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Student Comments

Roper v. Simmons: How the Supreme Court of the United States has Established the Framework for Judicial Abolition of the Death Penalty in the United States

BRIAN DANIEL ANDERSON*

I. INTRODUCTION

The Supreme Court of the United States has described the death penalty as "a punishment different from all other sanctions . . . [that] treats all persons convicted . . . not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[1] This statement explains in part why the Supreme Court's death penalty jurisprudence over the past forty years has slowly, relatively, and consistently limited the constitutionality of the death penalty. One of the Court's more recent death penalty cases and the general focus of this article, *Roper v. Simmons*,[2] abolished the use of the death penalty for persons who were under the age of eighteen at the time of the commission of their crime.[3]

This article will analyze how the Court's decision in *Roper* may ultimately provide the foundation for the judicial abolition of the death penalty in the United States. It will review the Supreme Court's recent

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1. Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976).
2. 543 U.S. 551 (2005).
3. *Id.* at 568.

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death penalty jurisprudence and take special account of the Court's increasing awareness of international and foreign domestic law. Part II of this article will summarize the history of the death penalty in the United States and the history of the Court's death penalty jurisprudence. Part III will discuss the Court's judicial abolition of the juvenile death penalty in the United States with its decision in *Roper*. Part IV of this article will demonstrate how the Court's rationale in *Roper* provides a framework for the complete abolition of the death penalty in the United States. Specifically, how the Court's rationale in *Roper* outlines the theoretical and factual elements necessary for judicial abolition of the death penalty in the United States: the Court's existing interpretation of the Eighth Amendment; a national consensus toward abolition; and relevant considerations of international law. As discussed herein, since 1971 there has been a recognized goal in international human rights law to abolish the use of the death penalty in its entirety.[4] The United States has lagged strenuously behind the international community, and especially other developed countries, in achieving this goal. This article will seek to show how the judicial abolition of the death penalty in the United States is possible based on the Court's decision in *Roper* and will demonstrate the rationale for a finding that the use of the death penalty in its entirety is contrary to the Eighth Amendment.

II. HISTORY OF THE DEATH PENALTY IN THE UNITED STATES AND MOVEMENTS TOWARD ABOLITION

The death penalty can trace its roots far back in human history, long before the conception of modern democratic governance.[5] At the inception of the United States and adoption of the Eighth Amendment, the death penalty was commonly used as a form of punishment for a variety of crimes.[6] Since then, however, the use of the death penalty has been tempered by the Supreme Court's interpretation of the Eighth Amendment. As early as 1878, the Court in *Wilkerson v. Utah*[7] was asked whether the Utah Territory's death penalty by firing squad was contrary to the Eighth Amendment.[8] Although the Court held that the Eighth Amendment did not

4. *See infra* text accompanying notes 143-48.

5. *See, e.g.*, HARRY HENDERSON, CAPITAL PUNISHMENT 90-116 (2000) (providing an interesting factual and jurisprudential chronology of the death penalty from 1700 B.C.E. to 2000 C.E.).

6. Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 795 (2009). The Eighth Amendment to the Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

7. 99 U.S. 130 (1878).

8. *Id. at* 136-37.

prohibit Utah's execution method, the Court noted that it was difficult to "define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted."[9]

Only twelve years after the Court's decision in *Wilkerson*, it gave more insight into the interplay between the death penalty and the Eighth Amendment's prohibition on cruel and unusual punishment. In the case of *In re Kemmler*,[10] the Court was asked to review the constitutionality of the State of New York's use of the electric chair to carry out the death penalty.[11] While the Court upheld the use of the electric chair, it noted that some methods of imposing the death penalty would not be permitted, including "something inhuman and barbarous . . . [and what was] more than the mere extinguishment of life."[12] In one of the Court's early progressive opinions interpreting the meaning of the Eighth Amendment, *Weems v. United States*,[13] the Court acknowledged the Eighth Amendment to be "progressive . . . [and] may acquire meaning as public opinion becomes enlightened by a humane justice."[14] This was seemingly the Court's first introduction to the notion that the meaning of the Eighth Amendment changing as society evolved.

After the Court's earlier cases navigating the requirements of the Eighth Amendment and somewhat examining the use of the death penalty, the Court's first modern death penalty decision came in 1972 in *Furman v. Georgia*.[15] In that case, a group of defendants challenged their death sentences as arbitrary and capricious, and a violation of the Eighth Amendment.[16] The Court, in a *per curiam* decision, held that the imposition of the death penalty in the challenged cases constituted cruel and unusual punishment as prohibited by the Eighth Amendment.[17] Notably, the Court pointed out that the challenged death penalty statutes allowed for the arbitrary imposition of the death penalty on defendants and that such

9. *Id.* at 135-36.

10. 136 U.S. 436 (1890).

11. *Id.* at 448-49. It is important to note that the rationale of the New York legislature to ban the death penalty by hanging, and replace it with the electric chair, was to give "a more humane way to terminate human life." *See* RAYMOND PATERNOSTER, ET AL., THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT 77 (2008).

12. *Kemmler*, 136 U.S. at 447.

13. 217 U.S. 349 (1910).

14. *Id.* at 378.

15. 408 U.S. 238 (1972); *see* SANAZ ALASTI, CRUEL AND UNUSUAL PUNISHMENT: COMPARATIVE PERSPECTIVE IN INTERNATIONAL CONVENTIONS, THE UNITED STATES AND IRAN 53 (2009).

16. *Furman*, 408 U.S. at 239-40.

17. *Id.* Although the opinion of the Court was *per curiam*, five justices filed separate concurring opinions in support of the result, while the other four justices filed separate dissenting opinions in opposition to the result. *Id.* at 240.

sentences were disproportionally imposed on blacks and "unpopular groups."[18] The effect of the Court's decision in *Furman* was the voiding of the death penalty statutes in forty states and the suspension of the use of the death penalty in the United States pending an examination of its constitutionality.[19] While two justices in *Furman* stated that imposition of the death penalty was altogether unconstitutional,[20] *Furman* only served to put a temporary hold on the imposition of the death penalty.[21] This moratorium was short-lived, however, when in 1976 the Court upheld newly crafted death penalty statutes in *Gregg v. Georgia*.[22] Nonetheless, these cases signaled the beginning of what would become a series of death penalty cases over the next thirty-two years that would progressively limit the constitutionally accepted application of the death penalty.

In 1977, only one year after *Gregg*, the Court limited the application of the death penalty by prohibiting its use for punishment of the crime of rape that did not result in the death of the victim.[23] In 1982, the Court held in *Enmund v. Florida*[24] that the Eighth Amendment prohibited the use of the death penalty for the crime of felony murder.[25] Later, in 1986, the Court concluded that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."[26] The Court imposed this restriction despite the defendant not being found to be insane at the time of the offense, trial, or sentencing.[27] The next limitation placed on the death penalty came in 1988 when the Court concluded in *Thompson v. Oklahoma*[28] that "standards of decency" did not permit the execution of an offender who was under the age of sixteen at the time they committed a capital offense.[29]

The trend of judicial limitation of the constitutional application of the death penalty was put on hold one year later in 1989, when the Court in two separate opinions ratified the use of the death penalty as punishment for those who were mentally retarded and for those over the age of fifteen at the

18. *Id.* at 249-51, 256-57 (Douglas, J., concurring).
19. ALASTI, *supra* note 15, at 53.
20. *Furman*, 408 U.S. at 296, 305 (Brennan, J., concurring); *id.* at 358-59 (Marshall, J., concurring).
21. *See* ALASTI, *supra* note 15, at 53.
22. 428 U.S. 153, 186-87 (1976).
23. Coker v. Georgia, 433 U.S. 584, 599 (1977).
24. 458 U.S. 782 (1982).
25. *Id.* at 782-83 (syllabus).
26. Ford v. Wainwright, 477 U.S. 399, 409-10 (1986).
27. *Id.* at 401.
28. 487 U.S. 815 (1988).
29. *Id.* at 821-23.

time of the commission of their crime.[30] Specifically, in *Penry v. Linbaugh*, the Court concluded that mental retardation could be considered as a factor to lessen a defendant's culpability, but it was not a factor conceived by the Eighth Amendment to preclude the imposition of the death penalty.[31] In S*tanford v. Kentucky*,[32] the Court similarly found no limitation under the Eighth Amendment for the use of the death penalty on capital offenders who were sixteen or seventeen years old at the time of the commission of their crime.[33] Although these decisions were a reversal in the Court's trend of narrowing the acceptable application of the death penalty, the effect was short-lived, and the cases were an important first step to shape the Court's more recent death penalty jurisprudence. In fact, the Court revisited both these issues and within sixteen years reversed them in two separate opinions.[34]

First, in 2002, the Court expressly overruled its decision in *Penry* when it held that punishment of mentally retarded criminals by use of the death penalty was excessive and a violation of the Eighth Amendment.[35] In so holding, the Court noted that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."[36] Three years later, in 2005, the Court issued its opinion in *Roper*, which expressly overruled its decision in *Stanford*, and held that the use of the death penalty on offenders who were sixteen or seventeen years old at the time of their offense was a violation of the Eighth Amendment's "evolving standards of decency."[37]

Most recently, in 2008, the Court held in *Kennedy v. Louisiana*[38] that the Eighth Amendment prohibited the use of the death penalty as punishment for the rape of a child when the act "did not result, and was not intended to result, in the death of the victim."[39] Although the Court in *Kennedy* confirmed that the death penalty was still a prescribed method of punishment under the Eighth Amendment, it noted that this method of punishment should be limited. Specifically, the Court wrote: "[t]hough the

30. *See* Penry v. Lynaugh, 492 U.S. 302 (1989); Stanford v. Kentucky, 492 U.S. 361 (1989).

31. *Penry*, 492 U.S. at 340.

32. 492 U.S. 361 (1989).

33. *Id.* at 380.

34. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002); *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

35. *Atkins*, 536 U.S. at 321.

36. *Id.* (citing *Ford*, 477 U.S. at 405).

37. *Roper*, 543 U.S. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

38. 128 S.Ct. 2641 (2008). S*ee, e.g.*, Kyle W. Bickford, Note, Kennedy v. Louisiana, 35 Ohio N.U. L. Rev. 835, 838-39, 845-50 (2009) (offering an excellent summary of the Court's decision, and insight into its holding).

39. *Kennedy*, 128 S.Ct.at 2646.

death penalty is not invariably unconstitutional . . . the Court insists upon confining the instances in which the punishment can be imposed."[40] Such statements by the Court, made upon the backdrop of a nearly uninterrupted thirty-five year period of limiting the scope and application of the death penalty, may foreshadow further limitation or an outright ban of the death penalty in the United States. With this possibility in mind, an examination of the Court's analysis in *Roper* shows that with its decision the Court has already given a framework for judicial abolition of the death penalty in the United States.

III. *ROPER V. SIMMONS*: ABOLITION OF THE DEATH PENALTY FOR MINORS IN THE UNITED STATES

On March 1, 2005, the Supreme Court announced its decision in *Roper*, holding that the Eighth Amendment to the United States Constitution prohibited the use of the death penalty as punishment for crimes committed when an offender was under the age of eighteen.[41] In *Roper*, the Court considered whether the death penalty should apply to Christopher Simmons, who was seventeen years old when he committed murder.[42] The State of Missouri tried Simmons as an adult, and the trial judge accepted the jury's recommendation that Simmons receive the death penalty.[43] After a series of state court appeals, and before the Court accepted Simmons's case, the Court issued its opinion in *Atkins v. Virginia*, holding that the use of the death penalty to execute a "mentally retarded person" was prohibited by the Eighth Amendment.[44] Based on the Court's rationale in *Atkins*, Simmons filed a new appeal, in which the Supreme Court of Missouri overturned the death sentence and concluded that a "national consensus [had] developed against the execution of juvenile offenders."[45] The Supreme Court of the United States granted certiorari and affirmed the decision of the Supreme Court of Missouri.[46]

The *Roper* decision expressly overruled the Court's prior holding in *Stanford*, decided only six years earlier.[47] In doing so, the Court held that

40. *Id*. at 2650.

41. *Roper*, 543 U.S. at 578-79. The Court held that the Fourteenth Amendment prohibited the use of the death penalty as punishment for crimes committed by a minor offender, as the Fourteenth Amendment applies the federal prohibition of cruel and unusual punishment of the Eighth Amendment to the states. *Id*.

42. *Id*. at 556.

43. *Id*. at 557-58.

44. *Id*. at 559 (citing *Atkins*, 536 U.S. 304).

45. *Roper*, 543 U.S. at 559 (citing State ex rel. Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003)).

46. *Id*. at 560.

47. *Id*. at 575.

the use of the death penalty for all offenders under the age of eighteen at the time of the commission of their offense was a violation of the Eighth Amendment.[48] The framework for the Court's opinion, as outlined in Section IV below, involved four main components. These were: (1) an analysis of the interpretation of the Eighth Amendment and its application to the death penalty; (2) an analysis of frequency and trends of the use of the death penalty on juvenile offenders; (3) the difference between application of the death penalty among juveniles and adults; and (4) an examination of international and foreign domestic law regarding the prohibition of the death penalty for juveniles.[49] As shown below, the rationale used by the Court to limit the use of the death penalty in *Roper* may easily be extrapolated to provide the framework for an outright judicial abolition of the death penalty in the United States.

IV. HOW THE *ROPER* FRAMEWORK APPLIES TO COMPLETE ABOLITION IN THE UNITED STATES

Although it was not the purpose of the Court's opinion, the *Roper* decision provides a framework to analyze whether the use of the death penalty should be abolished altogether as contrary to the Eighth Amendment's prohibition of cruel and unusual punishment. Or, to put it differently, the *Roper* opinion shows what factor or factors must change in the United States, the international community, or both for the Court to find that the death penalty is contrary to the Eighth Amendment's prohibition of cruel and unusual punishment.

A. Eighth Amendment and "Evolving Standards of Decency"

The Eighth Amendment to the Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[50] It is well settled in the United States that the Eighth Amendment is applicable to all the states through the Fourteenth Amendment and thus applies to all people.[51] The Court emphasized in *Roper* that "[b]y protecting even those convicted of heinous crimes, the *Eighth Amendment* reaffirms the duty of the government to respect the dignity of all persons."[52]

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48. *Id.* at 578.
49. *Id.* at 560-78.
50. U.S. CONST. amend. VIII (emphasis added).
51. *Roper*, 543 U.S. at 560 (citing *Furman v. Georgia*, 408 U.S. 238, 239 (1972); Robinson v. California, 370 U.S. 660, 666-67 (1962); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947)).
52. *Id.*

After settling to whom the Eighth Amendment applies, the Court has had to determine how to interpret its meaning and decide what punishments should be prohibited as being cruel and unusual. In *Roper*, the Court noted that to understand the meaning of "cruel and unusual punishment" in the Eighth Amendment it must be "interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design."[53] Moreover, the Court explained that, in doing so, it has "[a]ffirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society.'"[54]

Looking to evolving or civilized standards of decency to interpret the Constitution and its Amendments is nothing new to the Court. In the early twentieth century, the Court decided in *Weems* that the passage of time and the development of society brings with it a different interpretation and application of the Constitution.[55] In *Weems*, the Court wrote in terms of interpreting both statutory and constitutional legislation:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.[56]

After recognizing the general theory that constitutional principles evolve over time, the Court specifically addressed the Eighth Amendment, noting that it "may acquire meaning as public opinion becomes enlightened by a humane justice."[57]

In analyzing the reversal of its 1989 opinion in *Stanford* and noting its then recent reversal of *Perry* in 2002, the Court concluded that the evolution of society's standards, as contemplated by the Eighth Amendment,

53. *Id*.
54. *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).
55. *Weems v. United States*, 217 U.S. 349, 371-76 (1910).
56. *Id*. at 373.
57. *Id*. at 378.

permitted such a reversal.[58] What the Court conclusively showed in *Roper* is that "standards of decency" evolve over time to change what punishments may be used within the confines of the Eighth Amendment. Moreover, the Court's Eighth Amendment analysis shows that based on society's standards the death penalty can be found to be contrary to the Eighth Amendment. The next question, of course, is how? The remainder of the Court's opinion in *Roper* provides insight into answering this question.

B. National Consensus Toward Abolition

As one factor for abolishing the juvenile death penalty in *Roper*, the Court took into consideration the agreement among states and the federal government on the issue of abolition.[59] Specifically, the court looked to what it called an "objective indicia of society's standards, as expressed in legislative enactments and state practice[.]"[60] In *Roper*, the Court pointed out that, at the time of its decision, thirty states prohibited the use of the juvenile death penalty.[61] Moreover, the Court recognized that, in the twenty states with no formal prohibition on the juvenile death penalty, the practice was rare.[62]

Today in the United States, thirty-five states have death-penalty statutes and the death penalty may also be used by the federal government and in military tribunals.[63] Thus, only fifteen of the fifty states have legislatively abolished the use of the death penalty as a method of punishment in their criminal justice systems.[64] However, this statistic includes New Jersey, which in 2007 legislatively repealed the death penalty, and New Mexico, which repealed the death penalty in March, 2009.[65] In 2009, at least three more states saw legislative action moving toward repealing death penalty statutes.[66] Despite these recent changes, it is clear that a majority of states in the United States legislatively maintain the death penalty in their criminal justice systems.

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58. *Roper*, 543 U.S. at 562-63 (citing *Penry v. Linaugh*, 492 U.S. 302 (1989); *Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002)).

59. *Id.* at 564-67.

60. *Id*., at 563.

61. *Id.* at 564.

62. *Id*. at 564 (noting that in the ten years prior to the Court's decision only three states used the juvenile death penalty).

63. *See* States With and Without the Death Penalty, Death Penalty Information Center, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited, Nov. 27, 2009).

64. *Id.*

65. AP, *Death Penalty is Repealed in New Mexico*, N. Y. TIMES, Mar. 19, 2009, at A16.

66. Kirk Johnson, *Death Penalty Repeal Fails in Colorado*, N.Y. TIMES, May 5, 2009; Julie Bykowicz, *Senate may debate death penalty repeal*, BALT. SUN, Feb. 26, 2009 at A3.

The Court did not make it clear in *Roper*, however, that a national consensus alone was dispositive in disallowing the juvenile death penalty. Certainly, a consensus among states of a complete abolition of the death penalty would present a strong argument in favor of a new societal standard. However, the absence of such a consensus is not fatal to a determination that the use of the death penalty is contrary to the Eighth Amendment. For instance, the rate of changes in death penalty states outlawing specific uses of the death penalty was significant to the Court's holdings in *Atkins*, as well as *Roper*.[67] The Court pointed out that prior to its holding in *Roper*, state abolition of the juvenile death penalty occurred far slower than the rate of abolition of the death penalty for the mentally retarded in *Atkins*.[68] However, this slower rate of change did not prevent the Court's abolition of the juvenile death penalty in *Roper*. Thus, there is no prescribed rate of change required, and the Court may be at liberty to recognize such a trend with even a slower rate of change than in *Roper* if it considers a complete abolition of the death penalty.

Although there is no consensus among state laws toward complete abolition of the death penalty, such a statistic is not necessarily required. While in *Atkins* the Court looked to the commonality of death penalty laws among states as a barometer for change, it similarly noted that "[i]t is not so much the number of . . . States that is significant, but the consistency of the direction of change."[69] Such was the opinion of the Court in *Atkins* when it overturned *Perry*.[70] In so holding, the Court recognized that *de facto* abolition can also be a contributing factor as evidence of the reduction or halting of the death penalty in practice, short of legislative change.[71] Even in *Roper* the Court noted that, of the twenty states that permitted the juvenile death penalty, "the practice [was] infrequent."[72] Thus, even if the death penalty is permissible in a number of states, the frequency with which it is imposed, or a notable decline in its use, could be used by the Court to signal a shift in society's standards.

In the United States, nearly half of all executions since 1976 took place in only two states, Texas and Virginia; and of those approximately eighty

67. *See Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002); *Roper*, 543 U.S. at 565.

68. *Roper*, 543 U.S. at 565.

69. *Atkins*, 536 U.S. at 315.

70. *Id*. at 321.

71. *Id.* at 316. In evaluating the prevalence of the use of the death penalty on the mentally retarded, the Court noted that "it appears that even among those States that regularly execute offenders that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less . . . than 70." *Id*.

72. *Roper*, 543 U.S. at 564.

percent were in Texas.[73] Additionally, death penalty trends show that there has been a decline in the number of prisoners executed each year, with only thirty-seven executed in 2008.[74] Also, of the thirty-five states that retain the death penalty, fourteen states have executed six or fewer inmates since 1976 and fifteen others have executed less than fifty in that time.[75] In fact, since 1976, only four of the thirty-five retentionist states account for sixty percent of all executions in the U.S.[76] In addition to states that execute prisoners at a rate of only one per every five years, two states, South Dakota and New Hampshire, have not executed a criminal in more than fifty years even though they retain the death penalty in their laws.[77] These statistics show that, at least since the temporary moratorium on the death penalty in 1976, a significant number of states have curtailed the use of the death penalty. This shift toward *de facto* abolition may be considered indicative of an evolution in societal norms – because, as the Court pointed out in *Roper*, twenty states retained the juvenile death penalty in their laws but had become in essence *de facto* abolitionist.[78]

In addition to legislative and state practice, moral trends and viewpoints can be instructive when interpreting societal standards and the Eighth Amendment.[79] The Supreme Court introduced the notion of morals in the context of the death penalty in *Penry v. Lynaugh*,[80] when it upheld the use of the death penalty for the mentally retarded.[81] There, the Court noted that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime."[82] This reasoned morality was not abandoned when *Penry* was overturned, and in 2007 the Court noted in terms of imposing a death sentence, "when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to

73. Executions by State in the U.S., Amnesty International USA, http://www.amnestyusa.org/death-penalty/death-penalty-facts/executions-by-state/page.do?id=1011590 (last visited Nov. 27, 2009).

74. *Id*.

75. *Id*.

76. *Id*. (Texas, Virginia, Oklahoma, and Missouri).

77. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 7 (2003).

78. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

79. Brief of the United States Conference of Catholic Bishops, et al. as Amici Curiae Supporting Respondent at 4, *Roper v. Simmons*, 543 U.S. 551 (No. 03-633), 2004 WL 1617400 [hereinafter Religious Brief]. The brief pointed out that "[t]he death penalty, in particular, involves quintessentially moral questions." *Id*.

80. 492 U.S. 302 (1989).

81. *Id*. at 322-23.

82. *Id*. at 319 (quoting California v. Brown, 479 U.S. 538, 545 (1987)).

a defendant's mitigating evidence . . . the sentencing process is fatally flawed."[83]

In *Roper*, a brief was filed on behalf of Christopher Simmons by "[r]epresentatives of widely diverse religious communities in the United States [offering] '[a]dditional evidence' of a broad social and professional consensus against the imposition of the death penalty for a particular class of persons."[84] The moral argument advanced in the amicus brief of the religious groups, albeit logically sound, did not resonate in the Court's opinion in *Roper*.[85] However, the brief in large part reads much like one calling for a total abolition of the death penalty in the United States.[86] Specifically, a large portion of the religious groups' brief was dedicated to outlining the positions of twenty-nine distinct religious organizations representing multiple organized religions of various faiths.[87] Unsurprisingly, all twenty-nine groups stood firmly against the use of the juvenile death penalty, and twenty-two of these organizations opposed the death penalty altogether.[88] While the influence of the clergy alone will not tip the balance of the Court's decision, it may have influence on a reasoned morality regarding the death penalty and the evolving standards of decency that are used to interpret its application under the Eighth Amendment.

In addition to moral trends, other empirical evidence may offer support for the notion that societal trends regarding the death penalty are changing or have already changed. For instance, the Court could examine the frequency of jury-imposed death sentences, trends in the discretion of prosecutors in charging capital offenses, and elected judges' roles in sentencing.[89] Moral trends, empirical evidence, and state legislative action all lead to one large picture – a national trend toward abolition or at least an evolving societal standard favoring outright abolition.

It is unclear how important the national trend of state abolition of the juvenile death penalty was in the Court's decision in *Roper*. The question remains whether the Court's own independent judgment will suffice to consider the use of the death penalty in its entirety as a violation of the Eighth Amendment's evolving standards of decency. In its analysis of whether the death penalty was a disproportionate form of punishment, the

83. Abdul-Kabir v. Quarterman, 550 U.S. 223, 264 (2007).

84. Religious Brief, *supra* note 79 at 1-2. The brief represented views of "Christian, Jewish, Muslim, and Buddhist traditions." *Id.*

85. *See generally Roper v. Simmons*, 543 U.S. 551, 551 (2005).

86. *See generally* Religious Brief, *supra* note 79.

87. *Id.* at 6-27.

88. *Id*.

89. *See* Winick, *supra* note 6, at 799-800 (discussing these factors as used by the Court as indicators of evolving social norms).

Court considered itself to be exercising its "own independent judgment."[90] Thus, if the Court is willing to act on its independent judgment of a national trend, a national consensus may not be necessary to conclude that the use of the death penalty is contrary to the Eighth Amendment. Some of the Court's past cases indicate that it may be willing to invoke its own independent judgment when faced with less-than-concrete societal norms.[91] Perhaps one of the most prominent and well known of these cases, *Brown v. Board of Education*,[92] can be said to have been decided without national consensus, and moreover in the face of certain forceful opposition. Whether the Court's independent judgment, faced with a lack of state consensus, will result in judicial abolition remains to be seen. A combination of the Court's modern death penalty jurisprudence as well as the increased reference to international and foreign domestic law, as discussed below, could result in the Court's recognition of an evolution in the standard of decency. What *Roper* shows, however, is that commonality of state practice will weigh favorably in the Court's decision on issues involving the death penalty. The Court pointed out: "[a]s in *Atkins*, the objective indicia of national consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence" to abolish the juvenile death penalty.[93] Thus, even if the Court is not willing to take account of *de facto* state abolition, the Court made it clear in *Roper* that a significant trend of legislative abolition among the states would be dispositive of a change in the Eighth Amendment's evolving standards of decency test.

C. Whether the Death Penalty is a Disproportionate Form of Punishment

Because the Court was asked to rule on the juvenile death penalty in *Roper*, it undertook a detailed analysis of the difference between the use of the death penalty on those under the age of eighteen and those over.[94] In doing so, the Court noted three "general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot . . . be classified among the worst offenders" and thus punishable by the death

90. *Roper*, 543 U.S. at 564.

91. *See* Winick, *supra* note 6, at 801-14 (describing a series of instances where the Court exercised some independence in the absence of true consensus).

92. 347 U.S. 483 (1954).

93. *Roper*, 543 U.S at 552.

94. *Id.* at 568-75.

penalty.[95] These are: (1) a youth's "lack of maturity and an underdeveloped sense of responsibility[;]"[96] (2) that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure[;]"[97] and (3) that "the character of a juvenile is not as well formed as that of an adult."[98]

There is, however, a certain arbitrary nature to the Court's rationale with respect to these issues. For instance, the Court pointed out that these same characteristics justified the prohibition of the use of the death penalty for offenders under the age of sixteen in *Thompson*.[99] But these factors did not sway the Court's opinion in *Stanford* when it endorsed the use of the death penalty for those over fifteen years old.[100] *In Roper*, the Court merely changed the proverbial line, cutting off the use of the death penalty to the age of eighteen.[101] The Court itself noted that there is a certain element of arbitrariness to "[d]rawing the line at 18 years of age . . . [because] qualities that distinguish juveniles from adults do not disappear when an individual turns 18."[102] What is clear is that the differences outlined by the Court were not, in and of themselves, dispositive of any issue. As such, it is not likely that this analysis would interfere with the rest of the *Roper* framework being used to judicially abolish the death penalty in the future.

D. International Authority as "Instructive for Interpretation" of the Eighth Amendment

In a section of the Court's opinion devoted entirely to the exercise of comparative international law, Justice Kennedy wrote: "[o]ur determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[103] Justice Kennedy, citing the Court's decision in *Trop v. Dulles*, noted that while international and foreign domestic law is not controlling it is still "instructive for [the Court's] interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[104] Because of this relationship between international law and the interpretation

95. *Id.* at 569.
96. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
97. *Id.*
98. *Roper*, 543 U.S. at 570.
99. *Id.* at 570-71 (citing *Thompson*, 487 U.S. at 833-38).
100. *Stanford v. Kentucky*, 492 U.S. 361, 377-78 (1989).
101. *Id.* at 571.
102. *Id.* at 574.
103. *Id.* at 575.
104. *Roper*, 543 U.S. at 575 (citing *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958)).

of the Eighth Amendment, it is instructive to see how such an examination of international law may affect the Court's attitude when it is eventually asked to consider the judicial abolition of all uses of the death penalty.

1. International Law, Constitutional Interpretation, and the Eighth Amendment

In *Roper*, and other more recent death penalty and Eighth Amendment cases, the Supreme Court has referenced international and foreign domestic law as instructive to interpret the constitutionality of the death penalty. Given the Court's more recent foray into the persuasive value of international law, it is worth consideration of the international community's position on the death penalty and how it could affect the Court's decision on the subject.

In terms of international law, the Court once concluded that "[i]nternational law is part of our law."[105] While this statement has been somewhat aspirational in terms of the influence of international law on the jurisprudence of the Supreme Court, there seems to be a growing recognition of the importance, or at least the usefulness, of international and foreign domestic law when interpreting the Constitution. The use of international and foreign domestic law by the Supreme Court dates back to the eighteenth century.[106] Examining the role of international and foreign domestic law in the Court's early jurisprudence, Justice Blackmun once explained:

> [T]he early architects of our Nation understood that the customs of nations – the global opinions of mankind – would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations.[107]

The Court's analysis of the Eighth Amendment in *Trop v. Dulles* is especially instructive as to the relevance international law has on the interpretation of the Eighth Amendment. The Court wrote that the scope of

105. The Paquete Habana, 175 U.S. 677, 700 (1900).

106. Mark Wendell DeLaquil, *Foreign Law and Opinion in State Court*, 69 ALB. L. REV. 697, 697 (2006).

107. Harry A. Blackmun, *The Supreme Court and the Laws of Nations*, 104 YALE L.J. 39, 39 (1994) (citing Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215 (1992)); *see also* Brief for the Human Rights Committee of the Bar of England and Wales, et al. as Amici Curiae Supporting Respondent at 4, *Roper v. Simmons*, 543 U.S. 551 (No. 03-633), 2004 WL 1628523 [hereinafter HRC Brief].

"cruel and unusual" punishment is "firmly established in the Anglo-American tradition of criminal justice [and] was taken directly from the English Declaration of Rights of 1688."[108] Moreover, the Court wrote that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man" and that the purpose of the amendment is to assure that the power to punish is "exercised within the limits of civilized standards."[109] Justice Blackmun, a proponent of looking to international law to assist with constitutional interpretation, wrote with regard to the Eighth Amendment that if it "is to turn on the 'evolving standards of decency' of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States."[110]

In addition to the Eighth Amendment, the Court has looked to international and foreign domestic law for guidance in other constitutional matters.[111] For instance, as early as 1937, in *Palko v. Connecticut*[112] the Court looked to foreign legal practices to analyze the double jeopardy clause of the Fifth Amendment's application to the states.[113] In one of the Court's most well-known Fifth Amendment cases, *Miranda v. Arizona*,[114] the Court surveyed police interrogation practice in England, Scotland, Ceylon, and India.[115] More recently, the Court in *Lawrence v. Texas*[116] cited to the European Court of Human Rights, concluding that the right sought by petitioners "has been accepted as an integral part of human freedom in many other countries."[117]

On the opposite side of the political spectrum of the Court that supports the use of international law, Justice Scalia, an outspoken opponent of following international law, joined the majority opinion written by former Chief Justice Rehnquist in *Washington v. Glucksberg*.[118] In *Glucksberg*, the Court upheld a state law that criminalized assisted suicide, and in doing so looked to foreign domestic law by noting: "indeed, in almost every western

108. *Trop*, 356 U.S. at 100.

109. *Id.*

110. Blackmun, *supra* note 107, at 48.

111. S*ee* Harold H. Koh, *International: Law as Part of Our Law*, 98 AM. J. INT'L. L. 43, 45-49 (2004) (providing an excellent introduction to the Court's use of international and foreign domestic law to interpret the Constitution).

112. 302 U.S. 319 (1937).

113. *Id.* at 326 n.3.

114. 384 U.S. 436 (1966).

115. *Id.* at 488-89. The Court wrote: "it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described." *Id.* at 489 (referring to England, Scotland, Ceylon, and India).

116. 539 U.S. 558 (2003).

117. *Id.* at 577.

118. 521 U.S. 702 (1997).

democracy – it is a crime to assist a suicide."[119] The majority in *Glucksburg* cited a Canadian opinion that discussed "assisted-suicide provisions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France."[120]

In addition to the Court's recognition of the value of international legal sources, legal scholars also recognize that international and foreign domestic law both have a place in the Court's interpretation of the Constitution of the United States. For instance, Professor Gerald Newman has pointed out that "[f]oreign law played a well-known role in the debates over the relationship between the Bill of Rights and the Fourteenth Amendment."[121] One commentator noted that the Court's decisions in *Atkins*, *Lawrence*, and *Roper* signified "a decisive shift in the Court's position regarding the relevance of contemporary foreign legal practice to domestic constitutional interpretation."[122] Harold Koh has outlined several occasions when it is appropriate for the Court to use international and foreign domestic law to interpret the Constitution.[123] First, the Court has looked to foreign and international law "when American legal rules seem to parallel those of other nations, particularly those with similar legal and social traditions."[124] Second, these sources have been pertinent to the Court's analysis of the Constitution when "foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."[125] Third, the Court has examined foreign and international law when a concept of constitutional interpretation "implicitly refers to a *community standard*."[126] Thus, there is no question that international and foreign domestic law have a place in the role of the Court's interpretation of the Constitution. It is unclear, however, how

119. *Id.* at 710.

120. *Id.* at 710 n.8 (citing Rodriguez v. British Columbia, [1993] 107 D.L.R. 4th 342, 404 (Can.)). Interestingly, at the time the Court cited to the legal norms of these countries in terms of the criminalization of assisted-suicide, all the cited countries either abolished the death penalty entirely, or had abolished it for ordinary crimes and had not used it in decades. *See* Amnesty International, List of Abolitionist and Retentionist Countries 2-5, Mar. 24, 2009, *available at* http://www.amnestyusa.org/abolish/annual_report/AbolitionistRetentionist.pdf (last visited Dec. 16, 2009) [hereinafter Amnesty Report].

121. Gerald L. Newman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L. L. 82, 83 (2004).

122. Andrew R. Dennington, *We Are the World? Justifying the U.S. Supreme Court's Use of Contemporary Foreign Legal Practice in Atkins, Lawrence, and Roper*, 29 B.C. INT'L & COMP. L. REV. 269, 269-70 (2006).

123. *See* Koh, *supra* note 111, at 45-48.

124. *Id.* at 45 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

125. *Id.* at 46 (citing Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari)).

126. *Id.* (listing such standards to include cruel and unusual, due process of law, and unreasonable searches and seizures).

significant a role this has to play in the constitutional analysis of the death penalty.

2. International Law and the Court's Death Penalty Jurisprudence

The ultimate question, of course, is what *exactly* did Justice Kennedy mean when he wrote with respect to the death penalty that "the laws of other countries and . . . international authorities [are] instructive for [the Court's] interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[127] After the Court's 1958 decision in *Trop*, it looked several times to international law as interpretive of the relationship between the death penalty and the Eighth Amendment.[128] In its 1977 decision in *Coker v. Georgia*,[129] the Court noted that international opinion was relevant to the Court's conclusion that the use of the death penalty as punishment for the crime of rape was a violation of the Eighth Amendment.[130] When the Court abolished the use of the death penalty for felony murder in 1981, the Court cited the experiences of Canada, England, India and a number of countries in continental Europe that had already abolished the practice.[131] In the Court's most recent death penalty case, *Kennedy v. Louisiana*, the Court recalled that it has looked to international opinion to shape its death penalty jurisprudence.[132]

Indeed, even the most unlikely of Supreme Court Justices has acknowledged some usefulness of international law to interpret the constitutionality of the death penalty. For instance, in his opinion in *Stanford v. Kentucky*, Justice Scalia, true to his jurisprudence, dismissed the use of international norms as *dispositive* to establish the "Eighth Amendment prerequisite, that practice is accepted among [American]

127. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958)).

128. *See, e.g,. Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (noting that "[t]he right [of adults to engage in consensual intimate conduct] has been accepted as an integral part of human freedom in many other countries"); Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (noting support in international law for affirmative action policies); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (considering international opinion regarding death penalty as punishment for felony murder); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (considering the rejection of the death penalty for mentally retarded by the international community); *Thompson Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., concurring) (noting opposition of international community to the use of the death penalty for persons age sixteen or younger when their crime was committed); *Washington v. Glucksburg*, 521 U.S. 702, 710 n.8, 718 n.16 (1997) (surveying other nations' domestic law regarding assisted-suicide).

129. 433 U.S. 584 (1977).

130. *Coker*, 433 U.S. at 596 n.10 (noting "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").

131. *Enmund*, U.S. at 796 n.22.

132. Kennedy v. Louisiana, 128 S.Ct. 2641, 2650 (2008) (citing *Enmund*, 458 U.S. at 788).

people."[133] However, Justice Scalia citing his dissenting opinion in *Thompson v. Oklahoma*, noted:

> [t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well.[134]

Granted, Justice Scalia's opinion did not heed to international law for interpretation of the Eighth Amendment; however, this shows at least some recognition by the conservative wing of the Court that there is a place for international law in the Court's death penalty jurisprudence. After all, it was only six years later when the Court (Justice Scalia dissenting) overturned Justice Scalia's opinion in *Stanford* with its decision in *Roper*.[135] Moreover, only one majority opinion authored by Justice Scalia that explicitly *rejects* the use of international law to interpret the Constitution remains good law.[136]

3. International Law and the Death Penalty

Recognizing that international and foreign domestic law have a place in the constitutional interpretation of the death penalty, it is useful to understand the status of the legality of the death penalty in other countries and its treatment in international law. The Universal Declaration of Human Rights[137] ("UDHR") has generally been considered the foundational

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133. *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989).

134. *Id.* (citing *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988)). Relevant to Justice Scalia's position regarding the usefulness of international law, to parallel the United States' abolition with that of the United Kingdom, it is worth noting that the United Kingdom abolished the use of the juvenile death penalty before it abolished the death penalty altogether. Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 921 (2005). For instance:
"[British] Parliament made efforts to abolish capital offenses as early as the 1940s. By 1956, England became a de facto abolitionist state, and in 1983 the death penalty was prohibited for all civilian offenses. No one has been executed in the United Kingdom since 1964." *Id.* at n.145 (citing Amnesty International Abolitionist and Retentionist Countries, *available at* http://web.amnesty.org/pages/deathpenalty-countries-eng (last visited June 16, 2005)).

135. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

136. *See* Dennington, *supra* note 122, at 280 (citing Printz v. United States, 521 U.S. 898, 921 n.11 (1997)).

137. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

document for all human rights treaties and conventions that followed it.[138] Moreover, it has generally been accepted that the UDHR, although lacking in legal obligation at international law, has in part become customary international law because of state practice.[139] The UDHR states that "everyone has the right to life, liberty and security of person,"[140] and that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[141] While the UDHR does not expressly call for an abolition of the death penalty, Articles 3 and 5 of the UDHR are viewed as "the result of a compromise reflecting a 'common aspiration toward eventual abolition.'"[142]

It became explicit that there was an international goal toward abolition when in 1971 the United Nations General Assembly declared that the main objective of Article 3 of the UDHR was to progressively restrict the use of the death penalty, "with a view to . . . abolishing this punishment in all countries."[143] In 1984 the U.N. Economic and Social Council adopted a resolution calling for safeguards in the administration of the death penalty and its use for only the most serious crimes.[144] The European Union Member States, which filed a brief in *Roper* in support of abolition of the juvenile death penalty, wrote that they "are opposed to the death penalty in all cases and accordingly aim at its universal abolition."[145] Also, the Charter of Fundamental Rights of the European Union, adopted in 2000, holds that no person "shall be condemned to the death penalty, or executed."[146] The International Criminal Court expressly forbids the death penalty as a punishment in any matter.[147] As recently as February 2008 a U.N. General Assembly Resolution declared that the use of the death

138. *See* INTERNATIONAL HUMAN RIGHTS IN CONTEXT, 136 (Henry J. Steiner, et al. eds., 3d ed. 2008); THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW, 23 (William A. Schabas, ed., 3d ed. 1997) (referring to the UDHR as "the cornerstone of contemporary human rights law").

139. ALASTI, *supra* note 15, at 8 (citing Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 59 AM. J. INT'L. L. 168-70 (1965)).

140. UDHR, *supra* note 137, Art. 3.

141. *Id*. at Art. 5.

142. ALASTI, *supra* note 15, at 72 (quoting Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT'L. L. 273, 278 (1993)).

143. Capital punishment, GA Res. 2857, U.N. GAOR, 26th Sess., U.N. Doc. A/RES/2857 (Dec. 20, 1971).

144. U.N. Econ. & Soc. Council [SCOSOC], *Safeguards guaranteeing protection of the rights of those facing the death penalty*, U.N. Doc. E/RES/1984/50 (May 25, 1984).

145. Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent at 1 *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 U.S. S. Ct. Briefs LEXIS 424 [hereinafter EU Brief]. This position was joined by Canada, the Council of Europe, Iceland, Liechtenstein, Mexico, New Zealand, Norway, and Switzerland. *Id*. at 3.

146. Charter of Fundamental Rights of the European Union, 2000 O.J. (L 364/01) art. II, § 2.

147. Daniel J. Brown, Note, *The International Criminal Court and Trial in Absentia*, 24 BROOK. J. INT'L L. 763, 777 (1999).

penalty "undermines human dignity" and called on all states for a moratorium on the use of the death penalty.[148]

In practice, at the end of 2008, reports indicated that of 197 countries, 138 were abolitionist in law or practice (*de facto* abolitionist).[149] Of these countries, nearly one hundred prohibit the use of the death penalty for all crimes and thirty-six were considered "*de facto* abolitionist," because while the death penalty remains in their law, it has been phased out as a form of punishment.[150] While fifty-nine countries retain the use of the death penalty, just as in the United States, there is a great disparity in the frequency of its use where it remains legal. For instance, in 2005, only four countries accounted for ninety-four percent of the reported killings by way of the death penalty, evincing the infrequency of its use where it remained domestically lawful.[151]

While there has been no overwhelming recognition that abolition of the death penalty has become part of customary international law, there is a good argument that it is at the very least in the early stages of becoming customary international law. Customary law requires two elements: that states have a sense of legal obligation to act a certain way (*opinio juris*) and that states act according to the perceived legal obligation.[152] As noted above, the international legal community has declared that the legal object is to outlaw the use of the death penalty, indicative of the *opinio juris* element of customary international law. The actual and *de facto* abolition of the death penalty by nearly three-quarters of all countries lends support for the growing trend of state practice. If this trend continues and abolition of the death penalty becomes customary international law, it could have a significant influence on the Court's recognition of the use of the death penalty as a violation of the Eighth Amendment.

In addition to international and foreign domestic law, the United States' legal interactions with other countries may support recognition of a change in the country's attitude toward the death penalty. For instance, in 2003 the United States executed an extradition treaty with the United Kingdom and Northern Ireland that allows the refusal to extradite where the accused could

148. Moratorium on the use of the death penalty, GA Res. 62/149, U.N. GAOR, 62nd Sess., UN Doc. A/RES/62/149 (Dec. 17, 2007).

149. Amnesty Report, *supra* note 120, at 1.

150. *Id.* (stating that an additional ten countries abolished the death penalty for ordinary crimes only); *see also* Eric Neumayer, *Death Penalty: The Political Foundations of the Global Trend Towards Abolition*, 9 HUM. RTS. REV. 241, 248 (2008) (listing twenty *de facto* abolitionist counties).

151. Neumayer, *supra* note 150, at 249. This trend is similar to that in the U.S., where of the 3,373 prisoners on "death row" in 2005, only sixty were executed, showing a trend towards *de facto* abolition. *Id*.

152. *See* Steiner, *supra* note 138, at 71-3.

be punished by death or to grant extradition on the condition that the death penalty not be imposed.[153] The United States has also entered into similar arrangements in extradition treaties with other countries recognizing and accepting the global trend toward abolition of the death penalty.[154] Also, speculation exists of the United States becoming a signatory to the Rome Treaty of the International Criminal Court ("ICC"), which does not permit the death penalty for punishment of crimes.[155] This is especially instructive of countries' evolving standards of decency regarding the use of the death penalty and the United States, because just as the death penalty is reserved for only the most serious offenses in the United States,[156] the ICC's jurisdiction is also similarly limited.[157] Thus, adherence to the ICC by the United States would create an inherent contradiction in terms of the application of the death penalty with the United States reserving the punishment for the most serious of crimes but not making such a reservation at the international tribunal.

Other arguments in international law have been advanced that call for abolition of the death penalty. For instance, critics often refer to what has been called the "death penalty syndrome." When the Eighth Amendment was drafted, the death penalty system with which the Framers were familiar was "a system where the interim between conviction and execution would be a matter of days or weeks, not years or decades."[158] The length of time spent on death row was addressed by the European Court of Human Rights in *Soering v. United Kingdom*.[159] In *Soering*, the Court found that because of the duration of time spent on death row, and its dismal condition, it was a form of cruel and unusual punishment as contemplated in the European

153. *Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland*, art. VII, March 31, 2003, 28 U.S.T. 227, (entered into force 26 April 2007); *see also* Sean D. Murphy, ed., *New U.S./EU and U.S./UK Extradition Treaties*, 98 AM. J. INT'L L. 848, 849 (Oct. 2004).

154. *See Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania*, art. VII, October 23, 2001, S. TREATY DOC NO. 107-4; *see also,Extradition Treaty Between the United States of America and the Republic of Peru*, art. V, July 26, 2001, S. TREATY DOC NO. 107-6.

155. *See* Rome Statute of the International Criminal Court, art. 77, Nov. 10, 1998, 2187 U.N.T.S. 90. [hereinafter Rome Statute].

156. *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 157-58 (1987) (noting the requirement of a highly culpable mental state, and commission of only the most serious crimes for imposition of the death penalty).

157. *See generally* Rome Statute, *supra* note 155.

158. Kate McMahon, *Dead Man Waiting: Death Row Delays, the Eighth Amendment, and What Courts and Legislatures Can Do*, 25 BUFF. PUB. INT. L.J. 43, 49 (2006) (citing Death Penalty Information Center, Time on Death Row, *available at* http://www.deathpenaltyinfo.org/article.php?&did=1397).

159. 161 Eur. Ct. H.R. (ser. A) (1989), reprinted in 11 Eur. H.R. Rep. 439 (1989), [1989] ECHR 14038/88.

Convention on Human Rights.[160] As a result, the Court in *Soering* did not permit the extradition of a suspected criminal to the United States who *could* be subject to death row.[161] This decision is also instructive as the parallel between the relevant provisions of the European Convention and the Eighth Amendment.

4. International Law, the Roper Decision, and the Future of the Death Penalty

It is important to note that in *Roper* the Court did not abolish the juvenile death penalty as a violation of the Eighth Amendment based on national consensus and scientific research alone, but also with the inclusion of an analysis of the state of international law on the subject.[162] While the Court was cautious to note that international and foreign domestic law was not dispositive to its decision,[163] it was nonetheless significant to the Court's conclusion that the juvenile death penalty was contrary to the Eighth Amendment's evolving standards of decency. Thus, the continued trend of actual and *de facto* abolition of the world's countries will only serve to support a decision of complete abolition of the death penalty in the United States.

V. CONCLUSION

In 1994 Justice Blackmun foresaw the end of the juvenile death penalty in the United States, in part because of it being a violation of international law.[164] He also noted that one day public opinion as well as the judiciary would conclude the same in terms of the death penalty altogether.[165] He wrote: "I am confident, however, that at some point the courts and the country will come to appreciate that the execution of juvenile offenders – and the imposition of the death penalty generally – is no more tolerable than other violations of international law."[166]

Professor Winick has postulated that the next logical step in the Court's death penalty jurisprudence is to abolish the use of the death penalty as

160. *Soering*, 161 Eur. Ct. H.R. (ser. A) at ¶ 111.

161. *Id.*

162. *See, e.g.*, William Feldman, *The Role of International Human Rights Law in the American Decision to Abolish the Juvenile Death Penalty*, 7 APPALACHIAN L.J. 89, 103 (2007) (noting that "one can conclude that international developments were decisive in the Court's decision to overturn its own [recent] precedent").

163. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

164. Blackmun, *supra* note 107, at 49.

165. *See id.*

166. *Id.*

punishment for the severely mentally ill.[167] As for a complete abolition of the death penalty, however, public opinion at least seems to favor the status quo. While actual executions and death sentences have declined over time, public opinion has remained relatively constant and the number of death sentences imposed by juries still remains quite high.[168] Some commentators believe that the death penalty will continue to be used as a form of criminal punishment even though its use will continue to be relatively infrequent.[169]

However, regardless of the outcome of the debate among scholars of what they think will happen, the Court has already spoken as to what it will consider when abolishing or partially abolishing the death penalty. In terms of the Court's jurisprudence, the decision in *Roper* provides a solid framework for what factual conditions will result in the complete judicial abolition of the death penalty. On the extreme end, the Court would likely abolish the death penalty in the event of a complete, or nearly complete, consensus among states of the abolition of the death penalty. Such a decision would find support from trends in international law, at least with other western democracies. On the other end of the spectrum, the practice of the death penalty today shows some similarities that were seen with the practice of the juvenile death penalty before *Roper*. Specifically, the decline in the frequency of its use and the *de facto* abolition of some states indicates that there is a recognizable trend in the United States toward abolition. What is seemingly clear is that in the present context, the factual circumstances do not exist in the United States for a complete judicial abolition of the death penalty. However, the Court's decision in *Roper* offers a roadmap for the relevant domestic and international considerations that will be dispositive of the issue in the future.

167. Winick, *supra* note 6, at 788.
168. PATERNOSTER, ET AL., *supra* note 11, at 273.
169. *Id.* at 274.