Spring 2007

The Global Debate on the Death Penalty

Sandra L. Babcock

The Global Debate on the Death Penalty

By Sandra Babcock

Associated Press, AP

In France, an abolitionist country, members of Amnesty International lie on the ground to protest against the use of the death penalty in the United States.

The debate over capital punishment in the United States—be it in the courts, in state legislatures, or on nationally televised talk shows—is always fraught with emotion. The themes have changed little over the last two or three hundred years. Does it deter crime? If not, is it necessary to satisfy society's desire for retribution against those who commit unspeakably violent crimes? Is it worth the cost? Are murderers capable of redemption? Should states take the lives of their own citizens? Are current methods of execution humane? Is there too great a risk of executing the innocent?

We are not alone in this debate. Others around the world—judges, legislators, and ordinary citizens—have struggled to reconcile calls for retribution with evidence that the death penalty does not deter crime. They have argued about whether the death penalty is a cruel, inhuman, or degrading treatment or punishment. They have weighed its costs against the need for an effective police force, schools, and social services for the indigent. National leaders have engaged in these discussions while facing rising crime rates and popular support for capital punishment. Yet, while the United States has thus far rejected appeals to abolish the death penalty or adopt a moratorium, other nations have—increasingly and seemingly inexorably—decided to do away with capital punishment.

Indeed, the gap between the United States and the rest of the world on this issue is growing year by year. In June 2007, Rwanda abolished the death penalty, becoming the one hundredth country to do so as a legal matter (although eleven of these countries retain legislation authorizing the death penalty in exceptional circumstances, most have not executed anyone in decades). An additional twenty-nine countries are deemed to be abolitionist in practice since they have either announced their intention to abolish the death penalty or have refrained from carrying out executions for at least ten years. As a result, there are now at least 129 nations that are either de facto or de jure abolitionist.

According to Amnesty International, there are sixty-eight countries that retain the death penalty and carry out executions. But even this number is misleading. In reality, the vast majority of the world's executions are carried out by seven nations: China, Iran, Saudi Arabia, the United States, Pakistan, Yemen, and Vietnam. Many Americans know that the nations comprising Europe (except Belarus) and South America are abolitionist. But how many are aware that of the fifty-three nations in Africa only four (Uganda, Libya, Somalia, and Sudan) carried out executions in 2005? Even in Asia, where many nations have long insisted that the death penalty is an appropriate and necessary sanction, there are signs of change. The Philippines abolished the death penalty in 2006, and the national bar associations of Malaysia and Japan have called for a moratorium on executions.

The international trend toward abolition reflects a shift in the death penalty paradigm. Whereas the death penalty was once viewed as a matter of domestic penal policy, now it is seen as a human rights issue. There are now three regional human rights treaties concerning the abolition of the death penalty: Protocols 6 and 13 to the European Convention on Human Rights, and the Additional Protocol to the American Convention on Human Rights. The International Covenant on Civil and Political Rights, ratified by 160 nations (including the United States), restricts the manner in which the death penalty may be imposed and promotes abolition.

Many human rights organizations and intergovernmental organizations, such as the European Union, see the death penalty as one of the most pressing human rights issues of our time and accordingly have taken an active role in persuading countries to halt executions.

The Supreme Court's View of International Law

As the international chorus of abolitionist voices swells, domestic courts and policy makers have engaged in a heated debate over the role of international law in U.S. death penalty cases. The debate came to a head in mid-2005 after the Supreme Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that the execution of juvenile offenders violated the Eighth Amendment's prohibition of cruel and unusual punishment. Writing for the majority, Justice Anthony Kennedy observed that although international law did not control the Court's analysis, it was both "instructive" and "significant" in interpreting the contours of the Eighth Amendment.

The *Roper* Court noted that only seven countries had executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. But even those countries had disavowed the practice in recent years, leaving the United States as "the only country in the world that continues to give official sanction to the juvenile death penalty." *Id.* at 575. The Court looked to treaties that prohibit the execution of juvenile offenders, such as the Convention on the Rights of the Child, which has been ratified by every country in the world apart from the United States and Somalia. After examining these sources and reviewing international practice, the Court concluded that the "overwhelming weight of international opinion" was opposed to the juvenile death penalty.

The Court's majority opinion prompted a scathing dissent by Justice Antonin Scalia. After noting that the Court's abortion jurisprudence was hardly consistent with the more restrictive practices of most foreign nations, he commented: "I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than . . . disapproval by 'other nations and peoples' should weaken that commitment." *Id.* at 628. Conservative commentators and legislators likewise attacked the Court's citation of foreign law.

What many critics of *Roper* failed to recognize, however, is that the Court has long looked to the practices of the international community in evaluating whether a punishment is cruel and unusual. In *Wilkerson v. Utah*, 99 U.S. 130 (1879), the Court cited the practices of other countries in upholding executions by firing squad. And in its oft-cited opinion in *Trop v. Dulles,* 356 U.S. 86 (1958), the Court declared that banishment was a punishment "universally deplored in the international community of democracies." Since then, the Court has frequently referred to international law in a series of death penalty cases interpreting the meaning of the Eighth Amendment.

The Court's attention to international practice in death penalty cases is undoubtedly related to the flexible and evolving character of the Court's Eighth Amendment jurisprudence. In *Weems v. United States,* 217 U.S. 349 (1910), the Court held that the "cruel and unusual punishments" clause "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378. In *Trop,* the Court reaffirmed that the clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 100. The Eighth Amendment involves nothing more, and nothing less, than evaluating whether a punishment violates human dignity.

Courts around the world have wrestled with these same questions. When South Africa's Constitutional Court decided that the death penalty was an unconstitutionally cruel, inhuman, and degrading punishment, it surveyed the decisions of several foreign courts, including the U.S. Supreme Court. Like that Court, the South African court did not consider foreign sources to be controlling. Nevertheless, it observed that "international and foreign authorities are of value because they analyse [sic] arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention." *State v. Makwanyane*, Constitutional Court of the Republic of South Africa, 1995, Case No. CCT/3/94, ¶ 34, [1995] 1 LRC 269. The high courts of India, Lithuania, Albania, the Ukraine, and many others have likewise cited international precedent in seminal decisions relating to the administration of the death penalty.

In light of this history, the practice of citing international precedent hardly seems to warrant the storm of controversy surrounding it. But whether one agrees or disagrees with the Court's approach, a majority of the current justices favors consideration of international law. In the next few years, a number of capital cases will once again offer the Court an opportunity to look beyond U.S. borders and survey international law and the practices of foreign states.

Execution of Persons Who Did Not Kill

Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that the death penalty may only be imposed for the "most serious crimes." The United Nations (UN) Human Rights Committee, which interprets the ICCPR's provisions, has observed that this provision must be "read restrictively to mean that the death penalty should be a quite exceptional measure." Human Rights Committee, General Comment 6, Art. 6 (Sixteenth session, 1982) ¶ 7; Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994). In a death penalty case from Zambia, where the prisoner received a death sentence for participating in an armed robbery, the committee held that the sentence was not compatible with Article 6(2) because

the petitioner's use of firearms did not cause death or injury to any person.

The UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, defines "most serious crimes" as "intentional crimes with lethal or other extremely grave consequences." Referring to those safeguards, the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions has concluded that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." United Nations, Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, U.N. Doc. CCPR/C/79/Add.85, 19 Nov. 1997, ¶ 13.

Yet in the United States, several states authorize the death penalty for persons who are "major participants" in a felony, such as burglary or robbery, even if they never killed, intended to kill, or even contemplated that someone would be killed while committing the crime. In California and Georgia, persons may be sentenced to death for accidental killings during a felony or attempted felony.

Moreover, Texas, South Carolina, Georgia, Louisiana, Oklahoma, and North Carolina allow for the imposition of a death sentence in some cases for the rape of a minor, even if the victim did not die. These laws will be subject to strong legal challenges in coming years, although this will not be an easy battle, as demonstrated by the recent Louisiana supreme court decision upholding a death sentence against an offender who was convicted of raping a child. *Louisiana v. Kennedy*, No. 05-KA-1981 (La. May 22, 2007).

Available data indicate that prosecutors rarely seek the death penalty against "non-triggermen," and executions of these persons are few and far between. These two factors alone indicate that the imposition of the death penalty on persons who have committed nonlethal crimes may be ripe for challenge. In the event that the Supreme Court examines the issue, it is highly likely it will consider international practice. In *Enmund v. Florida*, 458 U.S. 782 (1982), a case involving a defendant sentenced to death under the felony-murder rule, the Court noted that international norms were "not irrelevant" to its analysis, observing that the doctrine of felony murder had been abolished in England and India, severely restricted in Canada and a number of other Commonwealth of Nations countries, and was unknown in continental Europe.

Execution of the Severely Mentally Ill

Although the Supreme Court has held that the Eighth Amendment prohibits the execution of the mentally incompetent, state and federal courts have routinely concluded that severely mentally ill prisoners are sufficiently competent that they may lawfully be executed. Consequently, dozens of prisoners suffering from schizophrenia, bipolar disorder, and other incapacitating mental illnesses have been executed in the United States during the last ten years. In June 2007, however, the Court overturned a decision by the U.S. Court of Appeals for the Fifth Circuit, holding that the court had used an overly restrictive definition of incompetence. *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007). This decision may encourage state and federal courts to take greater care in evaluating the mental status of those facing imminent execution, but it does not prohibit courts from sentencing severely mentally ill prisoners to death, nor does it guarantee that severely mentally ill prisoners will not be executed in the future.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), in which the Court struck down the execution of the mentally retarded, the Court cited an amicus curiae brief submitted by the European Union (EU) as evidence that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Id.* at 316 (citing in n.21 Brief for European Union as Amicus Curiae at 4). The current Court likely would be open to considering similar amicus briefs in a future case challenging the execution of the severely mentally ill.

A substantial body of international precedent exists regarding the execution of the severely mentally ill. The UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty prohibit imposing the death penalty "on persons who have become insane." In 1989, the UN Economic and Social Council expanded this protection

Countries and Territories That Retain the Death Penalty for Crimes in Addition to Such Exceptional Crimes as Wartime Crimes

Afghanistan, **Antigua and Barbuda**, Bahamas, **Bahrain**, Bangladesh, **Barbados**, Belarus, **Belize**, Botswana, **Burundi**, Cameroon, **Chad**, China, **Comoros**, Congo (Democratic Republic), **Cuba**, Dominica, **Egypt**, Equatorial Guinea, **Eritrea**, Ethiopia, **Guatemala**, Guinea, **Guyana**, India, **Indonesia**, Iran, **Iraq**, Jamaica, **Japan**, Jordan, **Kazakhstan**, Korea (North), **Korea (South)**, Kuwait, **Laos**, Lebanon, **Lesotho**, Libya, **Malaysia**, Mongolia, **Nigeria**, Oman, **Pakistan**, Palestinian Authority, **Qatar**, Saint Christopher & Nevis, **Saint Lucia**, Saint Vincent & Grenadines, **Saudi Arabia**, Sierra Leone, **Singapore**, Somalia, **Sudan**, Syria, **Taiwan**, Tajikistan, **Tanzania**, Thailand, **Trinidad And Tobago**, Uganda, **United Arab Emirates**, United States of America, **Uzbekistan**, Vietnam, **Yemen**, Zimbabwe.

Source: Amnesty International, http://web.amnesty.org/pages/deathpenalty-countries-eng (Aug. 21, 2007).

to cover "persons suffering from . . . extremely limited mental competence, whether at the stage of sentence or execution." United Nations Economic & Social Council, *Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty*, E.S.C. Res. 1989/64, U.N. Doc. E/1989/91 (1989), at 51, ¶ 1(d). The UN Commission on Human Rights has urged countries not to impose the death penalty on persons suffering from any form of mental disabilities. And the EU has consistently asserted that executions of persons suffering from severe mental disorders "are contrary to internationally recognized human rights norms and neglect the dignity and worth of the human person." *EU Memorandum on the Death Penalty* (Feb. 25, 2000), at 4, www.eurunion.org/legislat/deathpenalty/eumemorandum.htm.

Racial and Geographic Disparities

Arbitrariness in capital sentencing was one of the factors that led the Supreme Court to strike down existing state death penalty laws in *Furman v. Georgia*, 408 U.S. 238 (1972). Four years later, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court's decision to uphold the newly revised laws was based on its determination that the statutes minimized the risk of arbitrary sentencing by channeling the discretion of capital juries. But thirty years later, factors such as race and geography continue to lead to great disparities in capital sentencing. These disparities have led to a different sort of arbitrariness, one that may not be consistent with international norms.

Studies have repeatedly shown that race matters when determining who is sentenced to death. It has been said that, as a statistical matter, race is more likely to affect death sentencing than smoking affects the likelihood of dying from heart disease. In Philadelphia, the odds that an offender will receive a death sentence are nearly four times higher when the defendant is black. A 2006 study confirmed that defendants' skin color and facial features play a critical role in capital sentencing. And over the last twenty years, social scientists have repeatedly observed that capital defendants are much more likely to be sentenced to death for homicides involving white victims.

Enormous geographical disparities arise as well. This derives, in part, from the lack of uniform standards to guide the discretion of state prosecutors in seeking the death penalty. Prosecutors are almost always elected officials, and their support or opposition to the death penalty in a given case is often influenced by the level of popular support for capital punishment within a given community. In San Francisco, for example, the local prosecutor never seeks the death penalty because she is morally opposed to it. In Tulare County, located in California's conservative Central Valley, the chief prosecutor is a zealous advocate of capital punishment. As a result, two persons who commit the same crime, and who are ostensibly prosecuted under the same penal code, may be subject to two radically different punishments.

Article 6(1) of the ICCPR provides that nations may not "arbitrarily" take life. The term is not defined in the text of the treaty, nor has the UN Human Rights Committee had an opportunity to elaborate on its meaning in the context of an otherwise lawfully imposed capital sentence. In evaluating "arbitrary arrest and detention," however, that committee concluded that arbitrariness encompasses elements of inappropriateness, injustice, and lack of predictability. The Inter-American Commission on Human Rights, a human rights body of the Organization of American States, has found that geographic disparities in the application of the death penalty in the United States can result in a "pattern of legislative arbitrariness" whereby an offender's death sentence depends not on the crime committed but on the location where it was committed. In *Roach and Pinkerton v. United States,* Case 9647, Annual Report of the IAHCR 1986–87, the Inter-American Commission concluded that such geographic disparities constituted an arbitrary deprivation of the right to life and subjected the petitioners to unequal treatment before the law in contravention of the American Declaration of the Rights and Duties of Man.

These sources are generally considered to be nonbinding. But that does not mean that they are not persuasive. Five justices of the Supreme Court—like many judges throughout the world—find it a worthwhile endeavor to consider international norms in evaluating whether the application of the death penalty comports with basic human dignity, whether it constitutes cruel and unusual punishment, and whether it is consistent with contemporary standards of decency. As the community of nations continues to debate the pros and cons of capital punishment, the United States should take a seat at the table, listen, and learn.

Web Links and Resources

Death Penalty Information Center: www.deathpenaltyinfo.org

Hands Off Cain: www.handsoffcain.info/index.php

International Covenant on Civil and Political Rights: www1.umn.edu/humanrts/instree/b3ccpr.htm.

UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: www1.umn.edu/humanrts/instree/i8sgpr.htm

Paolo G. Carozza, *"My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights*, 81 Tex. L. Rev. 1032 (2003)

Sandra L. Babcock is an associate clinical professor and clinical director of the Center for International Human Rights at Northwestern University Law School in Chicago.