

United States and European Union approaches to the death penalty: America should consider a new perspective*

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ABSTRACT

The United States and the European Union have totally opposite views on the death penalty. The United States has reinterpreted and analyzed capital punishment and its application to the Constitution consistently through history. The European Union, nearly since its inception, has firmly held the death penalty is wrong and cannot be utilized without depriving defendants of basic human rights. These two unions have similar values and priorities, especially when it comes to human rights. However, the explanation for such diverse approaches to the death penalty is not yet clear, perhaps because the divergence should not exist. The purpose of this article is to identify, discuss, and attempt to explain the importance of the United States consideration of European Union policies concerning the death penalty. This article will first examine the historical and current death penalty policies of both the United States and the European Union and see where these policies diverge. Next, this article will examine the relationship between these two unions in an attempt to highlight the peculiarity of their policy divergence. This article then addresses potential explanations for this divergence. Finally is the most important and innovative aspect of this article, a compelling proposition that the United States consider the European Union approach. Given the United States relationship with the European Union, it is important that we consider international perspectives in forming our own approach. Consideration of the European Union approach will help the United States justice system, economic system, and foreign and domestic relations.

Keywords: human rights, death penalty, Comparative and Foreign Law

1. INTRODUCTION

The United States approaches many topics much differently than other nations around the globe. Each nation devises its own policies presumably based on the needs and wants of its people or its leaders. However, given global relations between countries, it is only natural that the policies of some nations will affect others. This paper discusses death penalty policies and procedures in the United States as well as in the European Union. First, it is necessary to briefly discuss the history of death penalty approaches in the United States and the European Union. While the European Union has determined that the death penalty is unjust and not something the member countries are willing to support, the United States has resisted pressure to conform with this policy, indicating that insistence from the European Union is not overly persuasive here in the United States. Therefore, this

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paper approaches influence and discusses the potential justification for such diverse European Union policies. Lastly, this paper will discuss why the approach of the European Union is relevant to the death penalty discussion in the United States. Against all opposition, the United States has preserved the use of the death penalty in contrast to many thriving nations around the globe.

The United States has long been known as the land of the free, the country that offers its citizens rights no other country offers. The United States prides itself on being a place where people come to achieve their dreams and escape persecution, a land whose justice system is centered on preserving the rights of the people. However, the United States has set itself apart from many other nations in a much different way. The United States remains part of the minority of countries that authorize the death penalty for capital crimes.¹ The United States is part of an even smaller group of countries that still regularly employs the death penalty.² Many states, while still legally recognizing the death penalty, hardly ever utilize this form of punishment.³ This viewpoint of the United States comes with much opposition. Many Americans feel that the death penalty should be abolished, and that our country should continue to evolve our standards of justice.⁴ There are also those states that have abolished death penalty completely.⁵ Even more pressure comes from abroad, with many nations pressuring the United States to abolish death penalty.⁶

The United States has evolved to its current state regarding the death penalty over a long period of time, shifting with different societal impacts and different viewpoints of decency and constitutionality.⁷ How-

ever, it remains to be determined whether the United States is influenced by the changing policies of other nations. The United States began as a nation that wanted independence and wanted to break the mold that other nations were creating for it. However, it was also a country that based much of its original law on the laws of other countries, namely England.⁸ The United States remains a trendsetter in many areas. We have advanced technology, the strongest armies, and many other admirable qualities that other nations covet. As a country that is an established world leader, it would make sense to assume that the policies on the death penalty in the United States have some effect on other nations. However, the United States, known as an independent nation, seems unaffected when it comes to the recognition and respect of international death penalty policies; as the world moves forward and standards evolve, the United States has determined that acceptance and utilization of the death penalty are what most closely mirrors the constitutional standards in this country.

2. THE DEATH PENALTY IN THE UNITED STATES

The death penalty has a long history in the United States. Death as a punishment for certain crimes was a part of America almost immediately upon its founding, with the colonies adopting a thorough list of crimes that carried the death penalty.⁹ This list was adapted from England's law and became the norm among American colonies.¹⁰ While the colonists recognized that murder was worse than theft, there was a consensus that death was the punishment for any crime on the enumerated list—no matter how serious.¹¹ Almost immediately, standards began to adapt and change as different colonies recognized different defenses, different lists of capital crimes, and different levels of seriousness that came with certain crimes.¹²

1 Rebecca Trail, *The Future of Capital Punishment in the United States: Effects of the International Trend Towards Abolition of the Death Penalty*, 26 *Suffolk Transnat'l L. Rev.* 105, 105 (2002).

2 *Id.* (China, Somalia, India, Iran, and Iraq, among others, still regularly employ the death penalty).

3 Jurisdictions with no recent executions, *DEATH PENALTY INFORMATION CENTER* (March 12, 2013), <http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions>.

4 See Senate Bill 19 to Repeal the Death Penalty Introduced, *American Civil Liberties Union* (March 12, 2013), <http://www.aclu.org/capital-punishment/senate-bill-19-repeal-death-penalty-introduced>.

5 States With and Without the Death Penalty, *DEATH PENALTY INFORMATION CENTER* (March 12, 2013), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

6 Trail, *supra* note 2, at 106.

7 See Banner, *infra* note 10 (death penalty was part of the new America from the beginning); see Furman, *infra* note 29 (United

States eventually finding death penalty unconstitutional).

8 See Charles Alan Wright, et al., *History—The Colonial Experience*, 30 *Fed. Prac. & Proc. Evid.* §6344 (2012).

9 STUART BANNER, *DEATH PENALTY: AN AMERICAN HISTORY* 5 (Harvard University Press 2003). This enumerated list included treason, willful murder, piracy, forgery, robbery, and rape.

10 *Id.*

11 *Id.*

12 *Id.* at 6-8. (Connecticut, Massachusetts, Plymouth, and Pennsylvania held that burglary and robbery were not capital crimes; burglary and robbery were capital offenses upon the third offense in New York, New Hampshire, and New Haven; Connecticut, Mas-

Since this time, directly after our nation's founding, the death penalty and its standards have not stopped changing. Even before our new country drafted its national Constitution, states were beginning to reform their individual laws to shorten the list of death-eligible crimes.¹³ However, in 1790 a newly formed Congress instituted mandatory death penalties for several "federal offenses."¹⁴

Opposition to the death penalty followed shortly after with states abolishing the death penalty as early as 1846.¹⁵ New methods of execution began emerging, beginning with electrocution in 1889 in an attempt to find more constitutional methods of execution.¹⁶ In 1897, as a response to a bill for total abolition of the death penalty,¹⁷ Congress declared the death penalty no longer proper in regards to several previously death-eligible offenses and left most all death sentences to the discretion of the jury.¹⁸ This shift towards more jury discretion was effectively approved by the Supreme Court in the case of *Winston v. United States*.¹⁹ Trends were continuing to change and utilization of the death penalty became a decision that was up to the jury.²⁰

While minor changes took place over the next several years,²¹ this discretionary sentencing was the generally accepted rule until late the 1960s and early 1970s. At this time questions of constitutionality were frequently raised, particularly focused on the question of whether executing criminals constituted cruel and

unusual punishment, something deemed unacceptable by the United States Constitution, as well as most state constitutions.²² The Supreme Court heard a series of cases and slowly fine-tuned the death penalty approach in the United States.²³ However, the actual utilization of the death penalty was beginning to slow as these constitutional questions became more common.²⁴ The Court began recognizing that what was considered *cruel and unusual* would change and evolve over time as attitudes and morals changed.²⁵

Opposition to the death penalty grew drastically as more states abolished the death penalty all together.²⁶ As stated before, even in those states where execution was still legal, it was being used much less frequently.²⁷ Opportunities to appeal and the possibility of having a sentence overturned became greater as it seemed the Supreme Court became more willing to address these issues. Things took a significant turn in the late 1960s when, due in part to the Civil Rights movement, the Supreme Court started analyzing the unconstitutional effects of death penalty legislation more closely.²⁸

Beginning in 1970 with *McGautha v. California*,²⁹ the Supreme Court, with a new make-up of Justices, heard a new string of death penalty cases.³⁰ The Court held in *McGautha* that jurors were given unfettered discretion in death penalty trials and that this preserves the Constitutional rights of all parties involved, focusing on due process rights.³¹ Shortly after the *McGautha* decision, the Court decided to hear *Furman v. Georgia*,³² which address-

sachusetts, New York, and Pennsylvania determined that arson was not a capital offense; manslaughter was distinguished from murder in early Quaker colonies of Pennsylvania and West New Jersey; Massachusetts held that blasphemy, adultery, and incest were not capital crimes in the early eighteenth century; Massachusetts eventually held that robbery was not a capital crime in 1761; New York added piracy, counterfeiting, and perjury to its list of capital crimes.)

13 By 1860, no northern state recognized capital punishment for any crimes other than murder and treason. *Id.* at 130-31.

14 Death eligible offenses included murder, treason, robbery, and rape. 1 Cong. Ch. 9 §§ 1-14 (1790).

15 Michigan voted to abolish capital punishment in 1846, followed by Wisconsin in 1853. Banner, *supra* note 10, at 130.

16 The use of the electric chair was introduced in 1889, followed by use of the gas chamber in 1921, and lethal injection in the 1970s. *Id.* at 169, 196, 296.

17 Newton M. Curtis, *The Death Penalty Undesirable and Not Sustained by Divine Authority*, reprinted in *Voices Against Death* 143 (Phillip English Mackey, ed., 1976).

18 29 Stat. 487 (1897).

19 172 U.S. 303 (1899).

20 *Id.*

21 States were continuing to abolish the death penalty, other states were shortening enumerated capital crimes.

22 Banner, *supra* note 10, at 231-235.

23 See *Trop v. Dulles*, 356 U.S. 86 (1958) (holding the Eighth Amendment contains an evolving standard of decency); and *United States v. Jackson*, 390 U.S. 570 (1968) (holding that Federal Kidnapping Act's requirement of the death penalty for a violation was unconstitutional); and *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (holding that exclusion of potential jurors because of general objections to the death penalty is unconstitutional).

24 Executions in the U.S. 1608-2002: The ESPY File, DEATH PENALTY INFORMATION CENTER (March 12, 2013), <http://www.deathpenaltyinfo.org/documents/ESPYyear.pdf>.

25 Banner, *supra* note 10, at 237.

26 Alaska and Hawaii abolished the death penalty in 1957, Vermont in 1964, West Virginia in 1965, Iowa in 1965, and North Dakota in 1973. *Id.* at 242-44.

27 Executions in the U.S. 1608-2002: The EPSY File, *supra* note 25.

28 See *McGautha v. California*, 402 U.S. 183 (1971); *Furman v. Georgia*, 408 U.S. 238 (1972).

29 See *McGautha*, 402 U.S. 183.

30 Banner, *supra* note 10, at 256.

31 See *McGautha*, 402 U.S. at 207.

32 *Furman*, 408 U.S. 238.

sed the arbitrariness of the death penalty as it applied not only to the facts of that case, but also two other cases: *Jackson v. Georgia*³³ and *Branch v. Texas*.³⁴ The *Furman* decision marked a turn in death penalty case law, holding that if a law, even though constitutional on its face, is applied in a way that produces discriminatory results, it is unconstitutional.³⁵ For death penalty legislation to be constitutional, arbitrariness in the application of the statutes must be sufficiently extracted, which it was not in the state statutes at question in these cases.³⁶ This holding was based on the Eighth Amendment, concluding that arbitrary sentencing constituted cruel and unusual punishment.³⁷ As the rising Civil Rights movement had proved, a discriminatory effect was innate in all current death penalty statutes, meaning the death penalty was effectively abolished.³⁸ The Court finally determined new death penalty statutes to be constitutional in *Gregg v. Georgia*³⁹, which meant reinstating the death penalty. The United States progressed so far that in 1994, Congress instituted the Federal Death Penalty Act, which created a national standard for crimes that were death eligible.⁴⁰

While the specific Constitutional standards have continued to evolve, the changes since the country's inception have been significant. However, they have not been as substantial as changes in nations worldwide, many of which decided to abolish the death penalty altogether.

3. THE DEATH PENALTY IN THE EUROPEAN UNION

The European Union is a collective group of nations that have aligned and joined forces to promote peace and prosperity.⁴¹ This Union functions by issuing

treaties that establish new rules, regulations, laws, and prohibitions.⁴² These treaties constitute binding documents for all member nations.⁴³

The idea of this Union came about after the devastation of World War II.⁴⁴ Robert Schuman set forth his plan for the reconstruction of Europe.⁴⁵ His plan was to pool Europe's resources, specifically for coal and steel production, together and create a common agency to regulate these resources.⁴⁶ This plan became known as the Schuman Declaration and was the official start of building a united Europe.⁴⁷ There were six founding countries: Belgium, France, Germany, Italy, Luxembourg and the Netherlands.⁴⁸ These six countries began negotiations to unite in sectors other than production, and they eventually reached an agreement to merge the economic and nuclear energy fields of the separate countries.⁴⁹ Establishing the practice that is still utilized today, the countries came together and signed two treaties: The European Economic Community (EEC) treaty and the European Atomic Energy Community (EAEC) treaty.⁵⁰ These two treaties became known collectively as the Rome Treaties, considered the first documents officially establishing the European Union.⁵¹ These treaties both begin with language indicating the sincere desire of this Union to bring together their common morals and values to seek world peace.⁵² These countries seemed sure that this collective effort to achieve global harmony would make them a very strong global presence.⁵³

The European Union began to increase membership gradually with Denmark, Ireland the United King-

33 *Jackson v. Georgia*, 171 S.E.2d 501 (Ga. 1969).

34 *Branch v. Texas*, 447 S.W.2d 932 (Tex. 1969).

35 See *Furman*, 408 U.S. at 239-40.

36 *Id.*

37 *Id.* at 258.

38 *Id.*

39 *Gregg v. Georgia*, 428 U.S. 227 (1976).

40 18 U.S.C.A. § 3591 (West, Westlaw through PL 112-207) (specifically enumerating death-eligible offenses including: intentional killing, intentional infliction of serious bodily injury that results in death, intentional participation in an act contemplating that lethal force would be used with the person and the person died, and intentionally engaging in an act of violence knowing that is cases great risk to a person. It states that a person shall be sentenced to death for these crimes as well as others included in Section 794 or section 2381. This statute expanded the death-eligible offenses significantly).

41 See generally OFFICIAL WEBSITE FOR THE EUROPEAN UNION,

http://europa.eu/index_en.htm (last visited April 8, 2013).

42 *Id.*

43 *Id.*

44 EUROPEAN UNION EXTERNAL ACTION, A GUIDE FOR AMERICANS: THE EUROPEAN UNION, 4 (2012) <http://www.euintheus.org/resources-learning/eu-guide-for-americans/>.

45 *Id.*

46 *Id.*

47 *Id.*

48 The history of the European Union, 1945-1959, <http://europa.eu/about-eu/eu-history/> (last visited April 8, 2013).

49 A GUIDE FOR AMERICANS: THE EUROPEAN UNION, supra note 45, at 4.

50 *Id.*

51 Marilyn J. Raisch, Treaties Establishing the European Union, AMERICAN SOCIETY OF INTERNATIONAL LAW, <http://www.asil.org/erg/?page=eu#id.70mqtmqhxqd> (last visited April 8, 2013).

52 See The European Economic Community Treaty, March 25, 1957; and The European Atomic Energy Community Treaty, March 25, 1957.

53 *Id.*

dom becoming members in 1973.⁵⁴ By this time, customs duties between member nations were abolished and there was a free-flowing trade system developing.⁵⁵ In 1981, Greece, Spain, and Portugal join the Union.⁵⁶ With new member nations, the European Union issues several more important treaties.

In 1986, European Union legislators drafted and signed the Single European Act.⁵⁷ This Act did more to organize and streamline borderless trading and commerce.⁵⁸ Shortly afterwards in 1993 came the Treaty on European Union (otherwise known as the Maastricht Treaty), which continued to alter the economic policies of the nations, attempting to form an Economic and Monetary Union.⁵⁹ The Treaty on the European Union also increased judicial and political cooperation, gave the European Parliament more legislative power, and of course gave the European Union its common name.⁶⁰ *Article F* of this treaty includes a section that explicitly states that the European Union respects and honors fundamental rights.⁶¹ This section specifically refers to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* adopted by the Council of Europe in 1950.⁶²

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* outlines the most important and fundamental human rights including the right to life and liberty, to be free from torture, to be free from slavery, and even the right to a fair trial, among others.⁶³ Many of these “fundamental rights” are si-

milar or identical to those the United States deems important for its own citizens.⁶⁴ In fact, nearly every right enumerated in this document is either specifically included in the United States Constitution or has been directly addressed and found fundamental by the United States Supreme Court in historic landmark decisions.⁶⁵ What is perhaps most interesting about this document is the language included in Sec. I, Article 2, which reads: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”⁶⁶ However, the Council of Europe (and the European Union) both routinely hold that the death penalty is abolished in member nations.⁶⁷ While this document, adopted by the Council of Europe and supported by European Union, still provides for the death penalty, all member nations have formally abolished capital punishment and currently support its abolition worldwide.⁶⁸

The European Union now boasts twenty-seven member nations, and has taken efforts to clarify and share its approach to the death penalty.⁶⁹ The European Union is

remedy, prohibition of discrimination, derogation in time of emergency, restrictions on political activity of aliens, prohibition of abuse of rights, and limitation on use of restrictions on rights.)

64 U.S. CONST. amend. V.

65 Convention, sec. I, art. 2, 5 (right to life and liberty; see U.S. CONST. amend. V (stating that no person shall be deprived of life, liberty, or property without due process)); Convention, sec. I, art. 3 (prohibition of torture; see U.S. CONST. amend. VIII (stating that cruel and unusual punishment shall not be inflicted)); Convention, sec. I, art. 4 (prohibition of slavery; see U.S. CONST. amend. XIII, sec. 1 (stating that slavery shall not exist)); Convention, sec. I, art. 6 (right to a fair trial; see U.S. CONST. amend. VI (stating that all shall enjoy the right to a speedy and public trial)); Convention, sec. I, art. 8 (respect for private and family life; see *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the Constitution protected a right to privacy)); Convention, sec. I, art. 9-11 (freedom of thought, conscience, religion, expression, assembly, and association; see U.S. CONST. amend. I (stating that the government shall not infringe upon any person’s freedom of speech, press, religion, or assembly)); Convention, sec. I, art. 12 (right to marry; see *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that marriage is a basic civil right of all people)); Convention, sec. I, art. 14 (prohibition of discrimination; see U.S. CONST. amend. XIV, sec. 1 (stating that all people are entitled to equal protection of the laws)).

66 Convention on Human Rights and Fundamental Freedoms, supra note 63, at sec. I, art. 2.

67 The Council of Europe, a death penalty free area, COUNCIL OF EUROPE, <http://hub.coe.int/what-we-do/human-rights/death-penalty> (last visited April 8, 2013).

68 Id.

69 Member countries of the European Union, OFFICIAL WEBSITE FOR THE EUROPEAN UNION, <http://europa.eu/about-eu/countries/member-countries/> (last visited April 8, 2013).

54 The history of the European Union, 1970-1979, <http://europa.eu/about-eu/eu-history/> (last visited April 8, 2013).

55 The history of the European Union, 1960-1969, <http://europa.eu/about-eu/eu-history/> (last visited April 8, 2013).

56 The history of the European Union, 1980-1989, <http://europa.eu/about-eu/eu-history/> (last visited April 8, 2013).

57 OFFICIAL WEBSITE FOR THE EUROPEAN UNION, supra note 41.

58 A GUIDE FOR AMERICANS: THE EUROPEAN UNION, supra note 45, at 4-5.

59 Id. at 5.

60 Id.

61 See Treaty on European Union, art. F, sec. 2, Feb. 7, 1992.

62 Treaty on European Union, supra note 62, (referencing Convention for the Protection of Human Rights and Fundamental Freedoms, April 11, 1950).

63 Convention for the Protection of Human Rights and Fundamental Freedoms, sec. I, art. 1-6, April 11, 1950. (Rights specifically outlined in the document include: right to life, prohibition of torture, prohibition of slavery and forced labor, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, freedom of conscience, freedom of religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective

extremely outspoken about its death penalty approach. Currently, the European Union's website has a section dedicated to its thoughts on the death penalty, with the first sentences reading: "The European Union holds a strong and principled position against the death penalty; its abolition is a key objective for the Union's human rights policy. Abolition is, of course, also a pre-condition for entry into the Union," showing that the Union not only disagrees with the utilization of the death penalty, but intends to share and spread its viewpoint worldwide.⁷⁰ In the late 1990s, the European Union decided that in order to give their principles greater prominence and influence, a formal document should be compiled documenting the fundamental rights and general principles of the European Union and other groups.⁷¹ This *Charter of Fundamental Rights* was sure to incorporate the general rights and freedoms included in the *European Convention on Human Rights and Fundamental Freedoms*, but also included policies and practices of other European Union member-nations as well as case law from the Court of Justice of the European Union.⁷² This Charter explicitly outlaws utilization of the death penalty for any reason.⁷³ The European Union recognizes the importance of respecting the rights of its people and preserving those rights by abolishing the death penalty. Furthermore, the values of the European Union's people are important to avoid uprising and protest, and maintain a peaceful system. The European Union has realized that preserving these rights is also preservation of the government and legal system they wish to maintain. The European Union sees the abolition of the death penalty as an extremely important aspect of a modern functioning legal system and has made it a point to share this perspective with nations all around the globe.⁷⁴ One nation, in particular, that the European Union has sought to align with is the United States, but it seems their efforts have been to no avail.

70 EU Policy on Death Penalty, EUROPEAN UNION EXTERNAL ACTION, http://eeas.europa.eu/human_rights/adp/index_en.htm (last visited April 8, 2013).

71 Charter of Fundamental Rights, OFFICIAL WEBSITE FOR THE EUROPEAN UNION, http://europa.eu/legislation_summaries/employment_and_social_policy/antidiscrimination_relations_with_civil_society/l33501_en.htm (last visited April 6, 2013).

72 EU Charter of Fundamental Rights, EUROPEAN COMMISSION, <http://ec.europa.eu/justice/fundamental-rights/charter/> (last visited April 8, 2013).

73 Charter of Fundamental Rights, title I, art. 2, sec. 2, Oct. 2, 2000.

74 EU Policy on Death Penalty, *supra* note 71.

4. HISTORICAL RELATIONSHIP BETWEEN THE UNITED STATES AND THE EUROPEAN UNION

The United States and the European Union began their relationship shortly after the European Union's inception, when the United States officially recognized the European Coal and Steel Community.⁷⁵ As early as 1952, the United States provided international recognition to this developing union.⁷⁶ Since then, the United States and the European Union have formed a valuable partnership.⁷⁷ While this partnership benefits both nations in many ways, one of the most important ties between the two is economically.⁷⁸ The European Union and the United States rely on each other for bilateral trade and foreign investment.⁷⁹ In fact, the two have the largest bilateral trade relationship in the world.⁸⁰ With this relationship comes respect, and the United States does align with the European Union in other areas besides economics.

The European Union and the United States work together to create and implement global policy. Ironically enough, the European Union publicizes in its own literature that it works closely with the United States to support "common values" like peace, freedom, and law.⁸¹ The European Union worked with the United States in reconstructing Afghanistan both physically, legally, politically, and economically after the destruction occurred there.⁸² However, the two remain divided on some issues, the death penalty being one of the most notable divisive issues.

While the United States is not the only country that still allows the death penalty for certain crimes, those nations that still allow the death penalty seem to be quite unlike the United States.⁸³ Among those nations that still allow the death penalty are Afghanistan, Iraq, Iran,

75 History of Delegation, DELEGATION OF THE EUROPEAN UNION TO THE UNITED STATES, <http://www.euintheus.org/who-we-are/history-of-the-delegation/> (last visited April 8, 2013).

76 *Id.*

77 A GUIDE FOR AMERICANS: THE EUROPEAN UNION, *supra* note 45, at 13.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* at 14.

83 Death Penalty Abolition Worldwide, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty/death-penalty-statistics-2010> (last visited April 8, 2013).

China, Japan, Somalia, and of course the United States.⁸⁴ These are all nations that have a troubled and conflicting history with the United States. However, most other forward-thinking, successful, and like-minded nations abolished the death penalty many years ago.⁸⁵ The best example of this is the subject of this paper, the European Union. The European Union is a group that has issued documents, treaties, laws, and reports clearly establishing the importance of human rights, freedom, and liberty. When it comes to protecting and preserving the rights of the people, the European Union is more like the United States than almost any other nation in the world. It is, therefore, interesting to explore the reasons for such diverging policies.

5. POSSIBLE EXPLANATIONS FOR DIVERGENT POLICIES

Even with this important and established relationship and notable similarities in other respects, these two nations currently have very diverse perspectives on the death penalty. As previously discussed, the European Union decided shortly after its inception that fundamental rights and human rights were to be preserved.⁸⁶ More importantly, the European Union clearly established that the preservation of these rights was an important goal.⁸⁷ While the United States has similarly adopted a preservation of fundamental rights through the United States Constitution, it seems clear that America and the European Union have, through the course of legislation and case law, chosen to define these rights differently. The European Union feels that life is precious and, therefore, that it is never appropriate to punish another by taking his or her life. However, the United States, also recognizing the value of individual lives, has reached a different conclusion. The United States uses the value of life to justify the harshest punishment when a person takes the life of another. If retribution is the goal, the only proper punishment for being careless with another person's life is the most severe punishment: death. Given similar policies underlying the laws of both America and the European

Union, it is interesting to consider what leads these two unions to different conclusions on this topic. Scholars have considered many theories, among them the lack of strong leadership in the United States willing to work towards abolition of the death penalty.⁸⁸

One idea is the notion that the United States offers its citizens freedom and liberties different from any other nation on this planet. While many nations give their citizens "freedom," not all of them offer education, employment, voting, and other things as freely as the United States. Many call America the "land of opportunity" where others come to avoid persecution for any number of things. If this is really true about America, perhaps the land of unparalleled freedom comes at a price. This price is potential death. If citizens want to live, learn, and work in the "land of opportunity," these people must do so with the understanding that if he or she chooses to disrespect the life of another in an extreme manner, the United States will take his or her life.

An additional explanation is that the United States sees this as a way to maintain its classification as the most powerful nation in the world. While it is highly unlikely that this is done with such specific purpose, it is possible that the United States thinks it is necessary to be stricter on certain policies so that it looks "macho" to everyone else. Just like the child in the schoolyard threatens to beat up anyone that gets in his way in order to maintain his place as the toughest guy in the schoolyard, the United States needs to be sure it is providing the toughest stance on certain crimes.

Another aspect of these policies that cannot go without mentioning is the most simple: we are dealing with two different unions. These unions are made up of different people with different attitudes, and different cultural influences. Most importantly, the European Union is facing different crimes. Perhaps crimes in the United States tend to be more heinous and atrocious and, therefore, warrant a more severe punishment. While there is no research directly supporting this theory, there is a wealth of research showing that crime rates are significantly lower in European Union countries as compared with the United States.⁸⁹ Given

84 Id.

85 Nations like United Kingdom, France, Germany, among others have abolished death penalty. Id.

86 The European Economic Community Treaty; and The European Atomic Energy Community Treaty, *supra* note 53.

87 Id.

88 Frederick C. Millett, Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?, 6 *PIERCE L. REV.* 547, 644 (2008).

89 Reporting that in the year 2000, United States had 5.87 homicides per 100,000 population and European Union member-nations had 2.49 homicides per 100,000 population on average. Gordon

this information, it is plausible to imagine that the United States is not only dealing with more homicides, but potentially more dangerous homicides and, therefore, needs a harsher punishment in place. However, it remains to be proven whether the death penalty remains because of high crime rate or if the crime rate is high because of the death penalty.

Perhaps the most persuasive explanation for the different death penalty approaches in the United States and the European Union is directly related to the first argument set forth in this section of the paper. Part of the freedom, liberty, and justice that the United States offers its citizens is the right to speak up and protest freely.⁹⁰ Furthermore, the United States government functions under a democracy and, therefore, politicians have to be accountable for their decisions to the people that elected them. This same type of democratic pressure is not present in the European Union to the same extent it is in the United States.

The European Union does not make laws in the same way as the United States and, therefore, does not have to answer to its citizens in the same way that legislators do in the United States. The website of the European Parliament generally outlines the process by which laws are made in the European Union.⁹¹ The outlines suggest that proposals are sent to the European Parliament and the European Council from the European Commission.⁹² Once the Parliament and the Council receive the proposal, they discuss it and determine the proper course of action.⁹³ If Parliament and the Council agree, then Parliament officially adopts it.⁹⁴ However, it is interesting to consider how the members of Parliament, the Council, and the Committee received their roles as legislators. Members of the European Commission are appointed once every five years by the European Council.⁹⁵ The European Council is made

up of the government leaders of the member nations,⁹⁶ which are elected by various means in each member nation. Finally, the European Parliament consists of 754 elected members from across the twenty-seven member nations.⁹⁷ Given this system, less members of the entire process are elected and, therefore, face fewer pressures from voting constituents. Not only is there less pressure because of the organization of the legislative system, but many United States citizens make it their job to constantly speak up about issues such as this.

There is a never-ending discussion regarding the death penalty approach in America. We have evolving standards that change as the wind blows. Whereas in the European Union the decision has been firmly planted since its inception, the United States continues to discuss, analyze, and reinterpret the standards here. All of these things contribute to a potential justification for the differing policies of the United States and the European Union.

6. IMPORTANCE OF CONSIDERING EUROPEAN UNION POLICIES

One of the most logical reasons to consider the policies of the European Union in United States death penalty legislation is the similarities in the two as discussed above. The United States does not align in many ways with the rights and policies in countries like Iran and China, which still recognize the death penalty.⁹⁸ However, the European Union seems to provide for and protect its citizens and their rights in much the same way as the United States. All of the member nations in the European Union have come together and collectively decided that killing another as punishment for a crime does not comply with the fundamental rights to life that every person is guaranteed. The European Union defines this fundamental right differently in an attempt to protect the rights of the people. Given the important rights and freedoms guaranteed to both European Union citizens and Americans, perhaps the United Sta-

Barclay & Cynthia Tavares, *International comparisons of criminal justice statistics 2000*, Table 1.1 (2002) http://www.iprt.ie/files/international/international_comparisons_of_criminal_justice_statistics_2000.pdf.

90 U.S. CONST. amend. I.

91 Ordinary legislative procedure, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/aboutparliament/en/0080a6d3d8/Ordinary-legislative-procedure.html> (last visited April 8, 2013).

92 Id.

93 Id.

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95 About the European Commission, EUROPEAN COMMISSION, <http://ec.europa.eu/about/> (last visited April 8, 2013).

96 The European Council—an official institution of the EU, EUROPEAN COUNCIL, <http://www.european-council.europa.eu/the-institution.aspx?lang=en> (last visited April 8, 2013).

97 Organisation and work, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/aboutparliament/en/0025729351/Organisation-and-work.html> (last visited April 8, 2013).

98 Death Penalty Abolition Worldwide, *supra* note 84.

tes should look to the policies of nations more similar to them.

The United States Constitution provides another justification for considering the policies of the European Union when forming death penalty policies in the United States. The “Supremacy Clause” of the United States Constitution states that the “supreme law of the land” shall be the Constitution along with United States Treaties.⁹⁹ This would naturally include any international treaties that the United States agrees to.

The United States ratified the *International Covenant on Civil and Political Rights*, part of the *International Bill of Human Rights*, in 1992 and addressed numerous specific rights that all nations would strive to provide for their citizens.¹⁰⁰ While there is a specific provision regarding the death penalty and its application in those nations that have not abolished it,¹⁰¹ there is also a provision prohibiting cruel or inhuman treatment, punishment, and torture.¹⁰² While the United States has determined through the Supreme Court and much case law that the death penalty does not constitute cruel and inhuman punishment, other nations that have signed this treaty do not agree. Evidence of this fact is clear just by looking at the list of those nations that have adopted the *International Covenant on Civil and Political Rights*.¹⁰³ Countries that have abolished the death penalty and consider it cruel and inhuman treatment, signed this international agreement.¹⁰⁴ Some of those countries include: Austria, Belgium, Denmark, France, Germany, Portugal, Spain, Sweden, and the United Kingdom—all members of the European Union.¹⁰⁵

While this treaty may not be actual United States law, it is nevertheless important in America and should be considered. Given the support for this treaty and the contents therein, it is clear that many other nations are

defining cruel and inhuman treatment much differently than the United States. While consideration of international policy is not required by any means, the “treaty” language was written into the Supremacy Clause of the Constitution for a reason.¹⁰⁶ International policy is important, especially when it is the policy of nations we align with in other ways. Therefore, it makes perfect sense to consider the fact that other nations define cruel and inhuman treatment differently and possibly consider their reasons for doing so. However, based on this same notion, the Supremacy Clause is a tactic the United States has provided to get around complying with pressures of voters. If the federal government enters into an international treaty, it will become supreme law and, therefore, not up for discussion among legislators.

It is also important to consider international policies on the death penalty as a result of the “evolving standard of decency” that became part of United States death penalty legislation many years ago.¹⁰⁷ In the landmark case of *Trop v. Dulles*,¹⁰⁸ Chief Justice Warren stated that the Eighth Amendment’s cruel and unusual punishment could not be judged according to the standards of the 1700s, but rather should be analyzed based on “evolving standards of decency.”¹⁰⁹ This gives United States courts and legislators license to consider all different types of modern influences when determining what society deems to be decent today. When Chief Justice offered these words that would echo through the United States’ legal system for many years to come, he was thinking about how many influences, both domestically and internationally, would influence what people in a certain time period felt was just and decent. Interpreting the Eighth Amendment could easily include consideration of international policy, which, according to some, was intended by the drafters of the Constitution.¹¹⁰ When we consider the common trends and morals of “society” today, views and opinions from people around the globe are important in that consensus. Foreign affairs affect the common standards concerning war, weapons, and the economy. Therefore, in determining what constitutes cruel and unusual punishment, it is important to look at the common view of society, including influences from countries other than the United States.

99 U.S. CONST. art. VI, § 2.

100 International Covenant on Civil and Political Rights, Dec. 16, 1966.

101 This section allowed the death penalty in those states where it is provided for by law. International Covenant on Civil and Political Rights, art. 6, sec. 2, Dec. 16, 1966.

102 *Id.* at art. 7.

103 The International Covenant on Civil and Political Rights was adopted by the United Nations generally, with many nations signing and ratifying the document themselves. Nations that signed onto this Covenant include: Denmark, Germany, Hungary, Romania, and Sweden. See International Covenant on Civil and Political Rights, Dec. 16, 1966.

104 *Id.*

105 *Id.*

106 U.S. CONST., *supra* note 100.

107 *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

108 *Id.*

109 *Id.*

110 Harold Hongju Koh, Paying “Decent Respect” to World Opinion on the Death Penalty, 35 U.C. DAVIS L. REV. 1085, 1103 (2002).

When this justification is joined with the prior justification, that many other nations defined cruel and inhuman in different ways, a natural step would be to consider foreign policy. The United States Supreme Court routinely allows groups and parties that have no direct relation to a case to submit *amici briefs* offering their thoughts and opinions on a matter. The reason for this is that those outside parties help contribute to determining what the evolving standard of decency current is. This is especially true when a non-party to a case has a potential interest in the outcome of the case. Given the European Union's continued efforts in the United States to abolish the death penalty, it certainly has an interest in the outcome of the case and should be able to submit briefs for consideration just as groups and initiatives from the United States are welcome to do.

A further important factor for considering European Union policies in the United States' death penalty discussion is the bilateral trade relationship referenced above.¹¹¹ Scholars have hypothesized that the United States cannot maintain its positive international relations without changing its stance on death penalty.¹¹² This theory was proven when the European Union developed new export laws regarding the shipment of certain drugs used in lethal injection in the United States, specifically to keep the drug from use in the death penalty.¹¹³ The drug the Union changed the regulations on is the anesthetic sodium thiopental.¹¹⁴ Being that this is the drug that takes the pain out of lethal injections, it makes sense that human rights groups will argue that without this drug, the death penalty is cruel and unusual punishment, as prohibited by the Constitution.¹¹⁵ The only other producer of the drug is an American-based company that refuses to supply the drug for the purpose of lethal injection.¹¹⁶ This is leaving the United States with few options, except an alternative method of execution. Considering 35 states currently authorize death penalty by lethal injection, this is an important issue that most certainly affects the death penalty discussion in

the United States.¹¹⁷ The European Union is getting its message across and, therefore, must be acknowledged.

The European Union has routinely made its presence known and attempted to assert influence in death penalty cases in the United States.¹¹⁸ While some of this attempted involvement is just an official European Union statement issued to the public, the European Union also submits letters to parole boards, Lieutenant Governors, Governors, and others.¹¹⁹ Many times the United States shares a response, always reiterating that death penalty in the United States is a process left up to elected government officials and federal and state levels.¹²⁰ While the response from the United States is correct, the process of forming death penalty legislation is left up to legislators in this country, there is nothing in any law prohibiting the United States from considering other viewpoints to get a new perspective.

Perhaps more importantly, the United States' reluctance to consider other death penalty approaches is causing discourse among citizens in foreign nations.¹²¹ This makes the European Union's interest in United States legislation vital. It is clear, given the alternating history of death penalty legislation in the United States, that there are legitimate reasons for both prohibition and acceptance of the death penalty. A very old saying states that two heads are better than one, and perhaps an additional perspective on this highly-debated topic can add something to the continuing conversation regarding the death penalty here in the United States.

7. CONCLUSION

The United States and the European Union have much different histories regarding the death penalty;

111 A GUIDE FOR AMERICANS: THE EUROPEAN UNION, *supra* note 45, at 13.

112 Trail, *supra* note 2, at 122.

113 Guido Bohsem, Europe to Ban Sale of Vital Lethal Injection Drug to U.S., *TIME.COM* (Dec. 15, 2011) <http://www.time.com/time/world/article/0,8599,2102266,00.html>.

114 *Id.*

115 U.S. CONST. amend. VIII.

116 Bohsem, *supra* note 114.

117 Authorized methods, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/methods-execution> (last visited April 8, 2013).

118 Death Penalty Archive, DELEGATION OF THE EUROPEAN UNION TO THE UNITED STATES, <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/> (last visited April 8, 2013).

119 *Id.*

120 US Response to EU Statement at Organization for Security and Cooperation in Europe, DELEGATION OF THE EUROPEAN UNION TO THE UNITED STATES, <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/death-penalty-archive-2011/> (last visited April 6, 2013).

121 Koh, *supra* note 111, at 1105-06.

the European Union has consistently disagreed with use of this punishment while the United States has spent most of the last century refining death penalty legislation, specifically as it applies to the Constitution. Both Unions, while prioritizing similar rights for citizens, have opposite views on the death penalty. The United States, by allowing the death penalty, finds itself among the company of nations such as Japan, Iran, and Afghanistan. These nations have histories of conflict with the United States, specifically as it applies to rights of citizens.

While the reason for these diverse policies could very well be undefinable, the solution might not be. Given our similarities with the European Union, both economically and constitutionally, it is important for us to consider the approach used there. This is also important given current interpretation of foreign treaties and the evolving standard of decency. The United States courts and legislators have a history of considering outside parties when amending or redefining the law in the United States, so continuing this practice with death penalty legislation is only logical. The European Union is interested and willing to provide guidance and thoughts on this troubling topic that the United States has clearly struggled with for many years. The United States needs to strive to consider important foreign perspectives concerning the critical subject of the death penalty. The reasons to consider European Union policies are numerous, while the explanation for the different death penalty policy in the United States is something far short of evident.

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