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The Influence of European Union Policy on Capital Punishment in the United States Judicial System

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THE INFLUENCE OF EUROPEAN UNION POLICY ON CAPITAL PUNISHMENT IN THE
UNITED STATES JUDICIAL SYSTEM

A Capstone Experience/Thesis Project

Presented in Partial Fulfillment of the Requirements for
the Political Science Bachelor of Arts with
Honors College Graduate Distinction at Western Kentucky University

By

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* * * * *

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2012

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ABSTRACT

Capital punishment has been present for the entirety of American history. Despite this, there have been active supporters for the abolition of the death penalty in the United States since the early 1960's. Considering the growing importance of the individual state's participation on the global stage, including the effects of globalization, international law, and human rights standards, the European Union's capital punishment policy may have an increasing influence over Supreme Court's interpretations of the constitutionality of capital punishment. This research intends to evaluate the factors that indicate a nation's likelihood to abolish the death penalty. It will then explore the potential influence the European Union will have in any future decisions by the American judiciary in regard to the practice of the death penalty.

Keywords: Capital Punishment, Death Penalty, European Union, Polling Jurisdictions, Abolition, International

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Introduction

Capital Punishment in the United States is defined as, “The sentence of death for a serious crime – also termed death penalty,” (Garner 223).

Death sentences have long been a part of human societies. Pre-historic cave drawings have been shown to depict executions (Mortensen 7). The first known mention of capital punishment in law was the Babylonian *Code of Hammurabi* dating back to 1750 BC (Mortensen 7).

However, although, capital punishment has been a part of North American history from colonization on, in more recent decades, there have been an increasing number of states, and political bodies abolishing the death penalty. This international standard could have a profound influence on the decisions made within the American legal system. If the United States were to abolish capital punishment through judicial means, the jurisprudence of polling jurisdictions, especially the influence of the European Union and its member states, could play a role, alongside other factors, in the reexamination of the practice of capital punishment in the United States.

What follows is a meta-analysis concerning the potential influence European Union policy concerning capital punishment could have on the United States judicial system particularly the federal system including the U.S. Supreme Court. First, will be a discussion of the factors that have been a common theme in other countries that have abolished capital punishment. It will evaluate those factors in the United

States and how they could potentially contribute to the abolition of capital punishment in the United States in the future. More specifically, this chapter will then elaborate specifically on the possible influence of the European Union and its Charter of Fundamental Rights on the United States Supreme Court and its decisions regarding the constitutionality of capital punishment in the United States.

Following this will begin with a very brief overview of the history of the death penalty in Europe. Following that, the second chapter will detail the current European Union policy concerning the abolishment of capital punishment for member states. This chapter will outline the wording of the Charter of Fundamental Rights of the European Union as well as address complimentary documents also relating in whole or in part to capital punishment in Europe. This chapter will also address the active role the European Union plays in retaining the abolition of the death penalty in its member states.

The third chapter will begin with an examination of different states and their laws concerning the death penalty. This third chapter will consider both states that have abolished capital punishment as well as those states that continue to use the death penalty. This research will look into the individual aspects of the laws as they function now and how they have changed in recent history. Those individual aspects of laws will include issues of potential racial bias in sentencing, methods of execution, age restrictions, other restrictions, and definitions of capital homicide. The chapter will conclude with a look into the factors that led to some abolitionist states moving away from the use of the death penalty.

The fourth and final chapter will be an analysis of the legal foundations of the death penalty in the United States. The research will address the high points of precedent leading up to the current constitutional guidelines on the practice of capital punishment in the United States. This fourth chapter will explore the stare decisis the U.S. Supreme Court Justices have to consider when addressing this topic. This will include a look at the cases leading up to *Furman v. Georgia*, a Supreme Court decision that could have meant the abolishment of capital punishment in the United States. It will then show the resounding backlash from *Furman* and how the death penalty was restored in the U.S. This chapter will conclude with examples of how the U.S. Supreme Court has handled death penalty cases recently.

Chapter One: The Influence of the European Union and the susceptibility of the United States to International Pressure

Globally, the abolitionist movement can be traced to the Enlightenment in Europe and to Cesar Beccaria, an Italian criminologist who wrote *On Crimes and Punishment* in 1764 (Mortensen 7). Beccaria presented the argument that capital punishment is useless and inhumane which ended up influencing other men in positions of political power of the time including Voltaire, Jefferson, Paine, Lafayette and Robespierre (Mortensen 7). With the beginning of the abolitionist movement, political players began influencing one another's perceptions on the issue on an international scale.

While Beccaria introduced the abolition of capital punishment in the academic world, it was not until much later that the global trend started to take hold for nations. Fifty Years ago, the majority of countries around the world still practiced the death penalty (Mortensen 3). Since then, the global trend has gradually moved away from capital punishment. Now, more than half of the world's countries have abolished the death penalty (Mortensen 3). Eric Neumayer's and Anne Mortensen's works have highlighted key domestic factors in nations that have abolished capital punishment. Those factors include a higher level of democracy, a democratic transition, a left-wing executive, and the number of years that have passed since the county was involved in armed conflict (Mortensen 3). The greater the presence of these domestic indicators, the higher the likelihood is that the country will abolish the death penalty. In addition to these domestic factors, this study also addresses the factor of international pressures. "Greater exposure to

abolitionist pressure is expected to raise the likelihood of abolition,” (Mortensen 4). Neumayer’s study on political foundations for abolition identifies four primary factors – a higher level of democracy or a democratic transition, a left-wing executive, the chronological proximity to armed conflict, and the pressure applied by ideologically similar nations – as indicators of a nation’s likelihood to abolish. A better understanding of the United States’ potential for abolition can be gained by taking a closer look at the factors, and their presence in the U.S.

Democratic states or those that have had democratic transitions are thought to be more likely to abolish capital punishment due to the links between democracies and a respect for fundamental human rights. “Capital punishment is basically incompatible with the most important tenet of democracy: the respect for the individual person,” (Mortensen 13). In that respect, the elites of a democratic government are less likely to violate the authority of the individual in a way as dramatic and permanent as a death sentence. “Democracies, almost by definition, are more willing to accept constitutional limits on governmental power and one would at least expect them to respect better the human rights of their citizens,” (Neumayer 250). Also, a fundamental component of democracy is the concept that individuals and group wielding political power have limits to those powers. This then implies limits to the extent of punishment (Mortensen 13). The level of democracy continues to be the most consistent indicator of abolition analysis (Mortensen 14). As highlighted in the example with France, however, this positive link between democracy and abolition is not necessarily due to public opinion. The decision to abolish the death penalty has often been made by outside countries as

well as states within the U.S. without the support of the public. Instead, this may indicate the link better correlates between the political elites in a democracy being more likely to support and promote individual rights (Mortensen 15).

In respect to those political elites, a country is more likely to move towards abolition if the politicians in power lean more to the political left. This link is thought to come from differing views on crime and punishment based on political orientation (Mortensen 16). For example, in the United Kingdom, the Labour Party began the consideration of abolishment in 1929, but they met opposition from the Conservative Party. When the death penalty was abolished in the UK, it was under a Labour Administration (Mortensen 17).

The final domestic indicators of potential for abolition is a country's experience with war and the length of time passed since the last military conflict. Studies have shown that the more time a country spends at war in the near past, the less likely that country is to forgo the death penalty (Mortensen 18). Mortensen argues that wartime lends itself to a culture where it is believed that killing is a necessity in defense of the citizens (Mortensen 18). This is also the kind of political culture that cannot be expected to change quickly, explaining the positive correlation between the length of peacetime and the willingness to abolish capital punishment.

The United States shares some of these factors. The U.S. is a democratic state. However, in regard to the judiciary, the current Supreme Court as a whole has a history of handing down conservative decisions. John Roberts, the Chief Justice of the Supreme Court is known for his conservative views. In regards to the judiciary

then, the political persuasion of those holding authority would serve as a barrier for abolition in the United States. The United States has also been involved in the War on Terror for a decade now, so the third domestic factor is not consistent with the trend; however, this war has been fought overseas in Iraq and Afghanistan.

In addition to the domestic factors discussed above, retentionist countries can expect pressure from abolitionist states. This is one determining factor that the United States cannot avoid. In recent history the death penalty has evolved from a national criminal justice issue to one concerning a violation of human rights, and therefore has become an issue of international concern (Mortensen 19).

Political pressures are particularly severe between nations that otherwise share similar cultural and political values (Neumayer 242). This suggests the United States would face more pressures from the European Union than from other entities. In regard to this particular issue, it has been argued that the United States and European countries are now further divided on the topic of the death penalty than any other morally significant question of government policy (Neumayer 242). Where the United States and the European Union member states are otherwise allies, the issue of capital punishment remains a division.

The United States Supreme Court has shown to be susceptible to these kinds of international pressures, especially coming from present day member states of the European Union. As part of the British Empire, the American colonies had a legal system that was founded in the same principles as the English Legal System. After the United States became an autonomous state and after, the influence of English law lingered (Sterling). Over time, the American legal system slowly evolved away

from its English roots, but it still maintained some aspects of its heritage. For example, the concept of common law still plays a role in U.S. law today.

The United States continued to borrow from the United Kingdom and British tradition long after the foundation of the American legal system was in place. For example, the original obscenity laws in the United States were borrowed from British law. Prior to the 1950's, American courts mostly avoided the topic of obscenity. Instead, with a lack of American precedent, courts used the British definition of obscenity from the 1857 case *Regina v Hicklin* (Epstein and Walker). If something so fundamental in the United States as the freedom of free speech and expression can be swayed by international influences, then it is completely within reason to expect the United States Supreme Court to consider international pressures on less fundamental issues.

Justice Goldberg's dissent to the denial of a writ of certiorari regarding *Rudolph v. Alabama* in 1963 more specifically illustrates how capital punishment and the American Justice System is influenced by factors outside of the U.S. Both Justices Douglas and Brennan joined Goldberg in his dissent (Ray 98). This memo argued that the death penalty violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. Justice Goldberg cited *Trop v. Dulles* and the Evolving Standard of Decency precedent set, which will be explained in further detail in a later chapter. In order to illustrate this "evolving standard of decency," Goldberg used the example of other industrialized western nations, thereby employing the polling jurisdictions jurisprudence (Epstein 43). In regard to other jurisdictions, Justice Goldberg wrote, "In light of the trend both in this country and throughout the

world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate evolving standards of decency that mark the progress of our maturing society or are standards of decency more or less universally accepted?" (Ray 98). In the footnotes of the memo, Goldberg referenced a United Nations survey that showed the United States with only five other nations as those still participating in and practicing capital punishment (Ray 98).

While in the United States, any of the three branches of government have the authority to be the power that triggers the abolishment of the practice of capital punishment; the judiciary already has a history with the topic. The House and the Senate could pass legislation that could abolish the death penalty. The executive branch could support the legislative branch, or it could start the chain of events itself by enforcing a moratorium that could make the continuance of capital punishment more difficult.

The Judicial branch would have a more independent path to abolition that would be distinctly different than that of the other two branches. The road to *Furman v. Georgia*, the case that nearly caused the abolition of capital punishment in the United States in 1972, was unlike the workings of any other branch of government. The judiciary had many of the required circumstances to move forward with the abolishment of capital punishment in the United States in when it decided *Furman v. Georgia*. The U.S. Supreme Court had been putting limitations on the death penalty without addressing the constitutionality of the practice itself for several years.

Furman essentially managed to abolish the death penalty in the United States, but did so only for a short time. The Supreme Court was able to accomplish this because of certain circumstances and conditions present. First, with *Furman*, coupled with the other capital punishment cases being reviewed by the U.S. Supreme Court at the same time, the Court had an effective vehicle to bring down a new constitutional interpretation. In 1972, there were also some strong-willed justices pushing for the abolishment of the death penalty. Those justices also had the support of some influential interest groups including the American Civil Liberties Union and the National Association for the Advancement of Colored People Legal Defense Fund.

Unfortunately for the anti-death penalty camp, there was not enough support for the abolishment of capital punishment on either the Court or in the legislative or executive branches for the decision to be strong enough to stick. The Court did not rule capital punishment itself unconstitutional in *Furman*. Rather, it ruled that capital punishment, as practiced at the time in the United States, was unconstitutional. Despite this leniency in the wording of the decision, Chief Justice Burger, who joined the dissent in *Furman*, felt defeated by the decision. He was later quoted outside of the Court saying, "There will never be another execution in this country," (Epstein 80).

Following *Furman*, efforts to restore the death penalty began quickly despite the pessimistic outlook by many supporters of the practice of capital punishment. President Nixon was one of the first and strongest advocates for reinstating the death penalty. Nixon was quoted saying, "The holding of the Court must not be taken

to rule out capital punishment,” (Epstein 84). With the support of the executive, the Senate’s Judiciary Committee found that the death penalty was a, “Valid and necessary remedy against dangerous types of criminal offenders,” (Epstein 84). With all of this opposition, the Supreme Court did not have the power to support and enforce its decision.

While the Court had some things working in its favor for the *Furman* decision, opposition at the time was too strong for the decision to stick. Starting with California, the individual states began to change their legislation to reinstate the death penalty by the end of the year (Epstein 85).

For the death penalty to be abolished through judicial means in the future, the Court would have to be able to meet certain conditions and would have to be open to certain influences. First, the Court would have to have justices that would support abolishment or at least be susceptible to influences coming from interest groups as well as international examples. The legislative and executive branches would have to be so inclined as to not work against the Court. Interest groups would have to invest their resources to get the right cases onto the Court’s docket. Finally, the Supreme Court would have to allow for the influence of international examples and pressures.

In addition to these past points of reference, there are continued pressures coming from the European Union and its member states. The European Union has expressed that it considers the, “abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights,” (Mortensen 18). In the European Union’s *Guidelines to EU Policy Towards Third*

Countries on the Death Penalty it states that it “has moved beyond [abolition within its own jurisdiction] and now espouses abolition for itself and others,” (Mortensen 18).

Only eight countries have executed minors since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, The Democratic Republic of Congo, China, and the United States (Mazzochi). As of 2007, there were 94 retentionist countries in the world, however 33 of those states were considered to be *de facto* abolitionist by Amnesty International, because they have not had an execution in 10 years (Mortensen 10). In 2007 85% of all known executions occurred in China, Iran, Saudi Arabia, Pakistan, and the United States (Mortensen 10).

It is rare that the United States, being a Western, industrialized nation, would be listed in this company. On the issue of capital punishment, the United States is alone as an industrialized, democratic nation that retains the practice of capital punishment. There is no question that the United States shares more similarities with European Union member states than these other seven countries. The United States works closely with other states and values its allies.

The European Union has not hesitated to continue to try to persuade member states not to reinstate the death penalty. Despite the support of Polish officials, many believe that the proposed referendum on the subject would not be effective in changing Polish law as long as Poland was bound by European Union policy (“EU Rebuffs Poland on Death Penalty”). While the Charter of Fundamental Rights of the European Union holds the abolition of capital punishment to its member states, that is not the final goal of the policy. The European Union also

actively campaigns for the universal abolition of the death penalty (Phillips). It uses its influence to support interest groups and to encourage other states to abolish.

The Charter of Fundamental Rights of the European Union makes the abolition of the death penalty in member states clear and straightforward. The “Right to Life’ article, which will be included in its entirety in a later chapter, is a simple but effective example that would be easily translated into the policy of other jurisdictions. While the simplicity of the European Union policy is important, it is not vague or overbroad. Coupled with a complimentary document that further elaborates on and clarifies the intentions of the Charter, there is nothing left unclear about European Union policy on capital punishment. Going beyond this Charter, the European Union argues for the global abolition of capital punishment. The European Union regard the death penalty as a “denial of human dignity” and maintains that the “abolition of the death penalty contributes to the progressive development of human rights,” (Neumayer 249). Considering this and the democracy indicator, it is not a surprise then that, with the exception of the United States, the countries making the most use of the death penalty are dictatorships (Neumayer 250).

The judicial system in the United States has shown that it can be susceptible to international influence, especially from other industrialized western nations like those that make up the European Union. From the foundations of our legal system, to borrowing laws directly from foreign jurisdictions, to using the example of other industrialized western nations in direct correlation with the practice of capital punishment.

Despite the potential for this influence, there are many other factors that can be expected to be prominent pieces to the process as the United States judiciary continues to make decisions in regard to capital punishment in the United States.

Chapter Two: The History of Capital Punishment in Europe and Modern European Union Policy

There is a long history of capital punishment throughout Europe. Many countries and areas had times with few executions or even stretches of time with no executions at all, while having many executions in other eras. Each member of the European Union has had its own series of events leading up to the abolishment of the death penalty.

The British have an extensive history of capital punishment. While under William the Conqueror, there were very few executions, during King Henry VIII's reign, the English saw a much higher number of death sentences. Starting in 1660, the number of capital crimes as defined by the English government began to rise ("National Archives"). By 1815, the number of crimes punishable by death in England had risen to 288 ("National Archives"). Someone could be sentenced to death for any number of offenses including petty theft and cutting down a young tree. These laws later became known as the "Bloody Code" ("National Archives"). Despite the name given to these laws, a death sentence was not a common result for some of these seemingly lesser capital crimes. History shows that many juries and judges were hesitant to use the death penalty as more than a threat ("National Archives") The number of capital crimes later decreased, but it was not until 1998 with the passage of the Human Rights Act, that the United Kingdom fully abolished the death penalty ("Amnesty").

During the Eighteenth Century, the French began looking for a method of execution that would be more humane than hanging and burning that were commonly used. The result of this new thinking was the eventual use of the Guillotine, which was seen as a quick and painless method of execution. On March 20 1792, the Guillotine became the only official method of execution in France (“The Guillotine”). The use of the Guillotine in France lasted through the French revolution and continued until capital punishment was abolished in France in 1981 (“The Guillotine”). This transition was made without the support of the public. In fact, two thirds of the French people were in support of the continued practice of the death penalty in their country (Mortensen 15).

Some Western European countries were among the frontrunners in the global abolitionist movement. Portugal, San Marino, the Netherlands, Norway and Sweden had all abolished capital punishment in peacetime prior to 1925 (Mortensen 8).

Following the turmoil over capital punishment for much of European history, there has been much done to unify the continent in the elimination the death penalty. Both the European Union and the Council of Europe have taken measures against the continued use of capital punishment in Europe. In regard to human rights, the Council of Europe and the European Union have a long history of working jointly (“Council of Europe”).

There are 27 member states of the European Union and six candidate states.

The member states include:

Austria
Belgium

| Greece
| Hungary

| Poland
| Portugal

Cyprus	Ireland	Romania
Czech Republic	Italy	Slovakia
Denmark	Latvia	Slovenia
Estonia	Lithuania	Spain
Finland	Luxembourg	Sweden
France	Malta	United Kingdom
Germany	Netherlands	

(“European Union”)

States that are candidates for membership in the European Union include:

Croatia	Iceland	Serbia
Former Yugoslav Republic of Macedonia	Montenegro	Turkey

(“European Union”)

The remaining European countries recognized as part of Europe by but not affiliated with the European Union are:

Albania	Georgia	San Marino
Andorra	Liechtenstein	Switzerland
Armenia	Moldova	Ukraine
Azerbaijan	Monaco	Vatican City
Belarus	Norway	
Bosnia and Herzegovina	Russia	

(“European Union”)

Not having the death penalty is a condition for starting membership negotiations with the European Union (“EU Rebuffs Poland on Death Penalty”). No European Union member state may practice capital punishment. In fact, the only country in all of Europe, not just member states of the European Union, that is still practicing the death penalty is Belarus. Belarus is a republic by name, but functions as a dictatorship (“CIA World Factbook”). The continent had gone an entire year

without an execution before Belarus broke the streak by executing two criminals on March 18, 2010 (Phillips). Latvia, despite being a member of the European Union, and having abolished the death penalty, still retains the theoretical possibility of imposing capital punishment in times of war (Phillips). Despite this theoretical possibility, Latvia has not been to war, and so has not acted upon it.

The document outlawing capital punishment for the European Union member states is the “Charter of Fundamental Rights of the European Union.” It was written in 1999 and was approved on October 2, 2000 (“European Union”.) This document has seven chapters and 54 articles all detailing the rights that are to be guaranteed to the citizens of member states. Chapter one is titled “Dignity,” and the first article reads, “Human dignity is inviolable. It must be respected and protected” (“Charter...” 9). This is the only provision listed before capital punishment is mentioned, and leads into the next article.

Immediately following Article One is the article, "Right to Life." This is the article that directly discusses the abolition of capital punishment in the European Union. It reads, "Everyone has the right to life. No one shall be condemned to the death penalty, or executed, " ("Charter..." 9). This article clearly abolishes the death penalty for member states of the European Union.

In the preamble, the Charter of Fundamental Right of the European Union explains its purpose, "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity," ("Charter..." 8). The preamble then goes on to emphasize the importance of the individual as well as the principles of freedom, security and justice ("Charter..." 8). It is partially through the abolition of capital punishment that the European Union seeks to achieve these goals.

The importance of the abolishment of the death penalty in the European Union is emphasized in a number of ways in this document. First, this charter applies to all member states, and a state must meet all terms of the charter in order to gain admittance into the European Union. Second, the "Right to Life" article is listed at the top of a long list of rights protected by the charter.

The supremacy of the Charter of Fundamental Rights of the European Union is made evident by European Union policy. In the preamble of the charter, the European Union references the support of many other institutions of legal framework to legitimize the chart itself. The charter references the constitutions and international obligations of member states, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights

and Fundamental Freedoms, the Social Charters adopted by the Community, the Council of Europe, and case-law of the Court of Justice of the European Communities and of the European Court of Human Rights (“Charter...” 8). This charter was created to work in support and alongside all of these listed institutions and foundations for international law in Europe.

The issue of incorporating the charter, or making it legally binding to member states was one that was raised by Cologne European Council. The European Parliament voted in favor of incorporation.

The authors of the Charter of Fundamental Rights of the European Union listed this Right to Life before 13 other pages of protected rights. The charter divided the protected rights into six sections; Dignity, Freedom, Equality, Solidarity, Citizens’ Rights, and Justice (“European Union”). The importance of this anti-capital punishment article is emphasized by its placement within the document.

After the incorporation of the charter, the European Union also released a complimentary document to further clarify the intent and conclusions of the protections in the charter. In this Draft Charter of Fundamental Rights of the European Union, there are detailed and descriptive purposes explained. Starting with the first article, Dignity, the authors clarify the importance of dignity in the protection of individual rights.

In this elaboration, the charter authors referenced the 1948 Universal Declaration of Human Rights, saying it, “Enshrined this principle in its preamble: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all member of the human family is the foundation of freedom, justice and peace in

the world,” (“European Union”). To further summarize this first article, the authors closed with, “It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted,” (“European Union”).

This then leads to the elaboration of Article Two, dealing directly with capital punishment through the “Right to life.” Here, the authors explain that this article must be incorporated for member states in order to respect European Council on Human Rights and its Protocol. Article One of Protocol Six of the ECHR reads, “The death penalty shall be abolished. No-one shall be condemned to such penalty or executed,” (“European Union”).

To further explain, this Draft Charter included the relevant Article in the ECHR:

- Article Two, Section Two of the ECHR: "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defense of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection."
- Article Two of Protocol Number Six to the ECHR:

"A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions..."

Article Two Section Two allows for the deprivation of life by the state only in extreme cases. This section allows for law enforcement to continue with their jobs unhindered. It is made clear though, that the state should use no more force than is absolutely necessary.

Under Article Two of Protocol Six, it is made clear that the death penalty is effectively abolished in times of peace for all member states of the European Union. Not mentioned in the Charter of Fundamental Rights of the European Union is Protocol 13 of the ECHR. In this Protocol, the ECHR abolishes the death penalty at all times, including times of war ("Amnesty"). Despite not being included in this Charter, most of the European Union member states have ratified Protocol 13. The only member state that has not ratified Protocol 13 is Poland ("Amnesty").

Past Polish president, Lech Kaczynski, received a great deal of opposition for supporting the reinstatement of capital punishment in Poland ("EU Rebuffs Poland on Death Penalty"). "Countries who give up this penalty award an unimaginable advantage to the criminal over his victim, the advantage of life over death," said President Kaczynski ("EU rebuffs Poland on Death Penalty"). Despite these efforts, European Union officials showed no sign of rescinding any policy concerning the abolishment of capital punishment. "The death penalty is not compatible with

European values," a European Commission spokesman, Stefaan de Rynck in response to Kaczynski's sentiments.

Europe has had a turbulent history concerning capital punishment, but has sought to create a unified front concerning their ambitions to abolish the death penalty. Through the direct efforts of the Charter of Fundamental Rights of the European Union, and the efforts to compliment other international treaties, the death penalty has been abolished in European Union member states. This sets a precedent on a global scale giving other countries an example of how to go about abolishing the death penalty elsewhere.

Chapter Three: Death Penalty and the States

While the United States has a wealth of capital punishment precedent on the federal level, the states each have slightly different histories on the topic. The first recorded execution in America was in 1608 in Virginia (Gershman 237). Four years later, Virginia passed the “Divine, Moral, and Martial Laws” which were the first laws in America that outlined capital crimes (Gershman 237).

Capital punishment laws and trends vary greatly from state to state. Over the majority of American history, several states as well as the District of Columbia have abolished the death penalty (the year the death penalty was abolished in that states is in parenthesis):

Alaska (1957)	Maine (1887)	New Jersey (2007)
Hawaii (1957)	Massachusetts (1984)	North Dakota (1973)
Illinois (2011)	Michigan (1846)	Rhode Island (1984)
Iowa (1965)	Minnesota (1911)	Vermont (1964)
Rhode Island (1984)	West Virginia (1965)	West Virginia (1965)
Vermont (1964)	Wisconsin (1853)	Wisconsin (1853)

(“Death Penalty Information Center”)

Today, there are 34 states that still practice capital punishment in addition to the United States Military and the United States Federal Government:

Alabama	Kentucky	Oregon
Arizona	Louisiana	Pennsylvania
Arkansas	Maryland	South Carolina
California	Mississippi	South Dakota
Colorado	Missouri	Tennessee
Connecticut	Montana	Texas
Delaware	Nebraska	Utah

Florida
Georgia
Idaho
Indiana
Kansas

Nevada
New Hampshire
North Carolina
Ohio
Oklahoma

Virginia
Washington
Wyoming

(“Death Penalty Information Center”)

This chapter will sample state laws concerning capital punishment from across the country to better understand the way capital punishment has evolved and how it is practiced in the United States today.

Race:

Concern over racial prejudice has been an issue in capital punishment sentencing for several decades, and the issue is still prevalent today. In 2009, North Carolina passed the Racial Justice Act, which allows death row inmates to reduce their sentences to life if they can show racial bias was a “significant factor” during the trial process even if they were not directly affected by discrimination. (Pesky). Death row inmates may now try to use statistical evidence to challenge their death sentences (Pesky). Those sentenced to death in North Carolina do have some reports and studies on their side. One study conducted by the Michigan State University College of Law found that 31 death row inmates in North Carolina had all-white juries and another 38 inmates had only one minority jury member (Pesky). This act is currently being used by two North Carolina death row inmates, Errol Duke and Carl Stephen Moseley, who are looking to have their cases re-examined under the new state law (Pesky).

Method of Execution:

While the methods of execution used in the United States have become more standardized, there are still several methods still written into the laws of the states.

Most states that still practice capital punishment have lethal injection as their primary form of execution, but there are some exceptions. Alabama and Nebraska, for example, still uses electrocution (“FindLaw”). Other states allow the death row inmate to elect how his or her sentence will be carried out given a few choices. Examples of this are Utah, where the death row inmate can choose between lethal injection and firing squad, and Washington, where the choice is between lethal injection or hanging (“FindLaw”). Other states have back-up methods of execution in case the primary method was to be ruled unconstitutional. In Wyoming, the primary method of execution is lethal injection, but the state law describes that lethal gas should be used if lethal injection is ever ruled unconstitutional (“FindLaw”).

Age Restrictions:

Among the states that still practice capital punishment, the minimum age for the defendant to be sentenced to death varied greatly before the Supreme Court case *Roper v. Simmons*. In this 2005 case, the Supreme Court held that it is unconstitutional for capital punishment to be imposed as a sentence for a crime committed before the defendant was 18 years old. Alabama, Arkansas, Delaware, Florida, Idaho, Louisiana, Mississippi, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, and Washington had no minimum age for a death sentence set by state law. More specifically, the 1977 Arkansas case, *Giles v. Statz* outlined that chronological age should not necessarily control the jury’s sentencing determination (“FindLaw”). California, Colorado, Connecticut, Indiana, Kansas, Maryland, Montana,

Nebraska, Ohio, and Tennessee already had a minimum age of 18 set by state law. Georgia, North Carolina, New Hampshire and Texas all had a minimum age of 17 set prior to *Roper*. Kentucky, Missouri, Nevada, Virginia, and Wyoming had a minimum age of 16. Arizona had a minimum age of 15, and Oregon had the lowest minimum age at 14 ("FindLaw"). Some states, like Colorado, specified in state law that age would be considered a mitigating circumstance or factor to be weighed in sentencing.

Other Restrictions:

Despite a death sentence, there are certain circumstances that vary by state that could allow a defendant can have his or her death sentence postponed. In *Atkins v. Virginia* (2002) The Supreme Court restricted the authority of the states to execute criminals that are considered to be mentally retarded (*Atkins v. Virginia*). In conjunction with this, many states have written into their laws that a defendant who is mentally retarded cannot be sentenced to death for his or her crimes due to a reduced personal culpability. In Indiana, for example, the law allows for the suspension of execution of an insane person until sanity returns. ("FindLaw")

In addition to the clauses concerning the mental state of the defendant, Many states have written into their capital punishment laws making it illegal to execute a pregnant woman until after she has given birth or is no longer pregnant. Kentucky is an example of a state that has included this written exception in its laws ("FindLaw").

Definitions of Capital Homicide

Each state still practicing capital punishment has its own legal definition of capital homicide. While capital homicide is often thought of as first-degree murder, many states go beyond this simple explanation to elaborate on the potential circumstances that could surround a crime legally worthy of a death sentence. For example, the definition of capital homicide in Texas reads, "Victim is peace officer or fireman in official duty; while committing/attempting to commit kidnapping, burglary, robbery, aggravated sexual assault or arson; obstruction; retaliation; for remuneration or employs another; while escaping; incarcerated and victim is employee or inmate; murder more than one person during same criminal transaction or scheme or course of conduct; victim under 6 years," ("FindLaw"). This definition begins by detailing what is more generally called a felony murder, or a murder that occurs during the commission of a felony (Garner1043). Then the Texas law goes on to include some of the defendant's criminal record, the number of people murdered, and finally the age of the victim is taken into account by the state law. A crime must meet any one of these standards for the defendant to be eligible for the death penalty in Texas.

While the considerations made in the definition of capital homicide in Texas are very similar to those of other death penalty states, no two states have the same working definition. In Arizona, the law goes further in regard to age stating that if the victim is younger than 15 years old or older than 70 years old the murder is a capital homicide ("FindLaw"). The Arizona law, similarly to other states, also adds that a murder can be a capital homicide if the murder committed the crime to

receive a payment (“FindLaw”). In Oklahoma, the definition of capital homicide is not grounded entirely in the crime itself. The state law leaves room for some evaluation of the defendant as well, “...probability of defendant being continuing threat to society...” (“FindLaw”).

Abolition of the Death Penalty in the States:

While some states have been without capital punishment for over a hundred years, like Wisconsin, other states are going through the process of abolishing the death penalty much more recently. Illinois, New York, New Jersey, and New Mexico have all ended capital punishment in their states within the past few years.

Wisconsin has been without the death penalty for over 150 years, making Wisconsin the state that has been consistently without the death penalty for the longest (“Wisconsin Lawyer”). In Wisconsin, the effort to abolish capital punishment began before statehood. In 1847, a bill passed the Territorial Assembly to abolish the death penalty, but it later failed in the Senate (“Wisconsin Lawyer”). On August 21, 1851, John McCaffary, after having been found guilty of the “Willful Murder” of his wife, was the last man to be executed in Wisconsin (“Wisconsin Lawyer”). This was the only execution in Wisconsin after it became a state.

While abolition in Wisconsin, like in many other states, was achieved through the legislature, the state of New York abolished the death penalty through the judiciary. In 2004, Stephen LaValle was sentenced to death, but later the state’s highest court reviewed his case and found capital punishment in violation of the New York State Constitution (“New York’s Death Penalty...”). The Court was

concerned that jurors would impose the death penalty on a defendant, not because he or she deserved death, but because the jurors feared the defendant might be released someday (“New York’s Death Penalty...”).

In 2009, the legislature in New Mexico passed a bill to abolish the death penalty in the state. Despite his personal beliefs on capital punishment, the then governor, Bill Richardson, signed the bill commenting that he did not have enough confidence in the criminal justice system to sign a death warrant (“Death Row”).

In Illinois the road to abolition was a relatively quick. In the mid-nineties, there was very little public, political, or judicial support for the abolition of capital punishment in the state (Bienen). Starting in 2000, the political atmosphere changed and a moratorium on executions was started by Governor George Ryan (Bienen). This moratorium would last ten years, until the death penalty was abolished in 2011 in Illinois. This makes Illinois the state that has most recently abolished the death penalty, but it may not stay that way for much longer.

Most recently, Connecticut has become the seventeenth state to abolish the death penalty. In early April 2012, the Senate passed the anti-capital punishment with a 20-16 vote (Altimari, and Lender). Shortly after the bill passed in the State Senate, the Connecticut House of Representatives also passed the bill with a 86-62 vote (Godin). The bill then went to Governor Dannel Malloy, who had previously expressed his support for the abolishment of capital punishment in his state (Godin). While this policy abolished the death penalty for defendants convicted of capital crimes in the future, it does not reduce the sentence for the 11 men still on death row in Connecticut (Altimari, and Lender).

As states continue to abolish capital punishment independently, they are making the process easier for other states to follow in their footsteps. The seventeen states that had have outlawed the death penalty have paved the way showing how abolition can come through different channels of government. This consideration of federalism could be a contributing, domestic factor unique to the United States in regard to the abolition of capital punishment.

Chapter Four: United States Capital Punishment History and Supreme Court Precedent.

For nearly the entire duration of our country's history, different aspects of capital punishment and its constitutionality have come into question before the United States Supreme Court. The intentions of our Founding Fathers however, were clear. The authors of our Constitution did not write the Eighth Amendment as a road to the abolition of capital punishment in this country. Despite this, the US Supreme Court has made concessions, in accord with the Constitution, that have benefitted the abolitionist camp.

Capital Punishment cases have dealt most directly with the Eighth Amendment and the Due Process Clause of the Fourteen Amendment. The Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Section One of the Fourteenth Amendment reads, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Early American history is spotted with examples of capital punishment cases, but there was no serious effort to abolish the death penalty in the United States. Cases that reached the Supreme Court were more concerned with the method of execution used. For example, in *Wilkinson v. Utah* (1879) the Supreme Court ruled that the use of a firing squad in a public execution for premeditated murder was constitutional (Epstein 41). Another example was the 1890 case, *In re Kemmler*, in which the Supreme Court ruled that cruel and unusual punishment could be defined as “torture or lingering death.” This, to the Supreme Court at the time, meant that death by electrocution was not in violation of the Eighth Amendment (Epstein 42). In addition to this ruling, in 1958, the Warren Court made a significant contribution to the continued discussion of the Eighth Amendment in a case that did not concern capital punishment in *Trop v. Dulles*. In this case, the Warren court held in a split decision that stripping an American of his or her citizenship constituted cruel and unusual punishment (Epstein 42). In the majority opinion, Chief Justice Warren wrote, “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” (Epstein 42). This precedent effectively took the standards for punishment out of centuries old thought into the modern era (Latzer 3). This has since become known as the *Trop* standard. The Chief Justice provided no other clarification of the interpretation of the Eighth Amendment. Despite the fact that this decision had no direct effect on capital punishment, this precedent would continue to play a major role in the abolitionist campaign to follow.

While the Supreme Court took a few capital punishment cases during the early part of the nation's history. These cases centered mostly around the Eighth Amendment which reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment be inflicted." In keeping with the original spirit of this amendment, these early cases did not argue whether or not the death penalty was constitutional, but rather how it should be carried out to meet constitutional requirements (Latzer 2). It wasn't until the 1960's that the Court began to show any inclination that they might find the death penalty in any way in violation of any part of the Constitution (Epstein 41).

Before state laws could be subjected to the requirements of the Eighth Amendment, it would have to be incorporated to the states. This was done in 1962 in the case *Robinson v. California*. While this case dealt with drug addiction, it was still applicable to the issue of capital punishment. It was through this case that the Supreme Court held that the states must adhere to the constitutional restriction on cruel and unusual punishment, just as the federal government (Latzer 3).

The first sign of potential abolition of capital punishment through the judiciary was in *Rudolph v. Alabama* in 1963. The case brought forward a procedural question, but Justice Arthur Goldberg circulated a memo among the other justices asking that they grant the case certiorari as a vehicle to abolish the death penalty. The memo said, "The evolving standard of decency that mark the progress of [our] maturing society now condemn as barbaric and inhumane the deliberate institutionalized taking of human life by the state," (Epstein 43). Goldberg reinforced the sentiments of this memo with reports of the status of capital

punishment in other countries, making an example of the jurisprudence of polling jurisdictions being introduced in the death penalty debate in the United States (Epstein 44). Goldberg's memo shocked many of the other Supreme Court Justices.

At this point, there was still too much opposition on the Court to even grant a writ of certiorari for this case when coupled with the clear intentions of Justice Goldberg (Epstein 44). In response, Goldberg along with two other justices wrote a dissent (Epstein 44), which effectively sent a message to the legal community that some justices were open to challenging the constitutionality of the capital punishment in the United States. This action opened the doors to interest groups to then pursue social change through the legal system. This is when the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People – Legal Defense Fund (NAACP LDF) began their campaigns against the use of the death penalty.

The ACLU began working toward the abolition of the death penalty in 1963, arguing that the practice violated the Constitutionally guaranteed rights to due process, equal protection, and the Eighth Amendment protection against cruel and unusual punishment (Epstein 46). While using many of the same legal arguments, the NAACP LDF were primarily concerned with the evident history of racial discrimination in the sentencing of capital punishment cases. In order to provide a statistical foundation for the claim of equal protection being violated by the apparent discrimination in sentencing, the LDF helped to facilitate a study conducted by Marvin Wolfgang. The study sought to show the racial discrimination evident in the sentencing of rape cases in southern states (Epstein 50). This

research was in response to *Maxwell v. Bishop* (1970). In that case, the attorney representing the defendant provided some statistics attempting to demonstrate this kind of discrimination. Despite this extensive effort, a district court judge still ruled against Maxwell, not trusting the statistical evidence (Epstein 52).

Specific contributing factors in the practice of the death penalty that came up before the Court in this era included many procedural arguments. Those supporting the abolition of the death penalty had many potential legal routes to consider. There were many legal questions that were coming up across the country. The abolitionists then faced the challenge of deciding which vehicles would have the best chances at success if the cases were to reach the United States Supreme Court.

One of the procedures that were questioned by the abolitionist camp was the use of a unitary trial. In a unitary trial the jury is asked to return a verdict of guilt or innocence and simultaneously determine whether the defendant would be punished by death or life imprisonment. This was argued to be in violation of the Due Process Clause.

Another procedure abolitionists argued against was the use of a death-qualified jury during sentencing. A death-qualified jury is defined as, "A jury that is fit to decide a case involving the death penalty because the jurors have no absolute ideological bias against capital punishment," (Garner 873). The LDF presented arguments against the use of death-qualified juries saying that they violated the Sixth Amendment right to an impartial jury. They presented the argument that a death-qualified jury does not represent a cross-section of society because it excludes members of society that are in opposition to the use of the death penalty

(Epstein 57). In 1968, the Supreme Court decided in *Witherspoon v. Illinois* that Illinois's death-qualified jury procedure was unconstitutional (Epstein 58). This meant that a potential jury member could not be excluded during voir dire, the jury selection process, due to his or her opposition to the death penalty. Later cases involving juror selection would alter this ruling. In *Lockhart v. McCree* (1986), the Supreme Court would rule that a juror may be excused if he or she is thought to have beliefs about the death penalty that could impair his or her performance in relation to the capital trial (Latzer143). Also concerning jury selection in capital trials was the 1986 case, *Turner v. Murray* in which the Supreme Court held that defendants in interracial murder cases would be granted the opportunity to question potential jurors about racial prejudice (Latzer 155).

Following the *Witherspoon* decision, another strategy used by the interest groups opposing the death penalty was the "moratorium." In the late 1960's, the NAAACPLDF attempted to provide counsel to all death row inmates in the country. The goal of this campaign was to tie up the court system. They wanted to use appeals to postpone executions and hoped to eventually stop all executions in the United States. They LDF hoped that if they could stall all executions for a time, that no governor would want to be the one to start execution prisoners again (Epstein 52-53). Despite the difficulty of a strategy of this caliber, the LDF did everything in their power to expand the resources available to death row inmates. The LDF celebrated its success in 1968. This was the first year in American history in which there were no state executions (Epstein 59). Outside of the legal system, there were other circumstances that changed the climate of the capital punishment debate. The

abolitionist movement celebrated another victory. In 1968, Attorney General Ramsey Clark formally petitioned Congress to abolish the death penalty. This act marked the first act of the executive branch toward abolition of capital punishment in the United States (Epstein 58). Those in support of capital punishment also had reason for optimism in 1968. Democratic presidential hopeful, Robert Kennedy was assassinated allowing Richard Nixon to win the presidency and subsequently appoint two new justices to the Supreme Court including a new Chief Justice (Epstein 60).

1970 marked the first time court in the United States ruled the death penalty unconstitutional. The case was *Ralph v. Warden*, which was a case in which the LDF represented a black man who had been accused of raping a white woman. The U.S. Court of Appeals for the Fourth Circuit held that, under certain circumstances, the death penalty constituted cruel and unusual punishment (Epstein 68).

Despite this success in lower federal courts in 1970, abolitionists faced a setback in 1971. In *McGautha v. California* and *Crampton v. Ohio* the Supreme Court held that neither unitary trials nor standardless sentencing in capital punishment cases were unconstitutional (Epstein 69). The justices argued that a two-stage trial would do no more good than the unitary trials states were using. In regard to sentencing standards, the justices maintained that there could never be a complete list of standards to meet for a death sentence (Epstein 69). In the opinion, Justice Harlan specifically addressed the question of the Eighth Amendment. Harlan said, "It is inconceivable that the framers intended to end capital punishment with the Amendment," (Epstein 69).

This precedent all led up to the landmark Supreme Court case, *Furman v. Georgia*. *Furman* was one of four cases the Supreme Court handpicked to address in its entirety the constitutionality of capital punishment in the United States (Epstein 70). One case, *Aikens v. California*, concerned a brutal murder. *Georgia, Jackson v. Georgia* and *Branch v. Texas* both dealt with interracial rapes. *Furman* though involved a potential accidental killing (Epstein 70). With these four cases on the docket, the Court gave itself the vehicles to reevaluate capital punishment alongside the Constitution from a variety of perspectives. The decision handed down by the Court was split.

Justices White, Stewart, and Douglas thought that capital punishment, as practiced by the states, violated the Constitution (Epstein 78). They were not entirely opposed to the use of the death penalty, but just found that some of the components of the way it is practiced were inconsistent with constitutional rights. Also in the majority in the *Furman* decision were Justices Brennan and Marshall. Differing from the other three in the majority, Brennan and Marshall contended that capital punishment was unconstitutional under all circumstances (Epstein 78). Aside from this division, all five of these justices agreed that the death penalty was being used in an arbitrary manner. They could not however agree on what specifically made the practice of the death penalty by the states arbitrary.

The four Nixon appointees on the Court were the dissenters (Epstein 79). All of the dissenting justices in some way argued that the Court was acting as a legislative body and therefore outside of its Constitutional authority. Accompanying his dissent, Chief Justice Burger made note that the plurality (Justices White,

Stewart, and Douglas) has not ruled out capital punishment as a resource to the state. Chief Justice Burger outlined that the states could make changes to their capital punishment law to make the practice constitutional and in conjunction with *Furman* (Epstein 79). Despite this argument laid out by the Chief Justice, he himself did not think that capital punishment would continue in the United States after this case (Epstein 80).

This defeat of capital punishment in the United States would not last long. The Supreme Court faced a great deal of political opposition from both the Executive and Legislative branches regarding the 1972 *Furman*. Immediately, state legislators began to rework their laws to circumvent the Supreme Court decision. Sixteen had managed to restore the death penalty by the end of 1973, with another fifteen states restoring the death penalty by the end of the decade (Epstein 87). This was not accomplished without some difficulty by the legislators. Many state courts and lower federal courts struck down much of the legislation that came before them that contracted the new precedent set forth by *Furman* (Epstein 88).

While several of the states worked independently to restore the death penalty, President Nixon was working to counteract *Furman* on the federal level (Epstein 88). Just as in the state legislative bodies, the response from federal legislators was also one of intense opposition to this Supreme Court action. Coinciding with this political support for the reinstatement of the death penalty as also public support for the same policy (Epstein 89). While *Furman* was a major victory for the advocates of abolition, it also stirred those in favor of the death penalty.

By the 1974, nine cases concerning the constitutionality of these new modified laws had made it to consideration by the Supreme Court for a writ of certiorari (Epstein 96). Of those nine cases, the Court granted certiorari to one case, *Fowler v. North Carolina*. The LDF, who were involved in this case, hoped to use it to consolidate and extend the Court's conclusions in *Furman*. Counteracting the efforts of the LDF, U.S. Solicitor General, Robert Bork, submitted an extensive amicus curiae brief in support of capital punishment arguing, not the narrow focus of *Fowler*, but instead the wider Eighth Amendment question (Epstein 97). With Justice Douglas unavailable for conference due to health issues, the Court originally was tied up, 4-4 (Epstein 99). Before a decision could be met, Justice Douglas resigned from the court and Justice John Paul Stevens was appointed (Epstein 99). Due to this set back, *Fowler* was not decided until the Supreme Court brought up the same question of mandatory death sentence for murder in *Woodson and Waxton v. North Carolina*. In *Woodson*, the Supreme Court ruled North Carolina's mandatory death sentences unconstitutional (Epstein 103).

With regard to this case and four others that had been considered by the court at the time, the Court and the media focused most heavily on *Gregg v. Georgia*, which concerned the question of cruel and unusual punishment. The Court's decision came down 7-2 supporting the overall constitutionality of the death penalty saying that it does not violate the Eighth Amendment (Epstein 110). In this decision, the Supreme Court outlined some sentencing standards for capital trials. *Gregg* outlined that someone could only be sentenced to death for a murder if there existed at least one "aggravating" circumstance and no "mitigating" circumstances

(Lutzer 45). The Court would define aggravating circumstances in this particular case as:

1. "That the offense of murder was committed while the offender was engaged in the commission of ... other capital felonies.
2. That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
3. The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they involved the depravity of [the] mind of the defendant," (Lutzer 47).

The Court would also outline mitigating circumstances that would prevent the capital trial of reaching a death sentence:

1. "Whether the sentence of death was imposed under the influence of passion, prejudice, or anything arbitrary factor and
2. Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance...., and
3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," (Lutzer 48).

The Court's opinion in *Gregg* also showed a great deal of influence from the *Furman* dissent as well as the amicus curiae briefs filed by Robert Bork (Epstein 113). In addition to those arguments and standards, the Court stated that the, "evolving standard of decency" (the *Trop* standard) nor the jurisprudence

concerning judicial restraint supported the abolitionist effort (Epstein 113). The *Gregg* decision marked a major victory for supporters of capital punishment. In response to the majority opinion, both justices of the minority, Brennan and Marshall, submitted dissents (Epstein 113).

While *Gregg* provided an example for sentencing standards for capital trials, it did not close this particular question. It was not until 1990 in *Godfrey v. Georgia* that the Supreme Court addressed some of the state's aggravating and mitigating circumstances. In *Godfrey*, the Court found that the death penalty may not be imposed when the aggravating circumstances are too broad or vague (Latzer 87). Similarly, the 1978 case, *Lockett v. Ohio*, ensured defendants the right to present evidence of mitigating circumstances to the court (Latzer 95). Also concerning mitigating circumstances was *McKoy v. North Carolina*. With this case, the Supreme Court ruled unconstitutional the requirement that juries unanimously agree on the existence of mitigating circumstances (Latzer101).

The next major death penalty case to be decided upon by the Supreme Court was *McCleskey v. Kemp* in 1987. This case again brought before the Court the question of racial discrimination in sentencing. The decision to grant a writ of certiorari to *McCleskey* was not one that was surprising. The Supreme Court had been vocal about capital punishment in the media throughout the early 1980s and a new study concerning racial discrimination in death penalty sentencing had just been conducted (Epstein 123). In April 1987, the Court ruled in favor of the constitutionality of the death penalty (Epstein 126). While the Court recognized the higher number of minorities executed in proportion to the demographics of all

convicted murders, they did not find that there was a discrimination problem in sentencing (Gershman 239). In the majority, Justices Rehnquist, O'Connor, White, Scalia, and Powell agreed that the statistics provided by the defense did not prove racial discrimination (Epstein 126). Justices Brennan, Marshall, Stevens, and Blackmun dissented taking into consideration varying aspects of the arguments presented (Epstein 127).

In 1988, the Supreme Court took on the question of executing people who were under the age of 18 at the time of the murder. In *Thompson v. Oklahoma*, the Court ruled that a convicted murderer may be executed as long as he or she was at least 16 at the time of the murder (Gershman 239).

The Court would next take on the question of mentally disabled members of society that are convicted of a capital crime. In 2002, the Court found that the mentally retarded cannot be executed in *Atkins v. Virginia* (Gershman 240).

In that same year, one of the United States District Courts handed down an opinion in *United States of America v. Alan Quinones* that said that the death penalty was unconstitutional on the grounds that there is too high a risk of an innocent person being executed by the state (Gershman 240). This decision was later overturned by the Second Circuit Court of Appeals (Gershman 240).

Today, capital punishment is still practiced in the United States but it is a more limited and monitored practice than it had been in the past. With very few exceptions (some treason), the death penalty is reserved for those who are convicted of first-degree murder (Latzer 4). This means that the defendant must have committed an intentional murder or a murder in conjunction with another

felony such as rape, robbery, kidnapping, arson, or burglary (Latzer 5-6). Capital trials in the United States are also all bifurcated trials, which means that there are separate trials to decide guilt and then to determine the sentence (Latzer 7). Of the 50 states, 34 still practice capital punishment ("Death Penalty Information Center). While the United States Judiciary has referenced international concerns in regard to capital punishment, it has not shown to be a major contributing factor in the decision-making processes of the justices.

Conclusion:

While the United States judiciary has borrowed ideas and phrasing from other jurisdictions throughout American history, it has also remained an outlier, despite international pressures, on the issue of capital punishment. The United States continues to stand alone as a democratic nation that practices the death penalty. This could be due to the current war, and the its resistance to international persuasion on the matter. For decades, the United States have faced international pressures to abolish capital punishment. While there has shown to be some susceptibility to those influences, it has not been enough to suggest it would be a leading reason for any potential abolition in the future through the American judiciary. Justice Goldberg tried to bring an international perspective to the Supreme Court in regard to the death penalty, but he was not able to gain the support of the rest of the Court. While polling jurisdictions remains a valid jurisprudence, it is unlikely to be the actual influence causing the abolition of the death penalty in the United States.

Outside of capital punishment, much of the borrowing done by the United States Supreme Court was done more for phrasing, and less for the borrowing of the foundations of the actual idea. The United States has a long history of using phrasing that has been put into place in other jurisdictions. In *Hicklin*, for example, the U.S. judiciary adopted the wording of English law, because the U.S. had no precedent on

the matter of obscenity. After that point, the United States Supreme Court took many more obscenity cases and further developed a truly American precedent on the matter. The Court essentially just used the borrowed precedent as a starting point to develop the law they intended for the land. Before that could be done, however, the Court first derived its law from that of another jurisdiction.

The United States seems resistant to international pressures, including those coming from the European Union, on the matter of the practice of the death penalty. It is likely that if the United States judiciary were to abolish capital punishment in the near future, it would do so based on domestic pressures, not those coming from the European Union or other international players. If capital punishment were to be abolished in the United States by the federal government the domestic factors previously discussed are likely to have the most impact on that decision. Regardless of which branch of the federal government abolishes the practice of the death penalty, it is likely that it will be due to left-wing officials in power, and steps toward the end of the war on terror.

The United States has retained capital punishment, and has continued to oppose international expectations on the issue. This could be in part, because of the strength of the influence of the domestic factors present in the U.S. The United States has been involved in the War on Terror for more than a decade now. Included in the domestic factors for abolition is peacetime. This, among other factors, seems to be outweighing any international pressures coming from the European Union or any other foreign entity. The United States, through its continued practice of the death penalty, has demonstrated that, while it considers the international

circumstances surrounding capital punishment, it will not conform to international expectations.

The United States judiciary is most susceptible to the domestic factors previously expanded upon. Despite this, there is no reason to believe that, if influenced to do so by those domestic factors, the United States would not borrow wording from the European Union's Charter of Fundamental Rights in the potential abolition of capital punishment. The United States Supreme Court is fundamentally tied to the United States Constitution. The Constitution and the Bill of Rights do share much of the same wording already with the Charter of Fundamental Rights of the European Union. Many of the core values of freedom are shared between the two. With these similarities, there is room, if the abolition of capital punishment in the United States were to come through the judiciary, for the Supreme Court to adopt the wording used for European Union countries.

To conclude, if the United States were to abolish capital punishment through the judiciary and its channels, it is unlikely that it will do so based on international pressures. This does not mean, however, that there is no expected international influence. Once the justices make the choice, it would be likely that the Supreme Court would reference the wording used in other jurisdictions, like the European Union, to write and hand down the official decision.

WORKS CITED

"Abolition in the UK." *Amnesty.org.uk*. Amnesty International, 21 11 2006. Web. 5 March 2012. <<http://www.amnesty.org.uk/content.asp?CategoryID=981>>.

Altimari, Daniela, and Jon Lender. "Connecticut poised to repeal death penalty." *Los Angeles Times* [Los Angeles] 06 04 2012, n. pag. Web. 6 Apr. 2012. <<http://www.latimes.com/news/nationworld/nation/la-na-death-penalty-20120406,0,4901527.story>>.

Bienan, Leigh. "Criminal Law: Capital Punishment in Illinois in the Aftermath of the Ryan Communications: Reforms, Economic Realities, and a New Saliency for

Issues of Cost." *Northwestern University, School of Law Journal of Criminal Law & Criminology*. (2010): n. page. Print

"Charter of Fundamental Rights of the European Union." *European Union*. European Union, 2000. Web. 15 Jan 2012.

<http://www.europarl.europa.eu/charter/pdf/text_en.pdf>.

"Convent 49." *European Union*. European Union, 11 10 2000. Web. 17 Jan 2012.

<http://www.europarl.europa.eu/charter/convent49_en.htm>.

"Countries." *European Union*. European Union, n.d. Web. 5 March 2012.

<http://europa.eu/about-eu/countries/index_en.htm>.

"Crime and Punishment." *The National Archives*. The National Archives - UK, n.d.

Web. 3 March 2012.

<<http://www.nationalarchives.gov.uk/education/candp/punishment/g06/g06cs1.htm>>.

Epstein, Lee. *The Supreme Court and Legal Change: Abortion and the Death Penalty*.

Chapel Hill: The University of North Carolina Press, 1992. 34-136. Print.

Epstein, Lee, and Thomas Walker. *Constitutional Law for a Changing America; Rights*

Liberties and Justice. 7th. Washington D.C.: CQ Press, 2010. Print.

Garner, Bryan. *Black's Law Dictionary*. 8. St.Paul, MN: Thomson West, 2004. Print.

Godin, Ellen. "Connecticut lawmakers vote to repeal death penalty." *Reuters/ Yahoo News* 11 04 2012, n. pag. Web. 25 Apr. 2012.

<<http://news.yahoo.com/connecticut-lawmakers-vote-repeal-death-penalty-031918635.html>>.

Latzer, Barry. *Death Penalty Cases: Leading U.S. Supreme Court Cases on Capital Punishment*. Woburn, MA: Butterworth-Heinemann, 1998. Print.

Mortensen, Anne Katerine. *Abolition of the death penalty: An event history analysis of the political, cultural and socio- economic determinants of death penalty abolition*. MA thesis. University of Bergen, 2008. privately published, 2008. Web.<https://bora.uib.no/bitstream/1956/3610/1/Masterthesis_Mortensen.pdf>.

Neumayer, Eric. "Death Penalty: The Political Foundations of the Global Trend Towards Abolition." *Human Rights Review*. (2007): 241-268. Web. 25 Apr. 2012.<<http://www2.lse.ac.uk/geographyandenvironment/whoswho/profiles/neumayer/pdf/deathpenaltyarticle.pdf>>.

"New York's Death Penalty Law Declared Unconstitutional DPIC Summary: People v. Stephen LaValle." *Death Penalty Information Center*. Death Penalty Information Center, 2012. Web. 10 Apr 2012.
<<http://www.deathpenaltyinfo.org/node/1199>>.

Pendleton, Alexander, and Blaine Renfert. "A Brief History of Wisconsin's Death Penalty." *State Bar of Wisconsin*. State Bar of Wisconsin, n.d. Web. 1 March 2012r 2012.
<<http://www.wisbar.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=50092>>.

Persky, Anna Stolley. "North Carolina's Death Row Inmates Let Statistics Back Up Bias Claims." *ABA Journal: Law news Now*. 01 05 2011: n. page. Web. 4 Apr. 2012.
<http://www.abajournal.com/magazine/article/north_carolinas_death_row_inmates_let_statistics_back_up_bias_claims/>.

Phillips, Leigh. "Europe's first ever execution-free year undone by Belarus." *EU Observer*. 30 03 2010: n. page. Web. 4 Apr. 2012.
<<http://euobserver.com/24/29797>>.

Ray, Laura Krugman. "The Legacy of a Supreme Court Clerkship: Stephen Breyer and Arthur Goldberg." *Penn State Law Review*. 151.1 (1990): n.Web. 4 Apr. 2012. <[http://www.pennstatelawreview.org/115/1/115 Penn St. L. Rev. 83.pdf](http://www.pennstatelawreview.org/115/1/115%20Penn%20St.%20L.%20Rev.%2083.pdf)>.

"State Capital Punishment Laws." *FindLaw*. Thomas Rueters, n.d. Web. 8 Mar 2012. <<http://law.findlaw.com/state-laws/capital-punishment/>>.

"States With and Without the Death Penalty." *Death Penalty Information Center*. N.p., 2012. Web. 27 Feb 2012. <<http://www.deathpenaltyinfo.org/states-and-without-death-penalty>>.

Sterling, John. "Concepts of Justice past and present: Historical development of theories of crime and punishment." *Law and Liberty*. Law and Liberty Foundation, n.d. Web. 01 March 2012. <<http://www.lawandliberty.org/justice.htm>>.

"The Council of Europe's Relations with the European Union." *Council of Europe External Relations*. Council of Europe, n.d. Web. 5 March 2012. <http://www.coe.int/t/der/eu_EN.asp>.

"Timeline: An Exploration Into the French Revolution." *The Guillotine*. N.p., 2006. Web. 3 March 2012. <<http://www.theguillotine.info/timeline/>>.

Wilson, Todd, and Ray Long. "Illinois death penalty ban sent to Gov. Pat Quinn."

Chicago tribune. 11 01 2011: n. page. Web. 4 Apr. 2012.

<http://newsblogs.chicagotribune.com/clout_st/2011/01/illinois-death-penalty-ban-a-step-closer-to-governors-desk.html>.

"New Mexico governor repeals death penalty in state." *CNN Justice*. 18 03 2009: n.

page. Web. 25 Apr. 2012. <[http://articles.cnn.com/2009-03-](http://articles.cnn.com/2009-03-18/justice/new.mexico.death.penalty_1_penalty-trial-death-row-death-penalty-information-center?_s=PM:CRIME)

[18/justice/new.mexico.death.penalty_1_penalty-trial-death-row-death-penalty-information-center?_s=PM:CRIME](http://articles.cnn.com/2009-03-18/justice/new.mexico.death.penalty_1_penalty-trial-death-row-death-penalty-information-center?_s=PM:CRIME)>.