, 832 n.37 (1988).

455. *Id.* at 838.

456. *Id.* at 878 (Scalia, J., dissenting).

457. Justice Kennedy did not participate in the decision. *Id.* at 838 (plurality).

458. *Id.* at 857–58 (O'Connor, J., concurring in the judgment).

treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.⁴⁵⁹

The issue of juvenile executions was again argued in *Stanford v. Kentucky*.⁴⁶⁰ Again the decision consisted of three opinions, but this time the plurality opinion was written by Justice Scalia. As expected by his dissent in *Thompson*, he concluded that the death penalty for a juvenile aged sixteen or seventeen when committing a crime was not cruel and unusual punishment.⁴⁶¹ To reach his conclusion, he started with the common law tradition of the death penalty, which stated that anyone over the age of fourteen was culpable for their felonious actions and that when the Eighth Amendment was adopted, theoretically anyone over the age of seven could be executed.⁴⁶² Then, looking to “evolving standards of decency,” he first specifically repudiated the use of international opinion on the issue, stating that it is only “*American* conceptions of decency” that matter for the analysis.⁴⁶³

Next, he looked to recent legislative judgments and noted that of “the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old

459. *Id.* at 830–31. As one source for their information, the Court cited the Children and Young Persons Act 1933 of England. *Id.* at 831 n.34. Scalia disagreed with the plurality’s use of international opinion. In a footnote to his dissent, Scalia wrote that international opinion may be relevant,

[b]ut where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

Id. at 868 n.4 (Scalia, J., dissenting).

460. 492 U.S. 361 (1989).

461. *Id.* at 381.

462. *Id.* at 368; *see also supra* Part II(B)(2).

463. *Id.* at 369 n.1 (citations omitted). The dissent by Justice Brennan disagreed with Scalia, noting that international opinion was very relevant to the issue:

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. Many countries, of course—over 50, including nearly all in Western Europe—have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. Twenty-seven others do not in practice impose the penalty. Of the nations that retain capital punishment, a majority—65—prohibit the execution of juveniles. Sixty-one countries retain capital punishment and have no statutory provision exempting juveniles, though some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles. Since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world, three of these in the United States. . . . Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.

Id. at 389–90 (Brennan, J., dissenting) (citations omitted).

offenders.”⁴⁶⁴ This established a majority of jurisdictions that allow the execution of sixteen and seventeen-year-old offenders. He then analogized the situation to *Tison* and concluded that the legislative judgments show that the juvenile death penalty is not cruel and unusual punishment.⁴⁶⁵

In *Roper v. Simmons*,⁴⁶⁶ the Supreme Court overruled *Stanford* and held that the death penalty for anyone under the age of eighteen when committing their offense was cruel and unusual punishment.⁴⁶⁷ The Court first looked to legislative enactments and determined that a “national consensus” existed within the United States for abolishing the juvenile death penalty. After *Stanford*, five states plus the federal government abandoned the juvenile death penalty, bringing the total to thirty states that reject the death penalty for juveniles—a definite majority.⁴⁶⁸ The Court then specifically rejected the counting methods for a consensus that the opinions in *Tison* and *Stanford* employed.⁴⁶⁹ As well as a majority of legislatures abolishing the death penalty, the Court also noted that in the twenty states that still use the juvenile death penalty, its use has been very infrequent—in the past ten years, only three states had actually executed a juvenile offender.⁴⁷⁰ For instance, defendant Stanford was granted clemency from the governor of Kentucky in 2003 and had his death sentence changed to one of life imprisonment.⁴⁷¹

The majority then conducted its proportionality review, first noting three general differences between juveniles and adults: (1) juveniles are less mature, (2) juveniles are more vulnerable to negative influences, and (3) the character of juveniles is less fixed.⁴⁷² The Court concluded that the societal purposes of retribution and deterrence are not met by the juvenile death penalty.⁴⁷³

Perhaps the most extraordinary part of the opinion, though, was the majority’s decision to devote a whole section to international authority on the juvenile death penalty. This has spurred much commentary from

464. *Id.* at 370 (plurality).

465. *Id.* at 371. In his dissent, Brennan took issue with this conclusion by Scalia as well. Brennan could not understand why Scalia chose to disregard the opinions of the states that have completely abolished the death penalty when looking at legislative judgments. Surely the fifteen jurisdictions that do not have the death penalty would also not allow the execution of a juvenile. When taking these states into account, a total of twenty-seven state legislatures have concluded that the death penalty for juvenile offenders is wrong. *Id.* at 384 (Brennan, J., dissenting).

466. 543 U.S. 551 (2005).

467. *Id.* at 578.

468. *Id.* at 564.

469. *Id.* at 574.

470. *Id.* at 564–65.

471. STREIB, *supra* note 453, at 6. A total of eight juvenile offenders would be executed in the United States between the years 1990 and 2005. *Id.* at 19–23.

472. *Simmons*, 543 U.S. at 569–70.

473. *Id.* at 571–72.

scholars and law students all over the nation asking whether international authority should be used to interpret the Constitution.⁴⁷⁴ The majority first noted that the United States is the only country in the world that still allows the death penalty for juveniles, and only one of eight countries that have executed juvenile offenders since 1990.⁴⁷⁵ The Court then went into a short analysis of the experience of the United Kingdom with the death penalty—noting that they abolished the juvenile death penalty in 1933 and have now completely abolished the death penalty.⁴⁷⁶ The majority then concluded that the juvenile death penalty was unconstitutional based on the national consensus and proportionality review done previously and stated that international opinion was used as confirmation of this conclusion.

E. Miscarriages of Justice in the United States

1. The Difficulty of Proving Actual Innocence

The awareness of the possibility of putting an innocent man to death in the United States is growing. As of February 8, 2008, 127 people sentenced to death were later found innocent.⁴⁷⁷ The media has started covering these miscarriages of justice more and more—bringing it to the attention of the American public.⁴⁷⁸ The way these wrongly convicted inmates

474. See, e.g., Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1 (2005); Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909 (2005); Glensy, *supra* note 6; Greta Proctor, Comment, *Reevaluating Capital Punishment: The Fallacy of a Foolproof System, the Focus on Reform, and the International Factor*, 42 GONZ. L. REV. 211 (2006–2007); Michael J. Shultz, Comment, *Finding Consensus While Footnoting the “Opinions of Mankind”*: *Roper v. Simmons and the Proper Role of International Consensus in United States Eighth Amendment Jurisprudence*, 45 WASHBURN L.J. 233 (2005).

475. *Simmons*, 543 U.S. at 575, 577. “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.” *Id.* at 577.

476. *Id.*

477. Death Penalty Information Center, *Innocence and the Death Penalty*, <http://www.deathpenalty-info.org/article.php?did=412&scid=6> (last visited Feb. 10, 2008). The last person found innocent on death row was Kennedy Brewer in Mississippi on February 8, 2008. *Id.*

478. See generally JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* 271 (2006) (a nonfiction work documenting the life of Ron Williamson, an ex-minor league baseball player, wrongly convicted of murder in Oklahoma—he once came within a week of execution before he was finally freed based on DNA evidence). See also Henry Weinstein, *Executions in U.S. Drop to a 10-Year Low*, L.A. TIMES, Dec. 15, 2006, at 21 (a recent Gallup poll found that 63% of the American public believed that an innocent man had been executed in the United States within the last five years). But see David R. Dow, *The End of Innocence*, N.Y. TIMES, June 16, 2006, at A31 (“For too many years now, though, death penalty opponents have seized on the nightmare of executing an innocent man as a tactic to erode support for capital punishment in America. Innocence is a distraction. Most people on death row . . . did what the state said they did. But that does not mean they should be executed.”); Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23 (“But nothing is gained by deluding the public into believing that the police and prosecutors are trying to send innocent

are freed is varied—some are freed because of recent developments in DNA science, others by long legal battles.⁴⁷⁹

In Illinois, the exoneration of innocent men on death row caused Governor Ryan to halt all executions in the state in 2000. In a speech given at Northwestern University, Ryan said that finding seventeen innocent men on death row was a “catastrophic failure” of the system and an “absolute embarrassment” for Illinois.⁴⁸⁰

A study written by Professors Hugo Bedau and Michael Radelet published in 1987, reported that it was possible that twenty-three innocent people had been executed in the United States throughout the history of the death penalty—even one in 1984.⁴⁸¹ This article was highly criticized by supporters of the death penalty⁴⁸² and is still being debated today as is evidenced by the Supreme Court’s recent decision in *Kansas v. Marsh*,⁴⁸³ which upheld Kansas’s death penalty statute as constitutional, but sparked a debate between the Justices about recent DNA testing and exonerations of innocent men on death row. Whatever the case, miscarriages of justice in the United States are occurring, and it is causing many people to question the death penalty, even though the Supreme Court has not used this factor in their Eighth Amendment analysis.⁴⁸⁴

people to prison. . . . Americans should be far more worried about the wrongfully freed than the wrongfully convicted.”).

479. Henry Weinstein, *Victims of the Justice System: A Conference at UCLA Brings Together the State’s Wrongly Convicted, to Share Their Experiences and Push for Legal Changes*, L.A. TIMES, Apr. 9, 2006, at 1.

480. George Ryan, “*I Must Act*,” in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 222 (Hugo Adam Bedau & Paul G. Cassell eds., 2004). Since his speech, there have now been eighteen people found innocent in Illinois. Death Penalty Information Center, Innocence and the Death Penalty, *supra* note 477. Illinois does not even have the highest number of innocent people found on death row—twenty-two people have been freed from death row in Florida because of innocence since 1976. *Id.*

481. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36 (1987). James Adams was executed in Florida in 1984, with what Bedau and Radelet believed to be a high level of doubt of his guilt. *See id.* at 91.

482. *See* Stephen J. Markman & Paul G. Cassell, Comment, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 124, 128–33 (1988) (“Moreover, the authors cite but a single allegedly erroneous execution during the past twenty-five years—that of James Adams. A review of that case demonstrates, however, that Adams was unquestionably guilty.”). *But see* Hugo Adam Bedau & Michael L. Radelet, Comment, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988). If anything can be said of this debate, it is how difficult it is to prove innocence once convicted in the United States, especially after one has been executed. *See* MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES, at xii (1992).

483. 126 S. Ct. 2516, 2534 (2006) (Scalia, J., concurring) (“Even if the innocence claims made in this study were true, all except (perhaps) the 1984 example would cast no light upon the functioning of our current system of capital adjudication. The legal community’s general attitude toward criminal defendants, the legal protections States afford, the constitutional guarantees this Court enforces, and the scope of federal habeas review, are all vastly different from what they were in 1961.”).

484. The possibility of executing the innocent was only once mentioned in a major Supreme Court death penalty case, brought up in Justice Marshall’s concurrence in *Furman*. *See Furman v. Georgia*,

One recent execution where a possible miscarriage of justice was thought to have occurred was the execution of Roger Coleman in 1992 in Virginia. Coleman was convicted of rape and murder in 1981, but professed his innocence.⁴⁸⁵ Investigators took up Coleman's case, researched the murder for four years, questioned the evidence used to convict him, and even found evidence that another person could be guilty.⁴⁸⁶

Around the time of his execution, Coleman was interviewed on TV, his face was on the cover of *Time* magazine, and even Pope John Paul II urged his execution to be stayed.⁴⁸⁷ The governor of Virginia then said that he would grant a stay to Coleman if he passed a lie detector test—Coleman failed and was executed.⁴⁸⁸ On January 12, 2006, DNA testing which was unavailable at the time of Coleman's conviction and execution proved that Coleman almost certainly was guilty of the murder.⁴⁸⁹

2. *The Supreme Court Shuts the Door to Innocence Claims*

In *Herrera v. Collins*,⁴⁹⁰ the Supreme Court basically stated that they were not open to innocence claims once a defendant has been convicted. In *Herrera*, the defendant claimed, in a second federal habeas petition, that new evidence now existed showing that he was "actually innocent"—ten years after his capital conviction at trial. New affidavits pointed to the fact that the defendant's brother, now dead, was the one who murdered the police officer, not the defendant.⁴⁹¹ The Court ruled that in a federal habeas petition, a defendant cannot solely present evidence of innocence, but must show that the evidence of innocence is rooted in a constitutional violation—a rule "grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."⁴⁹² Further, the Court reiterated the fact

408 U.S. 238, 366 (1972) (Marshall, J., concurring). Since that time, the Court has concentrated on objective factors and the social purposes of deterrence and retribution to guide their analysis.

485. *Marsh*, 126 S. Ct. at 2533 (Scalia, J., concurring); James Dao, *DNA Ties Man Executed in '92 to the Murder He Denied*, N.Y. TIMES, Jan. 13, 2006, at A14.

486. Dao, *supra* note 485.

487. *Marsh*, 126 S. Ct. at 2533 (Scalia, J., concurring); Dao, *supra* note 485.

488. *Marsh*, 126 S. Ct. at 2533 (Scalia, J., concurring).

489. Dao, *supra* note 485. DNA tests done in a Canadian laboratory stated that there was a one in nineteen million chance that Coleman was not the killer. Marquis, *supra* note 478.

490. 506 U.S. 390 (1993).

491. *Id.* at 393.

492. *Id.* at 400. However, the Court said that a defendant may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.

Id. at 404.

that once a defendant has been convicted after a fair trial, “the presumption of innocence disappears,” and upheld Texas’s law barring a new trial based on newly discovered evidence found thirty days after sentencing.⁴⁹³

The defendant claimed that the evidence of actual innocence in itself is a constitutional claim since the execution of an innocent person would constitute “cruel and unusual punishment.” In answer to this, the Court traced the history of the common law and recognized that clemency has been a “historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”⁴⁹⁴ Therefore, if new evidence comes up ten years after trial showing innocence, the defendant can petition for a reprieve from the governor.

However, the Court did concede one possible exception for a capital case: a situation where a “truly persuasive demonstration of ‘actual innocence’” was made.⁴⁹⁵ The Court then stated that there was an “extraordinarily high” threshold for proving this.⁴⁹⁶ The defendant did not meet this heavy burden with his evidence in this case and his new trial motion was denied. If anything can be taken from this case, it is that, although possible to get a court to review new evidence of innocence in a new trial, the burden is very high to actually meet. After *Herrera*, it is now more difficult for a defendant, even with new evidence, to prove he is innocent.

493. *Id.* at 399–400. The Court reasoned this principle from the fact of “finality” of judgments and that “passage of time only diminishes the reliability of criminal adjudications” which could prejudice the state after a long enough time has elapsed to again present a preponderance of evidence of guilt. *Id.* at 403.

494. *Id.* at 411–12. Further, the Court compared the practice of clemency in America to that of England, noting that in England, “[c]lemency provided the principal avenue of relief for individuals convicted of criminal offenses—most of which were capital—because there was no right to appeal until 1907. It was the only means by which one could challenge his conviction on the ground of innocence.” *Id.* at 412 (internal citation omitted). This is another similarity between the British death penalty and the American death penalty—the reliance on executive clemency to free the innocent. As seen from the cases of Timothy Evans and Derek Bentley, however, executive clemency did not work too well in England.

495. *Id.* at 417.

496. *Id.* So the question is: if Timothy Evans’s case occurred after the decision of *Herrera* in America, would the Court hear his claim of actual innocence? Would he meet the *extraordinarily high* burden of showing actual innocence? Keep in mind that Evans confessed to both murders and had a motive to kill at least his wife, similar to this case where Herrera confessed to the murder of the police officer that the Court seemed to weigh heavily in favor of Herrera not meeting the burden. Clemency did not help Evans, nor did it help Herrera as he was denied a pardon and executed shortly after this decision. See Death Penalty Information Center, Part II: History of the Death Penalty, <http://www.deathpenaltyinfo.org/article.php?scid=15&did=411> (last visited Sept. 18, 2007).

IV. ANALYSIS: EXPANDING ON *ROPER V. SIMMONS*

The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins.⁴⁹⁷

The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.⁴⁹⁸

A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.⁴⁹⁹

In *Gregg v. Georgia*, the Supreme Court first laid out the analysis to use for every Eighth Amendment analysis under the "evolving standards of decency" test. To determine whether a punishment is "excessive," a punishment must (1) make no measurable contribution to the goals of punishment and (2) not be grossly disproportionate to the serious nature of the crime.⁵⁰⁰ In subsequent cases, the Court has determined that the proportionality analysis is an objective test, where the Court looks to legislative judgments for a "national consensus" on the punishment, jury determinations on the rarity of the imposition of the punishment, and international opinion on the matter to confirm the Court's own conclusions.⁵⁰¹ In each subsequent death penalty case, the Court ends its analysis with its own judgment as to whether the punishment furthers the social purposes of deterrence and retribution.

In *Simmons*, the Court expanded the international opinion part of the test, concluding that the Court may look to (1) the international trend of abolition on the punishment at issue and (2) the opinions of the United Kingdom on the punishment at issue.⁵⁰² This next section first compares and contrasts English law to American law on the history of the death penalty, then briefly discusses the international trend of abolition of the death penalty. Finally, this section will look to the debate in the states, to see whether a "national consensus" is forming about the death penalty or whether one may be possible in the not so distant future.

497. *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

498. *Id.* at 578.

499. *Id.* at 568.

500. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

501. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Enmund v. Florida*, 458 U.S. 782, 788 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

502. *See Simmons*, 543 U.S. at 564, 578.

A. English Law v. American Law

In *Simmons*, a major part of the Court's analysis of international opinion was devoted to the death penalty in England. First, it is important to point out a few inconsistencies and misstatements of fact from the majority opinion. The Court mentioned the report of the select committee in 1930, which recommended the minimum age be raised to twenty-one in England. As can be seen from Part II of this article, though, that was only a minor, conditional recommendation of the report; conditional on if Parliament insisted on maintaining the death penalty. What is most important for *this* analysis is the major finding of the report—the complete abolition of the death penalty in England.⁵⁰³

Next, the majority mentions the Children and Young Persons Act 1933, which abolished the juvenile death penalty for all those under eighteen. What the majority failed to mention, however, is that the last actual execution of a juvenile offender in England occurred in 1833—one hundred years before the passing of this Act. In effect, this Act only codified in law what the common practice was in England.⁵⁰⁴ Hence, the juvenile death penalty had been abolished for much longer than fifty-six years in practice.⁵⁰⁵

It is also important to note Scalia's opinion about using international authority, especially English law, on the death penalty:

The Court's special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. . . . [But] [i]t is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own.⁵⁰⁶

503. See *supra* Part II(C)(2).

504. See *supra* Part II(B)(2).

505. Despite these few misstatements, Justice Kennedy's words ring true: "As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter." *Simmons*, 543 U.S. at 577.

506. *Id.* at 626–27 (Scalia, J., dissenting). In contrast to Scalia, Rex Glensy states the following about using English law in comparative analysis:

While his beliefs shed some light on the discussion, it is important to note that England abolished the death penalty in 1965, long before they joined the European courts and made many of the social changes Scalia refers to. The two countries may be going in different directions now, but that was not the case when England was considering abolishing the death penalty.

1. *Generally*

First, it is worth mentioning the obvious similarities and differences between British and American law on the death penalty. For example, both countries entered a moratorium on capital punishment in the 1960s, both in disregard of public opinion. In 1965, public opinion in England favored keeping the death penalty; nevertheless, British Parliament decided to enact the Murder (Abolition of Death Penalty) Act 1965, temporarily abolishing capital punishment in England for five years. In 1966, opinion polls in America showed that the public also supported the death penalty, but in 1967 the death penalty was effectively halted in every state based on two Supreme Court decisions. The moratorium in the United States would last for ten years, but the death penalty would be reinstated in 1976 with *Gregg* and its progeny. In 1969, the death penalty in England was officially abolished for murder.

One possible reason for this disparity may be the size difference between the countries. The United States is a very large nation, consisting of over fifty separate jurisdictions, while England is much like a single state here. Hence, it would take a great deal more change in the United States to equal the nation-wide impact that the developments had in England around the 1960s. England abolishing the death penalty, as a country, is much like a single state abolishing the death penalty in the United States.

The obvious, but important difference between the two countries is that England reformed its death penalty procedures by legislative action while America is currently reforming its system judicially. In his dissenting

Indeed, one need only observe the institutional make-up of the nation which is one of our favorite targets for comparison, the United Kingdom, to realize that the governmental superstructure of a nation is but window dressing to the true definition of the society that the superstructure governs. The United Kingdom is a non-federal constitutional monarchy with an unwritten constitution. It has a parliament giving rise to a government that fuses the executive and legislative; a largely self-appointed judicial branch without a defined power of judicial review; and laws that must comply with the laws of the European Union. In other words, from an institutional point of view, the United States and the United Kingdom have little in common. However, the structural differences between these two nations (and the societies comprising them) are "more fanciful than real," in that an examination from within reveals a commonality of history, direction, and outlook, which shows that the society of the United Kingdom closely resembles that of the United States.

Glensy, *supra* note 6, at 428–29.

opinion to *Furman*, Chief Justice Burger said the following, which is highly relevant to this discussion:

The world-wide trend toward limiting the use of capital punishment, a phenomenon to which we have been urged to give great weight, hardly points the way to a judicial solution in this country under a written Constitution. Rather, the change has generally come about through legislative action, often on a trial basis and with the retention of the penalty for certain limited classes of crimes. Virtually nowhere has change been wrought by so crude a tool as the Eighth Amendment. The complete and unconditional abolition of capital punishment in this country by judicial fiat would have undermined the careful progress of the legislative trend and foreclosed further inquiry on many as yet unanswered questions in this area.⁵⁰⁷

The reasoning behind this point is twofold: a separation of powers issue, and the judiciary is unable to adequately debate the issue of capital punishment—a largely fact-driven, not legal-driven, issue—and it should therefore be left to the legislature to decide.⁵⁰⁸

However, there are many counter-arguments to this theory. For instance, in the United States, the judiciary may present the only means through which to completely abolish the death penalty. As a nation consisting of fifty separate states and the federal government, the only way to completely abolish the death penalty in all states, other than through the Supreme Court, would be to add an amendment to the Constitution abolishing the death penalty. This is an improbable action. Other than this, the legislatures of every jurisdiction would have to debate and analyze the need for the death penalty, which could be a very time-consuming, exhaustive solution, not to mention the fact that certain states, unless forced, are unlikely to ever abolish the death penalty.⁵⁰⁹

507. *Furman v. Georgia*, 408 U.S. 238, 404 (1972) (Burger, C.J., dissenting). However, since this was written, South Africa abolished the death penalty judicially, declaring it unconstitutional in the landmark decision *State v. T. Makwanyane & M. Mchunu*. HOOD, *supra* note 86, at 39–40. In 1995, the Constitutional Court ruled that the death penalty was inconsistent with South Africa's prohibition against "cruel, inhuman or degrading" punishment, a provision in their constitution very similar to the Eighth Amendment to the U.S. Constitution. *Id.* at 40; *see also* Stephen B. Bright, *The Death Penalty and the Society We Want*, 6 PIERCE L. REV. 369, 384–85 (2008).

508. *See Furman*, 408 U.S. at 404–05 (Burger, C.J., dissenting).

509. Hugo Adam Bedau, *An Abolitionist's Survey of the Death Penalty in America Today*, in DEBATING THE DEATH PENALTY, *supra* note 480, at 31 ("[T]he death penalty is deeply entrenched in Texas, Florida, and other states of the Old Confederacy, where lynching was once the preferred way to deal with black men accused of the murder or rape of a white female. No one has any idea how the death penalty in these states—where the vast proportion of all death sentences and executions in the United States takes place—is to be ended or even seriously reduced in the near future.").

Further, in the years after *Furman*, the Supreme Court has been acting similarly to the foreign legislatures in its dwindling of the death penalty.⁵¹⁰ The process has been much like that of England. The English legislature first abolished the death penalty for those under sixteen, then for those under eighteen. Finally, the legislature limited the availability of the death penalty to only certain types of murder before abolishing it completely. Similarly in the United States, the Supreme Court limited the death penalty to only the most egregious types of murder in *Gregg*, *Coker*, *Enmund*, and *Tison*.⁵¹¹ Further, the Court abolished the death penalty for those under sixteen in *Thompson*, and then finally abolished the death penalty for those under eighteen in *Simmons*. This could be considered a similarity between the two systems.

Another disadvantage to the judicial adjudication of the death penalty issue is the permanence of the Court's judgment: if the Supreme Court proclaims the death penalty unconstitutional, the only way to reverse that decision would be to enact a constitutional amendment allowing the use of the punishment.⁵¹² This, however, is similar to the current situation in England. After 1998, England adopted two European protocols effectively requiring them to abolish the death penalty for all offenses and never re-

510. Justice Scalia, in his dissent to *Atkins*, even admits that this is what has been happening:

Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence. . . . There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.

Atkins v. Virginia, 536 U.S. 304, 352–53 (2002).

511. However, this fact is often disputed. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court was confronted, yet again, with the issue of whether the death penalty was applied in an arbitrary and racist manner. This time the Court was presented with statistical evidence (the Baldus study) that showed that a defendant who killed a white victim was 4.3 times more likely to receive the death penalty than a defendant who killed a black victim, and that a black defendant was more likely to receive a death sentence than other defendants, thus leading to the conclusion that black defendants who kill white victims were most likely to receive the death penalty in Georgia for similar murders. *Id.* at 288. Despite this evidence, the Court held that the Baldus study did not “demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process” and denied relief to McCleskey on both Eighth and Fourteenth Amendment grounds. *Id.* at 313.

In 2007, twenty years after the decision in *McCleskey*, the *Atlanta Journal-Constitution* published a four-part special report on the death penalty. See *A Matter of Life or Death*, <http://www.ajc.com/metro/content/metro/stories/deathpenalty/dayone/dpdayone1.html> (last visited Oct. 3, 2007) (published from September 23–26). The report looked at Georgia's death penalty within the last ten years, and found that the same problems that existed in 1972 exist today, reiterating Justice Stewart's words from *Furman*: “Getting the death penalty in Georgia is as predictable as a lightning strike.” Bill Rankin et al., *Death Still Arbitrary*, ATLANTA J.-CONST., Sept. 23, 2007, at A1. But see Ken Wynne, *Death Penalty Is Fair; Georgians Support It*, ATLANTA J.-CONST., Oct. 3, 2007, at A17 (president of the District Attorneys Association of Georgia). Instead of reserving the death penalty for the most egregious kinds of murders, the statutory provisions in practice have made little improvement to the way the death penalty is carried out.

512. *Furman*, 408 U.S. at 462 (1972) (Burger, C.J., dissenting).

enact the punishment. If England were to reinstate the death penalty now, they would have to denounce the European Convention on Human Rights and the treaties of the European Union—an unlikely proposition. Hence, the decision in England, while decided by the legislature, was also a permanent decision.

Another argument is that the issue of abolishing the death penalty in England was better debated by elected officials who were forced to stay in touch with public opinion. However, while the House of Commons is an elected body of Parliament, the House of Lords in England consists of appointed members not elected by the general public. Further, when the Murder (Abolition of Death Penalty) Act was passed in 1965, many of the House of Lords members were hereditary peers, whose right to be in Parliament was passed down from generation to generation.⁵¹³ The House of Lords played an integral role in passing death penalty legislation, as can be seen by the many years it took in England before the Lords arrived at the same opinion as those in the Commons that capital punishment should be abolished.

Similarly, the Supreme Court Justices are appointed in America, and thus one might argue that their power to see the public opinion on an issue restricts them from ultimately abolishing the death penalty. However, the Supreme Court can be seen as a similar body to the House of Lords, looking over what the appointed members in the Commons are doing and then rendering its own judgment. The Supreme Court bases all of its death penalty decisions greatly on what the individual legislatures in each state have done, thus acting like the House of Lords in England.

As can be seen from the analysis above, the difference between the legislative action in England and the judicial action in America concerning the death penalty is an important one. However, looking at the distinction in depth, many similarities exist between the processes in both countries despite this fundamental difference.

513. See *supra* note 94 and accompanying text.

The Lords currently has around 730 Members, and there are four different types: life Peers, Law Lords, bishops and elected hereditary peers. Unlike MPs, the public do not elect the Lords. The majority are appointed by the Queen on the recommendation of the Prime Minister or of the House of Lords Appointments Commission. . . . The right of hereditary peers to sit and vote in the House of Lords was ended in 1999 by the House of Lords Act but 92 Members were elected internally to remain until the next stage of the Lords reform process. UK Parliament, Different Types of Lords, http://www.parliament.uk/about/how/members/lords_types.cfm (last visited Mar. 1, 2007).

2. *After World War II: A More Humane Society*

Prior to the First World War, abolitionist movements in both the United States and England were gaining strength. Bills were being debated in the House of Commons to abolish the death penalty, and even one bill passed through Parliament and received the royal assent—the Children Act 1908, which abolished the death penalty in England for all children under the age of sixteen. In the United States, significant efforts were being made in legislatures throughout the states to enact anti-death penalty legislation. During the late 1800s, a few states abolished the death penalty and similar legislation in other states was going through the system—for all intents and purposes it looked like the death penalty would be abolished in America in the twentieth century.

The First World War then brought an abrupt halt to the abolition movement in both countries. Shortly after the war, the movement again picked up momentum—the 1930 report of the select committee was issued in England, calling for an end to the death penalty as one of its major recommendations. Further, as a response to that report, England enacted the Children and Young Persons Act 1933, officially abolishing the death penalty for all juveniles under eighteen. In the United States, a total of eight more states would abolish the death penalty for murder.⁵¹⁴

However, in both countries the movements again came to a halt. The recommendations of the select committee in England would not be acted upon for many years, and by 1921, five states in America reinstated the death penalty in their legislatures. By the time World War II began, the abolitionist movements in both countries were at all-time lows.

The end of the Second World War is where the two countries split. In England, the abolitionist movement picked up from where it left off, and by 1948, England had a bill to abolish the death penalty passed through one house of Parliament. By 1957 they had the Homicide Act that severely restricted the use of the death penalty; by 1965, they achieved complete abolition of the death penalty for murder. In the United States, though, the abolitionist movement did not pick up and nothing would really happen with the death penalty in the United States again until the 1960s.

What happened to cause this difference? By the end of World War II, England and the rest of Europe were in need of change—social reform for a more humane society. The horrors of the Second World War were still fresh in everyone's mind as the death penalty had been used by the Ger-

514. Arizona, Kansas, Minnesota, North Dakota, Oregon, South Dakota, Tennessee, and Washington. See Bedau, *supra* note 280, at 10.

mans and Italians as a political cleansing tool, for eugenics purposes.⁵¹⁵ The horrors of the potential of capital punishment were now visible, and the response in Europe was to get rid of it before it could do any more damage. Italy abolished the death penalty in 1944 and Germany did the same in 1949. In 1948, the United Nations adopted its Universal Declaration of Human Rights, which guaranteed to everyone the “right to life.”⁵¹⁶ That same year, England’s first major attempt to abolish the death penalty passed through the Commons and was nearly put into law. The efforts made by the abolitionists in these early years following the war paved the way for the United Nations’ recommendation to severely restrict the death penalty’s use in 1966 and its recommendation to abolish the death penalty in 1983 for all offenses during peace time.⁵¹⁷ By this time, however, England had already abolished the death penalty for murder nearly twenty years earlier.

In the United States, the abolitionist movement did not pick up pace as fast as in Europe. Maybe it was because we were not exposed to the horrors of the death penalty as in Europe—the distance of an ocean kept us from experiencing the damage capital punishment could bring if used for the wrong reasons.⁵¹⁸ Justice Marshall, in his concurrence to *Furman*, offered his reasoning:

It is not easy to ascertain why the movement lost its vigor. Certainly, much attention was diverted from penal reform during the economic crisis of the depression and the exhausting years of struggle during World War II. Also, executions, which had once been frequent public spectacles, became infrequent private affairs. The manner of inflicting death changed, and the horrors of the

515. See HOOD, *supra* note 86, at 10 (“[The death penalty] was reintroduced in Italy by Mussolini’s Fascist regime in 1927 and in Germany was expanded beyond all recognition by the Nazis, where it was ‘to be transformed from an instrument of penal policy into a tool of racial and political engineering . . . not merely a matter of retribution but also of eugenics policy.’ Under the Third Reich ‘some 16,500 death sentences had been passed.’”).

516. Universal Declaration of Human Rights, G.A. Res. 217A, Art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>.

517. See HOOD, *supra* note 86, at 14–15.

518. Joshua Marquis, a district attorney in Oregon, offers his own reasoning for why Europe was affected by the death penalty differently than America:

Again, context is essential. The nations that first foreswore capital punishment were Germany and Italy, whose very recent history was rife with state-sanctioned murder and even genocide. Add to that legal systems where defendants were and sometimes are presumed guilty, the absence of a comprehensive jury system, and a recent legal history of judicial corruption and you would likely find the staunchest of American death penalty supporters understanding why the European Union requires any nation seeking admission to renounce capital punishment.

Joshua K. Marquis, *Truth and Consequences: The Penalty of Death*, in DEBATING THE DEATH PENALTY, *supra* note 480, at 117, 125.

punishment were, therefore, somewhat diminished in the minds of the general public.⁵¹⁹

As explained in the next section, the United States would modify its death penalty system, creating restrictions on the way a state would choose who would receive the death penalty and new humane methods of executing the condemned prisoner. Nearly every one of these changes, however, would be discarded by England as unworkable modifications to the system with little known enhancement.

3. Sentencing/Execution Procedures

Many of the early modifications to the death penalty in the United States were explicitly rejected by the British as unworkable and unfair. For instance, until the death penalty's abolition in England, a capital case carried a mandatory death sentence for a defendant if convicted. Even after the Royal Commission on Capital Punishment Report of 1953 recommended that jury discretion be used, Parliament still believed that mandatory sentencing was the fairest solution because it based the sentence on the heinousness of the crime, not on the personal characteristics of the defendant or possible leniency of a jury. Jury discretion, the British believed, would not result in equal justice for all.

The United States, however, since the early history of the death penalty and confirmed by the Supreme Court in *Woodson*, believed that jury discretion was the best way to decide whether a particular defendant received the death penalty or not—that the imposition of the death penalty should take into effect aggravating and mitigating factors of the individual offender. While this was an improvement over the random, discriminatorily imposed jury discretion system pre-*Furman*, one must wonder if it is still better than the method England imposed. As it might be, both systems of imposing the death penalty were flawed for completely separate reasons.⁵²⁰

Other modifications the British explicitly rejected were the modern methods of execution. Until its abolition, the British method of execution was hanging—this they believed, if done correctly, was the most humane method of putting someone to death. In the Royal Commission on Capital

519. *Furman v. Georgia*, 408 U.S. 238, 340 (1972).

520. The system in the United States might be flawed, not because it allows discretion, but because discretion is used as a vehicle for racist administration of the death penalty. See *McCleskey v. Kemp*, 481 U.S. 279, 336 (1987) (Brennan, J., dissenting) (“Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being.”). But see *id.* at 311 (majority) (“a capital punishment system that did not allow for discretionary acts of leniency ‘would be totally alien to our notions of criminal justice’”).

Punishment Report of 1953, the commission recommended that lethal injection be looked into as a possible alternative to hanging, but explicitly rejected the use of electrocution and lethal gas as inhumane methods of execution. However, Parliament decided not to pursue the method of lethal injection in the 1950s (the United States would not even use it as a method of punishment until the 1980s, many years after England abolished the death penalty for ordinary crimes). With America's problems in the past with botched executions in the electric chair and the gas chamber, and with recent constitutionality issues with lethal injection, England may have been correct in its recommendation.⁵²¹

England also did not initially agree with separating murder into degrees, with one type of murder capital and the other non-capital, for much the same reason as jury discretion—it would be unworkable and unfair. Further, when England finally decided to do this with the Homicide Act 1957, confusion and unfairness in the law led the British to quickly abolish the death penalty less than ten years later. In the United States, first- and second-degree murder have been staples of our criminal law system for centuries. Looking at the statutes of many states, the criminal law for capital murder is very similar to the Homicide Act 1957 in the murders it deems capital and those it does not. Most states that have the death penalty impose it on a murder of a police officer, a prison officer by an inmate, or if the offender commits multiple murders, much like the Homicide Act required. The United States, however, has somehow managed to quiet the critics about the unfairness and questionability of the “murder by degrees” doctrine.

One area where the United States and England have agreed regarding execution procedure was the fact that executions should be private affairs,

521. The U.S. Supreme Court has just recently granted certiorari to hear the issue of whether the three-drug cocktail used in lethal injection procedures constitutes cruel and unusual punishment. Linda Greenhouse, *Justices to Enter the Debate over Lethal Injection*, N.Y. TIMES, Sept. 26, 2007, at A24; see also Tim Reid, *Lethal Injection Under Review*, TIMES (London), Sept. 26, 2007, at 38 (“Nearly all executions are carried out by lethal injection but its use has become increasingly controversial after research in 2005 in *The Lancet*, the British medical journal, suggested that some prisoners executed by lethal injection suffered agonising deaths.”). Although England rejected the use of lethal injection in the 1950s, nearly thirty years before the United States even started using it as an execution method, the United States has never until recently called into question its use.

Further, the Supreme Court has never held that a specific execution method is cruel and unusual. In one nineteenth century case, *Wilkerson v. Utah*, 99 U.S. 130 (1878), the Supreme Court upheld the firing squad as not a cruel and unusual method of punishment (in *In re Kemmler*, 136 U.S. 436 (1890), the Court ruled that New York's state court ruling, that electrocution was not cruel and unusual punishment, did not violate the Fifth Amendment's privileges and immunities clause). See *supra* Part III(B)(1). However, this will be the first challenge under the Eighth Amendment's “evolving standards of decency” doctrine for an execution method. See Petition for Writ of Certiorari at 12, *Baze v. Rees*, No. 07-5439 (July 11, 2007). Although this case does not present a facial challenge to the constitutionality of lethal injection, it is an important case for outlining the standard for an Eighth Amendment challenge to an execution method. *Id.*; see also *infra* note 541 and accompanying text.

not public spectacles.⁵²² When public executions actually ended in each country, however, was a different matter. In 1868, England abolished public hangings. On the other hand, it was not until after 1936, the last recorded public execution in Kentucky, that public executions were abolished in the United States. This discrepancy of nearly seventy years is another indication of how the system in England seems to lead and predict the changes in the United States. Not only did England abolish the death penalty for juveniles under sixteen, then for juveniles under eighteen, and then restrict its use to murder before the United States, but it also led the way in abolishing public hangings.

4. *Deterrence & Retribution*

Deterrence and retribution have justified use of the death penalty in both countries for thousands of years. Since the medieval times in England, the death penalty has been believed to deter crime, and the close connection between religion and the death penalty made retribution a justifiable purpose as well.

Until the twentieth century, the death penalty in England was a highly religious affair—many believed that waiting to be killed by the gallows inspired criminals to find God and repent of their sins. For many years, only clergy were allowed to visit a condemned person in prison before death—they would talk with the offender in hopes to allow him to confess of his sins before execution. It is this religious background where the seeds of punishment for retribution began to grow, as Potter wrote:

Throughout its history capital punishment served a religious function. Whether imposed in the name of the king, the representative of God on earth, or by priests, or in the name of a society considered as a sacred body, the infliction of the death penalty was seen not just as a punishment for a crime, but as a repudiation by society of the evil in its midst, ridding the land of its blood-guilt.⁵²³

522. However, as Stuart Banner writes, public executions varied between the two countries. In the United States, “[h]angings were not macabre spectacles staged for a bloodthirsty crowd. A hanging was normally a somber event, like a church service.” BANNER, *supra* note 282, at 24. He goes on:

[E]ighteenth century American execution crowds were usually not noisy or drunk or disrespectful. Indeed, when the earliest American opponents of capital punishment wished to argue that frequent public hangings instilled in spectators a lighthearted attitude toward violence, they had to cite examples of *English* execution crowds, for want of appropriate examples at home.

Id. at 27–28; see also *supra* Part II(B)(3).

523. POTTER, *supra* note 23, at 160.

Even in the Supreme Court, retribution is continuously mentioned as one of the reasons to maintain the death penalty. Retribution is a philosophy, viewed today as either “an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim.”⁵²⁴ Much has stayed the same since the early days in England. Although retribution has lost some value—some scholars look to reformation of the criminal as a better societal purpose than punishment for retribution—it is still used in the Eighth Amendment analysis for an excessive punishment. Reasons vary between seeing that the criminal gets his “just deserts” and preventing society from taking matters into their own hands.⁵²⁵ But many justices see the inadequateness of this purpose and note that retribution is not justified for many different kinds of offenders (the insane, the mentally retarded, juveniles). When retribution is justified, it cannot be used alone to justify the death penalty. Despite this, both England and the United States have used retribution as a justification for capital punishment.

Throughout history in both England and the United States, deterrence has been stated as the one major reason to support capital punishment. “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.”⁵²⁶ However, no study has ever proved that capital punishment is any more effective as a deterrent than life imprisonment without parole.

The British Royal Commission on Capital Punishment Report of 1953, one of the most comprehensive reports on the death penalty ever assembled (it was 500 pages in length and has been repeatedly cited by the U.S. Supreme Court), could find no statistical evidence that the death penalty deterred crime, but it assumed that the death penalty would deter certain people from committing murder, no matter the statistical evidence. In *Gregg*, the Supreme Court held similarly that there are “carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act,” despite there being no proof to support this contention.⁵²⁷ Studies since then have varied—some studies show that the death penalty is a deterrent; some show it has no effect; and still others show that the death penalty actually has a brutalization effect, increasing the murder rate where imposed.⁵²⁸ Although England abandoned the death penalty, claiming as

524. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

525. *Atkins v. Virginia*, 536 U.S. 304, 313 (2002).

526. *Id.* at 320.

527. *Gregg v. Georgia*, 428 U.S. 153, 186 (1976).

528. See Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 260–61 (2006) (finding that new studies showing the death

one of its reasons that capital punishment did not deter crime, the United States still uses deterrence as one of the main social purposes of imposing the punishment.

5. *The Role of Public Opinion*

The German philosopher Hegel once said, “[t]o be independent of public opinion is the first formal condition of achieving anything great.”⁵²⁹ This quotation summarizes the abolitionists’ stance on capital punishment, as there has rarely ever been public support for its abolition. In both England and the United States, public opinion polls throughout the history of the death penalty have shown support for its retention. A recent opinion poll in England has even suggested that the public wants the government to reinstate the death penalty as a punishment after over thirty years of its abolition for ordinary crimes.⁵³⁰ Nevertheless, opinion polls have usually made no difference to the subject of the death penalty in either country—as Justice Marshall stated in *Furman*, “American citizens know almost nothing about capital punishment.”⁵³¹

In England, public opinion during their retentionist years consistently showed the public wanted to retain the death penalty as a punishment. Even as Parliament was decreasing the offenses eligible for the death penalty and introducing abolition bills, public opinion was against the abolition of the death penalty. When the Murder (Abolition of Death Penalty) Act 1965 received the royal assent and became law, England was still a country with public support for the death penalty. Even after the abolition of the death penalty for ordinary offenses in 1965, many public opinion polls showed the public wanted to reintroduce the death penalty for murder, despite all the problems the country had with its Homicide Act 1957. When England adopted the two European protocols in 1998 and completely abolished the death penalty, Parliament was still acting without public support.

Similarly in the United States, public support has never favored the abolition of the death penalty. Other than Marshall’s opinion in *Furman*,

penalty is a deterrent “are fraught with numerous technical and conceptual errors”); Shepherd, *supra* note 81, at 203–04.

529. See Arnie Arnesen, *Shaheen Should Risk Doing What’s Right*, BOSTON GLOBE, Mar. 26, 2000, at 2.

530. John Cooper, *Stop! There Can Be Too Much of a Good Thing*, TIMES (London), Oct. 3, 2006, at 7 (“BEWARE popular demand—being popular does not make something right and it certainly may not make it good. . . . [For example,] if opinion polls are to be believed the general public would welcome back capital punishment with open arms, citing a mythical, safer society during the days of judicial execution.”).

531. *Furman v. Georgia*, 408 U.S. 238, 361–62 (1972) (Marshall, J., concurring).

the Supreme Court has only once recognized public opinion in any of its decisions—when the majority in *Atkins* mentioned in a footnote that the public supported the abolition of the death penalty for the mentally retarded.⁵³² Most of the state legislatures that have abolished the death penalty have done so despite public opinion to the contrary. When it comes to the issue of the death penalty, public opinion polls really do not matter that much to either the Supreme Court or the state legislatures. When enough people believe that the death penalty is inhumane and needs to be abolished, the government will take action despite what the public thinks.

6. *A Lack of Uniformity*

In England, a major factor in its decision to abolish the death penalty was the fact that it could not be fairly and uniformly administered. This is part of the reason why they decided not to use jury discretion and why their eight year experience in degrees of murder did not work. They believed that if the death penalty was to be imposed, it should be imposed equally upon all who commit an equivalent crime, no matter what the mitigating factors or where the defendant was located. To impose the punishment in any other way was to be unfair to the people of England. They also believed that in order for the death penalty to be a possible deterrent, it must be imposed on all people based on the crime they commit, not based on where a defendant is from or the defendant's personal circumstances. For the most part, this worked for them during their experiment with capital punishment, although if jury discretion was used instead of mandatory death sentences for murder, the lives of Derek Bentley and Ruth Ellis would probably have been spared.

When the Homicide Act 1957 was put into law, many scholars and politicians in England noted how unfair and confusing the change of law was, as it imposed the death penalty for certain offenses rather than others with no real consistency. There is no doubt that this Act helped lead to the abolition of the death penalty in 1965. As England believed, if they could not enact a law to improve the imposition of the death penalty, they might as well abolish it altogether.

The system in the United States is entirely different from that of England fifty years ago in this respect, and for entirely the wrong reasons. As Adam Liptak of the *New York Times* recently said:

Any system that sentences about 2 percent of all murderers to death and then executes relatively few of them is bound to seem

532. See *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

arbitrary. Add to that the fact that the states have chosen very different approaches to capital punishment, and the output of the machinery of death can seem awfully random.⁵³³

In the United States, there is a serious lack of uniformity with the use of the death penalty that many believe make it an unfair sentence. In many Southern states, studies have shown that race has played a substantial role in jury decisions on whether to impose the death penalty.⁵³⁴ Further, since the death penalty is not controlled by the federal government (except for where the Supreme Court has ruled), each state has a different law for capital punishment. Each state also has a different list of offenses that are punishable by death. Further, thirteen U.S. states currently do not have the death penalty. To better understand this situation, take the example of two bordering states: Michigan and Ohio. Michigan was the first jurisdiction in modern times to abolish the death penalty, while Ohio executed the second most people in the United States in 2006. If a defendant commits murder in Michigan, the worst sentence he could have received over the last 150 years is life imprisonment without parole. However, if the defendant lives just across the border in Ohio, that same defendant could be subject to the death penalty. It does not seem fair that such a distinction could exist for two different areas of the same country.⁵³⁵

Further, many European nations, as well as Canada and Mexico, are now refusing to extradite offenders back to the United States if the death penalty is sought. In order for extradition to occur in these situations, the United States must give written confirmation to these countries that the death penalty will not be sought.⁵³⁶ Take another example of a defendant who commits capital murder in Texas—the state that executes the most people in the United States. Assume that the defendant escapes into Mexico after committing the crime but before being caught by the authorities. Under this scenario, Texas would have to agree not to pursue the death penalty against the defendant in order for extradition to be possible. Why should the law give advantages to a defendant who runs away to another country after committing a crime? This seems to suggest that the best available option for a criminal who commits capital murder in a death penalty state is to leave the country. If the criminal can successfully get out of the country, the criminal is then free from the possibility of receiving the

533. Adam Liptak, *Geography and the Machinery of Death*, N.Y. TIMES, Feb. 5, 2007, at A12.

534. See *supra* note 511 and accompanying text.

535. Some may argue that this is the case in many areas of the law; however, as even Justice Scalia has admitted, “death is different.” See *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991).

536. HOOD, *supra* note 86, at 21.

death penalty. Not only does this seem unfair, but it also seems to cut down the already shaky deterrence effect of capital punishment.

If this is not enough, geography within a criminal's home state will also, in many cases, determine whether the death penalty will be sought. Consider the example of a defendant who commits capital murder in a state that has the death penalty on the west side of a road instead of a few feet away on the east side. Such a small difference should not matter when seeking the death penalty for a heinous offense like murder, should it? Well, if the west side of the road was given to the Native Americans by the United States and the offender who committed the crime is Native American, federal law prohibits the death penalty as a punishment unless the tribe consents to it. Such a far-fetched situation happened to Patrick Murphy, who is now on death row in Oklahoma appealing his sentence because the trial court determined that he committed murder on the wrong side of the road.⁵³⁷

Finally, geography can also play a deciding role depending on whether the prosecutor in your district is a staunch supporter of capital cases. As Stephen Bright, President of the Southern Center for Human Rights, said:

The two most important decisions in every death penalty case are made not by juries or judges, but by prosecutors. No state or federal law ever requires prosecutors to seek the death penalty or take a capital case to trial. A prosecutor has complete discretion in deciding whether to seek the death penalty and, even if death is sought, whether to offer a sentence less than death in exchange for the defendant's guilty plea. . . .

As a result of this discretion, there are great geographical disparities in where death is imposed within states. Prosecutors in Houston and Philadelphia have sought the death penalty in virtually every case in which it can be imposed. As a result of aggressive prosecutors and inept court-appointed lawyers, Houston and

537. Liptak, *supra* note 533. The issue could even turn on who has the property rights to the land and whether they are surface or underground rights:

But in December 2005, the Oklahoma Court of Criminal Appeals, while acknowledging that Mr. Murphy's case presented a "challenging issue," ruled that underground rights do not count. "Common sense tells us," Vice Presiding Judge Gary L. Lumpkin wrote, "that this issue has more to do with surface rights than underground minerals."

The United States Supreme Court is now considering whether to hear the case and asked the federal government in June to offer its views.

Id.; see also *Murphy v. State*, 124 P.3d 1198, 1207 (Okla. Crim. App. 2005).

Philadelphia have each condemned over 100 people to death—more than most states.⁵³⁸

Governor George Ryan of Illinois agreed with Bright. One of the reasons why he commuted all the sentences for inmates on death row in Illinois to life imprisonment in 2003 was the fact that uniformity was a problem within Illinois—where prosecutors around the state did not equally seek the death penalty.⁵³⁹ The non-uniformity of the United States' use of the death penalty has made it an unfair and random process. Uniformity was one of the main reasons for England abolishing the death penalty, and they did not have nearly as many of the problems that America is currently facing.

7. *The Importance of Miscarriages of Justice*

The United States has yet to have a *cause celebre* case of a miscarriage of justice similar to that of Evans, Bentley, and Ellis in England. Many of the innocent inmates in America discussed by the media have been found wrongly convicted through recent DNA technology, through independent groups that investigate death penalty cases, or even through the lengthy legal process. People like Ron Williamson, the ex-minor league baseball player wrongly convicted for murder in Oklahoma; Gary Gauger, wrongly convicted for murdering his parents in Illinois; and Ray Krone, freed because DNA evidence pointed to another man in Arizona, have all had their stories heralded around the news and public.⁵⁴⁰ Luckily these men eventually were found innocent before their executions, due in a large part to the abolitionist movement in the United States and the members of the public who are always questioning the system.⁵⁴¹

538. Stephen B. Bright, *Why the United States Will Join the Rest of the World in Abandoning Capital Punishment*, in DEBATING THE DEATH PENALTY, supra note 480, at 163; see also Bright, supra note 507, at 374–79.

539. Ryan, supra note 480, at 220–21. In a speech at Northwestern University in 2003, Ryan, once a staunch supporter of the death penalty, said the following:

In Illinois last year we had about 1,000 murders, only 2 percent of that 1,000 were sentenced to death. Where is the fairness and equality in that? The death penalty in Illinois is not imposed fairly or uniformly because of the absence of standards for the 102 Illinois state attorneys, who must decide whether to request the death sentence. Should geography be a factor in determining who gets the death sentence? I don't think so but in Illinois it makes a difference. You are five times more likely to get a death sentence for first-degree murder in the rural area of Illinois than you are in Cook County. Where is the justice and fairness in that? Where is the proportionality?

Id.

540. Death Penalty Information Center, Cases of Innocence 1973–Present, <http://www.deathpenalty-info.org/article.php?scid=6&did=109> (last visited Nov. 19, 2007).

541. Is it a good idea for the public to question the system? Obviously, Carol and Jordan Steiker do not believe so:

What is most frightening about the current situation in the United States, however, is that looking at the British trilogy of cases, in some instances history seems to be repeating itself. Because of the early modifications of jury discretion and degrees of murder, a person like Ruth Ellis probably would not be sent to death row in the United States. However, a case similar to Derek Bentley's almost occurred. LaSamuel Gamble was on death row in Alabama for a robbery murder he committed when nineteen years old. The actual triggerman, Marcus Pressley, is serving a life sentence because he was only sixteen at the time of the offense. Granted, Gamble was not in police custody when the shot was fired, but video evidence conclusively proved that Gamble was not the one who pulled the trigger during the robbery. Yet because of the confusing language in *Tison*, and because of Gamble being nineteen years old at the time of offense, he was on death row while his co-defendant—the one who actually committed murder—was not. However, thanks to the great work of the Southern Center for Human Rights, Gamble's death sentence was reversed on September 7, 2007. This decision has caused much controversy in Alabama and Troy King, the Alabama Attorney General, has promised an appeal in the case. The United States may avoid a miscarriage of justice like the one in England.

However, the case of Timothy Evans could never be avoided no matter how many "improvements" are made to the system. The case against Evans was overwhelming—he confessed to the killings, the bodies were found outside his house hidden in a wash-house, and he had a potential motive to kill his wife and daughter. If not for the revelation that a serial killer, John Christie, was also living at 10 Rillington Place who killed many more women in the same way that Evans's wife and daughter were killed, Timothy Evans would probably be just another guilty man who died by the gallows in England. An extraordinary, coincidental tale this was indeed, but most murders are extraordinary tales. What are the odds that this could happen again? What are the odds that this has already happened in the United States?

Moreover, when such errors are discovered, as some but by no means all of them eventually will be, they deeply undermine the legitimacy of the entire criminal justice system. This latter cost, though unquantifiable, is tremendously important. Public fear of unjust violence at the hands of the state, which has a monopoly on the legitimate use of force, is the hallmark of totalitarian regimes, one of the indices that most distinguish them from free and democratic societies. There is thus ample reason to weigh erroneous executions quite differently from unavoidable deaths in the regulatory context.

Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 588 (2005); see also Craig Haney, Comment, *Exoneration and Wrongful Condemns: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 GOLDEN GATE U. L. REV. 131 (2006).

The similarities between Evans's case and the facts in *Herrera* are striking. Herrera claimed to have new evidence showing his innocence ten years after he was convicted—Evans's innocence did not surface until many years after his execution. Further, Herrera allegedly confessed to the murder of the Texas police officer, a fact which the Supreme Court weighed heavily in favor of him not meeting the *extraordinarily high* burden—Evans also confessed to the murder of his wife and baby, and even had a potential motive to kill his wife. These similar facts show that, even if Herrera was guilty, the *Herrera* test could bar a future innocent inmate on death row from bringing that evidence to court.

True, recent scientific developments such as DNA testing have helped to predict who is guilty and who is not, but these tests are not 100% conclusive and cannot be applied in every case. Many cases just do not have physical evidence that exists that would be testable for DNA. Looking at the way John Christie murdered his victims, by gassing them and then strangling them, it is possible that if that same murder happened today, evidence might not be found to test for DNA to prove Timothy Evans's innocence.

The abolitionist movement thought they had a case of an innocent man executed in Roger Coleman. However, DNA testing after his execution proved that Coleman was actually guilty, prompting a sigh of relief from the whole world that an innocent man was not executed. The issue of innocence and death row exonerees is often one that gets much public attention in the United States, but it may not be the best approach to abolishing the death penalty.

In England, the "trilogy" of cases caused such a public outcry against the death penalty that action was nearly guaranteed in Parliament for abolition of capital punishment. However, in the U.S. Supreme Court, innocence rarely plays a role in the Justice's Eighth Amendment analysis. It was mentioned in passing by Justice Marshall in *Furman*, but has never played a part in any Court opinion restricting the death penalty. There are some signs of change occurring, however. In one of the most recent Supreme Court cases on the death penalty, *Kansas v. Marsh*, upholding Kansas's death penalty procedures, Justice Souter dissented citing recent DNA evidence and studies that showed the possibility of executing the innocent. Scalia, in a concurrence, then attacked Souter for his conclusions and for even bringing up such a subjective subject as innocence in a Court decision.⁵⁴²

There is also hope in the state legislatures, where innocence on death row is a more debated matter. In Illinois, for instance, the exoneration of

542. See *Kansas v. Marsh*, 126 S. Ct. 2516, 2534 (2006) (Scalia, J., concurring).

eighteen inmates believed to be wrongly convicted caused Governor George Ryan to implement a moratorium on the death penalty, create a commission to study the death penalty in Illinois, and later commute the death sentences for all inmates on death row in Illinois to life imprisonment without parole. If more states begin to look at the question of innocence, perhaps this question will become as important to abolition as it was in England.

8. *Political Involvement*

There is no question that politics plays a role in capital punishment. This is relevant both in England and the United States. Written after the decision in *Thompson*, one author mentions even the political nature of the Supreme Court decisions:

Although politics naturally plays a role in Supreme Court appointments, the Justices have expressed concern over the public's "perception that constitutionality is nothing more than the cumulative product of the political parties' power and luck at controlling new appointments." However, as one of the most important, yet divisive, constitutional issues of our day, capital punishment undoubtedly will continue to be controlled, to some extent, by political forces. Given the frequent political changes within the executive branch and the inevitable retirement or death of Court members, the Court's final word on both adult and juvenile executions may not be heard for a long time—if ever.⁵⁴³

Thus, the death penalty, even when being controlled by judicial oversight in America, can still be controlled by political appointments of Supreme Court Justices. Further, there is no question that the death penalty is a highly political issue in the state legislatures.

In England, abolition of the death penalty was achieved in most part due to the rise of power and backing of the Labour Party. The Labour Party, even when in office, stood by its stance against the death penalty in England, and when the time came for the government to abolish the death penalty in 1965, the Labour Party did everything within its power to make that not only a possibility but a political achievement.⁵⁴⁴

543. Susan M. Simmons, Note, *Thompson v. Oklahoma: Debating the Constitutionality of Juvenile Executions*, 16 PEPP. L. REV. 737, 760–61 (1989).

544. See generally Christoph, *supra* note 111, at 22, 31–35 ("The second development that gave cause for hope was the coming to power of the Labour Party. Over the years, Labour had shown considerably more interest in the cause of abolition than the Conservatives. For example, it was the Macdonald Government of 1929 that had appointed the Select Committee on Capital Punishment which

The backing of a political party is one thing the United States does not have. The Democratic Party comes close to having an anti-death penalty stance; however, whenever the Democrats are in power, little is done about the issue of capital punishment. In fact, one of the greatest expansions of the death penalty in the United States was signed into law by the Clinton administration—the Antiterrorism and Effective Death Penalty Act.⁵⁴⁵

This may be the greatest difference regarding abolition of the death penalty between these countries. England had the leadership and the party affiliation to make abolition a reality. The Labour Party, Sydney Silverman, Lord Gardiner, and many others were able to make a change because they believed that the death penalty needed to go. In the United States, few people here have risen up and taken the leadership role in abandoning the death penalty. Just like England, the United States needs leaders to denounce the death penalty and fight for change, instead of raising the death penalty up as being tough on crime.

Two recent signs of improvement are Governor Ryan denouncing the death penalty in Illinois and Democrat Governor O'Malley's recommendation that Maryland completely abolish the death penalty shortly after his entering office.⁵⁴⁶ Hopefully death penalty abolitionists can start to rely on the Democratic Party to renounce the death penalty—especially with a new presidential election soon approaching. Hopefully more Democrats like O'Malley will push for the abolition of the death penalty in state and federal legislatures. We need much more than just a few leaders rejecting capital punishment, however, for abolition to become a reality.

B. *International Trend of Abolishing the Death Penalty*

For the first time in history, a majority of the world has now abolished the death penalty. According to Table 1 below, 102 countries have either completely abolished the death penalty (91) or have abolished the death penalty for all but exceptional crimes, such as military offenses (11). Ninety-five countries still retain the death penalty, although technically thirty-three of those countries are abolitionist in practice, meaning they “have not executed anyone during the past 10 years and are believed to

recommended the experimental abolition of the death penalty for five years. Furthermore, the party's annual conference in 1934 had passed an abolitionist resolution, and a number of Labour MP's who now were ministers (including Home Secretary J. Chuter Ede) had supported the abortive 1938 amendment.”)

545. See The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

546. Jennifer Skalka, *O'Malley Lobbies for Repeal: Governor Urges an End to Death Penalty in MD*, BALT. SUN, Feb. 22, 2007, at 1A.

have a policy or established practice of not carrying out executions.”⁵⁴⁷ In practice, then, there are currently 135 abolitionist countries, compared to only 62 retentionist countries.

As seen in Table 1 below, since 1988, fifty countries have abolished the death penalty. Recently, in 2005 Mexico abolished the death penalty completely (their last execution for ordinary offenses was in 1937), leaving the United States as the only country in North America with capital punishment on its books.⁵⁴⁸ The most recent country to abolish the death penalty was Uzbekistan, which abolished the death penalty for all offenses on January 11, 2008.⁵⁴⁹ Further, all Western European nations have now abolished the death penalty, the last country being Turkey in 2004.⁵⁵⁰ It appears that the evolving international standard of decency shows that the death penalty is cruel and unusual punishment, as most countries around the world have now abolished capital punishment. The “world community” (especially America’s “democratic allies”) has turned away from the imposition of the death penalty, mostly due to the international human rights movement in Europe.⁵⁵¹

TABLE 1
RECENT INTERNATIONAL TREND OF ABOLITION

Year ^c	Abolitionist Countries ^a		Retentionist Countries ^b		Tot. No. Countries
	No.	Percent	No.	Percent	
1988	52	29%	128	71%	180
1995	73	38%	119	62%	192
2001	89	46%	105	54%	194

547. See Amnesty International—Abolitionist and Retentionist Countries, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Feb. 10, 2008).

548. See Amnesty International—Death Penalty Developments in 2005, <http://web.amnesty.org/pages/deathpenalty-developments2005-eng> (last visited Nov. 19, 2007). Canada completely abolished the death penalty in 1998—they had not executed anyone since 1962. HOOD, *supra* note 86, at 62.

549. Amnesty International—Abolitionist and Retentionist Countries, *supra* note 547.

550. Turkey abolished the death penalty for all ordinary offenses in 2002. HOOD, *supra* note 86, at 8. In 2004, Turkey completely abolished the death penalty for all offenses. Amnesty International—Abolitionist and Retentionist Countries, *supra* note 547.

551. HOOD, *supra* note 86, at 14–15. The human rights campaign in Europe began shortly after the Second World War, in 1948, when the United Nations declared that every human being had the “right to life.” Universal Declaration of Human Rights, *supra* note 516. In 1994, the Parliamentary Assembly of the Council of Europe recommended the complete abolition of the death penalty by establishing the Protocol to the European Convention on Human Rights. HOOD, *supra* note 86, at 14–15. By 2001, this protocol was ratified by thirty-nine countries. Another protocol of the ICCPR recommending abolition of capital punishment was ratified by forty-six countries. The effect of these treaties meant that all sixty-nine countries that had ratified them were now barred from reintroducing the death penalty. *Id.* at 15–16. Finally, the European Union has made the abolition of the death penalty a precondition of membership, causing many more countries to abolish the death penalty in order to join the EU. *Id.* at 17.

2008 WILL THE UNITED STATES FOLLOW ENGLAND . . . ? 635

2007	102	52%	95	48%	197
------	-----	-----	----	-----	-----

a. Includes complete abolitionist countries and abolitionist countries for ordinary offenses.

b. Includes retentionist countries and abolitionist in practice countries (abolitionist de facto—no executions within the last ten years).

c. All data from years 1988, 1995, and 2001 collected from HOOD, *supra* note 86, at 14. All data from 2007 collected from Amnesty International—Abolitionist and Retentionist Countries, *supra* note 547.

Despite this fact, many countries still support the use of capital punishment—ninety-one percent of all known executions in 2006 occurred in China, Iran, Pakistan, Iraq, Sudan, and the United States.⁵⁵² Methods of execution used by countries since 2000 include: beheading, electrocution, hanging, lethal injection, shooting, and stoning. The most common methods are hanging and shooting—electrocution is only used in the United States and lethal injection is only used in four countries.⁵⁵³ In these countries, abolition is not likely to happen for some time. As Roger Hood points out:

There is good evidence to support the view that abolition of capital punishment is linked to the development of political rights which emphasize “human rights,” and it is probable therefore that many countries that face this challenge shelter behind the fact that the government of the United States, a government which regards itself as a champion of human rights, continues to support and practise capital punishment. What happens to the abolitionist cause in America may therefore be of crucial significance to the further advancement of the abolitionist movement worldwide.⁵⁵⁴

In addition, many countries are refusing to extradite criminals to the United States if the death penalty is a possibility.⁵⁵⁵ In *Soering v. United Kingdom*,⁵⁵⁶ the European Court of Human Rights held that a West German national living in England could not be extradited to the United States because of what was called the “death row phenomenon,” the degrading and inhuman treatment suffered by a death row inmate awaiting execution, contrary to the European Convention of Human Rights.⁵⁵⁷ This policy has

552. Amnesty International—Facts and Figures on the Death Penalty, <http://web.amnesty.org/pages/deathpenalty-facts-eng> (last visited Nov. 19, 2007) (177 in Iran, 82 in Pakistan, 65 in Iraq, 65 in Sudan, and 53 in the United States).

553. *Id.* Lethal injection, now under controversy in the United States, is only used by three other countries in the world: China, Guatemala, and Thailand. Beheading is only used in Saudi Arabia and stoning is only used in Afghanistan and Iran. *Id.*

554. HOOD, *supra* note 86, at 22.

555. *Id.* at 21.

556. 11 Eur. Ct. H.R. at 439 (1989).

557. *Id.*; see also HOOD, *supra* note 86, at 20–21.

been taken up by all of Europe; even Canada and Mexico now refuse to extradite a criminal to the United States without express written confirmation that the death penalty will not be sought.⁵⁵⁸ The use of the death penalty by the United States is not only divergent to the international trend of abolition, but is also causing bad diplomatic relations with other nations.

C. *The Death Penalty Debate in the States*

1. *Generally*

In America, a majority of states still have the death penalty, making it very difficult, if not impossible, to find a “national consensus” for an Eighth Amendment analysis. Thirteen states, plus the District of Columbia, have completely abolished the death penalty in the United States.⁵⁵⁹ In fact, just recently New Jersey became the thirteenth state to abolish the death penalty in the United States, signing the abolition bill into law on December 17, 2007.⁵⁶⁰ On December 10, the New Jersey Senate voted to abolish by a vote of 21–16.⁵⁶¹ This was shortly followed by the New Jersey General Assembly, voting 44–36 on December 13 to abolish the death penalty.⁵⁶² The Bill was signed into law on December 17 by Governor Jon Corzine.⁵⁶³ This legislative action was spurred by a commission report published in January 2007 recommending complete abolition of the death penalty in New Jersey.⁵⁶⁴

There is evidence that momentum is beginning to gain in other states as well. In 2004, New York’s highest court declared its current death pen-

558. HOOD, *supra* note 86, at 21; Burlison, *supra* note 474, at 913–14.

559. Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. HOOD, *supra* note 86, at 63; Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3.

560. Peters, *supra* note 559.

561. Joe Donohue & Josh Margolin, *Poll: Jersey Voters Favor Keeping Death Penalty*, TIMES (Trenton, N.J.), Dec. 12, 2007, at A17.

562. Jeremy W. Peters, *Trenton Moves to End Capital Punishment*, N.Y. TIMES, Dec. 14, 2007, at B7.

563. Peters, *supra* note 559. The abolition of the death penalty in New Jersey was without public support. A poll taken shortly after the Senate voted to abolish the death penalty showed that the public supports the death penalty in New Jersey by a margin of fifty-three percent to thirty-nine percent. Donohue & Margolin, *supra* note 561.

564. Peter G. Verniero, *Appealed to Death*, N.Y. TIMES, Jan. 14, 2007, at 15; *see also* David W. Chen, *Suspension of the Death Penalty Is All but Assured in New Jersey*, N.Y. TIMES, Jan. 6, 2006, at B1; Laura Mansnerus, *Panel Seeks End to Death Penalty for New Jersey*, N.Y. TIMES, Jan. 3, 2007, at A1; *Rethinking the Death Penalty*, N.Y. TIMES, Jan. 5, 2007, at A16. *But see* John F. Russo, *Don't Abolish Death Penalty, Fix It*, BALT. SUN, Mar. 1, 2007, at 13A.

alty statute unconstitutional.⁵⁶⁵ Further action in the New York legislature has been unable to pass a new bill reinstating the death penalty.⁵⁶⁶ Also, on February 21, 2007, Governor O'Malley urged the Maryland legislature to consider a bill that would completely abolish the death penalty in Maryland, though this bill was defeated in a Senate committee.⁵⁶⁷ On February 8, 2008, the Nebraska Supreme Court declared death by electrocution "cruel and unusual punishment" in violation of their state constitution, thus voiding the state's only method of execution.⁵⁶⁸ Further, the Supreme Court heard oral arguments on the issue of whether the three-drug cocktail used in lethal injections is cruel and unusual punishment in January 2008. This has blocked all executions using lethal injection while the issue has been pending.⁵⁶⁹ Prior to this, lethal injection procedures were being questioned by the courts of many states, causing twelve jurisdictions to halt all executions and create de facto moratoriums.⁵⁷⁰ The main reason for this trend was a recent botched execution in Florida, where it took an accused individual thirty minutes to die by lethal injection.⁵⁷¹ Arkansas, California, Delaware, Florida, Maryland, Missouri, Nebraska, North Carolina, Ohio,

565. *People v. LaValle*, 817 N.E.2d 341, 368 (N.Y. 2004) (finding a problem with a mandatory jury instruction required by the death penalty statute); see also Al Baker, *Legislature Is Given Task of Correcting Law's Flaw*, N.Y. TIMES, June 25, 2004, at B5.

566. Patrick D. Healy, *Death Penalty Is Blocked by Democrats*, N.Y. TIMES, Apr. 13, 2005, at B1 ("Democrats in the State Assembly closed the door Tuesday on reviving the death penalty in New York State this year, handing a significant victory to opponents of capital punishment who are trying to build a national momentum."); see also Al Baker, *Effort to Reinstate Death Penalty Law Is Stalled in Albany*, N.Y. TIMES, Nov. 18, 2004, at A1.

567. Bradley Olson & Jennifer McMenaminy, *Death Penalty Revoked in N.J., Despite Hopes, Repeal in MD Faces Hurdles*, BALT. SUN, Dec. 18, 2007, at 1A; Skalka, *supra* note 546 ("Gov. Martin O'Malley appeared before two General Assembly committees yesterday to make a forceful call for repealing the death penalty. O'Malley, a Democrat, told lawmakers that the death penalty does not deter crime, carries excessive costs and damages human dignity."). But see Larry Carson, *Most County Legislatures Back Death Penalty*, BALT. SUN, Feb. 25, 2007, at 1G.

568. Liptak, *supra* note 298.

569. Greenhouse, *supra* note 521; see also *supra* note 521 and accompanying text.

570. *Rulings May Change Lethal Injection Process*, L.A. TIMES, Sept. 22, 2007, at 19 ("A federal judge's ruling Wednesday that Tennessee's lethal injection procedure could cause excruciating pain is another blow to the three-drug cocktail used by every state that executes by lethal injection."); Henry Weinstein, *N.C. Is 11th State to Halt Lethal Injections: A Judge Blocks Two Executions Until Procedures Are Changed*, L.A. TIMES, Jan. 26, 2007, at 16 [hereinafter Weinstein, *11th State*]; see also Andrew Cohen, *Stay of Executions: After a Generation of Often Reckless Expansion, the Pendulum Is Swinging Back*, L.A. TIMES, Feb. 3, 2007, at 19 (North Carolina, Ohio, and Texas courts have stayed executions for various reasons); Henry Weinstein, *Federal Judge Orders Missouri to Stop All Executions*, L.A. TIMES, June 28, 2006, at 16; Henry Weinstein, *Ruling Halts State Method of Execution: A Judge Says California's Injection Procedure Is Cruel and Unusual*, L.A. TIMES, Dec. 16, 2006, at 1.

571. Terry Aguayo, *Florida Death Row Inmate Dies Only After Second Chemical Dose*, N.Y. TIMES, Dec. 15, 2006, at A28; see also Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends the Death Penalty in Florida*, N.Y. TIMES, Dec. 16, 2006, at A11.

Tennessee, and the federal government all halted executions before the U.S. Supreme Court agreed to hear the issue.⁵⁷²

Illinois has had a moratorium on the death penalty since 2000, imposed by Governor Ryan after a number of innocent men were freed from Illinois's death row.⁵⁷³ Governor Ryan also set up a commission to study the death penalty in Illinois and in 2002, after two years of deliberation, the commission members agreed that the death penalty should be significantly changed and restricted. A majority of the commission even recommended the abolition of the death penalty.⁵⁷⁴ One specific recommendation made by the commission was to limit the number of crimes eligible for the death penalty to five types of murder: (1) murder of a police officer or firefighter, (2) murder of a prison correctional officer or inmate, (3) murder to obstruct the justice system, (4) torture during the course of a murder, and (5) the murder of two or more persons.⁵⁷⁵ Governor Ryan immediately announced legislation to put into effect the recommendations, but the legislature never acted.⁵⁷⁶ In a speech in 2003, Ryan commuted all the sentences of the death row inmates to that of life imprisonment, after noting that the system in Illinois was flawed and unfair.⁵⁷⁷

In 2006 there were fifty-three executions in the United States; in 2007 there were forty-two, the lowest number since 1994.⁵⁷⁸ Only fourteen states actually used the death penalty in 2006, followed by only ten states in 2007.⁵⁷⁹ In 2007, Texas accounted for twenty-six executions—no other state had more than three executions.⁵⁸⁰ In addition, a number of states who still maintain the death penalty have not even executed anyone since 1976: Kansas, New Hampshire, and New York.⁵⁸¹ South Dakota recently executed its first person since the death penalty was reinstated in 1976,

572. Weinstein, *11th State*, *supra* note 570; Death Penalty Information Center, Death Penalty in Flux, <http://www.deathpenaltyinfo.org/article.php?did=2289> (last visited Nov. 19, 2007).

573. Eighteen people have been found innocent on death row in Illinois. Death Penalty Information Center, Innocence and the Death Penalty, *supra* note 477.

574. HOOD, *supra* note 86, at 71–72.

575. *Id.* at 189. Does this not sound very similar to the Homicide Act 1957 in England?

576. *Id.* at 72 n.210.

577. Ryan, *supra* note 480, at 233.

578. Weinstein, *supra* note 478; Death Penalty Information Center, Executions by Year, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (last visited Nov. 19, 2007).

579. Weinstein, *supra* note 478; Death Penalty Information Center, Number of Executions by State and Region Since 1976, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last visited Nov. 19, 2007).

580. Weinstein, *supra* note 478.

581. Death Penalty Information Center, State Execution Rates, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=477> (last visited Nov. 19, 2007).

after previously postponing the execution because of concerns with the State's lethal injection procedure.⁵⁸²

See Figure 1 below for a summary of the death penalty currently in the United States. Added together, seventeen states (eighteen including D.C.) currently have either rejected or refused to impose the death penalty in the United States. Time will tell whether the jurisdictions who have currently halted all executions due to problems with lethal injection will decide to resume executions or abolish the death penalty, but it seems like momentum may be gaining with the state legislatures showing a rejection of capital punishment.⁵⁸³

582. Monica Davey, *Execution in South Dakota, Delayed a Year by Debate on Method, Is First in 6 Decades*, N.Y. TIMES, July 13, 2007, at A12 [hereinafter Davey, *Execution*]; Monica Davey, *South Dakota Plans Its First Execution Since 1947*, N.Y. TIMES, Aug. 29, 2006, at A16 ("Although capital punishment has been allowed in South Dakota for decades, it is one of a handful of states, including New Jersey and New Hampshire, that have carried out no executions since they most recently enacted such laws. In South Dakota, the most recent law allowing death sentences was enacted in 1979 after the United States Supreme Court restored capital punishment in 1976."); *South Dakota: Execution Postponed*, N.Y. TIMES, Aug. 30, 2006, at A17.

583. Things are not all going well for abolitionists, however. Six states have enacted legislation that would expand the death penalty in their states: Florida, Louisiana, Montana, Oklahoma, South Carolina, and Texas. Liptak, *supra* note 402. South Dakota just recently executed their first inmate since 1947. Davey, *Execution*, *supra* note 582. Further, New Hampshire, a state once thought would soon abolish the death penalty, is pursuing the death penalty for a recent arrest connected with the killing of a police officer. Jonathan Saltzman, *N.H. Revives Death-Penalty Issue: Officer's Killing Spurs a Debate*, BOSTON GLOBE, Oct. 19, 2006, at 5B; see also *infra* Part IV(C)(2).

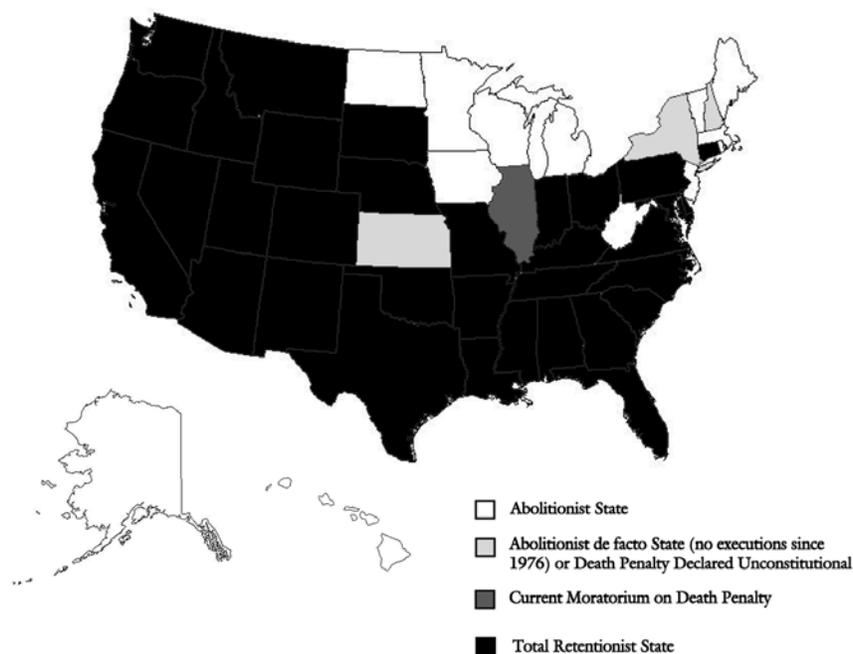


FIGURE 1
THE DEATH PENALTY IN AMERICA, 2007

2. History and Recent Developments in New Hampshire

New Hampshire is generally seen as the least worrisome state that still maintains the death penalty in the United States. New Hampshire is among the few states that have not executed anybody since the death penalty was reinstated in 1976. Further, New Hampshire is the only state that has not put anybody on death row since 1976.⁵⁸⁴ In fact, the last execution in New Hampshire was in 1939.⁵⁸⁵ Throughout the history of the death

584. See Norma Love, *Death Penalty Untested*, CONCORD MONITOR, Oct. 22, 2006, at B1.

585. Mike Pride, *Unseemly Enthusiasm*, CONCORD MONITOR, Oct. 22, 2006, at D1; see also DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW ENGLAND: A COMPREHENSIVE REFERENCE, 1623–1960*, at 373–74 (1999).

penalty in New Hampshire, the state has only executed twenty-four people—the same number, coincidentally, that Texas executed in 2006.⁵⁸⁶

The first execution in New Hampshire occurred in 1739—the public hangings of Sarah Simpson and Penelope Kenny for the murder of their infant children.⁵⁸⁷ The crimes were committed in Portsmouth, New Hampshire in August 1739 when both women had births out of wedlock. Both concealed their pregnancies and then killed their babies after birth. When the authorities found the dead infants, both women became suspects and were questioned by the police.⁵⁸⁸ Simpson and Kenny both confessed to the murders and both were convicted by juries and hanged on December 27, 1739.⁵⁸⁹ The last execution of a woman in New Hampshire was that of Ruth Blay—hanged on December 30, 1768, also for the murder of her newborn child.⁵⁹⁰

New Hampshire last revised their death penalty statute in 1991. Under New Hampshire law, six types of murder are eligible for the death penalty: (1) murder of a police or judicial officer acting in the line of duty, (2) murder during or while attempting to commit kidnapping, (3) murder for hire (either the one who paid or the one who killed), (4) murder while under the sentence of life without parole, (5) murder during or while attempting to commit aggravated felonious sexual assault, and (6) murder during or while attempting to commit a felony under the Controlled Drug Act.⁵⁹¹

Under the procedures enforced by the Supreme Court in *Gregg*, New Hampshire requires a second sentencing trial after conviction of capital murder where aggravating and mitigating factors are presented to the jury.⁵⁹² A jury must find at least two aggravating circumstances by unani-

586. Weinstein, *supra* note 478; see also HEARN, *supra* note 585, at 131–32, 141–42, 151, 174, 184, 192, 207–08, 222–23, 227–29, 245–46, 249, 252–53, 258–60, 262–63, 265–66, 274–75, 280–81, 285–86, 334–35, 339–41, 373–74.

587. HEARN, *supra* note 585, at 131–32.

Well into the nineteenth century, execution crowds still outnumbered crowds gathered for any other purpose.

One reason crowds were so big was that in any given area an execution was a rare event. When Sarah Simpson and Penelope Kenny were hanged for infanticide in Portsmouth, New Hampshire, in the winter of 1739, the ceremony “drew together a vast Concourse of People, and probably the greater, because these were the first Executions that ever were seen in this Province.”

BANNER, *supra* note 282, at 25.

588. HEARN, *supra* note 585, at 131.

589. *Id.* at 132.

590. *Id.* at 151 (“This celebrated case has long been rife with misinformation. A subject of folklore, it has had its facts twisted and romanticized by generations of storytellers to create a popular myth about innocence, wrongful execution, and official misconduct. The truth, however, is quite different: Ruth Blay was undeniably guilty and the sheriff who officiated at her execution acted in strict accordance to his orders.”).

591. N.H. REV. STAT. ANN. § 630:1 (2005).

592. N.H. REV. STAT. ANN. § 630:5 (1991).

mous vote to impose a death sentence. However, the finding of an aggravating circumstance with no mitigating circumstances does not mandate the death penalty—the jury may still impose a sentence of life without parole. New Hampshire’s statute provides nine statutory mitigating factors and ten statutory aggravating factors.⁵⁹³ There is also a specification that if a jury cannot decide on a sentence within a reasonable time, the judge shall sentence the defendant to life imprisonment without parole. Additionally, the Supreme Court must review death sentences within sixty days. New Hampshire specifies the use of lethal injection for executing the condemned, but also allows hanging if lethal injection cannot be administered.⁵⁹⁴

Attempts were made in 2000 to abolish the death penalty in New Hampshire. In March 2000, an abolition bill passed in the House by a vote of 191–163.⁵⁹⁵ The bill then received world-wide attention, as New Hampshire would possibly become the first state in over a decade to abolish the death penalty.⁵⁹⁶ In the preceding weeks leading up to a vote on the bill in the Senate, New Hampshire Senators received emails and calls from people all over the United States and the world urging them to end the death penalty in the State. It was said that the Colosseum in Rome would be lit up—as it is whenever a governing body abolishes the death penalty—and that the end of the death penalty in New Hampshire could start a national trend of abolition.⁵⁹⁷ In May, the Senate voted in favor of the bill to repeal the death penalty by a vote of 14–10, making New Hampshire the first legislature to abolish the death penalty for some time.⁵⁹⁸ However, shortly after the vote, Governor Shaheen vowed to veto the bill. Since the House vote was too narrow to override her veto, many abolitionists “began an around-the-clock vigil in the State House parking lot . . . near Shaheen’s space.”⁵⁹⁹ Shaheen, a democrat, eventually vetoed the bill and the momentum was lost—the death penalty survived.⁶⁰⁰

593. *See id.*

594. *Id.*

595. Arnesen, *supra* note 529.

596. Rachael M. Collins, *Eyes Turn to State Debate on Penalty Bill Would End Capital Punishment*, BOSTON GLOBE, Apr. 30, 2000, at 1 (“Worldwide, advocates of eliminating the death penalty were heartened when the New Hampshire House on March 9 became the first legislative body in the country to vote to abolish the death penalty since that power was reinstated to the states by the US Supreme Court in 1977.”).

597. *Id.*

598. Rachael M. Collins, *N.H. Senate OK’s Death Penalty Ban Shaheen Vows Veto; Repeal Vote Is Nation’s First in Two Decades*, BOSTON GLOBE, May 19, 2000, at A1.

599. *Id.* (“I respect the deeply held beliefs of opponents of the death penalty, but it is my strong belief that there are some murders so heinous that the death penalty is an appropriate punishment,” Shaheen said.”).

600. Hank Nichols, *Shaheen Missed Chance at Distinction*, BOSTON GLOBE, May 28, 2000, at 2 (“We let a remarkable opportunity slip through our fingers. We could have led the way for the rest of

In October 2006, Officer Michael Briggs was fatally shot in the head in Manchester, New Hampshire.⁶⁰¹ The suspect was arrested in Massachusetts fifteen hours after the murder and the next day, New Hampshire Attorney General Kelly Ayotte announced plans to seek the death penalty for Briggs's accused killer.⁶⁰² Legislators immediately granted Ayotte an extra \$420,000 to pursue the death penalty against the suspect—a figure \$70,000 more than the attorney general's litigation budget for a full year.⁶⁰³ This announcement caused a lot of reaction—varying from outrage that the decision was made so quickly, to concern about the resurrection of the death penalty debate in New Hampshire.⁶⁰⁴ This is the first capital prosecution since Gordon Perry, who avoided the death penalty by pleading guilty to first-degree murder in 1998.⁶⁰⁵

In March 2007, the New Hampshire legislature debated the issue of capital punishment for the fourth time in seven years. By a narrow vote, 185–173, the legislature rejected a proposal to abolish the death penalty—with a majority of the debate focused on the recent shooting of Briggs and the upcoming capital trial in New Hampshire.⁶⁰⁶

the nation. We pride ourselves on being first and we pat ourselves on the back for going our own way instead of following the herd. What a perfect time to do both. . . . Shaheen has decided that executions remain an option. She has dragged us all back into the execution business with the stroke of a pen.”).

601. Saltzman, *supra* note 583.

602. Pride, *supra* note 585; see also Brian R. Ballou & Raja Mishra, *Accused Killer Has a Violent Record; N.H. Prepares to Honor Officer*, BOSTON GLOBE, Oct. 20, 2006, at 3B.

603. Saltzman, *supra* note 583.

604. *Accused Shooter Fears N.H. Return*, CONCORD MONITOR, Oct. 26, 2006, at B7 (“[John Hayes, the public defender representing Addison,] also criticized legislators for immediately granting Attorney General Kelly Ayotte’s request for an extra \$420,000, just for Addison’s prosecution. ‘Here somebody in the State House said, “We’re going to grandstand and allocate this money and declare right now that this is going to be a death penalty case,” he said. ‘Normally, there is some review, some process. Look at the entire process without the heat, especially when you have somebody with their life on the line.’”); Pride, *supra* note 585 (“What I disliked was their enthusiasm for the task. Even Ayotte’s embrace of it seemed premature and possibly even political. She has more facts at her disposal than the public, but wouldn’t it have been better to ponder the decision carefully until she could explain to the public why this case warranted the death penalty?”); Saltzman, *supra* note 583 (“‘We’re against killing,’ said Arnie Alpert, a member of the New Hampshire Coalition Against the Death Penalty, who said the focus of attention should be Briggs’s grieving family, not plans to seek the death penalty. ‘We don’t think people should kill police officers, and we don’t believe the state should kill people.’”).

605. *Accused Shooter Fears N.H. Return*, *supra* note 604; Saltzman, *supra* note 583. In April 2007, Ayotte announced that she would pursue the death penalty in a second case in New Hampshire. See Brian R. Ballou, *N.H. Attorney General to Seek Death Penalty in ‘05 Slaying*, BOSTON GLOBE, Apr. 28, 2007, at 3B.

606. Raja Mishra, *N.H. Vote to Outlaw Executions Falls Short: Killing of Officer Figures in Debate*, BOSTON GLOBE, Mar. 28, 2007, at 1B.

V. CONCLUSION: LOOKING FORWARD

It is one thing to establish commissions to try to find ways to impose the death penalty fairly and without error and to ban it for the mentally retarded. But it is quite another to come to the conclusion that capital punishment should be abolished as a matter of principle on the grounds that its enforcement inevitably involves “cruel and unusual punishment.” It remains open for the United States Supreme Court to make that judgment under its “emerging standards of decency” doctrine.⁶⁰⁷

It is indeed a very difficult task to abolish the death penalty in the United States judicially. The majority of the world has now rejected it as a punishment, but the critical part of the test—the majority of U.S. states—have not. Nonetheless, the Supreme Court remains the best option for complete abolition of the death penalty in every state, and the “evolving standards of decency” doctrine makes even the slightest change of opinion in state legislatures relevant to the overall constitutionality of the punishment in the United States.

However, it is very doubtful that the Supreme Court will declare the death penalty unconstitutional anytime in the near future. If the death penalty is to be abandoned in the United States, two scenarios are possible. First, there must be a political response against capital punishment like there was in England. While the process of abolition in England may seem similar to that of the United States currently, this similarity is mostly superficial.

The key to abolition in England was the political leadership of the Labour Party, Sidney Silverman, and others who rose up, outnumbered, and made it their goal to end the death penalty. If anything can be learned from comparing the histories of capital punishment in the two countries, it is that the United States needs the kind of leadership that England had in order to abolish the death penalty. American politicians need to become better informed on the realities of capital punishment, need to quit the demagoguery on it, and start making conscientious votes to abandon the death penalty in state legislatures. If this were to happen, there might be the same rejection of the death penalty in Congress and the state legislatures as there was in England. While the similarities may be mostly superficial between the two countries, the same deficiencies with regard to the death penalty exist in the United States as they did in England when the death penalty was abolished. Therefore, there is a similar need in the United States for political leadership to abolish the death penalty in this country.

607. HOOD, *supra* note 86, at 73–74.

Second, if the political leadership does not develop, the United States may abandon the death penalty de facto. Over the past decade, the use of the death penalty has been declining in this country: juries are imposing it less, prosecutors are seeking it less, and life without parole is becoming more popular as an alternative to death. This could eventually lead to the death penalty withering away because it is used so infrequently. This gradual abandonment of the death penalty would not be like the nation-wide repeal in England, but more like society giving up on it as its flaws are recognized and society realizes that most of the world has rejected it as a punishment. If this were to happen in a majority of jurisdictions, it is even possible that the Supreme Court would step in and declare the death penalty unconstitutional for all offenses.

Until that time, however, the Supreme Court continues to restrict the use of the death penalty in America. What is next for the Supreme Court? Six states now have enacted laws allowing the death penalty as a punishment for child sex crimes. The constitutionality of these laws is still at issue, but they seem to go against the Court's decision in *Coker* and its progeny. Certiorari has just been granted after the recent Louisiana Supreme Court decision in *Kennedy*,⁶⁰⁸ ruling that the death penalty for child rape is not excessive, so the Supreme Court will take up the issue of the constitutionality of these laws soon and hopefully decide to explicitly limit the death penalty in the United States to murder. While the complete abolition of the death penalty would be a far better solution, it seems too distant a possibility for the Supreme Court to make without more significant changes in state legislatures.

The British today look back to the days when the death penalty was debated and note the efforts of Sydney Silverman and Lord Chancellor Gardiner in bringing together both Houses of Parliament to finally put an end to capital punishment in England. Perhaps one day in the not too distant future, Americans will look back on the early efforts of Justices Marshall and Brennan, and the future leaders who stepped up in state legislatures to make abolition of the death penalty a reality. As Justice Blackmun said many years after his dissent in *Furman*, "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."⁶⁰⁹

608. See *Kennedy v. Louisiana*, 128 S. Ct. 829 (2008).

609. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).