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Executing the Death Penalty: International Law Influences on United States Supreme Court Decision-Making in Capital Punishment Cases

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EXECUTING THE DEATH PENALTY: INTERNATIONAL LAW INFLUENCES ON UNITED STATES SUPREME COURT DECISION-MAKING IN CAPITAL PUNISHMENT CASES

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I. INTRODUCTION: THE THEME OF "CHANGE"

The idea of "change" in public policy is everywhere in the United States today. In significant measure, this is because of the Presidential candidacy of Senator Barrack Obama and his nomination battle with Hillary Clinton. Even the Republican candidate, 71-year-old John McCain, is attempting to recreate himself as an "outsider" and "change" candidate. Unfortunately, this public theme of change has not reached America's continuing practice of state execution of capital defendants. My lecture this evening will explore the legal changes that have taken place in death penalty law and practice in the United States in recent years, indicate how international law has influenced this change, and comment on how world opinion can affect change in the future.

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1. This article is based on a lecture that was delivered at Lund University, Lund, Sweden, on May 14, 2008. It is dedicated to the students of the 2007 Suffolk Summer Law Program held at Lund University during June 2007. Students from Suffolk University Law School, Lund University, several other American law schools, and two foreign lawyer candidates for the LLM degree, came together in the program to create an exceptional educational community, one in which learning occurred in an environment of mutual respect, support, and friendship. I was privileged to serve as on-site Director of this program and to co-teach, with Professor Kate Nace Day of the Suffolk law faculty, the course on International Human Rights. The experience was a transformative one. I am deeply grateful to the students and faculty of the program for making this possible. Special thanks are due to my Lund administrative assistant, Andrea Johansson, who now brings her extraordinary talents to the Swedish court system. Suffolk University Law School Dean Alfred Aman gave his full support for the lecture. Thanks are also due to Lund Law School Prefect Bengt Lundell and faculty members Hans Henrik Lidgard, Helen Ornemark Hansen, and Christopher Wong. My research assistant, Eric Carlson, performed superb technical and substantive work on the article. As in all of my professional activities, the wisdom, insight, patience, knowledge, and commitment of my wife, Kate Nace Day, were the foundation for whatever success this project has achieved.

Richard Dieter, Executive Director of the Death Penalty Information Center (DPIC) in New York City, observed: "capital punishment is unlikely to be undone for any one reason. Like snow on a branch, it is not any one flake that makes the branch break, but rather the collective weight of many flakes accumulating over time."[2]

I can confidently report that international law and the practices of nations constitute one of the snowflakes, a very, very, large one, which is weighing down the branch of American death penalty law. I hope it will eventually break that branch!

That is because the death penalty is a fatally flawed form of criminal punishment. Nobel Prize winner Archbishop Desmond Tutu of South Africa put it best when he said:

> The time has come to abolish the death penalty worldwide. The case for abolition becomes more compelling with each passing year. Everywhere experience shows us that executions brutalize [sic] both those directly involved in the process and the society that carries them out. Nowhere has it been shown that the death penalty reduces crime or political violence. In country after country, it is used disproportionately against the poor or against racial or ethnic minorities. It is often used as a tool of political repression. It is imposed and inflicted arbitrarily. It is irrevocable and results inevitably in the execution of people innocent of any crime. It is a violation of fundamental human rights.[3]

At least one sitting Justice of the United States Supreme Court, Justice John Paul Stevens, has concluded that the death penalty represents "the pointless and needless extinction of

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2. Richard Dieter, *International Law Influence on the Death Penalty in the United States*, 80 FOREIGN SERV. J. 31, 38 (Oct. 2003).

3. Desmond Tutu, *UN Death Penalty Vote Can Help Stop Cycle of Revenge*, INTER PRESS SERVICE, Sept. 2007, at 7, *available at* http://ipsnews.net/columns.asp?idnews=39352; *see also* ALAN W. CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY Preface (Northeastern University Press 2007) (stating "[t]here have long been compelling reasons to oppose the death penalty: the persistence of race, class, and ethnic bias; its profound arbitrariness; its failure to deter more effectively than its alternatives; its exceptional costs. The power of such critiques is itself significantly enhanced by the convergence of the two forces–international pressure [for abolition or severe restrictions on the use of capital punishment in the United States] and the innocence argument [originating in the growing body of evidence that innocent defendants have been sentenced to death and the likelihood that innocent death row inmates have been executed].").

life," produces "only marginal contributions to any discernible social or public purpose," and should be abolished.[4]

II. CAPITAL PUNISHMENT BASIC PRINCIPLES

In order to understand the influence of international law on the death penalty debate in the United States, one must first have a basic understanding of how death penalty law is made and appreciate the critical role played in that process by the U.S. Supreme Court. The Court will be the primary focus of my lecture.

In our federalist system, capital punishment laws are the product of legislation. Each of the fifty states, and the U.S. Congress, is free to pass a law imposing a death sentence for the commission of extremely serious crimes (deliberate murder; terrorism; child rape). Presently, thirty-six states and the U.S. Government have such laws on the books.[5]

Once a defendant is convicted and sentenced to death pursuant to these laws, an elaborate system of appeals takes place. *Kennedy v. Louisiana*,[6] now pending decision in our Supreme Court, is a good example. Patrick Kennedy, a 43 year old black man, was convicted in a Louisiana state court of raping his eight year old stepdaughter. Under Louisiana law, aggravated rape, defined at the time as sexual relations with a child under the age of twelve,[7] was a capital crime and Kennedy was sentenced to death. He appealed this sentence through state courts and lost.[8] 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 and that, as a result, he could not constitutionally be put to death.[9] The Court

4. Baze v. Rees, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring) (citing Furman v. Georgia, 408 U.S. 238, 311 (1972) (White, J., concurring)).

5. Death Penalty Info. Ctr. (DPIC), *Facts About the Death Penalty*, http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited Apr. 7, 2009) [hereinafter DPIC Facts]. Historical statistical information on the death penalty is reported by DPIC in Fact Sheets as noted above. Statistical information for the current year is continuously updated; however, DPIC does not maintain an archive of prior Fact Sheets. For purposes of reproducing this lecture, current year statistics have been reported as of October 15, 2008. Third party internet storage facilities, such as Internet Archive, maintain archived reports, but these services are not supported by DPIC.

6. 128 S. Ct. 2641 (2008).

7. LA. REV. STAT. ANN. § 14:42 (West 1997 & Supp. 1998).

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

9. U.S. CONST. amend. VIII.

accepted the case for review, arguments have been heard, and an opinion is expected at any time.[10]

This Eighth Amendment constitutional argument is typical of constitutional claims in our system. The Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[11] American constitutional rights, including those provided in the Eighth Amendment, are not affirmative or positive rights of the kind Europeans are used to experiencing. Rather, these "rights" are really negatives directed at governments. Such rights embody limitations or constraints on exercises of governmental power. They are commands on what a state may not do to its citizens, such as, deprive them of free speech,[12] purposely subject them to unequal treatment based on race,[13] or impose a criminal sentence that is "cruel and unusual."[14]

When the Supreme Court decides a case like *Kennedy* it is engaging in "judicial review" of government action to see if the state has gone too far.[15] As operating here, judicial review involves our highest national court, the United States Supreme Court, deciding what the Constitution–the Eighth Amendment–allows or prohibits. Under the "Supremacy Clause" of Article VI of the Constitution,[16] once the Court has ruled, its opinion is "the supreme Law of the Land" and "anything in the . . . Laws of any state to the contrary . . ." is invalid.[17] In other words, national law (the Constitution, valid acts of Congress, and ratified U.S. treaties) prevails over state law. In the *Kennedy* case, if the prisoner wins, the child rape death penalty provision of Louisiana law is overridden by the Eighth Amendment

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

11. U.S. CONST. amend. VIII.

12. U.S. CONST. amend. I.

13. U.S. CONST. amend. XIV.

14. U.S. CONST. amend. VIII.

15. *See* Marbury v. Madison, 5 U.S. 137 (1803) (establishing Supreme Court's power of judicial review); *see also* Mark Tushnet, *Marbury v. Madison and the Theory of Judicial Supremacy*, *in* GREAT CASES IN CONSTITUTIONAL LAW 17 (Robert P. George ed., 2000) (analyzing Court's assertion of judicial review in *Marbury*); Ronald A. Brand, *Judicial Review and the United States Supreme Court Citations to Foreign and International Law*, 45 DUQ. L. REV. 423, 434-35 (2007) (noting citation to foreign law in exercising judicial review is often dicta).

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

17. *Id.*

(as construed and applied by the Court) and Mr. Kennedy may not be executed.

Much of the history of capital punishment in America is, therefore, about the process by which a majority of the Court (5 votes out of 9 Justices) decides when it is or is not constitutional for government (State or Federal) to kill one of its citizens. This process has yielded clear but broad rules for measuring when a death penalty law is consistent with the Eighth Amendment.

Based on the 1972 case of *Furman v. Georgia*[18] and the *Gregg v. Georgia* line of cases[19] in 1976, the Supreme Court has, through an evolving series of decisions, set forth the following basic principles:

Capital punishment is not per se, or in all cases, an unconstitutional "cruel and unusual" punishment.[20] The death penalty is a valid sentence so long as, in each individual case:

(1) It is not imposed in an "arbitrary and capricious" manner. A death penalty statute 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, class, gender, or other impermissible factor;[21] and

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18. 408 U.S. 238 (1972).

19. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (holding death penalty not per se cruel and unusual punishment); Proffitt v. Florida, 428 U.S. 242 (1976) (holding capital punishment not per se cruel and unusual punishment); Jurek v. Texas, 428 U.S. 262 (1976) (holding death penalty not per se cruel and unusual punishment).

20. *See Gregg*, 428 U.S. at 187 (holding death penalty not per se cruel and unusual punishment).

21. *See Furman*, 408 U.S. at 242, 249-52 (Douglas, J., concurring) (noting death penalty cruel and unusual if discriminatory, arbitrary, or disproportionately applied); *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring) (finding wanton application of death sentence cruel and unusual); Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (noting death penalty reserved for "worst of the worst"); *see also* Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (holding States have constitutional duty not to apply death penalty in arbitrary or capricious manner). 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 . . . ." *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (affirming requirement to consider individual's character); *see also Furman*, 408 U.S. at 310 (noting some death sentences so arbitrary as to make 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).

(2) It "advances" a legitimate "penalogical justification" for the death penalty, meaning that it must achieve one of the sentencing goals of our criminal justice system: deterrence or retribution. (Justice Stevens has referred to incapacitation[22] and Justice Kennedy to rehabilitation[23]).[24] A Justice's personal answer to this question–what does the death penalty accomplish in terms of justifications for criminal punishment–can be considered in deciding this issue;[25] and

(3) As to each crime and criminal, capital punishment is consistent with "evolving standards of decency" recognized by a "maturing society" and respects the "human dignity" said to be at the "core" of the Eighth Amendment.[26] The Amendment requires proportionality–balance–between the crime committed and the sentence of death. This has come to mean that only "the worst of the worst" criminals, the most culpable and blameworthy, can be sentenced to death.[27] The Court must find a "na-

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22. Baze v. Rees, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring).

23. *Kennedy*, 128 S. Ct. at 2649.

24. *See* Atkins v. Virginia, 536 U.S. 304, 319 (2002) (analyzing rationales behind death penalty).

25. *See* Roper v. Simmons, 543 U.S. 551, 563 (2005) (discussing death penalty and evolving standards of decency). "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)). Furthermore, in the context of executing a mentally retarded offender, the Court stated that "[t]he impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect." *Id.* "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]." Enmund v. Florida, 458 U.S. 782, 797 (1982).

26. The evolving standards concept originated in *Trop v. Dulles*. Trop v. Dulles, 356 U.S. 86, 101 (1958) (denationalization for desertion from U.S. Army barred by Eighth Amendment). In addition, it was expressly adopted as the controlling test in *Gregg*. Gregg v. Georgia, 428 U.S. 153, 173 (1976). 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." *Id.*

27. *See Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319) (noting Eighth Amendment applies to death penalty "with special force"). "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.*; *see also Kennedy*, 128 S. Ct. at 2649 (2008) (reviewing Eighth Amendment jurisprudence of death penalty cases). "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 punishment for [a] crime should be graduated and proportioned to [the] offense.'" *Id.* (quoting Weems v. United States,

tional consensus" in contemporary American society in support of a particular death penalty practice.[28] Whether there is such a consensus is measured, first, by examining "objective" evidence in the form of legislative enactments.[29] Some Justices have also been willing to consider opinion polls and the views of national and international organizations.[30] As with sentencing goals above, individual Justices can–and do–make their own personal

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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.

28. *Roper*, 543 U.S. at 563. The Court has acknowledged its right to make an independent assessment of what evolving standards require. *See Atkins*, 536 U.S. at 312 (noting role of Court in judicial review of death penalty legislation).

> We also acknowledged in Coker that the objective evidence, though of great importance, did not "wholly determine" the controversy, "for 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" . . . Thus, in cases involving a consensus, our own judgment is "brought to bear," by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.

Id. (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)); *see Roper*, 543 U.S. at 564, 566 (discussing evolving standard regarding juveniles and death penalty).

> 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 . . . 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. 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 565. 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.* Furthermore, in the past ten years, only Oklahoma, Texas, and Virginia have done so. *Id.*

29. *See Roper*, 543 U.S. at 564-65 (discussing states prohibiting or failing to impose death penalty for mentally retarded and juveniles); *Atkins*, 536 U.S. at 314-15 (listing states which have enacted laws prohibiting use of death penalty on mentally retarded).

30. *See Atkins*, 536 U.S. 304, 316 n.21 (2002) ("[P]olling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.").

judgments about proportionality and excessiveness and what evolving standards of decency tolerate or require.[31]

Historically, these constitutional principles have generally promoted–facilitated–the enactment and implementation of death penalty laws in the United States. Yet, there is change happening.

III. THE EVIDENCE OF CHANGE

Based on data from the Death Penalty Information Center as of February 2008, there is some evidence of change in death penalty trends in the United States.

(1) The number of executions in the United States is steadily declining. In the past three years, executions have dropped from 60 in 2005, to 53 in 2006, to 42 in 2007. Executions peaked in 1999 with 98 death sentences carried out.[32] In 2008, there were 13 executions prior to a moratorium imposed because of *Baze v. Reese*,[33] a case I will describe later in the lecture.

(2) The number of death sentences imposed is also down from 153 capital sentences imposed in 2003 to 110 in 2007 (in 2005 the number was 138; in 2006 it was 115).[34] Most executions (86%) and death sentences are imposed in our Southern states (62% of executions took place in Texas in 2007).[35] The current U.S. death row population is over 3,300 (out of a population of over 300 million people).[36]

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31. *See Gregg*, 428 U.S. at 182-83 (joint opinion of Stewart, Powell, and Stevens, JJ.) (discussing death penalty and sentencing goals); *Coker*, 433 U.S. at 597-00 (comparing role of judiciary, juries, and legislature in death penalty cases).

32. DPIC Facts, *supra* note 5, at 1.

33. *See* Baze v. Rees, 128 S. Ct. 1520, 1538 (2008) (affirming state's method of lethal injection did not constitute cruel and unusual punishment under Eighth Amendment); DPIC, THE DEATH PENALTY IN 2007: YEAR END REPORT 3 (Dec. 2007) [hereinafter DPIC 2007 DEATH PENALTY REPORT] (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, http://www.deathpenaltyinfo.org/death-penalty-flux (last visited Apr. 7, 2009). The DPIC reports that executions have resumed in the United States and that, as of October 15, 2008, thirteen additional executions have been carried out. *See* DPIC Facts, *supra* note 5, at 1 (documenting executions by year). At the time of this writing it is unclear whether the number of executions pro rata for 2008 will continue to decline in the fashion noted in the text of the lecture.

34. DPIC Facts, *supra* note 5, at 1.

35. *Id.*

36. *Id.*

(3) States are backing away from capital punishment. New Jersey abolished it in December of 2007;[37] in 2006 and 2007, the New York legislature refused to restore capital punishment after the state's highest court declared it unconstitutional;[38] and several states attempted to pass abolitionist statutes.[39] Bills to expand death penalty laws were defeated in Georgia, Utah, Missouri, and Virginia.[40] Only Texas succeeded in expanding its laws.[41]

(4) Public Opinion is holding steady in support of capital punishment but is beginning to shift. A 2007 Gallup poll showed that approximately 69% of Americans support the death penalty in the abstract.[42] However, when given a choice between death and life in prison without parole (LWOP), 48% chose LWOP to 47% for the death penalty.[43] Only 38% of those polled thought capital punishment is a deterrent to murder and other serious crimes.[44] Most importantly, the steady stream of exonerations of capital criminals, and the growing understanding that innocent defendants have been executed, is eroding support for the death penalty–60% of citizens polled reported that evidence of wrongful convictions lessened their support for, or strengthened their opposition to, the death penalty.[45]

(5) Innocence. Since 1973, the DPIC estimates that 130 prisoners in 26 states have been released from death row because of evidence of innocence (DNA evidence, proof of

37. DPIC 2007 DEATH PENALTY REPORT, *supra* note 33, at 1; *see* S. 171, 212th Leg., 2006 Sess. (N.J. 2007) (abolishing death penalty).

38. DPIC 2007 DEATH PENALTY REPORT, *supra* note 33, at 1; *see* People v. LaValle, 817 N.E.2d 341, 357 (N.Y. 2004) ("deadlock instruction" provision of New York death penalty statute unconstitutional under New York constitution). *See generally*, Russell G. Murphy, *People v. Cahill: Domestic Violence and the Death Penalty Debate in New York*, 68 ALB. L. REV. 1029 (2005) (analyzing New York death penalty law).

39. Nebraska, New Mexico, Montana, Colorado, and Maryland. *See* DPIC 2007 DEATH PENALTY REPORT, *supra* note 33, at 2 (explaining decline in use of death penalty and near abolition in some states).

40. *See* DPIC 2007 DEATH PENALTY REPORT, *supra* note 33, at 2-3 (discussing bills to broadly expand death penalty).

41. *See id.* at 3 (stating Texas capital punishment laws applied to repeat child sex offenders).

42. *Id.*

43. Gallup, 2007 Gallup Poll: Death Penalty, *available at* http://www.gallup.com/poll/1606/Death-Penalty.aspx.

44. DPIC 2007 DEATH PENALTY REPORT, *supra* note 33, at 3. This is based on a poll conducted by RT Strategies and sponsored by DPIC. *Id.*

45. *Id.*

prosecutorial misconduct, or confessions by the real killers).[46] That is a staggering 1 out of approximately every 10 death sentences! In recent years, exonerations have increased to an average of 3 to 5 per year.[47]

(6) Activity at the U.S. Supreme Court level has shown slight movement towards limiting the categories of death-eligible crimes or criminals. The 2005 decision in *Roper v. Simmons,*[48] that the death penalty may not be imposed in any case in which the accused was a juvenile (under the age of 18) at the time a murder was committed, is seen by some as a shift away from broad state power to impose capital punishment. The Court's 2002 ban, in *Atkins v. Virginia,*[49] on executing the mentally retarded contributes to this view. The grant of appellate review in *Kennedy v. Louisiana*[50] and its potential restriction of death-eligible crimes to only those in which death of the victim occurs (thereby excluding rape of a child) offers the opportunity for further retreat by the Court. But, as will be seen later, the messages from the Court during its present term are very mixed, with two opinions already issued, *Medellín v. Texas*[51] and *Baze v. Reese,*[52] that failed to limit or restrict imposition of the death penalty. Progress towards abolition is halting and slow.

IV. The Role of International Law

In my description of the process used to make death penalty law in the United States, I tried to emphasize the critical role played by the U.S. Supreme Court. Because all capital punishment laws are limited by the Eighth Amendment to the Constitution, and because "the Constitution means what 5 members of the Supreme Court say it means," the attitude and approach, and, of course, actual decisions, of the Supreme Court in death

46. DPIC Facts, *supra* note 5; *see also* Richard C. Dieter, DPIC Report: Innocence and the Crisis in the American Death Penalty (Sept. 2004), http://www.deathpenaltyinfo.org/innocence-and-crisis-american-death-penalty (discussing risks associated with capital punishment, including risk of innocence).

47. Dieter, *supra* note 46.

48. *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding capital punishment imposed on individuals under eighteen at time of crimes prohibited by Eighth and Fourteenth Amendments).

49. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (holding capital punishment of mentally retarded cruel and unusual punishment, prohibited by Eighth amendment).

50. 128 S. Ct. 2641 (2008).

51. 128 S. Ct. 1346, 1346 (2008).

52. 128 S. Ct. 1520, 1534 (2008).

penalty cases are critical factors affecting change in capital punishment law.[53] It is here, in these decisions, that international law has become tremendously important. So important, actually, as to trigger a very public debate involving individual Justices and their views on the propriety and the permissibility of the Court's relying on international law and foreign court decisions in interpreting the Constitution.

A snap shot of the status of the death penalty worldwide quickly discloses why international law and practice are so important.

International law condemns capital punishment as a human rights violation. For authority one need look no further than the International Covenant on Civil and Political Rights (ICCPR)[54] and its Second Optional Protocol,[55] the American Convention on Human Rights,[56] the UN Convention on the Rights of the Child,[57] or Article 6 of the European Convention on Human Rights.[58]

Under the influence of these international agreements, the DPIC estimates that, as of January 2008, 135 countries are abolitionist on the death penalty either in law or practice.[59] Some 62 countries still retain capital punishment.[60] Europe is a virtually execution-free zone (except for Belarus) covering some 800 million people.[61] Membership in the 27 nation European Union is

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53. *See generally* James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1 (Jan. 2007) (analyzing Supreme Court's stance on death penalty over past forty years).

54. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Mar. 23, 1976).

55. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at Abolition of the Death Penalty, G.A. Res. 44/128, at 207, 44 U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49 (July 11, 1991).

56. American Convention on Human Rights art. 4, §§ 2-6, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

57. Convention on the Rights of the Child, U.N. GAOR, 44th Sess., 61st plen. mtg. art. 37, U.N. Doc. A/44/49 (Nov. 20, 1989).

58. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 1, 1985, E.T.S. No. 114.

59. DPIC, The Death Penalty: An International Perspective, Abolitionist and Retentionist Countries, http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries (last visited Apr. 7, 2009) [hereinafter DPIC International Perspective].

60. *Id.*

61. *See* CLARKE & WHITT, *supra* note 3, at 7 (discussing global movement to abolish death penalty).

conditioned on banning the death penalty.[62] "[A]ll 46 nations of the Council of Europe have stopped executions."[63] Forty of its member countries have ratified Protocol 6 of the European Convention on Human Rights abolishing the death penalty for all crimes except certain crimes committed in time of war.[64]

In 2005 and 2006, the six top executing countries were China, Iran, Pakistan, Saudi Arabia, the United States, and Iraq.[65] These nations were joined by Sudan, Yemen, Vietnam, Mongolia, Jordan, and Singapore.[66] In 2006, there were 1,591 executions worldwide, down 25% from 2005.[67] In 2007, 1,252 people were executed resulting in a 22% reduction over the previous year.[68] Yet, it is estimated that as many as 27,500 prisoners were on death row worldwide as we entered 2008.[69]

In other developments from 2007, Rwanda voted to abolish the death penalty; France amended its Constitution to ban capital punishment; the Third World Congress Against the Death Penalty was held in Paris; the EU and Council of Europe observed the "European Day Against the Death Penalty;" and, most importantly for this discussion, on December 18, 2007, the United Nations General Assembly passed a resolution calling for a global moratorium on executions. The vote was 104 in favor, 52 opposed, and 29 abstentions. The United States voted "no."[70]

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62. American Convention on Human Rights, *supra* note 56, at 12. 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" as an "integral part of the EU's human rights policy." Press Release, Council of the European Union, General Affairs and External Relations (June 16, 2008). The statement lauded the vote of the UN General Assembly calling 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.*

63. CLARKE & WHITT, *supra* note 3, at 7.

64. *Id.*

65. DPIC International Perspective, *supra* note 59, http://www.deathpenaltyinfo.org/death-penalty-international-perspective (last visited Apr. 7, 2009).

66. *See id.* (reporting countries with most executions).

67. DPIC, International News and Developments (2007), http://www.deathpenaltyinfo.org/node/2256 (last visited Apr. 7, 2009).

68. DPIC, International: Amnesty International Reports Worldwide Drop in Executions, http://www.deathpenaltyinfo.org/node/2354 (last visited Nov. 18, 2008).

69. 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 Apr. 7, 2009).

70. DPIC, International News and Developments, *supra* note 67. Italian Premier Romano Prodi called for a worldwide moratorium on the death penalty: "we shall

The commands of the Universal Declaration on Human Rights that "[e]veryone has the right to life, liberty and [the] security of person" and that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment" have greater meaning today than when the Declaration was enacted in 1948.[71] Except in the United States!

V. THE STORY BEHIND THE DECISIONS-WHAT DO THE JUSTICES REALLY THINK?

The extent to which international law influences future death penalty debates in the United States is heavily dependent upon whether Justices of the U.S. Supreme Court are persuaded that America should finally join the world community in ending or drastically reducing state executions. Are the Justices amenable to such persuasion?

We can learn the answer to this question, in part, by looking at what the Justices have said during a fascinating and relatively public debate that has been taking place among four members of the Court: Justices Anthony Kennedy, Stephen Breyer, Ruth Bader Ginsburg, and Anton Scalia. A fifth, Justice John Paul Stevens, should probably also be considered as part of this discussion because he has been willing to rely on international law in invalidating death laws[72] and criticized capital punishment in a speech to the American Bar Association in 2005.[73] The future

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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.*

71. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

72. *See infra* note 116 and accompanying text (discussing examples of Justice Stevens' reliance on international law).

73. Justice John Paul Stevens, Assoc. J., U.S. Supreme Court, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html. *See generally* James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607 (2006) (detailing Justice Stevens' role in death penalty debates in U.S. Supreme Court). The contrary thoughts of recently named Chief Justice John Roberts are partially revealed in his confirmation hearing testimony:

> [In] [f]oreign [l]aw, 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 dis-

of capital punishment in America may well turn on the "winner" of this debate. Let us look at what we know about the views of the Justices.

Historically, Justice Anthony Kennedy has been 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*[74] and *Roper v. Simmons*,[75] which relied heavily on foreign court decisions.

Attorney Jeffrey Toobin, author of the popular book about the Supreme Court, *The Nine*,[76] and frequent CNN commentator on all things legal, gave insights into Justice Kennedy's thinking in his September 2005 New Yorker magazine article *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court.*[77]

Toobin points out that Justice Kennedy has been living in Salzburg, Austria, every summer since 1990 in order to teach in the McGeorge University summer program at the University of Salzburg.[78] He regularly participates in "The Salzburg Seminar" at Schloss Leopoldskron, a meeting of scholars and judges to discuss and analyze American and European views of the law.[79]

> cretion 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.

See Court in Transition: 'I Believe That No One Is Above the Law Under Our System', N.Y. TIMES, Sept. 14, 2005, at A26 (excerpts from Senate Judiciary Committee's hearing on the nomination of Judge John G. Roberts, Jr.). "In 1992, Judge Roberts helped prepare a brief arguing that if a defendant was convicted in a fair trial, it was constitutional to execute him regardless of new evidence suggesting his innocence. A 6-3 Supreme Court agreed, and the Texas inmate was executed four months later." Jess Bravin, *Judge Roberts's Rules of Law and Order: While Deputy Solicitor General, the Nominee Saw State Criminal Prosecutions as Priority*, WALL ST. J., Aug. 8, 2005, at A4.

74. Lawrence v. Texas, 539 U.S. 558 (2003) (holding Texas statute criminalizing certain homosexual conduct unconstitutional).

75. Roper v. Simmons, 543 U.S. 551 (2005) (holding execution of individuals under eighteen years of age at time of crime violates Eighth and Fourteenth Amendments).

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

77. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42.

78. *Id.* at 44.

79. *Id.* at 47-48.

He also lectures to judges and lawyers in China on a frequent basis under the auspices of the American Bar Association.[80] He, together with other Justices of the Court, meets every four years with his judicial counterparts from England and Canada.[81]

In Attorney Toobin's words, Kennedy is said to believe that "by 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."[82] According to Kennedy, "[i]f we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there . . . [ought to] be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that's at least instructive to us."[83] And, "[w]e [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 [a similar] question."[84]

It is unusual for Supreme Court Justices to speak publicly in this way about their judicial philosophies or decision-making methodologies. Yet that is exactly what Justices Scalia and Breyer did in January of 2005 during an American University discussion of *The Relevance of Foreign Law Materials in U.S. Constitutional Cases*.[85]

These two Justices represent very different schools of thought on the job and role of a judge in deciding constitutional cases. In simplified form, the Scalia school–"originalists" or "strict constructionalists"[86]–believes that judges should follow

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80. *Id.* at 48.

81. *Id.* at 44, 48.

82. *Id.* at 50.

83. *Id.*

84. *Id.* at 48.

85. *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) [hereinafter *A Conversation Between Scalia and Breyer*].

86. *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 theory 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, 604-06 (2008) (describing originalist theory). 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.'" *Id.* at 606. Originalism is also defended as necessary to constrain

the literal text of a constitutional provision supplemented by the understandings and intentions of the Framers–the "Founding Fathers"–at the time of constitutional ratification in 1789.[87] The Breyer/Kennedy/Ginsburg school–what we might call "organic evolutionists"–view the Constitution as a "living" document whose general and broad language was meant by the Framers to adapt to changing social and political conditions.[88]

Justice Ginsburg has 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 (advanced by Justices Scalia and Thomas) that the U.S. Constitution is a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view. U.S. jurists honor the Framer's 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.[89]

Although neither Justice Kennedy nor Justice Ginsburg were participants in the American University conversation, Justice Scalia, the Court's most ferocious conservative, responded to their thinking through his criticism of Justice Breyer. Justice Scalia observed, "I do not use foreign law in the interpretation of the . . . Constitution . . . [i]f you told the Framers . . . we're after something that will be just like Europe, they would have been appalled."[90] Later in the debate Justice Scalia stated:

> my theory of what I do when I interpret the American Constitution is I try to understand what it meant, [how it] was understood by . . . society to mean when it was adopted. And I don't think it has

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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 . . . necessary means of promoting democratic legitimacy." Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 37 (1997).

87. *See infra* notes 90-92 (describing Justice Scalia's Constitutional interpretation).

88. *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 Constitution as living document). The "Living Constitution" is a metaphor for an organic view of the Constitution, one in which there is evolving 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.*

89. Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 64(3) CAMBRIDGE L.J. 575, 585 (2005).

90. *A Conversation Between Scalia and Breyer*, *supra* note 85, at 521.

> changed since then. Now, obviously, if you have that philosophy . . . foreign law is irrelevant with one exception: old English law, because phases like 'due process' [were] taken from English law.[91]

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 who voted for [it said it meant] . . . 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![92]

But, 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 "[t]he standards of decency of American society–not the standards of decency of other countries."[93]

Justice Breyer's approach is more flexible and practical: "[y]ou look around to what's cited, [and] what's cited is what . . . lawyers tend to think is useful . . . ."[94] and that often includes foreign and international law. Pointing to his dissent from the Court's refusal to review death sentences imposed in *Moore v. Nebraska*[95] and *Knight v. Florida*,[96] Justice Breyer made a basic point:

> 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.[97]

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91. *Id.* at 525.

92. *Id.*

93. *Id.* at 526.

94. The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer, (Jan. 13, 2005), http://www.freerepublic.com/focus/f-news/1352357/posts.

95. Moore v. Nebraska, 120 S. Ct. 459, 461 (1999) (Breyer, S., dissenting).

96. Knight v. Florida, 120 S. Ct. 459, 461 (1999) (Breyer, S., dissenting).

97. *A Conversation Between Scalia and Breyer*, *supra* note 85, at 528; Singh v. State of Punjab, (1980) 3 S.C.R. 383; Kindler v. Canada, [1991] 2 S.C.R. 779 (Can.); Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, [1993] ZIMB. L.R. 239, *reprinted in* 14 HUM. RTS. L.J. 323 (1993); Soering v. United Kingdom, 11 Eur. Ct. H.R. 439 (1989).

The debate continued:

> Scalia: [W]hat does the opinion of a wise Zimbabwean judge or, a wise member of the House of Lords law committee . . . 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 [what the Eighth Amendment allows in terms of the death penalty], 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.[98]
>
> Breyer: 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 . . . . If in a "cruel and unusual punishment" case . . . everyone in the world thinks [some]thing is at least worth finding out . . . [the court should consider that].[99]
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> Breyer: What do I read? . . . [Certainly not old English cases]. I read briefs. Those briefs frequently explain law with which I was not previously familiar . . . .
>
> . . . .
>
> . . . foreign law comes before us ever more frequently . . . [a]nd 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.[100]
>
> 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.[101]

The debate ended with Justice Breyer concluding: "[A]ll 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."[102]

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98. *A Conversation Between Scalia and Breyer*, *supra* note 85, at 529.
99. *Id.*
100. *Id.* at 536.
101. *Id.* at 540.
102. *Id.* at 541.

Justice Scalia added: "I think it's fine to conclude on something that we undoubtedly agree upon . . ." and the audience laughed.[103]

It is appropriate for me to conclude this part of my lecture with another quote from Justice Ginsburg. 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 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.'[104]

VI. INTERNATIONAL LAW MATTERS!

What I have described thus far is certainly interesting from an academic standpoint. But, the basic argument of my lecture today is that international law and foreign court decisions do actually influence U.S. Supreme Court decision-making in death penalty cases. The point is that our Supreme Court Justices have chosen to rely on international law as persuasive authority and have used it to support their conclusions in real cases. Here are some examples.

A very early illustration of the Court's reliance on international law is *Trop v. Dulles*.[105] 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."[106] In ruling that stripping a war time deserter of American citizenship was an invalid punishment under the 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."[107]

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103. *Id.*

104. Ginsburg, *supra* note 89, at 591.

105. 356 U.S. 86 (1958).

106. *Id.* at 100-01.

107. *Id.* at 102.

The 1977 case of *Coker v. Georgia*[108] confronted the issue of whether Georgia could execute a prisoner convicted of raping a sixteen-year-old "woman." Justice White, speaking for the Court, recognized in a footnote that "it is . . . not irrelevant . . . that out of 60 major nations of the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."[109] The Court followed international practice and prohibited Georgia from executing Coker.

Over twenty years later, in 1999, Justice 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 nineteen years and twenty-four years[110] on death row (the so-called "death row phenomenon").[111] According to Justice Breyer: "[a] growing number of courts outside the United

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108. 433 U.S. 584 (1977).

109. *Id.* at 596 n.10.

110. *See supra* notes 95-96 and accompanying text (discussing *Moore* and *Knight* cases).

111. 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." 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). "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." *Id.* at 69. On appeal, "Chessman argued that the length of his confinement constituted 'cruel and unusual punishment.'" *Id.* "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.* "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.

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 . . . ."[112]

After describing the many foreign cases and rulings used in his opinion (from England, India, Zimbabwe, and the European Commission on Human Rights) Justice Breyer summarized:

> Obviously this foreign authority does not bind us. After all, we are interpreting a 'Constitution for the United States of America'. . . [But] this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own . . . 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.'[113]

The modern era of Supreme Court use of international law begins with two cases from the 2002-2003 term of the Court, *Atkins v. Virginia* (2002)[114] and *Lawrence v. Texas* (2003).[115]

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."[116]

Lawrence v. Texas dealt with the non-Eighth Amendment issue of whether the Constitution protected the right of adults of the same sex to engage in voluntary intimate sexual activity (sodomy) free from criminal sanctions. In finding such a right (and overturning an earlier case, *Bowers v. Hardwick*,[117] that had held the opposite) a majority of the Court joined Justice Anthony Kennedy in placing international law at the center of the Court's opinion. The Court held that Lawrence's claim was consistent with "American values" shared with much of Western civilization; that many "nations . . . have [affirmed] the protected right of homosexual adults to engage in intimate, consensual conduct;" and that "the right the petitioners seek in

112. Moore v. Nebraska, 120 S. Ct. 459, 462 (1999); *Knight*, 120 S. Ct. at 462 (Breyer, J., dissenting).

113. *Knight*, 120 S. Ct. at 463-64 (Breyer, J., dissenting).

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

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

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

117. 478 U.S. 186 (1986).

this case has been accepted as an integral part of human freedom in many countries."[118]

Justice Scalia in dissent fired the first loud shot in what is now an open war among the Justices over the legitimacy of relying on foreign legal authorities. He protested:

> The *Bowers* majority opinion (overruled by *Lawrence*) 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.' [The] holding is likewise devoid of any reliance on the views of a 'wider civilization.' The Court's [new *Lawrence* opinion discussing] these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.[119]

The most recent word on the meaning of "cruel and unusual" in the death penalty substantive rights context came in a 2005 case, *Roper v. Simmons*.[120] Justice Kennedy's opinion in *Roper* found it unconstitutional in all cases to execute murderers who were under the age of eighteen at the time of their crime. He cited extensively to world legal opinions on the juvenile death penalty, as follows:

> [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.[121]
>
> [Yet], 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.[122]
>
> 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

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

119. *Id.* at 598.

120. 543 U.S. 551 (2005). *Baze v. Reese*, 128 S. Ct. 1520 (2008), was decided in April 2008 but dealt with constitutionally acceptable methods of execution (the "lethal cocktail injection" method) rather than constitutional limits on the use of capital punishment against certain types of crimes and criminals. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008), is an example of such a decision. *See infra* note 142 and accompanying text (discussing Justice Roberts' opinion in *Baze*).

121. *Roper*, 543 U.S. at 567; *see supra* notes 25-30 and accompanying text (describing role of domestic legislation establishing national consensus in favor of capital punishment in particular kinds of cases); *see also supra* notes 54-58 and accompanying text (highlighting broad-based rejection of death penalty at global level).

122. *Roper*, 543 U.S. at 575.

> punishment for crimes committed by juveniles under 18 . . . Parallel prohibitions are contained in other significant international covenants [Citing the International Covenant on Civil and Political Rights, Art. 6(5) at 175 (prohibiting capital punishment for anyone under 18 at the time of offense); American Convention on Human Rights; Pact of San Jose, Costa Rica, Art. 4(5); African Charter on the Rights and Welfare of the Child, Art. 5(3)].
>
> 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 . . . 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.[123]

Justice Kennedy emphasized:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions . . . .
>
> 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.[124]

Now, I must also acknowledge that not everything at the U.S. Supreme Court level is so positive from the abolitionist perspective. Two of the three death penalty cases on the Court's 2007-2008 docket, *Medellín v. Texas*[125] and *Baze v. Reese*,[126] resulted in rulings in favor of the death penalty.

The first, *Medellín v. Texas*, should be seen in the context of the reality that the American government, like many world powers, ignores international law whenever it feels that, to do so, is in the country's best interest.[127] The United States has taken reservations to major international treaties;[128] withdrawn

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123. *Id.* at 576-77.

124. *Id.* at 578.

125. 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).

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

127. *See* CLARKE & WHITT, *supra* note 3, at 23 (arguing United States ignores international law when it sees fit). "America's response to ratified treaties and to the establishment of international tribunals consistently reveals a selective embrace of absolute sovereignty; it is invoked . . . depending on whether U.S. interests are furthered by so doing." *Id.*

128. The most notorious of these reservations may be the U.S. reservation to the International Covenant on Civil and Political Rights that the United States expressly "reserves the right, subject to its Constitutional constraints, to impose capital punish-

from the jurisdiction of international human rights tribunals such as the International Court of Justice (I.C.J.) and the International Criminal Court;[129] for many years prior to *Roper v. Simmons* offered a deaf ear to world-wide objections to the execution of juveniles;[130] and completely ignored consistent state violations of the Vienna Convention on Consular Relations (Vienna Convention).[131] On this latter point, many Americans had hoped that the Supreme Court's disposition of *Medellín* would remedy this major violation of international law. The Court's refusal to do so in its March 25, 2008, decision in the case was, therefore, a major disappointment and a real set back in the fight to scale back the use of capital punishment in America.

Medellín v. Texas can be seen as an example of international law having no influence on American death penalty practices. The decision is a technical and complex one and I am not going to go into any detail on it. The basic holding was 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)*)[132] could not be enforced against the State of Texas by Presidential order.[133]

The Vienna Convention requires states and the federal government to advise foreign nationals held in custody in the United States on criminal charges of their right of access to their

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ment on any person . . . ." International Covenant on Civil and Political Rights, U.S. Reservations, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. No. 95-2, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976, *U.S. ratification* June 8, 1992), *available at* http://www2.ohchr.org/english/bodies/ratification/docs/DeclarationsReservationsICCPR.pdf.

129. *See* Letter from U.S. Secretary of State Condoleezza Rice to the United Nations Secretary General (Mar. 7, 2005), 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." *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A01.

130. 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 supra* note 57 (citing U.N. Convention on the Rights of the Child).

131. *See* CLARKE & WHITT, *supra* note 3, at 54-59 (discussing U.S. noncompliance with Vienna Convention).

132. 2004 I.C.J. 12 (Mar. 31).

133. Medellín v. Texas, 128 S. Ct. 1346, 1360-61 (2008).

country's embassy and its officials.[134] (Legal advice from those officials is often crucial to a fair trial for these defendants). Medellín and others were not given these rights. Through various appeals and habeas corpus petitions, Medellín, with the support of his home country, Mexico, tried to remedy this violation of the Vienna Convention in American courts . . . and lost.

Mexico sued the United States in the International Court of Justice which found a violation of the Vienna Convention and ordered the United States to review Medellín's conviction and sentence.[135] President Bush accepted the judgment and ordered Texas to comply.[136] Texas refused. When the case reached the U.S. Supreme Court, the Court ruled that the Vienna Convention was not a "self-executing" treaty which, therefore, required Congress to pass further legislation before this I.C.J. ruling (or any I.C.J. ruling) could become enforceable American law.[137]

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

135. *Avena*, 2004 I.C.J. at 71-73.

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

137. *Medellín*, 128 S. Ct. at 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. This means 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 I.C.J. judgment and Congress had not done so. "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 I.C.J. 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 I.C.J. judgments, allowing political branches to determine whether and how to comply with I.C.J. decisions. Noncompliance with an I.C.J. judgment through the exercise of a Security Council veto has always been regarded as a viable option by the President and Senate in light of the terms of the U.N. Charter, Optional Protocol, and I.C.J.-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.* Based on the ruling in *Medellín* in March of 2008, the State of Texas scheduled Mr. Medellín's execution for August 5, 2008. In response, in June of 2008, Mexico filed with the International Court of Justice 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*

As a result, the I.C.J.'s judgment was unenforceable in Texas and the scheduling of Medellín's execution could proceed.

Yet, international law did have some indirect influence on the majority decision. Justice Roberts' opinion cited the practices of 47 nations that signed the Vienna Convention Optional Protocol, and those of 117 countries that are parties to the Vienna Convention, of not treating I.C.J. judgments as automatically binding in domestic courts.[138] The Court seemed to be saying "see, we are just doing what other countries do (and we are not going to let some international body tell us what we can or cannot do when it comes to capital punishment)!"

Justice Breyer dissented and observed that the majority "takes a wrong turn . . . [by rejecting the I.C.J.'s] . . . workable dispute resolution procedures . . . [i]n a world where commerce, trade, and travel have become ever more international, that is a step in the wrong direction."[139] "[T]oday's holdings make it more difficult to enforce judgments of international tribunals . . . [and] weaken that rule of law for which our Constitution stands."[140]

Baze v. Reese,[141] decided on April 16, 2008, is not a good sign for future death penalty challenges. Only two Justices, Ginsburg and Souter, dissented from the Court's holding that Kentucky's "lethal cocktail" injection method of executing prisoners did not violate the Eighth Amendment. International law played no major part in the decision, and probably could not have. However, even here the justices were willing to bring international practices–if not international law–into the court's

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judgment. 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 I.C.J. to reaffirm the international law obligations of the United States. *Id.* On July 16, the I.C.J. 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.* On August 6, 2008, Texas executed Medellín without any further review of his case.

138. *Medellín*, 128 S. Ct. at 1349.

139. *Id.* at 1389 (Breyer J., dissenting).

140. *Id.* at 1391 (Breyer J., dissenting).

141. 128 S. Ct. 1520 (2008).

analysis. Justice Roberts referred approvingly to the recommendation of the Royal Dutch Society for the Advancement of Pharmacy approving use of the same or similar drugs used for executions in Kentucky in cases of physician-assisted suicide in Holland![142]

The decision in *Baze* means that the 2007-2008 moratorium on executions, put in place during the pendency of that case, is now lifted, executions are being scheduled, and they will soon be carried out.[143]

It seems rather clear that after *Baze* and *Medellín* the legal fight over capital punishment will continue to be over expansion of the death penalty, as illustrated by the *Kennedy* case, rather than over Justice Steven's conclusion, stated in his concurrence in *Baze*, that the death penalty is no longer supportable in law or policy and should therefore be abolished.[144]

The last case I will talk about today, and the third substantive capital punishment case before the Court this year, is *Kennedy v. Louisiana*.[145] It has been briefed and argued and we are waiting for a decision. As noted earlier, the case involves reconsideration of *Coker v. Georgia*[146] with reference to a law that makes rape of a child under twelve a capital crime in Louisiana. Just as Justices Breyer and Kennedy asked them to do, lawyers for Petitioner Kennedy cited in their brief updated evidence on international practices regarding capital punishment and rape.

According to the Brief:

> 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. 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. The handful of other countries

142. *Baze*, 128 S. Ct. at 1535. It is noteworthy that the majority in *Baze* found that the "State's legitimate interest in providing for a quick [and] certain death . . ." was advanced by approval of drugs that veterinarians in the United States will not use in euthanizing animals. *Id.* at 1524.

143. *See* DPIC, Death Penalty in Flux, *supra* note 33 (reporting executions have resumed in United States and, as of October 15, 2008, thirteen additional executions have been carried out).

144. Baze v. Reese, 128 S. Ct. 1520 (2008) (Stevens J., concurring) (calling capital punishment "the pointless and needless extinction of life").

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

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

> 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.[147]

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. In some countries, under Shari'a, survivors of rape are themselves subjected to significant corporal punishment.

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 "[s]hall not be extended to crimes to which it does not presently apply."[148] 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.[149]

This emphasis in the briefs carried over to oral argument (April 16 of 2008). The importance of international law was reflected in 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 "What 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."[150] Counsel conceded that treason is regarded in the United States and around the world as equivalent in seriousness to murder.[151]

Next, Justice Stevens referred to an amicus brief filed by leading British law associations, scholars, Queen's Counsel, and former Law Lords, and noted that it suggested that there was a

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147. Brief for Petitioner at 37-38, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343).

148. *Id.* at 36-37.

149. *Id.* at 37.

150. Transcript of Oral Argument at 20, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

151. *Id.* at 21. But note that treason has the unique status of constituting an offense against the right of a government to exist and protect itself.

"sort of correspondence" between international law and "our evolving standards of decency" and asked how international trends against expanding capital punishment applied to the case.[152] Counsel for Louisiana responded by seemingly denying the existence of such a trend. She asserted that twenty-eight countries "permit the death penalty for rape" and argued that "there are no treaties" that currently prevent the United States from executing child rapists.[153]

Finally, later in the argument, counsel for Texas (supporting respondent Louisiana as amici curiae) referred to the Law Lords' brief and asserted that they made the same unacceptable arguments that had been made in *Medellín*. Counsel characterized those arguments as stating that "the United States — that this Court has no ability [no right] to determine that . . . [certain crimes are] subject to the death penalty . . . . "[154] and that the United States is foreclosed from ever doing this (punishing rape of a child with the death penalty) because of "a treaty the United States has never ratified" and because "other nations have made [contrary] determinations under their law."[155] In other words, international law and practice should be ignored.

Counsel's position in *Kennedy*, that international law should not be used to dictate death penalty policy for Louisiana or the United States, may or may not ultimately persuade the Court.[156] But these questions, and the answers to them, make it

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152. *Id.* at 41.

153. *Id.* at 42.

154. *Id.* at 53.

155. *Id.* at 55.

156. The Court's decision in Kennedy was delivered on June 25, 2008. A bare majority held that the Eighth Amendment prohibits capital punishment for the crime of child rape. The Court's opinions were not influenced by arguments relating to international law or the practices of foreign nations. Justice Kennedy's opinion for the 5-4 majority contained only one parenthetical reference to international law. Citing *Edmund v. Florida*, 458 U.S. 782, 788 (1982), he noted that the Supreme Court considers the "historical development of the punishment at issue, legislative judgments, *international opinion*, and the sentencing decisions juries have made" when evaluating the existence of a societal consensus for or against a particular form of capital punishment. *Kennedy*, 128 S. Ct. at 2650 (emphasis added). However, Kennedy also noted that the Court's inquiry does not end there; "[w]hether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Id.* This international silence may be surprising for such an internationalist Justice, but the traditional structure of the majority's analysis and its emphasis on basic Eighth Amendment principles left little room, or need, for reliance on foreign law.

abundantly clear that international law continues to matter in constitutional cases before the Court.

The *Kennedy* case is especially important because of the nature of the issue presented. As a matter of decisional law, the Court has never allowed capital punishment for crimes against individuals other than for the crime of intentional murder. If a majority permits expansion of capital punishment to child rape cases, the abolitionist cause will be further set back and the recent trend towards restriction, and its concomitant respect for world opinion against capital punishment, will be reversed.[157]

VII. CONCLUSION

When I started preparing for this lecture I allowed myself the luxury of thinking that the time had come for a direct legal challenge to *Furman v. Georgia* and its rule that the death penalty is accepted by American society and can be constitutionally imposed. I can no longer indulge that thought.

It is true that new and important restrictions on the death penalty have been established by the United States Supreme Court, that international law and world opinion have significantly contributed to this process, and that as many as five Justices on the Court are on the record as welcoming further challenges through this process. But, *Furman v. Georgia*, and its rule that state execution is legal, is not going to be overruled any time soon.

Therefore, let me add these final random remarks:

(1) Justice Breyer's comments at the American University "conversation" make it clear that American lawyers have an obligation, at all court levels, to continue to use international law, foreign court decisions, and global political actions (like the vote at the UN) when litigating for Constitutional and statutory limits on the death penalty. There are many important matters that should be considered by the court, including: the Constitutionality of executing the mentally ill; the continuing problems of racial discrimination that were unsuccessfully challenged in *McCleskey v. Kemp*;[158] challenges to the "death row phenome-

157. *See supra* notes 48-52 and accompanying text (detailing recent trend toward limiting scope of death penalty).

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

non" that were denied court review in *Knight v. Florida*; and flaws in jury selection and jury deliberation processes.

(2) 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. Why hasn't there been a firestorm of criticism of China's use of the death penalty equal to that over political repression in Tibet? Will the 2008 Olympic Games bring attention to China's abusive reliance on capital punishment? Public actions by members of this audience–in Scandinavia, Europe, and the United States–to fight for abolition will be important to this process.

(3) The death machine of state execution could be shut down–quickly–by legislative action. On the basis of cost alone,[159] state legislatures might be convinced that the number one issue for Americans–our horrible economy–compels elimination of our multi-million dollar capital punishment systems. And, if, for what ever reason, Congress were to pass an omnibus bill comprehensively eliminating the death penalty as a sentence for all federal crimes, and substituting life imprison without parole in its place, the death penalty universe in the country would change overnight.

(4) We need more decisions like the South African case of *State v. Makwanyane*[160] and the Canadian judgment in *Minister*

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159. The DPIC 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 Apr. 8, 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 OF THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA, S. Res. 44, 2003-04 Reg. Sess., at 69-70 (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, Apr. 23, 2008.

160. Constitutional Court of the Republic of South Africa, 1995, Case No. CCT/3/94, [1995] 1 LRC 269. *See generally* Mark S. Kende, *The Constitutionality of the Death Penalty: South Africa as a Model for the United States*, 38 GEO. WASH. L. REV. 209 (2006) (advocating South Africa's death penalty stance should serve as model).

of Justice v. Burns[161] that reject capital punishment by comprehensively setting forth the myriad practical, legal, and moral problems created by modern death penalty laws.

(5) Finally, it is amazing, and incredible, that no candidate for President has said one word–publicly, in a debate, in answer to questions, in campaign materials–about capital punishment or the damage American use of the death penalty has caused us in the international community.[162] Abolitionists generally look to the Democratic party for support in their fight against the death penalty. Therefore, if Barack Obama is the "change" candidate he says he is, we American lawyers and law professors must find a way to force the issue into his campaign, and into public consciousness. World leaders and individual citizens like you can do so as well.

Let me return to the image I used in the introduction to this lecture. It is never too late for the snow of protest against capital punishment to fall on the heavy branch of American death penalty law. I hope that all of you will do your part to see that the branch breaks!

Thank you.

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161. 2001 Carswell BC 273, 2001 SCC 7, 1 S.C.R. 283.

162. 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 then that does not violate our Constitution." On this general subject, he went on, "I have said repeatedly that I think the death penalty should be applied in very narrow circumstances for the most egregious of crimes." 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 crimes. 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." *Justices Reject Death Penalty for Child Rapists*, USA TODAY, June 26, 2008, at 4A.