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# Like Snow [Falling] on a Branch...: International Law Influences on Death Penalty Decisions and Debates in the United States

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# "LIKE SNOW [FALLING] ON A BRANCH . . .": INTERNATIONAL LAW INFLUENCES ON DEATH PENALTY DECISIONS AND DEBATES IN THE UNITED STATES

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"[C]apital punishment is unlikely to be undone for any one reason. Like snow on a branch, it is not any single flake that makes the branch break, but rather the collective weight of many flakes accumulating over time."[1]

INTRODUCTION

Since the United States Supreme Court's 2002 decision in *Atkins v. Virginia*[2] prohibiting the execution of severely mentally retarded individuals, significant changes have occurred in American capital punishment law. Important restrictions have been imposed on the types of crimes and criminals that are subject to the death penalty. At the same time, the Court has refused to give effect to the judgment of an international human rights tribunal ordering the United States to review death sentences of Mexican nationals because of international law violations,[3] and has declined to invalidate the primary method, the three drug lethal "cocktail," used to execute prisoners.[4] Yet, in *Kennedy v. Louisiana*,[5] the Court narrowly held that the death penalty could not be constitutionally extended to non-homicide child rape. This Article explores how these decisions have been significantly, but unevenly, influenced by international law, foreign court decisions and global political actions, and the effect of Supreme Court case law on the death penalty debate in the United States.

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* Professor of Law, Suffolk University School of Law. The author wishes to thank former Law School Dean Alfred Aman for his steady support of this project. My Staff Assistant, Andrea Shannon Curley, provided patient, sustained and totally expert assistance at every stage of the preparation of the Article. It is dedicated to the one person whose continuing inspiration has made all of my professional accomplishments possible, my beloved wife Professor Kate Nace Day. [This Article originates from a lecture delivered on May 14, 2008, at Lund University, Lund Sweden. The lecture is available at http://www.jushumanis.org/Expert_Seminars/documents/Executing_Capital_Punishment.doc. A full text version of the lecture is also published, with footnotes, as *Executing the Death Penalty: International Law Influences on United States Supreme Court Decision-Making In Capital Punishment Cases*, 32 SUFFOLK TRANS. L. REV. 599 (2009).

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1. Richard C. Dieter, *International Influence on the Death Penalty in the United States*, 80 FOREIGN SERV. J. 31 (2003).

2. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that capital punishment of the mentally retarded is cruel and unusual and prohibited by 8th amendment).

3. Medellín v. Texas, 128 S. Ct. 1346, 1357 (2008).

4. Baze v. Rees, 128 S. Ct. 1520, 1538 (2008).

5. Kennedy v. Louisiana, 128 S. Ct. 2641, 2650-51 (2008).

Part I of this Article provides a description of the basic Eighth Amendment principles that govern the constitutionality of capital punishment law. Parts II and III set forth foundational information on death penalty practices in the United States and the global community, and identify specific provisions of international law that prohibit or restrict capital punishment. Part IV describes the public debate among Justices of the Court over the propriety of reliance on international law in U.S. constitutional decision-making. Part V provides examples of international law and foreign court decisions that have directly influenced opinions of U.S. Supreme Court Justices in death penalty cases. The Article concludes with commentary on ways in which international law can continue to impact American capital punishment policies and practices.

## PART I. THE REQUIREMENTS OF THE EIGHTH AMENDMENT

Thirty-five states and the federal government have legislatively enacted capital punishment laws.[6] These laws are subject to judicial review under the Eighth Amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[7]

Starting with *Furman v. Georgia*[8] and the *Gregg v. Georgia*[9] line of cases, the United States Supreme Court established clear, if not somewhat broad and general, rules for determining when a death penalty law is valid under the Eighth Amendment. Initially, capital punishment is not *per se* unconstitutional.[10] The death penalty is a constitutional criminal sentence so long as:

> 1. It is not imposed in an arbitrary and capricious manner.[11] Death penalty statues must contain clear and precise standards that narrow the range of crimes and criminals eligible for capital punishment to only the "worst of the worst" and prevent discrimination on the basis of race, gender, sexual orientation, or other impermissible factor.[12]

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6. Death Penalty Info. Ctr. (DPIC), *Facts About the Death Penalty*, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Sept. 16, 2009) [hereinafter DPIC Facts]. Historical statistical information on the death penalty is reported by DPIC in Fact Sheets as noted above. *Id.* Statistical information for the current year is continuously updated; however, DPIC does not maintain an archive of prior Fact Sheets. *See* Death Penalty Information Center, http://www.deathpenaltyinfo.org/home (last visited Oct. 19, 2009). Third party internet storage facilities, such as Internet Archive, maintain archived reports, but these services are not supported by DPIC. *See generally id.*

7. U.S. CONST. amend. VIII.

8. *See* Furman v. Georgia, 408 U.S. 238 (1972).

9. *See* Gregg v. Georgia, 428 U.S. 153 (1976); *see* Proffitt v. Florida, 428 U.S. 242 (1976); *see* Jurek v. Texas, 428 U.S. 262 (1976).

10. *See Gregg*, 428 U.S. at 187 (discussing *per se* constitutionality of capital punishment).

11. *See Furman*, 408 U.S. at 294-95 (discussing arbitrary and capricious application).

12. *See Furman*, 408 U.S. at 279 (Brennan, J., concurring) (discussing constitutional death penalty standards); *see also Furman*, 408 U.S. at 242, 249-52 (Douglas, J., concurring); *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 428 (1980). In addition, the *Woodson/Lockett* line of cases requires focus on the "character and record of the individual offender and the circumstances of the particular offense . . . ." Woodson v. North Carolina, 428 U.S. 280, 304

2. It "advances" a legitimate "penalogical justification," by achieving one of the sentencing goals of the U.S. criminal justice system: retribution, deterrence, incapacitation, or rehabilitation.[13] A Supreme Court Justice's personal answer to this question–what does the death penalty accomplish in terms of justifications for criminal punishment–may be considered in deciding this issue.[14]

3. It is consistent with the "evolving standards of decency" recognized by a "maturing society" and respects the "human dignity" that is at the core of the Eighth Amendment.[15] The Amendment requires proportionality between the crime committed and the sentence of death. As noted above, only the "worst of the worst" criminals, the most culpable and blameworthy, can be sentenced to death.[16] A court must

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(1976); Lockett v. Ohio 438 U.S. 586, 603 (1978); *see also Furman*, 408 U.S. at 310 (noting some death sentences are so arbitrary as to make the sentence "freakish"). "Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim." Kennedy v. Louisiana, 128 S. Ct. 2641, 2665 (2008). "[T]he death penalty must be reserved for the 'worst of the worst.'" Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).

13. *See* Atkins v. Virginia, 536 U.S. 304, 318-19 (2002) (discussing death penalty justifications); Baze v. Reese, 128 S. Ct. 1520, 1547 (Stevens, J., concurring); *Kennedy*, 128 S. Ct. at 2649 (analyzing death penalty rationales). The original rationale for the death penalty was limited to retribution and deterrence. However, Justice Stevens has recently referred to incapacitation in *Baze* and Justice Kennedy introduced rehabilitation in *Kennedy*. *See Baze*, 128 S. Ct. at 1547 (Stevens, J., concurring) (referring to incapacitation rationale); *Kennedy*, 128 S. Ct. at 2649 (discussing rehabilitation rationale); *see also* Erik Eckholm, *U.S. Shifting Prison Focus To Re-entry Into Society*, N.Y. TIMES, Apr. 8, 2008, *available at* http://www.nytimes.com/2008/04/08/washington/08reentry.html (noting President Bush would sign Second Chance Act "making rehabilitation a central goal of the federal justice system."); The Second Chance Act of 2007, H.R. 1593, 110th Cong. (2008) (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.); *see also* Fruqan Mouzon, *Forgive Us Our Trespasses: The Need For Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 9 (2008) (discussing Second Chance Act).

14. *See* Roper v. Simmons, 543 U.S. 551, 563 (2005) (discussing use of Justice's own judgment). "The Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)). When assessing the effectiveness of advancing penalogical goals the Court considers its "own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Kennedy*, 128 S. Ct. at 2650. "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on . . . [an accomplice to felony murder]." Edmund v. Florida, 458 U.S. 782, 797 (1982).

15. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (originating "evolving standards" concept); *Gregg*, 428 U.S. at 173 (referring expressly to preserving "human dignity" as central purpose of Eighth Amendment). The Court has never repudiated the statement in *Trop* that the broad purpose of the Eighth Amendment is to respect and preserve "the dignity of man." Gregg v. Georgia, 428 U.S. 153, 173 (1976).

16. *See Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319) (discussing proportionality of death penalty). "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Id.* "The Court explained in *Atkins* and *Roper* that the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that

> find a "national consensus" in contemporary American society in support of a particular death penalty practice.[17] Whether there is such a consensus is measured, first, by examining "objective" or "democratic" evidence of public understandings in the form of legislative enactments.[18] A court will look at the number of states (or the federal government) following a challenged practice and the "trends" in the United States.[19] Some Justices have also been willing to consider opinion polls and the views of national and international organizations.[20] As with sentencing goals, individual Justices can make their own personal judgments about what evolving standards of decency tolerate or require.[21]

Until recently, these constitutional principles had been applied in a way that led to a complex, multi-layered, highly technical body of substantive and procedural law which has both promoted imposition of the death penalty and made it extremely difficult to execute a death row prisoner. Yet, prior to the Court's 2007–2008 Term, perceptible changes had occurred, nationally and internationally, that suggested a retreat from the aggressive use of capital punishment.[22]

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punishment for [a] crime should be graduated and proportioned to [the] offense.'" *Kennedy*, 128 S. Ct. at 2649 (citations omitted) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). "Evolving standards . . . must . . . respect . . . the dignity of the person." *Id.* "*Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Id.* at 2661.

17. *See Roper*, 543 U.S. at 563 (discussing need for "national consensus"). "The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence Atkins held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded." *Id.* at 564.

18. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2642 (citing *Roper*, 543 U.S. at 563). The Court is guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Id.*

19. *See Roper*, 543 U.S. 551, 563-65 (2005) (noting death penalty trends). "The number of States that have abandoned capital punishment for juvenile offenders . . . is smaller than the number of States that abandoned capital punishment for the mentally retarded . . . ; yet we think the same consistency of direction of change has been demonstrated." *Id.* at 564-66. A national consensus can also be demonstrated in the states without a formal prohibition because the practice of executing juveniles and the mentally retarded is infrequent. *Id.* at 564-65. Since 1989, only five states have executed offenders known to have an IQ under 70 and only six states have executed prisoners for crimes committed as juveniles. *Id.* at 564. Furthermore, in the past 10 years, only Oklahoma, Texas, and Virginia have done so. *Id.* at 565.

20. *See Kennedy*, 128 S. Ct. at 2657 (discussing the use of execution statistics as evidence of societal acceptance); *see also* Atkins v. Virgina, 536 U.S. 304, 316 n. 21 ("[P]olling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.").

21. *See* Gregg v. Georgia, 428 U.S. 153, 182-83 (1976) (Stewart, Powell & Stevens, JJ., joint opinion) (discussing death penalty and sentencing goals); Coker v. Georgia, 433 U.S. 584, 597 (comparing the role of judiciary, juries and legislature in death penalty cases); *supra* note 14 and accompanying text (discussing judgment of Justices).

22. *See* James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 14-19 (2007); *see also* ALAN W. CLARK & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO

## PART II. A NATIONAL TREND AGAINST THE DEATH PENALTY?

The Court's three most important recent substantive death penalty opinions, *Kennedy v. Louisiana*,[23] *Roper v. Simmons*,[24] and *Atkins v. Virginia*[25] strongly emphasized trends in capital punishment practices applying "evolving standards of decency" under the Eighth Amendment. Two things were clear about such trends at the mid-point of 2008. American death penalty policies are continually subjected to intense, sustained, and widespread criticism.[26] And, reliance on capital punishment as the ultimate criminal sanction has steadily declined during the last decade.[27] These realities led Justice John Paul Stevens to conclude that the death penalty represents "the pointless and needless extinction of life," produces "only marginal contributions to any discernible social or public purposes," and should be abandoned by state and federal governments.[28] Justice Kennedy matched the power of these words in another opinion observing that, "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[29]

Basic criticisms of state execution in the United States are easily catalogued. There is still no generally accepted evidence that the death penalty deters murder or other extremely violent crime.[30] Decision-making in capital cases is

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THE DEATH PENALTY 11-13 (Northeastern Univ. Press 2008).

23. *See* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

24. *See* Roper v. Simmons, 553 U.S. 551 (2005).

25. *See* Atkins v. Virginia, 536 U.S. 304 (2002).

26. *See* discussion *infra* Part IV (describing debate among Supreme Court Justices and recent history of death penalty litigation at Supreme Court).

27. *See infra* text accompanying notes 42-53 and accompanying text (illustrating reduction in reliance on capital punishment and death sentences).

28. *See* Baze v. Rees, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring) (citing Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

29. Kennedy v. Louisiana, 128 S. Ct. 2641, 2650 (2008).

30. *See Baze*, 128 S. Ct. at 1547 (evaluating deterrence as an effective justification of capital punishment). "The legitimacy of deterrence as an acceptable justification for the death penalty is . . . questionable, at best." *Id.* "Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment." *Id.* (footnote omitted); *see, e.g.*, Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255 (2006) (discussing the numerous technical and conceptual errors of current deterrence studies); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005) (criticizing research methodologies and questioning results); *see also* Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 STAN. L. REV. 847 (2005) (discussing moral commitments behind deterrence in the death penalty debate); Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (criticizing Cass Sunstein and Adrian Vermeule's argument that because deterrence is supported by empirical evidence, the death penalty is morally permissible); *cf.* Adam Liptak, *Does the Death Penalty Save Lives? A New Debate*, N.Y. TIMES, Nov. 18, 2007, at 11 (discussing the debate surrounding deterrence and the death penalty); Robert Tanner, *Studies Say Death Penalty Deters Crime*, WASH. POST, June 11, 2007 (reporting that empirical studies show the death penalty to be a deterrent to crime); DPIC, *Experts From Both Sides Say Data Does Not Support A Deterrent Effect From The Death Penalty*, posted June 30, 2008, *available at* http://www.deathpenaltyinfo.org/experts-both-sides-

unavoidably arbitrary, from the initial prosecutorial choice to seek the death penalty, to judge and jury sentencing.[31] Racial and ethnic discrimination permeate the system.[32] The catharsis of retribution is widely rejected.[33] Decades often pass

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say-data-does-not-support-deterrent-effect-death-penalty (referencing Cass Sunstein & Justin Wolfers, WASH. POST, June 30, 2008); *but see* H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. L. & ECON. 453 (2003); Roy Adler & Michael Summers, *Capital Punishment Works*, WALL ST. J., Nov. 2, 2007, at A13 (asserting deterrent effect of death penalty).

31. DPIC, *Arbitrariness*, http://www.deathpenaltyinfo.org/arbitrariness (last visited Feb. 23, 2009). DPIC has documented evidence of arbitrariness in the use of the death penalty in such areas as geography, race, representation, jury mistakes, and gender. *Id.* A recent example includes an editorial in the *Virginian-Pilot* highlighting arbitrary application of the death penalty. *See* DPIC, *EDITORIAL: Imperfections Abound with Death Penalty*, THE VA.-PILOT, Nov. 7, 2008, *available at* http://www.deathpenaltyinfo.org/editorial-imperfections-abound-death-penalty (last visited Feb. 23, 2009); PilotOnline.com, *Imperfections Abound with Death Penalty*, Nov. 7, 2008, http://hamptonroads.com/2008/11/imperfections-abound-death-penalty (last visited Feb. 23, 2009); *see also* ROMY GANSCHOW, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, DEATH BY GEOGRAPHY: A COUNTY BY COUNTY ANALYSIS OF THE ROAD TO EXECUTION IN CALIFORNIA (Elise Banducci, Jeff Gillenkirk & Natasha Minsker eds. ACLU), *available at* http://www.aclunc.org/docs/criminal_justice/death_penalty/death_by_geography/death_by_geography.pdf. "California's death penalty has become so arbitrary that the county border, not the facts of the case, determines who is sentenced to execution and who is simply sentenced to die in prison." *Id.* at 1. The report indicates that residents of Alameda County are nearly eight times more likely to be given a death sentence than residents of similar demographics of nearby Santa Clara County. *Id.* In New York, upstate counties represent approximately 65% of capital prosecutions, despite representing only 20% of the state's homicides. *See* NEW YORK STATE CAPITAL DEFENDER OFFICE, CAPITAL PUNISHMENT IN NEW YORK STATE: STATISTICS FROM EIGHT YEARS OF REPRESENTATION, 1995-2003 (Capital Defender Office 2003). Similarly, the New Jersey Supreme Court released a report that found there is "unsettling statistical evidence indicating that cases involving killers of white victims are more likely to progress to a penalty phase than cases involving killers of African-American victims." Hon. David S. Baime, Report to the Supreme Court, Systemic Proportionality Review Project: 2000-2001 Term 2-3 (2001).

32. *See* DPIC, *supra* note 31 (discussing death penalty arbitrariness and discrimination); *see also* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: DEATH BY DISCRIMINATION – THE CONTINUING ROLE OF RACE IN CAPITAL CASES (2003), *available at* http://www.amnesty.org/en/library/asset/AMR51/046/2003/en/bd8584ef-d712-11dd-b0cc-1f0860013475/amr510462003en.pdf. Between 1976 and 1999, blacks and whites were murdered at a nearly equal pace. *Id.* at 1. Despite the racial equality among victims, eighty percent of people executed since 1977 were convicted of murdering white victims. *Id.* at 5. Similar discriminatory results have been found in cases with victims of high socio-economic status. *See* BALDUS, D.C., ET AL., FINAL REPORT ON THE DISPOSITION OF NEBRASKA CAPITAL AND NON-CAPITAL HOMICIDE CASES (1973-1999): A LEGAL AND EMPIRICAL ANALYSIS (Neb. Commission on Law Enforcement and Criminal Justice 2001). "[S]ince 1973 defendants whose victims have high socio-economic status have faced a significantly higher risk of advancing to a penalty trial and receiving a death sentence. Defendants with low SES victims have faced a substantially reduced risk of advancing to a penalty trial and of being sentenced to death." *Id.* at 22; *see also* Symposium, *Racial discrimination and the death penalty in the post-Furman era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 18 CORNELL L. REV. 1638 (1998); Symposium, *Race, Crime and the Constitution: Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001).

33. *See The Death Penalty in New York: To Examine the Future of Capital Punishment in New York State: Hearing Before the Assemb. Standing Comm. on Codes, Assemb. Standing Comm. on the Judiciary, and Assemb. Standing Comm. on Correction*, 2004 Leg., 108th Sess. (N.Y. 2004), *available at* http://nysl.nysed.gov/Archimages/75782.PDF [hereinafter 2004 *New York Public Hearing*] (statements of Bill Pelke and Kate Lowenstein). "[T]he death penalty has absolutely nothing at all to do

before an execution takes place[34] and the brutalization it represents perpetuates the pain caused by the original acts of the executed prisoner.[35] Victims' families, individually and through organizations, vehemently deny the "closure" that execution is presumed to achieve.[36] Life in prison without parole accomplishes the same incapacitation as capital punishment.[37] Prosecuting a death penalty case is

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with [] healing . . . in fact it just continues that cycle of violence and it creates more murder victim family members." *Id.* at 164 (quoting Pelke). "The death penalty does not honor our murdered family members. . . . It feeds our feelings of revenge, anger and hatred and holds out to us an illusionary form of healing and what we are told will be closure. By now I hope you all know not to offer closure to a victim's family members. There is no closure." *Id.* at 171-72 (quoting Lowenstein).

34. The "death row phenomenon" refers to the fact that in the United States, appeals of death sentences often take decades or more to be finally resolved. It has been argued that this phenomenon is itself an independent violation of the Eighth Amendment. In *Knight v. Florida*, Justice Thomas stated, "I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." *Knight*, 120 S. Ct. 459, 459 (1999) (Thomas, J., concurring). "[I]n most cases raising this novel claim, the delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence. . . ." *Id.* "Inmates have argued that general prison conditions violate the Eighth Amendment. U.S. courts have decided these cases differently, but no court has held that the general conditions on death row constitute cruel and unusual punishment." Florencio J. Yuzon, *Conditions and Circumstances of Living on Death Row-Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the 'Death Row Phenomenon,'* 30 GEO. WASH. J. INT'L L. & ECON. 39, 62-63 (1996) (citations omitted). "Condemned death row inmates rarely succeed at challenging their conditions on death row as cruel and unusual punishment." *Id.* at 63. "In People v. Chessman, . . . the defendant was convicted of seventeen felonies including first degree robbery and kidnapping and was sentenced to death. Chessman spent eleven years in San Quentin prison awaiting his execution. On appeal, Chessman argued that the length of his confinement constituted 'cruel and unusual punishment.' Although conceding that 'it [was] . . . in fact unusual that a man should be detained for more than 11 years pending execution of sentence of death and . . . that mental suffering attends such detention,' the court found that California had not violated Chessman's Eighth Amendment rights." *Id* at 69 (citations omitted). "Other recent case law indicates that courts will not find an Eighth Amendment violation where the inmate abuses the appeals process, thereby prolonging his time on death row." *Id.* at 70.

35. *See* 2004 *New York Public Hearing*, *supra* note 33 (discussing victim family testimony).

36. *Id.* at 172.

37. *See* Baze v. Rees, 128 S. Ct. at 1547 (Stevens, J., concurring) ("While incapacitation may have been a legitimate rationale in 1976, the recent rise in statues providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty."). Footnote 10 of this concurring opinion points out that as of the writing of *Baze*, forty-eight states had "some form of life imprisonment without parole. . . ." *Id.* at n. 10. *See also A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1841-44 (2006) (discussing increase in life without parole statutes); Andrew Welsh-Huggins, *Ohio Prosecutors Using New Life Without Parole Option*, AKRON BEACON J., June 23, 2008, *available at* http://www.moabolition.org/docs/Archives/OH6-08.doc (documenting use of life without parole as sentencing option). Public Defender Tim Young stated "If you can come to a life without parole option without having to go through that cost [of a death penalty trial at over $100,000 per initial trial] and it satisfies the public's need for safety and punishment, then that makes a real reasonable outcome for everyone involved." *Id.* A 2005 law in Ohio allows prosecutors to seek a sentence of life imprisonment without parole without first seeking the death penalty. *Id.* Even a state like Texas has recently provided the alternative of life without parole to seeking the death penalty in certain cases. *Id.* In part because of the new Ohio law, the number of death penalty indictments sought statewide dropped 32% from 2004 to 2007. *Id.*

vastly more expensive than bringing a non-capital charge.[38] Overlaying, and probably overshadowing, these flaws in the system is the profound presence of innocence. A steady stream of exonerations of death row inmates has obliterated the illusion of certainty of guilt that most Americans insist must exist to justify capital punishment.[39]

Perhaps because of these many problems, data from the Death Penalty Information Center suggests a retreat from the death penalty over the past decade that seems to accelerate each year. Both numbers of executions and death sentences imposed in the United States have steadily declined. In 1999 executions peaked at 98.[40] Between 2005 and 2007, executions totaled 60, 53, and 42 respectively.[41] Prior to the 2008 moratorium on executions imposed by the U.S. Supreme Court during the pendency of *Baze v. Reese* and a decision on the "lethal cocktail" method of execution, 13 death sentences were carried out.[42] Since the Court's approval of that method in April, 2008, 9 additional executions were carried out as of mid-July, 2008.[43]

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38. *See* DPIC, *Costs of the Death Penalty*, http://www.deathpenaltyinfo.org/costs-death-penalty (last visited Feb. 25, 2009) (discussing high costs of capital punishment); *see also* JOHN ROMAN ET AL., URBAN INSTITUTE, JUSTICE POLICY CENTER, THE COST OF THE DEATH PENALTY IN MARYLAND (2008), *available at* http://www.deathpenaltyinfo.org/CostsDPMaryland.pdf. The average cost of death penalty prosecution in Maryland is $1.9 to $3 million dollars more than a non-capital punishment prosecution. *Id.* at 2. Total cost for 5 executions since 1978 was $186 million or $37.2 million per execution. *Id.* at 3. *See also* NATASHA MINSKER, THE HIDDEN DEATH TAX: THE SECRET COSTS OF SEEKING EXECUTION IN CALIFORNIA (Claire Cooper & Elise Banducci, eds., American Civil Liberties Union), *available at* http://www.aclunc.org/docs/criminal_justice/death_penalty/the_hidden_death_tax.pdf (reporting death penalty costs). California's capital trials cost $1.1 million more than non-capital trials, and the state spends $117 million more per year to prosecute death penalty cases rather than seeking life without parole. *Id.* at 1-2.

39. *See* DPIC, *Innocence: List of Those Freed From Death Row*, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (listing 130 individuals exonerated since 1973). DPIC estimates that 130 death row inmates in 26 states have been exonerated. *Id.* This figure amounts to an approximate innocence rate of 1 out of 10 death sentences imposed. *Id. See generally* ALAN W. CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY 113-33 (Northeastern Univ. Press 2007) (providing comprehensive discussion of innocence cases). The Court has yet to acknowledge that an innocent death row inmate has been executed. *See* RICHARD C. DEITER, DPIC, INNOCENCE AND CRISIS IN THE AMERICAN DEATH PENALTY (DPIC 2004), *available at* http://www.deathpenaltyinfo.org/innocence-and-crisis-american-death-penalty (reporting on innocence in death penalty cases). *See also* DPIC, *infra* note 57 and accompanying text (discussing public opinion regarding death penalty and innocence).

40. *See* DPIC Facts, *supra* note 6 (detailing death penalty executions by year).

41. *Id.*

42. *See* DPIC, *The Death Penalty in 2007: Year End Report* 3 (2007), *available at* http://www.deathpenaltyinfo.org/2007YearEnd.pdf [hereinafter DPIC Year End Report 2007] (noting "profound effect" of *Baze* in temporarily placing all executions on hold). Executions were on hold in seven states, including Illinois, New Jersey, New York, California, Delaware, Maryland, and Nebraska. DPIC, *Death Penalty in Flux* (2007), http://www.deathpenaltyinfo.org/death-penalty-flux (last updated Jan. 22, 2009). The DPIC reports that executions have resumed in the United States and that 24 additional executions were carried out in 2008, totaling 37. *See* DPIC, *Facts about the Death Penalty*, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (documenting executions by year).

43. *See* DPIC, *Executions Since Supreme Court's Upholding of Lethal Injections*,

A similar pattern is seen in numbers of death sentences imposed. For the three years covering 2005 through 2007, these sentences fell from 138 to 121 to 115.[44] Preliminary figures for 2008 have further decreased to 111.[45] The current death row population still remains high at approximately 3300.[46] Death sentencing and execution continue to be heavily concentrated in the Southern parts of the United States. Texas dominates these statistics with over 60% of all executions in 2007 occurring in that state.[47]

Many states are backing away from capital punishment. Most compelling is the State of New Jersey's legislative abolishment of the death penalty in 2007.[48] This followed New York's refusal, in 2005 and 2006, to restore capital punishment in the state after procedural provisions of its law were struck down by the New York Court of Appeals on state constitutional grounds.[49] Abolitionist efforts in several states made progress at the legislature level but did not result in signed laws.[50] Numerous states have formed commissions to study death practices in those states with a view towards restriction or repeal.[51] These trends are counterbalanced by the relatively aggressive use of the death penalty by the United States Government, especially in the area of terrorism.[52]

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www.deathpenaltyinfo.org/executions-supreme-courts-upholding-lethal-injection (last visited Sept. 26, 2009) (documenting executions by year).

44. *See* DPIC, *Facts about the Death Penalty*, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

45. *Id.*

46. *Id.* As of January 1, 2008, there were a total of 3,309 inmates on death row in the United States. *Id.*

47. *Id.* For example, in 2008, out of the total of 37 executions in the United States, 35 were carried out in Texas, Virginia, Oklahoma, Florida, Georgia, South Carolina, Mississippi, and Kentucky. *Id.*

48. *See* DPIC Year End Report 2007, *supra* note 42, at 1; N.J. STAT. ANN. 2C:11-3 (2007) (abolishing death penalty by amendment).

49. *See* People v. LaValle, 817 N.E.2d 341, 357-58. (N.Y. 2004) (holding that the "deadlock instruction" provision of the New York death penalty statute is unconstitutional under New York's constitution); *see generally*, Russell G. Murphy, *People v. Cahill: Domestic Violence and the Death Penalty Debate in New York*, 68 ALBANY L. REV. 1029 (2005) (analyzing New York death penalty law).

50. *See* DPIC Year End Report 2007, *supra* note 42 (discussing abolitionist efforts in Nebraska, New Mexico, Montana, Colorado and Maryland).

51. *See* CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT 119-25 (2008) (describing California's broken and dysfunctional capital punishment system); MARYLAND COMMISSION ON CAPITAL PUNISHMENT, FINAL REPORT TO THE GENERAL ASSEMBLY (2008); H.R. 520, 161st Leg. (Nh. 2009) (establishing commission to study death penalty in New Hampshire).

52. Federal law provides for capital punishment in at least 40 separate statutes and approximately 55 federal inmates are presently on death row. *See* DPIC, *The Federal Death Penalty*, http://www.deathpenaltyinfo.org/federal-death-penalty; *see also* William Glaberson, *U.S. Presents Charges Against 6 in Sept. 11 Case*, N.Y. TIMES, Feb. 11, 2008 (noting U.S. seeking death penalty against Guantanamo detainees in military commission trials); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), S. Res. 735, 104th Cong. (1996) (enacted) (codified in scattered sections of 28 U.S.C.); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), H.R. 3162, 107th Cong. (2001) (enacted); USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th Cong. (2006) (enacted);

Public opinion is exceedingly important in determining the direction of death penalty law in America. It is often said that Justices of the Supreme Court read the newspapers—and opinion polls—just like every other citizen! These polls show that support for capital punishment is holding steady but beginning to shift. A 2007 Gallup poll showed that approximately 69% of Americans supported the death penalty in the abstract.[53] However, when given a choice between death and life in prison without parole, 48% chose life in prison to 47% for capital punishment.[54] Only 38% of those polled thought that the death penalty was a deterrent to murder or other serious crimes.[55] Significantly, the highly publicized exoneration of numbers of capital criminals, and the growing sense that it is highly likely that innocent prisoners have been executed, is rapidly eroding support for the death penalty. As many as 60% of a polled group said that evidence of wrongful convictions lessened their support for, or strengthened their opposition to, capital punishment.[56]

Innocence is the magnet that draws together all of the other criticisms of the death penalty. Since 1973 and the restoration of capital punishment in the United States, the Death Penalty Information Center (DPIC) estimates that approximately 130 prisoners in 26 states have been released from death row because of evidence of their innocence.[57] The grounds for these exonerations differ from case to case–DNA evidence (a small percentage of cases); proof of police (coerced confessions) or prosecutorial (suppression of evidence) misconduct; confessions by the real killer; and ineffective assistance of counsel.[58] From 2000 through 2007 these

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USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, S. Res. 2271, 109th Cong. (2006) (enacted) (codified in scattered sections of U.S.C.); Terrorist Death Penalty Enhancement Act of 2005, H.R. 3060, 109th Cong. (2005) (introduced June 24, 2005).

53. GALLUP, 2007 GALLUP POLL: DEATH PENALTY (2007), *available at* http://www.gallup.com/poll/1606/Death-Penalty.aspx; RICHARD C. DIETER, A CRISIS OF CONFIDENCE: AMERICANS' DOUBTS ABOUT THE DEATH PENALTY (Death Penalty Info. Ctr. 2007).

54. *Id.*

55. DPIC Year End Report 2007, *supra* note 42, at 3. This is based on a poll conducted by RT Strategies and sponsored by DPIC. *Id.*

56. *Id.*

57. *See* DPIC, *Innocence and the Death Penalty*, http://www.deathpenaltyinfo.org/innocence-and-death-penalty (last visited Feb. 25, 2009) [hereinafter Innocence and the Death Penalty] (discussing innocence issue and the death penalty).

58. *See* DPIC, *DPIC Summary: The Innocence Protection Act of 2004*, http://www.deathpenaltyinfo.org/node/1322 (last visited Feb. 25, 2009) (summarizing Innocence Protection Act of 2004); *see also* RICHARD C. DIETER, INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY (Death Penalty Info. Ctr. 2004) [hereinafter Innocence and the Crisis Report] (discussing innocence, exonerations, and death penalty). The story of Ryan Matthews provides an excellent example. At age 17, Matthews was arrested for the murder of a convenience store owner. Matthews' court-appointed attorney was ill prepared for the case, especially with regard to the DNA evidence and testing that was required. Despite not fitting the description of the assailant provided by witnesses and several hours of jury deadlock, the judge ordered additional deliberations until a verdict was reached. A single hour later, Matthews was convicted and later sentenced to death. After four years on death row, Matthews' attorneys properly retested the DNA evidence, excluding Matthews, and discovered evidence previously suppressed by the prosecution. Matthews was officially exonerated in August 2004. *See* Innocence and the Crisis Report, *supra* (providing examples of exonerations).

exonerations have increased to an average of slightly more than 5 per year.[59] It is understandable, then, that long-time supporters of capital punishment are changing their opinions.

These profound misgivings in the United States over the death penalty mirror an established international rejection of capital punishment.[60] When diverse nations and communities come together to condemn a government practice like the death penalty, policy makers are compelled to recognize the trends. It is in this environment that international law influences on U.S. Supreme Court death penalty decisions become more understandable.

## PART III. THE INTERNATIONAL SCENE (AND THE ISOLATION OF THE UNITED STATES)

Part I of this article noted that the Supreme Court has acknowledged in many decisions that individual Justices may make their own personal assessments of what "evolving standards of decency" require under the Eighth Amendment and whether a particular form of capital punishment significantly advances any of the "penalogical justifications" for the death penalty.[61] The flexibility, and subjectivity, of such judgments make it possible for international law, foreign court decisions, and global political activity to influence a Justice's decision in a death penalty case. International law is strongly anti-death penalty, as illustrated by the following summary of the status of capital punishment world-wide.

The most universally accepted international condemnation of the death penalty comes from the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol.[62] They provide:

> ICCPR (1976) Part III Article 6 (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. (2) In countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . . (5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. Article 10 (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[63]
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> Second Optional Protocol to ICCPR (1991) Article 1 (1) No one within the jurisdiction of a State Party to the present Protocol shall be executed.

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59. Innocence and the Death Penalty, *supra* note 58.

60. *See infra* notes 63-93 and accompanying text (discussing international death penalty trends).

61. *See supra* notes 13-21 and accompanying text (discussing judicial discretion in death penalty decisions).

62. International Covenant on Civil & Political Rights art. 6, *entered into force* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Second Optional Protocol to the International Covenant on Civil & Political Rights, Aiming at Abolition of the Death Penalty, G.A. Res. 44/128, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/49 (Dec. 15, 1989) [hereinafter Second Optional Protocol to ICCPR].

63. ICCPR, *supra* note 62, at art. 6.

> (2) Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction.[64]

Similar restrictions can be found in the UN Convention on the Rights of the Child,[65] The American Convention on Human Rights,[66] and the African Charter on the Rights and Welfare of the Child.[67] Especially important is Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1985).

> Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty. Article 1. The death penalty shall be abolished. No one shall be condemned to such penalty or executed. Article 2. A State may make provision in its law for the death penalty in respect of acts committed in time or war or of imminent threat of war . . . .[68]

Pursuant to these various provisions, much of the world has freed itself from the burdens and costs, moral and material, of capital punishment. Based on data from the Death Penalty Information Center, at the beginning of 2008 an estimated 135 countries had abolished the death penalty either in law or practice.[69] By comparison, 59 still retained capital punishment.[70] Because the European Union conditions membership on banning the death penalty,[71] and based on the fact that

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64. Second Optional Protocol to ICCPR, *supra* note 62, art. 1.

65. Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989) [hereinafter CRC].

66. American Convention on Human Rights art. O.A.S. Treaty Series No. 36, art. 4, 1144 U.N.T.S. 123 (July 18, 1978).

67. African Charter on the Rights and Welfare of the Child art 5, *entered into force* Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49.

68. Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S./114 (Mar. 1, 1985); *see also* Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 187 (Jan. 7, 2003). The European Convention for the Protection of Human Rights and Fundamental Freedoms was the first legally binding international treaty to ban capital punishment in all circumstances and without exceptions and is currently ratified by 41 countries. Amnesty International, *Death Penalty: Ratification of International Treaties*, http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties (last visited Sept. 28, 2009).

69. *See* DPIC, *The Death Penalty: An International Perspective, Abolitionist and Retentionist Countries*, http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries (last visited Feb. 25, 2009); *see also*, Amnesty International, *Abolitionist and Retentionist Countries*, http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries (last visited Feb. 25, 2009).

70. Amnesty International, *supra* note 69. On June 16, 2008, the Council of the European Union issued a statement reaffirming its goal of "working towards universal abolition of the death penalty" and identified that goal as an "integral objective of the EU's human rights policy" Press Release, President Dimitrij Rupel, General Affairs and External Relations for the Council of the European Union (June 16, 2008). The statement lauded the vote of the UN General Assembly that called for a moratorium on executions world-wide and noted that abolition "contributes to the enhancement of human dignity and the progressive development of human rights." *Id.*

71. American Convention on Human Rights, *supra* note 66, at 12; *see also* European Commission

all 46 nations of the Council of Europe have stopped executions (40 member countries ratified Protocol No. 6),[72] Europe (with the exception of Belarus) is now a no-execution zone covering 800 million people.[73]

At the present time, approximately 27,500 prisoners are on death row worldwide.[74] For the past few years, the top executing countries were China, Iran, Pakistan, Saudi Arabia, Iraq, and the United States.[75] Other active practitioners of capital punishment included Sudan, Yemen, Vietnam, Mongolia, Jordan and Singapore.[76] In 2006, there were 1591 executions, down 25% from 2005.[77] For 2007, executions decreased an additional 22% to 1252.[78] During the same year, a minimum of 3347 death sentences were imposed as compared to 3861 for 2006.[79] Obviously, these figures are only estimates, but they suggest a global trend away from the death penalty.

Other international developments in 2007 reinforce this view. Rwanda voted to abolish the death penalty;[80] France amended its constitution to ban capital punishment;[81] the Third World Congress Against the Death Penalty was held in Paris;[82] and the EU and Council of Europe observed the "European Day Against the Death Penalty."[83] Of critical importance, in an unprecedented act of unity on the issue, the United Nations General Assembly passed a resolution calling for a global moratorium on executions.[84] The vote was 104 in favor, 52 opposed, and 29 abstaining.[85] The United States voted "no." The resolution commits signatory countries to: (1) progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed; (2) establish a moratorium on

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on External Relations, *EU Policy on the Death Penalty*, www.ec.europa.eu/external _relations/human_rights/adp/index.htm#pol (last visited Mar. 2, 2009).

72. CLARKE & WHITT, *supra* note 39, at 7.

73. *Id.*

74. Amnesty International, *Death Penalty: Death Sentences and Executions in 2007*, http://www.amnesty.org /en/death-penalty/death-sentences-and-executions-in-2007 (last visited Mar. 2, 2009).

75. DPIC, *The Death Penalty: An International Perspective, Executions Around the World*, http://www.deathpenaltyinfo.org/death-penalty-international-perspective (last visited Mar. 2, 2009).

76. *Id.*

77. DPIC, *International News and Developments: 2007*, http://www.deathpenaltyinfo.org/node/2256 (last visited Mar. 2, 2009).

78. DPIC, *International: Amnesty International Reports Worldwide Drop in Executions*, http://www.deathpenaltyinfo.org/node/2354 (last visited Mar. 2, 2009).

79. Amnesty International, *Death Penalty: Death Sentences and Executions in 2007*, http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2007 (last visited Mar. 2, 2009); Amnesty International, *Death Penalty: Death Sentences and Executions in 2006*, http://www.amnesty.org/en/library/asset/ACT50/004/2007/en/dom-ACT500042007en.html (last visited Mar. 2, 2009).

80. DPIC, *International News and Developments: 2007*, *supra* note 77.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* Italian Premier Romano Prodi called for a worldwide moratorium on the death penalty: "we shall perform a great political act through the adoption of this resolution. It will demonstrate that humankind isn't capable of making progress only in science but also in the field of ethics." *Id.*

executions in each country with a view to abolishing the death penalty worldwide; and (3) not reintroduce capital punishment once it is abolished.[86]

The action of the United States in voting not to join much of the civilized world in eliminating capital punishment is representative of its approach to numerous human rights issues. On the death penalty alone, the United States steadfastly refused to join the ban on executing juveniles imposed by the Convention on the Rights of the Child.[87] It took a reservation to the ICCPR protecting its right to continue executions[88] and declined to sign the Second Optional Protocol.[89] America refused to accept the jurisdiction of the International Criminal Court[90] and withdrew from the jurisdiction of one of the most important human rights tribunals in the world, the International Court of Justice.[91] The United States has shown nothing but disdain for the human rights concerns of the world community by unilaterally deciding to go to war in Iraq, allowing the use of torture at Guantanamo Bay, seeking the death penalty for terrorists like Khalid Sheik Mohammed who were "waterboarded," narrowly reading the Geneva Convention and exhibiting isolationist "cowboy diplomacy."[92] The Supreme Court's recent 5 to 4 decision in *Boumediene v. Bush*, granting habeas corpus rights to Guantanamo detainees, highlights America's continuing isolation on human rights issues.[93]

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86. *See* Press Release, General Assembly, General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty, U.N. Doc. GA/10678 (Dec. 18, 2008) (discussing resolution placing moratorium on death penalty).

87. CRC, *supra* note 65, art. 37. The United States has never ratified the United Nations Convention on the Rights of the Child and refused to recognize its ban on the death penalty for juveniles. *Id.*

88. *See supra* text accompanying note 64; ICCPR, *supra* note 62, art. 6(5) (prohibiting capital punishment for anyone under 18 at the time of offense). The ICCPR is signed and ratified by the United States subject to a reservation regarding Article 6(5). United Nations Treaty Collection, Status of Treaties, International Covenant on Civil and Political Rights, *United States Declarations and Reservations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4& lang=en#EndDec.

89. Second Optional Protocol to ICCPR, *supra* note 62; United Nations Treaty Collections, Status of Treaties, *Participants to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en.

90. *See* Peter Malanczuk, *The International Criminal Court and Landmines: What are the Consequences of Leaving the U.S. Behind*, 11 EUR. J. OF INT'L L. 77 (2000) (evaluating U.S. rejection of International Criminal Court).

91. Letter from Condoleezza Rice to the United Nations Secretary General (Mar. 7, 2005), *available at* http://www.discourse.net/archives/2005/03/us_announces_withdrawal_from_consular_convention.html (stating that "the United States of America . . . hereby withdraws from . . ." the Optional Protocol Concerning the Compulsory Settlement of Disputes arising under the Vienna Convention and that, as a result, "the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol") [hereinafter U.S. Withdrawal Letter]; *see* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A01.

92. *See* Stephanie Bellier, *Unilateral and Multilateral Preventive Self-Defense*, 58 ME. L. REV 508 (2006); Lord Hacking, *The Rule of Law Papers*, 43 INT'L LAW 3 (2009); Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL U. L. REV. 1535 (2009).

93. Boumediene v. Bush, 128 S. Ct. 2229 (2008).

Today, the commands of the Universal Declaration on Human Rights, Articles 3 and 5, that "[e]veryone has the right to life, liberty and the security of the person" and "[n]o one shall be subject to torture or cruel, inhuman or degrading treatment . . ." have greater meaning than when the Declaration was adopted in 1948.[94] Except in the United States!

## PART IV. THE JUSTICES DEBATE

International law can influence American policy on capital punishment only to the extent that it is weighed, considered, and utilized by policy-makers at all levels. Part V of this Article firmly demonstrates that international law has had a direct and substantial impact on death penalty decisions of the United States Supreme Court.[95] A full understanding of the opinions behind those decisions is aided by an examination of a fascinating and very public debate that has been occurring among Justices of the Court over the permissibility and propriety of relying on international law in U.S. constitutional interpretation. The "winner" of this debate will greatly affect the direction of American death penalty law for years to come.

The constitutional principles that govern Eighth Amendment death penalty analysis frame this Justices debate. A significant group on the Supreme Court has accepted the notion that Justices can, and must, make their own independent personal determinations of what "evolving standards of decency" in a "maturing society" require in constitutional terms.[96] The Court must make the same assessment on whether a particular form of capital punishment "advances one of the penological justifications" for the death penalty.[97] While consistently acknowledging that international law is not "binding" on the Court,[98] public statements by at least four Justices reveal an openness to looking at world opinion and policy when deciding Eighth Amendment death penalty cases.[99] Two other Justices have made it equally clear that they passionately reject such an approach.[100] The debate is, then, fundamentally over the proper role of a Supreme Court Justice and appropriate theories of constitutional interpretation.[101]

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94. Universal Declaration of Human Rights, G.A. Res. 217A, art. 3-5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

95. *See infra* Part V (discussing international law's impact on U.S. Supreme Court cases).

96. *See supra* text accompanying note 17 (outlining Eighth Amendment judicial discretion).

97. *See supra* text accompanying note 21 (discussing judicial discretion in death penalty law).

98. *See infra* text accompanying note 119 (noting international law not binding on Supreme Court constitutional cases).

99. *See infra* text accompanying notes 102, 107, 117, 118, 119, 129, 130, 132, 133, 138, 139, 143, 144 (citing use of international law).

100. *See infra* notes 103, 121-23, 131, 136-36, 142, 162-62 and accompanying text (discussing views of Justices Scalia and Thomas on inappropriateness of citing to international law). Chief Justice Roberts seems to share these attitudes. "[In] [f]oreign Law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. . . . [L]ooking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent--because they're finding precedent in foreign law--and use that to determine the meaning of

The views of Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, and John Paul Stevens can be found in books, magazines, law review articles, speeches, public forums, and, of course, individual opinions. This group loosely shares a decision-making methodology that can be called "organic evolutionism" – a belief that the United States Constitution is a living, growing document, whose broad language was intended by its Framers to adapt to changing and unforeseeable social and political conditions in the United States.[102] Their outspoken opponents, Justices Anton Scalia and Clarence Thomas, are "originalists" or "strict constructionists" who believe that Justices are bound by the literal text of constitutional provisions supplemented only by the understandings and intentions of the Founding Fathers at the time of ratification.[103] Their positions are found in similar sources.

Unusual insights into the thinking and philosophies of these Justices were provided in a 2005 public discussion between Justices Breyer and Scalia at American University's Washington College of Law. Their debate, published as "The Relevance of Foreign Law Materials in U.S. Constitutional Cases: A Conversation Between Justice Anton Scalia and Justice Stephen Breyer,"[104]

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the Constitution. And I think that's a misuse of precedent, not a correct use of precedent." *See Court in Transition; 'I Believe That No One Is Above the Law Under Our System'*, N.Y. TIMES, Sept. 14, 2005, at A26 (listing excerpts from Senate Judiciary Committee's hearing on the nomination of Judge John G. Roberts, Jr.) [hereinafter Confirmation Hearings]; 151 Cong. Rec. S10.172 (daily ed. Sept. 19, 2005) (statement of Justice Roberts during testimony at confirmation hearing).

101. Some have termed this a debate over "constitutional comparativism." This concept considers justifications for using foreign and international law in terms of philosophies of judging, theories of constitutional interpretation (originalism, natural law, majoritarianism, and pragmatism), and political sovereignty (whether use of international law removes courts from our system of "self-government founded on democracy and popular sovereignty"). Kenneth Anderson, *Foreign Law and the U.S. Constitution*, 131 POL'Y REV. 33 (2005); *See* Roger Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005).

102. *See* Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy's Move Away from a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 29 (2007) (characterizing the Constitution as living document). The "Living Constitution" is a metaphor for an organic view of the Constitution as a document that is always evolving in meaning and adapting to contemporary values and practices. *Id.* at 29. The "Living Constitution" approach to interpretation allows judges to "go beyond . . . the four corners of the document." *Id.* (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980)).

103. *See generally* JAMES B. STAAB, THE POLITICAL THOUGHT OF JUSTICE ANTON SCALIA: A HAMILTONIAN ON THE SUPREME COURT (Rowman and Littlefield Publishers, Inc., 2006) (referring to proponents of this school as originalists or strict constructionalists); *see also* Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 QUINNIPIAC L. REV. 599 (2008) (describing originalist view). Originalist interpretation is focused on "the text of the written Constitution as it was understood at the moment of adoption or amendment, or on atextual but specific-in-time 'constitutional moments.'" Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 QUINNIPIAC L. REV. 606, 606 (2008). Originalism is also defended as necessary to constrain judges from acting on their own preferences by tying their hands, interpretively, to the original understanding of the Constitution's text. *Id.* at 608. "[O]riginalist interpretation is a highly plausible if not a necessary means of promoting democratic legitimacy." *Id.*

104. *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005)

symbolizes a much broader controversy over judicial functioning that has been part of American political conversation for some time and that reemerged in the 2008 presidential election campaign.[105]

This Article urges in its Conclusion that the issue of capital punishment should have been forced into the 2008 elections.[106] The views of a new President have great potential to affect the decisions of state legislatures and Congress on future capital punishment policies. The alternative is that, without political action, the difficult and emotional issues raised by capital prosecutions will continue to be decided by the Supreme Court. In this context, the subjective beliefs of the Justices set forth below, about the importance of international law, foreign court decisions, and world opinion in death penalty and related constitutional cases, will be critical to the Court's decisions.

A good starting point for this analysis is a speech given by Justice Ruth Bader Ginsburg in 2006 to South African judges and lawyers. In it she observed:

> The notion that it is improper to look beyond the borders of the United States in grappling with hard [constitutional] questions . . . [is in line with the view that] the US Constitution [is] a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view. US jurists honour the Framers' intent "to create a more perfect Union," . . . if they read the Constitution as belonging to a global 21st century, not as fixed forever by 18th-century understandings.[107]

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[hereinafter *A Conversation Between Scalia and Breyer*]; see Anderson, *supra* note 101, at n. 8 (warning Breyer and Scalia discussion was "informal and unscripted" and ought not to be "overinterpreted"). The unusually public nature of the Justices' remarks and the consistency of their comments with their decisions and reasoning in actual cases suggest that their statements should be given very significant weight. Anderson acknowledges that the discussion provided a "remarkable window into the thinking of the two justices . . . ." Anderson, *supra* note 101. *See also* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (West 2008); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); CHARLES WYZANSKI, WHEREAS--A JUDGE'S PREMISES: ESSAYS IN JUDGMENT, ETHICS, AND THE LAW (1965).

105. Presidential Candidates Obama and McCain took traditional partisan positions on judicial appointments. Obama was seen as promoting an activist judicial philosophy. *See ABA Bias; WH Confirms Judicial Activism Pledge*, COMMITTEE FOR JUSTICE BLOG, Mar. 18, 2009, http://www.committeeforjustice.com/blog/2009/03/aba-bias-wh-confirms-judicial-activism.html (discussing Obama's views on judicial appointments). Obama remarked that 'the critical ingredient [in a judicial nominee] is supplied by what is in the judge's heart . . . .' *Id.* Federal judges must have 'the empathy, to recognize what it's like to be a young teenage mom [or] poor, or African American, or gay, or disabled, or old.' *Id.* McCain supported the strict constructionist point of view. *See* Klaus Marre, *McCain Lambastes Judicial Activism*, THE HILL, May 6, 2008, http://thehill.com/homenews/campaign/1322-mccain-lambastes-judicial-activism (outlining McCain's position on judicial activism). 'I will look for people in the cast of John Roberts, Samuel Alito, and my friend the late William Rehnquist—jurists . . . who know their own minds, and know the law, and know the difference. . . .' *Id.* Nominees must 'understand that there are clear limits to the scope of judicial power, and clear limits to the scope of federal power.' *Id.*

106. *See infra* note 259 and accompanying text (calling for death penalty to be primary issue in 2008 presidential campaign).

107. Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of [Human]kind": The Value of a*

Historically, Justice Anthony Kennedy has been a strong adherent of Justice Ginsburg's approach and an outspoken proponent of using foreign and international law as an aid in interpreting the U.S. Constitution. He wrote majority opinions in two cases, *Lawrence v. Texas*[108] and *Roper v. Simmons*,[109] which relied on international law.

Attorney Jeffrey Toobin, author of the best-selling book about the Supreme Court, THE NINE,[110] and well-known CNN legal commentator, gave some context to these decisions in his September 2005 New Yorker magazine article *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court.*[111] Attorney Toobin's article illustrates nicely how a Justice's personal experiences can contribute to an internationally-based human rights jurisprudence.

Mr. Toobin points out that Justice Kennedy worked as an oil rigger in Canada when he was a teenager, studied at the London School of Economics in college, became licensed to practice law in Mexico, and served while a judge as the supervisor of American Territorial Courts in the South Pacific.[112] This assignment led to extensive travel to Guam, Palau, Saipan, American Samoa, Australia, New Zealand and Japan.[113] Importantly, Justice Kennedy has regularly lived in Salzburg, Austria, beginning in the summer of 1990, in order to teach in the McGeorge University (School of Law) summer program at the University of Salzburg.[114] He has lectured to judges and lawyers in China under the auspices of the American Bar Association.[115] He, together with other Justices of the Court, meets with his counterparts from England and Canada.[116]

Drawing on this experience, Justice Kennedy is said to believe that in "invoking foreign law the United States Supreme Court sends an implicit message to the rest of the democratic world that our society shares its values."[117] In Kennedy's words:

> "If we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way

*Comparative Perspective in Constitutional Adjudication*, 64(3) CAMBRIDGE L. J. 575, 585 (2005). [hereinafter *"A Decent Respect to the Opinions of [Human]kind"*].

108. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

109. Roper v. Simmons, 543 U.S. 551, 555 (2005).

110. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (Doubleday 2007).

111. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, *available at* http://www.newyorker.com/archive/2005/09/12/050912fa_fact.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

> that's at least instructive to us . . .[118] We [the Court] have to be aware of what's going on in the world. Of course, it's not binding on us, but we can't pretend that it doesn't exist. Today, no lawyer would think of not telling us how courts around the world have approached the same question.[119]

Although neither Justice Ginsburg nor Justice Kennedy was a participant in the American University discussion, Justice Scalia, the Court's most recognized conservative, responded to them through his criticism of Justice Breyer's willingness to rely on international law in his opinions.[120] Justice Scalia stated, "I do not use foreign law in the interpretation of the United States Constitution . . . If you told the framers . . . we're to be just like Europe, they would have been appalled."[121] Later in the debate Justice Scalia observed:

> [M]y theory of what to do when interpreting the American Constitution is to try to understand what it meant, [how it] was understood by . . . society . . . when it was adopted. And I don't think it has changed since then . . . If you have that philosophy . . . foreign law is irrelevant with one exception: old English law—because phrases like 'due process'. . . were taken from English law. . . .[122]

Justice Scalia continued:

> Justice Breyer [and Justices Ginsburg and Kennedy by inference] [do not] . . . have my approach. [They apply] the principle . . . that the Constitution is not static. It doesn't mean what the people voted for when it was ratified. Rather, it changes from era to era to comport with . . . 'the evolving standards of decency that mark the progress of a maturing society.' I detest that phrase, because . . . societies don't always mature. Sometimes they rot.[123]

For now at least, Justice Scalia is stuck with this "evolving standards" test. As a result, when deciding death penalty cases he will only use:

> The standards of decency of *American* society—. . . not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views. Of what conceivable value as indicative of American standards of decency would foreign law be?. . . .
>
> . . . The only way in which it makes sense to use foreign law is if you have a third approach to the interpretation of the Constitution, to wit: 'I as a judge am not looking for the original meaning of the Constitution,

118. *Id.*

119. *Id.*

120. *See infra* notes 123-26, 133, 136,138-39, 142, 144, and accompanying text (detailing Scalia's comments regarding international law).

121. *A Conversation Between Scalia and Breyer*, *supra* note 104, at 521.

122. *Id.* at 525.

123. *Id.*

> nor for the current standards of decency of American society; I'm looking for what is the best answer to this social question in my judgment as an intelligent person. And for that purpose I take into account the views of other judges, throughout the world.'[124]

Such an approach is, to Justice Scalia, totally wrong, and perhaps impeachable.

Justice Breyer's approach to constitutional interpretation and the use of international materials is more flexible and practical. "You look around to what's cited, [and] what's cited is what the lawyers tend to think is useful,"[125] and that often includes foreign law.

In terms of citing foreign law in death penalty cases, Justice Breyer was very specific in the American University discussion. "Nothing in Blackstone, nothing in Bracton, nothing even in the law books of King Arthur, says that a judge, in deciding what constitutes 'cruel and unusual punishment,' must confine his review to the United States alone or to the United States plus Great Britain."[126] Referring to his dissent from the denial of certiorari review in *Moore v. Nebraska*[127] and *Knight v. Florida*,[128] cases involving the so-called "death row phenomenon" that argued that decades-long confinement of death row prisoners prior to their executions constituted a violation of the Eighth Amendment, Justice Breyer made several basic points:

> Breyer: I referred to a decision by the Supreme Court of India [*Signh v. State of Punjab*] and one by the Supreme Court of Canada [*Kindler v. Minister of Justice*]. I referred to certain United Nations determinations . . . I referred to decisions that went the other way as well. I may have made what one might call a tactical error in referring to a case from Zimbabwe [Catholic Commission v. Attorney General]—not the human rights capital of the world . . . [But r]eaching out to those other nations, reading their decisions, seems useful, even though they cannot determine the outcome of a question that arises under the American Constitution.[129]
>
> Justice Thomas—disagreeing with me—wrote his own brief opinion arguing that I could not find American precedent supporting my view, so I must have looked to Zimbabwe out of desperation. He had a certain point. [Laughter.] But still, with all the uncertainties involved, I would rather have the judge read pertinent foreign cases while understanding that the foreign cases are not controlling. I would rather have the judge treat those cases cautiously, using them with care, than simply to ignore

124. *Id.* at 526.

125. *Full Written Transcript of Scalia-Breyer Debate on Foreign Law*, FREE REPUBLIC, Jan. 13, 2005, http://www.freerepublic.com/focus/f-news/1352357/posts.

126. *A Conversation Between Scalia and Breyer*, *supra* note 104, at 527.

127. Moore v. Nebraska, 528 U.S. 990, 993 (1999).

128. Knight v. Florida, 528 U.S. 990, 993 (1999).

129. *A Conversation Between Scalia and Breyer*, *supra* note 104, at 528.

them. I would rather hope that judges will exercise proper control, taking the cases for what they are worth, than have an absolute rule that says judges may never look at foreign decisions. The fact that I cannot find any absolute legal prohibition [to doing this]—not even in the laws of King Arthur—gives me cause for hope.[130]

The debate continued:

Scalia: [Y]ou can say every other country of the world thinks that holding somebody for twelve years under sentence of death is cruel and unusual, but you don't know that these other countries don't have habeas corpus systems which allow repeated applications to state and federal court, so that the reason it takes twelve years here is because the convicted murderer himself continues to file appeals that are continuously rejected.

In England, before they abolished the death penalty—and by the way, every public opinion poll in England suggests that the people would like to retain it, but maybe the judges and lawyers and law students feel differently about it—before they abolished the death penalty, whenever it was pronounced the judge pronouncing it would don a little skullcap. When you saw him reach for the skullcap you knew he was about to pronounce a sentence of death. And that sentence would be carried out within two weeks. So that's the reason twelve years seems extraordinary to them. It's extraordinary because we've been so sensitive to the problem of an erroneous execution that we allow repeated habeas corpus applications. I just don't think it's comparable. It's just not fair to compare the two.

But most of all, what does the opinion of a wise Zimbabwe judge or a wise member of a House of Lords law committee [*Soering v. House of Lords*]—what does that have to do with what Americans believe? It is irrelevant unless you really think it's been given to *you* to make this moral judgment, a very difficult moral judgment. And so in making it for yourself and for the whole country, you consult whatever authorities you want. Unless you have that philosophy, I don't see how it's relevant at all.[131]

Breyer: Well, it's relevant in the sense I described. A similar kind of person, a judge, with similar training, tries to apply a similar document with similar language ('cruel and unusual punishment' or the like), in a society that is somewhat similarly democratic and protective of basic human rights. England is not the moon, nor is India. Neither is a question of 'cruel and unusual punishment' an arcane matter of contract law where differences in legal systems are more likely to make a major difference. In fact, ironically in those more specifically legal areas—

130. *Id.*
131. *Id.* at 529.

> areas where results are more likely tied to the details of a different legal environment—references to foreign decisions are likely to prove less controversial. Indeed, we frequently look at foreign law in such cases, i.e., technical cases. If in a 'cruel and unusual punishment' case the fact that everyone in the world thinks one thing is at least worth finding out . . .(then that is worth looking at). And, if my having the legal power to do so adds some uncertainty to the law, I believe the legal system can adjust. That is because the law is filled with uncertainty. Its answers in difficult cases can rarely be deduced only by means of legal logic from clear legal rules and a history book. Were the latter possible, I would be more tempted to agree with your view that a system without reference to foreign law would better control subjective judicial tendencies. But it is not.[132]

Continuing with the discussion outside the death penalty area, Justice Breyer cited a First Amendment case involving campaign finance laws and noted that, again, foreign law was referred to in the briefs:

> Breyer: Well, consider [the Bowman case in England]. . . Mrs. Bowman, I believe, favored the right to life. She is a citizen of Great Britain. She wished to contribute a small amount of money in the days prior to an election to print literature that would identify pro-life (or pro-choice) candidates. And the British law prohibited the making of that contribution so close to the election date. The European Court of Human Rights considered her claim that Britain's [campaign contribution] law violated the freedom of expression guaranteed by the European Convention of Human Rights. Does that issue not sound familiar? One argument in Mrs. Bowman's favor was that it was unreasonable to prohibit her contribution while permitting newspapers to say about the same thing whenever they wished. Does that argument not sound familiar?
>
> Why is it unreasonable for me to be curious about how the European Court dealt with [free speech] arguments. I am not bound by what the Court said. But why can I not look at it? Why should I not be able, in my opinion, to refer to what the Court said?[133]
>
> Scalia: Look, I'm not preventing you from reading these cases.[134]
>
> Breyer: Well, isn't that exactly [Laughter.][135]
>
> Scalia: I mean, go ahead and indulge your curiosity! Just don't put it in your opinions! [Laughter.][136]

132. *Id.* at 529-30.
133. *Id.* at 534 (citation omitted).
134. *Id.*
135. *Id.*
136. *Id.*

Justice Scalia used the area of abortion rights to illustrate his approach:

> On the question of abortion, as an originalist, I would look at the text of the Constitution, which says nothing about the subject either way. You know, both sides would like me to resolve it constitutionally, to say that the Constitution requires the states to permit abortion, or requires the states to prohibit it. I look at the text; it says nothing about it. And I look at 200 years of history; nobody ever thought it said anything about it. That's the end of the question for me. What good would reading Canadian opinions do, unless it was my job to be the moral arbiter, which I don't accept?
>
> I regard the Constitution as having set a floor to what American society can democratically do. That floor says nothing about abortion. It's not the job of the Constitution to change things by judicial decree; change is brought about by democratic legislation. Abortion has been prohibited. You want to change that? American society thinks that's a terrible result? Fine. Persuade each other about that, and eliminate the laws against abortion.
>
> I have no problem with change. It's just that I do not regard the Constitution as being the instrument of change by letting judges read Canadian cases and say, 'Yeah, it would be a good idea not to have any restrictions on abortion.' That's not the way we do things in a democracy. Persuade your fellow citizens and repeal the laws. Why should the Supreme Court decide that question?[137]

As the discussion continued, focus shifted to judicial functioning and the influence of foreign and international law:

> Breyer: The last questioner implicitly ask[ed] how I go about my daily work. My daily job is reading and writing. . . .
>
> What do I read? Contrary to the impressions of some, I do not read the edicts of Colbert. I read briefs. Those briefs frequently explain law with which I was not previously familiar, for example Louisiana property law, highly relevant to interpreting an ERISA provision, which the California State Bar Association explained beautifully in an amicus brief.
>
> Those briefs will have to explain foreign law too, and ever more so. That is because foreign law comes before us ever more frequently in discovery cases, antitrust cases, EPA cases, NAFTA cases. We shall have to learn something about foreign law to decide those cases properly. And the lawyers will have to explain it, separating the more important from the less important information. If there are important, interesting, and relevant matters of foreign law, the lawyers will point them out.

137. *Id.* at 535-36.

> Perhaps I should add something relevant to the more 'newsworthy' cases, involving capital punishment and the like. No judge believes that he or she is there to advance a political point of view in respect to such cases. No judge believes that he or she is there to advance an ideological point of view. If I find that I reach a result simply because I think it 'morally good,' then I am not doing my job. I do not mean I am there to foment evil. [Laughter.] I am there to follow the law. That is what we all think.
>
> Moreover, each of us applies a framework that can be similarly described in general terms. We look to a document's text; we consider history; we consider tradition; we consider precedent; we search for the value or purpose that underlies the legal text; and we want to know the consequences of our decision, consequences viewed through the prism of the value or purpose that underlies the [legal] text. But we do not necessarily give the same weight to each of these factors. Some of us, over time, tend to place greater importance on some factors than others.
>
> The differences are differences of emphasis. And it is important not to overstate them. From your point of view as a law student or even as a professor or judge or practitioner, the similarities are more important than the differences.[138]
>
> . . .
>
> Breyer: I believe that I am interpreting the Constitution of the United States. If, for example, a foreign court, in a particular decision, had shown that a particular interpretation of similar language in a similar document had had an adverse effect on free expression, to read that decision might help me to apply the American Constitution. That is what is at issue. To what extent will learning what happens in other courts help a judge apply the Constitution of the United States. As I have said, in today's world where similar relevant experience becomes more and more common we are more likely to learn from other countries. I doubt that Franklin or Hamilton or Jefferson or Madison or even George Washington would have thought we cannot learn anything of value from abroad.[139]
>
> Scalia: Can I respond to that?[140]
>
> Anderson: Please.[141]
>
> Scalia: You know, it's a Constitution that contains phrases of great generality such as due process of law. Now if you're following an originalist approach, you ask, what did the framers believe constituted due process of law? And if I find something there I don't like, that's too

138. *Id.* at 536.
139. *Id.* at 537.
140. *Id.*
141. *Id.*

> bad; I am chained. Because of my theory of the Constitution, that's what due process was and that's what it is today, unless you amend the Constitution. Whereas if you believe 'due process of law' is an invitation for intelligent judges and lawyers and law students to imagine what they consider to be due process and consult foreign judges, then, indeed, you do not know what you're saying when you swear to uphold and defend the Constitution of the United States. It morphs. It changes.[142]
>
> . . .
>
> Breyer: I do not often put references to foreign materials in my opinions. I do so occasionally when I believe that a reference will help lawyers, specialists, or the public at large better understand the issue or the views expressed in my opinions. If the foreign materials have had a significant impact on my thinking, they may belong in the opinion because an opinion should be transparent. It should reflect my actual thinking.[143]

The debate ended with Justice Breyer concluding:

> [The centralizing principle about all exercises of power is that all] power has to flow from the people and the people must maintain checks on its exercise. That is a good thing.
>
> That principle, of course, . . . does not prevent me from sometimes looking at foreign opinions [and international law] and on occasion even citing them.[144]

Justice Scalia added: "I think it's fine to conclude on something that we undoubtedly agree upon" and the audience laughed.[145]

This controversy is not some intellectual or academic exercise. In her speech in South Africa, Justice Ruth Bader Ginsburg pointed out that after *Roper v. Simmons* was decided in March of 2005, the Marshal of the Supreme Court advised her and Justice O'Connor of the following web posting:

> Okay commandoes, here is your first patriotic assignment . . . an easy one. Supreme Court Justices Ginsburg and O'Connor have publicly stated that they use [foreign] laws and rulings to decide how to rule on American cases.
>
> This is a huge threat to our Republic and Constitutional freedom . . . If you are what you say you are, and NOT armchair patriots, then those two justices will not live another week.[146]

142. *Id.*
143. *Id.* at 540.
144. *Id.* at 541
145. *Id.*
146. *"A Decent Respect to the Opinions of [Human]kind," supra* note 107, at 582.

Justice John Paul Stevens and Chief Justice John Roberts have not directly entered this debate. However, the Chief Justice made his views on the use of foreign law materials quite clear during his confirmation hearings:

> [In] [f]oreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever . . . [L]ooking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent—because they're finding precedent in foreign law—and use that to determine the meaning of the Constitution. And I think that's a misuse of precedent, not a correct use of precedent.[147]

Justice Stevens wrote the majority opinion in *Atkins v. Virginia*[148] and, in striking down the death penalty for crimes committed by the mentally retarded, cited in a footnote "the world community['s]" disapproval of such practices as support for the Court's decision.[149] In a speech to the American Bar Association in August of 2005,[150] Justice Stevens broadly attacked America's capital punishment system without expressly referring to international law.[151] It is possible that Justice Stevens has moved past the controversy over using international law by concluding in *Baze v. Reese* that the death penalty causes the "needless extinction of life," makes only "marginal contributions" to the public good, cannot be justified on the traditional grounds offered to support it, and should therefore be legislatively abolished.[152]

This description of the Justices debate can conclude with another quotation from Justice Ginsburg. To her, "respect for 'the Opinions of [Human]kind'" requires recognition of all rights that are "accepted as an integral part of human freedom . . . " around the world. She said:

> I . . . believe [the U.S. Supreme Court] will continue to accord "a decent Respect to the Opinions of [Human]kind" as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being - combating international terrorism is a prime example - require trust and cooperation of nations the world over. And humility because, in Justice

147. Confirmation Hearings, *supra* note 100, at A26 (discussing Justice Robert's comments during confirmation hearings).

148. Atkins v. Virginia, 536 U.S. 304, 306 (2002).

149. *Id.* at 316 n.21.

150. Justice John Paul Stevens, U.S. Supreme Court, Address to the American Bar Association, Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html.

151. *See generally* James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607 (2006) (examining Justice Stevens' death penalty and criminal law jurisprudence, not mentioning or relying on international or foreign law).

152. Baze v. Rees, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., concurring) (citing Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

> O'Connor's words: "Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit."[153]

## PART V. INTERNATIONAL LAW AND ITS IMPACT ON DEATH PENALTY DECISIONS

The basic premise of this Article is that international law and foreign court decisions have significantly influenced U.S. Supreme Court decision-making in death penalty cases. The Justices debate outlined in Part IV is one manifestation of this reality. The examples that follow provide further evidence that Supreme Court Justices rely on international law as persuasive authority and use it to support their conclusions in real cases.

A very early illustration of the Court's reliance on international law is *Trop v. Dulles*.[154] In 1958, a plurality of the Court interpreted the Eighth Amendment "cruel and unusual punishments" clause to embrace, as its basic concept, "nothing less than the dignity of man" as measured by "evolving standards of decency that mark the progress of a maturing [U.S.] society."[155] In ruling that stripping a war time deserter of American citizenship was an invalid punishment under the Eighth Amendment, the Court noted that "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."[156]

The 1977 case of *Coker v. Georgia* confronted the issue of whether Georgia could execute a prisoner convicted of raping a 16 year old "woman." [157] Justice White, speaking for the Court, recognized in a footnote that "it is thus not irrelevant . . . that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."[158] The Court followed international practice and prohibited Georgia from executing Coker.

Over 20 years later, in 1999, one of the Court's most aggressive proponents of consideration of international law, Justice Stephen Breyer, relied extensively on the laws, court decisions, and practices of nations, in dissenting from the denial of Court review of a death sentence that raised the issue of whether the Eighth Amendment prohibited the execution of prisoners who had spent over 19 years[159] and 24 years[160] on death row. This is the so called "death row phenomenon" claim that making a death row prisoner wait decades or more before the carrying out of a death sentence is, by itself, unconstitutional cruel and unusual punishment. According to Breyer:

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153. *"A Decent Respect to the Opinions of [Human]kind," supra* note 107, at 591.

154. Trop v. Dulles, 356 U.S. 86, 99-100, 103 (1958).

155. *Id.* at 100–01.

156. *Id.* at 102.

157. Coker v. Georgia, 433 U.S. 584, 592 (1977).

158. *Id.* at 596 n. 10.

159. Moore v. Nebraska, 528 U.S. 990, 993 (1999). The defendant had spent 19 years and 4 months on death row. *Id.*

160. Knight v. Florida, 528 U.S. 990, 994 (1999). The defendant had spent 24 years and 6 months on death row. *Id.*

A growing number of courts outside the United States–*courts that accept or assume the lawfulness of the death penalty*–have held that lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel. In *Pratt* v. *Attorney General of Jamaica* . . . for example, the Privy Council considered whether Jamaica lawfully could execute two prisoners held for 14 years after sentencing. The Council noted that Jamaican law authorized the death penalty and that the United Nations Committee on Human Rights has written that "'capital punishment is not per se unlawful under the [Human Rights] Covenant.'" But the Privy Council concluded that it was an "inhuman act to keep a man facing the agony of execution over a long extended period of time," and the delay of 14 years was "shocking," It held that the delay (and presumptively any delay of more than five years) was "'inhuman or degrading punishment or other treatment'" forbidden by Jamaica's Constitution unless "due entirely to the fault of the accused."

The Supreme Court of India has held that an appellate court, which itself has authority to sentence, must take account of delay when deciding whether to impose a death penalty. *Sher Singh* v. *State of Punjab*, A.I.R. 1983 S.C. 465. A condemned prisoner may ask whether it is "just and fair" to permit execution in instances of "[p]rolonged delay." The Supreme Court of Zimbabwe, after surveying holdings of many foreign courts, concluded that delays of five and six years were "inordinate" and constituted "'torture or . . . inhuman or degrading punishment or other such treatment.'" *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999) . . . And the European Court of Human Rights, interpreting the European Convention on Human Rights, noted the convention did not forbid capital punishment. But, in the court's view, the convention nonetheless prohibited the United Kingdom from extraditing a potential defendant to the Commonwealth of Virginia–in large part because the 6- to 8-year delay that typically accompanied a death sentence amounts to "cruel, inhuman, [or] degrading treatment or punishment" forbidden by the convention. *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser.A), pp.439, 478, & ¶ 111 (1989).

Not all foreign authority reaches the same conclusion. The Supreme Court of Canada, for example, held that Canadian constitutional standards, though roughly similar to those of the European Convention on Human Rights, did *not* bar extradition to the United States of a defendant facing the death penalty. *Kindler* v. *Minister of Justice*, [1991] 2 S.C.R. 779, 838 (joint opinion). And the United Nations Human Rights Committee has written that a delay of 10 years does *not* necessarily violate roughly similar standards set forth in the Universal Declaration of Human Rights. Views adopted by the United Nations Human Rights Committee, 44th Sess., Mar. 30, 1992, *Inre: Barrett v. Jamaica* (Nos. 270/1988 and 271/1988) § 8.4. Given the closeness of

the Canadian Court's decision (4 to 3) and language that the United Nations Human Rights Committee used to describe the 10-year delay ("disturbingly long"), one cannot be certain what position those bodies would take in respect to delays of 19 and 24 years.

Obviously this foreign authority does not bind us. After all, we are interpreting a "Constitution for the United States of America." *Thompson v. Oklahoma,* 487 U.S. 815, 868, n.4, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (SCALIA, J., dissenting). And indeed, after *Soering*, the United States Senate insisted on reservations to language imposing similar standards in various human rights treaties, specifying, for example, that the language in question did not "restrict or prohibit the United States from applying the death penalty consistent with the . . . Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty." 136 Cong. Rec. 36192-36199 (1990) (U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

Nonetheless, the treaty reservations say nothing about whether a particular "period of confinement" is "constitutional." And this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances. In doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment. *Thompson v. Oklahoma, supra,* at 380-831, 108 S.Ct. *2687* (opinion of STEVENS, J.) (considering practices of Anglo-American nations regarding executing juveniles); *Edmund v. Florida,* 458 U.S. 782, 796-797, n.22, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (noting that the doctrine of felony murder has been eliminated or restricted in England, India, Canada, and a "number of other Commonwealth countries"); *Coker v. Georgia,* 433 U.S. 584, 596, n.10, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (observing that only 3 of 60 nations surveyed in 1965 retained the death penalty for rape); *Trop v. Dulles,* 356 U.S. 86, 102-103, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (noting that only 2 of 84 countries surveyed imposed denationalization as a penalty for desertion). *See also Washington v. Glucksberg,* 521 U.S. 702, 710, n. 8, and 718-719, n. 16, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (surveying other nations' laws regarding assisted suicide); *Culombe v. Connecticut,* 367 U.S. 568, 583-584, n.25, and 588, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (considering English practice concerning police interrogation of suspects); *Kilbourn v. Thompson,* 103 U.S. 168, 183-189, 26 L.Ed. 377 (1881) (referring to the practices of Parliament in determining whether the House of Representatives has the power to hold a witness in contempt). Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a "decent respect

> to the opinions of mankind."
>
> In these cases, the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their views are useful even though not binding.
>
> Further, the force of the major countervailing argument is diminished in these two cases. That argument (as set out by the Human Rights Commission) recognizes that there must be an "element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies." *Barrett, supra,* § 8.4. It claims that "even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies." *Ibid.* As the Canadian Supreme Court noted, "a defendant is never forced to undergo the full appeal procedure, but the vast majority choose to do so. It would be ironic if delay caused by the appellant's taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice." *Kindler, supra,* at 838; see also *Richmond v. Lewis*, 948 F.2d 1473, 1491-1492 (C.A.9 1990).[161]

Justice Clarence Thomas, the spiritual ally of Justice Scalia, agreed that the Court should not hear the appeal in these cases and ridiculed Justice Breyer's references to foreign court decisions.

> I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.[162]

In a follow-up footnote Justice Thomas wrote:

> In support of his claim, petitioner Knight cites Blackstone, who remarked that "a delayed execution 'affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.'" Pet. for Cert. in No. 98-9741, p. 15 (quoting 4 W. Blackstone, Commentaries *397). Blackstone was speaking of the effect speedy execution would have on deterring crime: "[P]unishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts a man to commit the crime,

161. Knight, 528 U.S. 990, 995-98 (Breyer, J., dissenting) (citations omitted).
162. *Id.* at 990 (Thomas, J., concurring).

> should instantly awake the attendant idea of punishment." *Ibid.* In this regard, Blackstone observed that "throughout the kingdom, by statute 25 Geo. II. c. 37. it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed." *Ibid.* I have no doubt that such a system, if reenacted, would have the deterrent effect that Justice BREYER finds lacking in the current system, but I am equally confident that such a procedure would find little support from this Court.[163]

The modern era of the Supreme Court using international law begins with two cases from the 2002-2003 term of the Court, *Atkins v. Virginia*[164] and *Lawrence v. Texas*.[165]

Justice John Paul Stevens, in *Atkins*, found a national and international consensus against the execution of murderers who were severely mentally retarded at the time of their crimes. He stated in a footnote that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[166]

*Lawrence v. Texas* dealt with the non-Eighth Amendment issue of whether the liberty protected by the Constitution's due process clauses protected the right of same-sex adults to engage in voluntary intimate sexual activity (sodomy), free from criminal sanctions.[167] In finding such a right, a Court majority joined Justice Anthony Kennedy's opinion that, for the first time, placed international law at the center—not in a footnote—of the Court's reasoning.[168] The Court's decision was, in effect, that Lawrence's claim was consistent with American values that are shared with much of western civilization, that many "nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. [And that t]he right . . . [sought] in this case has been accepted as an integral part of human freedom in many other countries."[169] And, as many would like to see happen with the *Furman* and *Gregg* line of cases, the Court used international law to overturn one of its prior decisions, *Bowers v. Hardwick*,[170] that had upheld the constitutionality of laws criminalizing adult homosexual sex.

Justice Kennedy's words ring powerfully today:

> The sweeping references by Chief Justice Burger [in *Bowers*] to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an

163. *Id.* at n. 1.

164. *See generally* Atkins v. Virginia, 536 U.S. 304 (2002) (holding capital punishment of mentally retarded individuals constitutes cruel and unusual punishment and is therefore prohibited by the Eighth Amendment).

165. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

166. *Atkins*, 536 U.S. at 316 n.21.

167. *Lawrence*, 539 U.S. at 562.

168. *Id.* at 562, 568, 572-73.

169. *Id.* at 576-77.

170. *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986).

> opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, §1.
>
> Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws [of Northern Ireland] proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) & ¶52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization. . . .
>
> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. *See P.G. & J.H. v. United Kingdom*, App. No. 00044787/98, & ¶ 56 (Eur. Ct. H.R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. *See* Brief for Mary Robinson et al. as *Amici Curiae* 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[171]

Justice Scalia, in his *Lawrence* dissent, fired the first loud shot in what is shown in Part IV of this Article to be an open war among the Justices over the legitimacy of relying on foreign legal authorities. He protested:

> The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," but rather rejected the claimed right to sodomy on the ground that such a right was not "'deeply rooted in *this Nation's* history and tradition,'" 478 U.S., at 193–194, 106 S.Ct. 2841 (emphasis added). *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization," *see id.*, at 196, 106 S.Ct.

171. *Lawrence*, 539 U.S. at 576-77.

> 2841. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans." *Foster v. Florida*, 537 U.S. 990, n., 123 S.Ct. 470, 154 L.Ed.2d 359 (2002) (THOMAS, J., concurring in denial of certiorari).[172]

Prior to the cases presented in the 2007–2008 Term, the most recent substantive holding on the meaning of "cruel and unusual" in the death penalty context came in 2005 in *Roper v. Simmons*.[173] Justice Kennedy's opinion in *Roper* found it unconstitutional in all cases to execute murderers who were under the age of 18 at the time of their crime. In a speech at Cambridge University, Justice Ruth Bader Ginsburg had this to say about *Roper*: "*Roper v. Simmons* presents perhaps the fullest expressions to date on the propriety and utility of looking to 'opinions of [human]kind' [in giving meaning to the broad language of our Constitution]."[174]

Justice Kennedy's opinion cited extensively to world legal opinion on the juvenile death penalty, as follows:

> Petitioner [the state of Virginia] cannot show national consensus in favor of capital punishment for juveniles but still resists the conclusion that any consensus exists against it. Petitioner supports this position with, in particular, the observation that when the Senate ratified the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), it did so subject to the President's proposed reservation regarding Article 6(5) of that treaty, which prohibits capital punishment for juveniles. This reservation at best provides only faint support for petitioner's argument. First, the reservation was passed in 1992; since then, five States have abandoned capital punishment for juveniles. Second, Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles. The reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions.
>
> . . .
>
> Our determination that the death penalty is disproportionate [and unconstitutional] punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws

172. *Id.* at 598.

173. Roper v. Simmons, 543 U.S. 551, 575 (2005) (citation omitted).

174. *"A Decent Respect to the Opinions of [Human]kind," supra* note 107, at 590.

of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments . . . ."

As respondent [Atkins] and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. *See* ICCPR, Art. 6(5); . . . American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5) [prohibiting capital punishment for anyone under 18 at the time of offense]; . . . African Charter on the Rights and Welfare of the Child, Art. 5(3) . . . .

Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, 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.

. . .

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and

> peoples simply underscores the centrality of those same rights within our own heritage of freedom.[175]

Not everything at the U.S. Supreme Court level is positive from the abolitionist perspective. Two of the three substantive death penalty cases on the Court's 2007-2008 docket, *Medellín v. Texas*[176] and *Baze v. Reese*,[177] resulted in rulings in favor of the death penalty.

*Medellín v. Texas* is an example of the American government ignoring international law when it feels that to do so is in the country's best interest. The United States has taken reservations to major international treaties, disclaiming any provisions excluded by the reservation;[178] withdrawn from the jurisdiction of international tribunals (e.g., International Court of Justice[179]); for many years offered a deaf ear to world-wide objections to the execution of juveniles that ultimately led to *Roper v. Simmons*;[180] and completely ignored consistent state violations of the Vienna Convention on Consular Relations.[181] Regarding the Vienna Convention, many had hoped that *Medellín* would remedy this violation of international law. The Court's March 25, 2008 decision was, therefore, a major disappointment.[182]

Article 36(1)(b) of the Vienna Convention requires states and the federal government to advise foreign nationals in U.S. custody on criminal charges of their right of access to their country's embassy and its officials.[183] Plainly, legal advice from those officials is often crucial to a fair trial for these defendants. Medellín and other Mexican nationals were not given these rights. Medellín tried to remedy this violation of the Convention in Texas and lost based on state procedural rules. During the pendency of Medellín's federal habeas case, Mexico sued the United States in the International Court of Justice which ordered the United States to review Medellín's conviction and sentence based on the violations of Article

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175. *Roper*, 543 U.S. at 567, 575-78 (citations omitted).

176. Medellín v. Texas, 128 S. Ct. 1346 (2008); *see also* Medellín v. Texas, 129 S. Ct. 360 (2008) (denying Medellín's second application for writ of habeas corpus).

177. Baze v. Rees, 128 S. Ct. 1520, 1538 (2008).

178. The most notorious reservation may be the U.S. reservation to the International Covenant on Civil and Political Rights expressly, "reserve[ing] the right, subject to its Constitutional constraints, to impose capital punishment on any person . . . ." United Nations Treaty Collection, Status of Treaties, International Covenant on Civil and Political Rights, *United States Declarations and Reservations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec.

179. *See* Letter of March 7, 2005, *supra* note 91 (noting U.S. withdrawal from I.C.J. jurisdiction); *see also supra* text accompanying note 93.

180. The United States has never ratified the United Nations Convention on the Rights of the Child and refused to recognize its ban on the death penalty for juveniles. *See* Convention on the Rights of the Child, *supra* note 65 (citing U.N. Convention on the Rights of the Child).

181. *See* CLARKE & WHITT, *supra* note 22, at 54-59 (discussing U.S. noncompliance with Vienna Convention).

182. Medellín v. Texas, 128 S. Ct. 1346, 1348 (2008).

183. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

36(1)(b).[184] President Bush accepted the ICJ's judgment and ordered Texas to comply.[185] Texas refused.[186] When the case reached the U.S. Supreme Court it ruled that the Vienna Convention was not "self-executing" and required Congress to pass further legislation before the ICJ judgment, or any ICJ ruling, could become enforceable American law.[187] As a result, the judgment in the *Medellín* case bound only the United States and not individual states. President Bush's order was thus also unenforceable because the ICJ order did not constitute valid federal law for purposes of the Supremacy Clause.[188]

*Medellín* could be read, first, as an example of international law having no direct influence on American death penalty practices. The Supreme Court's technical decision determined that a judgment and order of the International Court of Justice against the United States, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*,[189] was not enforceable against the State of Texas.[190] In so doing, the Court decided a question of U.S. domestic law—whether the Vienna Convention on Consular Relations[191] and its Optional Protocol Concerning the Compulsory Settlement of Disputes[192] were self-executing for purposes of enforcement of national law under the Supremacy Clause[193]—with some reference to international law—the Vienna Convention and its Protocol, the

184. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

185. Memorandum from President George W. Bush to the Attorney Gen. (Feb. 28, 2005) [hereinafter Bush Memorandum]. President Bush determined that the United States would "discharge its inter-national obligations . . . by having State courts give effect to the [Avena] decision." *Id.*

186. Ex parte Medellín, 223 S.W. 3d 315, 352 (2006).

187. Medellín v. Texas, 128 S. Ct. 1346, 1356-62 (2008). A treaty like the Vienna Convention is clearly a binding international commitment. It does not, however, become binding domestic U.S. law unless it is "self-executing" in the sense that it was ratified with the express intention or purpose of becoming law automatically enforceable within the United States, meaning the treaty must convey the intention to be self-executing and be ratified on that basis. In the Court's judgment, that was not the case with ratification of the Vienna Convention. Therefore, Congress needed to pass legislation in order to enforce the ICJ judgment, which it had not done. "If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause." *Id.* The Court took the view that ICJ decisions are not automatically enforceable as U.S. domestic law because of the enforcement structure established by Article 94 of the U.N. Charter. *Id.* Article 94(2) provides an option of noncompliance with ICJ judgments, allowing political branches to determine whether and how to comply with ICJ decisions. Noncompliance with an ICJ judgment through the exercise of a Security Council veto has always been regarded as a viable option by the Executive and Senate after consideration of the U.N. Charter, Optional Protocol, and ICJ Statute. A "self-executing" judgment would deprive a government of this option, leading the Court to decide that "there is no reason to believe that the President and Senate signed up for such a result." *Id.*

188. *Ex parte Medellín*, 223 S.W. 3d at 352.

189. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

190. *Medellín*, 128 S. Ct. at 1360-61.

191. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

192. Vienna Convention on Consular Relations, Optional Protocol concerning the Compulsory Settlement of Disputes, art. I., Apr. 24, 1963, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488.

193. U.S. CONST. art. VI, cl. 2.

UN Charter,[194] and the originating statute for the ICJ[195]—but no direct reliance on it. The underlying policy concern in the case was respect for international law and, on that point, the result is at least disappointing, particularly for the death row inmate parties to the case whose executions will proceed to scheduling.[196]

International law did have a tangential influence on the majority decision. Chief Justice John Roberts' opinion cited the practice of 47 nations that had signed the Optional Protocol to the Vienna Convention, and decisions of the 171 countries that are parties to the Convention, in refusing to treat an International Court of Justice judgment as self-executing or automatically binding domestic law.[197] "The lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts."[198] The Court seemed to say "see, we are just doing what other countries do."

A curious thing about the *Medellín* decision is that part of the U.S. government, the President, aggressively undertook to meet the international obligations imposed by the ICJ judgment. In doing so, he identified important U.S. interests such as insuring reciprocal compliance with the Vienna Convention, protecting relations with foreign governments, and demonstrating U.S. commitment to the role of international law.[199] The President's Memorandum was a good faith attempt to comply with the ICJ order by bringing pressure on Texas and other states to support the nation in its efforts to respect and follow international law. Yet, the Court felt no "separation of powers"[200] constraints and blocked that effort.

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194. U.N. Charter art. 94.

195. Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993 (1945) [hereinafter ICJ Statute].

196. Based on the March 2008 Supreme Court ruling in *Medellín*, Texas scheduled Medellín's execution for August 5, 2008. In response, in June of 2008, Mexico filed with the ICJ a "Request for Interpretation of Judgment" in the Avena case in which it characterized the actions of President Bush, the State of Texas, and the Supreme Court as a "fundamental dispute" over the scope and effect of the Avena judgment. *See* Press Release, International Court of Justice, Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (July 16, 2008) *available at* http://www.icj-cij.org/docket/files/139/14637.pdf. It pointed out that no "review and reconsideration" of Medellín's death sentence had occurred, as required by Avena, and asked the ICJ to reaffirm the international law obligations of the United States. *Id.* at 2-4. On July 16, the ICJ ordered the United States to 'take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas . . . [and the other Mexican nationals subject to the Avena judgment] are not executed pending judgment on the Request for interpretation submitted by [Mexico] . . . " or judgment on the provision of review and reconsideration required by the March judgment. *Id.* at 1. On August 6, 2008, Texas executed Medellín without any further review of his case. Manuel Roig-Franzia, *Mexican National Executed in Texas*, THE WASH. POST, Aug. 6, 2008, at A6.

197. *Medellín*, 128 S. Ct. at 1363. The point is that the Court's approach mirrors that of many countries in relying on post-ratification understandings of the effect of the Convention and the reach of ICJ jurisdiction.

198. *Id.*

199. Bush Memorandum, *supra* note 185.

200. *See Medellín*, 128 S.Ct. at 1369.

Justice Breyer entered his usual vigorous dissent to the Court's reasoning. Brief references to the practices of other nations were made (to Great Britain, the Netherlands, Mexico)[201] but, ultimately, Justice Breyer would have read the relevant treaties and conventions in a practical way so as to preserve a "workable dispute resolution"[202] procedure that functions effectively by using the Supremacy Clause to bind states like Texas to an ICJ "compulsory" jurisdictional[203] judgment. He observed, "[i]n a world where commerce, trade, and travel have become even more international . . . [refusing enforcement of the *Avena* judgment] is a step in the wrong direction."[204] Without self-execution, this treaty and many, many, others are rendered "useless."[205] Justice Breyer noted the position taken by the State Department at the time the Consular Relations Convention was ratified that the "Convention is considered entirely self-executive and does not require any implementing or complementing legislation"[206] and the view of the Executive Branch that other "indistinguishable" provisions of the Convention were "self-executing."[207] Justice Breyer concluded by noting that "today's holdings make it more difficult to enforce the judgments of international tribunals, . . . [and] weaken . . . [the] rule of law for which our Constitution stands."[208] His point was driven home when, subsequent to the Court's *Medellín* decision, the United States withdrew from the Optional Protocol and the jurisdiction of the ICJ on matters involving access to consulates.[209]

The problems created by *Medellín* for Americans travelling abroad are obvious. Why should other countries comply with their Vienna Convention consular obligations when the United States does not? The situation is comparable to the problems American adherence to the death penalty creates for extraditing murderers and terrorists. Dozens of countries now refuse to extradite criminals to the United States without "assurances" that the death penalty will not be sought after extradition.[210] Obstacles to extradition and outrage over denial of Vienna

201. *Id.* at 1381, 1386-87 (Breyer J., dissenting).

202. *Id.* at 1389.

203. *Id.* at 1383, 1389.

204. *Id.* at 1389.

205. *Id.* at 1384.

206. *Id.* at 1386.

207. *Id.*; *see also* Brief for United States as Amici Curiae Supporting Respondents, Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006) (Nos. 05-51 and 04-10566) 2006 WL 271823, p. 14, n.2.

208. *Medellín*, 128 S. Ct. at 1391. An amicus brief from "International Court of Justice Experts" urged the Court to find the treaties self executing. *See* Brief for International Court of Justice Experts as *Amici Curiae* Supporting Petitioner, Medellín v. Texas, 128 S. Ct. 1346 (2008), (No. 06-984), 2007 WL 1886207. One of the arguments made was that the essential purpose of the Supremacy Clause was, and is, to make treaties binding on the States, in order to protect fundamental national powers in foreign affairs as conferred by Articles I, II and III of the Constitution. *Id.* at 8-10. The majority is "hunting the snark"!? *See* LEWIS CARROLL, THE HUNTING OF THE SNARK (BookSurge Classics 2004) (1876). Carroll described the "snark" as a creature that could not be described or was "unimaginable." The unknown or mysterious creature that children could not see, find, or understand. *Id.*

209. *See* U.S. Withdrawal Letter, *supra* note 91 (discussing U.S. withdrawal from Optional Protocol).

210. *See, e.g.*, Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1; Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and

Convention rights raise a most compelling question—does America's continuing commitment to capital punishment as a state policy justify the damage done to our national security, our reputation in the international community, and our ability to protect our citizens outside the United States?

*Baze v. Reese*,[211] decided on April 16, 2008, signaled a return to active execution of death row prisoners in the United States.[212] Only two Justices, Ginsburg and Souter, dissented from the Court's holding Kentucky's "lethal cocktail" injection method of executing prisoners did not violate the Eighth Amendment.[213] International law played no major part in the decision, and probably could not have. But, Justices Alito and Stevens did manage to slip into the Court's analysis approving references to the practice of the Royal Dutch Society for the Advancement of Pharmacy of using the same drugs used for executions in Kentucky to carry out assisted suicides in Holland.[214] This may be contrasted with the fact that the *Baze* ruling permits use of a drug—pancuronioum bromide—that veterinarians are prohibited from using in euthanizing animals in many states![215] In any case, after *Baze*, it appears that the legal fight over capital punishment will continue to be over expansion of the death penalty, as illustrated by *Kennedy,* rather than over Justice Steven's conclusion, stated in his concurrence to *Baze*, that the death penalty is no longer supportable in law or policy and should therefore be abolished.[216]

The third and last substantive capital punishment case before the Court in 2007–2008, was *Kennedy v. Louisiana.*[217] The case involved reconsideration of *Coker v. Georgia* with reference to a Louisiana law that made rape of a child under the age of 12 a capital crime. [218] Patrick Kennedy, a 43-year-old black man, was convicted in a Louisiana state court of raping his eight year old step-daughter. Under Louisiana law, aggravated rape, defined at the time as sexual relations with a child under the age of 12,[219] was a capital crime and Kennedy was sentenced to

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Northern Ireland, U.S.-U.K.-N.Ir., March 31, 2003, Treaty Series No. 13 (2007), *available at* http://www.official-documents.gov.uk/document/cm73/7382/7382.pdf; United States v. Burns, [2001] 1 S.C.R. 283, 2001 SCC 7 (Can.); Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser.A) (1989); The United Nations Human Rights Committee, *Judge v. Canada: Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights,* UN doc. CCPR/C/78/D/829/1998 (Aug. 13, 2003); ICCPR, *supra* note 62, art. 6; Extradition Treaty, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059; *Mohamed v. President of South Africa* 2001 (3) S.A. 893(CC) at 16-17 (S.Afr.); *State v. Makwanyane* 1995 (3) SA 391 (CC) at 49-61, 451 (S. Afr.). All consider prohibiting extradition to the United States without formal assurances that criminal proceedings will not result in a death sentence.

211. Baze v. Reese, 128 S. Ct. 1520 (2008).

212. *See supra* text accompanying notes 44, 86, 88 (discussing moratoria on executions).

213. *Baze*, 128 S. Ct. at 1567 (Ginsburg J., dissenting).

214. *Baze*, 128 S. Ct. at 1535.

215. *Id.* at 1524.

216. *See supra*, text accompanying note 28 (Stevens J., concurring) (calling capital punishment "the pointless and needless extinction of life").

217. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

218. Coker v. Georgia, 433 U.S. 584 (1977).

219. LA. REV. STAT. ANN. § 14:42 (1998).

death. He appealed this sentence through state courts and lost.[220] He then appealed to the U. S. Supreme Court arguing that his sentence constituted "cruel and unusual punishment" under the Eighth Amendment to the U.S. Constitution[221] and that, as a result, he could not constitutionally be put to death. As Justices Breyer and Kennedy asked them to do, lawyers for Petitioner Kennedy cited in their brief updated evidence on international practice on this subject as follows:

> International norms reinforce the unacceptability of imposing capital punishment for child rape. This Court noted in *Coker* that only three out of 60 "major nations in the world" allowed the death penalty for any kind of rape in which death did not result. 433 U.S. at 596 n. 10. Today, no Western nation authorizes the death penalty for any kind of rape. Only a sliver of the countries admitted to the United Nations does so, the most prominent being China, a country that also allows capital punishment for tax evasion and other economic and nonviolent offenses. *See* Br. *Amici Curiae* of Leading British Law Associations et al.; Peter D. Nestor, *When the Price Is Too High: Rethinking China's Deterrence Strategy for Robbery,* 16 Pac. Rim L. & Pol'y J. 525, 538 (2007). The handful of other countries that Louisiana seeks to have the United States join in authorizing the death penalty for non-homicide rape include Saudi Arabia and Egypt, which authorize such punishment for reasons rooted at least partly in the subjugation of women.[222]

Petitioners elaborated on the issue of subjugating women with the following footnote:

> Saudi Arabia, Egypt, United Arab Emirates, Nigeria, and Jordan, all of which allow the death penalty for rape, appear to derive their criminal codes from Shari'a, which also subjects individuals to the death penalty for blasphemy, apostasy, adultery, prostitution and homosexuality. *See, e.g., Gay Nigerians Face Sharia Death,* BBC News, Aug. 10, 2007, *http://news.bbc.co.uk/2/hi/Africa/6940061.stm.* In some countries, under Shari'a, survivors of rape are themselves subjected to significant corporal punishment. *See, e.g., Rape Case Calls Saudi Legal System Into Question,* MSNBC, Nov. 21, 2006, http://www.msnbc. msn.com/id/ 15836746; Dan Isaacs, *Court in Nigeria Spares Woman from Stoning,* Daily Telegraph, Mar. 26, 2002, at 4.[223]
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> Since *Coker,* the United States also has become a signatory to the American Convention on Human Rights (ACHR), Article 4(2) of which provides that the death penalty "shall not be extended to crimes to which it does not presently apply." ACHR: Pact of San José, Costa Rica, Art.

220. Louisiana v. Kennedy, 957 So. 2d 757, 793 (La. 2007).

221. U.S. CONST. amend. VIII; Kennedy v. Louisiana, 128 U.S. 2641 (2008).

222. Brief for the Petitioner at 36-37, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343), 2008 WL 466093.

223. *Id.* at 37.

> 4(5), Nov. 22, 1969, 1144 U.N.T.S. 146 (entered into force July 19, 1978) (cited in *Roper*, 543 U.S. at 576). Thus, not only does Louisiana's death penalty for child rape isolate it on both the national and world stages, but it is at odds with an international treaty.[224]

When the *Kennedy* case was argued before the Court on April 16 of 2008, international law continued to be relevant and important to the appellate process. This was driven home by questions from two Justices and comments by counsel.

First, as the Petitioner's lawyer tried to argue that the Court had limited capital punishment to aggravated murder, and that child rape did not rise to a level of seriousness comparable to murder, Justice Kennedy interrupted to ask "[w]hat about treason? . . . Even the countries of Europe which have joined the European Convention on Human Rights . . . make an exception . . . for treason. You can slaughter your fellow citizens [in these countries], but if you offend the State you can be put to death."[225] Counsel conceded that treason is regarded in the United States and around the world as equivalent in seriousness to murder but argued that this had no bearing on a state's right to expand application of its death penalty beyond murder because the offense is against the safety and security of the state itself.[226]

Later, Justice Stevens, referring to the briefs, suggested that there was a "sort of correspondence" between international law and our "evolving standards of decency," and asked how the international trend against expanding capital punishment applied to the case.[227] Counsel for Louisiana responded by seemingly denying such a trend and asserting that approximately 28 countries "permit the death penalty for rape."[228] She argued further that "there are no treaties" in existence that would prevent the United States from executing child rapists.[229] National consensus, then, continued to have an international reference point.

Finally, later in the argument, counsel for Texas asserted that the international law arguments made in Petitioner Kennedy's brief, quoted above, made the same types of unacceptable arguments that had been made in *Medellín*. He characterized those arguments as suggesting "that this Court has no ability to determine that . . . [certain crimes are] subject to the death penalty."[230] Counsel found the assertions of one amicus brief[231] to be even more outrageous by arguing, in effect, that "the United States is foreclosed from ever doing this [punishing the rape of a child with the death penalty because of a treaty the United States has not

224. *Id.* at 37-38.

225. Transcript of Oral Argument at 20, *Kennedy*, 128 S. Ct. 2641 (No. 07-343) (2008 WL 1741235) [hereinafter Oral Argument Transcript].

226. *Id.* at 21-26.

227. *Id.* at 41-42.

228. *Id.* at 42.

229. *Id.*

230. *Id.* at 53.

231. *Id.* at 54; *see* Brief of Leading British Law Associations, Scholars, Queen's Counsel, and Former Law Lords as Amici Curiae Supporting Petitioner, Patrick Kennedy, *Kennedy*, 128 S. Ct. 2641 (2008) (No. 07-343), 2008 WL 706791.

ratified, the American Convention on Human Rights and] because other nations have made [contrary] determinations"[232] to those made by states like Louisiana. According to counsel, such a view of American power should not prevail before the Court.[233]

These arguments firmly demonstrate that lawyers have learned the lesson taught by the Justice Kennedy block on the Court - international law matters in Eighth Amendment cases.

*Kennedy v. Louisiana* was especially important because of the nature of the issue presented. As a matter of decisional law, the Court had not allowed capital punishment outside of the crime of murder. The Court's decision, on June 25, 2008, preserved that rule by invalidating the Louisiana child rape death penalty.[234] The recent trend towards restriction of capital punishment in the United States, and the concomitant respect accorded world opinion against the death penalty, were sustained by the decision, even though no direct references were made to international or foreign law.[235]

Structurally, the *Kennedy* decision, written by Justice Kennedy, followed the traditional approach utilized in *Atkins* and *Roper* of looking broadly for a national consensus for or against executing child rapists and then bringing the Court's own judgment to bear on whether this practice conforms to evolving standards of decency.[236]

Looking at existing objective evidence of consensus, the majority was forced to conclude that neither existing legislation-based practices nor national trends supported the Louisiana approach. Only 6 states, including Louisiana, imposed the death penalty for child rape.[237] Congress excluded child rape from death penalty

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232. Oral Argument Transcript, *supra* note 225, at 54.

233. *Id.* at 53-54.

234. *Kennedy*, 128 S. Ct. at 2646. In an unusual procedural development, the Court invited the submission of new briefs by the parties to *Kennedy* on a petition for rehearing filed by the U.S. Solicitor General's Office. *See* Order 07-343 entered on September 8, 2008; Supplement Brief for Respondent in Support of Petition for Rehearing, Kennedy, 128 S. Ct. 2641 (2008) (No. 07-343), 2008 WL 4359580 [hereinafter Supplemental Brief for Respondent]. The petition was based on the omission from the original briefs in the case of any reference to a 2007 Executive Order authorizing the death penalty for rape of a child under the Uniform Code of Military Justice. *See* Supplement Brief for Respondent at 1-2; Exec. Order No. 13,447, 72 Fed. Reg. 56, 179 (Sept. 28, 2007). The Court sought input on whether the omission required rehearing of the case on the question of whether the majority was correct in concluding that there is a national consensus against the death penalty for child rapists. *See* Order 07-343 entered on September 8, 2008.

235. Surprisingly, Justice Kennedy's majority opinion made only one cursory and general reference to international law. He noted that evolving standards of decency have historically been measured by "norms that 'currently prevail'" in society. *Kennedy*, 128 S. Ct. at 2649 (citing *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)). These norms take into consideration "'historical development[s] . . . , legislative judgments, *international opinion*, and the sentencing decisions juries have made.'" *Kennedy*, 128 S. Ct. at 2650 (citing *Enmund v. Florida*, 458 U.S. 782, 788 (1982)) (emphasis added).

236. *See* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008); *see* Roper v. Simmons, 543 U.S. 551 (2005); *see* Atkins v. Virginia, 536 U.S. 304 (2002).

237. *Kennedy*, 128 S. Ct. at 2651. The six states that imposed death penalty for child rape were Louisiana, Georgia, Montana, Oklahoma, South Carolina, and Texas. *Id.*

crimes under the Federal Death Penalty Act of 1994, even though the federal death penalty does apply to some non-homicide offenses.[238] Kennedy would have been the first death row inmate to be executed for rape since 1964.[239] The Court concluded that, not only was there no emerging consensus in favor of the death penalty for child rapists, the evidence showed "an opinion against it."[240]

In terms of the Court's independent judgment of the challenged practice, Justice Kennedy emphasized the historic focus of Eighth Amendment analysis on "evolving standards of decency" and the restraint and moderation they require in applying the death penalty. As applied to child rapists, "the death penalty should not be expanded to instances where the victim's life was not taken."[241] The "moral depravity and . . . injury to the person and to the public [present in child rape do not compare to those caused by intentional murder.]"[242] The ugliness of child rape may prejudice jurors and "overwhelm a decent person's judgment" leading to arbitrary and capricious capital sentencing; retribution would come at the expense of the (young) victims of child rape (who would be forced to relive the experience often and over a long period of time).[243] These cases involve delicate questions of reliability of evidence; and, applying the death penalty could deter reporting of child rape. The majority's strongest, and broadest, reason for limiting capital punishment to the crime of murder of individual citizens was captured in this statement: "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[244] Is there a majority on the Court that will move towards the views of Justice Stevens?

CONCLUSION

Justice Stevens's powerful conclusion in his *Baze* concurring opinion, that fundamental flaws in American death penalty law now require states to legislatively abolish it,[245] may trigger new efforts to initiate a direct constitutional challenge to *Furman v. Georgia*[246] and its rule that the death penalty is accepted by American society and can be constitutionally imposed.[247] These efforts can draw on the existence of new and important restrictions on the death penalty established by the U.S. Supreme Court and based in part on international law and world

238. H.R. Con. Res. 3355, 103rd Cong. (1994) (enacted).

239. Bill Mears, *Rape a Child, Pay with Your Life, Louisiana Argues*, CNN.COM, Apr. 15, 2008, http://www.cnn.com/2008/CRIME/04/15/rape.execution/index.html.

240. *Kennedy*, 128 S. Ct. at 2653.

241. *Id.* at 2659.

242. *Id.* at 2660.

243. *Id.* at 2660-61.

244. *Id.* at 2650.

245. Baze v. Rees, 128 U.S. 1520, 1546-48 (2008) (Stevens, J., concurring).

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

247. *See Furman*, 408 U.S. at 242, 249-250 (Douglas, J., concurring) (noting death penalty would be cruel and unusual if discriminatory, arbitrary or disproportionately applied); *Id.* at 309-10 (Stewart, J., concurring) (finding wanton application death sentence cruel and unusual in violation of Eight Amendment); Gregg v. Georgia, 428 U.S. 153, 168 (1976) (holding imposition of death penalty not per se cruel and unusual punishment).

opinion. Four Justices on the Court are now on record as welcoming further challenges based on foreign law and international practice.[248] Nonetheless, it is still extremely difficult to imagine that *Furman v. Georgia*, and its rule that state execution is constitutional, will be rejected by the U.S. Supreme Court any time soon.

Therefore, as encouraged by Justice Breyer's statements at American University,[249] lawyers in the United States, must, at all court levels, continue to use international law, foreign court decisions, and global political actions (such as the global moratorium vote at the United Nations) to litigate for more limits on the death penalty. The Court's decisions in *Medellín*, *Baze*, and *Kennedy* clearly indicate that future litigation will focus on restrictions and restraints on capital punishment rather than the Stevens abolitionist position. Accordingly, anti-death penalty strategies must focus on capital punishment practices that are ripe for challenge: execution of the mentally ill;[250] the continuing and acute problems of racial discrimination unsuccessfully attacked in *McCleskey v. Kemp*;[251] the "death row phenomenon" blocked from review in *Knight v. Florida*;[252] or documented shortcomings in jury selection and jury deliberation processes.[253] Most importantly, innocence-based exonerations[254] should be aggressively cited to make the case that the pervasive risk of error in capital cases compels adoption of the international position that the death penalty must be eliminated or severely restricted.

The death penalty debate is ultimately a political rather than legal debate. When international forums are available, they must be used to publicize and condemn death penalty abuses. During the recent summer Olympics, why was there not a firestorm of criticism over China's use of the death penalty equal to that over political repression in Tibet or the treatment of the families whose children were killed by the devastating Sichuan earthquake?[255] American credibility in foreign and international affairs continues to be compromised by its presence on the shortlist of world executioners.

The death machine of state execution could be shut down—quickly—by legislative action. On the basis of cost alone, state legislatures should recognize that the number one issue for Americans in 2008 and 2009—the troubled economy—requires elimination of the multi-million dollar capital punishment

248. Those are Justices Stevens, Breyer, Kennedy, Ginsburg. *See supra* Part IV; *supra* text accompanying note 214. The views of recently appointed Justice Sonia Sotomayor are unclear.

249. *See supra* Part IV (highlighting debate between Justices Breyer and Scalia).

250. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (holding capital punishment of mentally ill prohibited by 8th amendment).

251. McCleskey v. Kemp, 481 U.S. 279 (1987).

252. *See supra* note 34 (discussing "death row phenomenon").

253. *See supra* note 31 (discussing arbitrariness in jury selection and deliberation).

254. *See supra* notes 39, 56-59 and accompanying text (detailing death penalty innocence and exonerations).

255. PD Online Forum, NGO *Plays a Big Role in China Quake Relief*, PEOPLE'S DAILY ONLINE, June 10, 2008, http://english.peopledaily.com.cn/90001/90780/91420/6426815.html.

system.[256] How can any political leader justify capital punishment when studies show that executions are vastly more expensive than the sentence of life in prison without parole (LWOP).[257]Similarly, if, for whatever reason, Congress passed an omnibus bill comprehensively eliminating the death penalty as a sentence for all federal crimes (or at least limiting it to direct acts of terrorism) and substituting LWOP in its place, the death penalty universe in the United States could change very quickly.[258]

The death penalty must be made a more visible issue in American political debate. At the very end of the 2008 Presidential campaign, neither candidate had made a substantial critical statement about capital punishment or the personal, political, and financial harm it causes.[259] In the future, will President Obama

256. The current economic crisis is forcing states to reconsider the death penalty for cost reasons. Emanuella Grinberg, *Budget Concerns Force States to Reconsider the Death Penalty*, CNN.COM, Mar. 25, 2009, http://www.cnn.com/2009/CRIME/03/02/economy.death.penalty/index.html.

257. *See supra* note 38 (evaluating costs of death penalty). The Death Penalty Information Center website provides extensive information on the financial costs, state by state, of the American death penalty system. DPIC, *Costs of the Death Penalty*, http://www.deathpenaltyinfo.org/costs-death-penalty (last visited Sept. 13, 2009). These studies support two generalizations: state budgets are severely burdened by the costs of capital cases; and, it is extraordinarily more expensive to prosecute a death penalty case through to execution than it is to seek the penalty of life in prison without parole. For example, in California, the additional cost of confining an inmate to death row, as compared to a life sentence without possibility of parole, is $90,000 per inmate, per year, totaling approximately $63.3 million per year. California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California, S. Res. 44, 2003-04 Reg. Sess., at 69-70 (Cal. 2004), *available at* http://www.ccfaj.org/rr-dp-official.html. In New Mexico, prosecutors agreed to drop its pursuit of the death penalty against two defendants because the state legislature did not have the necessary money for the defendant's representation in the capital defense system. Adrianne Appel, *Court Says, 'Pay Up-Or Let Live!'*, IPS News Service, April 23, 2008, *available at* http://www.fadp.org/news/2008042404/.

258. On March 19, 2009, Senator Russell Feingold (D-W) introduced S. 650, the Federal Death Penalty Abolition Act of 2009. The bill would effectively eliminate the death penalty as a sentence for violations of federal criminal law. The Federal Death Penalty Abolition Act of 2009, S. 650, 111th Cong. (as introduced by Senator Russell Feingold, in the Senate, Mar. 19, 2009).

259. After the *Kennedy v. Louisiana* decision was issued on June 25, 2008, both Presidential candidates, Barack Obama and John McCain, issued statements criticizing the Court's ruling. These comments appear to be their first on the subject of the death penalty during the 2008 campaign. Democratic Senator Obama said "I think that the rape of a small child, 6 or 8 years old, is a heinous crime, and if a state makes a decision that under narrow, limited, well-defined circumstances, the death penalty is at least potentially applicable that that does not violate our Constitution." Joan Biskupic, *Justices Reject Death Penalty for Child Rapists*, USA Today, June 26, 2008, at 4A, *available at* http://www.usatoday.com/news/washington/2008-06-25-scotus-child-rape_N.htm. On this general subject, he went on, "I have said repeatedly that I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes." *Id.* The Republican candidate, Senator John McCain, called the decision "an assault on law enforcement's efforts to punish these heinous felons for the most despicable crime. That there is a judge anywhere in America who does not believe that the rape of a child represents the most heinous of crimes, which is deserving of the most serious of punishments, is profoundly disturbing." Jame Oliphant, *Supreme Court bans death penalty for child rape*, L.A. TIMES, June 26, 2008, *available at* http://articles.latimes.com/2008/jun/26/nation/na-scotus26. The Republican candidate, John McCain, criticized the Court's decision in *Roper v. Simmons* in a speech about the future of the federal judiciary given on May 6, 2008; "Sometimes the expressed will of the voters is disregarded by federal judges, as in a 2005 case concerning an aggravated murder in

extend his message of "change" to this basic human rights issue? Will politicians continue to exploit the death penalty for votes? Will the issue remain outside public consciousness? Lawyers, law professors, law students, and political activists should force the debate over capital punishment into national political discussions. World leaders can and should do so as well.

As a final matter, one can hope to see in the coming years more abolitionist decisions like *State v. Makwanyane*[260] in South Africa and *Minister of Justice v. Burns*[261] in Canada. The opinions of judges in these and similar cases around the world serve as a conscience for Americans. When foreign courts such as these comprehensively set forth the practical, legal, and moral problems created by modern death penalty laws they make it easier for judges in the United States to respond positively to court challenges to American forms of capital punishment. Court decisions like these can insure that international law will continue to matter in U.S. constitutional interpretation. And, they can continue to weigh down the branches of American death penalty law until they break.

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the state of Missouri. As you might recall, the case inspired a Supreme Court opinion that left posterity with a lengthy discourse on international law, the constitutions of other nations, the meaning of life, and 'evolving standards of decency'. These meditations were in the tradition of 'penumbras,' 'emanations,' and other airy constructs the Court has employed over the years as poor substitutes for clear and rigorous constitutional reasoning." Jeffrey Toobin, Comment, *In McCain's Court*, THE NEW YORKER, May 26, 2008, *available at* http://www.newyorker.com/talk/comment/2008/05/26/080526 taco_talk _toobin.

260. *State v. Makwanyane* 1995 (3) SA 391 (CC) at 49-61, 451 (S. Afr.); *see generally* Mark S. Kende, *The Constitutionality of the Death Penalty: South Africa as a Model for the United States*, 38 GEO. WASH. INT'L L. REV. 209 (2006) (advocating South Africa's death penalty stance should serve as paradigm).

261. United States v. Burns, [2001] 1 S.C.R. 283, 2001 SCC 7 (Can.).