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AN APPRAISAL OF "FAIR VALUE" IN THE REVISED CORPORATE APPRAISAL STATUTE SECTION 1.01

MARIYL B. CANE* AND PETER FEROLA+

"I conceive that great part of the miseries of mankind are brought upon them by the false estimates they have made of the value of things . . . ."1

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I. INTRODUCTION

The Florida Legislature extensively amended the provisions of the Florida Business Corporation Act ("FBCA") dealing with rights of appraisal first in 2003,2 then again in 2004,3 and 2005.4 The FBCA adopts, verbatim, the

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language of the Revised Model Business Corporation Act ("RMBCA") amendments with certain significant exceptions. The RMBCA amendments in 1998 made major changes to appraisal procedures and terminology. For example, the RMBCA's new formulation does not use the term "dissenter" and requires shareholders to "perfect" their claim by sending a "certification" plus their stock certificates.

The key distinction this article will address is that, whereas the RMBCA explicitly states that "fair value" shall be computed "without discounting for lack of marketability or minority status," the FBCA limits this language to apply only to a corporation with ten or fewer shareholders.

This could create an inference that in appraisal proceedings involving corporations with more than ten shareholders, such discounts should apply. As amended in 2003, the Florida statute eliminated the language concerning discounting, breaking completely with the RMBCA model on this issue. Additionally, in 2005, the FBCA included RMBCA's concept of denying discounts in appraisal proceedings, but only for corporations with ten or fewer shareholders.

There was concern over the issue of appraisal rights by Florida Governor John Ellis "Jeb" Bush that the change proposed to eliminate minority discounts was designed to affect the outcome of a certain pending lawsuit. Letter from Jeb Bush, Governor, State of Florida, to Glenda E. Hood, Secretary of State, Florida Department of State (June 20, 2005), available at http://www.flabuslaw.org/index.php?/list.committees=4/1 (follow "Gov. Bush 6/20/05 Letter re SB 1056/HB 595" hyperlink under "Committee Documents") [hereinafter Bush Letter]. He was assured by State Representative J. Dudley Goodlette that the legislation was not designed to do that, but rather, as Representative Goodlette wrote:

"I am comforted by the fact that provisions substantially like those amendments, derived from the Revised Model Business Corporation Act, had been unsuccessfully introduced in earlier legislative sessions and the Florida Bar’s Business Section was only attempting to gain their passage this time around. In fact, I was one of the sponsors of that earlier legislation. Thus, I am assured that this was the sole motivation of the Florida Bar members involved in the drafting, analysis and editing of the amendments.

The official commentary to the RMBCA states that the statutory appraisal remedy for shareholders should be available:

only when two conditions co-exist. First, the proposed corporate action as approved by the majority will result in a fundamental change in the shares to be affected by the action. Second, uncertainty concerning the fair value of the affected shares may cause reasonable persons to differ about the fairness of the terms of the corporate action.11

This means, generally, that the appraisal remedy is available in mergers, share exchanges, and dispositions of assets other than in the ordinary course of business.12 Moreover, the new provisions reinstall a market exception for publicly traded companies.13 Specifically, the new provisions deny appraisal rights in connection with any class of shares that is "[l]isted on the New York Stock Exchange [NYSE] or the American Stock Exchange [AMEX] or designated as a national market system security . . . by the National Association of Securities Dealers [Automated Quotations] [NASDAQ]," or that is held by 2000 or more shareholders and has a public float (number of shares that are outstanding) "of at least $10 million, exclusive of the value of such shares held by its subsidiaries, senior executives, directors, and beneficial stockholders."

11. MODEL Bus. CORP. ACT § 13.01 cmt. 1 (2005). Florida first adopted a modified version of the Model Business Corporation Act, former Florida Statutes Chapter 607, in 1975. FLA. STAT. ch. 607 (1975). Chapter 89-154, Laws of Florida, created the Florida Business Corporation Act, the current Florida Statutes Chapter 607. See FLA. STAT. ch. 607 (2005). This legislation, effective July 1990, revised, updated, and organized Florida Statutes Chapter 607. Id. It substantially followed the provisions of the Revised Model Business Corporation Act ("RMBCA") adopted by the American Bar Association in 1984. Chapter 607 was amended several times during the 1990s and early part of 2000. Specifically, Florida's dissenter's rights statute granted by Florida Statutes Chapter 607 was intended to protect shareholders against coercion, in majority-approved transactions that radically altered the nature of their investment in a corporation, by enabling them to dissent formally from certain fundamental corporate changes and demand payment from the corporation for the fair value of the shares. The then revised statute, which set forth what corporate actions gave rise to dissenter's rights, was based in part on existing Florida Statutes, and incorporated certain provisions of the RMBCA and the Georgia Business Corporation Code. Generally, the revised dissenter's rights statute filled the procedural gap left in the prior statute by providing procedures and time limits for both the corporation and the dissenting shareholder. If the dissenting shareholders fail to comply with the statutory requirements, their right to determine fair value of their shares terminates and they are bound by the corporate action. See generally Michael V. Mitrione, Dissenters' Rights, in FLORIDA CORPORATE PRACTICE § 11.1 (4th ed. 2002).


13. § 607.1302(2)(a).
shareholders owning more than 10 percent of such shares."14 The reason is that with such liquidity the minority shareholders have a ready market for their shares.

II. FLORIDA’S RIGHT OF APPRAISAL

A Florida statute carving out corporations with ten or fewer shareholders does not make sense. There is likely no market for shares in a corporation with eleven, twenty, or fifty shareholders. The logical distinction is whether there is an established market for the shares to ensure liquidity. This is the distinction drawn by the RMBCA.15 If there is a ready market, there is no need for the appraisal remedy; if there is not, there should be no minority or marketability discounts applied.

A. Dissenter’s Right Application

Under Florida Law, the right to appraisal applies to the following types of corporate actions: first, the consummation of a merger or conversion requiring a shareholder vote;16 second, upon disposition of assets requiring a shareholder vote with certain exceptions;17 third, “[c]onsummation of a share exchange;”18 fourth, amendment to the articles which reduces the shareholder’s ownership interest to a fractional share;19 fifth, upon certain amendments to the articles of incorporation merger and the like;20 finally, with respect to a class of shares existing prior to October 1, 2003, which negatively affects the shareholder in specified ways.21

Under section 607.1302(1), shareholders who are entitled to vote on a corporate action—whether because such shareholders have general voting rights or because group voting provisions are triggered—are not entitled to appraisal if the change will not alter the terms of the class or securi-

14. Id. Note that the RMBCA uses a $20 million float. MODEL BUS. CORP. ACT § 13.02(b)(1)(ii) (2005). Delaware law contains a market exception that is quite similar to the 1998 amendments to the RMBCA except that Delaware law contains no float requirement. There are several important exceptions to the market exception under the RMBCA and the Florida Statutes. See generally FLA. STAT. § 607.1302(2)(c)-(d) (2005); Richard A. Booth, Minority Discounts and Control Premiums in Appraisal Proceedings, 57 BUS. LAW. 127 (2001).
17. § 607.1302(1)(c).
18. § 607.1302(1)(b).
19. § 607.1302(1)(d).
20. § 607.1302(1)(e).
21. § 607.1302(1)(f).
ties that they hold. Thus, statutory appraisal rights are not available for shares of any class of the surviving corporation in a merger or any class of shares that is not included in a share exchange.

B. General Considerations

A voluntary dissolution will not trigger an appraisal remedy because such an action does not affect liquidation rights—the only rights that are relevant following a shareholder vote to dissolve. Moreover, the new provisions also eliminate appraisal in connection with amendments to the articles of incorporation, with some grandfathering. Instead, the amended statute permits corporations to delineate a list of transactions for which the corporation may voluntarily choose to provide appraisal by permitting a provision in the articles of incorporation that eliminates, in whole or in part, statutory appraisal rights for preferred shares.

Generally, the value of a corporation as a whole should be determined on the basis of what a willing purchaser, in an arms-length transaction, would pay for the entity as an operating business. However, valuation should take into account all relevant "factors, such as market value, asset value, [going concern value and] future earning prospects . . . . After these factors have been [evaluated] . . . they should then be weighed as to their relative bearing upon the ultimate question of the fair value of the stock." A shareholder "usually has a statutory right of . . . appraisal" in a statutory merger. "That is, a stockholder [typically holding a minority interest] who objects to the terms of a merger may demand to be paid in cash the fair value of his or her shares exclusive of any gain or loss that may arise from the merger itself."

22. See § 607.1302(1).
23. § 607.1302(1)(e)-(f) (discussing a class of shares prescribed in the articles of incorporation prior to October 1, 2003).
24. Id.
26. 12B FLETCHER, supra note 25, § 5906.120.
27. See Booth, supra note 14, at 127.
28. Id.
C. Appraisal Remedy Purpose

The purpose of an appraisal is to ensure that "the price paid in a merger is a fair one." 29

Most courts and commentators seem to agree that it is inappropriate to apply a minority discount in the context of an appraisal proceeding even though the fair market value of minority shares may be less than the going concern value of those shares. . . . Thus the appraisal remedy is founded on the possibility that market prices may be wrong. As the Delaware Supreme Court has stated, the goal of an appraisal proceeding should be to determine the value of the corporation as a whole, not the value of particular shares, and to award the found value per share to all dissenting stockholders. 30

Thus, Delaware does not apply discounts in corporate appraisal proceedings. 31 Moreover, the ALI Principles of Corporate Governance defines fair value as the value of the shareholder’s "proportionate interest in the corporation, without any discount for minority status or, absent extraordinary circumstances, lack of marketability." 32

Minority shareholders are still shareholders. 33 The fact that a shareholder is unlikely to exercise control is no reason to ascribe a diminished value to her shares in a transaction which is involuntary as to such shareholder.

In contradistinction to commentators, numerous state legislatures, and state judicial interpretations, Florida’s new statutory definition of "fair value" omits the Model Act’s proscription of a minority or marketability discount except with respect to corporations with ten or fewer shareholders. 34 This has opened the door to a multitude of disadvantageous results for the minority shareholder seeking an appraisal remedy. Florida’s revised statute clearly goes against the overwhelming trend not to apply discounts in appraisal proceedings generally.

Although many courts and commentators use the terms minority discount and marketability discount more or less interchangeably, the two

29. Id.
30. Id.
33. Booth, supra note 14, at 127.
are really quite distinct from each other. The idea of a minority discount does not properly refer to the fact that minority shares ordinarily will trade at a price that is less than the price that a controlling stockholder might command in a sale of control. Rather, the term minority discount as properly understood refers to a discount from the price that would be set for non-control shares in an active market simply because they are minority shares and have no power to influence the governance of the corporation. . . .

Conversely, "a marketability discount refers to a discount from what a fair trading price would be if there were an active market for the shares." Marketability discounts can also affect owners of large blocks of shares due to a difficulty in the resale process "without affecting the market price."

The 1998 Revised Model Business Corporation Act (RMBCA) states, among other things, that discounts are inappropriate in appraisal transactions as a whole. The RMBCA defines fair value as:

the value of the corporation's shares determined:

(i) immediately before the effectuation of the corporate action to which the shareholder objects;

(ii) using customary and current valuation concepts and techniques generally employed for similar business in the context of the transaction requiring appraisal; and

(iii) without discounting for lack of marketability or minority status . . . .

The drafters of the Model Act determined that discounts for marketability or minority status are unsuitable because transactions which trigger appraisal rights are those affecting the entire corporation, and such transactions could not be prevented by minority shareholders. This would result in a double-whammy for the unfortunate minority shareholder. Not only can she not prevent the transactions, such as a merger, but she is subject to a diminishment in the proportional value of her shares in what is effectively a forced sale. Additionally, "the lead-in language . . . is . . . designed to adopt the more modern view that appraisal should generally award a shareholder his or

36. Id. at 131.
37. Id.
38. MODEL BUS. CORP. ACT § 13.01 cmt. 2 (2005).
39. MODEL BUS. CORP. ACT § 13.01(4) (emphasis added).
40. MODEL BUS. CORP. ACT § 13.01 cmt. 2.
her proportional interest in the corporation after valuing the corporation as a whole, rather than the value of the shareholder's shares when valued alone.\textsuperscript{41}

The discounts can have a profound impact. For example, a combined thirty percent minority interest discount and forty percent discount for lack of marketability, which may be applied by appraisals, would render an eight-share valued at $10 to be valued at $4.20. For example:

\begin{itemize}
  \item $10.00 \quad \text{Control Value per share}
  \item -$3.00 \quad \text{Less minority interest discount (.30 x $10.00)}
  \item $7.00 \quad \text{Marketable minority value}
  \item -$2.80 \quad \text{Less lack of marketability discount (.40 x $7.00)}
  \item $4.20 \quad \text{Per share value of non-marketable minority shares}\textsuperscript{42}
\end{itemize}

D. American Law Institute Principles of Corporate Governance

The \textit{ALI's Principles of Corporate Governance} states "that the fair value of shares in an appraisal proceeding should be determined 'without any discount for minority status or, absent extraordinary circumstances, lack of marketability.'\textsuperscript{43} It also states that the value should be determined "in the context of the transaction giving rise to appraisal"\textsuperscript{44} and further states that "'[t]his standard does not necessarily imply . . . that fair value should be determined by the presumed outcome of a hypothetical competitive auction.'\textsuperscript{45} The ALI's official comment states that the "role of the appraisal remedy is to assist shareholders to police conflicts of interest that may arise in connection with the sale or disposition of [a] firm. In the absence of a conflict of interest, less policy justification exists for upsetting the bargain reached between [the buyer and seller.]\textsuperscript{46} Typically a court would not reform a contract to disturb the price set by the contracting parties, absent unconscionability.\textsuperscript{47}

\textsuperscript{41} Id. “If, however, the corporation voluntarily grants appraisal rights for transactions that do not affect the entire corporation—such as certain amendments to the articles of incorporation—the court should use its discretion in applying discounts if appropriate.” Id.


\textsuperscript{43} Booth, \textit{supra} note 14, at 136 (quoting 2 PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 (1992)).

\textsuperscript{44} 2 PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 (1992).

\textsuperscript{45} Id. at 136–37 (quoting 2 PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 cmt. d (1992)).

\textsuperscript{46} 2 PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 cmt. c (1992).

\textsuperscript{47} See id.
Accordingly, the ALI principles provide that "the court should give substantial deference to the board's judgment [as to price per share] unless the plaintiff can show by clear and convincing evidence that the board undervalued the firm."  

III. OPPRESSION STATUTES

With the notable exception of Florida, almost all states have passed legislation to provide remedies to shareholders who are opposed, including the possibility of seeking dissolution. The corporate statute that most states adopt is the RMBCA "which focuses on the 'illegal, oppressive, or fraudulent' actions by the majority shareholders." A remedy for oppression has been deemed appropriate in most states because oppressed minority shareholders have no liquidity or other means of redeeming their equity in closely-held corporations. In addition, there are a number of court-created definitions of oppression, some broad and some more narrow. Moreover, the case law is usually very fact specific which leads to unpredictability for minority shareholders seeking a remedy.

Because of the nature of a closely-held corporation, "some courts have imposed a [partnership-like] fiduciary duty among [the] shareholders." The same dilemma of ascertaining "fair value" arises in the context of a buyout "[w]hen a majority shareholder is ordered (or elects) to buy out the shares of an oppressed minority shareholder." The dilemma of the "fair value" of the minority stake is presented in the same manner as with an appraisal action. While "there is widespread support for a fair value buyout as a[n] . . . oppression remedy, there is significant disagreement [as to] what fair value means."

48. Id.
50. Id. (citation omitted).
51. See id.
52. Id.
53. Id.
55. Id. at 310.
56. Id. at 310–11.
57. Id. at 310.
A. Florida Law

The Florida Legislature revised Florida Business Corporations Act’s (“FBCA”) definition of fair value in 2003. Prior to that revision, the FBCA defined fair value as “the value of the shares as of the close of business on the day prior to the shareholders’ authorization date, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.” The 2003 revised definition mirrored that of the RMBCA version; however, it excluded the express proscription of discounts for lack of marketability or minority status. The act, as revised, defined fair value as:

[T]he value of the corporation’s shares determined:
(a) Immediately before the effectuation of the corporate action to which the shareholder objects.
(b) Using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable to the corporation and its remaining shareholders.

In examining both versions, it is quite apparent that the 2003 Florida legislature did not follow the overwhelming trend with regard to the minority/marketability discount issue.

In 2004, the Florida Second District Court of Appeal held in a dissenter’s rights action that “Florida’s dissenters’ rights statutes are based, in part, on the [RMBCA] . . . therefore, we may look . . . to cases from other jurisdictions that have adopted the provisions of the RMBCA in substantially the same form.” While one can argue that, based on the foregoing, one could look to other jurisdictions for guidance as to whether marketability/minority discounts should apply, a counter-argument could be made un-

62. Boettcher v. IMC Mortgage Co., 871 So. 2d 1047, 1052 n.5 (Fla. 2d Dist. Ct. App. 2004) (citation omitted). While this case involved the interpretation of the fair value as defined under § 607.1301, it was limited to the “appreciation or depreciation in anticipation of the corporate action” element of the definition. Id. at 1052 (quoting Fla. Stat. § 607.1301(2) (1999)).
under the statutory interpretative cannon of *expressio unius est exclusio alteris*, expressing one item of an associated group or series to another left unmentioned. In its 2003 revision, the Florida legislature generally adopted the RMBCA definition of “fair value” with the significant exception of its exclusion of its proscription against minority/marketability discounts. Obviously, this was no oversight by the Florida Legislature.

In fact, the Florida House of Representatives Judiciary Committee Substitute for House Bill 1623 as initially proposed in 2003, included the current definition of “fair value” with the following addition: “(c) Without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles of incorporation pursuant to s. 607.1302(1)(e) or circumstances in which not discounting for marketability would be inequitable to the corporation and its remaining shareholders.” In other words, as originally proposed, Florida's language followed the RMBCA by eliminating discounting by statute; however a subsequent amendment removed the text from the proposed bill. The reason for this remarkable change in 2003 is not evident from the official legislative history.

IV. JUDICIAL INTERPRETATION

A. Pueblo Bancorporation v. Lindoe, Inc.

In 2003, in *Pueblo Bancorporation v. Lindoe, Inc.*, the Supreme Court of Colorado addressed the meaning of fair value in determining shareholders' interest under its state corporation statute. Like Florida, Colorado based its statute largely on the Model Business Corporation Act. This case provides an excellent discussion of the applicability of discounts in appraisal proceedings. The Colorado statute at bar was not the recently updated RMBCA definition of “fair value,” but rather the older, more general version that did not explicitly address marketability/minority discounts. In rendering its decision, the court held that: 1) “the meaning of 'fair value' is a question of law, not an issue of fact to be [determined] . . . on a case-by-case basis,” 2) fair value under the state statute is not fair market value, 3) “fair

64. *Fla. CS for HB 1623, § 21 (2003) (proposed amendment to Fla. Stat. § 607.1301).*
65. *See id.*
66. 63 P.3d 353 (Colo. 2003).
67. *Id.* at 356.
68. *Id.* at 368.
69. *See id* at 360.
70. *See id* at 358–60.
value is the shareholder's proportionate interest in the value of the corporation;"73 and 4) "a marketability discount should not be applied at the shareholder level to determine the 'fair value' of the dissenter's shares."74

In Pueblo, the plaintiff brought an action to determine the fair value of a minority shareholder's interest under the state statute, challenging the value assigned after the lower court applied a minority and marketability discount in a cash-out merger.75 In holding that the meaning of fair value is a question of law, the court rejected the case-by-case approach stating that it was "too imprecise to be useful to the business community."76 This imprecision creates a problem for parties because they may not know what the trial court is, in fact, valuing.77 For example, does the trial court, seeking to determine what is "fair," award the shareholder the value of proportionate interest in the corporation or the value of his minority shares? In an arms-length transaction, willing buyer-willing seller situation, the buyer would likely seek discounts for both marketability and minority status. However, should that apply to the transaction, triggering the appraisal remedy transaction, which is involuntary as far as the minority shareholders are concerned?

The differences between the two measures is the most significant variable between the two measures (i.e., proportional or based on specific shares) in the appraisal process; however, the Colorado court said that "the [trial] court's choice of which interpretation to adopt is largely determined by" the most persuasive expert.78 Both corporations and dissenting shareholders are disadvantaged by the case-by-case approach which is subjective, unpredictable, and encourages unnecessary, costly litigation.79 The court also held that the legislature could not have intended the definition of fair value to vary from court to court.80 In holding that the Colorado legislature did not intend "fair value" to be synonymous with "fair market value" it stated that "[i]n the sixty year history of Colorado's dissenters' rights statute, the measure of compensation has changed from 'value' to 'fair value,' but the legislature has never required that dissenters to be paid 'fair market value.'"81

72. Id.
73. Id.
74. Id.
75. Id. at 356.
76. Pueblo Bancorporation, 63 P.3d at 361.
77. Id.
78. Id.
79. Id.
80. Id.
81. Pueblo Bancorporation, 63 P.3d at 361.
Since Colorado’s adoption of the MBCA standard of fair value and subsequent revisions, the definition has remained intact. In holding “that the proper interpretation of fair value is the shareholder’s proportionate ownership interest in the value of the corporation, without discounting for lack of marketability,” the court held that the object of the dissenters’ rights statute should be to compensate the minority shareholders for what they lost, which is their proportionate interest in the whole corporation as a going concern. The Court thus held that “[a] marketability discount is inconsistent with this interpretation.” Moreover, the court also determined that a discount for minority status was also inappropriate. “Such a rule would inevitably encourage corporate squeeze-outs.” The court also looked to other jurisdictions for the interpretation of fair value and found that most determined “fair value” in the appraisal context as a proportion of ownership without discounts.

The Colorado court found that, because the language at bar from the MBCA was nearly identical to that in many other statutes and because such language is based on a Model Act designed to promote uniformity among state corporation laws, the interpretation by other state courts on this issue was particularly persuasive. Citing “the leading case regarding discounts,” the court concluded that:

[T]he appraisal process is not intended to reconstruct a pro forma sale but to assume that the shareholder was willing to maintain his investment position, however slight, had the merger not occurred. Discounting individual share holdings injects into the appraisal process speculation on the various factors which may dictate the marketability of minority shareholdings. More important, to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result.

82. Id. at 368. “Fair market value is typically defined as the price at which property would change hands between a willing buyer and a willing seller when neither party is under an obligation to act.” Id. at 362 (citations omitted).
83. Id. at 363.
84. Id. at 364.
85. Pueblo Bancorporation, 63 P.3d at 364.
86. Id. (citation omitted).
87. Id. at 364–65, 367.
88. Id.
89. Id. at 365–66 (quoting Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989)).
B. Munshower v. Kolbenheyer

In 2004, the Florida Third District Court of Appeal held in a dissolution action that the fair value of shares of a corporation “rests on determining what a willing purchaser in an arm’s length transaction would offer for an interest in [a] business.” In rendering its decision, the court held that “Florida case law neither define[d] ‘fair value’ nor provide[d] criteria by which ‘fair value’ may be measured.”

To date, only one Florida appeals court has addressed the issue of marketability discounts. In 1999, in Munshower v. Kolbenheyer, the Florida Third District Court of Appeal affirmed a marketability discount, applied by the trial court, to reflect the lack of liquidity of the shares in a dissolution context. In Munshower, the plaintiff appealed a final judgment as to ascertaining the fair value of shares owned in a closely held corporation, determining the value of shares of Munshower’s stock, and imposing a lack of marketability discount of twenty percent. In rendering its decision, the court followed a New York decision, Blake v. Blake Agency, Inc., which held that “[a] discount for lack of marketability is properly factored into the equation because the shares of a closely held corporation cannot be readily sold on a public market.”

V. CONCLUSION

As amended, the Florida Business Corporation Act’s definition of “fair value” in the appraisal context departs from the latest version of the RMBCA. The legislation is flawed by under-inclusion. Of course, this does not preclude a court from determining, on a case-by-case basis, whether or not to apply a minority or marketability discount in a Florida corporation with more than ten shareholders. However, “[t]he clear majority trend is to interpret fair value as the shareholder’s proportionate ownership of a going concern and not to apply discounts at the shareholder level.” Moreover, the

90. G & G Fashion Design, Inc. v. Garcia, 870 So. 2d 870, 871 (Fla. 3d Dist. Ct. App. 2004). This case centered around a dissolution action not involving the issue of minority or marketability discounts. See id.
91. Id.
92. 732 So. 2d 385 (Fla. 3d Dist. Ct. App. 1999).
93. Id. at 385–86 (this case was decided prior to the 2003 revision of the FBCA); see Mitrione, supra note 11.
94. Munshower, 732 So. 2d at 385–86.
96. Id. at 349.
FBCA departs from the RMBCA in at least one other significant way. Unlike the RMBCA, the FBCA does not include “oppression” as a ground for judicial dissolution or other remedy. Florida is in a shrinking minority of states that do not include oppression as grounds for statutory relief. Taken together, these two departures from the RMBCA signify that the FBCA is exceptionally inhospitable, indeed antagonistic, to the interests of minority shareholders. Counsel should consider this statutory anti-minority shareholder tilt when determining whether to incorporate clients in Florida or in some other state. At the least, counsel for minority shareholders should attempt to address the concerns raised herein in a carefully drafted shareholders’ agreement.


JUDICIAL DISCIPLINE IN FLORIDA: THE COST OF MISCONDUCT

HONORABLE JAMES R. WOLF

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I. INTRODUCTION

In several recent cases involving judicial misconduct in Florida, a few of the justices of the Supreme Court of Florida have openly questioned the appropriateness of the disciplinary recommendations made by the Judicial Qualifications Commission (JQC). In fact, in several recent election misconduct cases, the supreme court has even rejected the stipulation entered into by the JQC and the accused judge, presumably because the recommended discipline was too lenient.

1. See, e.g., In re Diaz, 908 So. 2d 334, 338 (Fla. 2005) (Cantero, J., dissenting). In Diaz, Justice Cantero expressed, in a dissenting opinion joined in by Chief Justice Pariente, that the penalty recommended by the JQC and stipulated to by the judge was too harsh. Id. Justice Cantero specifically wrote that “[e]ven assuming that Judge Diaz’s conduct violated a specific canon, the recommended discipline—a $15,000 fine, a two-week suspension, a public apology, and a public reprimand—is much too harsh. I would eliminate all but a reprimand issued by opinion.” Id. at 341. In In re Kinsey, 842 So. 2d 77 (Fla. 2003), cert. denied, 540 U.S. 825 (2003), the reprimand and large fine recommended by the JQC were approved in an election misconduct case. Id. at 92. Chief Justice Anstead and Justice Pariente concurred with approving the recommended discipline, but expressed concern about the appropriateness of the penalty. See id. at 93–5 (Anstead, C.J., specially concurring and Pariente, J., concurring). Justice Lewis also concurred in the finding of a violation, but stated his belief that enormous fines, especially in election misconduct cases, are inadequate. Id. at 99 (Lewis, J., concurring in part and dissenting in part). He argued that when the conduct is sufficiently egregious to support such a fine, removal is the appropriate discipline. Id. He expressed this view again in a later election misconduct case involving the imposition of a large fine. In re Pando, 903 So. 2d 902, 904–05 (Fla. 2005) (Lewis, J., specially concurring) (citing Kinsey, 842 So. 2d at 99).

2. See, e.g., In re Renke, No. SC03-1846 (Fla. July 8, 2004) (order rejecting stipulation as to “the merits of the issues of misconduct as well as the appropriate discipline”); In re
The comments made by the justices in these several cases raise the following questions concerning the issue of discipline in judicial misconduct cases in this state: 1) what is the purpose of punishment for judicial misconduct; 2) are the penalties imposed for judicial misconduct in this state comparatively fair; 3) what factors should be considered in determining the appropriate punishment for judicial misconduct; 4) when is removal from office appropriate as punishment for judicial misconduct; 5) when should the punishment imposed for judicial misconduct be suspension and/or fine; and 6) how should judicial misconduct cases involving election violations be treated in terms of discipline? These questions are not unique to Florida, as evidenced by the following remarks made in the introduction to a recent study of state judicial discipline sanctions:

After determining that a judge has committed misconduct, the state judicial conduct commission and supreme court must “address the more difficult task of determining an appropriate sanction.” Decisions regarding sanctions have been described as “institutional and collective judgment calls,” resting on an assessment of the individual facts of each case, as measured against the code of judicial conduct and the prior precedents. Choosing the proper sanction in judicial discipline proceedings “is an art, not a science, and turns on the facts of the case at bar.”

In an effort to find answers to these questions, this article will generally examine the conduct which exposes judges to discipline in this state, the penalties available for such misconduct, and the fairness of both the JQC’s disciplinary recommendations and the penalties that have actually been imposed for such misconduct, a process that has never been undertaken in an organized fashion in Florida.

While a study of the seven canons of the Florida Code of Judicial Conduct will certainly reveal what behavior constitutes judicial misconduct warranting the imposition of discipline, such a study cannot provide an adequate framework for determining the fairness or equality of the penalties actually received by judges for their misconduct. This is true because the canons set forth only broad categories of appropriate conduct for judges; they do not speak to the issue of punishment. In fact, a particular violation of a canon

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Rodriguez, 829 So. 2d 857, 858 (Fla. 2002) (noting the supreme court’s rejection of stipulation recommending public reprimand for judicial misconduct); In re McMillan, 797 So. 2d 560, 564 (Fla. 2001).


4. See FLA. CODE JUD. CONDUCT.

5. See id.
may be very serious, while another violation of the same canon may not. In addition, a particular activity by a judge may constitute a violation of several canons.\(^6\)

In order to study the comparative fairness of the penalties imposed for judicial misconduct in this state, it is necessary to identify particular categories of behavior warranting discipline as judicial misconduct. In this process, it is beneficial for analytical purposes to identify narrow categories of conduct and to create a large number of categories to ensure that the comparison of penalties is truly for like conduct. Creating numerous categories of misconduct also allows for the grouping of specific categories that may involve violations of several different canons, but which are all clearly related.\(^7\) The utility of such a framework has been recognized by others who have engaged in similar efforts on a much grander scale.\(^8\)

According to Gray:

The question of the appropriate sanction in a judicial discipline case presents special challenges of fairness, consistency, and accountability because there is a wide range of possible judicial misconduct—from taking a bribe to accepting an award at a fund-raising dinner for a charity—and a wide range of possible sanctions—from informal adjustments and private reprimands to removal. The problem of making the sanction fit the misconduct is exacerbated in judicial discipline cases because most states have at most one or two formal cases a year, giving the disciplinary authorities little precedent to use as guidance, a “fortunate circumstance” in serious cases that nonetheless complicates the determination.\(^9\)

In an effort to provide a procedural context for this discussion, this article will begin with an overview of the process of judicial discipline in Florida—including a discussion of the penalties currently available for judicial misconduct under the Florida Constitution, the factors used to determine the appropriate penalty in judicial misconduct proceedings, and the goal of punishment in such cases. A review of the specific canons governing judicial behavior in Florida follows, with emphasis on what conduct has been determined in the past to constitute violations of each provision. The article will then compare the penalties that have been imposed for judicial misconduct in Florida using the following categories of misconduct: 1) lacking judicial temperament; 2) failing to be impartial; 3) engaging in ex parte communica-

\(^6\) See, e.g., In re LaMotte, 341 So. 2d 513, 515 (Fla. 1977).
\(^7\) See id. at 515–16.
\(^8\) See, e.g., GRAY, supra note 3, at 1.
\(^9\) Id. at 1 (quoting In re Drury, 602 N.E.2d 1000, 1010 (Ind. 1992)).
tions; 4) violating recusal and disclosure requirements; 5) improperly communicating with the press; 6) failing to follow the law while conducting judicial duties; 7) inappropriately using contempt power; 8) misusing office for personal gain; 9) misusing office for the assistance of others; 10) abusing substances; 11) improperly receiving gifts; 12) engaging in improper sexual conduct; 13) engaging in improper behavior while practicing law; 14) violating criminal laws; 15) inordinately delaying ruling; 16) exhibiting a lack of candor during official proceedings; 17) failing to file required financial disclosure documents; 18) criticizing juries and other public officials; 19) using intimidation with other judges and parties; and 20) engaging in election misconduct.

Election misconduct, in addition to making misrepresentations during the campaign, includes: a) making inappropriate promises of performance in office; b) campaign finance and reporting misconduct; c) engaging in partisan politics; d) supporting another candidate for office; and e) directly soliciting support from attorneys. The penalties imposed for conduct falling into the last two of these categories have caused the most controversy. It is important to note that these categories do not purport to address every conceivable action which might violate one or more of the canons; these categories are structured using only that conduct which has already been determined to warrant judicial discipline in Florida.

II. PROCESS OF JUDICIAL DISCIPLINE IN FLORIDA

A. Constitutional Framework

Article V, section 12(a)(1) of the Florida Constitution gives the JQC the power to “recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct . . . demonstrates a present unfitness to hold office.”10 This section of the constitution also gives the JQC the authority to “recommend the discipline of a justice or judge whose conduct . . . warrants such discipline.”11 “The supreme court may accept, reject, or modify in whole or in part the . . . recommendations of the [JQC] . . . .”12

In cases involving a formal hearing and disputed facts, the supreme court “determine[s] if [the JQC’s findings] are supported by clear and convincing evidence and reviews the recommendation of discipline to determine

11. FLA. CONST. art. V, § 12(a)(1).
12. FLA. CONST. art. V, § 12(c)(1).
whether it should be approved."13 The supreme court has stated that while it "gives the findings and recommendations of the JQC great weight, 'the ultimate power and responsibility in making a determination rests with [the] Court.'"14 In cases where the judge and the JQC "enter into a stipulation, [the] Court independently reviews the stipulated facts on which the JQC's findings are based and also determines whether the recommended discipline is appropriate."15

B. Available Penalties

The penalties available for judicial misconduct, as set forth in the Florida Constitution, are "reprimand, fine, suspension with or without pay, or lawyer discipline."16 A reprimand generally consists of the published opinion outlining the judge's misconduct, and, in most cases, also requires the judge's appearance before the Supreme Court of Florida for delivery of the reprimand during a public session.17 The supreme court has also approved the limited use of what has been designated as an admonition, generally involving a published opinion describing the misconduct, but no required appearance by the offending judge before the supreme court, presumably for cases where less serious violations of the canons have occurred.18 Lawyer discipline is available so the supreme court may determine whether the misconduct rises to the level which would require Bar disciplinary sanctions.19 The JQC may also recommend, and the supreme court may impose, reason-

13. In re Diaz, 908 So. 2d 334, 336–37 (Fla. 2005) (quoting In re Andrews, 875 So. 2d 441, 442 (Fla. 2004)).
15. In re Gooding, 905 So. 2d 121, 122 (Fla. 2005) (citing In re Luzzo, 756 So. 2d 76, 79 (Fla. 2000)).
16. FLA. CONST. art. V, § 12(a)(1). Prior to the adoption of Senate Joint Resolution 978 by the voters in 1996, article V, section 12 of the Florida Constitution only allowed the supreme court to impose two sanctions against judges: reprimand or removal. FLA. CONST. art. V, § 12(a) (amended 1996); Fla. SJR 978 (1996) at 3787 (proposed FLA. CONST. art. V, § 12(a)).
17. See, e.g., In re Frank, 753 So. 2d 1228, 1242 (Fla. 2000); In re Schwartz, 755 So. 2d 110, 113, 115 (Fla. 2000). In both Frank and Schwartz, the supreme court determined that all reprimands would require the judge's personal appearance before the court. Frank, 753 So. 2d at 1242; Schwartz, 755 So. 2d at 115. However, in In re Allawas, the supreme court determined, without any mention of the Frank case, that no personal appearance by the judge would be necessary for delivery of the public reprimand. Allawas, 906 So. 2d 1052, 1055 (Fla. 2005) (issuing public reprimand by publication).
19. See id.
able conditions related to the misconduct, like alcohol abuse counseling, stress management counseling, or anger management programs.

With the 1996 amendment allowing, among other penalties, suspension and fines, it is not totally clear whether there is now a punishment element to judicial discipline or whether the new tools are simply intended to act as a deterrent to future wrongful conduct. After adoption of the constitutional amendment providing for the additional punishments, however, the supreme court reaffirmed its position that the primary purpose of judicial disciplinary proceedings is "to gauge a judge's fitness" for office. Only once has the supreme court addressed the appropriate consideration for the imposition of fines, which will be discussed later in this article.

The 1996 amendment to article V, section 12 of the Florida Constitution also complicates the analysis of equality of judicial discipline. Do the pre-1996 cases provide a legitimate basis for comparison? It is impossible to know whether the JQC would have recommended either reprimand or removal had other options been available. Therefore, the major focus of this paper is on post-1996 cases.

C. Factors Used to Determine Appropriate Penalty

In determining the appropriate penalty in a particular case, the JQC and the Supreme Court of Florida evaluate factors other than the conduct itself. Both bodies weigh past behavior, judicial experience, and other extenuating circumstances in deciding what punishment is warranted. Patterns of behavior are also significant. A number of small incidents may be aggregated and considered in one proceeding. The JQC initially may also consider motive, remorsefulness, repentance, and rehabilitation efforts in an individ-

20. In re Wilson, 750 So. 2d 631, 633 (Fla. 1999).
22. See In re Schapiro, 845 So. 2d 170, 173, 174 (Fla. 2003).
23. FLA. CONST. art. V, § 12(a)(1).
25. See infra Part IV.T.2.; In re Rodriguez, 829 So. 2d 857, 861 (Fla. 2002).
27. See In re Allawas, 906 So. 2d 1052, 1054–55 (Fla. 2005).
28. See In re Kelly, 238 So. 2d 565, 566 (Fla. 1970).
29. In re Shea, 759 So. 2d 631, 638 (Fla. 2000) (citing Kelly, 238 So. 2d at 566).
A judge's candor or lack of candor also may affect disciplinary recommendations made by the JQC. 31

Several state supreme courts have adopted specific checklists of non-exclusive criteria to be considered in determining the appropriate discipline for judicial misconduct. 32 The Supreme Court of Washington indicated it would consider the following non-exclusive factors:

(a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent and frequency of occurrence of the acts of misconduct; (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge’s official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires. 33

Louisiana has adopted the same non-exclusive checklist. 34 Michigan has adopted a similar checklist. 35

Several other states consider aggravating and mitigating circumstances which have been adopted by applicable case law. 36 Other states have adopted criteria by rule. 37 Several compilations regarding appropriate disciplinary measures have been attempted. 38

31. See, e.g., In re Wood, 720 So. 2d 506, 508-09 (Fla. 1998); cf. In re Davey, 645 So. 2d 398, 405-06 (Fla. 1994) (holding that “only where lack of candor [before JQC] is formally charged and proven may it be used as a basis for removal or reprimand” of a judge).
32. See, e.g., In re Chaisson, 549 So. 2d 259, 266 (La. 1989); In re Brown (Christopher Brown), 626 N.W.2d 403, 405 (Mich. 2001); In re Deming, 736 P.2d 639, 659 (Wash. 1987), amended by 744 P.2d 340 (Wash. 1987).
33. Deming, 736 P.2d at 659.
34. Chaisson, 549 So. 2d at 266 (quoting Deming, 736 P.2d at 659).
35. See Christopher Brown, 626 N.W.2d at 405 (quoting In re Brown, 625 N.W.2d 744, 745 (Mich. 1999)).
38. See GRAY, supra note 3; Russell G. Donaldson, Annotation, Removal or Discipline of State Judge for Neglect of, or Failure to Perform, Judicial Duties, 87 A.L.R. 4TH 727 (1991).
D. **Goal of Judicial Discipline**

According to the Supreme Court of Florida, the primary purpose of disciplinary proceedings is not to inflict “punishment, but rather to gauge a judge's fitness to serve as an impartial judicial officer.” Courts in other states have made similar statements regarding the aim of judicial discipline.

The Supreme Court of Florida determined that the most severe penalty, removal, is only appropriate when there is no doubt that the judge “intentionally committed serious and grievous wrongs.” The court later modified the standard for removal, stating that removal is required when “the judge's conduct is fundamentally inconsistent with the responsibilities of judicial office.” Other states have adopted similar standards determining that removal is only appropriate for the most egregious conduct. One former member of the JQC purportedly described the duty of the JQC as being the protection of the public from bad judges and protection of good judges from themselves. Clearly, this was the duty of the JQC prior to 1996 when the only punishments available were reprimand and removal.

III. **CANONS OF JUDICIAL CONDUCT**

A. **Canon 1**

Florida Canon 1 defines a judge's responsibility to “[u]phold the [i]ntegrity and [i]ndependence of the [j]udiciary.” Conduct covered by Canon 1 of the Model Code includes “probity, fairness, honesty, uprightness, and soundness of character.” The courts in other jurisdictions have deter-

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39. *In re McMillan*, 797 So. 2d 560, 571 (Fla. 2001) (citing *In re Kelly*, 238 So. 2d 565, 569 (Fla. 1970)).

40. See, e.g., *In re JQC (Vaughn)*, 462 S.E.2d 728, 733 (Ga. 1995) (citing *In re Nowell*, 237 S.E.2d 246, 250 (N.C. 1977)).

41. *In re Boyd*, 308 So. 2d 13, 21 (Fla. 1975); *In re LaMotte*, 341 So. 2d 513, 517 (Fla. 1977).

42. *McMillan*, 797 So. 2d at 571 (quoting *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997)). The previous rule that required “[m]alafides, scienter or moral turpitude” has been modified. *In re JQC (Taunton)*, 357 So. 2d 172, 180 (Fla. 1978) (citation omitted).


44. This observation was attributed to Judge John S. Rawls, a longtime member and later General Counsel of the JQC.

45. *In re McMillan*, 797 So. 2d at 571 (quoting *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997)). The previous rule that required “[m]alafides, scienter or moral turpitude” has been modified. *In re JQC (Taunton)*, 357 So. 2d 172, 180 (Fla. 1978) (citation omitted).

mined that this Canon, adopted verbatim from the American Bar Association's Model Code of Judicial Conduct in both Florida and other states, is so broad that it will not alone support a charge of judicial misconduct. In Florida, Canon 1 has been held to apply to such diverse behavior such as threatening to misuse the judicial office to get out of a parking ticket, driving under the influence, mishandling client funds while practicing law, improper campaign financing, and failing to exercise judicial temperament in the courtroom.

B. Canon 2

Canon 2 addresses the requirement that judges "[a]void [i]mpropriety and the [a]ppearance of [i]mpropriety." As with Canon 1, the language in Canon 2 is necessarily broad. "The Commentary to Canon 2A acknowledges that Canon 2’s proscription against judges behaving with impropriety or the appearance of impropriety is cast in general terms. The Commentary, however, defends this language as necessary, noting it is not ‘practicable’ to list all prohibited acts." Specific sections of this Canon direct judges to promote public confidence in the judiciary; not allow business and family relationships to affect judicial duties; not improperly use the prestige of the judicial office for personal gain; and not participate in organizations that discriminate "on the basis of race, sex, religion, or national origin." Canon 2 has been interpreted as recognizing the very high standard of conduct expected of members of the judiciary.


47. See In re Larsen, 616 A.2d 529, 558 app. 1 (Pa. 1992) ("Canon 1 is primarily a statement of purpose and rule of construction, rather than a separate rule of conduct."); see also In re Jacobi, 715 N.E.2d 873, 875 (Ind. 1999) (finding the judge’s conduct not only violated Canon 1, but also Canons 2 and 3).

48. See In re Steinhardt, 663 So. 2d 616, 617–18 (Fla. 1995).

49. See In re Esquiroz, 654 So. 2d 558, 558–59 (Fla. 1995).

50. See In re Meyerson, 581 So. 2d 581, 582 (Fla. 1991).

51. See In re Rodriguez, 829 So. 2d 857, 859–60 (Fla. 2002).

52. See In re Haymans, 767 So. 2d 1173, 1174 (Fla. 2000).

53. FLA. CODE JUD. CONDUCT Canon 2.

54. See id.; see FLA. CODE JUD. CONDUCT Canon 1.


56. FLA. CODE JUD. CONDUCT Canon 2A.

57. FLA. CODE JUD. CONDUCT Canon 2B.

58. Id.

59. FLA. CODE JUD. CONDUCT Canon 2C.

60. See, e.g., In re LaMotte, 341 So. 2d 513, 517, 518 (Fla. 1977) (determining that removal was appropriate where judge used a state credit card for personal travel, and stating that
A violation of Canon 2 can be based on the same behavior that would constitute a violation of Canon 1. Such conduct includes, but is not limited to: exhibiting a lack of judicial temperament, engaging in illegal gambling, being publicly intoxicated, driving while intoxicated, and acting in a discourteous manner toward attorneys. Conduct which has been punished under Canon 2, but which did not form the basis of a charge under Canon 1, has included failing to act impartially, misusing the judicial office for personal gain, and signing official documents in a case involving a family member.

C. Canon 3

Canon 3 generally requires that judges perform their duties impartially and diligently. Specific sections of this Canon address the judge’s: 1) adjudicative responsibilities in terms of maintaining competence, requiring order and decorum, remaining dignified and courteous, performing duties without bias and prejudice, insuring a party’s right to be heard, not permitting improper ex parte communication, handling matters expeditiously, refraining from public comment which impairs the fairness of the proceeding, and not disclosing confidential matters; 2) administrative responsibilities, which include many of the same duties set forth as adjudicative responsibilities, and the additional prohibition against favoritism or nepotism in the exercise of the judge’s power of appointment; 3) disciplinary responsibilities which include reporting to the appropriate authorities substantial violations of the Code of Judicial Conduct and the Rules Regulating The Florida Bar; and 4) duty of disqualification in terms of the specific requirements of disclosure and recusal. Misuse of office for personal gain and inappropriate

[a] judge is required to conduct himself under standards which are much higher than those required of an attorney”).

61. See In re Haymans, 767 So. 2d 1173, 1174 (Fla. 2000).
62. See In re McIver, 638 So. 2d 45, 46 (Fla. 1994).
63. See In re Norris, 581 So. 2d 578, 578–79 (Fla. 1991).
64. See In re Esquiroz, 654 So. 2d 558, 558–59 (Fla. 1995).
65. See In re Steinhardt, 663 So. 2d 616, 617–18 (Fla. 1995).
66. See In re Gridley, 417 So. 2d 950, 954–55 (Fla. 1982).
67. See In re Richardson, 760 So. 2d 932, 932–33 (Fla. 2000).
68. See In re Brown (Robert Brown), 748 So. 2d 960, 961–62 (Fla. 1999).
69. See FLA. CODE JUD. CONDUCT Canon 3.
70. Fla. Code Jud. Conduct Canon 3B.
71. Fla. Code Jud. Conduct Canon 3C.
72. Fla. Code Jud. Conduct Canon 3D.
73. FLA. CODE JUD. CONDUCT Canon 3E.
74. See In re Steinhardt, 663 So. 2d 616, 617–18 (Fla. 1995).
courtroom demeanor\textsuperscript{75} constitute violations of Canon 3, as well as Canons 1 and 2.\textsuperscript{76} Conduct which has been determined to violate the specific language of Canon 3 includes failing to disclose the judge’s relationship with one of the attorneys litigating a case over which the judge was presiding,\textsuperscript{77} conducting ex parte communications,\textsuperscript{78} failing to properly follow the law,\textsuperscript{79} expressing inappropriate bias,\textsuperscript{80} and inappropriately communicating with the press.\textsuperscript{81}

D. Canon 4

Canon 4 encourages judges to engage in “quasi-judicial” activities in order to improve the legal system and the administration of justice.\textsuperscript{82} Under this Canon, “[a] judge is encouraged to speak, write, lecture, [and] teach... the law.”\textsuperscript{83} However, this Canon also states that judges engaging in these activities must not “cast reasonable doubt on [their] capacity to act impartially,” they must not “demean the judicial office,” and they may not allow such activities to “interfere with the proper performance of [their] judicial duties.”\textsuperscript{84} This Canon also describes the types of organizations in which a judge may be an officer or member.\textsuperscript{85} In addition, it contains a specific prohibition against personally participating in fund-raising or solicitation of funds on behalf of such an organization.\textsuperscript{86}

The aspirational goals set forth in Canon 4, as restricted by the prohibitions set forth in Canon 5, strike the appropriate balance between two competing interests.\textsuperscript{87} First, as the commentary to the Model Code states,
"[c]omplete separation . . . from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives." However, as the annotations to the Model Code make clear, to maintain public confidence in the judiciary, a judge must avoid all activity that either affects or appears to affect the ability of the judge to do the job fairly and impartially. Therefore, Florida's Judicial Ethics Advisory Committee has recognized that some extra-judicial activities may need to be completely avoided when one takes the bench.

Canon 4 has rarely been the basis for judicial discipline in Florida. However, in one case a judge was found to have violated Canons 1, 2, 3, and 4 by writing letters to a newspaper which were unduly critical of the criminal justice system. The Supreme Court of Florida determined that the letters undermined public confidence in the court system, and therefore imposed a public reprimand for the judge's conduct. In another case, the Supreme Court of Florida found that a judge's statements made to a newspaper, reflecting the judge's endorsement of racial stereotypes, warranted the judge's removal as Chief Judge of a circuit. Canon 4 may provide the basis for warnings by the JQC to judges concerning their membership in inappropriate organizations and their allowance of the use of their names in connection with fund-raising on behalf of an organization. These warnings have generally been sufficient to correct the offending behavior, thus removing the need for formal action.

89. Id. (citing JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT & ETHICS § 10.02 (3d ed. 2000)).
91. See In re Miller, 644 So. 2d 75, 76-78 (Fla. 1994).
92. Id. at 78.
94. See FLA. CODE JUD. CONDUCT Canon 4D(2)(a)-(d).
95. Informal actions taken by the JQC prior to a determination of probable cause are confidential; therefore, no citation to authority is available in connection with these actions of the JQC. FLA. CONST. art. V, § 12(a)(4). "Until formal charges against a justice or judge are filed by the investigative panel with the clerk of the [S]upreme [C]ourt of Florida all proceedings by or before the commission shall be confidential . . . ." Id.
E. Canon 5

Canon 5 defines the scope of a judge's appropriate participation in non-judicial activities. Like Canon 4, Canon 5 has been amended since its original promulgation to encourage judges to participate in ethically permissible and beneficial community activities. However, like Canon 4, Canon 5 states that these activities must not: "(1) cast reasonable doubt on the judge's capacity to act impartially...; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties." Specific sections of this Canon address the extent to which a judge may participate in governmental, civic, or charitable activities; the limitations on a judge's financial activities; the limitations on the acceptance of gifts by a judge and his family; the limitations on a judge's ability to serve as a fiduciary, arbitrator, or mediator; and the outright prohibition against a judge's practice of law. The specific provisions of Canon 5 are violated when a judge allows his name to be used in support of a charity golf tournament; becomes intoxicated and engages in inappropriate behavior at a judicial conference; or accepts baseball tickets from a law firm whose lawyers previously appeared before the judge. A judge's failure to follow the general prohibitions set forth in Canon 5 has also been found to violate Canons 1 and 2. A recent example of this kind of violation of Canon 5 occurred in a case involving a judge's violation of campaign finance and reporting laws. A judge's pattern of intimidating behavior has also been found to violate Canons 1, 2, 3, and 5. Similarly, a judge's intercession into a pending custody dispute violated the same Canons. Finally, a judge's making of racially insensitive remarks has been found to violate Canons 2, 4, and 5.

98. Fla. Code Jud. Conduct Canon 5A.
100. In re Byrd, 460 So. 2d 377, 377 (Fla. 1984).
101. In re Cope, 848 So. 2d 301, 302–03 (Fla. 2003).
102. In re Luzzo, 756 So. 2d 76, 77–78 (Fla. 2000).
103. See In re Rodriguez, 829 So. 2d 857, 858–59 (Fla. 2002).
104. Id. at 858–60.
106. In re Holloway, 832 So. 2d 716, 717, 729 (Fla. 2002).
F. Canon 6

Canon 6 regulates the financial interests of a judge. The first section of this Canon sets forth the limited circumstances under which a judge may receive compensation in addition to his or her judicial salary. This section also addresses the amount which may be received by the judge for such extra-judicial activity. The second and third sections of this Canon define the terms and conditions of a judge's required public and confidential filings concerning his or her income assets and gifts. Few cases have involved violations of Canon 6. However, the Supreme Court of Florida has determined that a judge's failure to make full disclosure within a required filing warranted a public reprimand. The Supreme Court of Florida has also held that filing an incomplete or misleading campaign finance report violates Canon 6. Yet, campaign finance improprieties alone will not constitute a violation of this Canon in the absence of evidence that any public filing was required.

G. Canon 7

Canon 7 regulates the political activities of judges. It applies to judges and candidates for judicial positions. The first section of this Canon prohibits a judge from engaging in certain political activities, including personally raising money for, or making speeches on behalf of a candidate, or endorsing any candidate. This section also specifically prohibits partisan political activities. It also regulates campaigns for judicial office by expressly prohibiting pledges or promises of specific conduct while in office, commitments concerning issues that will likely come before the judge once in office, and knowingly misrepresenting another candidate or the op-

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108. FLA. CODE JUD. CONDUCT Canon 6.
109. FLA. CODE JUD. CONDUCT Canon 6A.
110. Id.
111. FLA. CODE JUD. CONDUCT Canon 6B–C.
114. In re Gooding, 905 So. 2d 121, 122–23 (Fla. 2005).
115. FLA. CODE JUD. CONDUCT Canon 7.
116. FLA. CODE JUD. CONDUCT Canon 7A.
117. FLA. CODE JUD. CONDUCT Canon 7A(1)(b), (c), (e).
118. See FLA. CODE JUD. CONDUCT Canon 7A(1)(a)-(e).
posing candidate's qualifications for judicial office. The remaining sections of this Canon place additional limitations on a judge's fund-raising and campaigning in competitive and merit retention elections.

Canon 7 and similar canons adopted in other states have generated much debate at both the state and federal levels. The tension between an individual judge's right to free speech under the First Amendment of the United States Constitution on the one hand, and the state's compelling interest in regulating judicial elections on the other, has spawned several significant court decisions. Foremost among these decisions is the United States Supreme Court's opinion in *Republican Party of Minnesota v. White,* wherein the Supreme Court considered the constitutionality of a canon in the *Minnesota Code of Judicial Conduct* forbidding a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues." The Supreme Court held that "[t]he Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment." Soon thereafter the Supreme Court of Florida considered in *In re Kinsey* whether the decision in *White* precluded enforcement of Canon 7 of the *Florida Code of Judicial Conduct.*

In *Kinsey,* the Supreme Court of Florida held that Canon 7's prohibition against a judicial candidate making statements during an election which appear to commit the candidate to a particular position in a case or on an issue, did not violate the candidate's right to free speech under the First Amendment. In reaching this result, the Supreme Court of Florida specifically determined that the judicial candidate's statement of intent in her campaign literature that she would "help law enforcement by putting criminals where they belong...behind bars" could not be considered protected speech under the First Amendment. The Supreme Court of Florida in *Kinsey* distinguished the United States Supreme Court's *White* decision as follows:

119. FLA. CODE JUD. CONDUCT Canon 7A(3)(d)(i)-(ii). This Canon was recently amended by Court Order. In re Amendment to Code of Judicial Conduct, No. SC05-281 (Fla. Jan. 5, 2006).
120. See FLA. CODE JUD. CONDUCT Canon 7B-F.
121. 536 U.S. 765 (2002).
122. *id.* at 768 (quoting MINN. CODE OF JUD. CONDUCT Canon 5A(3)(d)(i) (2000)).
123. *id.* at 788.
125. *id.* at 85, 88-89.
126. See *id.* at 87.
127. *id.* at 88-89 (emphasis added).
The [United States Supreme] Court... emphasized that the "announce clause" [at issue in White] was separate and apart from the "pledges or promises clause" [in the Minnesota Code], since Minnesota adopted a separate canon which prohibited a candidate from promising or pledging to act in a certain manner while on the bench. Based on these observations, the Court found that Minnesota did not fulfill its burden in showing that the "announce clause" was narrowly tailored, and hence found that the rule violated the First Amendment.

In contrast to White, Florida does not have an "announce clause" but instead adopted a more narrow canon, which provides as follows:

A candidate for judicial office . . . shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or]

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . .

Two other recent federal cases have addressed provisions similar to those found in Canon 7. On remand in the White case, the Eighth Circuit considered the constitutionality of judicial canon prohibitions against personal fund-raising and taking part in partisan politics; the court found that both prohibitions violated the First Amendment. In Weaver v. Bonner, a case decided prior to the White remand opinion, the Eleventh Circuit held that the provisions of the Georgia Code of Judicial Conduct that prohibited judicial candidates from personally soliciting campaign contributions and regulated campaign speech violated the First Amendment because they were not narrowly tailored to prevent only false statements knowingly or recklessly made.

The Supreme Court of Florida addressed some of these concerns in several cases decided after Bonner but before the remand decision in White. In

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128. Id. at 86–87 (some alterations in original)(quoting FLA. CODE JUD. CONDUCT, Canon 7A(3)(d)(i)-(ii)). Florida previously had an announce clause, but it was determined to violate the First Amendment. ACLU v. The Fla. Bar, 744 F. Supp. 1094, 1099–1100 (N.D. Fla. 1990).

129. Republican Party of Minn. v. White, 416 F.3d 738, 766 (8th Cir. 2005).

130. 309 F.3d 1312 (11th Cir. 2002).

131. Id. at 1315, 1319–20, 1322–23, 1325.
In re Angel, the Supreme Court of Florida accepted a stipulation finding that a judge's participation in partisan politics during his judicial campaign violated Canon 7 and recommended a public reprimand as the appropriate punishment. In re Pando, the Supreme Court of Florida also accepted stipulations finding violations of Canon 7 based on campaign finance and reporting laws improprieties. The Supreme Court of Florida has also imposed discipline for a judge's campaign misrepresentations and inappropriate promises of performance, as well as a judge's active support for another candidate for office. The controversy that has arisen concerning the appropriate punishment for a violation of Canon 7 will be discussed later in this article.

IV. CATEGORIES OF MISCONDUCT

A. Lacking Judicial Temperament

Canon 3B(3) of the Florida Code of Judicial Conduct states, "[a] judge shall require order and decorum in proceedings before the judge." Canon 3B(4) states, "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . ." The portion of the Annotated Model Code of Judicial Conduct on decorum and intemperate behavior covers twenty-two pages. Some of the behavior described as violating these sections are: 1) "[j]udges' [l]ack of [d]ecorum;" 2) lack of dignity; 3) "[i]ntemperate [s]peech to or
about lawyers, litigants, and court employees;” 4 4 4) “disparaging lawyers;” 4 5) “disparaging litigants and witnesses;” 4 6) making disparaging or critical remarks to judges or other court employees; 4 7) using racial slurs or profanity; 4 8) “yelling during a court proceeding;” 4 9) using inappropriate humor or sarcasm; and 10) interrupting people who appear in the courtroom. While these behaviors are given many names, they essentially involve a judge being discourteous and not treating people the way he or she would want to be treated.

Complaints of discourteous conduct constitute a large percentage of the filings received by the JQC. A number of cases are resolved by the JQC by counseling the judge prior to formal charges being filed. Nevertheless, many

143. See ANN. MODEL CODE OF JUD. CONDUCT Canon 3B(4) annot. (2004). The Florida example given as violating this principle is In re Shea, 759 So. 2d 631 (Fla. 2000). ANN. MODEL CODE OF JUD. CONDUCT Canon 3B(4) (2004). In Shea, the judge “engaged in a pattern of conduct in which he acted with hostility towards attorneys, court personnel and fellow judges.” Shea, 759 So. 2d at 638.

144. ANN. MODEL CODE OF JUD. CONDUCT Canon 3B(4) annot. (2004). The Florida example given for this type of behavior is In re Schwartz, 755 So. 2d 110, 111–12 (Fla. 2000), in which the “appellate judge verbally abused law students who were making initial appearances before the court and made discourteous remarks about [a] professor who was supervising students.” ANN. MODEL CODE OF JUD. CONDUCT Canon 3B(4) (2004) (citing Schwartz, 755 So. 2d at 111–12).


146. ANN. MODEL CODE OF JUD. CONDUCT Canon 3B(4) annot. (2004). The Florida example given for this type of behavior is In re Golden, 645 So. 2d 970, 971 (Fla. 1994), in which the judge told a defendant to “[q]uit having so many babies so you can afford to pay your fines.” ANN. MODEL CODE OF JUD. CONDUCT Canon 3B(4) (2004) (quoting Golden, 645 So. 2d at 971).

147. ANN. MODEL CODE OF JUD. CONDUCT Canon 3B(4) annot. (2004). The Florida example given for this type of behavior is In re Graziano, 696 So. 2d 744, 748 (Fla. 1997), in which a judge was disciplined for “reduc[ing] a court reporter to tears by approaching her in the midst of a trial in another judge’s courtroom, demanding” her to move her car from the judicial assistant’s parking spot. ANN. MODEL CODE OF JUD. CONDUCT Canon 3B(4) cmt. (2004) (citing Graziano, 696 So. 2d at 748).


150. Id.

151. Id.

152. See id.
cases involve the filing of formal charges after informal procedures have been utilized. One case presently pending for trial by the hearing panel of the JQC involves allegations of inappropriate comments to court personnel including chastising a deputy sheriff for being an unwed mother. Occasionally professional counseling is imposed as part of a reprimand. Even where a pattern of rudeness is established, reprimand appears to be the preferred method of discipline. Only when the discourteous conduct has been coupled with other misconduct has removal from office been utilized.

In other states, intemperate judges have received similar punishments. First offenses for less serious cases of discourtesy have received public censures (which appear to be similar to reprimands in Florida), reprimands or short suspensions. Patterns of discourtesy, numerous outbursts of temper, repeated behavior after admonition, extremely offensive remarks,
and rudeness, along with other serious misconduct, have resulted in longer suspensions and removal.

B. Failing to be Impartial

Canon 3 requires that a judge perform the duties of office impartially. The Supreme Court of Florida has recognized the importance of this precept for many years. In a recent disciplinary case, the Supreme Court of Florida stated, "no other principle is more essential to the fair administration of justice than the impartiality of the presiding judge." Although the Supreme Court of Michigan has noted that discourteous behavior may lead parties to question the impartiality of proceedings, discourtesy generally has been treated as a separate area of judicial misconduct.

In a case involving lack of impartiality, the Supreme Court of Florida held that it was inappropriate for a judge to interject himself on behalf of a criminal defendant, and that this conduct justified a reprimand against the offending judge, even though there was evidence of his good intentions. In another proceeding, due to the judge's commendable service, lack of prior misconduct, demonstrated remorsefulness, and cooperative attitude, a public reprimand was adequate for signing legal documents in a case involving his former daughter-in-law. Another judge, however, who was facing unrelated JQC charges, intentionally arranged to have himself handle a first appearance hearing of a defendant that the judge helped apprehend for Driving While Intoxicated. The judge set an abnormally high bond, and the supreme court determined that such behavior, along with the other charges, justified his removal.


166. FLA. CODE JUD. CONDUCT Canon 3B(5).

167. *See, e.g., In re JQC (Taunton)*, 357 So. 2d 172, 177–79 (Fla. 1978).

168. *In re McMillan*, 797 So. 2d 560, 571 (Fla. 2001).


173. *McMillan*, 797 So. 2d at 569–70.

174. *See id.* at 570, 573.
C. Engaging in Ex Parte Communication

Misconduct closely related to impartiality includes inappropriate ex parte communication. The judicial canons state, "[a] judge shall not initiate, permit, or consider ex parte communications . . . outside the presence of the parties concerning a pending or impending proceeding." The Supreme Court of Florida has commented, "there is nothing 'more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.'" Thus, the supreme court authorized the removal of two judges who committed ex parte communication violations along with other misconduct. While the supreme court deems ex parte communication to be serious, the court accepted stipulations providing for a public reprimand. However, these cases occurred prior to 1996. Despite reasonable justification for the ex parte communication, the supreme court publicly reprimanded the judges involved. In one, the court determined a reprimand was appropriate in spite of the judge's overriding "concern for [the] welfare of the children involved." In the other, discipline was approved in spite of the fact that there was no immoral or illegal intent. Yet, in another case, the court considered the prior unblemished record of the judge involved and reprimanded him.

In 2002, the court admonished rather than reprimanded a judge when, without the knowledge or consent of the parties, the judge consulted several computer experts to better understand the case. The Supreme Court of

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175. FLA. CODE JUD. CONDUCT Canon 3B(7).
176. Id.
177. State v. Riechmann, 777 So. 2d 342, 351 (Fla. 2000) (citation omitted).
178. See In re Damron, 487 So. 2d 1, 7 (Fla. 1986) (holding that ex parte communication, along with solicitation of favors for judicial action, discouraging criminal defendants from exercising constitutional rights, threatening parties and individuals, and giving inaccurate testimony to the JQC warranted removal); In re Leon, 440 So. 2d 1267, 1268-70 (Fla. 1983) (holding that ex parte communication, along with a number of other violations, warranted removal).
179. In re Sturgis, 529 So. 2d 281, 281, 283 app. (Fla. 1988); In re Clayton, 504 So. 2d 394, 395 (Fla. 1987).
180. Sturgis, 529 So. 2d at 281; Clayton, 504 So. 2d at 394.
181. Sturgis, 529 So. 2d at 281, 283; Clayton, 504 So. 2d at 395.
182. Sturgis, 529 So. 2d at 281, 283 app.
183. See Clayton, 504 So. 2d at 395.
184. In re Dekle, 308 So. 2d 5, 12 (Fla. 1975). The rule established in Dekle was invalidated by the amendment to article V, section 12, subsection f of the Florida Constitution in 1976. In re JQC (Taunton), 357 So. 2d 172, 180 (Fla. 1978).
185. In re Baker, 813 So. 2d 36, 37 (Fla. 2002).
Florida removed another judge after a JQC trial, finding the judge guilty of ex parte communication and abusive behavior, among other things. 186

Across the country, the discipline for engaging in ex parte communication has varied widely, ranging from reprimand to removal. 187 Other factors, including motive, past judicial record, and remorse may influence the penalty which is imposed. 188

D. Violating Recusal and Disclosure Requirements

Canon 3E of the Florida Code of Judicial Conduct sets forth the guidelines governing disqualification. 189 It states, “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” 190 The Canon then lists specific circumstances when a judge must be recused. 191 Further, the Supreme Court of Florida has determined a duty to disclose exists even in certain circumstances when recusal is not required. 192

Specifically, because a judge “should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification,” it appears that the standard for disclosure is lower. In other words, a judge should disclose information in circumstances even where disqualification may not be required. 193

Failure to properly disclose an attorney’s representation of his daughter in a divorce proceeding resulted in a public reprimand for one judge. 194 Other judges were publicly reprimanded for acting in cases where recusal

186. In re McAllister, 646 So. 2d 173, 178 (Fla. 1994).
187. See Phoebe Carter, Annotation, Disciplinary Action Against Judge for Engaging in Ex Parte Communication with Attorney, Party, or Witness, 82 A.L.R. 4TH 567, 572–73 (1990). See also Miss. Comm’n on Judicial Performance v. Bowen, 662 So. 2d 551, 551 (Miss. 1995) (holding that public reprimand and $1450 fine was warranted for dismissing traffic tickets after ex parte communications with defendants); In re Schenck, 870 P.2d 185, 210 (Or. 1994) (holding that forty-five-day suspension without pay was warranted for ex parte communications with district attorney and public comments regarding pending case); In re Rasmussen, 734 P.2d 988, 989 (Cal. 1987) (holding that public censure was warranted where judge communicated with a defendant outside the presence of his counsel).
188. See, e.g., Clayton, 504 So. 2d at 395; Dekle, 308 So. 2d at 12.
189. See FLA. CODE JUD. CONDUCT Canon 3E.
190. Id.
191. See id.
192. In re Frank, 753 So. 2d 1228, 1239 (Fla. 2000).
193. Id. (quoting FLA. CODE JUD. CONDUCT Canon 3E(1) cmt.).
194. Id. at 1230.
was required.\textsuperscript{195} Continuing to preside over cases when recusal is required has resulted in discipline in other states, including reprimands.\textsuperscript{196}

E. Improperly Communicating with the Press

Publicity violations generally involve contact with a nonparty member of the media regarding pending litigation. Canon 3B(9) in pertinent part states:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness . . . . This Section does not prohibit judges from making public statements in the course of their official duties or from explaining . . . the procedures of the court.\textsuperscript{197}

Cases involving inappropriate contact with reporters have generally resulted in public reprimands. In \textit{In re Andrews}, the Supreme Court of Florida publicly reprimanded a judge who made statements to a reporter regarding a party in a pending proceeding which evidenced bias against that party.\textsuperscript{198} The same behavior warranted a public reprimand in a pre-1996 case.\textsuperscript{199} However, a judge's general comments regarding opposition to capital punishment did not violate the \textit{Florida Code of Judicial Conduct} where the judge indicated he would follow the law.\textsuperscript{200}

Several states have suspended or removed judges based on the nature of the remarks made by the judge or when the improper comment is tied to other misconduct.\textsuperscript{201}

\textsuperscript{195} In re Brown (Robert Brown), 748 So. 2d 960, 961–62 (Fla. 1999); In re Wood, 720 So. 2d 506, 509 (Fla. 1998).

\textsuperscript{196} See In re Johnson (Shirley L. Johnson), 532 S.E.2d 883, 884–85 (S.C. 2000).

\textsuperscript{197} FLA. CODE JUD. CONDUCT Canon 3B(9). See also Fla. Jud. Ethics Advisory Comm. Op. 00-30 (2000) (stating that a trial judge may not comment on cases pending appeal).

\textsuperscript{198} In re Andrews, 875 So. 2d 441, 441–42 (Fla. 2004).

\textsuperscript{199} In re Hayes, 541 So. 2d 105, 105–06 (Fla. 1989).

\textsuperscript{200} In re Gridley, 417 So. 2d 950, 954–55 (Fla. 1982).

\textsuperscript{201} See, e.g., In re Sheffield, 465 So. 2d 350, 353, 359 (Ala. 1984) (finding improper comment and failure to recuse self warranted two-month suspension); Office of Disciplinary Counsel v. Ferreri, 710 N.E.2d 1107, 1109, 1111 (Ohio 1999) (finding improper comments warranted suspension); In re Schenck, 870 P.2d 185, 188–89, 207, 210 (Or. 1994) (finding improper comments to newspaper about pending cases with three other code violations warranted forty-five-day suspension).
F. Failing to Follow the Law While Conducting Judicial Duties

Canon 3B(2) provides, "[a] judge shall be faithful to the law and maintain professional competence in it."\(^{202}\)

The vast majority of judicial rulings that are not "faithful" to the law are simply legal errors, which can be corrected on appeal, and are not grounds for judicial discipline. To discipline a judge for mere legal error would threaten judicial independence because judges might consciously or unconsciously render decisions based on how they think the disciplinary body would view the decision instead of what they think would be the right decision in a particular case.\(^{203}\)

However, conscious refusal to follow a clear legal duty, or commission of a gross legal error resulting in a significant loss of a party's rights, may result in judicial discipline.\(^{204}\) For example, a judge who repeatedly imposed unauthorized sentences, along with other misconduct, was removed from office.\(^{205}\) A judge's refusal to vacate an order, which both parties agreed was entered by mistake, warrants reprimand where the judge had otherwise rendered conscientious service to the judiciary.\(^{206}\) Readily apparent violations of constitutional rights have subjected judges to judicial discipline.\(^{207}\) In one circumstance, the court imposed a public reprimand where a judge was convicting defendants without trial when they failed to appear.\(^{208}\) Additionally, the Supreme Court of Florida determined that a judge who held a hearing in a child custody case without giving pre-hearing notice to the mother deserved a public reprimand.\(^{209}\) Similar cases in other jurisdictions involving failure to follow the law have resulted in censures as well as suspensions of varying length.\(^{210}\)

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202. FLA. CODE JUD. CONDUCT Canon 3B(2).
204. See In re Graham, 620 So. 2d 1273 (Fla. 1993).
205. Id. at 1274-75.
206. In re Vitale, 630 So. 2d 1065, 1066 (Fla. 1994).
207. See In re Miller, 644 So. 2d 75, 77, 79 (Fla. 1994); In re Colby, 629 So. 2d 120, 120 (Fla. 1993).
208. Colby, 629 So. 2d at 120, 121.
209. Miller, 644 So. 2d at 77, 79.
210. See, e.g., In re Spencer, 798 N.E.2d 175, 183, 185 (Ind. 2003) (holding that judge's misconduct warranted a thirty-day suspension); In re Brown (Helen Brown), 662 N.W.2d 733, 735-37 (Mich. 2003) (holding that public censure was an appropriate sanction for a judge); In re Landry, 789 So. 2d 1271, 1280 (La. 2001) (holding that justice of the peace's misconduct warranted a six-month suspension plus two years probation).
G. Inappropriately Using Contempt Power

The JQC has been particularly sensitive to a judge’s failure to follow the law in the area of contempt. The Supreme Court of Florida has said of the contempt power of the court:

[A]lthough the power of contempt is an extremely important power for the judiciary, it is also a very awesome power and is one that should never be abused. Further, because trial judges exercise their power of criminal contempt to punish, it is extremely important that they protect an offender’s due process rights, particularly when the punishment results in the imprisonment of the offender. As such, it is critical that the exercise of this contempt power never be used by a judge in a fit of anger, in an arbitrary manner, or for the judge’s own sense of justice.\(^{211}\)

The court went on to further say that:

Judges must necessarily have a great deal of independence in executing [their] powers, but such authority should never be autocratic or abusive. We judges must always be mindful that it is our responsibility to serve the public interest by promoting justice and to avoid, in official conduct, any impropriety or appearance of impropriety. We must administer our offices with due regard to the system of law itself . . . .\(^{212}\)

Thus, when a judge fails to follow the law concerning the use of the contempt power, the court has upheld imposition of public reprimands.\(^{213}\) In addition, when the evidence demonstrated a pattern of abuse in this area, the court has removed the offending judge.\(^{214}\) Other jurisdictions have handled contempt in a similar manner.\(^{215}\)

H. Misusing Office for Personal Gain

Canon 2B of the Code of Judicial Conduct states that “[a] judge shall not lend the prestige of judicial office to advance the private interests of the

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211. *In re Perry*, 641 So. 2d 366, 368 (Fla. 1994).
212. *Id.* at 368–69 (alteration in original) (quoting *In re Turner* (Fred Turner), 421 So. 2d 1077, 1081 (Fla. 1982)).
213. *Id.* at 361 (citing *In re Eastmoore*, 504 So. 2d 756, 758 (Fla. 1987); *Fred Turner*, 421 So. 2d at 1081; *In re Crowell*, 379 So. 2d 107, 110 (Fla. 1979)).
214. *Crowell*, 379 So. 2d at 110.
judge or others . . . .”216 According to the Supreme Court of Florida, “[u]sing the prestige of judicial office to advance one’s own interest undermines the very prestige and respect that is being traded upon and, inevitably, erodes public confidence in the judiciary.”217 The Court further asserts that “[s]uch acts cannot be tolerated.”218 Thus, utilizing the judicial position, by summoning a reporter to chambers to resolve a personal matter, resulted in a public reprimand.219 Reprimand was also determined to be appropriate where a judge attempted to get special treatment during his arrest for soliciting a prostitute.220 Another judge was reprimanded for threatening to withdraw a donation he regularly provided to the Police Officers Benevolent Fund because of a parking ticket the judge had received.221

In two cases, the misuse of office coupled with other misbehavior resulted in removal.222 In In re Damron, the Supreme Court of Florida held that the use of judicial office for personal political gain, the threatening of parties and other individuals, and the participation in ex parte communications warrants removal from office.223 In another case, a judge’s misuse of office coupled with elections violations resulted in removal.224

In several cases, other states have determined that utilizing the judicial position for personal financial gain justified a reprimand.225 A judge, who was involved in an accident and tried to direct how the investigation proceeded, was suspended for fifteen days without pay in light of his past indiscretions.226 In another case, a judge was removed for a pattern of misusing the office for personal gain.227

I. Misusing Office for Benefit of Others

Closely related behavior is misusing the judicial office for the benefit of others, which is conduct that is also expressly prohibited by Canon 2B.228

216. FLA. CODE JUD. CONDUCT Canon 2B.
217. In re Richardson, 760 So. 2d 932, 933 (Fla. 2000).
218. Id. (citing In re Fogan, 646 So. 2d 191, 194 (Fla. 1994)).
220. Richardson, 760 So. 2d at 932–33.
221. In re Steinhardt, 663 So. 2d 616, 617–18 (Fla. 1995).
222. In re McMillan, 797 So. 2d 560, 573 (Fla. 2001); In re Damron, 487 So. 2d 1, 7 (Fla. 1986).
223. Damron, 487 So. 2d at 7.
224. McMillan, 797 So. 2d at 562–64, 573.
228. FLA. CODE JUD. CONDUCT Canon 2B.
Canon 2B also states it is inappropriate for a judge to "testify voluntarily as a character witness." 229

In In re Holloway, the judge was suspended for thirty days for, among other things, approaching and chastising the presiding judge in a friend's child custody case. 230 Additionally, the judge exerted pressure on a fellow judge to take a case out of turn so her brother, who was a lawyer on the case, might make an appointment. 231 Another judge's involvement in hiring, and subsequent efforts to obtain a raise and promotion for a close personal friend and business associate, along with other misconduct warranted removal. 232 A judge who inappropriately interceded to release a son's friend after the friend was arrested for driving while intoxicated, entered into a stipulation with the JQC for a public reprimand. 233

In other states, isolated cases of inappropriate involvement in another judge's proceedings appear to have warranted suspension or reprimand. 234 In a case that appears similar to Holloway, a judge tried to help a lawyer-friend in a dissolution proceeding. 235 The Supreme Court of Iowa determined that a sixty-day suspension was appropriate. 236 Interceding with law enforcement on behalf of friends' children regarding pending cases resulted in a public censure. 237 A judge's entry of a protective order in a case involving his father, aunt, and first cousin resulted in a fifteen-day suspension. 238 A number of other cases involving fixing traffic tickets have resulted in reprimands or censure. 239

In a number of cases, the Supreme Court of Florida has held that providing a personal character reference letter for a personal friend who is to be

229. Id.
230. 832 So. 2d 716, 717–18, 729 (Fla. 2002).
231. Id. at 721.
232. In re Graziano, 696 So. 2d 744, 747, 753 (Fla. 1997).
233. In re Maloney, 916 So. 2d 786, 786–87, 789 (Fla. 2005).
234. See, e.g., In re Eads, 362 N.W.2d 541, 549–51 (Iowa 1985).
235. Id. at 543, 547, 549–51.
236. Id. at 551.
239. See, e.g., Miss. Comm'n on Judicial Performance v. Warren, 791 So. 2d 194, 196, 199 (Miss. 2001) (holding that a public reprimand, as well as payment of a fine and court costs, was an appropriate sanction for the judge's misconduct); In re Snow, 674 A.2d 573, 574–75, 579–80 (N.H. 1996) (holding that public censure, six-month suspension, completion of judicial ethics course, and payment of court costs as sanctions for judicial misconduct were all supported by the violations).
sentenced on criminal charges warrants a public reprimand. The law in other states appears to be consistent with the approach taken by Florida.

J. Abusing Substances

Many cases involving substance abuse are dealt with informally prior to the case becoming public. The JQC will intervene and require the judge to attend treatment programs. In some of these cases, inappropriate behavior while intoxicated will require that formal charges be filed. In some cases, treatment is required after charges have been filed. In one case, an intoxicated judge who witnessed a petty theft by an acquaintance, and later covered it up, received mandated alcohol counseling as part of her discipline. Another judge who went on a three-day drinking binge, during which he discharged a firearm, received a public reprimand. A public reprimand was determined to be appropriate for being intoxicated and making inappropriate sexual advances at an out-of-state judicial conference. Absent other extensive misconduct, treatment and reprimand appear to be the favored discipline.

K. Improper Receiving of Gifts

Canon 5D(5)(h) of the Florida Code of Judicial Conduct prohibits a judge from accepting a gift of any value from a "person who has come or is likely to come" before the judge. The commentary to Canon 5D(5)(h) specifically provides that this Canon "prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their firms if they have come or are

240. E.g., In re Ward, 654 So. 2d 549, 550–52 (Fla. 1995); In re Fogan, 646 So. 2d 191, 191, 194 (Fla. 1994); In re Stafford, 643 So. 2d 1067, 1068–69 (Fla. 1994).

241. See, e.g., In re Carton, 658 A.2d 1211, 1211, 1215–17 (N.J. 1995) (holding that giving legal advice to a defendant in a criminal matter, and allowing a fax to be sent to another judge about a matter pending before him, warranted a public reprimand); In re Decuir, 654 So. 2d 687, 691–93 (La. 1995) (holding that writing a letter to a judge regarding sentencing of a friend, among several other ethical violations, warranted a public censure).


243. See id. at 579.

244. See, e.g., In re Cope, 848 So. 2d 301, 302–03, 305 (Fla. 2003); Amended Notice of Formal Changes, In re a Judge (Scott Kenney), No. 98-198, (Fla. July 12, 2001), dismissed by In re Kenney, 828 So. 2d 386 (Fla. 2002); In re Wilson, 750 So. 2d 631, 632–33 (Fla. 1999).

245. Kenney, 828 So. 2d at 386; Wilson, 750 So. 2d at 632–33.

246. Wilson, 750 So. 2d at 632–33.

247. Norris, 581 So. 2d at 578, 580.

248. Cope, 848 So. 2d at 302, 305.

249. FLA. CODE JUD. CONDUCT Canon 5D(5)(h).
likely to come before the judge."250 One judge, with a spotless record and high grades in bar polls, stipulated to receiving a reprimand for accepting tickets to Florida Marlins games from two friends in a law firm whose firm had two cases in front of him at the time he accepted the tickets.251 There do not appear to be any other reported disciplinary cases involving acceptance of gifts. The acceptance of gifts from parties appearing, or likely to appear, before the court coupled with attempted concealment, however, has resulted in removal from office in at least two states.252

L. Improper Sexual Conduct

In In re McAllister,253 sexual harassment of an aide was one of the charges leading to removal.254 Continual sexual advances to court personnel,255 or probation officers and other parties appearing in front of the court,256 have resulted in judges resigning after charges have been filed.257 Other sexual misconduct has resulted in several judges resigning before formal charges were filed. In one case, a reprimand was warranted when a judge, who was well regarded as a jurist, was arrested for having sex in a parking lot with a woman that was not his wife.258 Different types of sexual misconduct have resulted in different penalties in other states.259

M. Improper Behavior While Practicing Law

Judges who violate the Florida Rules of Professional Conduct, while practicing as a lawyer, have been found to violate Canons 1 and 2 of the Florida Code of Judicial Conduct.260 In In re Hapner,261 the Supreme Court

250. FLA. CODE JUD. CONDUCT Canon 5D(5)(h) cmt.
252. See Adams v. Comm'n on Judicial Performance, 897 P.2d 544, 552, 567, 571 (Cal. 1995); In re Cunningham (Mary Rose Fante Cunningham), 538 A.2d 473, 488–90 (Pa. 1988).
253. 646 So. 2d 173 (Fla. 1994).
254. Id. at 174, 178.
255. Notice of Formal Charges, In re a Judge (Howard Berman), No. 00-211, (Fla. Nov. 30, 2000), dismissed by In re Berman, 814 So. 2d 439, 439 (Fla. 2002).
258. In re Lee, 336 So. 2d 1175, 1176–77 (Fla. 1976).
260. See In re Ford-Kaus, 730 So. 2d 269, 270–72, 276 (Fla. 1999).
261. 718 So. 2d 785 (Fla. 1998).
of Florida held that a judge’s removal from office was warranted for neglecting clients while running for office, giving “misleading testimony in a domestic violence proceeding,” and failing to comply with a court order in a dissolution proceeding. 262 In In re Ford-Kaus, the Supreme Court of Florida found that clear and convincing evidence supported a judge’s removal from office who, while a lawyer running for office: lied to clients about the status of their appellate brief, told them she had written the brief when it was written by another lawyer, falsified time records, and intentionally inserted a false certification as to the certificate of service. 263 Charging excessive fees and failing to timely pay charges from a trust account while closing an office warranted reprimand. 264 Removal from office was determined to be appropriate in a case of a judge who practiced law while previously serving on the bench and who also counseled a client with pending criminal charges to flee the jurisdiction. 265

One case involving a dispute over legal fees resulted in a reprimand. 266 Several cases involving inappropriate commingling of funds resulted in reprimands. 267 Obviously, the severity of the discipline will depend on the severity of the misconduct.

N. Violating Criminal Laws

Violations of the law clearly demean the judicial office and have been found to violate a number of canons. 268 As in the previous category, the severity of the discipline will depend on the seriousness of the legal violation. In one post-1996 case, the Supreme Court of Florida removed a judge for backdating official court records. 269 In a pre-1996 case, the court held that removal was warranted in a shoplifting case, despite evidence that the incident was caused by severe depression and the judge previously had an exemplary record of public service. 270 Misuse of a state credit card for personal

262. Id. at 786, 788.
265. In re Henson, 913 So. 2d 579, 582, 594 (Fla. 2005).
266. In re Davey, 645 So. 2d 398, 399–400, 409–10 (Fla. 1994).
267. E.g., In re Capua, 561 So. 2d 574, 575 (Fla. 1990).
268. See In re Wilson, 750 So. 2d 631, 632–33 (Fla. 1999); In re Johnson (June LaRan Johnson), 692 So. 2d 168, 173 (Fla. 1997); In re Garrett, 613 So. 2d 463, 463, 465 (Fla. 1993); In re Fowler, 602 So. 2d 510, 510–11 (Fla. 1992); In re LaMotte, 341 So. 2d 513, 515, 518 (Fla. 1977).
269. June LaRan Johnson, 692 So. 2d at 170, 173.
270. Garrett, 613 So. 2d at 463–65.
travel justified removal in another case.\textsuperscript{271} Withholding or giving false information to the police during an investigation resulted in a ten-day suspension in one case,\textsuperscript{272} and a public reprimand in another.\textsuperscript{273}

In \textit{In re McIver},\textsuperscript{274} the Supreme Court of Florida found the judge’s participation in an illegal card game and misdemeanor gambling conviction warranted a reprimand.\textsuperscript{275} Participation on a golf tournament committee that promoted gambling on the tournament was cause for public reprimand.\textsuperscript{276} Improper exhibition of a weapon warranted the same discipline.\textsuperscript{277} Reprimand was also deemed appropriate in several driving while intoxicated cases.\textsuperscript{278} Failure to report a boating accident\textsuperscript{279} also resulted in a public reprimand.\textsuperscript{280} Moreover, in a Michigan case, removal from office was the penalty imposed for a judge who left the scene of an automobile accident, appeared intoxicated, and drank more alcohol before speaking to the police.\textsuperscript{281}

O. \textit{Delay in Ruling}

Canon 3B(8) states: “[a] judge shall dispose of all judicial matters promptly, efficiently, and fairly.”\textsuperscript{282} Most cases involving delay are resolved through the informal process. In one case where a large number of cases were involved, the judge received a public reprimand.\textsuperscript{283}

P. \textit{Exhibiting Lack of Candor During Official Proceedings}

The failure to be candid during a police investigation has previously been discussed under the section on violating the law.\textsuperscript{284} Lack of candor or giving inconsistent statements during a JQC investigation may be taken into

\begin{itemize}
\item \textsuperscript{271} \textit{LaMotte}, 341 So. 2d at 515, 518.
\item \textsuperscript{272} \textit{Wilson}, 750 So. 2d at 632–33.
\item \textsuperscript{273} \textit{Fowler}, 602 So. 2d at 510–11.
\item \textsuperscript{274} 638 So. 2d 45 (Fla. 1994).
\item \textsuperscript{275} \textit{Id.} at 46.
\item \textsuperscript{276} \textit{In re Byrd}, 460 So. 2d 377, 377 (Fla. 1984).
\item \textsuperscript{277} \textit{In re Tye}, 544 So. 2d 1024, 1024–25 (Fla. 1989).
\item \textsuperscript{278} \textit{In re Esquiroz}, 654 So. 2d 558, 558–59 (Fla. 1995); \textit{In re Gloeckner}, 626 So. 2d 188, 189 (Fla. 1993).
\item \textsuperscript{279} \textit{In re Fletcher}, 666 So. 2d 137, 139 (Fla. 1996) (Anstead, J., specially concurring).
\item \textsuperscript{280} \textit{Id.} at 138 (per curiam).
\item \textsuperscript{281} \textit{In re Noecker}, 691 N.W.2d 440, 441–42, 448 (Mich. 2005).
\item \textsuperscript{282} FLA. CODE JUD. CONDUCT Canon 3B(8).
\item \textsuperscript{283} \textit{In re Allawas}, 906 So. 2d 1052, 1053–55 (Fla. 2005).
\item \textsuperscript{284} See supra Part IV.N.
\end{itemize}
account when assessing penalties. In one case, the Supreme Court of Florida emphasized the importance of candor, stating:

Berkowitz testified before the commission several times, and, each time, his testimony changed. The JQC found Berkowitz’ willful deception, by itself, sufficient to warrant removal. We agree that lying to the JQC is very serious because the “integrity of the judicial system, the faith and confidence of the people in the judicial process, and the faith of the people in the particular judge are all affected by the false statements of a judge.”

Q. **Failing to File Required Disclosure**

Judges in Florida are required to file various financial disclosure forms, as well as campaign financing reports, when they run for election. Failure to file these forms constitutes a violation of Canon 6. The vast majority of the failure to file financial disclosure cases are taken care of informally. The judge receives a reminder and the appropriate forms are filed. In one case, the failure to disclose income within a financial disclosure form constituted a violation of Canon 6 and resulted in a public reprimand. At least one other state imposed a reprimand for filing an incorrect disclosure form. The campaign finance violations generally are tied to other charges regarding violations of Canon 7. Such violations are discussed later in this article.

R. **Criticizing Jurors and Officials**

Canon 3B(11) prohibits a judge from criticizing jurors. In several cases, the JQC has taken informal action against judges for violating this

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285. See *In re* Berkowitz, 522 So. 2d 843, 843–44 (Fla. 1988); see also *In re* Holloway, 832 So. 2d 716, 719, 729 (Fla. 2002) (holding that making materially misleading and incomplete statements to judges violates judicial canons).

286. *Berkowitz*, 522 So. 2d at 843 (quoting *In re* Leon, 440 So. 2d 1267, 1269 (Fla. 1983)).

287. FLA. CONST. art. II, § 8; FLA. CODE JUD. CONDUCT Canon 6(B).

288. See FLA. CODE JUD. CONDUCT Canon 6.


290. *In re* Nelson, 532 S.E.2d 609, 610, 612 (S.C. 2000) (holding that failing to disclose extra-judicial income on an annual disclosure statement, as well as committing several other ethical violations before resigning, warranted a public reprimand).

291. See generally FLA. CODE JUD. CONDUCT Canon 7 (regulating inappropriate political activity).

292. See infra Part IV.T.2.

293. FLA. CODE JUD. CONDUCT Canon 3B(11). This rule was recently renumbered from 3(B)(10) to 3(B)(11) by court order. *In re* Amendment to Code of Judicial Conduct, No. SC05-281 (Fla. Jan. 5, 2006).
canon. Other canons suggest a judge should not misuse his office in order to unnecessarily criticize other public officials. One judge was removed for this action along with other erratic behavior. The following two categories have proved to be the most controversial as to the appropriate discipline.

S. Use of Intimidation

Words of intimidation or threat are used in a number of cases involving judicial discipline. This category involves inappropriate contact with other people as much as the two categories discussed earlier in this article, but because of the seriousness of the behavior, it has been treated with heightened scrutiny by the highest court and the disciplinary commissions of the various states. In Florida, a number of these cases exist.

In *In re Shea*, a judge "improperly contacted two attorneys and intimidated these attorneys into withdrawing from representation of their client." This behavior along with other misconduct warranted removal. In *In re Damron*, a judge’s actions of threatening parties and other individuals along with other acts of misconduct justified removal from office. A judge’s attempted intimidation of a fellow judge who was handling a friend’s case resulted in a thirty-day suspension. In another case, a judge who participated in the intimidation of a minor and his family received a ninety-day suspension and a $1500 fine. Lastly, a judge who threatened an attorney unless subpoenas were withdrawn received a fifteen-day suspension.

The results in other states are similar. Threats made in the courtroom mandated a six-month suspension without pay in a Washington State case. Inappropriate threats of the use of contempt power, as well as the issuance of

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294. *In re* Graham, 620 So. 2d 1273, 1274–75 (Fla. 1993) (approving the JQC’s finding of violations of Canons 1, 2, and 3(A)(1)).
295. *Id.* at 1274–75, 1277.
296. 759 So. 2d 631 (Fla. 2000).
297. *Id.* at 632.
298. *Id.* at 638–39.
299. 487 So. 2d 1 (Fla. 1986).
300. *Id.* at 7.
301. *In re* Holloway, 832 So. 2d 716, 723, 729 (Fla. 2002).
303. *In re* Elliston, 789 S.W.2d 469, 476, 484 (Mo. 1990) (holding that a menacing phone call to an attorney demanding the withdrawal of subpoenas, as well as several other discourteous acts, warranted a fifteen-day suspension).
304. *In re* Hammermaster, 985 P.2d 924, 926 (Wash. 1999).
other threats toward attorneys, resulted in a five-year suspension in Michigan. Other threats have resulted in censure or reprimand. In *In re Diaz*, Justice Cantero, in his dissenting opinion, questioned the severity of the punishment. Judge Diaz wrote an anonymous e-mail to another judge threatening political retribution unless the judge receiving the e-mail discontinued reporting illegal aliens who appeared before him. The judge received a $15,000 fine, a two-week suspension without pay, a public reprimand, and was required to issue a public apology.

The misconduct in *Diaz* involved threats and intimidation. The facts of *Diaz*, however, are unique. It is therefore difficult to determine whether the penalty was disproportionate. Unlike the other cases involving threats, the party being threatened was unaware that the person making the threat was a judge. While inappropriate off the bench conduct, which may bring the judiciary into disrepute, is clearly covered by the code, one might argue that the misconduct in *Diaz* is less serious because no one knew a judge was involved. The other viewpoint is that anonymous threats are just as serious and may further tarnish the judiciary when they become public knowledge. The only other case in Florida involving attempted intimidation of another judge is *In re Holloway*. Unlike *Holloway*, however, the threat in *Diaz* was not made in the heat of passion, but appeared to be a calculated attempt to coerce specific conduct. Thus, it could be argued that Diaz's level of misconduct was greater because the majority of the court in *Diaz* determined the penalty proposed by the JQC was appropriate.

T. Election Violations

The various types of election violations, in addition to making misrepresentations during the campaign, include: a) making inappropriate promises

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307. *Id.* at 334.
308. *Id.* at 338 (Cantero, J., dissenting).
309. See id. at 336 (majority opinion).
310. *Id.* at 336, 338.
311. *Diaz*, 908 So. 2d at 336.
312. See id. at 337.
313. See, e.g., *In re Cope*, 848 So. 2d 301, 302–03 (Fla. 2003); *In re Wilson*, 750 So. 2d 631, 632–33 (Fla. 1999).
314. 832 So. 2d 716, 718 (Fla. 2002).
315. See *Diaz*, 908 So. 2d at 336.
316. *Id.* at 336–38.
of performance in office; 317 b) campaign financing and reporting misconduct; 318 c) engaging in partisan politics; 319 d) supporting another candidate for office; 320 and e) directly soliciting loans in excess of the $500 statutory limit from family members. 321 These violations have been difficult to deal with not only because of the First Amendment implications discussed earlier, 322 but because of the competing concepts that a party should not profit (by obtaining a position in the judiciary) from campaign misdeeds and the idea that removal should only occur in those cases where the judge's conduct is fundamentally inconsistent with the responsibilities of judicial office. 323 The most contentious areas concerning discipline have involved inappropriate promises of performance and misrepresentations regarding an opponent. The area of campaign financing and reporting violations has also created some controversy as to appropriate discipline. While the prohibition as to engaging in partisan politics appears to involve profound First Amendment issues, the question of discipline has not been hotly disputed so far in Florida. Cases involving backing another candidate for office have been rare.

1. Making Inappropriate Promises of Performance in Office

In In re Alley, 324 the parties stipulated that the judge:

(a) misrepresented her qualifications and those of her opponent;
(b) injected party politics into a non-partisan election, by noting the party affiliation of the governor who had appointed her opponent to her position of county judge (when in fact both Alley and her opponent were members of the same political party, which was different from that of the governor); (c) improperly included a photograph of her opponent sitting next to a criminal defendant noting that her opponent "defend[ed] convicted mass murderer, cop killer, William Cruse," when at the time of the photograph Cruse had not been convicted and her opponent was an assistant public defender observing a duty placed on her as a member of The Florida Bar; and (d) improperly included a portion of a

318. In re Rodriguez, 829 So. 2d 857, 858–59 (Fla. 2002).
319. In re Angel, 867 So. 2d 379, 380–82 (Fla. 2004).
320. In re Glickstein, 620 So. 2d 1000, 1001–02 (Fla. 1993).
321. See In re Pando, 903 So. 2d 902, 902–03 (Fla. 2005).
322. See supra Part III.G.
323. See Rodriguez, 829 So. 2d at 858, 860–61; McMillan, 797 So. 2d at 572–73.
324. 699 So. 2d 1369 (Fla. 1997).
newspaper editorial which falsely implied that Alley, not her opponent, had been endorsed by the newspaper.\textsuperscript{325}

The JQC, finding her response to be sincere, recommended that the judge be reprimanded.\textsuperscript{326} The court reluctantly accepted the recommended penalty stating: "we find it difficult to allow one guilty of such egregious conduct to retain the benefits of those violations and remain in office."\textsuperscript{327}

The difficulty in determining the appropriate penalty in election cases was more thoroughly discussed in \textit{Kinsey}.\textsuperscript{328} The JQC found that judicial campaigns which depicted a very "pro-law enforcement" stance (representations made in pamphlets, flyers, and radio statements) violated Canon 7.\textsuperscript{329} The JQC also found that campaign materials which misrepresented a judge's role in criminal proceedings (to combat crime and support police officers) violated the code.\textsuperscript{330} In addition, there were misrepresentations concerning the incumbent judge's actions in specific cases.\textsuperscript{331}

[T]he JQC recommended that Judge Kinsey be publicly reprimanded and fined in the amount of $50,000 plus the costs of these proceedings. The amount of the fine represented approximately 50% of her yearly salary, or in other words, a six-month suspension without pay (which was the other option that the JQC considered imposing). The JQC explained this decision as follows:

The Panel finds that Judge Kinsey is guilty of serious violations growing out of her campaign in which she was successful in obtaining the position of county court judge. The Panel has no hesitancy in recommending that she be publicly reprimanded by this Court but believes leaving her in office with no further penalty is entirely inappropriate. Under the current Constitution, Judge Kinsey is subject to removal or further penalty in the form of a fine. The Hearing Panel has thoroughly deliberated this issue and concludes that the penalty imposed here must be sufficient to strongly discourage others from violating the Canons governing contested elections.

At least one member of this Panel strongly urged Judge Kinsey's removal. This Panel member concurs in and would apply the statement of this Court in \textit{Alley} that: "We find it difficult to allow one guilty of such

\textsuperscript{325} Id. at 1369 (alteration in original).
\textsuperscript{326} Id. at 1370.
\textsuperscript{327} Id.
\textsuperscript{328} In re Kinsey, 842 So. 2d 77, 80 (Fla. 2003).
\textsuperscript{329} Id. at 79–92.
\textsuperscript{330} Id.
\textsuperscript{331} Id. at 82–84.
egregious conduct to retain the benefits of these violations and remain in office."

However, the conduct in Alley was, in the view of the majority of the Hearing Panel, significantly more egregious than the conduct involved in the present case. Judge Alley admitted to intentionally misrepresenting the basic qualifications of her incumbent opponent and in intentionally misrepresenting her own qualifications. She altered a published newspaper to make it appear she had been endorsed by the paper which had actually endorsed her opponent. She intentionally injected party politics into the non-partisan race. Judge Kinsey’s misconduct did not rise to this level.

Despite the less egregious nature of the violations, Judge Kinsey must be punished for her conduct and such conduct simply cannot be tolerated in future elections. While a reprimand alone is insufficient, there was no evidence that Judge Kinsey is presently unfit to hold office other than her misconduct involved in winning the election. Although such misconduct can rise to the level of present unfitness as is required for removal under Article V, § 12(a)(1), here, the Panel finds the conduct does not warrant removal.

The panel obviously struggled with some very basic issues, including: 1) weighing Judge Kinsey’s culpability versus Judge Alley’s culpability; 2) the application of the strict standards for removal previously announced by the Supreme Court of Florida; 3) trying to arrive at an appropriate penalty short of removal for what it obviously regarded as serious misconduct; 4) trying to determine how to apply the relatively new penalties of fine and suspension (applying a fine equivalent to a six-month suspension without straining resources of the court system); and 5) trying to assess a penalty which would be strong enough to deter this misconduct in the future.

The Supreme Court of Florida upheld the decision of the JQC as to discipline, specifically finding:

We agree with the JQC that Judge Kinsey is guilty of serious campaign violations that warrant a severe penalty. Accordingly, this Court agrees with the JQC’s recommendation as to discipline and finds that a substantial fine is warranted in order to assure the public that justice is dispensed in a fair and unbiased manner and to warn any future judicial candidates that this Court will not tolerate improper campaign statements which imply that, if elected, the judicial candidate will favor one group of citizens over

332. Id. at 91–92 (citation omitted).
333. Kinsey, 842 So. 2d at 91–92.
another or will make rulings based upon the sway of popular sentiment in
the community.\textsuperscript{334}

Chief Justice Anstead, who concurred in the majority opinion, indicated
he felt the decision as to discipline was close.\textsuperscript{335} Justice Pariente recognized
the difficulty in applying the punishments of suspensions and fines, but de-
ferred to the decision of the JQC, especially in light of its goal to deter this
behavior in the future.\textsuperscript{336} Justice Lewis, as previously indicated,\textsuperscript{337} felt re-
moval was appropriate.\textsuperscript{338} Justice Wells dissented in an opinion joined by
Justice Quince, finding much of Judge Kinsey’s behavior protected by the
First Amendment as construed in \textit{Republican Party of Minnesota v. White}, a
United States Supreme Court case.\textsuperscript{339} In light of this determination, Justice
Wells would have only found Judge Kinsey guilty of misrepresentations and
imposed a reprimand.\textsuperscript{340}

In another case, the Supreme Court of Florida held that a judge is re-
quired to be removed when the judge is charged with:

(1) making explicit campaign promises to favor the State and the police in
court proceedings; (2) making explicit promises that he would side against
the defense; (3) making unfounded attacks on an incumbent county judge;
(4) making unfounded attacks on the local court system and local officials;
and (5) improperly presiding over a court case in which he had a direct
conflict of interest.\textsuperscript{341}

In several recent cases, other state courts have upheld reprimands and
censures for promises of being tough on crime,\textsuperscript{342} having the heart of a
prosecutor,\textsuperscript{343} or promising to be “tough on drunk driving.”\textsuperscript{344} A pledge to
stop repeated child abuse resulted in a thirty-day suspension from one

\textsuperscript{334} \textit{Id.} at 92.
\textsuperscript{335} \textit{Id.} at 93 (Anstead, C.J., specially concurring).
\textsuperscript{336} \textit{Id.} at 95–97 (Pariente, J., concurring).
\textsuperscript{337} \textit{Id.} at 95–97 (Pariente, J., concurring).
\textsuperscript{338} \textit{Id.} at 95–97 (Pariente, J., concurring).
\textsuperscript{339} \textit{Id.} at 95–97 (Pariente, J., concurring).
\textsuperscript{340} \textit{Id.} at 95–97 (Pariente, J., concurring).
\textsuperscript{341} \textit{Id.} at 95–97 (Pariente, J., concurring).
\textsuperscript{342} \textit{In re McMillan}, 797 So. 2d 560, 562 (Fla. 2001).
\textsuperscript{343} \textit{In re Haan}, 764 N.E.2d 740, 741 (Ind. 1997) (upholding reprimand).
\textsuperscript{344} \textit{In re Watson}, 794 N.E.2d 1, 2–3, 8 (N.Y. 2003) (upholding censure); \textit{see also In re}
\textsuperscript{345} \textit{Kaiser}, 759 P.2d at 394–98, 401.
Several cases involving misrepresentations of a judicial candidate’s qualifications or the qualifications of the opponent have resulted in fines or reprimands.346

2. Campaign Financing and Reporting Misconduct

In In re Rodriguez,347 the judge was disciplined for filing misleading financial reports which, among other things, indicated she had loaned her campaign $200,000 when in fact she had received a contribution to her campaign of that amount from her boyfriend.348 There were also several other campaign financing violations.349 The JQC originally recommended a reprimand, which was rejected by the Supreme Court of Florida.350 On remand, the JQC recommended that Judge Rodriguez be disciplined by: 1) a public reprimand to be delivered personally before the Supreme Court of Florida; 2) suspension for four months without pay; 3) a $40,000 fine to be paid upon Judge Rodriguez’s return to the bench “in equal monthly payments until the end of her present term;” and 4) “payment of all court reporter’s fees incurred by the JQC.”351 The court accepted this recommendation; however, it commented on appropriate considerations for fines in the future.352

The JQC explains that the fine “is designed to reimburse the public for payments made to the Respondent during her prior paid absence from the bench.” Judge Rodriguez’s prior paid absence was an eight-month paid suspension which she voluntarily took while being investigated by the State for potential criminal violations of the election laws. All charges related to the State’s investigation were eventually dismissed. The amount of the fine represents approximately half of the salary she received during that eight-month suspension. We understand that the JQC intended the fine and the unpaid four-month suspension to account for the monies paid to her during her previous suspension. However, the fine and the unpaid four-month suspension will not necessarily make the State whole. Generally, when a judge is suspended or on leave, a senior judge is appointed in

347. 829 So. 2d 857 (Fla. 2002).
348. Id. at 858–59.
349. See id. at 859.
350. Id. at 858.
351. Id.
352. Rodriguez, 829 So. 2d at 861.
her place. The senior judge's salary is paid out of a special fund. Thus, the JQC should in the future also take into consideration, when determining the amount of any fine, the potential financial burden a given circuit incurs when it has to appoint a senior judge in the event of a suspension. Any fine that is intended to make the circuit whole should include that component. 353

Thus, one appropriate gauge for a fine is to make the state whole for any damages resulting from the misconduct. 354

Two other recent cases have dealt with campaign financing violations during judicial campaigns. 355 In In re Pando, the Supreme Court of Florida accepted a JQC recommendation of a $25,000 fine where the judge accepted loans from her family in excess of the campaign limits, and then filed misleading campaign reports, as well as giving a misleading statement to the JQC counsel regarding the conduct. 356 In In re Gooding, the judge incurred campaign expenses when his account had insufficient funds, and then he tried to reimburse the account after the statutory deadline. 357 The Supreme Court of Florida accepted the JQC recommendation of a reprimand. 358

3. Engaging in Partisan Politics

In the most recent case that involves engaging in inappropriate partisan politics, the JQC and the accused judge stipulated that during his re-election campaign he spoke at partisan political gatherings to which his opponent was not invited, attended and campaigned at partisan gatherings, and held himself out as a member of a political party at political meetings. 359 The court accepted a reprimand as appropriate where the judge wrongfully believed his conduct was protected by the First Amendment. 360 In several other cases involving wrongfully engaging in partisan activities, the court also accepted recommendations of reprimands. 361

353. Id.
354. See id.
355. See In re Gooding, 905 So. 2d 121, 121 (Fla. 2005); In re Pando, 903 So. 2d 902, 902 (Fla. 2005).
356. Pando, 903 So. 2d at 902, 904.
357. Gooding, 905 So. 2d at 121 (citation omitted).
358. Id. at 123–24.
359. In re Angel, 867 So. 2d 379, 382 n.3 (Fla. 2004).
360. See id. at 383. But see Republican Party of Minn. v. White, 416 F.3d 738, 766 (8th Cir. 2005) (concluding that Minnesota's partisan-activities clause violated the First Amendment).
361. E.g., In re Kay, 508 So. 2d 329, 329–30 (Fla. 1987).
4. Supporting Another Candidate for Office

In one case, the Supreme Court of Florida held that a reprimand was appropriate for a judge who wrongfully supported a Supreme Court of Florida Justice for merit retention.\footnote{In re Glickstein, 620 So. 2d 1000, 1002-03 (Fla. 1993).} The Supreme Court of Florida stated, "[n]either honest motives nor well-intentioned conduct, however, excuse less than strict compliance with the Code of Judicial Conduct."\footnote{Id. at 1002 (citation omitted).} Another judge received a public reprimand for actively supporting his wife for the position of clerk of the court.\footnote{In re McGregor, 614 So. 2d 1089, 1090 (Fla. 1993); see also In re Turner (Jack Turner), 573 So. 2d 1, 1-2 (Fla. 1990) (approving recommendation for public reprimand of a judge for actively supporting his son, a candidate for judicial office).}

5. Directly Soliciting Support from Attorneys

While federal case law has raised questions concerning the validity of that portion of Canon 7 which prohibits direct solicitation of funds and support by judges seeking election,\footnote{FLA. CODE JUD. CONDUCT Canon 7B(1).} the Supreme Court of Florida has not spoken on its continued validity. In the one case where a violation was found, the court accepted the JQC's recommendation of a public reprimand.\footnote{In re Lantz, 402 So. 2d 1144, 1146-47 (Fla. 1981) (court found that soliciting support from a member of the bar violated Canon 7B(2), which at that time was the section that prohibited judicial candidates from soliciting support); FLA. CODE JUD. CONDUCT Canon 7B(2) (1994) (amended 1995).}

V. CONCLUSION

While the Supreme Court of Florida retains the right to reject the discipline recommended by the JQC, in the overwhelming majority of cases the court has approved the recommendation. This has been especially true in cases involving either removal or reprimand. There also appears to be basic equality in the discipline that judges receive for violations of the code. Variations usually result from numerous factors which may be considered by the JQC and the unique factual circumstances surrounding individual cases. In fact, the Supreme Court of Florida's rate of rejection of proposed disciplinary action in Florida does not vary significantly from what has occurred in other parts of the country.\footnote{In a recent survey of judicial discipline sanctions, the low nationwide rate of rejection of the recommended discipline in judicial misconduct cases was noted:}
The few areas of controversy or potential disagreement seem to concern election cases and cases where fines or suspensions are imposed. Several factors appear to be responsible for this confusion. There are very strict guidelines laid out by the Supreme Court of Florida for removal of judges and, therefore, this punishment is only imposed for the most egregious conduct, repeated behavior, or cases of active concealment. These are cases where there is little room for disagreement. Reprimand usually involves minor or isolated infractions. Suspension and fines are imposed in those tough cases where the misconduct is serious but where the standards for removal have not been met. Suspension and fines are relatively new, as they were authorized in 1996. The philosophy involving when to impose these measures has not been clarified. The Supreme Court of Florida has stated that the goal of judicial discipline even after the 1996 constitutional amendment is not punishment. It is therefore unclear when these disciplinary measures should be utilized.

In the area of elections, the court has stated that a candidate should not profit by their misdeeds. This area of the law however is extremely complicated. Some violations are technical. Many times the offender has taken the bench and performed well. It is unclear whether the same standards for removal apply or whether the court is suggesting a different standard applies in terms of election.

In conclusion, although some areas should be clarified, it appears that in the area of judicial discipline the JQC is performing its duties in the manner contemplated by the Supreme Court of Florida.

JANE E. CROSS*

In Fall 2004, Nova Southeastern University Shepard Broad Law Center hosted a Goodwin Seminar series entitled Trade Winds in Caribbean Law: Evolution of Legal Norms and the Quest for Independent Justice. Since the conclusion of the Goodwin Seminar in November 2004, there have been two significant developments in the Commonwealth Caribbean. First, the Caribbean Court of Justice (“CCJ”) was inaugurated on April 16, 2005 in Port of Spain, Trinidad. Second, the CARICOM Single Market and Economy (“CSME”) was launched on January 30, 2006.

With these two important first steps, both the CCJ and CSME will undoubtedly continue their development. Two countries, Barbados and Guyana, already have access to the CCJ as a final court of appeal while other countries, such as Jamaica, are still implementing the legal changes necessary to avail themselves of the CCJ’s appellate function. The first sitting of the CCJ took place on August 8–9, 2005. In addition, the CCJ has original jurisdiction in the interpretation of the Revised Treaty of Chaguaramas, including matters related to the CSME. On January 1, 2006, six countries—Jamaica, Barbados, Belize, Guyana, Suriname and Trinidad and Tobago—joined the CSME, which will be fully implemented by December 2008. These long-awaited and highly anticipated developments have set a promising course for the Commonwealth Caribbean.

It is not yet clear, however, whether the CCJ will engage in judicial activism in death penalty cases in the Caribbean. Within death penalty discourse in the Caribbean, judicial activism posits the concept of national sov-

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ereignty and cultural imperatives against an expansive view of evolving international human rights. Moving into four decades and more of independence, Commonwealth Caribbean nations seek to strike a sometimes precarious balance between their own national identities and their observance of a dynamic mass of international obligations.

Both Mr. Dennis Morrison and Minister Mia Mottley, in their respective articles, explore the role of judicial activism in the Caribbean Commonwealth. Mr. Morrison examines judicial activism by the Judicial Committee of the Privy Council (Privy Council) in three case studies dealing with the Privy Council’s treatment of the death penalty. Minister Mottley examines the judicial activism of regional and international human rights tribunals in determining whether states are breaching their treaty obligations. Mr. Morrison expresses admiration for the Privy’s Council efforts to infuse emerging human rights concepts into death penalty cases. Minister Mottley notes with concern that the imposition of outside cultural values by applying emerging international norms creates tensions within Caribbean nations as they seek to protect and safeguard the rights of their citizens. These distinct approaches to judicial activism show the interplay of international, regional and domestic concerns as the Commonwealth Caribbean nations strive to consolidate their independent, national sovereign personae regarding human rights.

Mr. Dennis Morrison is the author of the article entitled The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism. He was appointed Queen’s Counsel in 1994, is currently a partner and head of the litigation department at the law firm DunnCox, and serves as a Judge of the Court of Appeal in Belize. He has also served as chairman of the Council of Legal Education, president of the Jamaican Bar Association, and a member of the Jamaica Council for Human Rights.

Mr. Morrison has degrees from the University of the West Indies, Cave Hill, Barbados and Norman Manley Law School in Jamaica. As a Jamaica Rhodes Scholar, he attended Balliol College, Oxford University. He has also lectured at Norman Manley Law School in the areas of the laws of evidence, hire, purchase and sale of goods, and the rights and obligations of the legal profession.

Mr. Morrison begins his article by providing background on the role of the Privy Council and the impetus for the establishment of the CCJ. Near the end of this section he concludes that:

[The recent successful challenge in Jamaica to the constitutionality of local legislation designed to give effect to the Agreement and the Protocol demonstrates that, despite the inauguration of the Caribbean Court of Justice on April 16, 2005, the governments and the people of the region may yet be some distance away from the complete achievement of abolition of appeals to the Privy Council.]

With that assessment, Mr. Morrison turns to the focus of this article—the role of the Privy Council opinions in the area of capital punishment.

Before starting his case study of Privy Council and three important death penalty case studies in the Caribbean, Mr. Morrison provides background on the history and support for the death penalty in the Caribbean. He observes that despite the international movement to abolish the death penalty and opposition to the death penalty within the Caribbean, "the death penalty remains, and is likely to remain for some time, the penalty for murder throughout the region." Next, Mr. Morrison provides a summary of the International Bill of Rights as it relates to the death penalty issue. He then explains that the International Bill of Rights was enshrined in the Independence Constitutions of Commonwealth Caribbean nations. In these sections, Mr. Morrison masterfully provides the legal, historical, and political context for the examination of the treatment of the death penalty in three sets of Privy Council cases he has selected for study.

In structuring his case study, Mr. Morrison selects cases that touch upon critical topics in Commonwealth Caribbean concerning constitutional limitations on death penalty enforcement. Using these cases, he shows the evolving trend of the Privy Council to set aside its own earlier decisions as it attempts to reconcile constitutional construction with evolving international norms on the death penalty. He aptly identifies three areas in which the Privy Council has reversed prior rulings on the death penalty.

In the first topic, "The Carrying Out of a Sentence of Death—The Impact of Delay," Mr. Morrison explains how the Privy Council departed from its decision in Riley v. Attorney General with its subsequent holding in Pratt v. Attorney General. In Riley, Mr. Morrison focuses on the Privy Council's holding that delays in death sentence execution are not contrary to constitutional prohibitions against inhuman or degrading treatment. Mr. Morrison

4. Id. at 405.
5. Id. at 406.
then remarks that a decade later when the Privy Council addressed the same issue in Pratt, the Privy Council reversed Riley by holding that a delay of more than five years in the execution of a death sentence provides a compelling basis for showing a violation of the very same constitutional prohibitions. He ends this study by indicating that one regrettable reaction to Pratt was the decision by the Governments of Jamaica and Trinidad and Tobago to withdraw from the Optional Protocol to the International Covenant on Civil and Political Rights.

In his second case study on “Procedural Fairness and the Prerogative of Mercy,” Mr. Morrison reviews the rationale that led the Privy Council to overrule de Freitas v. Benny and of Reckley v. Minister of Public Safety and Immigration (No. 2) with its holding in Lewis v. Attorney General. As Mr. Morrison explains, de Freitas provided that a convicted person did not have a right to be shown materials submitted or to be heard when a Head of State is being advised on “the [P]rerogative of [M]ercy.” Mr. Morrison notes that the Privy Council upheld its decision in de Freitas some twenty years later in Reckley, but four years after Reckley:

the Privy Council concluded in Lewis that [d]e Freitas and Reckley should be overruled and that a petitioner for mercy should have access to the material to be placed before the ‘Mercy Committee,’ as well as the right to make representations to the Committee, whether in writing, as would normally be the case, or orally.

Mr. Morrison concludes that these cases demonstrate the Privy Council’s tendency to freshly scrutinize existent precedent to incorporate principles of fairness.

With the final case study, Mr. Morrison explores “The Mandatory Death Penalty.” Starting with Ong Ah Chuan v. Public Prosecutor, Mr. Morrison notes that the Privy Council had not entertained a constitutional challenge to the mandatory death penalty in Singapore. He then notes that in two subsequent cases, Reyes v. The Queen and Watson v. The Queen, the

11. [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.).
12. Morrison, supra note 3, at 416 (alteration in original).
13. Id. at 416–19.
Privy Council examined the constitutionality of the mandatory death penalty in the Caribbean. As Mr. Morrison explains, the Privy Council in *Reyes* ruled that the mandatory imposition of the death penalty in Belize after a murder conviction without considering mitigating factors was unconstitutional because it constituted inhuman and degrading punishment. He observes that the Privy Council made a similar determination in *Watson* with regard to the constitutionality of the mandatory death penalty in Jamaica.

At the same time the Privy Council decided *Watson*, it upheld the constitutionality of the mandatory death penalty in two cases decided at the same time as *Watson*. The mandatory death penalties of Barbados and Trinidad and Tobago were upheld, respectively, in *Boyce v. The Queen* and *Matthew v. The State* due to the saving clause provisions in their constitutions that preserves the constitutionality of laws in effect prior to the enactment of their constitutions. The peculiarity of the *Watson* opinion becomes evident when Mr. Morrison refers to the dissent of Lord Nicholls in *Matthew*, which states in part that:

I do not believe the framers of these constitutions ever intended the existing laws savings provisions should operate to deprive the country’s citizens of the protection afforded by rising standards set by human rights values. The savings clauses were intended to smooth the transition, not to freeze standards for ever. The constitutions of these countries should be interpreted accordingly, by giving proper effect to their spirit and not being mesmerised by their letter. A literal interpretation of these constitutions means that the law of Jamaica, a country which has taken steps to distinguish between different types of murders, is held to be unconstitutional, whereas the laws of Barbados and of Trinidad and Tobago, where no ameliorating steps have been taken, are held to be constitutional. This is bizarre.

Mr. Morrison concludes that sentencing will now play a much greater role in capital murder cases in the Caribbean. Indeed, after Mr. Morrison completed his article, the Privy Council once again considered the constitutionality of the mandatory death penalty in the Bahamas. On March 8, 2006, *Matthew* [2004] UKPC 33, [2005] 1 A.C. at 470.
the Privy Council decided in Bowe v. The Queen 20 the mandatory death sentence imposed by the Penal Code of the Bahamas "should be construed as imposing a discretionary and not a mandatory sentence of death." 21

Mr. Morrison concludes his case study with the following statement:

These three case studies demonstrate the response of the Privy Council to the challenge of change in the area of human rights norms in the context of death penalty cases. They underscore the fact that for the law to preserve its relevance in this area it must be constantly responsive to the "evolving standards of decency that mark the progress of a maturing society." 22

In the end, Mr. Morrison expresses his hope that the CCJ will adopt the Privy Council's judicially active role "as independent guardians of the constitution." 23

During the 2004 Goodwin Seminar, Minister Mottley delivered a speech entitled "Walking the Tightrope." Minister Mottley is currently the Deputy Prime Minister. At the time she delivered this speech, Minister Mottley was the Attorney General and Minister of Home Affairs. In February 2006, she was appointed the Minister of Economic Affairs and Development. Throughout her political career, Minister Mottley has reached many milestones. She was elected to the Barbados Parliament in 1994 and was one of the youngest persons ever to be assigned a ministerial portfolio when she was appointed to the Ministry of Education, Youth Affairs and Culture. She is also the first woman to ever hold the position of Attorney General in Barbados. Before that, she was the youngest person ever to become Queen's Counsel in Barbados. In 1996, she was elected General Secretary of the Barbados Labour Party.

Minister Mottley has also served as the chairman of the Regional Preparatory Committee for the establishment of the CCJ and the chairman of the Social Council of Barbados. She is also a member of the National Security Council of Barbados and the Barbados Defence Board. She is an attorney-at-law and graduated with a law degree from the London School of Economics with a specialty in advocacy. She is a barrister of the Bar of England and Wales.

In her speech, Minister Mottley examined "the impact of judicial activism on the nature of [Barbados'] obligations either already accepted or in

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20. [2006] UKPC 10 (appeal taken from Bah.).
21. Id. ¶ 43.
23. Id. at 424.
Examining the role of the United Nations in human rights law, she notes that not only the structure, but also the cultural values of the developed world have influenced the judgments of international human bodies which in turn "have sought to redefine the obligations of states through re-interpreting those obligations under international treaty law in a manner that was never understood by the states at the time of the acceptance of the obligations, or indeed at the time of the reservations being submitted right before that time." She explains that the expansion of the definition of human rights has occurred due to the actions of judicial bodies and not by the state's undertaking new obligations. This trend impinges on the rights of nations "to appropriately and properly plan for themselves and their citizens according to their norms, their customs and their respect for fundamental rights.

Since Commonwealth Caribbean nations have a "healthy respect for human rights," these nations adopted constitutions and entered into human rights conventions. Barbados, for example, signed the International Covenant of Civil and Political Rights and the American Convention of Human Rights. At the time of signing these treaties, however, Barbados indicated its "continued intention to apply the death penalty as is provided for in both the constitution of Barbados and the Offences Against Persons." Until very recently, Barbados has since its "existence as an independent state, since 1966, been regarded as a model adherent to human rights obligations.

Minister Mottley notes that judicial encroachment on the construction of human rights obligations in the Caribbean are reflected in the decision by the Judicial Committee of the Privy Council in *Pratt*, a Jamaican case. As noted in the summary of Mr. Morrison's article, the *Pratt* decision imposed a five-year time limit for executing death sentences in Commonwealth Caribbean states. Several years after this decision, the United Nations Human Right Committee reduced that limit by appropriately four months for Trinidadian cases. As an exercise of its own sovereignty, Barbados amended its constitution in 2002 to avoid the application of *Pratt* to Barbadian death penalty sentences. In the last few years, however, Barbados has had to contend with litigation on the issue of the "mandatory death penalty."

25. *Id.* at 427–8.
26. *Id.* at 428.
27. *Id.*
28. *Id.* at 429.
The issue of the constitutionality of Barbados's mandatory death penalty went before the Privy Council in *Boyce*.\(^{30}\) In that landmark case, a panel of nine judges sat to hear this case and two similar cases from Jamaica,\(^{31}\) and Trinidad and Tobago.\(^{32}\) The Privy Council found in a five-to-four ruling that the mandatory death penalty was preserved by the savings clause (section 26) of the Constitution of Barbados. Similarly, in *Matthew*, the Privy Council upheld the constitutionality of Trinidad and Tobago's mandatory death penalty, but in *Watson*, the Privy Council struck down Jamaica's mandatory death penalty because it was not preserved by the saving clause in the Jamaican Constitution given that the relevant statute had been amended since independence. Minister Mottley considers the *Boyce* opinion a reversal of "ten (10) years of political onslaught in the form of judicial activism."\(^{33}\)

Next, Minister Mottley addresses the term "mandatory death penalty." Although that term has been used in reference to the death penalty in Barbados, Minister Mottley notes that the use of pre-conviction defenses and resort to post-conviction mechanisms limit the application or execution of the death penalty. In addition, the Constitutional Amendment Act passed in 2002 will further strengthen the procedural safeguards for the accused. Despite the fact that Barbados is deemed to have a mandatory death penalty, Minister Mottley notes that "the statistics show that more often than not, since Independence, the sentence has been commuted rather than affirmed."\(^{34}\)

Even though the death penalty in Barbados has been found consistent with its domestic law, the death penalty is still being challenged under international law. In particular, within the Organization of American States, the Inter-American Commission on Human Rights has held that the mandatory death penalty is in contravention of the American Convention on Human Rights. After the 2002 Constitutional Amendment, Barbados was called before the Inter-American Commission by a British law firm with ties to the commission.

Despite this development, Barbados remains committed to remaining a party to the American Convention on Human Rights. Minister Mottley notes that both Jamaica and Trinidad and Tobago chose to move away from the convention after their mandatory death penalties came under scrutiny. Minister Mottley states that:

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34. *Id.* at 434.
The Government of Barbados feels fundamentally that we have worked too long and too hard to promote and to respect human rights norms and laws for us to be the victim of a form of judicial activism that constitutes a virtual amendment to the treaty as opposed to an interpretation of it.35

Accordingly, Barbados has consistently maintained that its death penalty has not breached its treaty obligations or any customary international law.

Minister Mottley explains that judicial activism is more appropriate in a national arena where there are appropriate checks and balances. In democratic countries, legislatures can remedy “judicial usurpation of the legislature’s role.”36 Without discussion of this issue in international fora, judicial activism in an international setting may also have domestic implications. If international treaty obligations continue to make incursions into domestic issues, states may seek to limit the executive power to enter into such agreements. Minister Mottley points to debates concerning the use of corporal punishment and same-sex marriages as topics that might create tensions between human rights and cultural concerns.

Minister Mottley also broaches the possible problems for developing nations that might be required to make additional expenditures in order to guarantee new human rights asserted by international organizations. She noted that while Barbados provides free education to the tertiary level, free access to prescription drugs and subsidized public transportation, enshrining such rights in the Constitution of Barbados “would present tremendous difficulties for us as a small state which has an inherent vulnerability not only to international economic shocks but also to natural disasters.”37 These concerns were noted at a meeting of the Law Ministers of the Small States of the Commonwealth that Minister Mottley attended in November 2005. In particular, Minister Mottley quotes the meeting’s communiqué which stated that “[t]here was anxiety in particular over the assertion of new human rights, which emerge not from considerate action by all states but from organizations with no democratic mandate.”38 In addition, the communiqué also stated that the:

Ministers discussed the role of human rights courts in the interpretation and scope of human rights. They recognized that State

35. Id. at 436.
36. Id. at 437.
37. Id. at 16.
38. Mottley, supra note 24 at 440.
power had to be subjected to scrutiny as part of the system of checks and balances between the branches of government, but were concerned at the undue global influence of some regional courts, as they reflected an activist approach to the interpretation of treaty obligations and were not subject to appeal to any global body. 39

Minister Mottley suggests the need for regional discourse to address human rights issues. She also proposes a regional dialogue on the development of a Caribbean Human Rights Convention. She also notes that establishment of the CCJ creates a mechanism for the enforcement of such a convention and asserts that the CCJ might be more sensitive to the "mores and customs of the region." 40 Minister Mottley predicts that the human rights dialogue will continue to play a dominant role in the Caribbean region and the Commonwealth for at least the next ten years. She ends her article by clarifying that:

We are not blasting or bashing human rights or human rights organizations. However, by the same token, we are not going to lie prostrate while people reinterpret the obligations of our States in a way that causes us to be deemed non-compliant without our active participation or agreement. This is the tightrope that we must walk. 41

The articles by Minister Mottley and Mr. Morrison, taken together, show two distinct views, but complementary views, on judicial activism in the Commonwealth Caribbean. While both recognize the importance and the implications of the death penalty decisions, each article presents a different reaction to the introduction of emerging human rights norms in the Caribbean. In doing so, they highlight the texture of the dialogue in the Commonwealth Caribbean on death penalty issues. Both are concerned with upholding human rights in the Caribbean context, but place emphasis on either the adoption of prevailing cultural constructs or the adaptation to evolving. In the end, human rights in the Commonwealth will undoubtedly strike a balance between the two concerns and perhaps provide a model for other smaller and developing nations.

39. Id.
40. Id. at 441.
41. Id. at 442.
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL AND THE DEATH PENALTY IN THE COMMONWEALTH CARIBBEAN: STUDIES IN JUDICIAL ACTIVISM

DENNIS MORRISON, Q.C.

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I. THE COMMONWEALTH CARIBBEAN

The term “the Commonwealth Caribbean” describes that group of countries bounded by the Caribbean Sea, from the Bahamas in the north to Guyana in the south, including a sole Central American outpost in Belize in the west, which are bounded by the Caribbean Sea, and all of which were, at some point in their rich and colourful history, colonies of Great Britain.1 In this regard, they all share with the United States some aspects of a common history, such as a common language.2 With the exceptions of Belize and Guyana, which are geographically parts of the continents of Central and South America, they are all island countries whose names are well known

1. Dennis M. Hanratty, Introduction to ISLANDS OF THE COMMONWEALTH CARIBBEAN: A REGIONAL STUDY, at xix (Sandra W. Meditz & Dennis M. Hanratty eds., 1989). The full list of the independent countries is as follows: Anguilla, Antigua and Barbuda, the British Virgin Islands, Barbados, Belize, the Cayman Islands, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, the Bahamas, Trinidad and Tobago, and Turks and Caicos. Id.

2. Franklin W. Knight, Regional Overview, in ISLANDS OF THE COMMONWEALTH CARIBBEAN: A REGIONAL STUDY, supra note 1, at 41.
throughout the world for the exploits of their nationals in the arts, culture, sports, and for their reputation for physical beauty and an incredibly hospitable climate.  

Prior to these territories gaining independence from the United Kingdom, the apex of their judicial and legal system was the Judicial Committee of the Privy Council, which was an English institution that had been established by the Judicial Committee Act 1833. The Privy Council accordingly functioned as the final court of appeal for all of the colonies of Britain (including, at various stages of their history: Canada, Australia, New Zealand, Hong Kong, and much of Africa) and, by that role, provided a unifying force in the common law of England as it applied in the colonies.  

The independence movement in the Commonwealth Caribbean began in the early 1960s (with Jamaica and Trinidad and Tobago being the forerunners in 1962) and continued well into the 1980s. By the end of the independent movement, there remained in the region only five dependencies of the United Kingdom. Upon achieving independence, each of the former colonies had a choice "of either allowing appeals to an external court to continue or of abolishing them." All of them, in fact, opted to preserve appeals to the Privy Council (an external court) and, with the single exception of Guyana, this has remained the situation up until quite recently.  

3. *Id.* at 5, 41.  
5. *See Antoine, supra* note 4, at 230.  
sertion of their independence in, as some have argued, "an exercise of sovereignty, not a derogation from it," the territories of the Commonwealth Caribbean chose to retain the Privy Council as their final court of appeal.

However, this state of affairs has not enjoyed complete approbation from significant parts of the body of informed opinion throughout the region, and as one distinguished Caribbean jurist observed, "it is offensive to the sovereignty of independent nations and therefore, politically unacceptable, to have a foreign tribunal permanently entrenched in their [C]onstitutions as their final court." The arguments for and against are lucidly expounded by Professor Simeon McIntosh, the distinguished current Dean of the Faculty of Law of the University of the West Indies, in the concluding chapter, "Reading Text and Polity: The Case for a Caribbean Supreme Court," of his seminal work on constitutional reform in the Commonwealth Caribbean. Many in the region would find it difficult to question his conclusion that "the continuing presence of the . . . Judicial Committee in the post-independence Commonwealth Caribbean political order represents a vestigial incongruity, a contradiction in the constitutional symbolism of a politically independent sovereign order." This therefore provides the historical and theoretical background against which some of the governments in the region have entered into the international "Agreement Establishing the Caribbean Court of Justice, signed at Bridgetown, Barbados, on the 14th day of February, 2001." The recent successful challenge in Jamaica to the constitutionality of local legislation designed to give effect to the Agreement and the Protocol demonstrates that, despite the inauguration of the Caribbean Court of Justice, signed at Bridgetown, Barbados, on the 14th day of February, 2001, the governments and the people of the region may yet be some distance away from the complete achievement of abolition of appeals to the Privy Council and the removal of what the Chief Justice of Barbados

12. See ISLANDS OF THE COMMONWEALTH CARIBBEAN: A REGIONAL STUDY, supra note 1, passim.
15. Id. at 265.
has described as "an affront to sovereignty ... inconsistent with independence."  

But this article's main area of focus is not so much on the merits, or otherwise, of abolishing appeals to the Privy Council and the establishment of a Caribbean Court of Justice in its place; for despite the constitutional challenges, the actual setting up of the Court and the appointment of judges, both of which have now taken place, must surely set the stage for the kind of creative, but purposive, dialogue between the governments and the people of the region that will be required to secure a basis for consensus on its viability in the long run. Rather, my concern is to highlight the role of the Privy Council, as a final court of appeal for the region, in an area of critical importance to the every day life of all citizens of the region, that is, capital punishment. An analysis of that role will establish, I contend, that the Privy Council has demonstrated tremendous flexibility in response to changing norms in the area of international human rights, and it has done so in a manner that underscores the absolute desirability of an independent, responsible, and responsive final court of appeal. Far from being an argument in favor of preserving indefinitely, or for a time, appeals to the Privy Council, this is intended, rather, to provide a signpost to the quality of thought and adjudication that the citizenry must be entitled to expect, and to demand, from its higher judiciary, whether its seat is to be found in London, or in Port of Spain.

II. THE DEATH PENALTY

In the case of Boyce v. The Queen, an appeal from Barbados, Lord Hoffman (delivering the majority judgment), described the mandatory death penalty in this way:

Since the island of Barbados was colonised by the English in the seventeenth century, death has been the mandatory sentence for the crime of murder. That was the common law of England and it became the law of Barbados. In the nineteenth century it was codified in English statutes dealing with offences against the person: see section 3 of the Offences Against the Person Act 1828 and section 1 of the Offences Against the Person Act 1861. Each of these statutes was followed a few years later by a


similar statute in Barbados. Section 2 of the Barbados Offences Against the Person Act 1868 provided, as section 1 of the English Act of 1861 had done, "whosoever shall be convicted of murder shall suffer death as a felon."

In the United Kingdom the death penalty was confined by Part II of the Homicide Act 1957 to certain kinds of murder which the Act designated "capital". The Murder (Abolition of Death Penalty) Act 1965 abolished altogether its imposition for murder and section 1 of the Offences Against the Person Act 1861 was repealed. But no similar legislation was enacted in Barbados and the old law remained in force when Barbados became independent on 30 November 1966. Since then, section 2 of the 1868 Act has been replaced by section 2 of the Offences Against the Person Act 1994: "Any person convicted of murder shall be sentenced to, and suffer, death."  

Apart from minor differences in wording (in Belize, for instance, the law states that "[e]very person who commits murder shall suffer death"), the Barbados provision is typical of that to be found in the Commonwealth Caribbean. However, the movement internationally towards the abolition of the death penalty by statutory intervention has not borne fruit in the region (save, of course, in the remaining British dependent territories, where the United Kingdom reforms described by Lord Hoffman have applied as a matter of course). Despite a strong and sustained human rights campaign, particularly in Jamaica and Trinidad and Tobago, in favour of abolition of the death penalty, I think it is fair to say that this result remains a remote possibility. The fact is that the rate of violent crime, particularly murder, in these small countries continues to be such (and it is on the increase) that abolition of the death penalty at this time is unlikely to attract the level of public support that governments will probably want to look to in order to promote such a radical change in the status quo. So the death penalty remains, and is likely to remain for some time, the penalty for murder throughout the region. However, there have been legislative attempts, notably in Jamaica and Be-

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22. See id.
lize, to mitigate its application by providing for degrees of murder, with only the most serious ("capital") cases attracting the sentence of death.\textsuperscript{24}

III. THE INTERNATIONAL BILL OF RIGHTS AND THE COMMONWEALTH CARIBBEAN

What has come to be known as the International Bill of Rights comprises the Universal Declaration of Human Rights,\textsuperscript{25} the International Covenant on Economic, Social, and Cultural Rights,\textsuperscript{26} the International Covenant on Civil and Political Rights,\textsuperscript{27} and the Optional Protocols to the International Covenant on Civil and Political Rights.\textsuperscript{28} To these may be added the American Declaration of the Rights and Duties of Man,\textsuperscript{29} which is similar in its terms to the Universal Declaration,\textsuperscript{30} and the American Convention on Human Rights (1979),\textsuperscript{31} both of which are products of the Organization of American States system,\textsuperscript{32} of which many countries of the region are members.\textsuperscript{33}

The right to life is a centrally enshrined feature of many international instruments. "Every person has the right to life, liberty and the security of

\begin{thebibliography}{99}
\bibitem{30} Universal Declaration of Human Rights, \textit{supra} note 25.
\bibitem{32} See Boyce v. The Queen [2004] UKPC 32 ¶ 16, [2005] 1 A.C. 400 (appeal taken from Barb.).
\bibitem{33} All thirty-five independent countries of the Americas are members of the Organization. Member States and Permanent Missions, \textit{http://www.oas.org/documents/eng/memberstates.asp} (last visited Mar. 20, 2006).
\end{thebibliography}
person," proclaims the Universal Declaration,34 while the equivalent provision of the American Declaration is very similar.35 More detailed provisions are to be found in the International Covenant on Civil and Political Rights.36 Article six, paragraph one states, "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."37 Article seven states, "[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."38

And the American Convention on Human Rights deals with the death penalty in even greater detail than the earlier instruments.39

1. Every person has the right to have his life respected. This right shall be protected by law . . . No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes . . . .

. . .

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases.40

IV. THE INDEPENDENCE CONSTITUTIONS

By the time the Independence Constitutions came to be drafted in the beginning of the 1960s, the basic outline of what was to become the International Bill of Rights had already began to take shape and all of the new Constitutions incorporated Bills of Rights patterned on the Universal Declaration and the European Convention on Human Rights.41 As I have previously argued elsewhere, with reference to the case of Jamaica, "the international provenance of the Bill of Rights has had the salutary effect of locating those

34. Universal Declaration of Human Rights, supra note 25, art. 3.
35. American Declaration of the Rights and Duties of Man, supra note 29, art. 1. "Every human being has the right to life, liberty and the security of his person." Id.
36. See International Covenant on Civil and Political Rights, supra note 27, art. 6.
37. Id.
38. Id. art. 7.
40. Id.
41. See, e.g., THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 § 13.
clauses within an international context." The rights protected by section 13 of the Jamaican Constitution are a fair sample of what appears in the other Constitutions and are as follows: "(a) life, liberty, security of the person, the enjoyment of property and the protection of the law; (b) freedom of conscience, of expression and of peaceful assembly and association; and (c) respect for his private and family life."

The enshrinement of these rights in the Constitutions has "had the effect of providing an authoritative, normative statement of the standards of conduct expected by the society of the state in its relationship with its citizens," and has also served to promote what Dr. Rose-Marie Belle Antoine has described as the "norm-building and evolutionary character of a constitution." Their importance for the discussion which follows has to do mainly with the extent to which it will be seen that they have prescribed norms of state behavior which have come over time, through the way in which they have been interpreted, to mirror contemporary international standards.

V. THE PRIVY COUNCIL AND THE DEATH PENALTY IN THE COMMONWEALTH CARIBBEAN—THREE CASE STUDIES

It has tended to be a feature of supreme courts or courts of last resort in common law systems that only a small selection of cases of significant and general public importance are chosen for hearing and final adjudication. In this way, the dockets of these courts are not overburdened, therefore allowing the judges the kind of space and time that is necessary to make meaningful contributions to the interpretation of existing rules of law and to the development of case law. One practical consequence of this is that decisions of courts of last resort tend to endure and to be difficult to change even where clearly justified by changed or changing circumstances. No less so with the Privy Council, though the Privy Council has never been, in the strict sense, bound by its own decisions. Against this background, one highly unusual feature of the decisions of the Privy Council on death penalty cases from the Commonwealth Caribbean over the past twenty-five to thirty years

43. THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 § 13(a)-(c).
44. MORRISON, supra note 42, at 3.
45. ANTOINE, supra note 4, at 81.
47. Id. at 305.
48. See id. at 304-20.
is that it has felt able to explicitly reverse its own previous decisions on at least three occasions, a phenomenon which represents a recognition of the ferment of changing norms in the arena of international human rights, and no less of changing times. 50

A. Case Study One: The Carrying Out of a Sentence of Death—The Impact of Delay

In *Riley v. Attorney-General*, 51

"[The appellants were sentenced to death in Jamaica on various dates in 1975 and 1976 for murder. Their appeals to the Court of Appeal were dismissed and petitions for leave to appeal to the Privy Council were either dismissed or abandoned in 1976 and 1978. Between 1976 and 1979, however, there had been acute controversy in Jamaica regarding capital punishment. During that period, the execution of sentences of death was held in abeyance. In 1979, the House of Representatives resolved that capital punishment should be retained. Warrants for the execution of the appellants were issued in the same year. They then sought declarations from the Supreme Court that their executions would be contrary to section 17(1) of the Constitution, as being “inhuman or degrading punishment or other treatment” by reason of the length and circumstances of the delay in each case between the passing of the sentence and its execution. The Full Court refused the declarations and appeals to the Court of Appeal were dismissed."

On further appeal to the Privy Council, it was held by a bare majority that the appeals should be dismissed as “whatever the reasons for or the length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1).” 53

The Privy Council thus rejected the argument on behalf of the appellants that “long delay in the execution of a death sentence, especially delay for which the condemned man is himself in no way responsible,” 54 could

51. [1983] 1 A.C. 719 (P.C.) (appeal taken from Jam.)
54. *Id.* at 725.
constitute "'inhuman or degrading punishment or other treatment'" contrary to section 17(1) of the Constitution. In so doing, the majority of their Lordships were content to apply the reasoning of their own previous decision on appeal from Trinidad and Tobago.

Ten years later, exactly the same question came before the Privy Council again in Pratt v. Attorney-General. The appellants were convicted in 1979 of a murder committed in 1977 (since which [time] they had been detained in custody), and were sentenced to death. After various unsuccessful appellate proceedings, in 1991 they instituted proceedings for redress under the Constitution of Jamaica "claiming that their continued detention under sentence of death" for nearly fourteen years constituted "inhuman or degrading punishment or other treatment" in contravention of section 17(1) of the Constitution. Not surprisingly, these proceedings were dismissed and the Supreme Court and the Court of Appeal of Jamaica correctly held themselves to be bound by the Privy Council's earlier decision in Riley.

But in a reversal of its own decision in Riley, the Privy Council in Pratt ruled:

That the execution of the death sentence after unconscionable delay would constitute a contravention of section 17(1), except where the delay had been the result of some fault of the accused, e.g. an escape from custody or the frivolous or time-wasting resort to legal procedures such as would amount to an abuse of process; but delay attributable to the accused exploring legitimate avenues of appeal did not fall within such exception.

The Privy Council ruled further that "to execute the appellants after holding them in custody and under sentence of death for nearly fourteen years would be inhuman and in breach of section 17(1) and [that] their sentence[s] should [accordingly] be commuted to life imprisonment." The factual background

55. Id. at 726 (quoting THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 § 17(1)).
56. Id. at 725-26 (citing de Freitas v. Benny [1976] A.C. 239 (P.C.) (appeal taken from Trin. & Tobago)). In a powerful dissent which foreshadowed events to come, Lord Scarman and Lord Brightman disagreed with the result. See id. at 727-36 (Scarman, L., & Brightman, L., dissenting).
59. Id. (quoting THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 § 17(1)).
60. Id. at 355-56.
61. Id. at 341.
62. Id.
and the context were stated briefly, but graphically, by Lord Griffiths as follows:

The appellants, Earl Pratt and Ivan Morgan, were arrested sixteen years ago for a murder committed on 6th October 1977 and have been held in custody ever since. On 15th January 1979 they were convicted of murder and sentenced to death. Since that date they have been in prison in that part of St. Catherine’s prison set aside to hold prisoners under sentence of death and commonly known as “death row”. On three occasions the death warrant has been read to them and they have been removed to the condemned cells immediately adjacent to the gallows. The last occasion was in February 1991 for execution on 7th March; a stay was granted on 6th March consequent upon the commencement of these proceedings. The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the fourteen years that they have been in prison facing the gallows. It is unnecessary to refer to the evidence describing the restrictive conditions of imprisonment and the emotional and psychological impact of this experience, for it only reveals that which it is to be expected. These men are not alone in their suffering for there are now twenty-three prisoners in death row who have been awaiting execution for more than ten years and eighty-two prisoners who have been awaiting execution for more than five years. It is against this disturbing background that their lordships must now determine this constitutional appeal and must in particular reexamine the correctness of the majority decision in *Riley v. Attorney-General*.63

After a full review of the authorities, Lord Griffiths expressed the unanimous conclusion of the seven member court in these terms:

In their lordships’ view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner

who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

The application of the appellants to appeal to the Judicial Committee of the Privy Council and their petitions to the two human rights bodies do not fall within the category of frivolous procedures disentitling them to ask the Board to look at the whole period of delay in this case. The total period of delay is shocking and now amounts to almost fourteen years. It is double the time that the European Court of Human Rights considered would be an infringement of article 3 of the European Convention on Human Rights and their lordships can have no doubt that an execution would now be an infringement of section 17(1) of the Jamaican Constitution.

To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1). In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The delay in this case is wholly unacceptable and this appeal must be allowed.\(^\text{64}\)

In the result, Riley was overruled,\(^\text{65}\) and the court concluded that, "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute ‘inhuman or degrading punishment or other treatment.’\(^\text{66}\) It was accordingly recommended that consideration be given to immediate commutation to life imprisonment of the sentences of death of all affected persons who had then been on death row for more than five years, and a process to achieve this was in fact put in place and carried out in due course.\(^\text{67}\) In coming to its conclusion, the court was not unmindful of "a powerful argument that it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures," and recognized this as the view then prevailing in some states in the United States, resulting in what had become known as the “death row phenomenon.”\(^\text{68}\) At the end of the day, the court was in no doubt that developed, contemporary human rights stan-

\(^\text{64.} \) Id. at 359–60.
\(^\text{65.} \) Id. at 355.
\(^\text{66.} \) Id. at 362 (quoting THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 § 17(1)).
\(^\text{67.} \) Id.
\(^\text{68.} \) Pratt [1993] 43 W.I.R. at 356 (internal quotations omitted).
standards required a departure from its own earlier decision in Riley and Pratt. This was therefore a landmark decision, signaling the readiness and willingness of the Privy Council, as the Supreme Court of Jamaica, to mold the law of that country and the region in response to changing imperatives.

The wholly regrettable sequel to Pratt has, however, been the actions of the Governments of Jamaica and Trinidad and Tobago, both of which subsequently withdrew from the Optional Protocol to the International Covenant on Civil and Political Rights. It is the Optional Protocol which provides an "international machinery for dealing with communications from individuals claiming to be victims of violations" of the rights enshrined in the Covenant. The reason given for the withdrawal was that, in light of the decision in Pratt, those states would be unable to carry out the death penalty, given the probability that the domestic appellate and the international process would not be completed within the five-year period. The comment of one learned observer on these developments has, in my view, irresistible force:

Trinidad and Jamaica have now taken a lone stance in the international arena as the only group of countries to withdraw deliberately from the rule of international human rights law. To impose and carry-out the death penalty in conditions that would escape international accountability is a clear indication that certain Caribbean countries are isolating themselves from international principles concerned with the application of the death penalty. It is hoped that the states concerned will re-accede to the regional and international human rights bodies, and so enable domestic executive practice to be informed by new international attitudes to human rights and fundamental freedoms.

B. Case Study Two: Procedural Fairness and the Prerogative of Mercy

"The phrase 'procedural fairness' has come to describe those rules . . . which are concerned with the procedures for administrative decision mak-

69. See id at 355–62.
71. MORRISON, supra note 42, at 6.
The rules "therefore have more to do with ensuring the integrity of the decision making process, rather than with the decisions themselves." The core requirements of the concept of procedural fairness in the modern law are that administrative decision makers must adhere to the rules of natural justice" or, put another way, that "they must act fairly." The right to a hearing has, of course, traditionally been regarded as a key component of the duty to act fairly.

Virtually all of the Independence Constitutions in the Commonwealth Caribbean provide a procedure whereby convicted persons under sentence of death and who have exhausted all appellate procedures, may nevertheless seek commutation of their sentences to life imprisonment, by virtue of the exercise of "the [P]erogative of [M]ercy." The question that arose for decision for the first time by the Privy Council in de Freitas (a 1975 decision) was whether, "before advice is tendered" by the designated body or person to the Head of State "as to the exercise of the prerogative of mercy," the convicted person is "entitled (1) to be shown the material which the [body or person] who tender[ed] th[e] advice has placed before the [Head of State] . . . and (2) to be heard by that [Head of State] in reply at a hearing at which he is legally represented." The Privy Council answered both questions in the negative, Lord Diplock observing memorably that "Mercy is not the subject of legal rights. It begins where legal rights end." The decision in de Freitas, which was concerned with the Constitution of Trinidad and Tobago, was twenty years later followed by the Privy Council in the case of Reckley v. Minister of Public Safety and Immigration (No. 2), an appeal from the Bahamas. Lord Goff, speaking for the Privy Council, dealt with the matter in this way:

74. MORRISON, supra note 42, at 15 (emphasis added).
75. Id.
76. Id.
77. Id. at 16.
78. See de Freitas v. Benny [1976] A.C. 239, 247 (P.C.) (appeal taken from Trin. & Tobago). It is so called because its exercise "has always been a matter which lies solely in the discretion of the sovereign." Id. The person or body on whose advice the Head State acts in this regard varies from country to country. In Trinidad and Tobago it is a Minister designated for this purpose. Id. at 248. In Jamaica it is the local Privy Council (not to be confused with the Judicial Committee). Riley v. A-G [1983] 1 A.C. 719, 725 (P.C.) (appeal taken from Jam.). In [t]he Bahamas it is the Advisory Committee on the Prerogative of Mercy. See Reckley v. Minister of Pub. Safety & Immigration (No. 2) [1996] 1 A.C. 527, 530 (P.C.) (appeal taken from Bah.).
80. Id.
81. Id. at 241.
82. [1996] 1 A.C. 527 (P.C.) (appeal taken from Bah.).
The point can be placed in a broader context. A man accused of a capital offence in the Bahamas has of course his legal rights. In particular he is entitled to the benefit of a trial before a judge and jury, with all the rights which that entails. After conviction and sentence, he has a right to appeal to the Court of Appeal and, if his appeal is unsuccessful, to petition for leave to appeal to the Privy Council. After his rights of appeal are exhausted, he may still be able to invoke his fundamental rights under the Constitution. For a man is still entitled to his fundamental rights, and in particular to his right to the protection of the law, even after he has been sentenced to death. If therefore it is proposed to execute him contrary to the law, for example because there has been such delay that to execute him would constitute inhuman or degrading punishment, or because there has been a failure to consult the Advisory Committee on the Prerogative of Mercy as required by the Constitution, then he can apply to the Supreme Court for redress under article 28 of the Constitution. But the actual exercise by the designated minister of his discretion in death sentence cases is different. It is concerned with a regime, automatically applicable, under which the designated minister, having consulted with the advisory committee, decides, in the exercise of his own personal discretion, whether to advise the Governor-General that the law should or should not take its course. Of its very nature the minister's discretion, if exercised in favour of the condemned man, will involve a departure from the law. Such a decision is taken as an act of mercy or, as it used to be said, as an act of grace. As Lord Diplock said in de Freitas v. Benny: "Mercy is not the subject of legal rights. It begins where legal rights end." And the act of the advisory committee in advising the minister is of the same character as the act of the minister in advising the Governor-General.84

It might have been thought that the confirmation in Reckley that de Freitas "remains good law," would have put an end to the question whether, on a petition for mercy (after all other domestic attempts to set aside the convictions or to prevent execution have been exhausted), a convicted person is entitled to know what material the "Mercy Committee" had before it, and to make representations as to why mercy should be granted.85 But this is precisely the question that the Privy Council was again asked to determine a mere four years later in an appeal from Jamaica in Lewis v. Attorney-

83. Id. at 527.
84. Id. at 540 (citation omitted).
85. Id. at 542.
In that case, there was some discussion of differences in procedure between Trinidad and Tobago, the Bahamas, and Jamaica with regard to the exercise of the prerogative of mercy, but the majority concluded that these differences did not justify a distinction in this regard being drawn between the three countries. Lord Slynn observed that "[t]he position in each with respect to the right to make representations on a mercy petition should be the same." The task at hand and the proper approach were therefore summarized by Lord Slynn as follows:

Their lordships are accordingly compelled to consider whether they should follow these two cases. They should do so unless they are satisfied that the principle laid down was wrong—not least since the opinion in the Reckley (No 2) case was given as recently as 1996. The need for legal certainty demands that they should be very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so. But no less should they be prepared to do so when a man's life is at stake, where the death penalty is involved, if they are satisfied that the earlier cases adopted a wrong approach. In such a case rigid adherence to a rule of stare decisis is not justified.

While the Privy Council in Lewis reiterated that "[t]he merits [of a petition for mercy] are not for the courts to review," it nevertheless observed that "the insistence of the courts on the observance of the rules of natural justice, of 'fair play in action', has in recent years been marked" and that, on the face of the matter:

there are compelling reasons why a body which is required to consider a petition for mercy should be required to receive the representations of a man condemned to die and why he should have an opportunity in doing so to see and comment on the other material which is before that body.

After a full and careful review of authorities throughout the common law world, as well as of Jamaica's obligations under the American Convention on Human Rights, the Privy Council concluded in Lewis that de Freitas and Reckley should be overruled, and that a petitioner for mercy should have access to the material to be placed before the "Mercy Committee", as well as

86. [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.).  
87. Id. at 74–75.  
88. Id. at 75.  
89. Id. at 75–76.
the right to make representations to the Committee, whether in writing, (as would normally be the case) or orally.90 The Privy Council was obviously influenced by the dictum of Justice Holmes in Biddle v. Perovich,91 that "[a] pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme."92 In that case, the consideration of whether it should be granted or not must necessarily be open to judicial review in order to determine that the ordinary accepted principles of fairness have been applied.93 "This decision, as I have observed elsewhere, 'is accordingly not so much a 'death penalty' case as it is a case about the duty to demonstrate fairness in process, enhanced, albeit, by the finality of the consequences of failing to do so."94 It is at the same time another demonstration of the willingness of the Privy Council, as a court of last resort, to insist that old paradigms (mercy begins where legal rights end) be subject to fresh scrutiny in the light of developed concepts of what the requirements of fairness might demand in particular cases.95

C. Case Study Three: The Mandatory Death Penalty

As recently as 1981, Lord Diplock in delivering the judgment of the Privy Council in Ong Ah Chuan v. Public Prosecutor96 had observed that there was nothing unconstitutional in a death sentence being mandatory and that its efficacy as a deterrent might to some extent be diminished if it were not.97 Furthermore, it had not been sought in either Pratt or Lewis, or in any of the earlier challenges to the manner of the administration of the death penalty, to argue that the mandatory nature of the penalty was in any way unconstitutional.98 Yet, by 2004, Lord Hope tersely described Lord Diplock's remark referred to above as "no longer acceptable."99 What is it that had happened in the interim?

90. See id. at 279–80.
91. 274 U.S. 480 (1927).
92. Id. at 486.
93. See id.
94. MORRISON, supra note 42, at 19 (citation omitted).
95. See generally Biddle, 274 U.S. 480.
97. Id. at 674.
In *Reyes v. The Queen*, the defendant was convicted of a "class A" murder which by the Criminal Code of Belize was punishable by a mandatory sentence of death. The defendant challenged his sentence as unconstitutional in that it infringed upon his right not to be subjected to inhuman or degrading punishment or other treatment, under Section 7 of the Belize Constitution. In another landmark ruling, the Privy Council upheld this contention and set aside his sentence, holding that since the character of the offence of murder by shooting could vary widely, the imposition of the death penalty for some such offences "would be plainly excessive and disproportionate." Denying a person convicted of murder by shooting "the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity." The sentence of death was therefore quashed and the case remitted to the Supreme Court of Belize to pass an appropriate sentence after receiving or hearing any evidence and submissions on his behalf.

In arriving at this conclusion, the Privy Council referred with approval to the report of an independent enquiry into the mandatory life sentence for murder, which it obtained in the United Kingdom, in which it was stated that "[t]here is probably no offence in the criminal calendar that varies so widely both in character and in degree of moral guilt as that which falls within the legal definition of murder." Reference was also made to "[i]nternational developments," some of which have already been described at paragraphs eight through ten above, as well as to the modern approach to the interpretation of constitutional provisions protecting human rights, which is to adopt a "generous and purposive interpretation" and to consider the substance of the fundamental right at issue and "ensure contemporary protection of that right in the light of 'evolving standards of decency that mark the progress of a maturing society.'" Against this broad backdrop of principle, the court had no difficulty in holding that the mandatory sentence of death for murder, without reference to any potentially mitigating factor in the person or in cir-

102. *Id.* at 237.
103. *Id.* at 242, 256.
104. *Id.* at 256.
105. *Id.* at 258.
107. *Id.* at 244.
108. *Id.* at 246 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
cumstances of the condemned man, constituted inhuman and degrading punishment.109

To similar effect as Reyes were the decisions of the Privy Council in Regina v. Hughes110 and Fox v. The Queen.111 And more recently, in Watson v. The Queen,112 the Privy Council came to the same conclusion, Lord Hope referring specifically to "[t]he march of international jurisprudence" on the death penalty issue which had driven the court to the conclusion that the mandatory sentence of death was unconstitutional.113 In this regard, two American cases, Woodson v. North Carolina114 and Roberts v. Louisiana,115 influenced the thinking of the Privy Council, in particular around the notions that "[c]onsideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development"116 and that "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense."117

In the companion cases to Watson from Barbados and Trinidad and Tobago, it is clear that the decisions would have been the same were it not for the existence, in the constitutions of those countries, of effective provisions saving laws that pre-dated the constitution ("pre-existing laws") from challenge.118 Ultimately, in Matthew v. The State,119 the breathtaking progression that Reyes, Watson and the other cases have described receives its most effective summary from the brief, but powerful, dissent of Lord Nicholls:

Years ago no one thought mandatory death sentences were an unusual or inhumane form of punishment. They existed in the United Kingdom until 1965. As recently as 1981 Lord Diplock was able to say there was nothing unusual in a capital sentence being mandatory.

Times have changed. Human rights values set higher standards today. The common endeavour, to rid the world of man’s

109. Id. at 248–50.
117. Roberts, 431 U.S. at 637.
inhumanity to man, has not ceased. Conduct, once tolerated, is no longer acceptable. Murder can be committed in all manner of circumstances. In some the death penalty will plainly be excessive and disproportionate. As Lord Lane noted, there is “probably no offence in the criminal calendar that varies so widely both in character and in degree of moral guilt as that which falls within the legal definition of murder.” To condemn every person convicted of murder to death regardless of the circumstances is a form of inhumane punishment. A sentence of death which lacks proportionality lacks humanity.

The three countries with which these appeals are concerned have human rights values at the very forefront of their constitutions. Among the fundamental human rights expressly enshrined is prohibition of cruel and unusual punishment in section 5 of the Constitution of Trinidad and Tobago, inhuman punishment in section 17 of the Constitution of Jamaica, and inhuman punishment in section 15 of the Constitution of Barbados. Each country has also entered into international commitments of a like nature.

Despite these constitutional and international guarantees the governments of these countries insist on continuing to inflict on their citizens a form of punishment which, by today’s standards, is inhuman. Each government justifies its mandatory sentences of death for murder by pointing to a transitional savings clause in the country’s constitution in respect of laws in force when the constitution was adopted. Each government seeks thereby to clothe a form of inhuman punishment with continuing constitutional legitimacy and an appearance of human rights respectability.

I do not believe the framers of these constitutions ever intended the existing laws savings provisions should operate to deprive the country’s citizens of the protection afforded by rising standards set by human rights values. The savings clauses were intended to smooth the transition, not to freeze standards for ever. The constitutions of these countries should be interpreted accordingly, by giving proper effect to their spirit and not being mesmerised by their letter. A literal interpretation of these constitutions means that the law of Jamaica, a country which has taken steps to distinguish between different types of murders, is held to be unconstitutional, whereas the laws of Barbados and of Trinidad and Tobago, where no ameliorating steps have been taken, are held to be constitutional. This is bizarre.

Self-evidently, an interpretation of the constitutions which produces this outcome is unacceptable. A supreme court of a country which adopts such a literal approach is failing in its responsibilities to the citizens of the country. A constitution should be interpreted as an evolving statement of a country’s supreme law.
This is not to substitute the personal [predilections] of individual judges for the chosen language of the constitution. Rather, it is a recognition that the values underlying a constitution should be given due weight when the constitution [fails] to be interpreted in changed conditions. A supreme court which fails to do this is not fulfilling its proper role as guardian of the constitution. It is abdicating its responsibility to ensure that the people of a country, including those least able to protect themselves, have the full measure of protection against the executive which a constitution exists to provide.  

The result of the decisions in *Reyes* and *Watson* is that the sentencing process, once perfunctory in capital murder cases, must now take on an importance second only to that of the trial itself, in the quest for proportionality and individualized sentences. This will pose a particular challenge for practitioners at the criminal bar in the affected parts of the region, as they seek to assist the judges “to develop judicially reasoned alternatives to death in convictions for capital murder.”

**VI. CONCLUSION**

These three case studies demonstrate the response of the Privy Council to the challenge of change in the area of human rights norms in the context of death penalty cases. They underscore the fact that for the law to preserve its relevance in this area it must be constantly responsive to the “evolving standards of decency that mark the progress of a maturing society.”

While this conclusion applies equally in relation to private law, its importance has an enhanced significance in relation to constitutions, which articulate and record the covenant between the state and its citizens and which must of necessity be capable of adaptation to changing circumstances. In this regard, the role of the judiciary, and in particular courts of last resort, attains the critical significance so well captured by Justice Dickson in the Supreme Court of Canada in *Hunter v. Southam, Inc.*:

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123. [1984] 2 S.C.R. 145 (Can.).
The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.124

The Caribbean Court of Justice was conceived and has been established with the highest of expectations, reflecting the confidence of the governments of the region in the ability of local institutions to secure for the future, the quality of adjudication that every citizen is entitled to expect. In discharging their duties, the new judges of that new court will do well to remember always, as the Privy Council has manifestly demonstrated that it has in recent years, their role as independent guardians of the constitution, particularly so in changing times.

124. Id. at 155 (emphasis in original).
WALKING THE TIGHTROPE

THE HONOURABLE MIA AMOR MOTTLEY, Q.C., M.P.*+

Thank you very much. Let me first say that, maybe I am still too young and recently out of University, but I feel almost on every occasion that I stand before an academic audience, the same level of nervousness that I felt when I went to University in 1983 at the London School of Economics. I told Professor Cross as well, that it is a very unnerving feeling for me today, because it is only twice in the last ten years that I have ever read a speech; and I speak on average four or five times a month to all kinds of bodies—outside of Parliament, that is. And it is because upon becoming a politician, I felt it was fashionable to treat all politicians as pariahs incapable of sincerity or belief. I therefore took a vow upon entering public life that when I spoke, I would speak only to what I truly believe; and hence I would speak from the head and the heart, rather than from the aid of paper.

Unfortunately, when you enter an academic environment, if it is not reflected on paper, it is treated as an immediate failure by those who are to judge you. The only other time that I have spoken with the aid of a written speech, has been when I addressed a recent graduation at the Mona Campus at the University of the West Indies, in Jamaica; because they too, and perhaps even more so than you, unwittingly created that aura, buttressed, of course, by the garb that they wore that it was a no-no for someone as lowly as a politician to come before them and dare to speak without the benefit of early and deliberate preparation as evidenced by paper.

Nonetheless, I shall try to walk that tightrope again today, literally and figuratively, since I have entitled this discussion paper, “Walking the Tightrope...” (pun intended).

I am also told that you have been recently addressed by three distinguished individuals: first, my distinguished predecessor, who is now Chief Justice of Barbados; secondly, my colleague with whom I did the Bar Finals in London, the Prime Minister of St. Lucia; and finally, Dr. Antoine, his wife, Lecturer at the University of the West Indies, Cave Hill Campus, in Barbados. Consequently, I feel a sense of comfort now, by virtue of the fact that those who have spoken to you before are persons with whom I am well familiar and in whom I have great confidence; and I have heard from some

* Deputy Prime Minister of Barbados; Attorney General and Minister of Home Affairs.
+ The following is a transcription of a speech given by the author at Nova Southeastern University’s 2004 Goodwin Seminar.
of them that the interaction has been stimulating and worthwhile and that they have enjoyed the opportunity of being able to address you.

I want to thank you also, because it is not often that one gets the opportunity to address audiences that are not necessarily rooted within the jurisdiction that you have to represent, and especially as a small state when you believe that every opportunity should be taken to be able to sensitize persons as to the differences and vagaries that may perhaps be peculiar in some instances to small states.

I want in particular to thank Professor Cross, whom I met some time ago in Barbados when I addressed a conference, which she attended at which I delivered a speech entitled “The Law as an Instrument of Oppression, and a Tool of Empowerment”. Since that time, we have had a number of opportunities to meet again, and therefore, while I really ought to be at home in Barbados today, I felt duty bound to accept this invitation and to reciprocate in being able to continue to articulate what our participation in the International Community represents.

I have been informed that my predecessors focused primarily on the soon to be established Caribbean Court of Justice. Hence, I will not treat to this issue although I do chair the preparatory committee for the establishment of the Court.

My appreciation to be able to speak to you is further heightened because very often there is an absence of sensitivity as to what we confront as a small state. Indeed, the norm across the developed world and more particularly within international institutions is to assume that the settlement of one set of rules in one country is capable of being both appropriate and applicable to all states and bodies globally on the basis of a “one size fits all” prescription. This, I must confess, has not been our experience—there can be no such prescription!

One such example, is our negotiations in the area of regional and international trade agreements as we seek to establish the need for special and differential treatment. The constraints of our size coupled with our inability to distort the patterns of regional or international trade, strengthen our arguments for special and differential treatment. We hold 0.000 percent of global trade in goods, and 0.001 percent in global trade in services, neither being capable of distorting global trade in goods and services.

Equally, our settlement of standards within the regulation of the international financial services network has become problematic. Consequently, we have argued once again that the rules must relate to the risk that is confronted, rather than a “one size fits all” prescription, which in effect is tantamount to a non-tariff barrier in relation to the expansion of our international financial services. This imposes extremely heavy burdens on our administrative, financial and other resources in order for us to be compliant and avoid
being an international pariah; even though the risk of significant money laundering and terrorism financing is not found in our states but still is still prevalent in the metropoles of London and New York.

While it is entirely possible therefore to speak to a range of experiences in our interaction with the global community, it is intended in this discussion today to restrict my comments to the impact of judicial activism on the nature of our obligations either already accepted or in fact being considered by sovereign nations in the area of international law; in particular, international human rights law.

The second half of the twentieth century as you all know witnessed an explosion in the birth of new states across the globe. Indeed, this is best exemplified by the fact that at the time of the establishment of the United Nations the number of member countries was approximately 51. Today, there are over 191 countries involved in that organization. It is clear that this phenomenon would have undoubtedly had an impact on the development of international law.

It also meant that there could no longer be a discourse and focus in international texts on what Lord McNair refers to in his “Law of Treaties” as the “Great Powers”. In fact, the variables pertaining to circumstances, capacity and culture would initially seem to be irrelevant since the focus of international human rights law relates to principles that ought to be universal. The growth in the use of multi-lateral treaties after the establishment of the United Nations would also have reduced the extent to which customary international law and its emphasis on state practice would by implication prejudice the potential influence of the development of these new nations.

With the apparent equality of States offered by the establishment of the United Nations and their admission to membership, all would appear, on first blush, to be propitious for a new, more democratic framework for the conduct of both international relations and the development of what has become the new form of international human rights law. Regrettably this has not been the case. Those who might have assumed so may on reflection be forgiven for this form of naïve idealism.

Even in the corridors of the United Nations today as we speak, it is arguable that inequity still governs both the structure of the membership and the veto power, which continues to be vested in the five permanent members of the Security Council. Were this to be the extent of the challenge, there might be hope for optimism on the part of developing countries, especially small states like Barbados. However, it is the invisible hand of the cultural values of the developed world that has come to define the doubts being experienced by many of us in small states. In recent times, this perspective has often been reflected in the judgments of many international human rights bodies which have sought to redefine the obligations of states through re-
interpreting those obligations under international treaty law in a manner that was never understood by the states at the time of the acceptance of the obligations, or indeed at the time of the reservations being submitted right before that time.

This process of re-definition and re-interpretation has often been reflected in the values of the Western world deemed to be “enlightened” but insensitive to those from other regions. They have resulted from the lobbying and petitioning by a number of human rights bodies and Non-Governmental Organizations which reflect a strong political agenda and which would wish to reshape the world in their absolute image. It is significant that in 1993 the Bangkok Declaration reflected that the concentration on western values was the centerpiece of the more recent development of human rights norms: The Bangkok Declaration as settled by the majority of the Asian countries.

It is this phenomenon of the continuous expansion of the definition of what constitutes human rights, (not by the state accepting new obligations, but by the judicial bodies), that significantly affects the rights of nations to appropriately and properly plan for themselves and their citizens according to their norms, their customs and their respect for fundamental rights.

It is critical to emphasise that in the English Speaking Caribbean, there is a very healthy respect for human rights, as this has been universally understood for years. In addition to this respect for human rights, it is fair to say that our record on human rights as originally understood in the early decades of the development of the laws following the 1948 Universal Declaration of Human Rights has been among the best in the world, both the developed and developing. This has largely sprung from the strong abhorrence for injustice, oppression and inequity that we feel in light of our own experiences and history over the course of the last few centuries.

So what is this definition of human rights to which I keep referring? It is simply this, and this is what it has always been in its purest form, namely, universal legal guarantees protecting all individuals and groups, simply by virtue of being human, against action and omissions that interfere with fundamental freedoms and human dignity.

What is the key for that definition? Two phrases – firstly, “universal legal guarantees” and secondly, “fundamental freedoms and human dignity”. Words that are generic in their scope and therefore without further particularity to treaty provisions which are capable of all kinds of subjective interpretation. Fortunately, these words were buttressed by specific treaty provisions in almost every single instance, whether they be by the International Covenant on Civil and Political rights, the American Declaration of Human Rights, or the European Declaration of Human Rights, to mention a few.

Every single Commonwealth Caribbean country at the time of Independence settled a written Constitution, unlike Britain (from whom we
would have derived most of our governmental structures), whose constitution still remains unwritten to date. Each one has as its cornerstone in its constitution a Fundamental Rights Chapter. There is a clear protection for the rights that we have all come to consider as fundamental to life, to liberty and the preservation of human dignity. They assert the need to assure due process and the protection of the law to all of our people. They prohibit slavery and genocide and the taking of life other than by the due process provided for in the laws of our country. The freedoms of expression, association and assembly are found in each of them, in varying forms of words but nevertheless found.

In other words, Commonwealth Caribbean constitutions are strong and unequivocal in the need to protect these rights and in the definition of these rights. There was no need for us to avoid this clear definition because its inclusion ensured that there was then an obvious protection of the rights of individuals and groups of individuals (minorities in particular) against abuses that are patently repugnant to the norms of civilized behaviour. Consistent with the same philosophy that led to these clear written constitutions, there was a commitment to reflect the same adherence to the protection of these fundamental rights in our international obligations.

So what did we do? We signed the major human rights conventions like that of the International Covenant of Civil and Political Rights; like that of the American Convention of Human Rights; and at the time of signing them, there was little or no debate in our countries because it was uncontroversial. It was accepted that a treaty that spoke of these noble things could only be good. May I also remind you that these treaties spoke to those universal values to which you could adhere and that were relevant irrespective of whether you are a Christian or Muslim; black or white; or old or young. It should be noted that in all of the treaties to which we adhered there was authorization for the use, albeit for serious offences, of the death penalty. This is evident not only in the American Convention of Human Rights and the International Covenant of Civil and Political Rights but also in the protocol in the American Convention of Human Rights to abolish the death penalty, where its use and application is still permitted in times of war. I will say more about that later because it recognizes that the viability of the state must be preserved at all costs if mankind is to be preserved ultimately.

But in truth and in fact, for what offences and in what circumstances is the death penalty used in the region? It is used for murder and treason. In spite of the fact that these conventions referred to above provided for the use of the death penalty, Caribbean states, however, took the additional precaution of entering specific reservations to those provisions, as did Barbados in 1982 when it became a party to the American Convention). This clearly reflected our continued intention to apply the death penalty as is provided for
in both the constitution of Barbados and the Offences Against Persons Act which latter act codifies the common law as it was inherited. We understood that any obligations attained in international law would be constrained by the nature of that reservation that was entered by us.

To become a little more specific for you now, because I’m sure many of you are saying, “Where is she going with this?”

Barbados as you know is a small island in the Caribbean which joined the family of nation states on the 30th of November, 1966. Its philosophy, which is key, as articulated by its then Prime Minister, the Right Excellent Errol Barrow at his inaugural address to the United Nations, was captured by this phrase “friend of all, satellite of none”. That has continued to guide the conduct of our foreign policy and our international relations, as small as we are.

It is fair to say that this philosophy emanated from a state which has long been known to buck the trend when necessary in support of what it believes. Our country is internationally recognized for its commitment to the rule of law and its belief in the central importance of fostering tenets of democracy within the context of social justice. Many of you may not know that your own battle of independence here in America, which was fought on the precept of “no taxation without representation”, was pre-dated by more than one century by the Charter of Barbados signed at Oistins in 1652, when that precept was articulated by those in Barbados who were defending the rights of the Crown against the incursions of Cromwellians in London. So that this dates back beyond our memory. We have been firm in our belief since Independence, clearly emerging once again from our historical roots, that each state must play its role in the international community. There must be an unwavering effort on the part of states to advance the goals of humanity and to improve the lot of the citizens of the world, many of whom have been long oppressed.

Social justice is a critical part of any foreign policy formulation both at the domestic and the international level. I state these facts because it is important to understand that the intrinsic values reflected by the modern state of Barbados are those that are consistent with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights – generally, the objective to remove inequity, oppression and lack of dignity from the backs of the people of the countries of the world as we move forward. Indeed, we have through our existence as an independent state since 1966 been regarded as a model adherent to human rights obligations.

The tide, I fear, is now beginning to turn – and unjustly so! This is specifically as it relates to the country’s application of the death penalty accord-
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ing to its laws, which have been intact throughout and unchanged. I will now seek to provide a brief history in order to explain why.

In 1994, the Judicial Committee of the Privy Council (JCPC), which is the highest court of Barbados pending the establishment of the Caribbean Court of Justice, delivered a judgment as the final court, not then of Barbados but of Jamaica, in the case of Pratt and Morgan. This decision was to have significant and long-ranging consequences for most Commonwealth Caribbean States. In that case, the Court held that while the application of the death penalty was not unconstitutional in Jamaica, the detention of a convicted person on death row for more than five years constituted cruel and unusual punishment and hence was unconstitutional.

While this case was binding only on Jamaica, because it sat as the court of Jamaica, it was persuasive for other Commonwealth Caribbean jurisdictions. Indeed, it represented a sea change for the JCPC. The JCPC would reaffirm that principle over the next decade when sitting as the final Court of other Commonwealth Caribbean jurisdictions. In time, they were to come to use other reasons in a clear effort to restrict the circumstances in which the death penalty could be applied. In recent times, the debate has revolved around the mandatory nature of the death penalty.

May I say to you, that three years after that JCPC ruling in relation to Jamaica, one of the bodies charged with the application of human rights interpretation, that is, the United Nations Human Rights Committee, held in the case of Johnson v. Jamaica, that in the absence of compelling circumstances, mere length of time on death row does not constitute cruel inhuman and degrading treatment or punishment and hence does not constitute a breach of the Covenant of International Civil and Political rights. Three years, after the JCPC in England gave its ruling on this matter, the body which is actually charged with the interpretation of the same Covenant that the JCPC uses as the basis for their justification, says that length of time does not constitute cruel and unusual punishment.

It is interesting because in Pratt and Morgan, the JCPC has reflected that the norm in Europe was seven years, but yet set a five-year deadline for Commonwealth Caribbean States. And, three years later when the United Nations Human Rights Committee is ruling in Johnson v Jamaica, this same JCPC is reducing the five years or sixty months to fifty-six months in the cases coming from Trinidad – no certainty, no clear line that allows you to act.

The U.N. Human Rights Committee felt that there ought to be other compelling circumstances, failing which, you would force governments to act expeditiously in carrying out the death penalty in circumstances where they may well be reason not to carry it out. It is important to note that in my own country, even before Pratt and Morgan, the death penalty had not been
carried out for almost ten (10) years, and that was because there were cases, which regularly went to our local Privy Council (an advisory body to the Governor-General) for the exercise of the prerogative of mercy. So the JCPC's decision has placed Commonwealth Caribbean countries' backs against the wall and forced them now to "work to a stopwatch" which makes no sense, as the Human Rights Committee well appreciated.

May I say, that after many years of this oppression, our own government, in 2002, passed a specific legislative amendment to the Constitution, expressly stating that the reasons set out by the JCPC in Pratt and Morgan and Neville Lewis v. Attorney General of Jamaica that led to the restriction of the use of the death penalty, were to be avoided. The amendment reinforces that if these circumstances occurred, that they would in no way constitute a breach of the Constitution. This is an assertion of our sovereignty. We are now in the process of drafting a new Constitution, and we will seek to reflect the will of the people of Barbados with our understanding of the international obligations, which Barbados has accepted.

The most recent litigation, however, has surrounded the issue of what has now been commonly referred to as "the mandatory death penalty". In the last three years human rights advocates and lawyers across the region, in London, and within the Americas, have argued that this system, which has been in use for centuries and which has been held to be compliant with all of the human rights conventions is suddenly now unconstitutional domestically and in breach of the human rights conventions to which we are signatory.

Over the last year, I have appeared before the JCPC on two occasions. The first time I appeared was three weeks after it delivered a ruling against the Government of Trinidad and Tobago in the case of Balkissoon Roodal v. The State of Trinidad and Tobago that the mandatory death penalty was in breach of the Trinidad Constitution.

Barbados' case was argued three (3) weeks later with the knowledge that the principle of stare decisis would imply that the JCPC would be unlikely to move from the Trinidad and Tobago ruling. The JCPC, in an unexpected move, asked the parties to come back and re-argue the case before a larger panel of judges. When we returned it was not just to argue as The State of Barbados, but our appeal was joined with appeals from Trinidad and Tobago and Jamaica. The three appeals were heard at the same time in a case that involved over thirty (30) lawyers, and for the first time ever, in its history, the JCPC sat as a body of nine (9) judges. Normally this body sits as five (5), and for rare, complex legal decisions they sit as seven (7). In sitting as a body of nine (9), history was being made.

In July, the JCPC held that Barbados' use of the death penalty, even if referred to as "mandatory", was consistent with the Constitution of Barbados since it was expressly saved by the Savings Clause of the Constitution. The
JCPC also reversed the ruling in the Trinidad and Tobago decision in Roodal and held that the “mandatory” death penalty is also consistent with Trinidad and Tobago’s Constitution. In Jamaica’s case, however, because it has changed its legislation for capital offences and created a hybrid set of offences since its Independence, it was held that Jamaica’s use of the mandatory death penalty was unconstitutional.

What was the majority? In Barbados and Trinidad and Tobago’s case, it was won by the slimmest of margins, namely, a five (5) to four (4) majority. Nevertheless, it reversed what had been ten (10) years of political onslaught in the form of judicial activism.

What are the real features of this system that has been styled the “mandatory death penalty”? In truth and in fact any person charged with murder in Barbados may avail themselves of a range of statutory and common-law defences. Indeed the definition of murder is very precise and results in a very small percentage of persons (I believe it is about eight percent (8%)) being convicted of murder and thus sentenced to death. Why is this? Because there are a range of Pre-conviction defences, ranging from self-defence to accident, from provocation to diminished responsibility and insanity and equally related bars to a finding of fitness to plead, to incapacity by infancy to insufficient mens rea.

There are also Post-conviction mechanisms that have worked exceedingly well for us, both pre- and post-Independence, which can be used to avoid capital punishment. These include appeals to the Privy Council under the Constitution. Under Section 78 of the Constitution there is a local Privy Council chaired by His Excellency the Governor General that membership comprising accomplished, well-respected and experienced persons. These persons have been drawn from the ranks of Deputy Prime Ministers and Prime Ministers; from persons who have been Presidents of international organizations; and from persons who have served in social services or the private sector at the very highest level; in other words, what would otherwise in bygone era, be referred to as a council of wise persons.

Under the new Constitutional Amendment Act, passed in 2002, which will only be effective in the near future once these four (4) cases that are going through their appellate process are completed, there is actually a strengthening of the framework and proceedings by requiring the Privy Council to invite written representations from any person sentenced to death before considering the exercise of the prerogative of mercy. This was done because we accepted that that was a good thing to do, and also to ensure the sharing of all materials as required by the local Privy Council for those persons so as to permit them to be able to comment thereon. We also have several rules of procedural fairness that guarantee the impartiality of our system,
and also ensure that there are benefits afforded to support an accused person, namely:

1. the unanimity rule for the jury in relation to convictions of murder;
2. the provision of legal aid through an attorney-at-law of choice, (not a public attorney, not a public defence counsel). Consequently, persons charged with murder have available to them the best legal counsel on the island. And indeed, everyone who has made his/her name as an advocate in Barbados has worked for legal aid representing persons, and that perhaps accounts for why the conviction rate is as low as eight percent (8%);
3. allowing in the last decade defence lawyers to be present during the police interview of any murder accused, so that even before the charge of murder is brought down, defence counsel are present to guarantee fairness and an absence of any bias or unfair tactics.

In sum, in order for a person to be executed following a capital punishment conviction in Barbados, his/her offence must have been proved beyond a reasonable doubt before a unanimous jury, during a trial in which he/she would have been represented by an attorney-at-law of choice, funded by the State. He/She would have had their full due process rights respected during which he/she could have availed himself/herself of a number of legal defences or incapacities, both under statutory and common law. After the conclusion of the trial, (an accused) then has the right to go all the way to the Court of Appeal and the JCPC, soon to be the Caribbean Court of Justice. Even after that, they then have the right to petition the local Privy Council, for the exercise of the prerogative of mercy; and the statistics show that more often than not, since Independence, the sentence has been commuted rather than affirmed.

Parliament itself, however, has also been sensitive to the need to restrict the death penalty as a mandatory penalty, the only penalty available to a judge in certain circumstances. It is significant that under Sentence of Death (Expectant Mothers) Act, that no woman convicted of an offence punishable by death is to be sentenced to death while she is pregnant. Her sentence will be commuted to life imprisonment instead. Equally, other offenses that in our past have been known to carry the conviction of death no longer do so, for example:

- killing in the course of the furtherance of some other offence, usually a felony known as the Felony Murder Rule in our history;
- attempted murder;
- threatening murder through letters;
- conspiracy to murder;
- aiding suicide;
- aiding/acting in pursuance of a suicide pact; and
Infanticide.

These offences all carry life imprisonment. There has been a genuine attempt to restrict those offences to a minimum. Some ask us ‘Why don’t you have two categories of murder?’ But the same philosophy that I spoke about guides us. Most systems that have two categories of murder have—first-degree murder for who you kill and not the fact that someone was killed. In Barbados we believe that every life is sacrosanct and that the loss of one life should not attract a greater penalty than the loss of another person’s life. And that what is important are the issues of intent and defence as opposed to the subjective issues of who you kill or the manner in which they were killed, unless they pertain to those offences.

However, the determination of the validity of this mandatory death penalty in international law is much more complex. In spite of the fact that all human rights treaties apply it, in the last decade there has been a galvanizing effort on the part of international human rights advocates and lobbyists to further their political agenda. In this hemisphere, the most persistent challenge has come within the Inter-American system. In the Organization of American States the treaty (the American Convention) covers many more rights than the matter of the death penalty, even though what one hears discussed is the death penalty. Suffice it to say, that Inter-American court two years ago in the Trinidadian case of Hilaire held that the mandatory death penalty was in breach of the American Convention on Human Rights. Subsequent to that, because of that Constitutional Amendment in 2002, they carried the Barbados Government, before the Inter-American Commission. In spite of the fact that we reserved our right to be heard because we had two weeks notice of the hearing, they heard the matter in our absence and rendered an opinion. Subsequent to our extremely strenuous objections, we were again, one year later, allowed to make a submission, after the first opinion had been rendered by the Inter-American Commission.

This petition to carry us before the Inter-American system was not from a Barbadian law firm, but from a firm of solicitors out of London Simons, Muirhead and Burton, who on occasion have been the attorneys at law on record for the Inter-American Commission before the Inter-American Court. So the very lawyers of the Inter-American Commission carried us before the Inter-American Commission. I hope you can begin to see the picture. Nevertheless, we presented our case, but in spite of this, the opinion of the Inter-American Commission was rendered on the Friday before.

We have now been referred to the Inter-American Court and we have until the tenth of December of 2004 to find persons out of our seventeen in-house counsel in the Chambers of the Attorney-General (who deal with every legal matter coming through the Government of Barbados) to try and find
time now to research and present a case in Costa Rica that will clearly take a long time and much effort.

In fine, our contention is that the Inter-American Court and the Inter-American Commission are treaty-created and treaty-regulated bodies. As such they cannot go beyond the powers vested in the treaty that creates them or the 1969 Vienna Convention of Treaties, or the customary international law as it relates to the interpretation of treaties. We contend that they are seeking to use a provision in the Convention that for the last twenty years has been sufficient to keep us compliant. However, all of a sudden, with no change in our legal system, and with no change in the Convention, we are deemed overnight to be in breach. And what is that one word? The word is the word “arbitrarily”. And what is the definition of arbitrarily? The meaning that they would wish to apply is one that says that the inability of Parliament to give Judges discretion as to what sentence to impose, is now to be regarded as an arbitrary process.

In our system, Parliament has the exclusive right to make the law and hence prescribe the penalty for offences. The courts have the right to interpret and apply the law. What they have effectively done by their assertion is to cause a blur in the separation of powers as guaranteed by the Constitution of Barbados in relation to the role of Parliament and the role of the Judiciary.

Equally, when you go to that legal bible of definitions - “Words and Phrases”- that is used in every common law jurisdiction, arbitrarily is defined as follows: “that to act arbitrarily is to act “without any reasonable cause;” or, to act “capriciously,” or to act ‘without any apparent reason.”

Now a system that guarantees all that I said it guarantees, is now to be determined as one that is acting “without any reasonable cause” or “capriciously” or “without any apparent reason” in spite of the many safeguards which I have already outlined. We will await the verdict of the Inter-American Court, but I must tell you, that our colleagues in the region, did otherwise. Trinidad chose to denounce the American Convention of Human Rights and they came out of the Convention. Jamaica chose to step away from other Human Rights Conventions. The popular thought in Barbados is probably that we should do the same. However, the Government of Barbados feels fundamentally that we have worked too long and too hard to promote and to respect human rights norms and laws for us to be the victim of a form of judicial activism that constitutes a virtual amendment to the treaty as opposed to an interpretation of it. Further, it operates effectively as an amendment that falls outside of the broad framework outlined by the 1969 Vienna Convention or, indeed, the customary international law as it relates to the interpretation of treaties.

We also put forward arguments as to why our death penalty legislation is not a breach of customary international law. All of us know that no more
than half of the countries in the world have repealed the death penalty. Therefore, it cannot be styled as a *jus cogens* right. It cannot be styled as a crime against humanity, in the way that slavery and genocide have been categorised. Thus, where is the ability to reinterpret the obligations imposed on Member States? The Inter-American Court sets out the terms for the restrictions to be imposed, in respect of the use of the death penalty, in its Advisory Opinion rendered in 1983. This, however, was not addressed by the Court.

Now, the question must be asked whether the Courts are bound by previous decisions and/or opinions forever? Surely, they are not. But what they also are not entitled to do is to so interpret provisions such that they are in effect amended without the patent consent of the State Parties. For to do so is to undermine the system of international law as the glue that keeps international law effective. It is the principle that says that States, in good faith, choose to be bound by the obligations which they accept willingly - *Pacta Sunt Servanda*. Are we, therefore, to see the erosion, little by little, of this rule in this scenario because of the inability of States to accept the new obligations imposed on them which they are unable and unwilling to accept?

All of these questions will lead to significant debate in the countries in which we live. There is a need for greater accountability on the part of international human rights bodies that interpret and apply treaties. I know, as a politician, to whom I am accountable. You know, as officers of this faculty, to whom you are accountable in terms of your obligations and your contracts. Most of us have some form of accountability. There is no form of accountability for judges in the international human rights system, because there is no automatic right of appeal to the ICJ or any other body outside of the regional system. And this will have to be placed for political discussion and debate firmly and squarely within the fora to which these Courts belong if we are to ensure that we do not have respectable countries opting out of serious human rights conventions. It is the duty of all (States and the Courts) to ensure that the system is not undermined and prevented from being able to achieve what it was designed so to do.

We also believe that judicial activism is not necessarily to be deprecated. However, it is more appropriate within the arena of domestic jurisdictions, where it becomes easier to have a system of checks and balances. This is because where the activism leads to results which go too far outside the realm of accepted limits (in relation to the cultural mores, the views and the perspectives of a country), a democratically elected legislature (as has happened in this country) and as has happened in my country, can choose to pass laws to redress what they see as a judicial usurpation of the legislature’s role.

This is acceptable within the domestic legal framework provided that redressing the law is consistent with the same fundamental rights and free-
doms as guaranteed by the Constitution. So we are not saying that the legislature amends the laws without limits but that it is done in a manner that is consistent with constitutional obligations.

Therefore, we feel the need for a serious debate in the various international fora. There will have to be a recognition that there will be more resentment and there will be a reluctance on the part of States to negotiate and conclude more international agreements. In particular, those treaties that diminish the importance of cultural diversity and seek to create a homogenized world in the image of only a twentieth-century western-developed world will be affected. It should be recalled, however, that many of these western developed countries did not reach this state of development within the forty or fifty years that they are now requiring of us, but took a century or two, in some instances, to be able to adjust their societies to the said norms they would now wish us to readily accept.

Equally, there will be further implications at the domestic level. There are some players who are now arguing that there should be a reform of the powers of the State governing their capacity to enter into international treaty obligations. Right now in our system, the executive can do so without reference to the Parliament. This is different from the United States of America that requires the approval of the legislature and the United Kingdom where Parliamentary debate, and not approval, is needed. These issues will have to be put on the table, because countries are being required increasingly by international tribunals to change domestic policy to adjust to international obligations that they have never accepted and with which they cannot abide.

The death penalty is the example I have used because of the case in which we have been involved. Nevertheless, there are other issues that will affect us more like corporal punishment. In the Caribbean, parents have long used this as the instrument of correction without there being any detrimental consequences to any of us who were subjected to this form of discipline. Let me make it clear that I am not talking about abuse. Abuse is abuse and corporal punishment is corporal punishment. There is also the issue of same-sex marriages, on which all of us may have different views. In strong Christian societies like ours, it is felt that this must not be permitted by the laws of the country—a view incidentally shared by the religious right in the USA.

These are the tensions that will inevitably arise once you start broadening the definition of human rights from the core that can bind all humanity together irrespective of race, colour, sex or religion. The reality is that there is often internationally the political advocacy asserting these rights prior, then, to the judgements being delivered. One is, therefore, led to the inescapable conclusion that there is a political agenda being advanced even if in some instances that were not the case.
Many Caribbean societies are simply not prepared to confront these issues nor are their citizens prepared to hear that these are their international obligations, even if it means, as I have said earlier, that their countries will have to renounce these international obligations. It should be noted that, in the case of Barbados, we have decided to fight from within the Inter-American system because we believe that we are more compliant with the majority of the human rights obligations imposed by the American Convention on Human Rights than 95% of the countries in the hemisphere as we go through provision by provision by provision.

However, throughout the region the popular refrain as we confront these other issues is likely to be the same as with the death penalty – withdraw. It is significant that this is all the more likely to be the reaction today, more so than even thirty (30) to forty (40) years ago when there was greater hope within the country and there was not such a sense of powerlessness felt by people as they confront the vast changes in the wider community and work environment.

To date, technological advancement and the rapid pace of globalization in transportation and the movement of information and capital have caused so much change to envelop our society that people are more prone to hold on firmly to those things which they feel they can resist rather than allow change to take its normal gradual course as has happened in previous generations. The world is simply moving too fast and when those winds blow upon us, people hold on to what they can to establish a form of rootedness and bearings.

By the same token, there are other rights being stemmed, in particular development rights. On the face of it, these appear to be very noble - the right to education, the right to health, the right to adequate food, shelter, clothing, social security, the right to participate in cultural life, the right to development.

But can these really be styled as "rights" which impose obligations on the States? While the initial answer may be that they are simply declaratory, there is no doubt that international jurisprudence has reflected a disposition on the part of these international tribunals to be more activist and liberal in their interpretation of such rights. In the construction of the obligations of the State, not just in Conventions but in soft law, this would be catastrophic for us as countries since there are fiscal and other constraints we experience. If the courts, domestic or international, were now to start holding the State liable for the inability to provide some of these rights, we may be unable to satisfy these judgments while meeting our normal developmental and legal responsibilities as governments.

It is instructive to note that I speak from the perspective of a country, Barbados, which provides free education from the pre-primary to tertiary
levels. We provide free access to prescription drugs for all persons under sixteen (16) and over sixty-five (65) years of age and for those persons suffering from selected chronic diseases. We also provide subsidized public transportation. However, were we to enshrine these rights in our Constitution it would present tremendous difficulties for us as a small state which has an inherent vulnerability not only to international economic shocks but also to natural disasters. Unfortunately, we have seen this with Grenada, Haiti, Cayman Islands and Jamaica in this year alone.

This unbridled rush to establish these new norms as rights with the possibility of their becoming at some point justiciable is unfortunate. These are best left as ideals and aspects of our political philosophy that will in the future guide us in the best way possible. Only last week in London, we, the Law Ministers of the Small States of the Commonwealth met, and among other things, we discussed what was happening in the area of human rights. These are countries mainly from the Pacific region, from Africa and from the Caribbean. And I quote now directly from the communiqué which stated as follows:

“Ministers emphasized their commitment to the protection of fundamental human rights, “universal legal guarantees protecting all individuals and groups simply by virtue of being human, against actions and omissions that interfere with fundamental rights and human dignity.” Their discussion reflected strongly-held views over some aspects of current human rights rhetoric. There was anxiety in particular over the assertion of new human rights, which emerge not from considerate action by all states but from organizations with no democratic mandate.

“Although the international conventions on social and economic rights accept that progressive realization of those rights must take account of the available resources, there was concern that ideals and aspirations could be too readily translated into justiciable guarantees requiring sovereign states to commit themselves to particular patterns of expenditure.

“Ministers discussed the role of human rights courts in the interpretation and scope of human rights. They recognized that State power had to be subjected to scrutiny as part of the system of checks and balances between the branches of government, but were concerned at the undue global influence of some regional courts, as they reflected an activist approach to the interpretation of treaty obligations and were not subject to appeal to any global body.

“The role of some human rights organizations was seen as problematic. Their work could be seen as an expression of global citizenship but activism by unrepresentative organizations, operating in parts of the world distant from the States whose actions they sought to constrain, could create harmful disillusionment with the whole human rights movement, the overall results of which have been so beneficial.”
It is clear that these matters will continue to dominate discussion for some time to come. Indeed, there has been much debate internationally about your own government in the U.S.A. and its failure to ratify what people consider to be noble human rights treaties – The United Nations Convention on the Rights of the Child and CEDAW—the UN Convention on the Rights against the Discrimination against Women and the Kyoto Protocol relating to the environment.

While one cannot always support the reasoning advanced for not signing and ratifying these treaties, there must be sympathy and empathy with the U.S. Government’s position when one reads the book “Why Sovereignty Matters” by Jeremy Rabkin. Mr. Rabkin reflects an understandable concern on the part of this country about the creeping encroachment of customary international law (not only treaties) on domestic policy. He argues this following the developments in the 1980s in the Filartiga v. Pina-Iralia case and the third restatement of Foreign Relations law. There has been a disproportionate influence over the course of the last two and a half decades in the U.S. system by reason of the decisions of the Supreme Court and others effectively opening a back door for international norms to become part and parcel of domestic law without the tacit approval of Congress.

We in the Caribbean have to seriously examine our options as we go forward. This would include discussing the feasibility in the near future of a Caribbean Human Rights Convention adding in addition to the existing non-binding Charter to Civil Society. Unfortunately, the American Convention on Human Rights seeks to bring together three (3) distinct cultures: that of Latin America, North America and the Caribbean. It may well be, that without prejudice to our right to remain within the American Convention, we would have to look at a system that is more reflective of our norms and our mores while still respecting those fundamental rights that are necessary for the advancement of humanity and the best precepts of social justice.

Indeed, with the advent of The Caribbean Court of Justice, it would seem appropriate to engage in this regional dialogue because this Court could then properly be the interpreter of those convention rights should we be able to settle on such a convention. It is expected, as with every court, that there must be sensitivity – not that courts do what States or people want them to do. However, there is a greater sensitivity to the mores and customs of the region if you are from the region than if you are sitting four thousand (4000) miles away, having never visited the country, and not necessarily understanding the people, their religion or their way of life.

Ladies and gentlemen, this discussion, I anticipate, will dominate regional and Commonwealth dialogue for the next five (5) to ten (10) years because as with everything else in international law it does not happen overnight. There is a clear signal that this time judicial activism has gone too far.
Our countries, which have been model observers of human rights obligations for decades, are now being suddenly regarded as pariahs in the international community on this single issue of the death penalty, (a penalty permitted by every human rights convention). We can run or we can stay and fight and work within the system. We are choosing to stay and fight and work within the system. These are interesting times.

We may well want to look at the other provisions that are available to us which would allow for additional legal arguments such as the provision in the 1969 Vienna Convention of Treaties. This may allow us to argue that there has been a fundamental change of circumstances leading to a breach of the treaty, not originally drafted for this purpose, but drafted for purposes that are related to fundamental changes of circumstances outside of the control of the state. These however have never been understood to be such by the interpreting body.

Equally, there must be a consideration of the wider case law that reflects the more restrictive interpretation to interpretation by international tribunals as they decide asylum cases, immigration cases and those pertaining to economic rights. After all, these are issues that are all central to the vital interest of the majority of the developed world. Ironically judicial activism was not as ever present in these areas as they have been applied in our death penalty line of cases. This is despite the fact, that within our jurisdiction, they are central to our ability to assure the security of our population and by extension, our economy.

I ask, therefore, that you reflect on these things after my speech today, not because I expect you to be able to go and do anything substantial or significant immediately. However, it is important that by understanding the context within which we now find ourselves and the challenges which we face as small states, those of you who occupy academic positions and who are responsible for expanding knowledge, begin to appreciate that there are on-going debates on wider global issues within your neighbourhood in which you may well wish to participate.

I do not expect that many of you will necessarily be in agreement. Nevertheless, I share today my perspective, not asking you to accept it as your only perspective, but simply to treat it as a valid perspective of a small state and what it has had to fight, and where it must go to balance its commitment to fundamental human rights norms with its right to self-determination. I ask you also to recognize that these interesting times call, therefore, for us to walk on a tightrope whilst attempting to balance these commitments.

We are not blasting or bashing human rights or human rights organizations. However, by the same token, we are not going to lie prostrate while people reinterpret the obligations of our States in a way that causes us to be deemed non-compliant without our active participation or agreement. This is
the tightrope that we must walk. It brings to mind the words of that famous reggae band out of London of Caribbean origins – Steel Pulse, who in its song “Walking on a Tightrope” expresses all the sentiment we feel.

These are indeed turbulent times for our participation in the international law regime. Yes, the waters are truly turbulent but when you come from an island state you learn to negotiate rough seas and you learn to negotiate high winds as you, too, in Florida ought to have learnt as a peninsula.

In this context, when you combine our geographical circumstances with our historical characteristics, you will appreciate why we have ultimately only to be one thing – resilient in all challenges which we confront, confident that at the end of the day those who labour in a good and just cause shall never labour in vain.

I am obliged to you.
SUBSTANTIALLY ADVANCING PENN CENTRAL: SHARPENING THE REMAINING ARROW IN THE PROPERTY ADVOCATE’S QUIVER FOR THE NEW AGE OF REGULATORY TAKINGS

BRADLEY C. DAVIS*

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I. INTRODUCTION

Throughout the nation, America’s private property and business owners are losing many of the property rights the founders of this great country felt were of utmost importance.¹ Consider the plight of the Mach family of Hollywood, Florida.² After chasing the American dream, the Machs had finally

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¹ See U.S. CONST. amend. V.

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obtained it in the form of a four-unit retail building in downtown Holly-
wood. For thirty-four years, the Mach family has owned and operated this building. Throughout this period, the property has provided the Machs with a substantial income and allowed them to work in the city for twenty-five of those years. Katalin Mach, the widowed immigrant who now owns the property, does not want to sell. David Mach, Katalin's son, said that his father "always wanted to buy because he figured in America, they couldn't take it." Nonetheless, after all of these years of work, during which the Machs paid taxes and apparently met all other responsibilities of ownership, the City of Hollywood is threatening to take the property through eminent domain.

Eminent domain refers to "[t]he inherent power of a governmental entity to take privately owned property, [especially] land, and convert it to public use, subject to reasonable compensation for the taking." This threat is being made in order to make way for yet another South Florida condominium development. In July 2004, the city commission approved a development plan with the builder, Charles "Chip" Abele, in which they agreed to use their eminent domain powers if necessary to take the Mach's property. The City turned down a plan from Mr. Abele which would have left the Mach's property intact due to concerns about parking.

One must consider whether the city has its values right when it shows greater concern for individuals who may have to walk a block, than to a family who has been a part of the city for over three decades. Further, Mr. Abele claimed that the Machs were "very emotional" and demanded exorbitant prices for their property. Will he face the same criticism when his 750-square-foot, one bedroom condos are being sold for $400,000? Just as the Mach family saw their relatives lose property and businesses in Nazi Germany, the family is now destined to lose their business in the United States

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3. Id.
4. Id.
5. Id.
6. Id.
8. O'Boye, supra note 2.
11. Id.
12. Id.
13. Id.
of America. The Mach's tragic story is just one example of how the United States Constitution is being manipulated to crush the American dream.

The problem with a taking claim is that challenging a regulatory taking, or determining if one has occurred, has been, and continues to be, confusing for both practitioners and courts alike. Private property and business owners are at the mercy of the courts and attorneys. While the City of Hollywood has the power to physically occupy and take the property, the Machs also face the possibility that their property will be taken through regulation. Land-use regulations come in many forms including building codes, zoning ordinances, and growth control statutes. Additionally, such regulations impose restrictions on landowners regardless of their wishes. Such regulations may, by going "too far," effect a taking for which just compensation is due. This article focuses on the aforementioned regulations, which often significantly diminish property values and rights, but rarely result in just compensation.

While the recent United States Supreme Court decision of Lingle v. Chevron U.S.A., Inc. helped define certain narrow categories of regulatory takings, the Court has left open the interpretation of the test set forth in Penn Central Transportation Co. v. New York City, which considers certain facts and circumstances that are used to adjudicate a case without consideration of wider application. Among the facts and circumstances set forth in Penn Central are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." Therefore, the courts have indicated that they are "unable to develop any 'set formula' for determining" whether a regulatory taking has occurred. Instead, the Penn Central test focuses on the magnitude "of the burden that [the] government imposes upon private

16. See id.
18. See BLACK'S LAW DICTIONARY 301 (8th ed. 2004). Just compensation is defined as, "a payment by the government for property it has taken under eminent domain—[usually] the property's fair market value, so that the owner is theoretically no worse off after the taking." Id.
20. Id. at 2081–82.
22. See id. at 124.
23. Id.
24. Id.
property rights." The problem is determining when the government has exceeded its power by taking private property through regulation.

In light of last year's three takings decisions, which have come down from the United States Supreme Court, American property owners now face a greater risk of losing their homes and businesses to government regulation than ever before. These decisions may be read to indicate that the Court feels property rights have gone as far as they should. The destruction of certain regulatory takings tests which favored property owners, coupled with the decision in *Kelo v. City of New London*, in which the United States Supreme Court held that private property may be taken for private development, has resulted in a severe blow to property rights. Finally, with the massive real estate development occurring in Florida and throughout major urban centers, the rights of property owners need to be clearly established. It is for these reasons that the *Penn Central* test needs to be reexamined in order to provide property owners the protections to which they are constitutionally entitled.

This article will provide an analysis of regulatory takings jurisprudence and recommendations to fix the broken balancing test in *Penn Central*.

There are few, if any, subjects that conjure a more heated debate than that of regulatory takings. This debate is due in part to the numerous, and often conflicting, holdings of the United States Supreme Court which have led to "ad hoc, factual inquiries," balancing tests, nuisance exceptions,

28. *See generally Kelo*, 125 S. Ct. 2655 (upholding decision allowing private property to be taken for private development).
29. *Id.* at 2668.
30. *See U.S. Const. amend. V.*

> The Supreme Court has been much less clear and consistent, however, in deciding when the Fifth Amendment requires the state to compensate a property owner whose land the state has not physically taken, but merely has regulated to such an extent that the property owner has lost the opportunity to enjoy much of the “economic value” associated with her property.

*Id.* at 191.
and per se rules—which all seem to conflict in varying degrees. Such conflict has left lawyers and courts with little guidance in deciding takings issues on a case-by-case basis. As Justice Stevens once stated, "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." 37

In order to work through this great uncertainty and provide a proper background for a clear understanding of this article, Part II will give an overview of American regulatory takings jurisprudence, which will include a discussion of some of the major cases in the development of regulatory takings. Part III will discuss Lingle and what implications it may have for the future of the Penn Central test. Part IV will analyze Penn Central and recommend ways to turn the test in favor of private property owners. In Part V, a conclusion will reinforce the suggestions set forth in Part IV, and encourage Americans to defend against the governmental taking of their private property.

II. AMERICAN REGULATORY TAKINGS JURISPRUDENCE

"The threshold issue in any regulatory takings case is whether the claimant can point to some property interest she held as of the date of the alleged taking that was affected by the challenged government action." 38

Also, the property interest must be one "that the claimant can claim a protected right to exploit." 39 A regulatory taking occurs when government regulation or action goes so far as to constitute a taking, even though no property or title to such property is actually taken. 40

The threat that a government may exercise its power to take property or frustrate the owner's expectations, so long as just compensation is paid, is undoubtedly a significant invasion of the rights of private property owners. 41

36. Id. at 1027 (setting forth the total diminution in value test); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (setting forth the permanent physical invasion test).
39. Id. at 48.
While the protections set forth in the Constitution should ensure individuals who have their property taken will not suffer financially, such an exchange does not leave everyone feeling satisfied with the transaction.\(^\text{42}\) The Mach family example, set forth in the Introduction, is a concrete representation of such a situation.\(^\text{43}\) For the Mach family, no amount of money can make up for the sentimental ties which flow from the generational ownership of their building.\(^\text{44}\) To suggest that an exchange of money for property is "fair" or "just" overlooks the fact that property is not fungible, which means, "each parcel of land is 'unique' and therefore money damages cannot be an accurate substitute."\(^\text{45}\) Anthony Kronman's article on specific performance addressed this issue by stating:

In asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee. Conceived in this way, the uniqueness test seems economically sound.\(^\text{46}\)

However, government regulation is necessary to a certain degree.\(^\text{47}\) In fact, the United States Supreme Court has held that regulation is necessary for the proper performance of our government.\(^\text{48}\) Nevertheless, the Takings Clause must be read literally in order to enforce private property owners' constitutional rights.\(^\text{49}\)

A. The United States Constitution

The guarantee against taking without just compensation is among the many fundamental rights set forth in the United States Constitution.\(^\text{50}\) The Fifth Amendment's Takings Clause provides that private property shall not

\(^{42}\) See id.

\(^{43}\) See Jesse Dukeminier & James E. Krier, Property 589 (5th ed. 2002).

\(^{44}\) O'Boye, supra note 2.

\(^{45}\) Dukeminier & Krier, supra note 43, at 589.


\(^{47}\) See Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924).

\(^{48}\) See id.

\(^{49}\) See U.S. Const. amend. V.

\(^{50}\) See id.
“be taken for public use, without just compensation.” 51 The Takings Clause is made applicable to the states through the Fourteenth Amendment which states, in pertinent part: “nor shall any [s]tate deprive any person of life, liberty, or property, without due process of law.” 52 These amendments are meant to provide a safeguard against governmental abuses of power. 53 While an initial reading may seem straightforward, these words have caused confusion for well over a century. 54

B. The Constitutional Interpretation

1. Pennsylvania Coal Co. v. Mahon

\textit{Pennsylvania Coal Co. v. Mahon} is considered to mark the birth of the idea that a government action or regulation may result in a taking which requires just compensation. 55 In fact, until the Court’s decision in \textit{Mahon}, “it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property . . . or the functional equivalent of a ‘practical ouster of [the owner’s] possession.’” 56

In \textit{Mahon}, the plaintiffs owned the surface of the land, but the deed reserved the right to remove the coal under the Mahons’ land to Pennsylvania Coal. 57 At issue was the Kohler Act, which prevented the mining of coal in ways that would cause the disturbance, or sinking, of “any structure used as a human habitation.” 58 Ultimately, the Court held the statute had resulted in an unconstitutional taking of Pennsylvania Coal’s property. 59 This was in part

\begin{itemize}
  \item 51. \textit{Id.}
  \item 52. U.S. CONST. amend. XIV, § 1; \textit{see also} Chi., Burlington, & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236 (1897) (stating that although the state “legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation”).
  \item 55. \textit{See} Janet McClafferty Dunlap, \textit{This Land Is My Land: The Clash Between Private Property and the Public Interest} in \textit{Lucas v. South Carolina Coastal Council}, 33 B.C. L. REV. 797, 808 (1992) (indicating that prior to the year in which \textit{Mahon} was decided, the United States Supreme Court found no taking if the government had a legitimate public purpose for the challenged regulation and no trespass had occurred on the land).
  \item 58. \textit{Id.} at 412–13.
  \item 59. \textit{Id.} at 414.
\end{itemize}
due to the fact that "[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."\(^{60}\)

Justice Holmes highlighted the eternal struggle between individual property rights and governmental power in the following quote:

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts."\(^{61}\)

The preceding language clearly indicates the power that the Constitution provides to both private property owners and governments.\(^{62}\) This language also marks the birth of the "diminution in value" test\(^{63}\) and the consideration of the economic impact of regulations on property owners.\(^{64}\) While disagreement abounds as to the proper interpretation of \textit{Mahon}, it "is uniformly held to stand for the proposition that the judiciary should closely scrutinize economic legislation for potential unconstitutionality"\(^{65}\) in order to ensure that the government is not abusing its power.\(^{66}\)

In one of the most famous lines in regulatory takings jurisprudence, Justice Holmes stated, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."\(^{67}\) The problem with this often quoted phrase is that it fails to clarify how to determine what is too far.\(^{68}\) The diminution in value test is one way that Justice Holmes attempted to define how far is too far.\(^{69}\)

\(^{60}\) \textit{Id.}
\(^{61}\) \textit{Id. at 413.}
\(^{62}\) \textit{See Mahon}, 260 U.S. at 413.
\(^{63}\) \textit{See id. at 413.}
\(^{64}\) \textit{Id. at 413–14.}
\(^{66}\) \textit{Id.}
\(^{67}\) \textit{Mahon}, 260 U.S. at 415.
\(^{69}\) \textit{Mahon}, 260 U.S. at 415.
recent example of the consideration of economic factors, or diminution in value test, is set forth in *Williamson County Regional Planning Commission v. Hamilton Bank.* In *Williamson,* the Court held that its task was "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." While many questions were left unanswered in *Mahon,* regulatory takings, a balancing test, and economic considerations complicated the previously straightforward analysis of the Fifth Amendment.

2. *Penn Central Transportation Co. v. New York City*

After leaving so many critical questions unanswered in *Mahon,* many commentators expected that the floodgates of regulatory takings litigation would open. However, it was not until fifty-five years later, in *Penn Central* that the United States Supreme Court made a significant effort to clarify these unanswered questions.

In *Penn Central,* the Court admitted that it was "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Instead, the Court indicated that it will engage in "ad hoc, factual inquiries" which balance the important factors of each particular case. These factors will be highlighted and discussed in Part IV of this article.

3. *Agins v. City of Tiburon*

One of the reasons that this article is placing a new emphasis on the *Penn Central* test is due to the recent destruction of the regulatory takings test set forth in *Agins v. City of Tiburon.* In *Agins,* the landowners filed suit claiming that the city had unconstitutionally taken their property in violation of the Fifth and Fourteenth Amendments. The landowners' claim arose out of zoning ordinances which were enacted after the purchase of the land and

71. *Id.* at 199.
74. *Id.*
76. *Id.*
78. *Id.* at 258.
prevented the claimants from building on their property as originally expected. The United States Supreme Court held that the regulation of a "particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." The State of California felt that the maintenance of open spaces was an important state interest and that the zoning ordinance substantially advanced that interest. Therefore, the Court held that the ordinance passed constitutional muster.

Since Agins was decided, the "substantial advancement test" has been favored by property rights advocates. This favoritism was shown because the Agins test allowed claimants to challenge the effectiveness of a government regulation. If the claimant can show that the governmental action or regulation does not substantially advance a legitimate state interest, the claimant will prevail regardless of economic impact, or other considerations.

4. Those Other Takings Tests

In the interest of clarity, this section will briefly look at some other tests the Lingle decision helped set forth. While these tests are not the focus of this paper, they should be analyzed and distinguished.

First, there are instances when the government has interfered in such a way that the owner has suffered "a permanent physical occupation" of their property. In these situations, the permanent invasion, no matter how minor, demands that just compensation be made. This type of takings test was first set forth in Loretto v. Teleprompter Manhattan CATV Corp.

79. Id. at 257.
80. Id. at 260 (citations omitted).
81. Id. at 261.
82. Agins, 447 U.S. at 261.
84. See Lingle, 125 S. Ct. at 2079.
85. See id.
86. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (finding a taking where a state law requires landlord to allow cable companies to install their facilities on or in the buildings).
87. Id. at 425; Lingle, 125 S. Ct. at 2081.
88. 458 U.S. at 426.
Next, there may be a total regulatory taking as defined in *Lucas v. South Carolina Coastal Council*. In *Lucas*, the Court held that if the government, through a regulation, denied a property owner all economically viable use of his or her property, then a taking must be found and just compensation must be paid. However, the Court noted that when such a regulation is designed to prohibit a use that is or could be a nuisance, an exception to the *Lucas* test will be found.

Finally, the Court held that takings claims which flow from land-use exactions must be examined through the tests set forth in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. Land use exactions “include dedications of land to the public, installation of public improvements, and exactions of money for public purposes that are imposed by governmental entities upon developers of land as conditions of development permission.” This duo of cases sets forth two important points. In *Nollan*, the Court stated that there must be a nexus between the condition sought and the problem to be alleviated. In other words, the exaction must be calculated to advance the interest that is used to justify the exaction. *Dolan* went a step further by indicating that when a nexus exists, there must be some “rough proportionality” between the thing exacted and the development permitted in exchange. Here again, courts and practitioners are left with a test that does not clarify the meaning of its terms.

Outside of these narrow categories, regulatory takings cases fall under the *Penn Central* test. The preceding tests are relatively easy to work with in comparison to *Penn Central*. For example, when a property owner has suffered a “permanent physical invasion,” or has lost all value associated with his or her property, it is nearly impossible to argue that just compensation should not be paid. However, as this article will show, not all of these tests have survived subsequent interpretations of the United States Supreme Court.

90. *Id.* at 1027.
91. *Id.* at 1022–23.
94. STOEBUCK & WHITMAN, supra note 15, at 675.
95. *Nollan*, 483 U.S. at 837.
96. *Id.*
98. STOEBUCK & WHITMAN, supra note 15, at 684.
100. *See id.* (stating that *Loretto* and *Lucas* are “per se” or “categorical” takings).
101. *Id.*
III. DISCUSSION OF LINGLE V. CHEVRON U.S.A., INC.

While property rights advocates have favored the Agins "substantial advancement test" for twenty-five years, the recent United States Supreme Court decision of Lingle v. Chevron U.S.A, Inc. effectively destroyed the Agins test. Due to this rare, unanimous decision from the Court, scholars have indicated that the next "turn of the wheel" will be a case which helps define the meaning of the Penn Central test.

A. A Statement of the Case

Showing apparent concern for the public welfare in relation to the arguably oligopolistic concentration in the gasoline market, the Hawaii Legislature passed Act 257 in 1997. The key effect of Act 257 involved a rent ceiling that oil companies could charge dealers who lease their service stations from the company. This ceiling limited rent to fifteen percent of the

102. Id. at 2087.
103. Coyle, supra note 83.
104. HAW. REV. STAT. § 486H-10.4 (Supp. 2004); Lingle, 125 S. Ct. at 2078.
105. § 486H-10.4. Section 486H-10.4 states:

(a) Beginning August 1, 1997, no manufacturer or jobber shall convert an existing dealer retail station to a company retail station; provided that nothing in this section shall limit a manufacturer or jobber from:

(1) Continuing to operate any company operated retail service stations legally in existence on July 31, 1997;

(2) Constructing and operating any new retail service stations as company retail stations constructed after August 1, 1997, subject to subsection (b); or

(3) Operating a former dealer retail station for up to twenty-four months until a replacement dealer can be found if the former dealer vacates the service station, cancels the franchise, or is properly terminated or not renewed.

(b) No new company retail station shall be located within one-eighth mile of a dealer retail station in an urban area, and within one-quarter mile in other areas.

(c) All leases as part of a franchise as defined in section 486H-1, existing on August 1, 1997, or entered into thereafter, shall be construed in conformity with the following:

(1) Such renewal shall not be scheduled more frequently than once every three years; and

(2) Upon renewal, the lease rent payable shall not exceed fifteen per cent of the gross sales, except for gasoline, which shall not exceed fifteen per cent of the gross profit of product, excluding all related taxes by the dealer operated retail service station as defined in section 486H-1 and 486H-10.4 plus, in the case of a retail service station at a location where the manufacturer or jobber is the lessee and not the owner of the ground lease, a percentage increase equal to any increase which the manufacturer or jobber is required to pay the lessor under the ground lease for the service station. For the purposes of this subsection, "gross amount" means all monetary earnings of the dealer from a dealer operated retail service station after all applicable taxes, excluding income taxes, are paid.

The provisions of this subsection shall not apply to any existing contracts that may be in conflict with its provisions.
dealer’s gross profits from gasoline sales plus fifteen percent of gross sales of products other than gasoline.  

At the time of the case, Chevron dominated the Hawaii market by controlling roughly "60 percent of the market for gasoline produced or refined in-state and 30 percent of the wholesale market on the State’s most populous island, Oahu." This market share was accomplished through "64 independent lessee-dealer stations." Through this relationship, Chevron purchases the land, erects the station, and then leases the station to independent dealers at a rent determined by a percentage of the dealer’s sales, which allows Chevron to unilaterally set the price for gasoline.

Within a month of Act 257 being enacted, Chevron filed suit in the United States District Court for the District of Hawaii. Chevron’s main claim was that the rent cap constituted an unconstitutional regulatory taking, thereby violating the Fifth and Fourteenth Amendments. Shortly thereafter, Chevron moved for summary judgment claiming "that the rent cap [did] not substantially advance any legitimate government interest." The District Court agreed with Chevron’s analysis and granted the summary judgment. The District Court made the following findings: 1) the statute would not reduce the lessee-dealers’ rents or retail prices; 2) dealers who were selling their stations could “charge the incoming lessee a premium” so the new lessee’s would not obtain the benefits from the rent cap; 3) oil companies would gain back their lost rents by unilaterally increasing fuel price; and 4) the Act would decrease the number of lessee-dealer stations because the rent cap would discourage companies, such as Chevron, from investing in such stations. On appeal, the Ninth Circuit Court of Appeals held that the District Court had applied the correct legal standard but vacated the summary judgment stating that there was a “genuine issue of material fact . . . as to whether the Act would [actually] benefit consumers.” Finally, on remand,

(d) Nothing in this section shall prohibit a dealer from selling a retail service station in any manner.

Id.  
106. Id.  
107. Lingle, 125 S. Ct. at 2078.  
108. Id.  
109. Id.  
110. Id. at 2078–79.  
111. Id. at 2079.  
112. Lingle, 125 S. Ct. at 2079.  
113. Id. (citing Chevron U.S.A., Inc. v. Cayetano (Chevron I), 57 F. Supp. 2d 1003, 1014 (D. Haw. 1998)).  
114. Id.; Chevron I, 57 F. Supp. 2d at 1010–14.  
115. Lingle, 125 S. Ct. at 2079 (citing Chevron U.S.A., Inc. v. Cayetano (Chevron II), 224 F.3d 1030, 1037–42 (9th Cir. 2000)).
the District Court upheld the previous findings that the statute would not substantially advance a legitimate state interest.\(^{116}\) This holding was reached after hearing competing expert economists' opinions of the effects of the statute.\(^{117}\) The State of Hawaii's further attempts to challenge the ruling were rejected, and the United States Supreme Court granted certiorari.\(^{118}\) The aforementioned procedural history shows the confusion this subject has caused the courts.

B. Why the Divergence? The United States Supreme Court's Reasoning

Faced with numerous splits among the courts and confusion throughout the field, the United States Supreme Court hoped to bring some clarity to regulatory takings tests.\(^{119}\) The Ninth Circuit, where \textit{Lingle} took place, and the First Circuit, consistently applied the "substantially advance test."\(^{120}\) "Other federal courts hadn't rejected it, but didn't know what to do with it. A number of state courts had applied it as well."\(^{121}\) In other words, the confusion was apparent and pervasive.\(^{122}\)

Clarifying the confusion, Justice O'Connor, in the telling opening statement of \textit{Lingle} wrote:

On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined. A quarter century ago, in Agins v. City of Tiburon, the Court declared that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests . . . ." Through reiteration in a half dozen or so decisions since Agins, this language has been ensconced in our Fifth Amendment takings jurisprudence.\(^{123}\)

Next, Justice O'Connor gave a brief overview of takings jurisprudence before getting into the heart of the majority's analysis.\(^{124}\) The majority was exceptionally clear in laying out the distinct categories of takings claims.\(^{125}\)
These claims, which were discussed earlier, include: 1) permanent physical invasions of property; 2) deprivation of all economically beneficial use of his or her property; 3) exactions; and 4) claims falling under the *Penn Central* test. The Court acknowledged that the categories falling outside the *Penn Central* test are "relatively narrow." Emphasis was placed on the fact that regulatory takings tests aim to determine the severity of the burden that such regulations impose upon private property owners, which was an indication of where the opinion was headed.

The Court dealt the final blow to the Agins "substantially advance test" when it disapproved of the fact that the test has been read to be a stand alone test, "wholly independent of *Penn Central* or any other test." The Court determined that the Agins test focused on due process and not takings jurisprudence. Showing further approval for the focus of the more deferential *Penn Central* test, the Court stated:

In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

As the preceding quote indicates, the Court highlighted the fact that the Agins "substantially advances" test was a "means-ends test." The Agins test asks "whether a regulation of private property is effective in achieving some legitimate public purpose" instead of determining the magnitude or character of the regulation. Following this determination, the Court held


128. *Id.* at 2082.

129. *Id.*

130. *Id.* at 2083.

131. *Id.* at 2084.


133. *Id.*
that the Agins test is flawed as a takings test because the Takings Clause of the Fifth Amendment presupposes that the regulation serves a legitimate, beneficial effect to the public. 134 Therefore, the Takings Clause is not concerned with whether a regulation is valid on its face, but whether the regulation has such a severe impact on the property owner that just compensation is required. 135 Consequently, the Agins test is "logically prior to and distinct from the question [of] whether a regulation effects a taking." 136

In simplistic form, the Court established how a proper takings test would analyze Chevron's claims by looking at the burden and value loss associated with Act 257. 137 The Court highlighted that there is no clear indication that Chevron suffered any severe burden or lost revenue which requires just compensation. 138 Chevron expected to regain its losses by raising the price of the gasoline it sells to the independent lessee-dealer's. 139 However, the Court does note that Chevron could have brought its claim under the Penn Central test. 140 The foregoing analysis suggests that if Chevron would have brought suit under Penn Central, its claim would have failed. 141

C. A Look to the Future

While the Lingle decision clarified the question of whether the Agins substantially advances test is proper for regulatory takings, the opinion did not indicate a proper interpretation of the Penn Central test or attempt to define its terms. 142 The Penn Central test is vitally important to takings jurisprudence because nearly all regulatory takings actions fall under it. 143 The destruction of the Agins test, 144 coupled with the recent decisions of Kelo and San Remo Hotel, demands the test be reexamined in order to provide what little protection is left to property owners. 145 As John Adams once stated, "[t]he moment . . . the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public jus-

134. See id. at 2084–85.
135. Id.
136. Id. at 2084.
137. Lingle, 125 S. Ct. at 2084–86.
138. Id. at 2084–85.
139. Id. at 2085.
140. See id. at 2087.
141. See id. at 2084–86.
142. Lingle, 125 S. Ct. at 2081–82.
143. Coyle, supra note 83.
144. Lingle, 125 S. Ct. at 2078.
tice to protect it, anarchy and tyranny commence.” The force of law and public justice Adams spoke of is fading with each subsequent interpretation by the United States Supreme Court.

IV. SUBSTANTIALLY ADVANCING PENN CENTRAL?

Penn Central has been defined as the “polestar” of American regulatory takings jurisprudence. Being classified as the polestar indicates that the Penn Central test has always been the most widely used takings test. In fact, “98 percent of regulatory takings cases fall under the Penn Central wing.” However, following the decision in Lingle, the Penn Central test has been substantially advanced and is now the most important takings case which the United States Supreme Court needs to interpret.

Interpreting Penn Central has proven to be extremely difficult and confusing, and has even been described as “inscrutable.” This difficulty is due to Justice Brennan’s introduction of a new balancing test which considers multiple factors. As mentioned earlier, Justice Brennan indicated that the Court was unable to develop a “set formula” for regulatory takings cases, but instead held that the Court would engage in “essentially ad hoc, factual inquiries.” Justice Brennan identified the important factors in these inquiries when he stated:

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some

147. See Lingle, 125 S. Ct. 2074; Kelo, 125 S. Ct. 2655.
149. See Coyle, supra note 83.
150. Id.
151. Id.
152. See id.
154. Id.
public program adjusting the benefits and burdens of economic life

to promote the common good.155

In Penn Central, these factors were applied in order to determine
whether a historic landmark law, which prevented the owners of Grand Cen-
tral Station from building an office high-rise, resulted in a taking for which
just compensation was due.156 The proposal set forth for the high-rise com-
plied with all zoning and development regulations that were in place at the
time.157 However, because the City of New York felt that the "special his-
toric, cultural, or architectural significance [would] enhance the quality of
life for all,"158 the owner of a designated landmark was required to maintain,
at their own expense, the exterior of the building.159 Further, before the
owner of a landmark could alter the exterior or construct any improvements
to the landmark, they were required to seek approval from a regulatory body
known as the Landmark Preservation Commission.160 Penn Central sought
the necessary approval from the Landmark Preservation Commission by
submitting two separate plans.161 Both plans submitted to the Commission
were denied.162 Penn Central then sought declaratory judgment and injunc-
tive relief to prevent the City of New York from applying the Landmarks
Preservation Law to prevent the construction of the office building.163 After
making its way through the courts, the case wound up in the United States
Supreme Court.164 The Court held, over strong dissent, that a taking had not
occurred.165 The Court noted that the regulation had a significant impact on
the use of the property, but did not go too far.166 The scales of justice tipped
in favor of the government, and the notion that property provides security,

155. Id. (citations omitted).
156. Id. at 107.
157. Id. at 116.
159. Id. at 111–12.
160. Id. at 110, 112.
161. Id. at 116.
162. Id. at 117.
163. Penn Cent. Transp. Co., 438 U.S. at 119. Penn Central also sought damages for a
"temporary taking," and a determination as to whether "transferable development rights"
would equate "just compensation" if a taking was found. Id. at 119, 122.
164. Id. at 119–22.
165. Id. at 138.
166. Id. at 137.
which was set forth in *Mahon*, was replaced with the notion that property should provide efficiency for society at large.\(^{167}\)

However, Justice Rehnquist fired back with a powerful dissent.\(^{168}\) He first attacked the decision because the landmark designation singled out Penn Central.\(^{169}\) Penn Central suffered a significant financial burden and received no meaningful benefit in return.\(^{170}\) Singling out individual property owners violates the fundamental notion that a government should not impose burdens upon individuals which should be carried by society at large.\(^{171}\) Further, there was no "reciprocity of advantage"\(^{172}\) present to Penn Central because they received no benefit from the landmark designation.\(^{173}\) While zoning ordinances may at times reduce property values, such a burden is shared between many individuals, thereby leaving some benefit to those affected by the zoning ordinance.\(^{174}\) In contrast, Penn Central received no such benefit, but instead faced a multi-million dollar burden.\(^{175}\) Had this burden been placed upon the population of the City of New York, the cost "per person would be in cents per year."\(^{176}\)

Therefore, Justice Rehnquist’s dissent shows that the case should have been decided in favor of Penn Central.\(^{177}\) Penn Central suffered a significant economic impact, which exceeded several million dollars a year.\(^{178}\) A reasonable investment-backed expectation was lost due to the preclusion of an office high-rise.\(^{179}\) Prior to the landmark designation, Penn Central obvi-


This article uses the phrase “property as security” to describe a regulatory regime that maximizes the landowner’s rights in property and protects the property owner against governmental interference, allowing, to the greatest extent feasible, the rights of the landowner to utilize her property as she chooses. By contrast, the phrase “efficiency of property” refers to an environment in which much greater deference is given to the government’s ability to regulate and restrict private property without compensation.


\(^{169}\) See id. at 139.

\(^{170}\) Id.


\(^{172}\) *Mahon*, 260 U.S. at 415.

\(^{173}\) *Penn Cent. Transp. Co.*, 438 U.S. at 139.

\(^{174}\) Id. at 147 (Rehnquist, J., dissenting).

\(^{175}\) Id. at 149.

\(^{176}\) Id. at 148.

\(^{177}\) See id. at 138–53.


\(^{179}\) Id. at 142.
ously had an expectation to build an office in their air space. Finally, because there was no "reciprocity of advantage" and the regulation imposed a burden upon an individual, "which, in all fairness and justice, should be borne by the public as a whole," the character of the regulation does not pass the third prong of the *Penn Central* test.

A. The Destructible Landmarks of *Penn Central*

Justice Rehnquist's dissent shows that the *Penn Central* test can be interpreted in a way that favors property rights. However, a number of landmark factors coming out of *Penn Central* stand in the way of reaching the "justice and fairness" for which this test strives.

The first element which stands in the way of justice and fairness is known as the "whole property" rule. The whole property rule commands that a court may only consider the effects of a government action or regulation on the whole parcel, as opposed to a specific portion of that parcel. This rule was set forth in *Penn Central* when Justice Brennan wrote that takings "jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."

Since the decision in *Mahon*, courts recognize that a regulation may result in a taking if it "goes too far." However, since *Penn Central*, determining if a regulation has gone "too far" depends upon "ad hoc, factual inquiries," or the facts of the case at hand. The problem is that the courts must determine what property, or part of the property, is being affected to determine whether the regulation goes "too far." If only the whole parcel

180. *Id.; see also* United States v. Causby, 328 U.S. 256 (1946) (holding that air rights may be taken).
184. *Id.* at 138–53 (Rehnquist, J., dissenting).
185. *Id.* at 124 (majority opinion).
can be considered in the analysis, a regulatory taking will rarely be found. 192 Consider the following example of the unfairness of the whole parcel rule among property owners of land of varying size or values.

If we have an owner of 100 acres of land and also an owner of 10 acres of the same quality of land, then, if piecemealing is not allowed, the owner of the 100 acres would receive no compensation if 10 (or probably even more) acres were put into an unusable land reserve, but the owner of the 10 acres would be compensated if his 10 acres were similarly restricted. 193

The preceding example represents an unfair use of the “deep pocket” doctrine. 194 Further, the decision in Mahon may be read to indicate that courts should focus on the loss in value to the affected parcel of property. 195 In Mahon, Justice Holmes focused on how the Kohler Act diminished the value of the part of the coal company’s rights that were affected, not the entire parcel. 196 While this issue remains to be resolved, this article suggests abolishing the whole parcel rule in order to get closer to the fairness for which the Penn Central test currently strives. 197 In fact, the Federal Circuit Court of Appeals and the Ninth Circuit Court of Appeals have already embraced this interpretation. 198

Next, the Court in Penn Central rejected “the proposition that diminution in property value, standing alone, can establish a ‘taking.’” 199 Holding that diminution in value is not enough to establish a taking contradicts what the Court previously held in its opinion by stating that one important factor in the Penn Central test is the “economic impact of the regulation on the claimant.” 200 While the Court did not clarify how much of an economic impact would result in a taking, 201 one may deduce that the greater the adverse

192. Id.
193. STOEBUCK & WHITMAN, supra note 15, at 537.
195. Treanor, supra note 65, at 824.
196. Id.
198. See Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (finding a taking by considering only twelve and a half out of fifty acres for the purposes of a regulatory taking); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1433–34 (9th Cir. 1996).
200. Id. at 124.
201. Id.
effects on the claimant, the greater the likelihood of a taking. 202 However, this interpretation cannot be squared with subsequent decisions by the United States Supreme Court. 203 For example, in Lucas, the Court held that a taking will often occur "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use." 204 Consideration of the statement in Lucas indicates that the Court feels that a negative economic impact can lead to a taking, so long as there is a total loss of value. 205

While the Court in Penn Central never expressly held that the three prongs of the test should be considered together or alone, analysis of the "economic impact of the regulation" on the claimant prong of the Penn Central test shows that the three prongs of the test are to be considered together. 206 Such an analysis means property owners who have suffered a ninety-five percent loss of their property value will not be compensated, while an owner suffering a 100 percent diminution of value will recover the full value of the land. 207 As Judge Smith said in Florida Rock Industries, Inc. v. United States (Florida Rock V), 208 "[t]he notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it." 209

A better approach is set forth in Florida Rock V, where the Federal Claims Court found that a ninety-five percent diminution in value was substantial enough to constitute a taking under the Fifth Amendment. 210 In Florida Rock Industries, Inc. v. United States (Florida Rock IV), the Federal Circuit Court of Appeals held that the Fifth Amendment does not limit guarantees against uncompensable takings to only categorical or complete regulatory takings. 211 Therefore, in cases falling under the Penn Central test which deal with less than total takings, the question remains as to "when a partial loss of economic use of the property has crossed the line from a noncom-

204. Id. at 1027.
205. See id.
207. Lucas, 505 U.S. at 1064 (Stevens, J., dissenting).
208. 45 Fed. Cl. 21 (1999).
209. Id. at 23.
210. Id.
211. Fla. Rock Indus., Inc. v. United States (Fla. Rock IV), 18 F.3d 1560, 1570 (Fed. Cir. 1994).
pensable ‘mere diminution’ to a compensable ‘partial taking.’”212 In Florida Rock V, Judge Loren Smith set forth the conditions under which a substantial, but not complete loss of economically viable use becomes a compensable taking under the Penn Central test.213 This analysis asks the parties to answer the following economic questions:

1. Has the value of the relevant parcel been significantly diminished?
2. Can investment in the relevant parcel be recouped? Recouped at opportunity cost?
3. Does the return on investment in the relevant parcel before and after the permit denial reasonably exceed the opportunity cost of money, i.e., is the return to the entire investment economically viable before and after permit denial? Or, does the permit denial frustrate investment-backed expectations?214

The answers to these questions will determine when a partial regulatory taking has occurred and just compensation is due.215 The analysis set forth in Florida Rock V attempts to get past the broken balancing test of Penn Central and sets forth a stable framework for when “a severe, but not total, loss of the economically viable use of plaintiff’s property” demands just compensation.216

However, assuming the Court maintains its position that mere diminution in value is not enough to constitute a taking, courts across the nation must interpret another muddled economic prong of the Penn Central test labeled as interference with the claimant’s “distinct investment-backed expectations.”217 The United States Supreme Court has left the meaning of “investment-backed expectations” undefined.218 One of the problems is classifying property by using the phrase “investment-backed” because “[a]ll expectations in privately held property are investment-backed by purchase or acquisition.”219 Another problem is that both parties to the suit, the property

212. Id. at 1570.
214. Wade, supra note 213, at 11226.
216. Id. at 23.
218. See Mandelker, supra note 186, at 225.
219. Id. at 226.
owner(s) and the government, "can legitimately claim expectations entitled to protection." 222

One way to avoid the problems with "investment-backed expectations" is known as the "entitlement-to-property theory," which recognizes that protecting landowners’ rights is paramount to other considerations in takings law.221 By accepting a unitary theory such as the entitlement theory, only one side of the battle can claim expectations.222

A more thorough approach to the problem relates back to the founder of the phrase "investment-backed expectations."223 The United States Supreme Court did not formulate "investment-backed expectations" on its own, but instead borrowed the phrase from the influential work of Frank I. Michelman.224 In his article, Michelman wrote that a proper test asks, "whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation."225 Unfortunately, the Court did not adopt the analysis of Michelman, which would have avoided the years of ensuing confusion.226

Michelman suggests weighing "[d]emoralization costs" against "[s]ettlement costs."227 Michelman defines demoralization costs by looking to the amount of compensation which would be necessary to satisfy those who have suffered through regulation, combined with the amount of lost value caused by the regulation.228 An example of lost value is a decrease in investment and development due to fears that such a regulation may result in similar effects on those similarly situated.229

These demoralization costs must then be weighed against the settlement costs, which are defined as "the dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs."230 If the demoralization costs are greater than the settlement costs, then compensation is due.231 This analysis

220. Id. at 227.
221. Id. at 227–28.
222. See id.
223. Michelman, supra note 31, at 1213.
224. See id.
225. Id. at 1233.
228. Id. at 1214.
229. Id.
230. Id.
231. Id. at 1215.
conforms with the rules discussed throughout this article.232 For example, in the case of a Loretto-type physical occupation, “settlement costs are likely to be low and demoralization costs (absent compensation) to be high.”233 Therefore, compensation would be due.234 In a Penn Central analysis, the “ad hoc, factual inquir[y]”235 could remain intact, and Michelman’s analysis would set forth a balancing test with defined terms.236 The fact that no takings claimant has ever prevailed under the Penn Central test suggests that it is time for a change.237

One of the problems with suggesting a replacement balancing test is that some of the same problems will arise.238 While the Michelman test does define the terms used in its analysis, any balancing test will allow “bias, prejudice, and incompetence” to be brought into the analysis.239 Even though judges are supposed to be insulated from political pressures, they may have their own political or ideological desires to push upon the public.240 For these reasons, another suggestion may be discarding the Penn Central test in exchange for bright line rules which provide greater protection to property owners.241 Examples of these rules are set forth in legislative proposals.242 Such proposals call for compensation when diminution in value is as low as twenty percent.243 Legislative proposals show that many lawmakers believe that when an individual has lost a portion of their property rights, just compensation should be paid.244 While bright line rules must have exceptions, such rules may be the only answer to protecting property rights.245

While the economic factors of the Penn Central test are usually the deciding factor, courts must also consider the “character of the governmental action.”246 The character prong of the Penn Central test focuses on whether

232. See DUKEMINIER & KRIER, supra note 43, at 1234.
233. Id.
234. See Michelman, supra note 31, at 1215.
236. See generally id. at 1165.
238. See Mattingly, supra note 167, at 716.
239. Id.
240. Id.
242. See id. at 246–50.
243. See id. at 246.
244. See id.
245. See Echeverria II, supra note 202 at 4 (indicating that no regulatory takings claimant has ever prevailed under the Penn Central analysis).
a government action promotes the common good. One problem with the character prong of the Penn Central test is the deference that courts show economic and social regulations. Such deference means that all regulations that meet "a very low threshold" of public benefit are given substantial weight in the analysis.

In order to balance this deference towards government regulation, the courts should scrutinize the actions of the regulators in the same manner they scrutinize takings claims. To reach the fairness the Penn Central test strives for, "the motivation and circumstances of the regulator" should be analyzed as well. Applying the same standard to government regulators as to private property owners helps make the character prong symmetrical and moves toward a fair balance. The character prong of the Penn Central test must mesh with the idea that a government should not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Whatever approach property advocates pursue, they must get back to the notion "that the state's rights against its citizens are no greater than the sum of the rights of the individuals whom it benefits in any given transaction." The answer to the question of how much power the government should have to take property is the government should only have the power to force exchanges of property when it can leave the property owners with rights more valuable than those which are lost.

VI. CONCLUSION

The efforts of the United States Supreme Court have failed to attain a true balancing test which meets even the most liberal standard of justice and fairness. This failure is highlighted by the fact that since the Penn Central test was set forth in 1978, the Court has rarely found that a regulatory taking

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248. Id.
249. Id.
250. See id.
251. Id. at 6.
255. Id. at 332.
had occurred.\textsuperscript{256} In fact, the few cases that have been decided in favor of a takings claimant have been decided as a categorical or per se taking as defined in \textit{Lucas} and \textit{Loretto}.\textsuperscript{257} This leads to the conclusion that a takings claimant has never prevailed under the \textit{Penn Central} test. Such a conclusion is not reached through a true balancing test.

As takings opinions continue to come down from the United States Supreme Court, the balance remains tilted in favor of government regulation.\textsuperscript{258} This article has shown how the constitutional interpretation has moved from a notion of property as security towards the notion of property as social efficiency. While the recent cases from the United States Supreme Court may have broken many of the arrows in the property advocate's quiver, and the \textit{Penn Central} test as it stands heavily armors the government, the changes suggested in this article may sharpen this remaining arrow and provide a chink in the government's mail.

Getting back to the roots of regulatory takings, in which private property was viewed with the notion that it was secure, is essential to the maintenance of our society. In foreshadowing the pressures which rest on the takings issue today, Justice Holmes warned that courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."\textsuperscript{259} This article takes the position that the courts have crossed that line, have gone too far, and need to consider revising the interpretation of the \textit{Penn Central} test in order to provide private property and business owners the protections to which they are constitutionally entitled.

\textsuperscript{256} See Mattingly, \textit{supra} note 167, at 699.
\textsuperscript{259} Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
I. INTRODUCTION

In 1993, while other juniors at Fox High School were planning their careers and what colleges they were going to attend, seventeen-year-old student

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Christopher Simmons was planning a gruesome and egregious murder. Simmons described his plan to his friends in “chilling, callous terms” about how he wanted to find someone to burglarize, tie the victim up, and ultimately push the victim off a bridge. Simmons assured his friends Charles Benjamin, fifteen, and John Tessmer, sixteen, that because they were juveniles “they could ‘get away with it.’”

In the late evening of September 8, 1993, Simmons met with his two friends; however, Tessmer dropped out of the plot and went home. Simmons and Benjamin continued on their mission to commit burglary, hoping to find drug money. At random, they picked the home of forty-six-year-old Shirley Crook. Finding a window cracked open, they reached in, opened it, and entered into Crook’s home. Mrs. Crook saw a hallway light turn on and asked, “Who’s there?” Simmons entered into her bedroom and “he recognized her from a previous car accident.” Simmons then realized Mrs. Crook could identify them, so he panicked and “decided to kill her, so she wouldn’t snitch on them.” Simmons next ordered Mrs. Crook to get out of her bed. Then, while Benjamin stood guard, Simmons used duct tape to bind her hands as well as to cover her eyes and mouth. They put Mrs. Crook in her minivan, bound and gagged her, and drove around looking for a place to kill her. They stopped at a state park, forced her out of the van, and noticed that she had removed the tape from her arms and her mouth. They then proceeded to cover her entire face with duct tape as well as a towel and hog-tied her by tying her hands and feet together with electrical cable. They took her to the railroad trestle, forty feet above the Meramec River, kicked her off the side of a bridge, and watched her drown in the cold.

1. Tim Rowden, Inmate Imagines His Final Walk to Execution: Simmons Hopes Court Decision Will Keep Him from Taking It for Real, ST. LOUIS POST-DISPATCH, June 17, 2002, at A1 [hereinafter Rowden I].
3. Id.
4. Id.
5. Rowden I, supra note 1.
6. Id.
7. Roper, 543 U.S. at 556.
8. Id.
9. Id.
12. Id.
15. Id.
waters below. As a result of the burglary, Simmons and Benjamin only procured about six dollars from Mrs. Crook's purse. "It's a cheap price for a life," the local police lieutenant said.

The next day, her husband, Steven Crook, returned home from an overnight trip to find his bedroom in disarray. Steven Crook testified that when he arrived "the couple's poodle was whimpering" and "the dog [was] wrapped in duct tape on the bed in the master bedroom." Meanwhile, Simmons was busy bragging to his friends that he "killed a woman 'because the bitch seen my face.'" That same afternoon, two fishermen found Mrs. Crook's body floating in the Meramec River, three quarters of a mile downstream from the railroad trestle. The medical examiner determined that the cause of death was drowning and that Mrs. Crook was fully conscious and alive before being pushed from the bridge. He also "testified that Shirley Crook's face had been bound with duct tape with only an area for her nose visible" and was battered with "29 bruises on her body and four fractured ribs.

Shirley Crook was forty-six when she died: a wife, a mother of two, and unbeknownst to her at that time, soon to be a grandmother. Her daughter learned that she was pregnant two weeks after the murder. The murder caused great anguish among Mrs. Crook's family. Mrs. Crook's mother died of a heart attack shortly after she was murdered. A few years later, Mrs. Crook's husband also died of a heart attack. The two were high school sweethearts, and family members expressed that he never got over the agony of losing his wife.

In all likelihood, Simmons never envisioned that his actions would lead to such a great deal of controversy—not only among our nation, but also
worldwide. This article discusses the fate of Simmons and the juvenile death penalty. Part II discusses the controversy that arose over Simmons’ case, including how it reached the United States Supreme Court and the relevant precedent. Part III discusses the international community’s disdain for the juvenile death penalty, including arguments made by England and the European Union in their amici curiae briefs submitted to the Court in support of Simmons. Part IV analyzes the Court’s rationale for abolishing the juvenile death penalty and the reasons why the dissenters opposed the abolition. Finally, Part V illustrates the effects of the Court’s decision around the nation and in Florida, specifically detailing the number of juveniles on death row at the time whose lives were spared.

II. THE CONTROVERSY

A. The Trial

Simmons was charged with burglary, kidnapping, stealing, and first-degree murder—there was little question as to his guilt. The State introduced an overwhelming weight of evidence against Simmons, including his own confession to the murder, a video-taped reenactment of the scene, along with testimony from his friend, John Tessmer, stating that Simmons had discussed the plot with him and later bragged about it. The defense did not call any witnesses. The jury found Simmons guilty and the trial proceeded to the penalty phase.

The State sought capital punishment. Family members of Simmons took the stand and testified about the close relationship they had with him and described some of the kind acts he had performed in his life, such as taking care of his two younger half-brothers. Simmons’ counsel introduced mitigating factors, most significantly, his lack of any prior criminal history and his age. In response, the prosecutor used Simmons’ age as a double-edged sword. He argued that it was “[q]uite the contrary” of a mitigating factor stating: “Seventeen years old. Isn’t that scary? Doesn’t that scare

31. The term “juvenile death penalty” used throughout this article refers to the imposition of the death penalty on those under the age of eighteen years old.
33. Id.
34. Id.
35. Id.
36. Id.
37. Roper, 543 U.S. at 558.
38. Id.
ABOLITION OF THE JUVENILE DEATH PENALTY

B. Post-Conviction Proceedings

Simmons applied to the trial court for post-conviction relief alleging ineffective assistance of counsel at trial based on his counsel’s failure to introduce Simmons’ alcohol and drug usage. The court found no constitutional violation and denied the motion. Simmons took a consolidated appeal to the Supreme Court of Missouri, which affirmed the trial court’s denial of post-conviction relief. The federal courts, specifically the United States District Court for the Eastern District of Missouri and the Court of Appeals for the Eighth Circuit, also denied Simmons’ writ of habeas corpus.

After these numerous post-conviction relief efforts were made, the United States Supreme Court decided Atkins v. Virginia, holding that the Eighth Amendment forbids the imposition of the death penalty on mentally retarded persons. Based on Atkins, Simmons filed a new motion for post-conviction relief alleging that a similar national consensus has developed against executing juveniles.

The Missouri Supreme Court agreed, finding that “a national consensus has developed against the execution of juvenile offenders.” Based on this finding and a prediction of how the United States Supreme Court would currently decide the constitutionality of the juvenile death penalty, the Supreme

39. Id.
40. Brief for the Respondent at 5, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633). The jury found the following three statutory aggravating factors; that the murder was: 1) “committed for the purpose of receiving money”; 2) “outrageously and wantonly vile, horrible, and inhuman” because it involved torture and depravity of the mind; and 3) “committed for the purpose of avoiding . . . a lawful arrest.” Id. at 5 (quoting Mo. Ann. Stat. § 565.032(2) (West 1999)).
41. Roper, 543 U.S. at 558.
42. Id. at 558–59.
43. Id. at 559.
44. Id. (citing State v. Simmons, 944 S.W.2d 165, 169 (Mo. 1997) (en banc), cert denied, 522 U.S. 953 (1997)).
45. Id. (citing Simmons v. Bowersox, 235 F.3d 1124, 1127 (8th Cir. 2001), cert. denied, 534 U.S. 924 (2001)).
47. Id. at 321.
49. Id.
Court of Missouri "set[] aside Mr. Simmons' death sentence and re-
sentence[d] him ... to life imprisonment without eligibility for probation,
parole, or release except by act of the Governor."\textsuperscript{50} In 2004, the United
States Supreme Court granted certiorari to address the issue of whether a
national consensus has in fact developed against imposing the death penalty
on juveniles.\textsuperscript{51}

C. Relevant Precedent

1. Eighth Amendment Jurisprudence

The Eighth Amendment of the United States Constitution contains a
provision against the infliction of "cruel and unusual punishments."\textsuperscript{52} The
United States Supreme Court has held that this proscription must be observed
not only by the Federal Government, but also by the states through the Due
Process Clause of the Fourteenth Amendment.\textsuperscript{53} The Court has acknowl-
ledged that "[t]he authors of the Eighth Amendment ... made no attempt to
define [its] contours"\textsuperscript{54} and has frequently acknowledged the difficulty in
defining what constitutes "cruel and unusual."\textsuperscript{55} Although there is no precise
definition of what is "cruel and unusual," the Court has sought guidance in
determining whether a particular punishment is categorically prohibited by
the Eighth Amendment by referring to "the evolving standards of decency
that mark the progress of a maturing society."\textsuperscript{56}

To determine what the "evolving standards" are, the Court has empha-
sized that such an inquiry should not be based on the subjective views of the
Justices, but rather on "objective factors to the maximum possible extent."\textsuperscript{57}
The Court has found that laws enacted by states' legislatures provide "[t]he
clearest and most reliable objective evidence of contemporary values."\textsuperscript{58}
Additionally, the Court has referenced the behavior of sentencing juries.\textsuperscript{59}

\textsuperscript{50} Id. at 413.
\textsuperscript{52} U.S. CONST. amend. VIII.
\textsuperscript{55} E.g., Furman v. Georgia, 408 U.S. 238, 376 (1972) (Burger, J., dissenting) ("[T]he
ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially
manageable terms.").
\textsuperscript{58} Penry v. Lynaugh, 492 U.S. 302, 331 (1989), \textit{abrogated by} Atkins v. Virginia, 536
\textsuperscript{59} Thompson, 487 U.S. at 831.
This section of the article focuses on Supreme Court decisions discussing the Eighth Amendment's contours.

2. Thompson v. Oklahoma

In Thompson v. Oklahoma, the petitioner was fifteen years old when he murdered his former brother-in-law, with the help of three men, by shooting the victim and by cutting his throat, chest, and abdomen.\(^{60}\) They chained concrete blocks to his body and threw him into a river where the victim's body remained for nearly four weeks before being discovered.\(^{61}\) The petitioner was convicted of murder in the first degree and, by the jury's recommendation, was sentenced to capital punishment.\(^{62}\)

The case reached the United States Supreme Court where the Court considered whether the execution of a person who was fifteen-years-old at the time of committing a capital offense violates the constitutional prohibition against "cruel and unusual punishment."\(^{63}\) In evaluating the contours of the Eighth Amendment, guided by the ""evolving standards of decency,"" the Court looked at two societal factors in confronting the issue before it: first, relevant legislative enactments, and second, jury determinations.\(^{64}\) In assessing these factors, coupled with an independent assessment of the issue, the Court ultimately concluded "that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense."\(^{65}\)

Looking at the legislative enactments, the Court recognized the differences in the law "which must be accommodated in determining the rights and duties of children as compared with those of adults."\(^{66}\) The Court emphasized that in Oklahoma "a minor is not eligible to vote, to sit on a jury, to marry without parental consent, or to purchase alcohol or cigarettes."\(^{67}\) In addition, most states are also in conformance with such legislation that imposes restrictions on minors with regard to driving, gambling, and the purchase of pornographic materials.\(^{68}\) Every state has created a juvenile justice system in which most juvenile offenders are not held criminally responsi-

\(^{60}\) Id. at 819.

\(^{61}\) Id.

\(^{62}\) Id. at 818, 820.

\(^{63}\) Thompson, 487 U.S. at 820.

\(^{64}\) Id. at 821–22 (citations omitted).

\(^{65}\) Id. at 838.

\(^{66}\) Id. at 823.

\(^{67}\) Id. (footnotes omitted).

\(^{68}\) Thompson, 487 U.S. at 824 (citations omitted).
ble.69 The Court concluded that "[a]ll of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult."70

Additionally, the Court addressed state legislation concerning the death penalty, finding that "[m]ost state legislatures have not expressly confronted the question of establishing a minimum age for [its] imposition."71 At the time of the decision, there were nineteen states that authorized capital punishment, but had no minimum age to impose such punishment.72 However, the Court pointed to eighteen death penalty states that had expressly delineated an age limit to their death penalty statutes.73 The Court attached a particular importance to the fact that all eighteen of these states had limited their imposition of the death penalty to those offenders who were at least the age of sixteen at the time the capital offense was committed.74

The Court also looked at the behavior of sentencing juries.75 The Court found that, in the twentieth century, imposition of the death penalty by juries on those who were under the age of sixteen when committing the capital offense was exceedingly rare.76 Further demonstrating the rarity of its practice, the Court referred to Department of Justice statistics from 1982 to 1986 that showed of the 1393 offenders sentenced to death, only five of them were under sixteen years of age at the time of the offense.77 The Court deemed these five young offenders' sentences as "‘cruel and unusual in the same way that being struck by lightning is cruel and unusual.’"78 Based on juries' hesitation to impose death sentences on such young individuals, the Court concluded "that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community."79

In addition to legislative enactments and the behavior of juries, the Court undertook its own analysis of whether the Eighth Amendment permits the imposition of the death penalty on a fifteen-year-old offender.80 In making an independent judgment, the Court analyzed two pivotal concerns: first,

69. Id. at 823–24.
70. Id. at 824–25.
71. Id. at 826.
72. Id. at 826–27 (citations omitted).
73. Thompson, 487 U.S. at 829.
74. Id. (citations omitted).
75. Id. at 831.
76. See id. at 832.
77. Id. at 832–33.
78. Thompson, 487 U.S. at 833 (quoting Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)).
79. Id. at 832.
80. Id. at 833.
"whether the juvenile’s culpability should be measured by the same standard as that of an adult" and, second, "whether the application of the death penalty to this class of offenders ‘measurably contributes’ to the social purposes that are served by the death penalty."^81

The Court found that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult,” based on juveniles’ lack of experience, education, and intelligence that impairs juveniles’ ability to assess the consequences of their actions.^82 Furthermore, the multitude of reasons why juveniles are not given the same privileges and responsibilities of adults “also explain[s] why their irresponsible conduct is not as morally reprehensible as that of an adult.”^83

Additionally, the Court found that the retribution and deterrence purposes of the death penalty were not served when imposed on those who committed crimes under the age of sixteen.^84 Retribution is not furthered by the execution of a fifteen-year-old offender “[g]iven the lesser culpability of the juvenile offender, the teenager’s capacity for growth, and society’s fiduciary obligations to its children.”^85 Likewise, the Court found that the deterrent function of the death penalty was not effective when imposed on juvenile offenders. The Court’s reasoned that juveniles are not likely to make a cost-benefit analysis of the possibility of being executed, and, even if they do, given the extreme rareness of executing such individuals in the twentieth century, it would be unlikely that such an individual would be deterred by the possibility of such a rare sanction.\(^87\)

3. *Stanford v. Kentucky*

Nearly a year after deciding *Thompson*, the Court again addressed the constitutionality of the juvenile death penalty in *Stanford v. Kentucky.*^88 In *Stanford*, there were two consolidated cases with one ultimate issue before the Court: whether the imposition of the death penalty on an individual who commits a capital offense “at 16 or 17 years of age constitutes cruel and unusual punishment” in violation of the Eighth Amendment.\(^89\) One of the petitioners, Kevin Stanford, was seventeen-years-old when he committed mur-
der. 90 Stanford and an accomplice robbed a gas station, "repeatedly raped and sodomized" the twenty-year-old attendant, and then shot her at close range in the face. 91 Stanford was convicted of first-degree murder and sentenced to death. 92 The other petitioner, Heath Wilkins, was sixteen years old when he and an accomplice stabbed to the death a twenty-six-year-old store clerk while robbing a convenience store. 93 Wilkins was also convicted of first-degree murder and sentenced to death. 94

Consistent with Thompson, the Court again assessed the "‘evolving standards of decency that mark the progress of a maturing society.’" 95 Writing for the majority, Justice Scalia emphasized that in making Eighth Amendment evaluations, the Court has not looked at its own independent "‘conceptions of decency, but to those of modern American society as a whole.’" 96 As mandated by the language of the Eighth Amendment, what is cruel and unusual should not be decided by the "‘subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.’" 97 Further admonishing what an Eighth Amendment judgment should not include, Justice Scalia delineated that the conceptions of decency in other countries are not relevant—nor are public opinion polls and the views of interests groups and various professional associations. 98

The relevant objective indicium looked at once again to "‘reflect the public attitude toward a given sanction’" 99 were legislative enactments 100 and the behavior of juries. 101 The Court found that out of the thirty-seven death penalty states, only fifteen prohibited its imposition on sixteen-year-old offenders and twelve prohibited its imposition on seventeen-year-old offenders. 102 The Court concluded that these legislative enactments did "‘not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual.’" 103 As a benchmark,

90.  Id. at 365.
91.  Id.
92.  Id. at 366.
93.  Stanford, 492 U.S. at 366.
94.  Id. at 367.
95.  Id. at 369 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
96.  Id.
97.  Id. (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).
99.  Id. at 370 (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987)).
100.  Id. at 369–70.
101.  Id. at 373.
102.  Id. at 370.
the Court provided a summary of instances when it previously found the evidence of a national consensus sufficient to characterize a particular punishment as cruel and unusual:

In invalidating the death penalty for rape of an adult woman, we stressed that Georgia was the sole jurisdiction that authorized such a punishment. In striking down capital punishment for participation in a robbery in which an accomplice takes a life, we emphasized that only eight jurisdictions authorized similar punishment. In finding that the Eighth Amendment precludes execution of the insane and thus requires an adequate hearing on the issue of sanity, we relied upon (in addition to the common-law rule) the fact that "no State in the Union" permitted such punishment. And in striking down a life sentence without parole under a recidivist statute, we stressed that "'[i]t appears that [petitioner] was treated more severely than he would have been in any other State.'"104

Unlike these cases, the Court did not find a national consensus against the death penalty of sixteen and seventeen-year-old offenders because the majority of states authorized the death penalty for such offenders.105

The Court next looked at the behavior of juries in imposing the death penalty upon sixteen or seventeen-year-old offenders.106 While only two percent of executions between 1642 and 1986 were for crimes committed by offenders under the age of eighteen, Justice Scalia did not find these statistics sufficient.107 Justice Scalia argued, rather than showing that prosecutors and juries felt the death sentence is categorically unacceptable for those offenders under the age of eighteen, it shows instead that they believe it should rarely be imposed.108 Additionally, this discrepancy in treatment can be attributed to the fact that juveniles commit a far smaller percentage of capital crimes than adults.109

The Court also responded to the petitioner's argument that because the legal age for various activities such as drinking alcoholic beverages and voting is set at the age of eighteen, the death penalty should also be set at eighteen.110 Justice Scalia did not see the connection between these activities:

104. Id. at 371 (citations omitted).
105. See id. at 371–72.
106. Id. at 373.
107. Id. at 373–74.
109. Id.
110. Id.
It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards. . . . These laws set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests for each driver, drinker, or voter. The criminal justice system, however, does provide individualized testing. In the realm of capital punishment in particular, "individualized consideration [is] a constitutional requirement."\(^{111}\)

Based on the legislative enactments and the behavior of juries, the Court held that neither a historical nor a modern national consensus existed forbidding the imposition of the death penalty on an individual who committed a capital offense at the age of sixteen or seventeen.\(^{112}\) Accordingly, the Court concluded that such punishment was not deemed cruel and unusual and consequently did not violate the Eighth Amendment.\(^{113}\) Justice O'Connor concurred in the judgment of the Court, stating that "[t]he day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed," but that she did not believe that day had yet arrived.\(^{114}\)

4. **Penry v. Lynaugh**

On the same day the Court decided *Stanford*, it also decided another Eighth Amendment case, *Penry v. Lynaugh*.\(^{115}\) In 1979 the petitioner, Johnny Penry, violently raped a Texas woman and then stabbed her to death with scissors.\(^{116}\) Despite the fact that Penry was mentally retarded, he was sentenced to death for his brutal crime.\(^{117}\) The issue before the Court was whether the Eighth Amendment categorically prohibits the imposition of the death penalty on the mentally retarded.\(^{118}\) Once again, to determine if there was a national consensus against such a practice, the Court looked at the

\(^{111}\) *Id.* at 374–75 (citation omitted).

\(^{112}\) *Id.* at 380.

\(^{113}\) *Stanford*, 492 U.S. at 380.

\(^{114}\) *Id.* at 381–82 (O'Connor, J., concurring).


\(^{116}\) *Id.* at 307.

\(^{117}\) *Id.* at 307, 310.

\(^{118}\) *Id.* at 307.
objective evidence of legislative enactments and the actions of sentencing juries.\textsuperscript{119}

First, in looking at legislative enactments, the Court noted that "[o]nly one State . . . currently bans execution of retarded persons who have been found guilty of a capital offense."\textsuperscript{120} Maryland had also adopted a similar statute to take effect that year.\textsuperscript{121} The Court found that the legislation by these two states was not sufficient evidence to amount to a national consensus against such punishment.\textsuperscript{122} To the contrary, when the Court found a national consensus against the execution of the mentally insane, no state then permitted the execution of the insane.\textsuperscript{123}

The Court also looked at the behavior of juries and likewise concluded that there was a lack of evidence, finding no facts as to the general behavior of juries in regards to sentencing mentally retarded defendants to death.\textsuperscript{124} The Court disregarded public opinion polls against the execution of the mentally retarded, recognizing that they may be ultimately expressed in legislation, which is objective indicia the Court considers in a national consensus evaluation.\textsuperscript{125}

Lastly, the Court evaluated whether the mentally retarded could act with the degree of culpability required to justify the death penalty.\textsuperscript{126} The Court admitted "that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act."\textsuperscript{127} However, it recognized that the states already have procedural safeguards to protect the mentally retarded by recognizing their limited levels of culpability as a mitigating factor in death penalty statutes; for example: "'[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."\textsuperscript{128}

The Court refused to generalize the level of culpability of all mentally retarded people: "In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level

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\begin{enumerate}
\item[119.] \textit{Id.} at 331.
\item[120.] \textit{Penry}, 492 U.S. at 334 (citing GA. CODE ANN. § 17-7-131(j) (2004)).
\item[121.] \textit{Id.} (citation omitted); \textit{see} MD. CODE ANN., CRIM. LAW § 2-202(b)(2)(ii) (LexisNexis 2002).
\item[122.] \textit{Penry}, 492 U.S. at 334.
\item[123.] \textit{Id.} (citing Ford v. Wainwright, 477 U.S. 399, 408 n.2 (1986)).
\item[124.] \textit{Id.}
\item[125.] \textit{Id.} at 334–35.
\item[126.] \textit{Id.} at 336.
\item[127.] \textit{Penry}, 492 U.S. at 337 (citations omitted).
\item[128.] \textit{Id.} (quoting ALA. CODE § 13A-5-51(6) (LexisNexis 1994)).
\end{enumerate}
\end{flushleft}
of culpability associated with the death penalty." Ultimately, the Court held that, while mental retardation may lessen a defendant's culpability for a capital offense, according to the Eighth Amendment, mental retardation itself does not categorically preclude the execution of a person convicted of a capital offense.

5. Atkins v. Virginia

Thirteen years later, the Court revisited the issue of the constitutionality of executing the mentally retarded in Atkins v. Virginia. The petitioner, Daryl Renard Atkins, and an accomplice robbed and murdered a man, shooting him eight times with a semiautomatic handgun. The jury sentenced Atkins, a mentally retarded man, to death.

The Court took note of a "dramatic shift in the state legislative landscape that had occurred in the past 13 years," so it granted certiorari to revisit the issue from Penry. The Court considered these recent and consistent legislative enactments, the reluctance of juries to impose the death penalty upon the mentally retarded, the Court's independent assessment of penology, and the mental capacity of the mentally retarded and ultimately concluded that executing the mentally retarded violates the Eighth Amendment.

Looking at the legislative enactments since Penry was decided, the Court observed significant changes:

In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998. There appear to have been no similar enactments during the next two years, but in 2000 and 2001 six more States—South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina—joined the procession. The Texas Legislature unanimously adopted a similar bill, and

129. Id. at 338-39.
130. Id. at 340.
132. Id. at 307.
133. Id. at 309.
134. Id. at 310.
135. See id. at 321.
bills have passed at least one house in other States, including Virginia and Nevada.\textsuperscript{136}

While only two states in 1989 had statutes prohibiting the death penalty for mentally retarded offenders, in 2002 there was a total of eighteen states with such statutes.\textsuperscript{137} The Court found that it is not the number of states with such statutes that is significant; rather, it is the consistent direction of change, coupled with the fact that it is a time when anti-crime legislation is more popular than providing protections for criminal defendants.\textsuperscript{138}

Even in states without these statutes, the Court found evidence of a national consensus against executing mentally retarded offenders by the fact that juries hesitate to impose such punishment.\textsuperscript{139} While states such as New Hampshire and New Jersey do not statutorily prohibit imposition of the death penalty on the mentally retarded, it has not been carried out for decades.\textsuperscript{140} Only five states have executed an offender with an IQ below seventy since \textit{Penry} was decided.\textsuperscript{141} The Court concluded that the practice of executing the mentally retarded had “become truly unusual.”\textsuperscript{142}

The Court proceeded with two additional reasons, “consistent with the [national] consensus that the mentally retarded should be categorically excluded” from receiving the death penalty: 1) the penological goals of the death penalty are not justified when applied to mentally retarded offenders; and 2) the reduced capacity of the mentally retarded make them ineligible for the death penalty.\textsuperscript{143}

The two prominent goals of the death penalty are “retribution and deterrence of capital crimes.”\textsuperscript{144} The Court found that the goal of retribution is not met when the death penalty is imposed on the mentally retarded: “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”\textsuperscript{145} Likewise, the Court concluded that the goal of deterrence is not met by executing the mentally retarded, finding that inherent in such persons are “cognitive and behavioral impairments” that make it unlikely that they will be able to process the

\textsuperscript{136} \textit{Atkins}, 536 U.S. at 314–15. (footnotes omitted).
\textsuperscript{137} See \textit{id.} (citations omitted).
\textsuperscript{138} \textit{Id.} at 315–16.
\textsuperscript{139} See \textit{id.} at 316.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Atkins}, 536 U.S. at 316; see \textit{Penry v. Lynaugh}, 492 U.S. 302 (1989).
\textsuperscript{142} \textit{Atkins}, 536 U.S. at 316.
\textsuperscript{143} \textit{Id.} at 318–21.
\textsuperscript{144} \textit{Id.} at 319 (quoting \textit{Gregg v. Georgia}, 428 U.S. 153, 183 (1976)).
\textsuperscript{145} \textit{Id.}
nature and consequences of their conduct and control their conduct based upon that information.\textsuperscript{146}

The Court found that the reduced capacity of the mentally retarded provides further justification against imposing the death penalty upon such individuals.\textsuperscript{147} In addition to the increased likelihood of false confessions, the mentally retarded may have trouble assisting their counsel, "and their demeanor may create an unwarranted impression of lack of remorse for their crimes."\textsuperscript{148} The Court concluded that the mentally retarded are especially prone to being wrongfully convicted.\textsuperscript{149} This case would lay the analytical framework for assessing the constitutionality of the juvenile death penalty.

III. \textbf{INTERNATIONAL INFLUENCE}

The case of \textit{Roper v. Simmons} has generated an unusually large number of amicus briefs filed on behalf of Christopher Simmons, the Respondent, from various organizations representing international, religious, child advocacy, and professional and legal communities.\textsuperscript{150} Premised on different rea-
soning and beliefs, there was clearly one shared belief amongst them all: the United States Supreme Court should prohibit the juvenile death penalty and spare the juvenile defendant’s life. While this article does not address all of the concerns included in the various amicus briefs, it will discuss some of the international issues, which caused a great deal of controversy in the actual decision by the Supreme Court.

A. England and Wales

On July 15, 2004, England submitted a brief of amici curiae in support of Simmons, urging the Court to prohibit the juvenile death penalty. England asserted that a prohibition against executing persons who were under the age of eighteen at the time of committing a crime has now reached the status of “jus cogens, a peremptory norm of international law” which is beyond the status of customary international law.

England explained that international law is relevant in the United States because “[f]rom the beginning, the laws of the United States have been informed and shaped by laws and opinions of other members of the international community.” This amici brief made note of the Founders influence by international and social thought, as well as the Court’s “recogni[tion of] the relevance of international norms when considering the permissibility of practices” under the Constitution. International law has been particularly relevant in determining the boundaries of the Eighth Amendment in defining what punishments are “cruel and unusual.” This amici brief asserted that viewing “the evolving standard[s] of decency in an isolated and insular domestic environment would be contrary to all that the drafters of the Constitution knew as essential to joining the ranks of nations.” Additionally, based on the shared values and close relationship between the United States and the United Kingdom, this amici brief asserted that the law and opinions of the


151. See, e.g., Brief for England, supra note 150, at 3.
152. See Roper v. Simmons, 543 U.S. 551, 628 (Scalia, J., dissenting) (stating that “[a]cknowledgment of foreign approval has no place in the legal opinion of this Court”).
154. Id. at 3.
155. Id.
156. Id. at 5–6.
158. Id. at 7.
United Kingdom are particularly relevant in the Court’s evaluation of the contours of the Eighth Amendment. Since 1948, at a time when British law still accepted the death penalty, statutory developments in England prohibited the execution of persons under the age of eighteen at the time of the offense. 

Aside from British law, England asserted that the practice of executing persons who were under the age of eighteen at the time of the commission of the crime “has been rejected by every nation in the world except the United States.” Hence, the prohibition of such practice is now a jus cogens norm, defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

England explained that a norm must meet four requirements in order to be considered a jus cogens norm: “1) it is general international law; 2) it is accepted by a large majority of states; 3) it is immune from derogation; and 4) it has not been modified by a new norm of the same status.”

This amici brief elucidated how each of these requirements has been met. First, general international law clearly prohibits the juvenile death penalty, as evidenced by “[n]umerous treaties, declarations, and pronouncements by international bodies, as well as the laws of the vast majority of nations.” Second, the prohibition of the juvenile death penalty is accepted by a large majority of states. This amici brief contended every country in the world has ratified the Convention on the Rights of the Child which prohibits the juvenile death penalty, except the United States and Somalia—“a country lacking a central government.” As to the third requirement for a jus cogens norm, the prohibition against the juvenile death penalty is “non-derogable,” as explicitly expressed in the International Covenant, as well as

159. Id. at 8.
160. Id. at 11.
161. Id. at 12.

163. Id.
164. See id. at 13–22.
165. Id. at 13.
166. Id. at 17.
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evidenced by the laws and practices of other nations.69 Lastly, "[a]s to the . . . final requirement, there is no emerging norm that contradicts the current norm. The prohibition of the juvenile death penalty enjoys near universal acceptance."70

The counsel for amici concluded that the uniform international rejection of the imposition of the death penalty on persons under the age of eighteen at the time of the commission of the crime is "strong evidence" that such a practice is inconsistent with the Eighth Amendment and, thus, should be deemed cruel and unusual.71 This amici brief reprimanded the United States, stressing that "[t]he United States cannot continue to demand compliance with human rights principles and norms abroad while it refuses to apply them in its own country."72 Yet these amici were not alone in their stance.

B. The European Union

On July 12, 2004, the European Union (EU) also submitted a brief of amici curiae in support of Simmons.73 The brief was filed on behalf of its twenty-five Member States74 and in the shared interest of Canada, the Council of Europe,75 Iceland, Liechtenstein, Mexico, New Zealand, Norway, and Switzerland.76 The EU asserted that there is an international consensus against imposing the death penalty upon offenders below the age of eighteen.77 Evidencing its argument, the EU relied upon "the practices of the overwhelming majority of nations," international law and treaties, along with international norms and standards.78 As a threshold matter, the EU urged that "the views of the international community [are relevant] in determining whether a [particular] punishment is cruel and unusual."79

169. Id. at 22.
170. Id.
171. Id. at 25.
173. Brief for the European Union, supra note 150.
174. Id. at 1. The Member States include: Austria; Belgium; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; the Netherlands; Poland; Portugal; Slovakia; Slovenia; Spain; Sweden; and the United Kingdom. Id.
175. Id. at 3. The Council of Europe is a political organization comprised of forty-six countries, including twenty-one countries from Central and Eastern Europe. About the Council of Europe, http://www.coe.int/T/e/Com/about_coe/ (last visited Apr. 2, 2006).
176. Brief for the European Union, supra note 150, at 3.
177. Id. at 6.
178. Id.
179. Id. at 7 (quoting Thompson v. Oklahoma, 487 U.S. 815, 830 n.31 (1988)).
These amici found it significant that "[s]ince 1990, only eight countries reportedly executed children: Iran (8), Saudi Arabia (1), Nigeria (1), the Democratic Republic of Congo ("DRC") (1), Yemen (1), Pakistan (3), China (1) and the United States (19)." These countries have either now abolished the use of the juvenile death penalty, are in the process of doing so, or deny that they have executed juvenile offenders. This amici brief concluded that the United States presently "stands virtually alone among all the nations of the world" in imposing the death sentence for offenses committed by individuals under the age of eighteen.

These amici also commented on the fact that a considerable number of treatises, some of which have been signed or ratified by the United States, prohibit the imposition of the death penalty for offenses committed by individuals below the age of eighteen. The United Nations Convention on the Rights of the Child (CRC), ratified by roughly 192 nations, "is the most widely ratified human rights treaty in the world" and prohibits the imposition of the death penalty on juveniles. "The [United States] and Somalia are the only two nations [in the world] that have not ratified the CRC," but both countries have signed it, indicating an intent to ratify. This amici brief pointed to the Vienna Convention on the Laws of Treaties, an authoritative guide on treaty procedure, which instructs that after signing a treaty and prior to ratification, "a nation is oblig[ated] to 'refrain from acts which would defeat the object and purpose of the treaty.'" Likewise, these amici pointed to Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), which prohibits the imposition of the death penalty upon juvenile offenders. The United States "ratified [the ICCPR] in 1992 with a reservation to Article 6(5), stating that "the United States reserves the right, subject to its Constitutional constraints, to impose" the death penalty upon juvenile offenders. This reservation was made de-

180. Id. at 8–9.
181. See Brief for the European Union, supra note 150, at 9–11.
182. Id. at 11.
183. Id. at 12.
185. Brief for the European Union, supra note 150, at 12.
186. Id.
187. Id. at 12 (quoting Vienna Convention on the Law of Treaties, supra note 162, at art. 18).
188. Id. at 14. Article 6(5) of the ICCPR specifically states that a "'[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age.'" Id. (quoting International Covenant on Civil and Political Rights art. 6(5), adopted Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]).
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spite the fact that Article 4(2) of the ICCPR does not permit derogation from Article 6 "even in times of public emergency, thus indicating that Article 6 is seen to be inherent to the object and purpose of the ICCPR." 190 This amici brief mentioned other agreements, such as the Arab Charter on Human Rights,191 the American Convention on Human Rights,192 and the Fourth Geneva Conventions,193 that also prohibit the imposition of the death penalty on juvenile offenders.194

Lastly, these amici found that "[i]nternational norms and standards adopted by international bodies and organisations, including the United Nations, further reflect the international consensus against the death penalty for juvenile offenders."195 The counsel for these amici concluded that a national consensus exists against the imposition of the death penalty upon individuals below the age of eighteen, and the United States' position on this issue "is out of step with the international community, [presenting] both legal and diplomatic issues."196

IV. THE DECISION: ROPER V. SIMMONS

A. The Majority

On March 1, 2005, the United States Supreme Court once again confronted the issue of whether the execution of persons who were sixteen or seventeen years of age at the time of the commission of the crime violates the Eighth Amendment's prohibition of cruel and unusual punishment.197

190. Id. at 14–15; ICCPR, supra note 188, art. 4(2).
192. Brief for the European Union, supra note 150, at 19 (citing American Convention on Human Rights art. 4(5), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]). The American Convention on Human Rights provides that "'[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age.'" Id. at 19 (quoting American Convention, supra, art. 4(5)).
193. Id. at 21 (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 68, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]). The Fourth Geneva Convention states in Article 68 that ""the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.'" Id. (quoting Fourth Geneva Convention, supra, art. 68).
194. Id. at 18–21.
196. Id. at 26.
Justice Kennedy delivered the majority opinion of the Court, joined by Justices Stevens, Souter, Ginsburg, and Breyer. The Court rendered its decision based on objective indicium, particularly relevant legislative enactments, as well as an independent determination by the Court. Additionally, the Court found confirmation from the opinion of the international community.

Recognizing that the Eighth Amendment forbids excessive sanctions, the Court reaffirmed "the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." In a 5-4 decision, the Court overruled Stanford, holding that society's standards have changed since that decision and the evolving standards have changed to indicate that the imposition of the death penalty on such individuals is forbidden by the Eighth and the Fourteenth Amendments.

The Court looked at objective indicium in determining that a national consensus has formed since Stanford against the juvenile death penalty. Looking at the relevant legislative enactments, the Court relied heavily on Atkins, outlining the similarities between the constitutionality of executing the mentally retarded and executing juvenile offenders:

When Atkins was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. Atkins emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent.

Similarly, the practice of executing juveniles is infrequent in the states without a formal prohibition against such a practice. Since Stanford, only

198. Id. at 554.
199. Id. at 564.
200. Id. at 575.
201. Id. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
202. Roper, 543 U.S. at 574.
203. Id. at 564.
204. Id. (citations omitted).
205. Id.
six states have imposed the death penalty on juvenile offenders. Likewise, only five states executed the mentally retarded since Penry v. Lynaugh, the predecessor case to Atkins.

The Court noted that despite the striking similarities between the present case and Atkins, there is at least one difference between the cases pertaining to evidence of a national consensus. During the thirteen year period between the decisions of Penry and Atkins, sixteen additional states prohibited the practice of executing the mentally retarded. "[T]he rate of abolition of the death penalty for the mentally retarded" during this period was significant.

To the contrary, the rate of abolishing the juvenile death penalty has been slower. In the fifteen intervening years since Stanford, only five additional states have prohibited the juvenile death penalty, "four through legislative enactments and one through judicial decision." The Court considered this change since Stanford significant, despite the "less dramatic" change from Penry to Atkins, stressing that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." Since Stanford, there has been a consistent direction of change against the juvenile death penalty—with no states reinstating it.

The Court concluded that, similar to Atkins, looking at objective indicia such as "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice" provides evidence of a national consensus against executing such individuals.

The Court also made its own independent evaluation of the constitutionality of the juvenile death penalty under the Eighth Amendment. The Court emphasized that "the death penalty is the most severe punishment, [and therefore] the Eighth Amendment applies to it with special force." The imposition of the death penalty "must be limited to those offenders who

206. Id. at 564–65.
207. Roper, 543 U.S. at 564.
208. Id. at 565.
209. Id.
210. Id.
211. Id.
212. Roper, 543 U.S. at 565 (citations omitted).
213. Id. at 566 (quoting Atkins v. Virginia, 536 U.S. 304, 315 (2002)).
214. Id.
215. Id. at 567.
216. See id. at 567–75.
commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” 218 The Court noted three differences between juveniles and adults that categorically remove juveniles from the classification of the worst offenders. 219 First, juveniles tend to be less mature and more irresponsible than adults. 220 States recognize this fact and, hence, prohibit juveniles from enjoying many privileges that adults have such as “voting, serving on juries, or marrying without parental consent.” 221 Secondly, “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” 222 Lastly, because juveniles go through so many changes, their character “is not as well formed as that of an adult.” 223 The Court found that “[t]hese differences render suspect any conclusion that a juvenile falls among the worst offenders.” 224

The Court also concluded that the penological justifications for the death penalty are not served with the same force when applied to juveniles. 225 First, “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” 226 Second, “[a]s for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument.” 227 Even if the death penalty were to have a deterrent effect on juveniles, the sanction of life imprisonment without the possibility of parole would also deter such persons, particularly juveniles who have their entire life ahead of them. 228

The petitioner argued that even if juveniles in general have a diminished level of culpability, a categorical bright-line rule barring the death penalty on any juvenile offender “is both arbitrary and unnecessary.” 229 Petitioner asserted that jurors should decide if the death penalty is appropriate for juvenile offenders on a case-by-case basis, taking into consideration mitigating

218. Id. (quoting Atkins, 536 U.S. at 319).
219. Id. at 569.
220. Id.
221. Id.
222. Roper, 543 U.S. at 569 (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
223. Id. at 570.
224. Id.
225. Id. at 571.
226. Id.
227. Roper, 543 U.S. at 571.
228. See id. at 572.
229. Id.
factors related to youth. The Court disagreed with this argument, finding that the task of deciding whether a juvenile should receive the death penalty is too difficult of an inquiry for jurors. Even expert psychologists have difficulty in distinguishing whether a juvenile offender acts due to his or her immaturity or acts a result of his or her "irreparable corruption" of character. However, the Court did acknowledge that a bright-line rule is not flawless:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. However, a line must be drawn.

The Court found that drawing the line at eighteen is appropriate because this is where society commonly marks the line between a child and an adult.

Based on its own determination, the Court concluded that due to the diminished capacity of juveniles and the lack of penological justifications for imposing the death penalty on such offenders, the death penalty is a disproportionate punishment for juveniles. The Court pronounced "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."

Lastly the Court pointed to "overwhelming weight of international opinion against the juvenile death penalty." The Court stated that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." The Court found confirmation that the death penalty is excessive punishment for juveniles due to the fact "that the United States is the only country in the world" that officially continues to carry out such a sanction. Looking at international treaties and practices prohibiting the juvenile death penalty, the

230. Id.
231. See id. at 573.
232. Roper, 543 U.S. at 573.
233. Id. at 574.
234. Id.
235. See id. at 567–74.
236. Id. at 573–74.
237. Roper, 543 U.S. at 578.
238. Id.
239. Id. at 575.
Court concluded that "it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty." 240

While looking at the international authority, the Court noted that the United States Constitution still earns the highest respect, and its doctrines remain essential to our national identity. 241 The Court explained how looking at an international opinion does not defy the Constitution: "[i]t 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." 242 The Court emphasized that an international opinion is not controlling in the Court’s Eighth Amendment interpretation, however it is instructive. 243

B. Justice Stevens, Concurring

Concurring in the judgment, Justice Stevens, joined by Justice Ginsburg agreed with the majority opinion and emphasized that interpreting the Constitution is not a static task:

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court’s interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. 244

Justice Stevens found it important for the Court to adjust its interpretation of the Eighth Amendment in accordance with the evolution of society. 245 He postulated that if Alexander Hamilton were alive today, sitting with the Court, he would also join the majority in its decision. 246

C. Justice O’Connor, Dissenting

Justice O’Connor dissented, contending that there was a lack of evidence to support the Court’s categorical prohibition against the juvenile

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240. Id. at 577.
241. Id. at 578.
242. Roper, 543 U.S. at 578.
243. Id. at 575 (citing Trop v. Dulles, 356 U.S. 86, 102–03 (1958)).
244. Id. at 587 (Stevens, J., concurring) (citation omitted).
245. See id.
246. Id.
death penalty. Justice O'Connor asserted that neither the objective evidence of a national consensus, nor the Court’s independent assessment, which she referred to as “the Court’s moral proportionality analysis,” supported this categorical prohibition. Finding that so little had changed since the Court’s decision in Stanford, Justice O’Connor pronounced that she “would not substitute [the Court’s] judgment about the moral propriety of capital punishment for 17-year-old murderers for the judgments of the Nation’s legislatures,” but would rather wait for a patent showing that society is against such a practice before categorically forbidding it.

Justice O’Connor pointed to the Court’s decision in Thompson, in which she concurred, acknowledging that a national consensus existed against imposing the death penalty on fifteen-year-old offenders, but she “declined to adopt that conclusion as a matter of constitutional law without clearer evidentiary support.” Yet again in the Court’s decision of Stanford, Justice O’Connor concurred with the Court’s judgment that imposing the death penalty on sixteen and seventeen-year-old offenders was not prohibited by the Eighth Amendment. Justice O’Connor concluded that there was not a national consensus against such a practice and that the “proportionality arguments,” much the like the Court’s arguments in Roper, “did not justify a categorical Eighth Amendment rule against capital punishment of 16- and 17-year-old offenders.”

Justice O’Connor agreed that the objective evidence presented in Roper was similar to that presented in Atkins, but found that the evidence of a national consensus in Roper was weaker than the evidence in Atkins:

Most importantly, in Atkins there was significant evidence of opposition to the execution of the mentally retarded, but there was virtually no countervailing evidence of affirmative legislative support for this practice. The States that permitted such executions did so only because they had not enacted any prohibitory legislation. Here, by contrast, at least eight States have current statutes that specifically set 16 or 17 as the minimum age at which com-

248. Id.
249. Id. at 588.
250. Id. at 591 (citing Thompson v. Oklahoma, 487 U.S. 815, 849 (1988) (O’Connor, J., concurring in judgment)).
251. Id. (citing Stanford v. Kentucky, 492 U.S. 361, 381 (1989) (O’Connor, J., concurring in part and concurring in judgment)).
252. Roper, 543 U.S. at 592 (O’Connor, J., dissenting) (citing Stanford, 492 U.S. at 382 (O’Connor, J., concurring)).
mission of a capital crime can expose the offender to the death penalty. 253

Justice O'Connor found it noteworthy that of the eight states that still permitted the juvenile death penalty, five of these states had juvenile offenders on death row and four of them had executed such offenders in the past fifteen years. 254 She pointed to the fact that there were over seventy juveniles on death row at the time of the decision of Roper, adducing the actuality of "continuing public support" for upholding the juvenile death penalty. 255

Justice O'Connor also found that the proportionality argument against the juvenile death penalty to be "so flawed that it can be given little, if any, analytical weight." 256 She argued that the differences between a seventeen-year-old and young adults are not clear "enough to justify a bright-line prophylactic rule against capital punishment of the former." 257 She criticized the line drawn by the Court to be "indefensibly arbitrary," claiming that it may protect those juvenile "offenders who are mature enough to deserve the death penalty." 258 Justice O'Connor found individualized sentencing by juries to be more appropriate than a bright-line rule. 259 She pointed out that the Court provided no evidence for its argument that sentencing juries cannot ascertain the juvenile's level of maturity to give appropriate weight to mitigating factors, asserting that this task is no different than sentencing juries "giving proper effect to any other qualitative capital sentencing factor." 260

Justice O'Connor also criticized the Court for failing to admonish the Supreme Court of Missouri for not following the precedent set out by the United States Supreme Court in Stanford. 261 She stated that "[b]y affirming the lower court's judgment without so much as a slap on the hand, today's decision threatens to invite frequent and disruptive reassessments of our Eighth Amendment precedents." 262

253. Id. at 595–96 (citations omitted).
255. Id. at 596 (citing Streib, supra note 254, at 11, 24–31).
256. Id. at 598.
258. Id. at 601–02.
259. Id. at 602–03.
260. Id. at 603–04.
261. Id. at 593–94.
Justice O'Connor agreed with the majority on one issue: that foreign and international law can be pertinent to Eighth Amendment evaluations.263 She stated that "the existence of an international consensus . . . can serve to confirm the reasonableness of a consonant and genuine American consensus."264 Because she did not find a genuine national consensus in this case, however, she did not think that "the recent emergence of an otherwise global consensus" could replace the lack of a national consensus against the juvenile death penalty.265

D. Justice Scalia, Dissenting

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, also dissented, arguing that not only was there a lack of evidence showing the development of a national consensus against the juvenile death penalty, but moreover they discredited the modern usage of the national consensus test in general.266 Rather than using "the evolving standards of decency" to determine what punishments are cruel and unusual, Justice Scalia would refer to "the original meaning of the Eighth Amendment."267 Justice Scalia also disagreed with the Court acting as a "sole arbiter of our Nation's moral standards" in making an independent judgment on the issue, as well as taking guidance from international opinions.268

Justice Scalia scrutinized the Court's evidence of a national consensus.269 He criticized the majority for counting non-death penalty states toward evidence of a national consensus against the imposition of the death penalty on sixteen and seventeen-year-olds.270 Justice Scalia objected to the relevancy of the twelve states that prohibit the death penalty in all cases because, in repealing the death penalty, the states did not consider the same determinative factors decided by the Court with respect to juvenile offenders, such as levels of culpability and maturity.271

Justice Scalia also took issue with the Court's reliance on the legislative changes since Stanford.272 He did not find the fact that only four states since Stanford have changed its laws to prohibit the juvenile death penalty signifi-

263. Id. at 604.
264. Id. at 605.
265. Id.
266. Id. at 607–11 (Scalia, J., dissenting).
267. Roper, 543 U.S. at 608 (Scalia, J., dissenting) (citation omitted).
268. Id.
269. See id.
270. Id. at 610–11.
271. Id.
272. Roper, 543 U.S. at 613 (Scalia, J., dissenting).
Scalia contended that "[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."

In addition to disagreeing with the evidence of a national consensus, Justice Scalia did not find it appropriate that the Court exercised its own independent judgment in coming to the conclusion that the death penalty is an inappropriate punishment for all juveniles. Justice Scalia objected "to supplant[ing] the consensus of the American people with the Justices' views" asserting "that it has no foundation in law or logic." Justice Scalia found the Court's role in evaluating the "evolving-standards" test is solely to determine if a national moral consensus exists. Justice Scalia posed the question: "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"

Justice Scalia further attacked the Court for exercising its own independent judgment, stating that:

Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.

Justice Scalia observed that the Court "need not look far to find studies" showing otherwise. Justice Scalia also posited the fact that the legislatures are in the best position to look at the results of statistical studies in light of their own local conditions. Justice Scalia found it significant that even looking at the studies cited by the Court, "[n]ot one . . . opines that all individuals under 18 are unable to appreciate the nature of their crimes."

273. Id. at 613–14.
274. Id. at 609 (citation omitted).
275. Id. at 615–16.
276. Id.
277. Roper, 543 U.S. at 616 (Scalia, J., dissenting).
278. Id.
279. Id. at 616–17.
280. Id. at 617.
281. Id. at 618 (citing McCleskey v. Kemp, 481 U.S. 279, 319 (1987)).
282. Roper, 543 U.S. at 618 (Scalia, J., dissenting).
He also disagreed with the Court's explanation for drawing the line at eighteen years old. Justice Scalia found that “[s]erving on a jury or entering into marriage also involve[s] decisions far more sophisticated than the simple decision not to take another's life.” Furthermore, Justice Scalia established that, in imposing these types of age limitations, states make categorical determinations without looking at individual maturity levels. On the other hand, he asserted that the criminal justice system "provides for individualized consideration of each defendant."

Justice Scalia also rejected the Court's use of international opinions in its decision, denouncing that the "'[a]cknowledgment' of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court's judgment—which is surely what it parades as today." Justice Scalia explained that the fact that the President of the United States and the Senate have not entered into treaties prohibiting the juvenile death penalty only further evidences that the United States has not reached a national consensus against it.

Justice Scalia also referred to the United Nations Convention on the Rights of the Child, explaining that it not only prohibits the juvenile death penalty, but also prohibits life imprisonment of juveniles. He pointed out that if the United States is to remain consonant "with the international community, then the Court's reassurance that the death penalty is really not needed, since 'the punishment of life imprisonment without the possibility of parole is itself a severe sanction,' gives little comfort."

V. EFFECTS OF THE COURT'S RULING

A. Nationwide Effects

The United States Supreme Court's ruling in Roper spared seventy-two juvenile offenders' lives nationwide by commuting their death sentences to life imprisonment. Thirteen states at the time of the decision had juveniles...
on death row: Texas (28); Alabama (13); Mississippi (5); Arizona (4); Louisiana (4); North Carolina (4); Florida (3); South Carolina (3); Georgia (2); Pennsylvania (2); Virginia (1); and Nevada (1). The decision had the effect of invalidating laws in twenty states that permitted the juvenile death penalty.

The implications of this ruling were immediately felt in Prince William County, Virginia, where prosecuting attorney Paul Ebert was considering trying Washington D.C. area sniper Lee Boyd Malvo on capital charges, but stated that "in light of this decision, [he] will not do so." Malvo was seventeen-years-old at the time of the shooting spree in 2002 and had already been convicted and sentenced to life in prison for two of the ten murders. Prosecutors were planning to try him in other jurisdictions in hopes of obtaining a death sentence. Ebert criticized the Supreme Court’s decision stating that he personally believes "you can’t draw a bright line between a 17-year-old and an 18-year-old." In regards to Malvo’s crimes, Ebert thought they “were meticulously planned—not the negligent act of a minor.”

The difficulty in drawing a bright-line rule was clearly illustrated in the case of brothers Kevin and Tilmon Golphin. In 1997, the brothers robbed a finance company in South Carolina, stole a car, and drove off on the interstate heading north. They were pulled over near Fayetteville, North Carolina by Highway Patrol Trooper Ed Lowry who called for back up after realizing that they were driving a stolen vehicle. When Deputy David Hatchcock arrived, nineteen-year-old Tilmon Golphin shot both men with a semi-automatic rifle, seriously wounding them. “Then, as the men lay wounded, the 17-year-old [Kevin Golphin] took Lowry’s pistol and finished them off,

293. Id.
295. Id.
296. See id.
297. Id.
298. Id.
299. Valerie Bauman, Age Ruling Lets Older Brother Die, Other Live: Narrow Gap Between Partners in Murder Highlights Cutoff Conflict, CHARLOTTE OBSERVER, Mar. 17, 2005, at 6B.
300. Id.
301. Id.
302. Id.
shooting both officers to death at point-blank range."303 The brothers were
adjudged guilty of murder and were both sentenced to death.304 However,
the Court's ruling in Roper had the effect of releasing Kevin Golphin from
death row, while his brother Tilmon Golphin will remain there for essentially
the same crime.305

Not all commentators favor this trend. Jordan Steiker, a death penalty
expert at the University of Texas law school, suggested that the decision may
lead to a judicial abolition of the death penalty in all cases.306 Steiker stated
that ""[t]he lasting significance of this case is that it opens the door to the
abolition of the death penalty judicially . . . . If a national consensus can
emerge without a majority of the death penalty states moving toward aboli-
tion, then it suggests that judicial abolition is a genuine prospect.""307

B. Effects on Florida

Florida was one of the nineteen states that permitted the imposition of
the death penalty on juvenile offenders.308 The ruling affected three juvenile
offenders on death row in Florida whose sentences will be reduced to life in
prison.309 Before 1994, Florida law allowed those facing life sentences to
have the possibility of parole after serving twenty-five years.310 Two of the
three juvenile offenders formerly on death row in Florida committed their
crimes before a change in this law was made, so they may now become eli-
gible for parole.311

The two men are Cleo LeCroy, now forty-one-years-old, and James
Bonifay, now thirty-one-years-old.312 In 1986, LeCroy of Palm Beach
County was convicted for the murders of a young couple from Miami, John

303. Id.
304. Bauman, supra note 299.
305. See id.
306. Peter Franceschina, Juvenile Killers Spared Death, FT. LAUD. SUN SENT., Mar. 2,
2005, at 1A.
307. Id.
308. Tisch, supra note 291; see also STREIB, supra note 254, at 24–31.
309. See Jackie Hallifax, Ruling Will Affect Florida's Death Row, TALL. DEM., Mar. 2,
310. Franceschina, supra note 306; see FLA. STAT. § 775.082(1) (1993), amended by FLA.
STAT. § 775.082(1) (1995). In 1993, section 775.082(1) of the Florida Statutes proscribed that
"[a] person who has been convicted of a capital felony shall be punished by life imprisonment
and shall be required to serve no less than 25 years before becoming eligible for parole." Id.
311. Franceschina, supra note 306.
312. Id.
and Gail Hardeman, who were camping near the Florida Everglades. In 1991, Bonifay misidentified Billy Wayne Coker, a clerk at an auto parts store in Pensacola, Florida, for another clerk that allegedly caused Bonifay’s cousin to get fired. Coker, the victim, had “pleaded for his life on behalf of his wife and two children” before he died. “But . . . Bonifay told Coker to ‘shut up’ and fired two [deadly] shots into his head.”

Twenty-seven-year-old Nathan Ramirez was also on death row for a crime committed as a juvenile and will no longer be executed, despite the fact that two juries decided Ramirez should receive the death penalty. However, Ramirez will be incarcerated for the rest of his life without the possibility of parole because he committed the crime after the change of law in Florida. In 1995, Ramirez and a friend broke into the home of seventy-one-year-old widow Mildred Boroski to steal her birthday presents in Pasco County, Florida. They beat her miniature poodle to death with a crow bar. “Then they tied up the 71-year-old woman with telephone cords, raped her and drove her to a grassy field, where they shot her twice in the head with her late husband’s .38-caliber revolver.” As a result of the burglary, Ramirez and his friend stole “two guns, a pair of handcuffs, a ring, a cordless phone and about $30, which the teenagers used to play video games the next day.”

VI. CONCLUSION

Our living document, the United States Constitution, is a symphony of words that harmonize the collective conscience of our forbearers. This masterpiece is dynamic and evolving in its performance, reflecting the prevailing
wisdom of the day. No one person has the hand of change, but many have fingerprints on the documents used as a basis for rulings to be rendered.

In *Roper*, the legal system of the United States addressed a topic wrought with controversy of a multi-faceted nature. The concept of executing persons for capital crimes they committed as juveniles merited consideration at the highest level, presenting a quandary to the United States Supreme Court that legal, moral, and religious beliefs do not always coincide. When the "hands of change" were counted, the majority ruled by a 5-4 decision that capital punishment of juveniles violates the Eighth Amendment's ban against "cruel and unusual" punishment.

The decision's significance goes beyond abolishing the juvenile death penalty; it subjects the Eighth Amendment's "cruel and unusual" punishments clause to interpretation by the Justices based on their own subjective views. In the progeny of case law since *Thompson*, the Court has slowly veered away from the objective national consensus analysis of looking at the states legislative enactments to decide the constitutionality of a particular punishment. Instead, they have created leeway for Justices to instill their own beliefs as to what punishments are "cruel and unusual," supported by scientific studies that endorse their individual views. As Justice Scalia noted in his dissent, there is nothing in the law that allows the Justices "to supplant the consensus of the American people" with their own personal views.

Many question whether a categorical bright-line rule was appropriate here. With the sad reality that juveniles kill, the questions become: What is the proper punishment for these juvenile murderers? Should our laws assume that no juvenile can act with the same level of culpability as that of an adult and hence the death penalty is not appropriate for all juveniles? They should not. The relationship between chronological age and levels of culpability is tenuous. There is serious doubt over whether one is less culpable at the age of seventeen years and 364 days as compared to the day he or she turns eighteen.

The majority is correct that a line must be drawn. However, the line was drawn correctly in the Court's decision of *Thompson*, prohibiting the death penalty on those under the age of sixteen. This left the decision—of whether sixteen and seventeen year olds should be executed—to juries based on case-by-case examinations of individual defendants in the states that permitted the juvenile death penalty. This line was drawn correctly because there was a clear national consensus of support.

324. *Id.* at 578–79 (majority opinion).
325. *Id.* at 615 (Scalia, J., dissenting).
The ruling in *Roper* has left many wondering what the role of international opinion serves in our country's legal system. What did the majority mean by stating that the international opinion provided "confirmation" of its decision? It is difficult to see where international opinion fits into the inquiry of a *national* consensus. If we change this test to an *international* consensus, we may find ourselves on a slippery slope, considering the fact that many of the countries the Court looked to for "confirmation" forbid life imprisonment for juveniles and prohibit the death penalty in all cases.\(^{327}\)

If the ruling does not stand the test of time, relief will be delivered by the merits of each case as it progresses through the system. If one day in age can be the difference between facing capital punishment or life imprisonment, the rigidity of this line is arbitrary and bound to produce injustice.

\(^{327}\). *See, e.g.*, Brief for the European Union, *supra* note 150, at 1, 13.