ACCULTURATION AND THE DEVELOPMENT OF DEATH PENALTY DOCTRINE IN THE UNITED STATES

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INTRODUCTION

Capital punishment predates the modern nation-state. Until the twentieth century, the death penalty was administered by extraordinarily harsh and brutal means, such as burning at the stake, skinning alive, and crucifixion.[1] Today in the United States, more humane means such as lethal injection and electrocution are used to carry out the death penalty. Just as the means of administering the death penalty have evolved over time, so have attitudes toward capital punishment in general. In the past century, the United States Supreme Court has revised death penalty doctrine, showing concern with when and to whom it is applied and with how it is carried out. Although it is not surprising that the doctrine has evolved over time, considering that it is founded on a flexible standard found in the Eighth Amendment to the Constitution,[2] what is surprising is that the Supreme Court's death penalty jurisprudence has demonstrated an overall trend restricting the power of the state in favor of the human rights of accused individuals. Even more surprising is that death penalty doctrine in the United States has almost uniformly followed in the footsteps of death penalty developments in other Western developed democracies.

This pattern seems too consistent to be coincidental, but how can the fact that the United States has so closely followed Europe's lead be explained? The ability to influence state behavior in the field of

1. Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZ. ST. L.J. 335, 336 (1996).

2. U.S. CONST. amend. VIII; s*ee* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

human rights has traditionally been understood through a framework consisting of two methods: coercion and persuasion.[3] However, these two methods do not seem to explain fully the changes in United States death penalty doctrine. Coercive measures have been infrequently applied, and the impact of direct attempts at persuading the United States to alter its death penalty doctrine is questionable.[4] Thus, it is probable that another, less obvious method of influence is at work.

In an article entitled, *How to Influence States: Socialization and International Human Rights Law*, Professors Ryan Goodman and Derek Jinks explore the theory that international human rights are not spread primarily by coercive or persuasive measures, but instead by a method they refer to as acculturation.[5] They state, "[Acculturation] induces behavioral changes through pressures to assimilate—some imposed by other actors and some imposed by the self."[6] Acculturation helps to more fully explain the similarities between the development of death penalty doctrine in Europe and in the United States as it accounts for the subtle pressures that induce the United States to conform.

This Note analyzes how the various methods of influencing state behavior, as outlined by Goodman and Jinks, apply to changes in United States death penalty jurisprudence. Part I provides background on how the use of the death penalty has evolved in both Europe and the United States, laying out relevant similarities. Part II presents a summary of Goodman and Jinks' modality, providing a framework for understanding how the United States' death penalty doctrine has been influenced. Part III then applies this framework, evaluating the effectiveness of coercion, persuasion, and acculturation, each as defined by Goodman and Jinks' modality, as motivating factors behind the evolution of death penalty doctrine in the United States. Part III further argues that coercion and persuasion inadequately explain developments in American death penalty doctrine, and that Goodman and Jinks' idea of acculturation

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3. *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 625 (2004) (discussing how the "first generation" of international human rights scholarship found that change occurred as a result of coercion and persuasion).

4. *See infra* Parts III.A–III.B.

5. Goodman & Jinks, *supra* note 3, at 626.

6. *Id*.

is necessary to a complete understanding of how death penalty doctrine in the United States has changed. The Note concludes with speculation on how coercion, persuasion, and particularly acculturation may affect death penalty doctrine in the United States in the future.

I. A SIDE-BY-SIDE COMPARISON

A. Death Penalty Doctrine in Europe

The first attempts to abolish the death penalty in Europe occurred at the end of the eighteenth century.[7] Prior to this period, the death penalty was widely applied in Europe by a variety of barbaric means.[8] However, the rise in humanitarian philosophy at the end of the eighteenth century caused state leaders to reevaluate their treatment of those found guilty of crimes.[9] Leaders began to develop more humane systems of penal law under the influence of philosophers such as Cesare Beccaria, who criticized the death penalty in his treatise *Of Crime and Punishment*.[10] In this spirit, several states called for the abolition of the death penalty during this period, including Tuscany, Austria, and France.[11]

Although abolitionist sentiment was strong at the end of the eighteenth century in Europe, it was short-lived. Soon after provisions abolishing the death penalty were put in place, they were reversed,[12] and the French *Code Civil*, which served as the foundation for codes in Belgium, the Netherlands, and Luxembourg, called for

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7. Roger Hood, *Introduction* to THE DEATH PENALTY: ABOLITION IN EUROPE 9, 10 (Tanja Kleinsorge & Barbara Zatlokal eds., 1999).

8. M. MARC ANCEL, EUROPEAN COMM'N ON CRIME PROBLEMS, THE DEATH PENALTY IN EUROPEAN COUNTRIES 8 (1962).

9. *Id.* at 9.

10. *Id.*

11. Ancel notes that

> Leopold II of Tuscany abolished capital punishment in the Tuscan Penal Code of 1786 . . . and Joseph II abolished it in the Austrian Code of 1787. . . . With regard to French law, it is to be noted that the decree of the Convention of 14th Brumaire of the Year IV provided for the abolition of capital punishment when peace should be re-established, but it never took effect, even after the Peace of Amiens.

Id. at 9.

12. Hood, *supra* note 7, at 10; *see also* ANCEL, *supra* note 8, at 9 ("Austria re-introduced the death penalty for high treason in 1795 and for other crimes as well in the Code of 1803, while Tuscany also reverted to it in 1730.").

the death penalty as the punishment for a number of crimes.[13] Additionally, the death penalty served as the punishment for over 200 crimes in England at the turn of the nineteenth century.[14]

Despite the widespread use of the death penalty in the early 1800s, abolitionist movements again began to emerge around 1830.[15] The changes brought about by these movements were gradual, first consisting of declining use of the death penalty before changes in the law occurred.[16] However, by the end of the nineteenth century, a number of European countries had adopted policies and legislation against the use of capital punishment.[17]

Further setbacks in the complete abolition of the death penalty in Europe again occurred during the first half of the twentieth century. The authoritarian movement caused a number of countries to reinstate capital punishment, including Italy, Austria, and Germany.[18] Furthermore, the Second World War caused even states with strong abolitionist sentiment to reinstate the death penalty for certain war-related crimes.[19]

Despite these temporary setbacks, the trend toward the abolition of the death penalty in Europe continued after the end of the Second World War.[20] By 1962, only the United Kingdom, the Irish Republic, Spain, Turkey, Greece, and France carried out executions in Europe, and by 1977, Turkey was the only state not to have abandoned capital

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13. ANCEL, *supra* note 8, at 9.

14. *Id.*

15. *Id.*

16. *Id.* at 10; *see, e.g.*, Hood, *supra* note 7, at 10 (noting that Portugal did not abolish the death penalty until 1863, but it had not been imposed since 1843).

17. For example, in France the list of crimes punishable by death was shortened to exclude forgery, compound larceny, and eventually political crimes. Additionally, juries in France were given increased discretion in applying the death penalty. ANCEL, *supra* note 8, at 10. In Germany, the 1849 Constitution ineffectively attempted to abolish the death penalty in German States. *Id.* In Spain, a bill to abolish the death penalty was introduced in 1822. *Id.* In the United Kingdom, there was a drastic reduction in the number of offenses punishable by death in the 1861 Offences Against the Person Act. *Id.* In Portugal, the death penalty was completely abolished in 1863, a step later taken by Romania, Italy, Norway, and the Netherlands. Hood, *supra* note 7, at 10.

18. *See* ANCEL, *supra* note 8, at 11–12 (detailing the authoritarian movement in Italy, Germany, and Austria, in which German law was applicable from 1938 until 1945).

19. *See id.* at 12 (noting that Belgium, Norway, and the Netherlands brought back the death penalty for treason, war crimes, and collaboration with the enemy).

20. *See id.* at 12–13 (observing that "the movement has always been towards the abolition of capital punishment" and in particular noting the post-war movements toward abolition in England, Italy, Germany, and Austria).

punishment.[21] Movement in the direction of the abolition of the death penalty could even be seen in former Soviet countries, known for using the death penalty as a political tool, by the late 1980s.[22]

The trend toward abolition in individual European countries in the latter half of the twentieth century was accompanied by the development of regional and international human rights regimes, many of which advocated the abolition of the death penalty. The first major step toward an international human rights system and the abolition of the death penalty on an international scale was the United Nations' adoption of the Universal Declaration of Human Rights (UDHR) in 1948.[23] Article 3 of the UDHR states, "Everyone has the right to life, liberty and security of person."[24] Although this provision did not specifically urge the abolition of the death penalty, the "right to life" language provided an important springboard for future developments.

This language can be seen in the next major document in the development of the international human rights regime: the International Covenant on Civil and Political Rights (ICCPR).[25] The ICCPR built on the UDHR by both adding detail and providing binding norms.[26] Article 6 of the ICCPR provides, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[27] Although the ICCPR did not prohibit the use of the death penalty, except involving those under the age of eighteen at the time of the crime, article 6 did state, "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."[28] The wording of article 6 thus indicated a preference for the abolition of the death penalty.

The preference for the abolition of the death penalty in the ICCPR was strengthened into a requirement in the subsequent

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21. Hood, *supra* note 7, at 10.

22. *Id.*

23. 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].

24. *Id.* art. 3.

25. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

26. Although the UDHR was a declaration, the ICCPR was a treaty and was thus binding on those states that ratified it.

27. ICCPR art. 6, para. 1.

28. *Id.* para. 6.

Second Optional Protocol to the ICCPR.[29] The Second Optional Protocol provides, "No one within the jurisdiction of a State Party to the present Protocol shall be executed. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction."[30] Although the Second Optional Protocol to the ICCPR was only binding on those states that ratified it, it represented the first statement of an emerging international norm against capital punishment. Other recent international human rights treaties contain provisions on capital punishment as well, such as the Convention on the Rights of the Child (CRC).[31]

The development of a regional human rights system that led to the Europe-wide abolition of the death penalty accompanied these international developments in human rights. The first major step in the development of a European regional human rights system was the creation of the European Convention on Human Rights (ECHR).[32] The Council of Europe created the ECHR, which came into force on September 3, 1953, in order to form a list of fundamental rights and freedoms under the jurisdiction of the European Court of Human Rights. Article 2 of the ECHR states, "Everyone's right to life shall be protected by law."[33] However, the ECHR did not abolish capital punishment, but instead preserved it, stating, "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."[34]

The trend toward abolition in individual European states began to influence region-wide change after a 1962 survey by Marc Ancel for the Council of Europe illustrated the uniformity of European states' trend toward abolition.[35] By the end of the 1970s, the Committee of Ministers of the Council of Europe had begun to

29. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 206, U.N. Doc. A/44/49 (Dec. 15, 1989) [hereinafter Second Optional Protocol].

30. *Id.* art. 1.

31. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR Supp. No. 48, at 166, U.N. Doc. A/Res/ 44/99 (Nov. 20, 1989) [hereinafter CRC].

32. European Convention on Human Rights, Nov. 4, 1950 [hereinafter ECHR].

33. *Id.* art. 2, para. 1.

34. *Id.*

35. *See generally* ANCEL, *supra* note 8.

consider the death penalty a human rights issue.[36] Once the Council of Europe established that the death penalty violated human rights, the need for region-wide abolition became apparent, and the Committee of Ministers decided to create a protocol to the ECHR that would ban capital punishment in European countries.[37] Thus, Protocol Number 6 to the ECHR was drafted and entered into force on March 1, 1985.[38]

Protocol Number 6 was the first Europe-wide pronouncement on the abolition of the death penalty. Article 1 of Protocol Number 6 states, "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."[39] Thus, the protocol directly prohibited the death penalty and did not require any action on the part of the states.[40] It is important to note, however, that although Protocol Number 6 was a large step in the abolition of the death penalty in Europe, it still provided states with the option of using the death penalty during times of war.[41]

The next important step in the abolition of the death penalty in Europe came when the Council of Europe decided in 1993 that applicants to the Council must sign and ratify the ECHR.[42] By 1994, the Parliamentary Assembly strengthened this requirement, stating that applicants to the Council must put in place an immediate moratorium on executions followed by the signature and ratification of Protocol Number 6 to the ECHR abolishing the death penalty in peacetime.[43] Thus, all Council of Europe members were required to abolish the death penalty in times of peace.

Recent changes in Europe have reflected a similar emphasis on the abolition of the death penalty. In 2002, the Council of Europe

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36. Hans Christian Krüger, *Protocol No. 6 to the European Convention on Human Rights*, *in* THE DEATH PENALTY: ABOLITION IN EUROPE, *supra* note 7, at 69, 70 (1999).

37. *Id.*

38. *Id.*

39. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, art. 1, Europ. T.S. No. 114 [hereinafter Protocol No. 6].

40. Krüger, *supra* note 36, at 70.

41. *See* Protocol No. 6 art. 2 ("A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.").

42. Hood, *supra* note 7, at 11.

43. *Id.*

adopted Protocol Number 13 to the ECHR,[44] which supplements Protocol Number 6 by calling for the complete abolition of the death penalty, even during times of war. Furthermore, in order to become a member of the European Union (EU) a state must have abolished capital punishment.[45] Additionally, the EU has undertaken measures to persuade other states to abolish the death penalty, including the Guidelines to European Union Policy toward Third Countries on the Death Penalty.[46]

Europe has been moving slowly toward the abolition of the death penalty for centuries. Early periods of abolitionist sentiment were followed by setbacks to the abolition of the death penalty, but since the creation of international human rights regimes in the latter-half of the twentieth century, Europe has moved rapidly toward abolition under the premise that capital punishment violates human rights. Although the United States has yet to reach the final step of abolition, up to this point, the developments in American death penalty doctrine follow a very similar path to the European developments just described.

B. Death Penalty Doctrine in the United States

Capital punishment has occurred in the United States since before the country's inception. The first documented execution on U.S. soil occurred in 1608.[47] When the Constitution was written, the Framers were aware of capital punishment, and the lack of any explicit prohibition on capital punishment in the Constitution indicates that they were also tolerant of it.[48] The provision in the Constitution that most closely relates to capital punishment is the Eighth Amendment, which states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[49] Although the Framers did not intend for the

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44. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, Europ. T.S. No. 183 [hereinafter Protocol No. 13]; *see also* Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?* 81 OR. L. REV. 131, 138 (2002).

45. Hood, *supra* note 7, at 11.

46. Guidelines to European Union Policy towards Third Countries on the Death Penalty, June 3, 1998, *available at* http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm.

47. RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 3 (1991).

48. *Id.*

49. U.S. CONST. amend. VIII.

"cruel and unusual punishment" provision to outlaw capital punishment,[50] it has since been interpreted as an evolving standard,[51] and it is the primary source used by abolitionists to argue for the unconstitutionality of the death penalty.

Until the 1900s, the death penalty in America was primarily under local control.[52] Initially, colonies created their own penal systems and imposed the death penalty as they saw fit.[53] The use of the death penalty was influenced by British tradition,[54] although the death penalty was applied far less extensively in the colonies, in particular those in the North, than it was applied in England.[55] In America, the death penalty was mostly reserved for serious crimes such as murder and rape; however some colonies imposed capital punishment for religious crimes and other offenses.[56] Conversely, in England the list of crimes for which the death penalty was imposed grew longer and longer during this period.[57]

The first steps toward restricting the use of the death penalty in America occurred shortly after the United States became a nation. The Commonwealth of Massachusetts led the way by restricting the list of crimes for which death was a penalty.[58] Other states followed suit, limiting the number of crimes subject to the death penalty and, for some states, dividing the crime of murder into degrees.[59] Such actions on the part of the states signaled the beginning of a gradual shift from a locally controlled death penalty regime to one controlled

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50. *See* PATERNOSTER, *supra* note 47, at 3 ("Since the Fifth Amendment ensured that no person could be deprived of *life*, liberty, or property without due process of law, the implication was that *with* such due process of law such deprivations were acceptable.").

51. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

52. PATERNOSTER, *supra* note 47, at 3.

53. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 6 (2002) ("England's North American colonies exhibited significant regional variation in their criminal codes right from the beginning.").

54. *See* PATERNOSTER, *supra* note 47, at 5 (outlining the contemporary history of capital punishment in England and noting its pervasive influence on the colonies).

55. *See* BANNER, *supra* note 53, at 6 (stating that property crimes in particular were treated much more leniently in the northern colonies than in England).

56. PATERNOSTER, *supra* note 47, at 5.

57. BANNER, *supra* note 53, at 7.

58. *See* PATERNOSTER, *supra* note 47, at 5 (stating that capital crimes were reduced to include only "murder, sodomy, burglary, buggery, arson, rape, and treason").

59. *Id.* at 6.

by the state, although this process was not completed until the twentieth century.[60]

The sentiment of the American people regarding the death penalty was similarly evolving during the late eighteenth and early nineteenth centuries, and the first public discussions on whether the death penalty should be completely abolished were initiated during this period.[61] As the debate over the death penalty continued into the nineteenth century, abolitionists organized themselves alongside anti-slavery and temperance groups.[62] In 1845, the first national organization opposing the death penalty was created: the American Society for the Abolition of Capital Punishment.[63] Popular opinion against the death penalty accompanied the trend of state governments restricting the death penalty to fewer crimes in fewer circumstances.

The work of death penalty abolitionists began to come to fruition during the middle of the nineteenth century. In 1846, Michigan became the first state to abolish capital punishment for all crimes but treason.[64] In the next ten years, Rhode Island and Wisconsin completely abolished the death penalty for all crimes,[65] and during the latter half of the nineteenth century, three more states, Iowa, Maine and Colorado, completely abolished the death penalty.[66] The abolitionists were beginning to make headway, although their progress soon slowed and became plagued by setbacks, such as Iowa's reinstatement of the death penalty in 1878, Maine's temporary reinstatement of the death penalty from 1883 through 1887, and Colorado's reinstatement of the death penalty in 1901.[67]

The trend toward abolition was revived during the progressive era accompanying the turn of the twentieth century.[68] Nine states—

60. *See id.* at 7 ("In the 1890s, 86 percent of all executions were performed under local authority, but by the 1920s almost eight out of every ten executions were conducted under state authority.").

61. *See* BANNER, *supra* note 53, at 88 (describing the abolitionist sentiment present in newspaper editorials, letters, and political figures' works of the 1780s and 1790s).

62. PATERNOSTER, *supra* note 47, at 8.

63. *Id.*

64. *Id.* at 9.

65. Rhode Island did so in 1852, Wisconsin in 1853. *Id.*

66. Iowa did so in 1872. Maine did so in 1876. Colorado did so in 1897. *Id.*

67. WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 6 tbl.1-1 (1974).

68. *See id.* at 7 (discussing the progressive ideas prevalent at the beginning of the twentieth century such as abolitionism, feminism, prohibition, and prison reform).

Kansas, Minnesota, Washington, Oregon, North Dakota, South Dakota, Tennessee, Arizona, and Missouri—did away with the death penalty during this period.[69] However, the beginning of the First World War again produced setbacks in the abolitionist movement, causing six of the nine states that had just abolished the death penalty to reinstate it.[70] After Kansas later reinstated the death penalty,[71] only six states remained abolitionist by the middle of the 1900s.[72]

Despite the setbacks incurred thus far, the movement to abolish the death penalty again gained strength during the latter half of the twentieth century. Alaska and Hawaii were both abolitionist when they became states in 1960,[73] and all nine states to abolish capital punishment in the second half of the twentieth century remain abolitionist to this day, with the exception of Delaware.[74] Furthermore, even in states where capital punishment was legal, it was used less and less, causing the number of executions to decline drastically from 1930 to 1970.[75]

Most of the influential developments in United States death penalty doctrine before 1970 took place in state legislatures; however in 1972 the Supreme Court's decision in *Furman v. Georgia*[76] began a period during which the most influential changes in the death penalty have come from the federal judiciary. Since *Furman*, the Supreme Court has played a significant role in moving the United States down Europe's path by continually restricting the constitutionality of the death penalty.[77]

The Court in *Furman* did not go so far as to find the death penalty to be unconstitutional; however it did find, by a 5 to 4 margin, that the death penalty, as it was applied in *Furman* and two accompanying cases, was "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[78] The practical result of

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69. *See id.* at 6 tbl.1-1 (listing the 9 states that abolished the death penalty between the turn of the twentieth century and World War I).

70. *See id.* (noting that Minnesota, North Dakota, and Kansas were the only states of the nine above who did not reinstate the death penalty during this period).

71. *See id.* (showing that Kansas reinstated the death penalty in 1935).

72. *Id.* at 7.

73. Alaska and Hawaii repealed the death penalty as territories in 1957. *Id.*

74. Delaware only abolished the death penalty from 1958 to 1961. *Id.* at 6 tbl.1-1.

75. PATERNOSTER, *supra* note 47, at 11 fig.1-1.

76. Furman v. Georgia, 408 U.S. 238 (1972).

77. *See infra* notes 78–97 and accompanying text.

78. *Furman*, 408 U.S. at 240.

Furman was to strike down all existing capital punishment statutes because of the unguided and unregulated discretion given by these statutes to criminal juries in death penalty cases.[79] Thus, in order to continue using the death penalty, it was necessary for states to revise their capital punishment sentencing guidelines in conformity with Furman. As many as thirty-five states attempted to reinstate the death penalty with revised statutes.[80] However, they were compelled to meet further requirements delineated by the Court in later cases such as Gregg v. Georgia,[81] which held that statutes requiring the mandatory imposition of the death penalty in certain situations were unconstitutional, while statutes that merely guided the discretion of jurors in death penalty cases withstood constitutional scrutiny.[82]

Despite the fact that many states passed new legislation to reinstate the death penalty after the brief pause instituted by Furman, since Furman the death penalty has been used less frequently than ever before in the United States. Raymond Paternoster asserts, "Since the reinstatement of capital punishment only a handful of offenders have been executed each year."[83] The decline in the use of the death penalty has resulted from legislative and executive action by states, from the discretion of jurors and judges, and most importantly, from action on the part of the Supreme Court restricting capital punishment.

One of the means by which the Court has limited the death penalty is by restricting the crimes for which the death penalty can be a punishment. In Coker v. Georgia[84] the Supreme Court held that capital punishment could not be imposed for rape,[85] and in Enmund v. Florida[86] the Court restricted when the death penalty could be applied for felony murder.[87] In both of these cases, the Court focused its analysis on whether applying the death penalty for those convicted of rape or felony murder would be consistent with the Eighth Amendment's evolving standard, and in both cases the Supreme

79. PATERNOSTER, supra note 47, at 19.
80. Id. at 20.
81. Gregg v. Georgia, 428 U.S. 153 (1976).
82. Id. at 206–07; see also PATERNOSTER, supra note 47, at 21.
83. PATERNOSTER, supra note 47, at 21.
84. Coker v. Georgia, 433 U.S. 584 (1977).
85. Id. at 598.
86. Enmund v. Florida, 458 U.S. 782 (1982).
87. Id. at 801.

Court defined this standard by looking at objective factors, such as actions of state legislatures and sentencing juries, to determine "the country's present judgment."[88]

The Court has also attempted to gauge national opinion in its decisions regulating to whom the death penalty can be applied. In *Atkins v. Virginia*,[89] the Supreme Court held that the death penalty could not be applied to those who are mentally retarded,[90] and in *Thompson v. Oklahoma*[91] the Court found it cruel and unusual punishment in contravention of the Eighth Amendment to execute someone who was fifteen or fewer years of age at the time of the crime.[92] The reach of *Thompson* was limited by *Stanford v. Kentucky*,[93] which upheld the constitutionality of applying the death penalty to someone who was seventeen years of age at the time of the crime.[94] However, this decision was overruled in the recent Supreme Court case *Roper v. Simmons*.[95] In *Simmons*, the Court found the execution of those under the age of 18 at the time of the crime to be unconstitutional under the evolving Eighth Amendment standard.[96] All of these cases turned on the Court's appraisal of "national consensus," as evidenced primarily by state legislative action regarding the death penalty.[97]

The jurisprudence of the Supreme Court and the Court's appraisal of national consensus in these cases evidence an overall trend toward restricting the death penalty in the United States. As a result of Supreme Court decisions, those convicted of felony murder or rape, mentally retarded individuals, and those under the age of eighteen at the time of the commission of the crime can no longer be executed.[98] Currently, thirty-eight states still have statutes imposing

88. *Coker*, 433 U.S. at 593; *accord Enmund*, 458 U.S. at 788–89 (discussing *Coker*'s approach and analyzing issue "in a similar manner").

89. Atkins v. Virginia, 536 U.S. 304 (2002).

90. *Id.* at 321.

91. Thompson v. Oklahoma, 487 U.S. 815 (1988).

92. *Id.* at 838.

93. Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

94. *Id.* at 380.

95. *Roper*, 543 U.S. 551.

96. *Id.* at 578.

97. *See id.* at 564 ("The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instructions.").

98. *See supra* notes 84–97 and accompanying text.

the death penalty, but only thirty-three of these states have executed someone since 1976.[99] In 2004, only fifty-nine people were executed nation-wide and in 2005, this number was only sixty.[100] These numbers are down from the ninety-eight people executed in 1999 and the eighty-five people executed in 2000.[101] Furthermore, the number of people sentenced to death hit a record low in 2004—65 percent fewer than in 1998.[102]

Although, just as in Europe, there have been temporary setbacks over time, American death penalty doctrine is slowly moving toward abolition. In particular, the jurisprudence of the United States Supreme Court has almost uniformly moved in the direction of abolition since 1972.[103] In order to evaluate whether these similarities between European and American death penalty doctrine will result in the eventual abolition of the death penalty in the United States, it is important to understand why the developments in Europe and the United States have been so similar.

II. GOODMAN AND JINKS' MODALITY

In order to understand why the United States' death penalty doctrine has developed largely in the footsteps of Europe's, one must look to how states influence one another in general. In *How to Influence States: Socialization and International Human Rights Law*, Ryan Goodman and Derek Jinks set forth a framework that attempts to provide a comprehensive understanding of how states influence

99. Death Penalty Info. Ctr., Facts About the Death Penalty 1, (May 12, 2006), http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited June 4, 2006).

100. *Id.*

101. *Id.*

102. In 2005, only 125 people were sentenced to death nationwide. American Judicature Society, http://www.ajs.org/include/story.asp?content_id=478 (last visited June 4, 2006). In 1998 this number was approximately 300. Death Penalty Info. Ctr., *supra* note 99, at 3.

103. The only exception to the Supreme Court's continual restriction of the death penalty was *Stanford v. Kentucky*, 492 U.S. 361 (1989), which was recently abrogated by *Roper v. Simmons*, 543 U.S. 551 (2005). It should also be noted that federal legislation has somewhat undermined the trend in restricting the death penalty by narrowing the scope of habeas corpus relief in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 104–108, 110 Stat. 1214–26 (codified as amended in scattered sections of U.S.C.). However, changes in the scope of habeas corpus are only important to death penalty doctrine once a death sentence has already been imposed, and it is at this initial sentencing level that the Supreme Court's restrictions take effect.

one another, particularly in the field of human rights.[104] Goodman and Jinks' modality provides a foundation for understanding the influential factors that have shaped American death penalty doctrine.

In Goodman and Jinks' framework, there are three mechanisms by which states influence one another: coercion, persuasion, and acculturation. By carefully differentiating and defining these three mechanisms, Goodman and Jinks provide a modality for understanding the complexities of state interaction with regard to human rights.

For Goodman and Jinks, coercion is the "first, and most obvious, social mechanism."[105] It entails the deliberate practice of states providing "material rewards and punishments" to other states in order to "escalat[e] the benefits of conformity or the costs of nonconformity."[106] Thus, in essence coercion works by altering a state's cost-benefit calculations in favor of a certain result.[107]

Since coercion depends upon one state's ability to alter another state's cost-benefit calculation, coercion necessarily implicates power dynamics among states. Goodman and Jinks assert, "Under the coercion approach, traditional notions of power—military and economic—provide the principal machinery for changing state practices."[108] States can coerce other states through the unilateral employment of military or economic measures or threats, or they can cooperate with other states through treaty instrumentalities, funneling their coercive influence through international law.[109] Either way, coercion requires some level of individual or pooled military or economic power to effectively influence state behavior.

For Goodman and Jinks, persuasion is a less forceful, but equally deliberate mechanism of state-to-state influence. Goodman and Jinks define persuasion as "the active, often strategic, inculcation of norms. . . . [in which] actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice."[110] Under

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104. *See* Goodman & Jinks, *supra* note 3, at 625–26 (proposing that their acculturation analysis will help provide a "more complete conceptual framework").

105. *Id.* at 633.

106. *Id.*

107. *Id.* at 634.

108. *Id.* at 690.

109. *See id.* at 691 (discussing the possibilities of coercive influence through treaties, in particular "agreements with teeth").

110. *Id.* at 635.

persuasion, both states are aware of the persuasive effort, thus one state must use overt measures such as careful argument and reasoned logic to assert its influence.

The obvious nature of persuasion makes the means through which it is employed particularly important to its effectiveness. Goodman and Jinks outline several techniques that enhance a persuasive effort, including framing and cuing.[111] Framing relates to the substantive context in which the persuasive material is presented. "The basic idea," they state, "is that the persuasive appeal of a counterattitudinal message increases if the issue is strategically framed to resonate with already accepted norms."[112] Cuing relates to the procedural context in which the persuasive material is presented. Proper cuing results in a target audience "'think[ing] harder' about the merits of a counterattitudinal message."[113] Both framing and cuing attempt to render a state more open to the persuasiveness of another state's arguments.

Goodman and Jinks suggest that, although coercion and persuasion were the predominant mechanisms explored in "[f]irst generation scholarship" on human rights laws,[114] they provide an incomplete framework insofar as coercion "fails to grasp the complexity of the social environment within which states act" and persuasion "fails to account for many ways in which the diffusion of social and legal norms occurs."[115] Thus, they suggest that a third mechanism is necessary to a more complete understanding of how states influence one another, a mechanism they term "*acculturation*."[116] Acculturation is an important, but systematically undervalued, social mechanism,[117] defined as "the general process of adopting the beliefs and behavioral patterns of the surrounding culture," and works not by direct means of influence, but instead by "changing the actor's social environment."[118] Thus, for one state to influence another, acculturation requires a state to somehow

111. *Id.* at 636–37.

112. *Id.* at 636.

113. *Id.* at 637.

114. *Id.* at 625.

115. *Id.*

116. *Id.* at 626.

117. *See id.* at 700 ("[A]n integrated model should take seriously the processes of acculturation. Indeed, acculturation has been systematically undervalued (and, at times, misunderstood) in debates about human rights regimes.").

118. *Id.* at 638.

influence the target state's group identifications. In the field of human rights, Goodman and Jinks posit that influencing group identifications may not be a complex undertaking, as they see an emerging global social environment within which human rights norms can be spread.[119]

Once a target state is firmly within the appropriate social environment, acculturating that state to the desired norm requires another state to apply a variety of cognitive and social pressures. Goodman and Jinks outline two types of cognitive pressures that play a role in acculturation: "(1) social-psychological costs of nonconformity (such as dissonance associated with conduct that is inconsistent with an actor's identity or social roles), and (2) social-psychological benefits of conforming to group norms and expectations (such as the 'cognitive comfort' associated with both high social status and membership in a perceived 'in-group')."[120] A state applying these cognitive pressures creates "'[c]ognitive dissonance'" in the target state as a result of the difference between the pressures and the target state's counter-attitudinal actions or beliefs, with the aim that the target state will relieve this dissonance by conforming to the desired norm.[121]

Goodman and Jinks also identify two types of social pressures that play a role in acculturation: "(1) the imposition of social-psychological costs through shaming or shunning and (2) the conferral of social-psychological benefits through 'back-patting' and other displays of public approval."[122] These pressures are more obvious than cognitive pressures and play on a target state's need for social legitimacy and status rather than its internal sense of legitimacy and justifiability. A combination of both cognitive and social pressures is most likely to produce the desired result.

One final set of variables presented by Goodman and Jinks influence the effectiveness of acculturation independently from the

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119. *See id.* at 646–56 (discussing the extent of isomorphism across states and providing statistical and case evidence of acculturation within a global social environment).

120. *Id.* at 640 (citations omitted).

121. *See id.* at 640–41 ("'Cognitive dissonance'—defined broadly as the discomfort caused by holding two or more inconsistent cognitions—is a useful example. This phenomenon is part of a family of cognitive processes related to the basic human need to justify one's actions to oneself and others. . . . An implication of [internal pressure such as cognitive dissonance] is that once actors internalize some role (or any other identity formation), they are impelled to act and think in ways consistent with the highly legitimated purposes and attributes of that role.") (citations omitted).

122. *Id.* at 641.

acuteness of the pressures applied. These variables, derived from social impact theory, are group "strength, immediacy, and size."[123] Goodman and Jinks posit that: "(1) conformity with group norms becomes more likely as the importance of the group to the target actor increases (and as the importance of the issue to the group increases); (2) conformity increases as the target actor's exposure to the group increases; and (3) conformity increases—up to a point—as the size of the reference group increases."[124] Ultimately, these three variables relate back to the need for a state to alter its target's social environment in order for acculturation to be successful. By maximizing group importance, exposure, and size, a state ensures the maximum scope of a target state's immergence in the appropriate social environment, and thus the likelihood that a target state will be susceptible to acculturation.

For Goodman and Jinks, acculturation works in tandem with coercion and persuasion, forming a complete modality through which human rights norms are spread from state to state. Thus, in evaluating the development of death penalty doctrine in the United States, the role played by acculturation, in addition to those played by coercion and persuasion, must be evaluated to fully explain the similarities in United States developments to those that have occurred in Europe.

III. EVALUATING THE SIMILARITIES BETWEEN EUROPE AND THE UNITED STATES

From the outset it is clear that the death penalty doctrines of both Europe and the United States are on a similar trajectory. Just as Europe underwent an extended period of gradual movement toward abolition marked by a number of temporary setbacks before completely abolishing the death penalty in 1985,[125] the United States is currently experiencing an overall trend toward abolition driven by Supreme Court jurisprudence, despite the setbacks outlined above.[126] Goodman and Jinks' modality provides three potential means of explaining the similarity in death penalty doctrine between Europe and the United States.

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123. *Id.* at 642.

124. *Id.*

125. Protocol No. 6 to the ECHR entered into force in 1985. *See supra* note 38 and accompanying text.

126. *See supra* Parts I.A–I.B.

First, the similarity between the death penalty doctrines of Europe and the United States could be a result of attempts by Europe and other states that have abolished the death penalty to coerce the United States. Although Goodman and Jinks' modality emphasizes coercion as a viable means of influencing state behavior, the power dynamics between the United States and other states make the possibility that the United States has been coerced much less likely. And there are no examples of successful outright coercion of the United States in this area.[127]

Second, the similarity between Europe and the United States could be a result of direct attempts by Europe to persuade the United States. There is considerable evidence of such attempts,[128] and the acknowledgement and use of European doctrine and practice by some members of the Court suggests that persuasion is one means of explaining the similarity between European and American death penalty doctrine. However, persuasion may not fully account for the similarities between the United States and Europe. Supreme Court Justices do not explicitly state that they are persuaded by the logic of foreign and international sources; instead, they merely provide these sources as examples of what other states have done.[129] Indeed, some Justices vehemently reject any use of European or other foreign sources in Supreme Court opinions.[130] These factors suggest that persuasion is probably not the only method of influence at work.[131]

Finally, the method of influence that best seems to explain the great degree of similarity between European and American death penalty doctrine is Goodman and Jinks' idea of acculturation. Acculturation suggests that the United States is following in Europe's footsteps not only as a result of outright coercion and persuasion, but also because the beliefs and behavior of Europe, as a part of the culture of Western developed democracies surrounding the United States, have more subtly influenced the beliefs and behavior of the United States through a number of micro-processes.[132] Acculturation is necessary to a complete understanding of the similarity between the

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127. *See infra* Part III.A.

128. *See infra* note 146 and accompanying text.

129. *See infra* notes 147–57 and accompanying text.

130. *See infra* notes 158–62 and accompanying text.

131. *See infra* Part III.B.

132. *See* Goodman & Jinks, *supra* note 3, at 68 (describing the micro-processes of acculturation, which include "orthodoxy, mimicry, identification, and status-maximization").

United States and Europe because, although the United States has resisted more overt forms of social pressure from Europe and other Western states, its treatment of the death penalty shows sensitivity to the tacit cognitive and social pressures produced by these other states.[133]

A. The Failures of Coercive Influence

Under Goodman and Jinks' definition of coercion, it is theoretically possible that Europe and other Western states could provide the United States with some sort of material benefit for abolishing the death penalty or with some sort of material cost for not abolishing the death penalty, which could cause the United States to find that the benefits of moving toward abolition outweigh the costs.[134] However, the United States does not seem to have based its action on a response to such a cost-benefit calculation.

Some of the only truly coercive measures that Europe and other states have utilized against the United States regarding the death penalty are threats not to invest in states that apply the death penalty[135] and refusal to extradite criminals to the United States because of its use of the death penalty.[136] Although European refusal to invest would cost the United States economically and refusal to extradite would cost the United States the ability to prosecute accused criminals within its jurisdiction, the United States' strong economic and political power lessens the potential impact of these costs. These measures seem unlikely to change the United States' behavior. And there is no evidence that they have done so.

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133. *See infra* Part III.C.

134. *See* Goodman & Jinks, *supra* note 3, at 633 (defining coercion as a "social mechanism . . . whereby states and institutions influence the behavior of other states by escalating the benefits of conformity or the costs of nonconformity through material rewards and punishments").

135. *See* Letter from Alan J. Donnelly, Chairman, Delegation for Relations with the U.S., European Parliament, to George Bush, Texas governor (June 25, 1998), http://www.eurunion.org/legislat/DeathPenalty/EPDonBush.htm (last visited Apr. 11, 2006) ("Europe is the foremost foreign investor in Texas. Many companies, under pressure from shareholders and public opinion to apply ethical business practices, are beginning to consider the possibility of restricting investment in the U.S. to states that do not apply the death penalty.").

136. *See* John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 191 (1998) (discussing the European Court of Human Rights' case *Soering v. United Kingdom*, which held that a man who was accused of committing murder in Virginia should not be extradited from the United Kingdom to the United States because of the possibility that he could receive the death penalty).

Most other coercive measures regarding the death penalty are international treaties signed by a number of states, such as the ICCPR and its Second Protocol and the CRC,[137] all of which contain provisions on capital punishment. The United States has ratified the ICCPR with a reservation regarding its continued use of the death penalty,[138] but it has not ratified the Second Protocol to the ICCPR or the CRC. One of the only material benefits that the United States would receive from ratifying these instruments is that it could then have the ability to enforce these human rights treaties against other state parties, and one of the only material costs of not doing so is that the United States cannot enforce these agreements. These treaties are not the coercive "'agreements with teeth'" envisioned by Goodman and Jinks,[139] and are thus relatively weak inducements for the United States to change its behavior. Furthermore, there is no evidence that they have had such a result.

Any other coercive measures applied against the United States regarding the death penalty are likely to meet the same fate as those measures mentioned above because many of the most effective coercive measures are economic,[140] and the United States is the richest country in the world. Any effective economically coercive measure is likely to damage the coercing state as much as, if not more than, the United States as such action could result in the loss of access to the United States' lucrative markets and retaliatory action by the United States. The power dynamics implicated in coercion are acutely visible with regard to the United States, making coercion a very unrealistic method for altering United States human rights behavior.[141] Coercion does not appear to have influenced United States actions regarding the death penalty in the past and is unlikely to work in the future.

B. The Partial Successes of Persuasion

In recent years Europe, other states, and independent actors have bombarded the United States with attempts to persuade it to

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137. *See supra* notes 25–31 and accompanying text.

138. *See* Demleitner, *supra* note 44, at 141–42 (discussing the United States' reservations about the ICCPR).

139. Goodman & Jinks, *supra* note 3, at 691.

140. *See id.* at 633–34 (using the Foreign Assistance Act, which is a United States statute providing financial assistance to needy countries who do not violate human rights, as an example of a coercive measure).

141. *See supra* note 108 and accompanying text.

abolish, or at least narrow, its use of the death penalty.[142] Although these attempts seem to have made some impact on the United States' death penalty doctrine, it is unlikely that persuasion is the only mechanism of state-to-state influence at work. As Goodman and Jinks set forth, persuasion requires the target state to be consciously convinced of the correctness of a proposition by the reasoning of the persuading state, with the assistance of both framing and cuing.[143] Although Europe and other states have made a series of efforts to persuade the United States in this way, the United States' response to these efforts does not indicate that it was actually persuaded by them, despite the fact that the United States has often reached the persuading states' desired conclusion. Persuasion has likely played some role in the development of American death penalty doctrine, but resistance to acknowledge that role, particularly by the Supreme Court, indicates that another mechanism of influence, such as acculturation, is also at work.

Europe's attempts to persuade the United States to follow in its footsteps in abolishing the death penalty began with the creation of the Guidelines to European Union Policy toward Third Countries on the Death Penalty in 1998,[144] which outlined the European Union's desire to "work towards universal abolition of the death penalty" and "[w]here the death penalty still exists, to call for its use to be progressively restricted and to insist that it be carried out according to minimum standards."[145] Shortly after this document was issued, the European Union began submitting a series of statements, letters, demarches, and amicus briefs to the United States in order to encourage it to abolish the death penalty, or at least to restrict its use.[146]

This strong onslaught of persuasion has had some effect in the United States. Supreme Court Justices have cited international and in

142. *See infra* notes 145–46 and accompanying text.

143. *See supra* notes 110–13 and accompanying text.

144. *See supra* note 46 and accompanying text.

145. *See* Guidelines to European Union Policy towards Third Countries on the Death Penalty, *supra* note 46, at II.

146. The EU has submitted a number of internal policy demarches that focus on the United States and its use of the death penalty, and it has written letters to American state and federal government figures and submitted briefs in United States death penalty cases. Lists of these documents and links to their full text can be found on the EU website: *EU Policy and Action on the Death Penalty*, EUROPEAN UNION IN THE U.S., http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm (last visited Jan. 17, 2005).

particular European states' practices in their opinions, acknowledging the value of these practices as examples of what other states have done.[147] Citing the use of international opinions in *Trop v. Dulles*[148] as precedent, Justice White referred to international opinion in footnotes in *Coker v. Georgia*[149] and in *Enmund v. Florida*.[150] Justice Stevens went so far as to discuss the value of the examples of "other nations that share our Anglo-American heritage" and "the leading members of the Western European community" in the text of *Thompson v. Oklahoma*.[151] Justice Brennan's dissent in *Stanford v. Kentucky* discusses the practices of Western Europe and other countries at some length,[152] and Justice Stevens even cites to an amicus brief by the European Union in a footnote in *Atkins v. Virginia*.[153] Most recently, the brief of the European Union and the role of international opinion were discussed in the oral argument of *Roper v. Simmons*,[154] and in his majority opinion for the case, Justice Kennedy discusses international and foreign sources extensively.[155]

However, despite the long list of instances in which European and international persuasive attempts seem to have made a difference, there is reason to believe that these attempts were not effective because of their persuasiveness. In other words, although the United States has followed Europe's path and even cited to Europe's practice and persuasive efforts in doing so, it is possible that the United States did not do so because it felt "convinced of the truth, validity, or appropriateness" of European sentiment toward the death

147. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 830 n.31 (1988) ("We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.").

148. Trop v. Dulles, 356 U.S. 86, 102–03 (1958). Although *Trop* is not a death penalty case, it did provide precedent for citing international opinion that later influenced such citations in death penalty cases.

149. Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977).

150. Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982).

151. *Thompson*, 487 U.S. at 830.

152. Stanford v. Kentucky, 492 U.S. 361, 389–90 & nn.9–10 (1989) (Brennan, J., dissenting).

153. Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

154. *See* Transcript of Oral Argument at 13, Roper v. Simmons, 543 U.S. 551 (2005) No. 03-633 (addressing the role of foreign law in a question by Justice Kennedy: "We've seen very substantial demonstration that world opinion is—is against this, at least as interpreted by the leaders of the European Union. Does that have a bearing on what's unusual?").

155. *See Roper*, 543 U.S. at 575–78 (citing to the CRC, the ICCPR, and other treaties and to the practices of the United Kingdom and other countries and referring to "the overwhelming weight of international opinion against the juvenile death penalty").

penalty.[156] Instead, the United States may have decided to follow Europe's path for different reasons.[157] This conclusion is supported by the fact that none of the citations discussed above attribute persuasive or precedential value to foreign or international practices; these practices are merely cited as examples.

The conclusion that persuasion may not fully explain the similarities between Europe and the United States is also supported by the strong reaction of some Justices on the Supreme Court against the use of foreign or international law as persuasive precedent. Justice Scalia commences his series of attacks on the use of foreign law in decisions interpreting the U.S. Constitution in his dissent in *Thompson v. Oklahoma*, in which he finds the plurality's reliance on the persuasive precedent of foreign practice to be "totally inappropriate."[158] Justice Scalia's plurality opinion in *Stanford v. Kentucky* expresses a similar rejection of foreign practice,[159] as does his dissenting opinion in *Roper v. Simmons*.[160] Furthermore, Chief Justice Rehnquist agreed with Justice Scalia's objections in his *Atkins v. Virginia* dissent,[161] and Chief Justice Rehnquist and Justice Thomas joined in Justice Scalia's *Roper v. Simmons* dissent, denouncing the majority's use of international and foreign sources.[162]

Another motivation for considering the possibility that persuasive attempts were influential for reasons other than their persuasiveness is the fact that most of the references to foreign law in the above opinions were relegated to dicta in footnotes, and the fact the European nations chose a certain path was not a pivotal factor in the Court's decision in any of these cases. Furthermore, it can be argued that the Justices use foreign law to provide justifications for opinions that they already hold in order to minimize the appearance of raw judicial activism. If this is the case, the Justices have not been directly persuaded by foreign law, but instead have formed their opinions by other means. Thus, it is important to consider what else

156. Goodman & Jinks, *supra* note 3, at 635.

157. *See infra* Part III.C.

158. Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting).

159. *See* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (asserting that "practices of other nations . . . cannot serve to establish . . . that the practice is accepted among our people").

160. *Roper*, 543 U.S. at 622–28 (Scalia, J., dissenting).

161. Atkins v. Virginia, 536 U.S. 304, 324–25 (2002) (Rehnquist, C.J., dissenting).

162. *See Roper*, 543 U.S. at 622 (Scalia, J., dissenting) ("[T]he views of our own citizens are essentially irrelevant to the Court's decision today, [but] the views of other countries and the so-called international community take center stage.").

besides persuasion may be causing the gradual shift toward the abolition of the death penalty in the United States.

C. *The Strong Influence of Acculturation*

When it comes to the death penalty, the United States does not seem to be susceptible to the coercive influence of the European Union or other states. Similarly, it does not appear to change its course solely as a result of the carefully reasoned persuasive techniques from Europe or elsewhere. Therefore, the high degree of similarity between the developments in death penalty doctrine between Europe and the United States must result from another, less-obvious method—the process of acculturation.

As Goldman and Jinks set forth, before acculturation can take place the target state must be integrated into the appropriate social environment. In this case the United States most likely already identifies itself with the group of developed Western democracies, such as those in Europe, that have abolished the death penalty, and it probably also identifies with the global social environment that upholds human rights norms.[163] Like the United States, these countries have democratic systems of government, are at similarly high levels of economic development,[164] and share similar levels of respect for human rights in areas other than the death penalty.

As the United States is already integrated into the appropriate social environment, acculturation next requires that European countries apply the correct combination of cognitive and social pressures.[165] Both categories of pressures can be seen in evaluating the United States' movement toward the abolition of the death penalty.

Cognitively, Europe's actions within the social environment of democratic, developed, rights-respecting countries create social-psychological costs to the United States. The fact that the United States and Europe have a similar degree of respect for human rights in areas other than the death penalty allows both regions to view

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163. *See supra* note 119 and accompanying text.

164. In fact, many of these countries are members alongside the United States in the Organisation for Economic Co-operation and Development, the member countries of which are considered by many to be the most economically developed states. Ratification of the Convention on the Organisation for Economic Co-operation and Development, http://www.oecd.org/document/58/0,2340,en_2825_293564_1889402_1_1_1_1,00.html (last visited Feb. 28, 2006).

165. *See supra* notes 120–22 and accompanying text.

themselves as nations that respect human rights. The United States was at the forefront of the movement to create international regimes to increase respect for human rights globally.[166] Respect for human rights is implicit in the identity and social role of the United States. The United States sees itself as a country that spreads human rights, and not one that violates them.

The fact that the United States has not abolished the death penalty is cognitively dissonant with the rights-respecting identity of the United States. The increased resolve with which Europe has attempted to persuade the United States and other countries to abandon the death penalty creates significant pressure reinforcing this dissonance. Justice Kennedy acknowledges the cognitive dissonance caused by the differences in death penalty doctrine between the United States and other rights-respecting countries in his majority opinion in *Roper v. Simmons*.[167] The more widespread and vocal the opposition to capital punishment becomes, the more contradictory the fact that the United States still uses capital punishment becomes with its identity as a nation that respects human rights. In order to resolve this cognitive dissonance, the United States, and in particular the Supreme Court, has continually restricted its use of the death penalty.

Europe has also attempted to create social-psychological benefits for the United States to continue its trajectory along the same path as Europe in death penalty doctrine. By moving toward abolishing the death penalty, the United States preserves its membership in the "in-group" of Western developed democracies that respect human rights. Again, as objections to capital punishment grow stronger and more widespread, the death penalty seems more and more contrary to human rights, and it becomes more and more unlikely that a country that still uses the death penalty would be revered for respecting human rights. Dean Harold Hongju Koh states, "I have little doubt

166. *See* Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 294 (2002) ("Since its founding, the United States has promoted international human rights as a rhetorical cornerstone of its foreign policy.").

167. *See Roper*, 543 U.S. at 578 ("[Constitutional] doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.").

that America's continuation of the practice [of capital punishment] has undermined our claim to moral leadership in international human rights."[168] In order for the United States to maintain its status as one of the world's leaders in respecting human rights and to continue fitting in with its social environment of other Western developed democracies, it must continue to move toward abolition of the death penalty.[169]

Socially, the United States experiences the pressure of shaming as a result of the frequent statements by Europe on the inhuman nature of the death penalty.[170] In a 2000 memorandum on the death penalty, the European Union specifically mentions the United States and its practices regarding the death penalty, stating:

> The EU is deeply concerned about the increasing number of executions in the United States of America (USA), all the more since the great majority of executions since reinstatement of the death penalty in 1976 have been carried out in the 1990s. Furthermore, it is permitted to sentence to death and execute young offenders aged under 18 at the time of the commission of the crime, in clear infringement of internationally-recognised human rights norms.[171]

The fact that the European Union singled out the United States' violations of human rights provides a shaming mechanism pressuring the United States to move toward abolition. The European Union also attempts to shame the United States by emphasizing its likeness to countries that are not well known for respecting human rights.[172] Furthermore, every time Europe attempts to persuade the United States to abandon its practice of executing individuals in an amicus

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168. Koh, *supra* note 166, at 310 (2002).

169. *See supra* Part I.B.

170. *See supra* note 146 and accompanying text.

171. *EU Memorandum on the Death Penalty* (Feb. 25 2000), *available at* http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm. The European Union's mention of an increasing number of executions references one of the setbacks in the movement toward abolition of the death penalty, during which the number of executions rose to a high of ninety-eight in 1999. The number of executions has decreased significantly since the writing of this memorandum, amounting to only fifty-nine in 2004 and sixty in 2005. Death Penalty Info. Ctr., *supra* note 100, at 1.

172. *See* Brief for the European Union and Members of the International Community as Amici Curiae Supporting Respondent at 8–9, Roper v. Simmons, 543 U.S. 551 (2005) (No.03-633) (placing the United States in a class with Iran, Saudi Arabia, Nigeria, the Democratic Republic of Congo, Yemen, Pakistan, and China as the only countries to execute children since 1990).

brief, letter, or demarche,[173] the shaming effects of Europe's statements on the death penalty are reinforced.

The European Union also provides tentative praise to the United States when it further restricts its use of the death penalty, providing a small social benefit for moving toward abolition. After the United States stopped imposing the death penalty on mentally retarded individuals in *Atkins v. Virginia*, the European Union "welcome[d] the decision."[174] This light pat on the United States' back indicated that the European Union would be even more enthusiastic toward the United States if it eventually decides to completely abolish the death penalty.

The degree to which acculturation can be expected to influence American death penalty doctrine also turns on group importance, exposure, and size.[175] Consideration of each of these variables further supports the argument that acculturation has played a role in the development of death penalty doctrine in the United States. As to group importance, the United States' social environment, composed of Europe as well as other developed Western democracies, is certainly important to the United States. Especially since the creation of the European Union, Europe has become an economic and social force in the global arena, and the opinions of the EU are influential in international organizations to which the United States is also a party.[176] As the issue of the death penalty has become more and more important to Europe, as evidenced by the time and effort spent by the European Union in combating the use of the death penalty internally and worldwide,[177] it becomes a more important factor to the group as a whole.

As to exposure, the United States' closeness to the European Union, with respect to capital punishment and other issues, is increasing. In addition to globalization, which allows for increased exposure due to improved transportation and technology, the European Union has worked hard to ensure that the United States is

173. *See supra* note 146 and accompanying text.

174. Letter from the European Union to the U.S. Office of the Political Counselor (June 21, 2002), http://www.eurunion.org/legislat/DeathPenalty/DarylAtkinsPrRel.htm (last visited Apr. 11, 2006).

175. *See supra* notes 123–24 and accompanying text.

176. For example, two of the five permanent members of the U.N. Security Council are members of the E.U. (the United Kingdom and France).

177. *See supra* note 146 and accompanying text.

continuously exposed to its opposition to the death penalty.[178] The United States would need to be in a vacuum to avoid a high degree of exposure to its social environment in this area.

As to size, the magnitude of the United States' social environment that has abolished the death penalty continues to grow. Although the growth in the size of the group is only relevant up to a point,[179] the EU and larger groups of Western developed democracies have certainly reached that point. Therefore, the three final variables influencing the effectiveness of acculturation are met, reinforcing the high likelihood that acculturation has been effective in guiding the death penalty doctrine of the United States down the same path that Europe has taken.

In the footsteps of European death penalty doctrine developments, the United States has been constantly exposed to cognitive and social pressures to similarly alter its death penalty doctrine by other states that compose its social environment. The United States Supreme Court's restriction of the death penalty in favor of human rights displays a response to these pressures characteristic of Goodman and Jinks' mechanism of acculturation. Although some direct persuasion, and perhaps even coercion, may have been involved in American death penalty doctrine developments, the theory of acculturation provides a more complete understanding of how the United States has responded to changes in Europe and elsewhere.

CONCLUSION

The path the United States has embarked upon in continuing to restrict the application of the death penalty is oddly similar to that of Europe, which only finally abolished the death penalty after many years of slow reform. The similarities between the United States and Europe seem too uncanny to be coincidental, but traditional notions of how states influence one another, coercion and persuasion, do not seem to explain completely the similarities. The United States is far too powerful for the kind of cost-benefit calculations that accompany human rights norms to have serious effects, and the reticence of Supreme Court Justices to attribute precedential value to foreign and

178. *See supra* note 146 and accompanying text.

179. *See* Goodman & Jinks, *supra* note 3, at 642 n.73 (noting that the group size is only positively correlated with the extent of influence from about three to eight).

international law in their opinions makes it unlikely that persuasive efforts have single-handedly convinced the United States to change.

The gap left by the theories of coercion and persuasion is filled by acculturation.[180] Acculturation is a process that operates more tacitly than coercion and persuasion, explaining similarities between states by evaluating the internal cognitive and external social pressures that bear on a group as a result of its social environment. Acculturation more fully explains the similarities between the United States and Europe in the development of their respective death penalty doctrines by illustrating how the United States' membership in the group of Western developed democracies that respect human rights, a group that also includes Europe, causes it to experience cognitive and social pressures to maintain its identity as a human rights leader and thus restrict its use of capital punishment.

The United States Supreme Court in particular has demonstrated the effects of acculturation in its recent decisions restricting the death penalty under the Eighth Amendment. Although the Justices do not acknowledge the persuasiveness of foreign precedent, the Court's death penalty decisions have almost always followed foreign precedent. It remains to be seen whether the United States will follow Europe all the way down the path to abolition, but the effectiveness that acculturation, alongside some persuasive and coercive measures, has had thus far on influencing the beliefs and behavior of the United States indicates that abolitionists can reasonably be hopeful for such a result.

180. *Id.* at 626.