Editor:

I read with great interest the article by Sarkar,[1] my interest being ignited by both the subject matter and his perspective as a non-U.S.-based forensic psychiatrist. Given that I am also a non-U.S.-based forensic psychiatrist with an interest in the subject at hand, I was moved to set out my views, which, to a significant degree, differ from Dr. Sarkar's.

I am sure that Dr. Sarkar, a well-respected colleague and friend, will not be surprised by my saying that, notwithstanding the clear reasoning behind his argument and the eloquence with which he has expressed it, it nonetheless is flawed, possibly fatally, for reasons that will be enunciated presently. The essence of his argument, as I understand it, is that the U.S. Supreme Court is misguided in its "reliance on foreign authorities in interpreting the U.S. Constitution," and as a subsidiary argument, "moral relativism," as represented by the concept of "evolving standards of decency" have no place in the courts and certainly not in the Supreme Court of the United States.

As Dr. Sarkar himself points out, *Roper v. Simmons*[2] was not the first time the U.S. Supreme Court has looked beyond the borders of the United States to seek guidance in its jurisprudence. It was not even the first time the Court had done so in a death penalty case. Presumably, Dr. Sarkar does not object to the Court's seeking guidance from international law in noncapital cases; if this is the case, why not? It appears to me that the fundamental issue is one of how established legal principles are applied to new or different circumstances (which, after all, is the essence, in my view, of what being a judge is all about) and not the emotive nature of the situation to which said legal principles are being applied.

Dr. Sarkar takes issue with what he describes as "the proclivities" of "the justices who are in the liberal camp" for "overturning the principle of *stare decisis.*" Perhaps he should consider whether a similar accusation could be leveled against those justices not "in the liberal camp" (see *Bush v. Gore*),[3] the majority on that occasion asserting, in effect, that their decision in this case could not be used as a precedent in other cases.

Dr. Sarkar further asserts that "Juries are required to apply the law. If the features of a crime meet the legal criteria for death, then a jury is supposed to impose the sentence, not simply to ask themselves whether they think the person deserves it based on the jurors' personal moral values." This, in my opinion, is simply wrong. If Dr. Sarkar's assertion is correct, it eliminates the exercise of discretion by the jury and makes them no more than automatons who, programmed with the right cues, will generate an entirely predictable response, which, as anyone who has ever had much to do with juries knows, is simply not the case.

I turn now to the question of international law. First, Dr. Sarkar is wrong in asserting that constitutional law "deals with purely domestic concerns." Section 8 of the U.S. Constitution gives the Congress the power to, among other things, declare war, regulate commerce with foreign nations, and define and punish offenses against the law of the nations, none of which can be described as "purely domestic concerns." If the Constitution is so explicit in its recognition that it is concerned not only with matters within the U.S., why is it so outlandish that, in seeking to interpret it, some consideration (which does not necessarily need to be probative) is given to international law? Second, the whole question of international law and its influence over the interpretation of the Constitution is actually a red herring. The "evolving standards of decency that mark a maturing society" that were referred to in *Trop v. Dulles*[4] had nothing to do with international law; they referred to the domestic United States. It was not that long ago that the death penalty was imposed for horse rustling. I am unable to persuade myself that the reason this is no longer the case is not because of these same "evolving standards."

Dr. Sarkar is on much stronger ground when he suggests that a panel of nine unelected judges may not necessarily provide the best way for the nation to express its change of mind as far as its values (and the laws based on them) are concerned. That, however, does not negate, in my view, the essential function of the courts: to interpret the law as it relates to the current situation.

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2. Roper v. Simmons, 543 U.S. 551 (2005)
3. Bush v. Gore, 531 U.S. 98 (2000)
4. Trop v. Dulles, 356 U.S. 86, 101 (1958)

Reply

Editor:

I am glad that my article on *Roper v. Simmons*[1] is being read with a critical eye and is attracting the kind of debate I had hoped for. For a long time, your *Journal* has provided a forum for debate of the more contentious matters involving forensic practice, and I hope this tradition will continue. I would like to address some of the points raised by Dr. Akinkunmi, whom I would like to thank for furthering the discussion.

He is correct in pointing out that *Roper* was not the first case in which the Supreme Court looked beyond its shores. What he does not mention is that the opposition to those forays was strong. One has only to look at the dissent raised in *Lawrence v. Texas*[2] and *Atkins v. Virginia*,[3] by practically the same judges who dissented in *Roper*. *Lawrence* (a homosexual sodomy case) overturned *Bowers v. Hardwick*,[4] not so much on reason or science, but relying largely on foreign jurisprudence. This pick-and-choose reliance on foreign law, therefore, is not limited to death penalty cases but perhaps extends to all contentious and divisive matters in U.S. politics. This is the source of the dissent, and my discontent, not the practice of looking at foreign law, as such.

The same applies to the precedence that Dr. Akinkunmi also mentions. The reliance on helpful (to one's position) precedence and total rejection of others is what the dissenting judges meant. Adherence to precedence should be a matter of law. *Stare* is not a matter of sovereign grace. I hope that I gave sufficient examples of this ideology-driven inconsistency in the original article.

Regarding the juror's discretion and exercising of it, there has been a lot said and written in professional journals, and I do not wish to reopen the debate. I would just reiterate that the jury is required to decide on the evidence before them and not on their personal and moral values. In a 1980 case in the Supreme Court (*Adams v. Texas*)[5] the following was said:

> During *voir dire* examination of individual prospective jurors, the prosecutor, and sometimes the trial judge, intensively inquired as to whether their attitudes about the death penalty permitted them to take the oath set forth in [the Texas] Penal Code . . . as follows:
>
> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

This seems to be the case in other jurisdictions as well. Utah law says:

> . . . and convene a new jury for the proceedings; requires the jury to find, beyond a reasonable doubt, that the aggravating factors outweigh the mitigating factors and that the sentence of death is appropriate by unanimous decision.[6]

Both of these examples clearly mean that the jurors have limited space in which to exercise their discretion, and their discretion may not be exercised arbitrarily.

Dr. Akinkunmi's last point, I feel, is equally unpersuasive. All the examples in which the Congress is given the power to do things actually involve the citizenry of the United States. It allows the Congress to declare war on nations who are attacking the country, and so forth. The U.S. Constitution was framed by "we the people" (of the United States) and is for the people of the United States. The Constitution does not explicitly state that the judiciary is allowed to look beyond its shores to decide domestic law, just as it does not explicitly prohibit that practice. The originalists and textualists therefore advance the argument that if it isn't there, it wasn't meant to be. The only way to change the Constitution, they believe, is by amendments, not through judicial activism. I merely echoed that view.

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1. Roper v. Simmons, 543 U.S. 551 (2005)
2. Lawrence v. Texas, 539 U.S. 558 (2003)
3. Atkins v. Virginia, 536 U.S. 304 (2002)

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5. Adams v. Texas, 448 U.S. 38 (1980)
6. Utah Code Ann. § 76-30-4 (1953)

Editor:

The editors of the *Journal* and Dr. Gutheil deserve our gratitude for publishing an article that details some common pitfalls in the forensic evaluation of testamentary capacity.[1] It is worth noting that such pitfalls can be magnified by those hidden dangers common in both diagnostic reasoning and opinion formulation.[2] For example, there is the common human tendency to have first impressions become last impressions. This has been described as the heuristic of "anchoring." Since treating physicians focus on relief of suffering, they may anchor on an initial formulation of impairment level which, although helpful for treatment purposes, is misleading for forensic purposes. Even when a treating clinician is subsequently presented with the criteria for evaluation of testamentary capacity, it is more difficult to apply these criteria in an open-minded fashion without anchoring on the prior evaluation of impairment for specific treatment purposes. These considerations make it all the more crucial that the forensic evaluation be conducted separately from any clinical evaluation.[3] This separation is necessary to avoid any potential, if inadvertent, conflicts of interest whose influence, with all good intentions, cannot be easily prevented or undone.[4]

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3. Bursztajn HJ: Competency to make a will. Am J Psychiatry 149: 1415, 1992
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Editor:

The practice guideline, *Forensic Psychiatric Evaluation of Competence to Stand Trial*,[1] recently published by AAPL, is a major accomplishment and a worthwhile resource for all forensic examiners. Table 3, which delineates the key features of state statutes, is an interesting and helpful resource. Unfortunately, the information concerning Hawaii's statutory requirements for appointing forensic examiners is incorrect. The correct wording of the Hawaii Revised Statute follows:

> § 704-404 Examination of defendant with respect to physical or mental disease, disorder, or defect.
>
> (2) Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners in felony cases and one qualified examiner in nonfelony cases to examine and report upon the physical and mental condition of the defendant. In felony cases the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, licensed psychologist, or qualified physician. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health.[2]

I trust this information will be useful in correcting the practice guideline.

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2. Hawaii Revised Statutes § 704-404 (1993 and Supp. 1999)