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Paying "Decent Respect" to World Opinion on the Death Penalty

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* Harold Hongju Koh, Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale University; U.S. Assistant Secretary of State for Democracy, Human Rights, and Labor, 1998-2001. This essay grows out of the 2001 Edward L. Barrett, Jr. Lecture on Constitutional Law, delivered at the University of California, Davis School of Law on November 7, 2001. It arises, in part, from my work as counsel for *amici curiae* Diplomats Morton Abramowitz, et al., before the U.S. Supreme Court in *McCarver v. North Carolina*, No. 00-8727 (U.S. cert. dismissed Sept. 25, 2001) and *Atkins v. Virginia*, No. 00-8452 (U.S. argued Feb. 20, 2002). It also draws upon presentations given to the Yale Law School Schell Center Human Rights Workshop and the Connecticut Bar Foundation Symposium on the death penalty, and from shorter articles published in the *New York Times* and on the Project Syndicate website, www.project-syndicate.org. I am deeply grateful to Dean Rex Perschbacher, Associate Dean Kevin Johnson, and many other friends for their gracious hospitality during my visit to King Hall: Judge David F. Levi, Justice Cruz Reynoso, Professors Bill Ong Hing, Anupam Chander, Madhavi Sunder and Tobias Wolff. Akhil Amar, Sandra Babcock, Robert Burt, Ray Bonner, Paige Chabora, Deena Hurwitz, Paul Kahn, Jenny Martinez, Jim Silk, Kate Stith and Strobe Talbott provided welcome insights, and J. Rebekka Bonner, Kris Kavanaugh and Jessica Sebeok of Yale Law School gave excellent research assistance. I dedicate this essay to Mary-Christy Fisher.

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Throughout his career, your founding Dean, Ed Barrett, has been a nationally renowned scholar of constitutional law and criminal procedure.¹ In his honor, my subject today seeks to combine his two fields with my own: international law and human rights. The question I want to ask is whether we, as Americans, pay decent respect to the opinions of humankind in our administration of the death penalty. If, as I believe, we do not, what significance should this have for the constitutionality of capital punishment under the Eighth Amendment to the U.S. Constitution?

Let me answer these questions by telling a tale in three acts: first, the story of our country's uneasy embrace of international law as part of our law; second, the story of efforts to abolish the death penalty as part of the law in our and other countries; and third, the story of my own personal struggle — as a citizen, a lawyer, and a human rights policymaker — to understand the legality of the death penalty under U.S. and international law.

In the final act, all three stories come together, for the United States' administration of the death penalty and international human rights law are on a collision course that may ripen as early as 2002, when the U.S. Supreme Court decides a case called *Atkins vs. Virginia*.² The question in

¹ During his life, Ed Barrett has journeyed across this remarkable nation of ours — from Kansas to Utah, from Berkeley to Washington, D.C. — where, as special assistant to the Attorney General of the United States, his principal assignment was to assist in the development of the first civil rights legislation in this country since the Civil War. He then returned to Davis, California, where he became founding dean of U.C. Davis School of Law in 1964. Even after he moved to Oregon, where he now resides, we had the pleasure of serving together for several years on the editorial board of the Foundation Press. I am touched and honored that he and his wife Beth should cheerfully drive all the way from Oregon to be present at this lecture that bears his name.

² See *Atkins v. Virginia*, No.00-8452 (U.S. argued Feb. 20, 2002), *cert. granted*, 122 S. Ct. 29 (Oct. 1, 2001).

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that case is whether the Eighth Amendment to the U.S. Constitution forbids the execution of persons with mental retardation.³ I believe, and in that case I submitted an *amicus curiae* brief arguing, that the Eighth Amendment does so forbid.⁴ My reasoning is simple: when one factors in international law and international practice, and pays decent respect to world opinion, it becomes clear that it is both "cruel" and "unusual," in the ordinary senses of both words, for governmental officials of the United States to put to death an adult who possesses the mind of a child.

I. INTERNATIONAL LAW AS PART OF OUR LAW

Let me begin with my governing text, which you will recognize as the very language that gave birth to our country:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation. . . . [L]et Facts be submitted to a candid world.⁵

Why did the leaders of the fledgling United States feel not just the need, but also the obligation, to look outside our borders to explain their conduct? The answer is simple: the colonies wanted to be viewed as a nation, not just as a property. And so the Framers spoke to what they hoped would be a jury of their peers: other sovereign states. In seeking liberation from England, the Framers both drew inspiration from the European Enlightenment and made appeal to a global audience. Thus, out of a decent respect for the opinions of mankind, the Framers let facts be submitted to a candid world.

Significantly, because the United States had no law of its own at the time, the Framers necessarily looked to the Law of Nations, which had a concrete and well-understood meaning in the courts of the American

³ See *id.* (amending Sept. 25, 2001 order and limiting writ of certiorari to question "Whether execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment?").

⁴ See *Atkins v. Virginia*, No. 00-8452, 122 S. Ct. 642 (Dec. 3, 2001) (granting motion of *amicus curiae* filers in *McCarver v. North Carolina*, No. 00-8727, to have their *amicus curiae* briefs considered in support of petition in *Atkins*); Brief of Amici Curiae Diplomats Morton Abramowitz et al. at 1-21, *McCarver v. North Carolina*, 2000 U.S. Briefs 8727 (N.C. June 8, 2001).

⁵ THE DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776) (emphasis added).

colonies.⁶ As early as the second century, the Romans had spoken of a law of nations — a *jus gentium* “common to all men.”⁷ Sixteenth and seventeenth century legal scholars, such as Hugo Grotius, had viewed the law of nations as a universal law binding upon all mankind. William Blackstone described the law of nations as “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world . . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.”⁸ Notice that his definition broadly embraced what we now call “transnational law:” private as well as public, domestic as well as international, state and individual transactions.⁹ This definition encompassed not simply the so-called “law of states” and interstate relations — for example, rules relating to passports and ambassadors — but also the “law maritime,” affecting prizes, shipwrecks, admiralty, and the like, and the “law merchant” (*lex mercatoria*) applicable to transnational commercial transactions.

Why, then, did nation-states obey the law of nations? In other work, I have argued that nations obey global law when they choose, through various channels of transnational legal process, to internalize global rules into domestic law.¹⁰ This internalization happened with respect to the law of nations in both England and the United States during the colonial era. As England became the preeminent global power, the law of nations was domesticated first into English common law, then applied to the American colonies, then eventually incorporated into U.S. law. With American independence, the law of nations became part of the common law of the United States. In John Jay’s words, “the United States had, by taking a place among the nations of the earth, become amenable to the

⁶ This discussion draws upon Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2351-53 (1991).

⁷ MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1 n.2 (1988) (citing *The Four Commentaries of Gaius on the Institutes of the Civil Law*, 1 THE CIVIL LAW 81 (Scott ed. 1973)).

⁸ *Id.*; 1 WILLIAM BLACKSTONE, COMMENTARIES *66 (emphasis added).

⁹ Judge Philip Jessup defined “transnational law” as “all law which regulates actions or events that transcend national frontiers. . . [and including] [b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories.” PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

¹⁰ See generally Harold Hongju Koh, 1998 Frankel Lecture: *Bringing International Law Home*, 35 Hous. L. Rev. 623 (1998) [hereinafter *Frankel Lecture*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) [hereinafter *Nations Obey*].

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law of nations."¹¹

Obeying the law of nations was considered part and parcel of paying decent respect to the opinions of mankind. For that reason, the Federalist Papers repeatedly referred to the law of nations' role in U.S. courts.¹² The Continental Congress resolved to send a diplomatic letter stating that the United States would cause "the law of nations to be most strictly observed."¹³ In the drafting of the Constitution itself, in Article I, the Framers expressly gave Congress the power "[t]o define and punish Piracies . . . committed on the high Seas, and Offences against the Law of Nations."¹⁴ Article III expressly extended the judicial power of the United States not simply to cases arising under the Constitution and laws of the United States, but also to a large class of international cases — particularly cases arising under treaties, those affecting "Ambassadors, other public Ministers and Consuls," admiralty and maritime cases, and cases involving foreign parties.¹⁵

All three branches of the federal government became channels for internalizing the law of nations into the nascent American law. In his 1793 letter to French Foreign Minister Genet, then-Secretary of State Thomas Jefferson heralded the law of nations as "an integral part . . . of the laws of the land."¹⁶ As part of the First Judiciary Act, Congress enacted the Alien Tort Claims Act, which gave the district courts jurisdiction "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Over the last twenty years, this statute has been the subject of extensive civil litigation against human rights violations in U.S. courts.¹⁷ In the late eighteenth century, Congress passed statutes criminalizing such law of nations

¹¹ *Chisholm v. Georgia*, 2 Dall. 419, 474 (1793); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.").

¹² See, e.g., THE FEDERALIST NO. 3, at 14-16 (John Jay), NO. 42, at 271-73 & NO. 53, at 351 (James Madison), NO. 80, at 517 & NO. 83, at 548-49 (Alexander Hamilton) (Modern Library ed. 1937).

¹³ 14 JOURNALS OF THE CONTINENTAL CONGRESS 635 (W. FORD ED. 1909).

¹⁴ U.S. CONST. art. I, § 8, cl. 10.

¹⁵ U.S. CONST. art. III, § 2, cl. 1.

¹⁶ Letter from Thomas Jefferson, Secretary of State, to M. Genet, French Foreign Minister (June 5, 1793), in 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 10 (1906); see also 1 Op. Att'y Gen. 27 (1792), reprinted in 1 OPINIONS OF THE ATTORNEYS GENERAL 27 (Dennis & Co., Inc. 1945) ("The law of nations, although not specifically adopted by the constitution or any municipal act, is essentially a part of the law of the land.").

¹⁷ See Alien Tort Claims Act ch. 20, sec. 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2002)).

violations as piracy and assaults upon ambassadors.¹⁸ American courts regularly decided cases under the law of nations, particularly those involving piracies, offenses against the law of nations, foreign sovereign immunity, and principles of war and neutrality.¹⁹ In all of this practice, the term “international law” was never used, for the simple reason that Jeremy Bentham did not coin that phrase until 1789.²⁰ But long before the modern period, U.S. courts routinely applied international law in domestic cases out of a decent respect to the opinions of mankind.

Throughout the nineteenth century, American courts continued to construe and apply the unwritten law of nations as part of the “general common law,” particularly to resolve commercial disputes, without regard to whether it should be characterized as federal or state.²¹ And so, by 1895, Justice Gray could proclaim in *Hilton v. Guyot*:²²

International law, in its widest and most comprehensive sense — including not only questions of right between nations, governed by what has been appropriately called the ‘law of nations’ but also questions arising under what is usually called ‘private international law,’ or the ‘conflict of laws,’ and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation — is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.²³

The Supreme Court clearly saw the judicial branch as the central channel for making international law part of U.S. law. For when “there is no written law upon the subject,” Justice Gray directed, “*the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights*

¹⁸ See Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113-14; Act of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 112, 118.

¹⁹ See, e.g., *The Peterhoff*, 72 U.S. (5 Wall.) 28, 54-56 (1866) (principles of war and neutrality); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 155 (1820) (piracy); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 125 (1812) (foreign sovereign immunity); *Republica v. De Longchamps*, 1 U.S. (1 Dall.) (1784) (attacks upon ambassador).

²⁰ J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 296-97 (J. Burns & H. Hart eds. 1970).

²¹ See generally William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984) (discussing role of general common law in federal courts in nineteenth century).

²² 159 U.S. 113 (1895).

²³ *Id.* at 163.

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of parties to suits regularly brought before them."²⁴ That language strongly recalls the cadences in *Marbury vs. Madison's* command that "[i]t is emphatically the province and duty of the judicial department to say what the law is," a directive that nowhere limited the judiciary's law-declaring function to cases involving domestic law.²⁵ To the contrary, within a year after writing *Marbury*, Chief Justice John Marshall ruled in the famous *Charming Betsy* case that "an act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains . . ."²⁶ Eleven years later, he further clarified that absent a contrary statute, "the Court is bound by the law of nations which is a part of the law of the land."²⁷

As the twentieth century opened, Justice Gray repeated almost verbatim his words from *Hilton* in the now-famous case of the *The Paquete Habana*: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."²⁸ As I have chronicled elsewhere,²⁹ the U.S. courts have become less accepting of international law in later years. In the beginning, American judicial notice of the law and practice of other nations was not simply originalist, but internalized. The original design and history of our courts envisioned that they would not merely accept, but would actively pursue, an understanding and incorporation of international law standards out of a decent respect for the opinions of mankind.

II. THE DEATH PENALTY AS PART OF OUR LAW

That brings me to the second part of my story: the international history of the death penalty. For if the early American Republic repeatedly looked for guidance to international law and foreign opinion, why did the Republic not outlaw the death penalty? Again, the reason was simple. In 1789, when the United States adopted the Eighth Amendment's ban against cruel and unusual punishments, the sentence

²⁴ *Id.* (emphasis added).

²⁵ 5 U.S. (1 Cranch) 137, 177 (1803); see also Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1824 (1998) (describing judicial branch as channel of internalization of international norms into United States law).

²⁶ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

²⁷ *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

²⁸ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

²⁹ See Koh, *Transnational Public Law Litigation*, *supra* note 6, at 2356-64.

of death was considered neither cruel nor unusual worldwide.³⁰ To the contrary, the practice had been widespread internationally for generations.³¹

During the sixteenth century, the British Crown alone executed tens of thousands by such shocking means as boiling, burning at the stake, or drawing and quartering and for such "offenses" as marrying a Jew and not confessing to a crime. By the 1700s, more than two hundred crimes had been declared punishable by death in Britain, including such minor offenses as stealing, cutting down a tree, and robbing a rabbit warren.³² However, a safety valve ultimately emerged: the British commitment to the civil jury. Jurors demanded that the punishment fit the crime, and so tended to acquit in cases where too harsh a punishment was sought. In response, fewer crimes were declared "death-eligible," until by the mid-nineteenth century, the death penalty had been eliminated for nearly half of the crimes originally punishable by death.³³

When the British colonized America, they brought capital punishment with them. Early American law punished as capital crimes such offenses as idolatry, blasphemy, adultery, and of course, witchcraft.³⁴ But in the 1700s, an American abolitionist movement arose, inspired by the writings of many of the same European Enlightenment theorists who had inspired the Declaration of Independence, the Bill of Rights and the modern international human rights movement. Montesquieu, Voltaire and Bentham, and especially Cesare Beccaria's 1767 essay, *On Crimes and Punishment*, gave abolitionism new momentum and helped spur the abolition of the death penalty in Austria and Tuscany.³⁵ Significantly, Thomas Jefferson, the author of the Declaration, introduced a nearly successful bill to revise Virginia's death penalty laws so that capital

³⁰ The very ban upon "cruel and unusual punishment" originated in the English Bill of Rights, which was a product of the Glorious Revolution of 1688. See Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215, 215 n.1 (1992).

³¹ For histories of the death penalty going back to Hammurabi's time, see William A. Schabas, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 3-6 (2d ed. 1997) and Michael H. Reggio, *History of the Death Penalty, in SOCIETY'S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY* 1-11 (Laura Randa ed., 1997).

³² Reggio, *supra* note 31, at 3.

³³ *Id.* at 3.

³⁴ *Id.* The first recorded execution in the American colonies was that of an alleged traitor in Virginia in 1608. Four years later, Virginia's governor implemented laws that imposed the death penalty for minor offenses such as stealing grapes and killing chickens. *Id.*

³⁵ CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (Henry Paolucci trans., Bobbs-Merrill 1963) (1764); PHILIP E. MACKEY, *VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787-1975*, at 64 (1976); Schabas, *supra* note 31, at 5.

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punishment could be used only for the crimes of murder and treason. Other signers of the Declaration, including Benjamin Rush, Benjamin Franklin, and William Bradford, succeeded where Jefferson failed, prodding Pennsylvania to become the first state to repeal the death penalty for all offenses except first-degree murder.³⁶ During the nineteenth century, Michigan became the first state to abolish the death penalty for all crimes except treason, followed by Rhode Island and Wisconsin, which abolished the death penalty for all crimes.³⁷ Elsewhere in the world, such countries as Venezuela, Portugal, Netherlands, Costa Rica, Brazil, Romania, Italy, Norway and Ecuador followed suit.³⁸

Given this trend, why did the death penalty survive? The short and chilling answer appears to be *war*. History suggests that the onset of war, and the attendant sense of national threat, tends to increase dramatically the American public's tolerance for the death penalty. Obviously, this observation is a cautionary tale given the post-September 11 period in which we now live. During the Civil War, opposition to the death penalty declined, with most available human rights energy being channeled instead toward the anti-slavery movement. But in the early twentieth century, the abolitionist movement revived. From 1907 to 1917, six states abolished the death penalty and three others limited it to exceptional offenses, such as treason and first-degree murder of certain law enforcement officials. Again, however, war intervened. Shortly after the United States entered World War I, five of the six abolitionist states reinstated their death penalty.³⁹ More executions took place nationwide during the 1930s than during any other decade in American history, an average of 167 per year.⁴⁰

The prolonged, bloody horror of World War II and the Holocaust triggered a global revulsion against death that helped prompt the rise of the international human rights movement. The Universal Declaration of Human Rights, adopted in 1948, proclaimed in absolutist terms that "[e]veryone has the right to life, liberty and security of the person," language arguably in tension with government imposition of the death

³⁶ ROBERT M. BOHM, *DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 3-4 (1999).

³⁷ *Id.* at 5.

³⁸ Roger Hood, *Introduction, The Importance of Abolishing the Death Penalty*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 10 (Tanja Kleinsorge & Barbara Zatlökal eds., 1999); Schabas, *supra* note 31, at 6.

³⁹ For the nineteenth and early twentieth century history of American abolitionism, see Bohm, *supra* note 36, at 4-7.

⁴⁰ *Id.* at 7.

penalty.⁴¹ Although the Soviets in particular pressed for a worldwide ban, the Universal Declaration's framers finally agreed that it was politically impossible simply to mandate elimination of the death penalty worldwide in all of its manifestations.⁴² Instead, the International Covenant on Civil and Political Rights, the treaty designed to implement the civil and political rights provisions of the Declaration, sought to constrain use of the death penalty by imposing two requirements. First, the death penalty can be applied only in conjunction with strict due process requirements. Second, the death penalty is subject to the absolute limitation that the "sentence of death shall not be imposed for crimes committed by *persons below eighteen years* of age and shall not be carried out on pregnant women."⁴³

During the postwar period, a *de facto* moratorium on the death penalty took effect throughout most of Western Europe. The European members of the post-war Axis, Italy and Germany, abandoned the death penalty in 1944 and 1949, respectively.⁴⁴ By 1962, only Great Britain, France, Greece, Ireland, Spain, and Turkey still carried the penalty on statute books. Over the next four decades, all of them foreswore use of the penalty. Two regional treaties drafted during this era — the European Convention on Human Rights and the American Convention on Human Rights — expressly protected the right to life, but initially tolerated the death penalty, so long as this punishment was provided by national legislation and later confirmed by a court of law.⁴⁵ But only four years after the European Convention entered into force, experts in the Council of Europe pressed to study the problem of capital punishment in Europe. By the late 1970s, the Committee of Ministers of the Council of Europe began debating whether an additional protocol abolishing the

⁴¹ Universal Declaration of Human Rights art. 3 (Dec. 10, 1948), *available at* <http://www.amnesty.ie/about/udhr.shtml>.

⁴² Although many representatives had expressed sympathy for abolishing capital punishment, and several of their own countries had done so, most agreed with the Human Rights Commission's decision to state the general principle without taking an explicit position on abortion, euthanasia, or the death penalty. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 152 (2001).

⁴³ International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 6(5), 999 U.N.T.S. 171, 175 (entered into force March 23, 1976) [hereinafter ICCPR] (emphasis added), *available at* <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>. At this writing, more than 140 countries have ratified the ICCPR, including the U.S., which ratified the Covenant in 1992, but with an explicit reservation to Article 6.

⁴⁴ Hood, *supra* note 38, at 10.

⁴⁵ Schabas, *supra* note 31, at 227-28, 273.

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punishment should be adopted.⁴⁶ By the 1980s, three international protocols were drafted with the express goal of building an international norm favoring elimination of the death penalty: Protocol No. 6 to the European Convention on Human Rights, and its successors, the Inter-American Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty and the United Nation's Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.⁴⁷ Much of the world outside the United States thus came to internalize the norm against capital punishment through the process of treaty ratification.

In the United States, both public sentiment favoring capital punishment and the number of executions nationally declined strikingly during the Cold War. As the Cold War wore on, the number of executions worldwide dropped by nearly half, and by 1966, popular U.S. support for capital punishment had reached 42%, an all-time low.⁴⁸ American states stopped carrying out executions, with a decade-long judicially imposed moratorium on all executions in 1967. After the federal execution by hanging of Victor Feguer in Iowa in 1963, the federal death penalty went unimposed for nearly forty years.

This growing social internalization of a norm against the death penalty coincided, in 1958, with the Supreme Court's decision in *Trop v. Dulles*,⁴⁹ which pioneered a new interpretive mode for judicial incorporation of international standards into domestic law. Prior to *Trop*, the Court had occasionally noted when American legal rules paralleled those of other nations, particularly those with similar legal and social traditions.⁵⁰ But in *Trop*, the Court specifically held that the Eighth Amendment contained an "evolving standard of decency that marked the progress of a maturing society."⁵¹ In so holding, the Court expressly looked to

⁴⁶ Hans-Christian Kruger, *Protocol No. 6 to the European Convention on Human Rights, in THE DEATH PENALTY: ABOLITION IN EUROPE*, *supra* note 38, at 70.

⁴⁷ Because the Council of Europe now requires new members to undertake and ratify Protocol No. 6 as a condition of membership, the norm against the death penalty has been effectively internalized into domestic legal systems throughout Central and Eastern Europe. For the definitive discussion of the status of the abolitionist movement, see ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 7-55 (revised & updated ed. 1996).

⁴⁸ The number of executions fell from 1,289 executions in the 1940s to 715 in the 1950s, to only 191, from 1960 to 1976. A Gallup poll taken in 1966 showed popular support for the death penalty at only 42%. Bohm, *supra* note 36, at 9-10.

⁴⁹ 356 U.S. 86 (1958).

⁵⁰ See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (stating that "[p]olygamy has always been odious among the northern and western nations of Europe").

⁵¹ *Trop v. Dulles*, 356 U.S. at 101-02.

international practice and opinion to assess what constituted “evolving standards of decency” for Eighth Amendment purposes.

Although *Trop* was not itself a death penalty case, it provided a valuable approach to constitutional interpretation in death cases. For the next three decades, abolitionists argued — and the courts seriously considered — the view that even if the death penalty had been constitutional when the Republic began, “evolving standards of decency” — which reflected evolving international standards — increasingly rendered aspects of death penalty administration unconstitutional violations of the Eighth Amendment. While the Court primarily discerned the evolution of these standards by reference to the actions of state legislatures and juries, it regularly looked to international practices as well. The Court made clear that the Eighth Amendment’s bar against cruel and unusual punishment embodies broad evolving “concepts of dignity, civilized standards, *humanity* and decency,”⁵² while effectively acknowledging that contemporary standards of “*humanity*” must consider practices of nations other than our own.⁵³

In *Coker v. Georgia*,⁵⁴ for example, the Court determined that international practices regarding the death penalty for rape were relevant to “evolving standards” analysis. Five years later, in *Enmund v. Florida*, the Court noted that “the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”⁵⁵ In *Ford v. Wainwright*, the Justices noted “the natural abhorrence *civilized societies* feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution *simply offends humanity* is evidently shared across this Nation.”⁵⁶ Finally, in *Thompson v. Oklahoma*, the Court looked to international practices in determining that the death penalty was unconstitutional as applied to a fifteen-year-old.⁵⁷

The judicial turning point seemed to come in 1972. In *Furman v. Georgia*, by a vote of five to four, the Court applied the Eighth

⁵² *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

⁵³ As Justice Blackmun has noted, “if the substance of the Eighth Amendment is to turn on the ‘evolving standards of decency’ of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States.” Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 *YALE L.J.* 39, 48 (1994).

⁵⁴ 433 U.S. 584, 596 n.10 (1977).

⁵⁵ 458 U.S. 782, 797 n. 22 (1982).

⁵⁶ 477 U.S. 399, 409 (1986) (emphasis added).

⁵⁷ 487 U.S. 815, 830 (1988).

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Amendment to strike down Georgia's death penalty statute, which gave the jury essentially unfettered sentencing discretion.⁵⁸ By so saying, the Court effectively voided forty death penalty statutes, commuted the sentences of more than 600 death row inmates, and suspended the practical operation of the death penalty until existing statutes could be rewritten. One of the Justices who dissented in *Furman* was Harry Blackmun. In dissent, he wrote poignantly that "I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence for the death penalty," yet as a federal judge he felt duty-bound to uphold the democratically enacted law.⁵⁹

In response, capital punishment advocates rewrote some thirty-four death penalty statutes to provide that the death penalty could only be imposed with strict sentencing guidelines, bifurcated trials, automatic appellate review of convictions and sentence, and proportionality review. After another frenzy of litigation, the Supreme Court approved these new, "guided-discretion" statutes in 1976 in *Gregg v. Georgia*.⁶⁰ In January 1977, the ten-year national moratorium on executions ended with the execution of Gary Gilmore by firing squad in Utah, an execution that Gilmore not only did not challenge, but actually welcomed.⁶¹

III. COMING TO TERMS WITH EXECUTIONS: A PERSONAL STORY

At this point — the late 1970s — our nation's and the world's struggle with the death penalty started to converge with my own. When Gary Gilmore was executed eight months before I started law school, I gave his case only fleeting thought. During law school, I rarely discussed the

⁵⁸ 408 U.S. 238 (1972).

⁵⁹ *Id.* at 405 (Blackmun, J., dissenting). A quarter-century earlier, as a circuit judge, Justice Blackmun had declared that he was "not convinced of the rightness of capital punishment as a deterrent in crime." *Nomination of Harry A. Blackmun of Minnesota to be Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. on the Judiciary*, 91st Cong., 37, 59 (1970); see *Maxwell v. Bishop*, 398 F.2d 138, 153-54 (8th Cir. 1968). See generally Lynn E. Blais, *Simple Justice/Simple Murder: Reflections on Judicial Modesty, Federal Habeas and Justice Blackmun's Capital Punishment Jurisprudence*, 97 DICK. L. REV. 513 (tracing evolution of Justice Blackmun's views on death penalty).

⁶⁰ 428 U.S. 153; see *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976) (collectively referred to as *Gregg* decision). For a sensitive review of this period of constitutional turmoil, see ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 327-44 (1992).

⁶¹ *Gilmore v. Utah*, 429 U.S. 1012 (1976). Gilmore said in his last dictated open letter: "Capital punishment has been around since before recorded history. Death penalty is an actuality that comes and goes. It gets voted out, then gets voted back in. I'm not a proponent of it, neither am I exactly against it. I do believe it will always be part of mankind. . . . Personally, I was given a sentence that I did not seek. But when I got it, I took it serious and accepted it." ROBERT M. COVER, ET. AL., *PROCEDURE* 441 (1988).

death penalty nor, surprisingly, did I find it much discussed by other professors and students. To the extent that I thought about capital punishment, I probably favored it. If pressed to explain why, I would have offered some form of the three basic claims usually offered in support of the death penalty: *deterrence* — that it discourages future murders by the same and other perpetrators; *retribution* — that it is the only appropriate punishment for a crime as horrible as murder; and *closure* — that it is necessary to give both victims and society the peace of mind they need to go on with their lives.

Two years after law school, I spent a memorable year clerking for Supreme Court Justice Harry Blackmun. I saw in person how intensely uncomfortable the death penalty made him.⁶² That year made it painfully clear to me that Justice Blackmun had not fully reconciled his intense moral distaste for capital punishment with his judicial oath to uphold its administration. I recall no actual executions during my clerkship year, however, because *Furman* had commuted to life all death sentences pending in the lower courts, and death sentences issued post-*Gregg* were still undergoing state and federal habeas review.

In the fall of 1982, just months after my clerkship ended, an unexpected event deeply shook me. Early one evening, a man carrying a sawed-off shotgun robbed Mary-Christy Fisher, who is now my wife of eighteen years, in front of her Washington D.C. apartment. When she screamed, he shot at her, and the bullets grazed her head. Miraculously, she was not even seriously wounded. Witnesses identified the culprit, who was captured, swiftly tried, and ultimately convicted.

In my heart, I decided that if Christy had been killed, I would have wanted the culprit given strict due process and put to death. But when I told her this, she stunned me by begging me never to pursue the death penalty, even against a perpetrator who was undeniably guilty. She first rejected the notion that “an eye for an eye” was appropriate retribution. She believed that the government itself should not kill, and that we the people should not stoop to the level of murderers by taking lives. If someone had murdered her, she said, it would “make a mockery of forgiveness” to engage in reciprocal killing. Instead, she would vastly prefer that the killer be given a chance to rehabilitate, a possibility that an execution would preclude. Second, she rejected as unproven the

⁶² See EDWARD LAZARUS, CLOSED CHAMBERS 109 (1998) (“One cannot read Justice Blackmun’s [*Furman*] dissent, openly acknowledging the ‘temptation’ of his personal preferences, without recognizing how much he wanted to be persuaded to join the majority.”).

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argument about deterrence. If the death penalty were really such a deterrent, why did countries without the death penalty have lower rates of violent crime? We discussed an old English print I had once seen, which called the deterrence claim into question by showing pickpockets blithely stealing wallets at a London public hanging. Third, and finally, she made me question forever arguments based on "closure." For if the victim herself adamantly refused to have her attacker put to death, what standing did I, as her loved one, have to seek that remedy in the name of closure for myself? And if the victims and loved ones do not seek closure, what right or standing do prosecutors or politicians have to call for closure in their names? Christy deemed it false closure to redress the taking of a life by taking another. What might end pain for one family would simply open it for another. If she had been killed, she said, being responsible for another's death was not the way she wanted to be remembered.

My fiancée's narrow escape and my clerkship with Justice Blackmun started me questioning the death penalty, at just the moment that the national tide began moving the other way. Following *Gregg*, state executions proliferated, as the Court rejected successive challenges to the death penalty based on claims of race and class bias, the defendant's status as a juvenile, mental incapacity of the defendant, inadequate legal representation, and lack of consular notification for foreign defendants.⁶³

However, perhaps the most striking change in the Court's approach during that period was a shift in its Eighth Amendment method. In 1988, in *Thompson v. Oklahoma*, the Court held that the Eighth Amendment bars the execution of fifteen-year-old offenders.⁶⁴ Following the reasoning of *Trop v. Dulles*, Justice Stevens, writing for the plurality, evaluated the "civilized standards of decency" embodied in the Eighth Amendment in part by looking to the prohibition of the execution of minors by the Soviet Union and nations of Western Europe.⁶⁵ Justice Stevens took particularly careful note of the views of "other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community."⁶⁶ In addition, both the plurality and Justice O'Connor's concurrence found significant that three major international human rights treaties — including Article 68 of the Geneva Convention, which the United States had ratified — explicitly prohibited

⁶³ For an account of this period in the Court's history, see *id.* at 147-217.

⁶⁴ *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion).

⁶⁵ *Id.* at 830-31 & n.3.

⁶⁶ *Id.* at 830.

juvenile death penalties.⁶⁷

Justice Scalia, dissenting, denounced the plurality's reliance on international practice as "totally inappropriate." "[T]he views of other nations, however enlightened the Justices of this Court may think them to be," he argued, "cannot be imposed upon Americans through the Constitution."⁶⁸

In light of the history reviewed above, Justice Scalia's observation seems triply ironic. First, that history should have led a Justice avowedly devoted to originalism to look toward, not away from, international opinion, just as the Framers themselves had done. Second, far from "imposing" the views of other nations on Americans, an originalist reading of the Eighth Amendment that looked to international standards would acknowledge that the early Americans were not forced to accept the views of other nations; instead, we self-consciously *appealed* to those views in order to win global legitimacy for our fledgling republic. Third, in other settings, Justice Scalia has not hesitated to argue against interpreting U.S. law in a manner that "would conflict with principles of international law."⁶⁹

Two Terms later, by a narrow five to four majority, the Court held in *Stanford v. Kentucky* that, notwithstanding international opinion, the Eighth Amendment does not prohibit the execution of juvenile offenders who committed their crimes at age sixteen.⁷⁰ Justice Scalia's opinion announcing the Court's judgment applied the methodology of his *Thompson* dissent. In a footnote, he refused to examine the juvenile sentencing practices of other countries on the ground that "it is *American*

⁶⁷ See *id.* at 831 n.34 (citing American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 123, available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> (entered into force July 18, 1978)); *id.* at 851 (O'Connor, J., concurring) (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 3560, 75 U.N.T.S. 287, 330 (entered into force Oct. 21, 1950)). Justice O'Connor's concurrence invoked the United States' ratification of the Geneva Convention "to undercut any assumption that [recent congressional legislation has intended] to authorize the death penalty for some 15-year-old felons." *Id.* at 852 (O'Connor, J., concurring).

⁶⁸ *Id.* at 868 n.4 (Scalia, J., dissenting).

⁶⁹ For example, in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), Justice Scalia argued in dissent that an assertion of extraterritorial jurisdiction by Congress over antitrust defendants' foreign activity would be unreasonable, in violation of international law, and hence the Congress could not have intended to regulate it. *Id.* at 815, 818-19 (Scalia, J., dissenting) ("[T]his and other courts have frequently recognized that . . . statutes should not be interpreted to regulate foreign persons on conduct if that regulation would conflict with principles of international law.") (emphasis added).

⁷⁰ 492 U.S. 361 (1989).

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conceptions of decency that are dispositive."⁷¹ Justice Brennan, now writing in dissent for the four members of the *Thompson* plurality, countered "that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis."⁷² "Within the world community," Justice Brennan observed, "the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved."⁷³

During the same year, the Court also considered, in *Penry v. Lynaugh*, the constitutionality of executing persons with mental retardation.⁷⁴ In *Penry*, the Court declined to adopt a categorical rule barring such executions, holding instead that the Eighth Amendment permitted juries to determine on a case-by-case basis whether defendants with mental disabilities are sufficiently culpable to be sentenced to death. Justice O'Connor, who announced the judgment of the splintered Court, did not renounce the relevance of international standards. Instead, she asserted that "[t]he clearest and most reliable objective evidence of contemporary values [that mark the progress of a maturing society] is the legislation enacted by the country's legislatures."⁷⁵ At the time, only the federal government and sixteen states (two of which had enacted specific statutory bars and fourteen others that had rejected capital punishment completely) had decided against executing persons with mental retardation. Justice O'Connor concluded that the practice did not yet violate the Eighth Amendment, but acknowledged that a "national consensus against execution of the mentally retarded *may someday emerge* reflecting the evolving standards of decency that mark the progress of a maturing society" for purposes of the Eighth Amendment.⁷⁶

After *Stanford*, U.S. death penalty jurisprudence has proceeded largely without reference to the opinions of mankind. In the years since, the

⁷¹ *Id.* at 369 n.1 (emphasis in original). Although Justice O'Connor joined Part I of Justice Scalia's opinion in *Stanford*, which included his dismissive footnote, her concurrence made no comment upon it. Instead, she explicitly applied the *Thompson* standard and concluded that no national consensus yet forbid the imposition of capital punishment on sixteen- and seventeen-year-old offenders. She took pains to note, however, that "proportionality analysis," the Court's assessment of an offender's relative blameworthiness, must play a role in Eighth Amendment analysis. *Id.* at 382 (O'Connor, J., concurring).

⁷² *Id.* at 389 (Brennan, J., dissenting) ("Since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world, three of these in the United States.").

⁷³ *Id.* at 390 (Brennan, J., dissenting).

⁷⁴ 492 U.S. 302 (1989).

⁷⁵ *Id.* at 331.

⁷⁶ *Id.* at 340 (emphasis added).

Court's decisions have widened the gap between domestic and international practice. In *Johnson v. Texas*, for example, the Court upheld a law allowing Texas courts to sentence juvenile offenders to death without ever instructing the jury to consider the defendant's age as a circumstance mitigating against death.⁷⁷ In *Campbell v. Wood*, Justice Blackmun dissented from a denial of review of a state-sponsored hanging, arguing that "the only three jurisdictions in the English-speaking world that impose state-sponsored hangings are Washington, Montana, and South Africa."⁷⁸ Finally, in *Wills v. Texas*, Justice Blackmun again argued in dissent from denial of certiorari that execution of mentally retarded juvenile offenders violated evolving standards of decency.⁷⁹ Although the majority turned a deaf ear to each of these claims, outside the death penalty setting, the Court has chosen to cite the practices of other nations when they support the outcome the majority wishes to reach.⁸⁰

In 1994, just months before he announced his retirement, Justice Blackmun declared in *Callins v. Collins*⁸¹ that he could no longer uphold by law what he abhorred in morality:

From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.⁸²

In effect, Justice Blackmun declared, the line that he had tried to defend for twenty-two years — personal opposition to the death penalty, coupled with legal deference to it — was no longer defensible. He closed with a line that has haunted me ever since: "The path the Court has chosen lessens us all."⁸³ To take human life, he suggested, cheapens us as a society. Why should we continue in a practice that lessens us both

⁷⁷ See *Johnson v. Texas*, 509 U.S. 350, 373 (1993).

⁷⁸ 511 U.S. 1119, 1120 (1994).

⁷⁹ 511 U.S. 1097, 1100 n.2 (1994).

⁸⁰ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) ("In almost every State — indeed, in almost every western democracy — it is a crime to assist a suicide."); *id.* at n.8 (citing Canadian decision discussing provisions prohibiting assisted suicide in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France).

⁸¹ 510 U.S. 1141 (1994).

⁸² *Id.* at 1145-46.

⁸³ *Id.* at 1159.

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as a nation and in the eyes of the world?

In the years since, Justice Blackmun's opinion in *Callins* has been widely cited abroad, most prominently in various opinions of the South African Constitutional Court abolishing the death penalty in *State v. Makwanyane*.⁸⁴ But from the U.S. Supreme Court, the reaction to Justice Blackmun's opinion was resounding silence.⁸⁵ During the two years after Justice Blackmun's retirement, I had the honor of serving as his oral historian. Over the course of nearly forty recorded hours, we reviewed the evolution and intersection of his jurisprudence on both the death penalty⁸⁶ and the relevance of international law to U.S. law.⁸⁷ His views on both were best summarized in a speech that he gave to the American Society of International Law shortly before his retirement: "Taking international law seriously where the death penalty is concerned," he said, "draws into question the United States' entire capital punishment enterprise."⁸⁸

International law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishments.

. . . The drafters of the [Eighth] Amendment were concerned, at root, with "the dignity of man," and understood that "evolving standards of decency" should be measured, in part, against international norms.

. . . [I]nterpretation of the Eighth Amendment, no less than interpretations of treaties and statutes, should be informed by a decent respect for the global opinions of mankind.

I am confident . . . that at some point the courts and the country will come to appreciate that the execution of juvenile offenders — and

⁸⁴ 1995(6) BCLR 665 (CC).

⁸⁵ A computer-assisted search of Shepard's conducted on Lexis on April 25, 2002 indicates that, at this writing, no other Supreme Court Justice has yet cited to Justice Blackmun's opinion in *Callins*.

⁸⁶ For a thoughtful analysis of that evolution from *Furman* to *Callins*, see Malcolm L. Stewart, *Justice Blackmun's Capital Punishment Jurisprudence*, 26 HASTINGS CONST. L.Q. 271 (1998).

⁸⁷ For an analysis of Justice Blackmun's international jurisprudence, see Harold Hongju Koh, *Justice Blackmun and the "World Out There,"* 104 YALE L.J. 23 (1994).

⁸⁸ Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 46, (1994).

the imposition of the death penalty generally — is no more tolerable than other violations of international law.⁸⁹

In 1998, President Clinton nominated me as Assistant Secretary of State for Democracy Human Rights and Labor, a post in which I served from 1998 to 2001. As the U.S. government's chief human rights official, my job was to be both America's "plaintiff's lawyer" and its defense lawyer for human rights in both bilateral and multilateral fora. Before taking the job, I wondered whether I could publicly defend the legality of the death penalty. My initial view was that, whatever my moral beliefs, as an official sworn to uphold the Constitution and laws of the United States, I could defend the legality of the death penalty, so long as it was in fact administered — as *Gregg* and *Furman* required — according to exacting constitutional procedures. While I recognized that the United States stood increasingly among the minority of nations in its adherence to the practice, I did not believe that a customary norm of international law had yet formed condemning the practice.

As someone whose parents had immigrated to the United States more than fifty years ago in search of greater respect for human rights, I had become accustomed to thinking that America's human rights standards — like our economic and technological standards — set the standard for the world. In many respects that remains true. But in my travels as Assistant Secretary, I found that our continuing administration of the death penalty is a glaring exception to that rule. Simply put: *no other civilized, democratic government that has our commitment to human rights resorts to the death penalty in the way we do.*

The statistics alone are stunning. Over 3,048 people were executed worldwide in 2001, more than twice the total of 1,457 executions documented in 2000. Just four countries — China, Iran, Saudi Arabia, and the United States — conducted ninety percent of these executions.⁹⁰ The United States has carried out more executions of juvenile offenders since 1989 than any country in the world. Only six countries have publicly executed juveniles since 1990 — Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the United States. In 1999, the only other country than the United States to execute a juvenile offender was Iran, a country now officially designated by our President as part of the "Axis of Evil."

⁸⁹ *Id.* at 45-49.

⁹⁰ Press Release, Amnesty International, Worldwide Executions Doubled in 2001 (Sept. 4, 2002), available at <http://www.aiusa.org/news/2002/world04092002.html>. For additional information, see also the Death Penalty Information Organization's outstanding website, <http://www.deathpenaltyinfo.org>.

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For more than two years, I engaged in diplomatic dialogue on this subject both in bilateral meetings with scores of nations, and at various multilateral fora, such as the U.N. Human Rights Commission, the U.N. General Assembly, the U.N. Committee Against Torture, and U.N. Committee for the Elimination of Racial Discrimination. During those months, I became increasingly aware that the United States' adherence to the death penalty has become a growing irritant with other nations. I learned that 108 (of the more than 180) countries in the world have now abolished the death penalty.⁹¹ European regional organizations have made abolition of the death penalty a prerequisite to joining the new Europe, and a cornerstone of European human rights policy.⁹² Particularly with Western European countries, which have adopted an increasingly unequivocal abolitionist position, the U.S. practice has become a growing source of diplomatic discussion and contention.

From extensive personal experience, I can now testify that these are no longer minor diplomatic irritants. Increasingly, this issue has placed America and Europe on a collision course in almost every multilateral human rights forum. Even while American courts have largely shielded the death penalty from domestic legal challenge, the rest of the world has moved in the opposite direction. Increasingly, I found important bilateral meetings with our closest allies — particularly from European Union and Latin American countries — consumed with answering demarches challenging the death penalty. Inevitably, these differences have begun to warp U.S. foreign policy. The European Union now regularly criticizes U.S. death penalty practices in diplomatic demarches and pointed letters protesting specific executions.⁹³ In many European

⁹¹ See Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/dpicintl.html> (last visited Apr. 8, 2002).

⁹² See, e.g., Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances, Feb. 21, 2002, Council of Europe (providing for full abolition of death penalty, prohibiting any derogation from or reservation in respect of its provisions, and noting that abolition of death penalty is "essential for the protection of this right and for the full recognition of the inherent dignity of all human beings"). The new Protocol explicitly strengthens Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, which does not exclude the death penalty in respect to acts committed in time of war or of imminent threat of war.

⁹³ See, e.g., Toby Harndon, *Bush Team Angry over EU Pressure on Death Penalty*, DAILY TEL. (London), Mar. 8, 2001, at 15 ("Willy Helin, spokesman for the EU in Washington, said the EU was opposed to the death penalty in principle but particularly highlighted cases involving people who were minors at the time of the offence, mentally retarded or foreign nationals."); Press Release, European Union in the U.S., EU Policy on the Death Penalty (May 10, 2001) ("[i]n line with established EU practice, the Swedish Presidency of the European Union on May 10, 2001 made a demarche to the US Administration presenting

capitals, outrage over American capital punishment has triggered street protest and angry public demonstrations. One former U.S. Ambassador reported that death penalty protestors besieged his consulates, and that his embassy had received an anti-death penalty petition signed by 500,000 local citizens.⁹⁴

The practice has caused allies and adversaries alike to challenge our claim of moral leadership in international human rights, and probably helped contribute to the recent, embarrassing loss of America's seat on the U.N. Human Rights Commission.⁹⁵ Even more troubling, the practice has provided heavy diplomatic ammunition to countries with far worse human rights records. I found, for example, that China, despite its own appalling human rights record does not hesitate to raise America's death penalty when demarched about its human rights practices.

My doubts about the liabilities of the death penalty abroad were enhanced by mounting evidence at home that capital punishment does not even serve its intended purpose. Rapidly accumulating evidence suggests that, contrary to the Supreme Court's directive, the death penalty is not in fact being administered fairly in the United States. Since 1976, about 100 people who were put on death row have been

the EU positions of principle on the death penalty In individual cases, the EU makes clemency demarches in cases involving mentally retarded persons"), at <http://www.eurounion.org/legistat/DeathPenalty/Demarche10May.htm> (last visited June 6, 2001). In 2000, the European Union expressed its concern, via a demarche, that the United States continues to carry out the death penalty against those who suffer from mental disorders. See European Union, *EU Policy on the Death Penalty: EU Demarche on the Death Penalty* (Feb. 25, 2000) (containing European Union's demarche on death penalty of February 25 2000, forwarded to United States with European Union Memorandum on Death Penalty), at <http://www.eurounion.org/legislat/deathpenalty/Demarche.htm> (last visited June 6, 2001).

⁹⁴ See, e.g., Felix G. Rohatyn, Editorial, *America's Deadly Image*, WASH. POST, Feb. 20, 2001, at A23. See also Marcus Mabry, *A Bad Case of Euro Envy: The Rift Between U.S. and Old World Values is Threatening America's Claim to Global Leadership*, NEWSWEEK, Apr. 16, 2001, at 2 ("Human-rights organizations and thousands of demonstrators bear down on U.S. embassies with each controversial execution in America. . . . [Karsten] Voigt [coordinator for German-American relations at the Foreign Ministry in Berlin] predicts that in coming years, disagreements over values will become intractable. . . . [A]ll this discord will eventually have political ramifications. . . . Increasingly, Europe will find it difficult (and unpopular) to be allied with a nation whose values it doesn't share — not to mention to be led by it.").

⁹⁵ See Editorial, *Europe's View of the Death Penalty*, N.Y. TIMES, May 13, 2001, § 4, at 12 (suggesting that U.S. position on this issue may have contributed to U.S. failure to gain re-election to United Nations Human Rights Commission); Harold Hongju Koh, Editorial, *A Wake-Up Call on Human Rights*, WASH. POST, May 8, 2001, at A23.

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exonerated as not guilty.⁹⁶ The Innocence Project, founded in 1992 by Cardozo Law School Professors Barry C. Scheck and Peter J. Neufeld, has used innovative DNA testing of evidence to yield conclusive proof of the innocence of more than 100 incarcerated individuals.⁹⁷ In a highly publicized survey, law and journalism students in Illinois showed that thirteen of the twenty-five inmates on Illinois' death row were in fact innocent.⁹⁸ In response, Governor George Ryan of Illinois, a Republican, declared a statewide moratorium on executions and set up a special bipartisan commission to investigate the way the death penalty is administered in that state.⁹⁹ In a compelling statistical study based on examination of more than 4,500 American capital appeals between 1973 and 1995, Professors James Liebman and Jeffrey Fagan of Columbia University discovered the following:

"[C]ourts found serious, reversible error in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during the period. . . . The most common errors — prompting a majority of reversals at the state post-conviction stage — are (1) egregiously incompetent defense lawyers who didn't even look for — *and demonstrably missed* — important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who *did* discover that kind of evidence but *suppressed* it, again keeping it from the jury."¹⁰⁰

This troubling evidence has led political leaders and commentators across the board, including such conservative voices as Pat Robertson and George Will, to question whether the death penalty continues to

⁹⁶ Jonathan Alter, *The Death Penalty on Trial*, NEWSWEEK, June 12, 2000, at 24.

⁹⁷ For further information about the Innocence Project, see <http://www.innocenceproject.org>.

⁹⁸ See <http://www.law.nwu.edu/depts/clinic/wrongful/deathpenalty.htm>. In particular, faculty and students at the Center on Wrongful Convictions at Northwestern Law School have worked since the 1977 restoration of the death penalty in Illinois to find evidence exonerating 13 Illinois death row inmates.

⁹⁹ For the results of the Ryan Commission's work, see, e.g., E. J. Dionne Jr., *Challenging the Death Penalty*, WASH. POST., Apr. 16, 2002, at A19; *Reform the Death Penalty?*, WASH. POST., Apr. 16, 2002, at A18; Jodi Wilgoren, *Few Death Sentences or None Under Overhaul Proposed by Illinois Panel*, Apr. 16, 2002, at A22. See also, <http://www.deathpenaltyinfo.org/IllinoisCCP.html>.

¹⁰⁰ See JAMES S. LIEBMAN & JEFFREY FAGAN, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, available at <http://www.law.columbia.edu/instructionalservices/liebman> (emphasis in original). Strikingly, this analysis demonstrates that the overall rate of serious error found in Illinois capital sentences was not aberrational, but was actually lower than the national average.

serve any purpose.¹⁰¹ State legislators in many areas of the country are backing moratoriums on the use of the death penalty. More than two dozen municipalities have passed resolutions calling for a moratorium.¹⁰² U.S. Senator Russell Feingold of Wisconsin has introduced two bills — the Federal Death Penalty Moratorium Act and the National Death Penalty Moratorium Act — that would halt executions by the federal government and all thirty-eight states that have death penalty laws on their books.¹⁰³ Significantly, an increasingly active movement has arisen in opposition to the death penalty even among families of murder victims.¹⁰⁴

One day during my time in government, while being challenged on the death penalty, I could no longer find it in my heart to defend the practice. I found myself morally convinced that its continuing use is not only utterly wrong, but also unconstitutional. I came to understand in a deeper way just what Justice Blackmun meant when he said that capital punishment “lessens us.” Capital punishment concretely diminishes America’s reputation as a human rights leader and hence its ability to lead a coalition of nations founded on moral principle. For a country that aspires to be a world leader in human rights, the death penalty has become our Achilles’ Heel. Moreover, as Justice Blackmun noted, “if the substance of the Eighth Amendment is to turn on ‘evolving standards of decency’ of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States.”¹⁰⁵ International opinion has informed the Court’s understandings of the social values of the United States from the Founding. In an increasingly globalized society, the opinions of other nations, and of the international community as a whole, are more relevant today than ever before.

¹⁰¹ See Brooke A. Masters, *Pat Robertson Urges Moratorium on U.S. Executions*, N.Y. TIMES, Apr. 8, 2000, at A1; George F. Will, *Innocent on Death Row*, WASH. POST, Apr. 6, 2000, at A23.

¹⁰² See, e.g., Sara Rimer, *Support for a Moratorium In Executions Gets Stronger*, N.Y. TIMES, Oct. 31, 2000, at A18.

¹⁰³ Federal Death Penalty Abolition Act, S. 191, 107th Cong. (2001); National Death Penalty Moratorium Act, S. 233, 107th Cong. (2001). For the full text of these bills, see also, <http://thomas.loc.gov> Library of Congress website containing federal legislative information freely available to the public.

¹⁰⁴ Two prominent leaders of that movement are Bud Welch of Oklahoma, an outspoken opponent of the death penalty whose only daughter, Julie, was killed in the Oklahoma City bombing, and Kate Lowenstein, daughter of murdered human rights activist Allard Lowenstein, who has become an advocate for abolition of the death penalty with the nongovernmental organization, Murder Victims’ Families for Reconciliation.

¹⁰⁵ Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 48 (1994).

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As my time in the government came to a close, the Clinton Administration faced the execution of the first federal defendant in nearly forty years. Upon doing research, I was dismayed to learn that of the 183 defendants for whom U.S. attorneys recommended seeking the death penalty between 1995-2000, 74% were members of minority groups. Along with many others in the U.S. government, I urged President Clinton to impose a moratorium on all federal executions until we could be sure that they are racially unbiased. Such a moratorium, I argued, would both reaffirm our national commitment to racial justice and equality and ensure that we meet our international legal obligations to avoid race discrimination in the administration of criminal punishment.¹⁰⁶

When I left the government and returned to academia in January 2001, I decided that the death penalty ranked among the U.S. human rights practices most abhorrent to me. But how best to apply international law and practice to change America's conduct of the death penalty?

IV. BRINGING INTERNATIONAL LAW TO BEAR ON THE DEATH PENALTY

A. *The Strategy: Identifying a Workable Channel of Norm-Internalization*

Before entering government, I had argued in academic work that a key to understanding whether and when nation-states will comply with international law is *transnational legal process*: "the theory and practice of how public and private actors — nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals — interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."¹⁰⁷ Transnational legal process, I had argued, promotes obedience with international law by encouraging *norm-internalization*: the process whereby nations incorporate international law principles into their domestic law and practice. Norm-internalization occurs through a cycle of "interaction-interpretation-internalization:" repeated *interactions* among states and other transnational actors in various law-declaring fora produce

¹⁰⁶ See Raymond Bonner, *Veteran U.S. Envoys Seek End to Executions of Retarded*, N.Y. TIMES, June 10, 2001, at A3 (describing effort to secure moratorium on federal executions through end of Clinton Administration).

¹⁰⁷ Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996); Koh, *Nations Obey*, *supra* note 10, at 2626.

interpretations of applicable global norms, which are then in turn *internalized* into states' domestic legal processes.¹⁰⁸

In the first, "horizontal" phase of this process, one or more transnational actors provoke an interaction with another in a global law-declaring forum, forcing that forum to enunciate or interpret a rule of international law. In the second, "vertical" phase, the same or other actors take that global norm and seek to persuade a domestic judicial, executive or legislative institution to incorporate it into national law. Through this process of interaction, followed by horizontal interpretation and vertical internalization, a nation-state internalizes the enunciated rule of international law into its domestic legal system. Under this theory, various agents of internalization — which include transnational norm entrepreneurs, governmental norm sponsors, and interpretive communities — can collaborate to provoke nations into internalized obedience of international rules.¹⁰⁹

U.S. domestic courts, with their power to interpret domestic law to incorporate global norms, represent a prime channel for norm-internalization.¹¹⁰ Their interpretive powers give them the unique ability to incorporate international interpretation of global norms into domestic law. Yet in recent decades, efforts to invoke international law norms directly before the U.S. courts — and particularly the U.S. Supreme Court — have met with mixed success.

In the 1950s and 60s, for example, American civil liberties groups filed suits before state and federal courts, asking those courts to apply international treaty norms to invalidate as racially discriminatory laws governing education, transportation, employment, housing, and land ownership.¹¹¹ These cases triggered widespread concern that our

¹⁰⁸ For elaboration of this argument, see Koh, *Nations Obey*, *supra* note 10, and Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397 (1999).

¹⁰⁹ Transnational norm entrepreneurs are nongovernmental transnational organizations or individuals who mobilize popular opinion and political support both within their host country and abroad to promote elimination of a morally offensive practice. Koh, *Frankel Lecture*, *supra* note 10, at 645. "Governmental norm sponsors" are public officials who use their official positions to promote normative positions, and who collaborate with transnational norm entrepreneurs in transnational issue networks to generate political solutions for transnational problems. "Interpretive communities" use law-declaring fora, such as international tribunals, treaty bodies, domestic and regional legislatures, nongovernmental organizations, commissions, and others to announce shared understandings of legal norms. *Id.* at 648-49.

¹¹⁰ See generally Koh, *Transnational Public Law Litigation*, *supra* note 6 (discussing transnational public law litigation in U.S. courts).

¹¹¹ See generally Bert Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 *IOWA L. REV.* 901 (1984) (citing cases and discussing "widespread

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postwar treaty commitments, coupled with the Supremacy Clause, might undermine the sovereignty of the several states. They also spurred the famous, unsuccessful drive to adopt the Bricker Amendment in the early 1950s.¹¹² In 1948, four Justices of the U.S. Supreme Court had suggested that a California Alien Land Law violated United States' obligations under the United Nations Charter.¹¹³ But in subsequent cases, numerous state and federal courts developed the doctrine of "non-self-executing treaties," which held that certain human rights treaties must be implemented by statute to be accorded domestic legal effect. This doctrine has dramatically limited the ability of individuals directly to enforce treaty norms against domestic practices.¹¹⁴

The most recent efforts to persuade the Supreme Court to invoke international norms to limit state executions have met with similar resistance. In 1998, in *Breard v. Greene*,¹¹⁵ the Supreme Court refused to stay the execution of Angel Breard, a Paraguayan national who had claimed that Virginia officials had not informed Paraguayan consular authorities of his arrest and trial, as required by Article 36 of the Vienna

consensus among scholars and human rights activists that the human rights provisions of the United Nations Charter . . . have had little effect on postwar American jurisprudence"); Howard Tolley, *Interest Group Litigation to Enforce Human Rights: Confronting Judicial Restraint, in* WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS 123, 125 (Mark Gibney ed., 1991).

¹¹² The Bricker Amendment would have overruled *Missouri v. Holland*, 252 U.S. 416 (1920), which held that a statute implementing a migratory bird treaty could regulate matters apparently reserved to the states, notwithstanding the Tenth Amendment. Thus, under *Holland*, Congress would have had the authority to implement the Genocide Convention or the Convention on the Elimination of Racial Discrimination (had the United States ratified those treaties) by enacting sweeping civil rights legislation. Fear of this result helped to delay United States' ratification of the two conventions for decades. In the meantime, ironically, Congress enacted broad civil rights legislation anyway, invoking the Commerce Clause and section 5 of the Fourteenth Amendment. See DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988).

¹¹³ See *Oyama v. California*, 332 U.S. 633, 647, 650 (1948) (Black, J., joined by Douglas, J., and Murphy, J., joined by Rutledge, J., concurring).

¹¹⁴ See, e.g., *Pauling v. McElroy*, 278 F. 2d 252 (D.C. Cir. 1960) (holding that individual may not invoke UN Charter to enjoin detonation of test nuclear weapons in Marshall Islands); *Vlissidis v. Anadell*, 262 F.2d 398 (7th Cir. 1959) (holding that alien may not resist deportation on ground that UN Charter superseded racist provisions of immigration laws); *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952) (reaching opposite conclusion from concurring justices in *Oyama*). For criticism of this doctrine, see Koh, *Transnational Public Law Litigation*, *supra* note 6, at 2383-84; Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

¹¹⁵ 523 U.S. 371 (1998) (per curiam). For some of the extensive law review commentary on this case, see Jonathan I. Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT'L L. 666 (1998).

Convention on Consular Relations (VCCR).¹¹⁶ Eleven days before Breard's scheduled execution date, Paraguay filed suit against the United States in the International Court of Justice (ICJ) claiming a violation of Paraguay's own Vienna Convention rights, and seeking an order of provisional measures. Six days later, the ICJ issued an order requesting that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings . . ."¹¹⁷

That Easter weekend, I joined an *amicus* brief signed by a group of international law professors urging the Court to stay the execution on comity grounds and to set the case for plenary briefing and oral argument.¹¹⁸ Soon thereafter, Secretary of State Madeleine Albright sent a remarkable letter to the Governor of Virginia, urging him to stay the execution.¹¹⁹ Secretary Albright warned:

In light of the [ICJ's] request, the unique and difficult foreign policy issues, and other problems created by the Court's provisional measures, I therefore request that you exercise your powers as Governor and stay Mr. Breard's execution. . . . *As Secretary of State . . . I have a responsibility to bear in mind the safety of Americans overseas. I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention. The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a*

¹¹⁶ Paraguay initially asked a federal district court to enjoin Breard's execution and void his conviction as a remedy for the undisputed Article 36 violation. *Republic of Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996). The court dismissed for lack of jurisdiction, Paraguay appealed, and Paraguay's petition for certiorari to the U.S. Supreme Court was eventually consolidated with Breard's petition seeking review of his own conviction and death sentence. *See Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998), *cert. denied sub nom. Breard v. Greene*, 523 U.S. 371 (1998).

¹¹⁷ Case concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Request for Provisional Measures, Order, ¶¶ 18, 20 (Apr. 9, 1998), *available at* <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>.

¹¹⁸ *See* Statement *Amicus Curiae* of International Law Professors, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-1390); Brief *Amicus Curiae* of April 13, 1998, *Paraguay v. Gilmore*, 523 U.S. 371 (1998) (No. 97-1390) (on file with author). The international law professors who signed the brief were: George A. Bermann, David D. Caron, Abram Chayes, Lori Fisler Damrosch, Richard N. Gardner, Louis Henkin, Harold Hongju Koh, Andreas F. Lowenfeld, W. Michael Reisman, Oscar Schachter, Anne-Marie Slaughter, and Edith Brown Weiss.

¹¹⁹ Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *available at* <http://www.asil.org/ajil/agera1.htm>.

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*denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.*¹²⁰

Remarkably, however, the Solicitor General's brief to the Court, filed almost simultaneously, opposed the stay, ignoring the very interference with foreign policy that the Secretary of State said would likely occur if the execution took place.

The Supreme Court refused to stay the execution and denied Paraguay's request. The Supreme Court majority concluded that any claimed violation of the Vienna Convention was procedurally barred on habeas corpus review, calling it "unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier."¹²¹ The Governor of Virginia then rebuffed Secretary's Albright's request and let the execution proceed, saying that he owed his duty to the people of Virginia.¹²²

The *Breard* case arose in an extremely disadvantageous procedural posture for the petitioner. The petitioner had filed a petition for habeas corpus six years after the crime was committed and five years after the conviction became final. The frenzied litigation activity leading up to the execution left the Supreme Court almost no time to absorb the foreign policy implications of its decision. *Breard* is thus best remembered as a case in which internalization of international norms into U.S. law through executive and judicial action was attempted, but not completed, due to severe time pressures and the peculiar procedural posture of the case. In retrospect, it seems incredible that the Court did not delay the execution, grant certiorari, and hear plenary briefing and argument, if only out of simple comity to the ICJ. The Virginia Governor's rejection of the U.S. Secretary of State's plea is equally stunning. For it was precisely to prevent state officials from following their loyalties to their own citizens, in the process creating unwanted international disputes for our nation, that the Framers chose to discard the Articles of Confederation in favor of a federal Constitution.¹²³

¹²⁰ *Id.* (emphasis added).

¹²¹ *Breard*, 523 U.S. at 378. Three justices (Stevens, Breyer, and Ginsburg) dissented, and Justice Souter concurred only because he saw no "reasonably arguable causal connection between the alleged treaty violations and Breard's conviction and sentence." *Breard*, 523 U.S. at 378-79 (statement of Souter, J.).

¹²² See Norman Kempster, *Despite Warnings, Virginia Executes Paraguayan Citizen*, L.A. TIMES, Apr. 15, 1998, at A6.

¹²³ In *The Federalist*, Alexander Hamilton expressed concern that the United States

After *Breard*, however, foreign states have fared little better in blocking the execution of their nationals who have been denied consular rights. In June 1999, for example, Texas executed Joseph Stanley Faulder, a Canadian national who had been arrested, convicted, and sentenced to death in East Texas without ever being notified of his Article 36 rights under the Vienna Convention. Faulder unsuccessfully sought post-conviction relief in both state and federal court, arguing that the lack of consular notification had prevented him from obtaining crucial mitigating evidence from Canada that would have persuaded the jury to recommend a life sentence. As Paraguay did in *Breard*, Canada supported Faulder's claims in several *amicus* briefs and Canadian foreign minister Lloyd Axworthy personally requested Secretary of State Madeleine Albright's intervention to block the execution. On December 10, 1998, the fiftieth anniversary of the Universal Declaration of Human Rights, Secretary Albright sent another detailed letter to then-Texas Governor George W. Bush in support of Faulder's clemency petition. As in *Breard*, Albright noted that "the consular notification issues in this case are sufficiently troublesome that they may provide sufficient grounds for according discretionary clemency relief."¹²⁴ When that clemency request was denied, Faulder petitioned to the Inter-American Commission on Human Rights, arguing that Texas had violated U.S. human rights obligations by scheduling multiple dates for his execution.¹²⁵ As the ICJ

might be held internationally responsible for "an unjust sentence against a foreigner" issued by a state court. THE FEDERALIST NO. 80, at 477 (Alexander Hamilton). As founders of a fledgling nation broadly subject to the law of nations, the framers feared that a state court's denial of international justice might inspire the alien's nation to make war on the United States. *Id.*

¹²⁴ The letter was also sent to the Texas Board of Pardons and Paroles. See Letter from Madeleine K. Albright, Secretary of State, to George Bush, Texas Governor (Nov. 27, 1998), available at <http://www.web.amnesty.org/ai.nsf/index/AMR510851999>. As in *Breard*, Secretary Albright commented upon the backlash the execution might bring upon Americans abroad who depend on consular assistance:

As Secretary of State, ensuring the protection of American citizens abroad — including over 300 imprisoned Texans last year — is one of my most important responsibilities. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.

¹²⁵ Faulder's petition claimed violations of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Torture Convention"), adopted Dec. 10, 1984, entered into force June 26, 1987, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984); the ICCPR, Dec. 19, 1966, entered into force Mar. 23,

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had done in *Breard*, the Inter-American Commission issued precautionary measures directing the United States to stay his execution, but Texas denied Faulder's last appeal and executed him in June 1999.

A third affront to the international community came when Arizona executed two German brothers, Karl and Walter LaGrand, who also had not been advised of their rights to consular notification and access. After Germany's diplomatic intervention failed to persuade Arizona officials to halt Karl's execution, in March 1999, Germany applied in the International Court of Justice for provisional measures to block the brother's execution.¹²⁶ The ICJ issued those measures the next day, again requesting that the United States take all measures at its disposal to prevent Walter's execution.¹²⁷ Once again, Germany invoked the ICJ measures before the U.S. Supreme Court, seeking a judicial stay of the execution, and once again, the Solicitor General opposed the stay, arguing that the provisional measures were not binding "and did not furnish a basis for judicial relief."¹²⁸ The Supreme Court denied the stay and allowed Walter's execution to proceed. Undeterred, Germany pressed on, and more than two years later, won a sweeping judgment against the United States before the ICJ.¹²⁹

Fourth and finally, a less celebrated opportunity passed for the Supreme Court to decide the relevance of international law to the domestic death penalty in November 1999, when the U.S. Supreme Court denied certiorari in *Domingues v. Nevada*.¹³⁰ Domingues, who had

1976, 999 U.N.T.S. 171, 174-75; and the American Declaration of the Rights and Duties of Man, art. 18, OAS Res. XXX (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>.

¹²⁶ See generally *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. No. 104 (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (finding that United States had breached its obligations to Germany and LaGrand brothers under Vienna Convention on Consular Relations).

¹²⁷ *Id.* at ¶ 32.

¹²⁸ *Id.* at ¶ 33.

¹²⁹ The International Court of Justice ruled, inter alia, that: (1) Article 36, paragraph 1 of the Vienna Convention creates an individual right to consular notification and access; (2) that a foreign national deprived of his Article 36 rights and sentenced to a "severe penalty" is entitled to "review and reconsideration" of his conviction and sentence; (3) that application of domestic rules of procedural default to the LaGrand brothers violated the United States' obligation to give "full effect" to the purposes of Article 36; (4) that a foreign national need not demonstrate prejudice by the Article 36 violation before he may obtain an effective remedy for the violation; and (5) that the provisional measures order should have been treated as binding upon the United States. *Id.* at ¶¶ 123-127. See <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> for the full opinion.

¹³⁰ 528 U.S. 963 (1999).

been sentenced to death in Nevada for a crime committed when he was only sixteen years old, argued for the first time on a post-conviction motion to correct sentence that his execution would violate the International Covenant on Civil and Political Rights and customary international law.¹³¹ The Nevada Supreme Court affirmed the denial of that motion, nowhere addressing Domingues's customary international law claim, and concluding that the Senate's express reservation to Article 6(5) of the ICCPR "negates [Domingues's] claim that he was illegally sentenced."¹³² The U.S. Supreme Court then denied certiorari, declining to pass on the merits of any of Domingues's claims.

At this writing, both the domestic and international fallout from *LaGrand* and *Breard* continues. Domestically, the cases have spurred numerous cases in which foreign states, particularly Mexico, have sought to block or delay pending executions on the grounds that U.S. state officials violated Article 36 of the VCCR as well as the bilateral Consular Convention between the United States and Mexico.¹³³ To handle the

¹³¹ A number of scholars have now argued that a customary norm of international law has emerged prohibiting the execution of juveniles. See generally DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 707 (3d ed. 2001) (reviewing state practice and *opinio juris*). There are also now 191 states parties to the U.N. Convention on the Rights of the Child, excluding only the United States and Somalia. That Convention forbids capital punishment for offenses committed by persons below the age of 18. See <http://www.amnesty-usa.org/abolish/juveniles.html>.

¹³² 961 P.2d 1279 (Nev. 1998). When the Senate gave its advice and consent to ratification of the ICCPR on April 2, 1992, its resolution of ratification adopted verbatim the entire package of conditions proposed by President George H. W. Bush, including a declaration that the Articles 1-27 of the ICCPR are not self-executing and a reservation to Article 6(5) of the ICCPR that states: "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (emphasis added). In 1995, the Human Rights Committee, upon receiving the United States' first report under the ICCPR, concluded that the U.S. reservation to Article 6(5) was incompatible with the object and purpose of the ICCPR and recommended that the United States withdraw it. David WEISSBRODT ET AL., *supra* note 131, at 700. The U.S. Supreme Court has yet to pass on the validity of that reservation under either domestic or international law.

¹³³ In 1997, Mexico sought to block the execution of Ramon Martinez-Villarreal, a defendant with mental retardation who had allegedly received ineffective legal representation, arguing that Arizona officials had violated Article 36 of the VCCR, the bilateral U.S.-Mexico Consular Convention, as well as the ICCPR and customary international law. The federal courts dismissed the complaint for lack of subject matter jurisdiction, *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997), but the Supreme Court ultimately vacated and remanded for competency proceedings, without addressing the VCCR, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). While Martinez-Villarreal's case was pending, two other Mexican nationals who had not received consular notification were executed in Virginia and Texas. See *Murphy v. Netherland*, 116 F.3d 97

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flood of cases involving Mexican nationals, the Mexican Foreign Ministry even established the Mexican Capital Legal Assistance Program in September 2000, which has now assisted forty-five defendants and filed *amicus* briefs in thirteen cases.¹³⁴ Numerous lower courts have heard claims by individual defendants, citing *LaGrand* in support of suppressing evidence obtained in the absence of consular notification.¹³⁵

(4th Cir. 1997); Christy Hoppe, *Texas Executes Mexican Despite Protests*, DALLAS MORNING NEWS, June 19, 1997, at A1. Mexico subsequently sought and won an advisory opinion from the Inter-American Court on Human Rights, which held that the execution of a defendant who had been denied opportunity to exercise his rights to consular notification and access would constitute an arbitrary deprivation of life in violation of Article 6 of the ICCPR. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Oct. 1, 1999, Inter-Am. Ct. H.R., (Ser. A) No. 16 (1999), available at <http://www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html>. In reaching that decision, the Inter-American Court heard briefing and oral argument from eighteen private parties and eight countries, including the United States.

¹³⁴ Sandra Babcock, *The Role of International Law in United States Death Penalty Cases* (2002) (unpublished manuscript on file with author). I am informed by Sandra Babcock, Director of the Mexican Capital Legal Assistance Program (former lead counsel in the *Faulder* case) that this Program now works with lawyers and consular officials throughout the United States to provide litigation support to attorneys representing Mexican nationals in capital trials and on appeal. Mexico's counsel has appeared before courts in Georgia and Arizona to conduct evidentiary hearings on matters of international law, and at this writing, attorneys connected to MCLAP are working on cases in California, Arizona, Oregon, Texas, Georgia, Illinois, Florida, Oklahoma, Tennessee, and Kentucky. *Id.*

¹³⁵ See, e.g., *United States v. Villasenor-Lopez*, No. 00-10010, 2000 U.S. App. LEXIS 30236, at *4 (9th Cir. Nov. 29, 2000) (finding failure to inform defendant of VCCR-based consular rights did not warrant exclusion of evidence); *United States v. Morales-Ramirez*, No. 99-50589, 2000 U.S. App. LEXIS 16165, at *2 (9th Cir. July 11, 2000) (finding post-arrest statements obtained in violation of VCCR need not be suppressed); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 884-85 (9th Cir. 2000) (en banc) (holding that suppression of evidence was not appropriate remedy for violation of Vienna Convention); *United States v. Kurdyukov*, 75 F. Supp. 2d 660 (S.D. Tex. 1999) (holding that government's failure to advise defendant of his right to contact consul was no basis to suppress his statements since he received better warnings than required); *Delaware v. Marco Vasquez*, Nos. 98-01-0317-R2 & 98-02-1488-R2, 2001 Del. Super. LEXIS 209, at *2-3 (Del. Super. Ct. May 23, 2001) (finding defendant failed to establish cause for not raising issue of consular notification in conviction proceedings). Two recent cases hold that the Vienna Convention on Consular Relations does not confer upon a criminal defendant any enforceable rights, but incredibly does not even consider the ICJ's June 2001 decision in *LaGrand*. See *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001), and *State v. Martinez-Rodriguez*, 33 P.3d 267 (N.M. 2001), which were decided in October and September of 2001. Three other recent cases do mention *LaGrand*, but only in passing, assuming that the Vienna Convention confers some rights on defendants, but then finding no reversible error for a variety of other reasons. See, e.g., *United States v. Minjares-Alvarez*, 264 F.3d 980 (10th Cir. 2001) (July 27 opinion mentions ICJ decision in passing); *State v. Lopez*, 633 N.W.2d 774 (Iowa 2001) (Sept. 6 opinion); *State v. Issa*, 752 N.E.2d 904 (Ohio 2001) (Aug. 29 opinion in which dissent discusses ICJ decision).

After reviewing these cases, it seemed clear to me that the best judicial avenue for bringing international practice to bear on the death penalty remained the Eighth Amendment's "cruel and unusual punishment" jurisprudence. But what should the vehicle for that argument be?

B. The Vehicle: McCarver and Atkins

Unexpectedly, an opportunity arose just months later, when the Supreme Court granted certiorari first in *McCarver v. North Carolina*,¹³⁶ and then in *Atkins v. Virginia*.¹³⁷ For the first time in thirteen years, these cases reopened the question first raised in *Penry v. Lynaugh*¹³⁸ — whether the Eighth Amendment to the U.S. Constitution forbids execution of persons with mental retardation.¹³⁹ Although Justice Scalia's footnote in his plurality opinion in *Stanford v. Kentucky* had eschewed reliance on foreign or international precedents, a number of subsequent decisions had cited such precedents.¹⁴⁰ Moreover, Justice O'Connor, the swing

¹³⁶ *McCarver v. North Carolina*, 532 U.S. 941 (2001) (March 26 decision to grant certiorari, limited to Question 1 presented by petition). When North Carolina passed a law forbidding execution of persons with mental retardation, the U.S. Supreme Court dismissed certiorari in that case. *McCarver v. North Carolina*, 533 U.S. 975 (2001) (Sept. 25 decision to dismiss writ of certiorari as improvidently granted). It then granted the certiorari petition of Daryl Atkins, which had been held for *McCarver*, and permitted all amici curiae briefs originally filed in *McCarver* to be refiled in support of the same position in *Atkins*. *Atkins v. Virginia*, 122 S. Ct. 642 (2001).

¹³⁷ 122 S. Ct. 29 (2001).

¹³⁸ 492 U.S. 302 (1989).

¹³⁹ According to the American Association on Mental Retardation, a person possesses the intellectual-deficit component of mental retardation if, among other things, he or she has an IQ of 70 to 75 or below. AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 25 (9th ed. 1992). At the sentencing phase in *McCarver*, experts testified that the defendant had the reading comprehension of a 7-year-old, the writing ability of an 8-year-old, Tr. at 732-33, and possessed an age-equivalent score in adaptive behavior of 10 years and 5 months. Atkins was found after similar testing to have an IQ of about 57.

¹⁴⁰ See *supra* notes 70-73 and accompanying text (citing 492 U.S. at 369 n.1). See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) ("In almost every State — indeed, in almost every western democracy — it is a crime to assist a suicide."); *id.* at 711 n.8 (citing Canadian decision discussing assisted-suicide provisions in Austria, Spain, Italy, United Kingdom, Netherlands, Denmark, Switzerland, and France). In the line-item veto case, *Raines v. Byrd*, 521 U.S. 811 (1997), Chief Justice Rehnquist observed that "[t]here would be nothing irrational about a system which granted standing [to legislators] in these cases; some European constitutional courts operate under one or another variant of such a regime [although] it is obviously not the regime that has obtained under our Constitution to date." *Id.* at 828; see also *Knight v. Florida*, 528 U.S. 990, 995-98 (1999) (Breyer, J., dissenting from denial of certiorari) (arguing that unusual delay in administration of death penalty violates Eighth Amendment and arguing that analogous decisions of Privy Council, Supreme Court of India, Supreme Court of Zimbabwe, and

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vote in *Penry*, had not explicitly embraced that footnote, and in subsequent public statements had called upon U.S. judges to consult case law in foreign jurisdictions regarding the interpretation of international treaties and the relationship between national courts and international tribunals.¹⁴¹

Over the next few months, my students, co-counsel, and I communicated with nine former U.S. diplomats, who collectively had rendered more than two centuries of service to both Democratic and Republican Administrations.¹⁴² Four of their number had retired from

European Court of Human Rights are "useful even though not binding"); *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (noting that foreign precedents "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem"); *United States v. Then*, 56 F.3d 464, 468-69 (2d Cir. 1995) (Calabresi, J., concurring) (stating that U.S. courts no longer have "monopoly on constitutional judicial review," and should follow German and Italian constitutional courts in seeking ways to signal legislature that statute is "heading toward unconstitutionality").

¹⁴¹ Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT'L JUD. OBSERVER, June 1997, at 2 (adapting Justice O'Connor's speech at 1997 spring meeting of American College of Trial Lawyers).

¹⁴² That illustrious group included: Morton Abramowitz, a Career Ambassador, who had served as U.S. Ambassador to Turkey and Thailand, Assistant Secretary of State for Intelligence and Research, and U.S. Ambassador to the Mutual and Balanced Force Reduction Negotiations in Vienna; Stephen W. Bosworth, Dean of the Fletcher School of Law and Diplomacy at Tufts University, who had served as U.S. Ambassador to the Republic of Korea, the Philippines, and Tunisia, and Director of the State Department Policy Planning Staff; Stuart E. Eizenstat, who had served as Deputy Secretary of the Treasury, Undersecretary of State for Economic, Business and Agricultural Affairs, Undersecretary of Commerce for International Trade, U.S. Ambassador to the European Union, Special Representative of the President and the Secretary of State on Holocaust-Era Issues, and Chief Domestic Policy Adviser to the President; John C. Kornblum, who had served as U.S. Ambassador to the Federal Republic of Germany, Assistant Secretary of State for European and Canadian Affairs, U.S. Ambassador to the Conference of Security and Cooperation in Europe, Special Envoy to the Balkans, and U.S. Deputy Permanent Representative to the North Atlantic Treaty Organization in Brussels; Phyllis E. Oakley, who had served as Assistant Secretary of State of the Bureau of Intelligence and Research, and Assistant Secretary of State of the Bureau of Population, Refugees, and Migration; Thomas R. Pickering, a Career Ambassador, who had served as Undersecretary of State for Political Affairs, Assistant Secretary of State for Oceans, Environment and Science, U.S. Ambassador and Permanent Representative to the United Nations in New York, and as U.S. Ambassador to Russia, India, Israel, El Salvador, Nigeria, and Jordan; Felix G. Rohatyn, who served from 1997-2000 as U.S. Ambassador to France; J. Stapleton Roy, a Career Ambassador, who had served as U.S. Ambassador to Indonesia, the Peoples' Republic of China, and Singapore, and Assistant Secretary of State for Intelligence and Research; and Frank G. Wisner, a Career Ambassador, who had served as U.S. Ambassador to India, the Philippines, Egypt, and Zambia, Under Secretary of Defense for Policy and Under Secretary of State for International Security Affairs. My co-counsel included Jim Silk and Deena Hurwitz of Yale Law School's Lowenstein International Human Rights Clinic, and the late professor Stan Herr of the University of Maryland School of Law. Yale law students Daniel Reich, J. Rebekka Bonner, Amy Meselson, Adrian Lingaya, Christine

the U.S. Foreign Service with the rank of Career Ambassador, the highest rank that can be awarded to a member of the U.S. diplomatic corps.¹⁴³ Some of them opposed the administration of the death penalty principally with respect to the execution of people with mental retardation; others opposed its application in all circumstances. But all agreed upon three propositions: first, that the current U.S. practice of executing people suffering from mental retardation is inconsistent with evolving international standards of decency; second, that continuation of the practice by states of the United States strains diplomatic relations with close American allies, increases America's diplomatic isolation, and impairs U.S. foreign policy interests; and third, that these considerations should lead the Court to hold that the practice of executing people with mental retardation offends our "evolving standards of decency" and hence, the Eighth and Fourteenth Amendments of the U.S. Constitution.

We agreed to file an *amicus* brief before the Court arguing that the Eighth Amendment should now be read to forbid this practice.¹⁴⁴ We reasoned that former diplomats were entitled, as friends of the Court, to advise the Court regarding the customs of nations with which they had become familiar. In particular, former diplomats could speak with authority regarding the likely impact the continuing administration of the death penalty against individuals with mental retardation would have upon our diplomatic relations with foreign governments and upon our standing in the international community.¹⁴⁵ We also noted that in *Crosby v. National Foreign Trade Council*,¹⁴⁶ the Supreme Court recently found that "statements of foreign powers necessarily involved in the President's [foreign policy] efforts[,] . . . indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration" of Congress' foreign policy objectives by state law.¹⁴⁷ By analogy, we reasoned,

Lehmann, and Matthew Kutcher also contributed to the brief.

¹⁴³ Ambassadors Abramowitz, Pickering, Roy, and Wisner.

¹⁴⁴ The Diplomats' brief may be found at <http://www.deathpenaltyinfo.org/ForeignServiceBrief.html>.

¹⁴⁵ The Court has long held that international law standards "may be ascertained by consulting the . . . general usage and practice of nations." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). International law standards are also ascertainable by examining "the customs and usages of civilized nations; and as evidence of these . . . the works of . . . commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added).

¹⁴⁶ 530 U.S. 363 (2000).

¹⁴⁷ *Id.* at 385.

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opinions of former senior U.S. government officials might help persuade the Court that a state practice of executing people with mental retardation also frustrates our broader national foreign policy goals.¹⁴⁸

C. *The Norm Against Executing Persons with Mental Retardation*

Further research quickly revealed that the current U.S. practice of executing people with mental retardation has become manifestly inconsistent with evolving international standards of decency. Numerous international and regional intergovernmental bodies have passed resolutions, statements and judgments expressing opposition to capital punishment for people with mental retardation. As far back as 1989, the U.N. Economic and Social Council (ECOSOC) passed by consensus a resolution that recommended "eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence."¹⁴⁹ In three successive sessions beginning in 1999, the U.N. Commission on Human Rights had adopted resolutions urging those states that retain capital punishment "not to impose the death penalty on persons suffering from any form of mental disorder," a term understood by the Commission to include both mental illness and mental retardation.¹⁵⁰ Two successive U.N. Special Rapporteurs on

¹⁴⁸ In *Crosby*, the Solicitor General filed, and the Court largely followed, an amicus brief of the United States that argued that a state selective purchasing law, the Massachusetts Burma Act, violated the Foreign Commerce Clause and disrupted the conduct of U.S. foreign policy. According to the Statement of Interest of the United States: "The Massachusetts Burma Act, while consistent with United States foreign policy in its ultimate end, seeks to achieve that end by means that diverge from those chosen by the President and Congress." Brief for the United States as Amicus Curiae, at *8, *Natsios v. National Foreign Trade Council*, No. 99-474, 2000 WL 194805 (U.S. Feb. 14, 2000) (emphasis added). The United States' Brief later noted: "The Massachusetts Burma Act has generated protests from a number of U.S. allies and trading partners. . . . Senior United States officials have acknowledged that the Act and the consequent protests from U.S. allies have been an irritant that has, among other things, diverted the United States' and Europe's attention from focusing where it should be — on Burma." *Id.* at *11. In our view, a very similar argument could be made about state death penalty procedures that selectively impose capital punishment on defendants with mental retardation. Not only have these procedures demonstrably failed to prevent the execution of persons with mental retardation, they also diverge from the better means — a flat legislative ban — chosen by comparable federal legislation. As in *Crosby*, the state procedure now followed in a minority of states has generated increasing diplomatic protests and growing irritation that has, among other things, diverted U.S. and European attention from our common human rights goals.

¹⁴⁹ *Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Res. 1989/64, U.N. ESCOR, ¶ 1, U.N.Doc. E/RES/1989/64 (1989).

¹⁵⁰ See *The Question of the Death Penalty*, Hum. Rts. Comm. Res. 2001/68, U.N. GAOR, 57th Sess., ¶ 4, U.N.Doc. E/CN.4/RES/2001/68 (2001); *The Question of the Death Penalty*,

Extrajudicial, Summary or Arbitrary Executions had also repeatedly criticized the United States for executing people with mental retardation.¹⁵¹ In 2001, the Special Rapporteur, Asma Jahangir, noted that during the previous year, she had sent urgent, unsuccessful appeals on behalf of at least four persons facing execution in the United States "despite indications that they were suffering from mental illness or disability."¹⁵²

Most important, we discovered that since *Penry*, the number of states and nation-states who persist in executing persons with mental retardation has fallen dramatically. In 1980, three years after the U.S. Supreme Court allowed the several states to resume the practice of capital punishment, only sixty-two other countries had abolished the death penalty; now 109 countries are abolitionist either in law or in practice.¹⁵³ As abolition of the death penalty has become a cornerstone of European human rights policy, Central and Eastern European countries who aspire to enter the European Union and the Council of Europe have increasingly calculated that the benefits of joining Europe far exceed the benefits that might inure from occasional use of the death penalty. Thus, as the Death Penalty Information Center has extensively chronicled, steps have been taken to abolish or impose a moratorium on the death penalty in such countries as Taiwan, Lebanon, the former Yugoslavia, Turkey, Chile, the Philippines, Russia, Bermuda, and Poland.¹⁵⁴ Countries whose human rights practices otherwise fall well below U.S. standards, such as Cuba, Turkmenistan, Pakistan, Latvia, Malawi,

Hum. Rts. Comm. Res. 2000/65, U.N. GAOR, 56th Sess., ¶ 3, U.N.Doc. E/CN.4/RES/2000/65 (2000); *Question of the Death Penalty*, Hum. Rts. Comm. Res. 1999/61, U.N. GAOR, 55th Sess., ¶ 3, U.N.Doc. E/CN.4/RES/1999/61 (1999).

¹⁵¹ See *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur*, U.N. GAOR, Hum. Rts. Comm., 54th Sess., ¶ 145, U.N.Doc. E/CN.4/1998/68/Add.3 (1998). In his 1998 report, the Special Rapporteur (Mr. Bacre Waly Ndaiye) stated: "Because of the nature of mental retardation, mentally retarded persons are much more vulnerable to manipulation during arrest, interrogation, and confession. Moreover, mental retardation appears not to be compatible with the principle of full criminal responsibility." *Id.* at ¶ 58. In 2000, the Special Rapporteur urged governments that continue to use the death penalty "to take immediate steps to bring their domestic legislation and legal practice into line with international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons." *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. GAOR, Hum. Rts. Comm., 56th Sess., ¶ 97, U.N. Doc. E/CN.4/2000/3 (2000).

¹⁵² *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. GAOR, Hum. Rts. Comm., 57th Sess., ¶ 82, U.N.Doc. E/CN.4/2001/9 (2001).

¹⁵³ Death Penalty Informational Center, available at <http://www.deathpenaltyinfo.org/dpicintl.html>.

¹⁵⁴ *Id.*

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Azerbaijan, Georgia, Bulgaria, Estonia, and Lithuania, have all taken proactive steps to eliminate or impose a moratorium on the use of the death penalty.¹⁵⁵

As the United States has become increasingly isolated in its practices, we learned, its isolation has become increasingly costly. The practice has begun to create friction with and alienate American allies of long standing. Nations with strong rule-of-law traditions and histories, legal systems and political cultures similar to ours, have most consistently protested our practice. In particular, Canada, the European Union countries, and Australia have strongly criticized the U.S. execution practice in formal demarches and in letters expressing distress at specific executions.¹⁵⁶ The foreign media and general public have expressed growing outrage at the existence and frequency of capital punishment in our country, with particular emphasis on the U.S. practice of executing people with mental retardation.¹⁵⁷ The Council of Europe has passed a resolution calling for revocation of the United States' observer status before that body unless it makes "significant progress" toward abolishing the death penalty by 2003. Similarly, the European Union has called for a moratorium on federal executions in the United States,¹⁵⁸ and a number of countries (including Canada and South Africa) have refused to extradite criminal suspects to the United States if they will be subject to capital punishment.¹⁵⁹

¹⁵⁵ *Id.*

¹⁵⁶ On March 26, 2001, for example, the European Union, via its Presidency (Sweden), the subsequent President (Belgium) and the European Commission, appealed to the Governor of Nevada not to execute Thomas Nevius, a defendant with an IQ between 57 and 68. The European Union's letter noted that Nevius's execution would be contrary to the United Nations' "Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty" as well as to the most recent resolution on capital punishment by the Commission on Human Rights. See European Union, Letter to Nevada Governor Guinn on Behalf of Thomas Nevius, Mar. 26, 2001, available at <http://www.eurunion.org/legislat/DeathPenalty/NeviusGovLett.htm> (last consulted April 14, 2002).

¹⁵⁷ See, e.g., *A Cultural Gulf*, INT'L HERALD TRIBUNE, May 14, 2001, at 8 ("European politicians and intellectuals, who view the death penalty as a human rights issue, are incredulous that Americans support a punishment that . . . is used on the mentally retarded and has often gotten the wrong man.") (emphasis added); Gay Alcorn, *The Softer Option*, SYDNEY MORNING HERALD, May 12, 2001, at 37 ("Why would the U.S., champion of human rights and justice, be so alone among its allies . . . ?").

¹⁵⁸ See *supra* note 100 at 47, 48. The Clinton Administration left office having continued a moratorium on federal executions that had lasted nearly four decades. Shortly after taking office, however, the Bush Administration oversaw the execution of Oklahoma City bomber Timothy McVeigh, followed soon thereafter by the execution of alleged drug kingpin Juan Raul Garza. See <http://www.deathpenaltyinfo.org/dpicintl.html>.

¹⁵⁹ *Id.*

In particular, we were stunned to learn, on further research, that the United States of America is now the only established democracy in the world that regularly executes people with mental retardation. China, for example, the world's leader in executions, has reportedly banned the execution of people with mental retardation since imperial times.¹⁶⁰ Of the minority of nations in the world that still retain the practice of capital punishment, we at first concluded that only two – the United States and Kyrgyzstan – openly execute people with mental retardation.¹⁶¹ Yet when we filed our brief so arguing, we learned that in 1999, Kyrgyzstan's President Askar Akayev had signed into law a moratorium on executions and announced plans to eliminate capital punishment by 2010 in an effort to confirm the nation's "commitment to basic human rights and freedoms."¹⁶² When the *New York Times* reported on our brief, Kyrgyzstan's ambassador to Washington rushed to set the record straight, noting that the United States now stands alone, because Kyrgyzstan has executed no one – much less a person with mental retardation – in the past few years.¹⁶³ Given this near-unanimity of state practice followed out of a sense of legal obligation, we concluded that the current U.S. practice of executing persons with mental retardation violates customary international law, which "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. . . ."¹⁶⁴

The growing international condemnation of the United States' practice of executing people with mental retardation has also become a significant factor in the flurry of state legislation seeking to eliminate the practice.¹⁶⁵ In 1989, when *Penry* was decided, Justice O'Connor

¹⁶⁰ Stephen Davis, *The Death Penalty and Legal Reform in the PRC*, 1 J. CHINESE L. 303, 307 (1987).

¹⁶¹ In 1994, the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions expressed concern that an execution in Japan may have involved a person with mental retardation, but we were not able to independently verify that claim. *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur*, U.N. GAOR, Hum. Rts. Comm., 51st Sess., ¶ 380, U.N.Doc. E/CN.4/1995/61 (1994). Nor does that report suggest that Japanese law and practice authorize the regular, knowing, and deliberate execution of individuals with mental retardation.

¹⁶² Douglas Frantz, *World Briefing: Asian: Kyrgyzstan: Death Penalty Moratorium*, N.Y. TIMES, Jan. 17, 2002, at A8.

¹⁶³ See Baktybek Abdrisaev, Editorial, *Penalties in Kyrgyzstan*, N.Y. TIMES, June 30, 2001, available at <http://www.nytimes.com/2001/06/30/opinion/L30KYRG.html?ex=995179324&ei=1&en=76edcd977f0cf7e8>.

¹⁶⁴ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁶⁵ See, e.g., Eric Dyer, *Death Penalty Measure Passes in State Senate: The Legislation Would*

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acknowledged that executing people with mental retardation might be cruel and unusual punishment, but held that there was "insufficient evidence of a national consensus against [the practice]."¹⁶⁶ At that time, only two states (Maryland and Georgia) and the federal government prohibited executing people with mental retardation. Today, public opinion polls show that a large majority of Americans — even those who support capital punishment — are opposed to executing people with mental retardation.¹⁶⁷ At this writing, eighteen states and the federal government prohibit the practice by statute.¹⁶⁸ When added to the twelve states and the District of Columbia that prohibit all capital punishment, at this writing, a majority of the jurisdictions in the country — thirty states, the federal government and the District of Columbia — ban the practice of executing the mentally retarded. Moreover, a number of states that do not prohibit capital punishment *de jure*, have not in fact executed a person with mental retardation in many years.¹⁶⁹ At the same

Prohibit Prosecutors from Seeking Capital Punishment for Anyone with an IQ of 70 or Below, NEWS & RECORD (Greensboro, N.C.), Apr. 24, 2001, at A1 (quoting North Carolina Republican State Senator Hamilton Horton after state senate passed a bill exempting people with mental retardation from death penalty: "This act addresses the situation of a child's mind in an adult's body. . . . I want the world to know that in North Carolina, we aren't in the business of executing children."); Rodney Ellis, *The Hard-Line Punishment Texans Don't Support*, N.Y. TIMES, June 2, 2001, at A13 (quoting Texas state senator: "[s]ince the death penalty was ruled constitutionally permissible in 1976, 35 offenders with mental retardation have been executed nationwide. Texas leads the way, having executed six. Around the globe this makes Texas look barbaric and concerned with revenge, not justice.") (emphasis added).

¹⁶⁶ *Penry v. Lynaugh*, 492 U.S. 302, 333-35 (1989).

¹⁶⁷ See, e.g., Steve Brewer & Mike Tolson, *A Deadly Distinction: Part III*, HOUSTON CHRON., Feb. 6, 2001, at A6 (citing nationwide poll showing that only 16% of those people who otherwise support death penalty support execution of person who is mentally impaired); Sheryl McCarthy, *The Mentally Retarded Should Be Spared the Chair*, NEWSDAY (New York), Apr. 2, 2001, at A2 (citing nationwide Gallup poll finding that two-thirds of Americans oppose executing people with mental retardation).

¹⁶⁸ Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, New York (except for murder by a prisoner), North Carolina, South Dakota, Tennessee, and Washington. Since 1988, the federal government has enacted legislation outlawing the imposition of the death penalty upon defendants with mental retardation. The federal Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(l), 102 Stat. 4390 (1988 ed.), states unequivocally the view of both Congress and the President that "[a] sentence of death shall not be carried out upon a person who is mentally retarded."

¹⁶⁹ See the statement of Justice Souter in oral argument in *Atkins v. Virginia*, noting that New Hampshire has not executed a person with mental retardation in over 60 years. United States Supreme Court Official Transcript at 38, *Atkins v. Virginia*, No. 00-8452, 2002 WL 341765 (U.S. Feb. 20, 2002). See also *id.* at 41-42 (statement of J. Ginsburg) (pointing out that 30 states constitutes "Three-fifths of all the States. We get enough to, for example, block a filibuster in the Senate. That's a super majority. Why isn't that — why doesn't that

time, no other country in the world regularly and openly executes the mentally retarded. Based on this record, I would submit, *any practice that is banned as cruel and uncivilized by the federal government, a majority of the states, and every other nation in the world must qualify as both "cruel and unusual,"* for purposes of an Eighth Amendment that is interpreted in light of the "evolving standards of decency that mark the progress of a maturing society."

When asked about the diplomats' brief, President Bush initially said, "we should never execute anybody who is mentally retarded."¹⁷⁰ His response was surprising, given that, while governor of Texas, he had opposed clemency petitions and legislation to bar such executions.¹⁷¹ But the President went on to say "our court system protects people who don't understand the nature of the crime they've committed nor the punishment they are about to receive."¹⁷² Yet the judicial protections to which he referred are designed to protect the *mentally insane*, not those with mental retardation. Under existing law in many states, a mentally retarded person (defined as a person with an IQ under 70, low adaptive skills, and early onset of the condition) can still be sentenced to death, despite his developmental disabilities, if he can be found personally culpable.¹⁷³

On reflection, the White House cannot have it both ways. The first half of the President's statement — that we should never execute people with mental retardation — should have allied him with the majority of American jurisdictions and all foreign countries that now categorically ban such executions. But the second half of his answer — that existing court processes adequately protect those with mental retardation — mirrors the opposite position, taken by the minority of states that still permit such executions. If the President sincerely believed that "the mentally retarded should never be executed," he should have made that the policy for his Administration by one or all of four methods:

suffice [to establish a national consensus]?").

¹⁷⁰ David G. Savage & Eric Lichtblau, *The Nation: Aides 'Clarify' Bush Stance on Executing Retarded Inmates*, L.A. TIMES June 13, 2001, at A7.

¹⁷¹ See Ellis, *supra* note 165, (noting that of 35 people with mental retardation who have been executed nationwide since 1976, at least six were executed in Texas, one while then-Governor Bush was campaigning for president).

¹⁷² Savage, *supra* note 170.

¹⁷³ See Harold Hongju Koh, *A Dismal Record on Executing the Retarded*, N.Y. TIMES, June 14, 2001, at A33. Persons who meet the legal criteria for mental retardation, usually defined as having an IQ under 70, low adaptive skills, and early onset of the condition, are quite different from the mentally insane, who may have high IQ's, high adaptive skills, and may come by their illness late in life. *Id.*

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instructing his Justice Department to file an *amicus* brief in the Supreme Court opposing Atkins's execution;¹⁷⁴ introducing and supporting new federal legislation displacing inconsistent state procedures; announcing his refusal to sign death warrants for any federal death row inmates found to suffer from mental retardation; and urging state governors to ban the practice.¹⁷⁵

At oral argument in *Atkins*, Justice Ginsburg asked the Virginia state attorney the following question:

[I]n making this cruel and unusual decision . . . does what the rest of the world think about executing the mentally retarded . . . have any relevance at all? I mean, we have, since the time we said we don't look to the rest of the world [e.g., Justice Scalia's *Stanford* footnote], been supporters of international human rights tribunals . . . for the former Yugoslavia, for the former Rwanda. But is it still, would you say, just irrelevant that most of the rest of the world thinks that mentally retarded people — because it's inhuman to execute them?

In responding, the attorney for the State of Virginia repeatedly waffled on whether international practice is relevant, and ultimately concluded that it was not.¹⁷⁶

¹⁷⁴ The Solicitor General's office could have submitted an *amicus curiae* brief noting the foreign policy difficulties described in text, and stating that, in the view of the United States Government, a national and international consensus has in fact emerged, and that a critical part of that consensus is the emergence of a clear federal policy against the execution of the mentally retarded, which is endorsed by both the federal legislature and the federal executive branch. The Solicitor General could then have urged the Court to construe the Eighth Amendment consistently with the contemporary national and international consensus opposing the execution of persons with mental retardation.

¹⁷⁵ Significantly, the President's own brother, Florida Governor Jeb Bush, publicly vowed not to sign death warrants for prisoners with mental retardation and recently signed into law a bill prohibiting execution of persons with mental retardation. See *National Briefing South Florida: Legislature Bans Execution of Mentally Retarded*, N.Y. TIMES, May 5, 2001, at A9.

¹⁷⁶ See United States Supreme Court Official Transcript at *48, *Atkins v. Virginia*, No. 00-8452, 2002 WL 341765 (U.S. Feb. 20, 2002):

MS. RUMPZ: This Court has said previously that the notions of other countries and the notions of other lands cannot play the deciding factor in what —

JUSTICE GINSBURG: Not deciding. I asked you if it was relevant.

MS. RUMPZ: Well, it is relevant in — as Justice Scalia said in one of his opinions, to determine whether our practice is a historical accident or not. But it certainly is not relevant in deciding the Eighth Amendment principle. . . .

JUSTICE GINSBURG: I asked if it was relevant. . . . I didn't ask if it was

How should the Court decide *Atkins*? The Justices should begin by declaring that the Eighth and Fourteenth Amendments categorically prohibit the infliction by any American government official not only of punishments considered cruel and unusual at the time the Bill of Rights was adopted, but also those contemporary American penal practices that offend the “evolving standards of decency that mark the progress of a maturing society.”¹⁷⁷ The Court should declare that it cannot meaningfully evaluate such “evolving standards of decency” without weighing both international and domestic opinion.

By so saying, the Court should treat as nonbinding dicta Justice Scalia’s footnote in *Stanford v. Kentucky* dismissing the relevance of international opinion. As noted above, that dicta is both anti-originalist and increasingly harmful to U.S. foreign policy interests in an age of globalization. In *Penry*, the Court declined to adopt a categorical rule barring such executions, but acknowledged that a “national consensus against execution of the mentally retarded may someday emerge.”¹⁷⁸ Reviewing the record sketched above, the Court should hold that abundant evidence now exists of both an international and a national consensus against executing persons with mental retardation. The Court should find that current U.S. practice of executing adults with the minds of children has become manifestly inconsistent with evolving global standards of decency.¹⁷⁹ The Court should further find that allowing the

dispositive.

MS. RUMPZ: It’s not dispositive, and it is relevant once the Eighth Amendment principle has already been established. It’s not relevant in establishing whether something is cruel and unusual.

JUSTICE SOUTER: Why do you need it after it’s been established?

QUESTION: You don’t.

MS. RUMPZ: You don’t. You — you look — you look after the fact to see whether — I guess my answer I guess is it’s not relevant.

¹⁷⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁷⁸ *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

¹⁷⁹ In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Court held that Oklahoma’s application of the death penalty to a defendant who was 15 years old at the time of the offense violated the Cruel and Unusual Punishments Clause. *Id.* at 838. Justice O’Connor’s concurrence invoked the United States’ ratification of Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365 (entered into force for United States on Feb. 2, 1956), “to undercut any assumption that [recent congressional legislation has intended] to authorize the death

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practice to continue will strain diplomatic relations with close American allies, provide diplomatic ammunition to countries with demonstrably worse human rights records, increase U.S. diplomatic isolation, and impair other U.S. foreign policy interests. For that reason, this Court should now take the step postponed in *Penry* and hold that the practice of executing people with mental retardation offends the broad universal "concepts of dignity, civilized standards, humanity and decency" that lie at the core of the Eighth and Fourteenth Amendments.¹⁸⁰

CONCLUSION

In closing, let me answer the two questions I presented when I began this lecture. The evidence strongly suggests that we do not currently pay decent respect to the opinions of humankind in our administration of the death penalty. For that reason, the death penalty should, in time, be declared in violation of the Eighth Amendment. The *Atkins* case presents our Supreme Court with an invitation to begin that process, by internalizing the global norm against execution of persons with mental retardation through a judicial process of constitutional adjudication. If the Court accepts that invitation, it would give new energy to "vertical" efforts to internalize international law norms into domestic constitutional law.¹⁸¹

Whatever the result in *Atkins*, it now seems clear that America's death penalty will remain on a collision course with the opinions of humankind. Officials of the European Parliament have begun threatening the possibility that European companies will start "restricting the investment in the U.S. to states that do not apply the

penalty for some 15-year old felons." 487 U.S. at 852 (O'Connor, J., concurring). It would be illogical if the Court were now to ignore an equally strong expression of international practice and opinion and affirmatively authorize imposition of the death penalty upon an adult with the mind of a 10-year old.

¹⁸⁰ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

¹⁸¹ Judicial norm-internalization is not the only form of norm-internalization that has occurred thus far. One salutary result of *Faulder*, *Breard*, *LaGrand*, and other consular notification cases has been the State Department's new and massive educational campaign to teach law enforcement officers their obligations under Article 36 of the Vienna Convention. See *United States Department of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* (Jan. 1998), available at http://travel.state.gov/consul_notify.html; Koh, *Frankel Lecture*, *supra* note 10 (arguing that incorporation of international norms into bureaucratic compliance procedures makes obedience with international law into institutional habit).

death penalty."¹⁸² At this writing, the government of Mexico continues to press Oklahoma on the case of Gerardo Valdez, a mentally impaired Mexican national who was sentenced to death without receiving any consular rights.¹⁸³ But that result does not resolve, but only postpones ultimate judicial elaboration of the precise scope of a death row inmate's rights and remedies under the Vienna Conventions.

In short, we have come full circle from the Declaration of Independence. A candid world has now submitted the facts to us: in this day and age, the use of the death penalty is increasingly cruel, unusual, and in violation of evolving global standards of decency.

After September 11, one question is particularly worth asking: why should we continue a national practice that isolates us and offends our allies at a time when we are trying to isolate our adversaries by leading a global coalition based on respect for human rights? In recent weeks, European allies have made it increasingly clear that they will not extradite suspects to U.S. prosecution, particularly before U.S. military commissions, if these suspects will face the death penalty.¹⁸⁴ In an era of global terrorism, the United States' efforts to lead a global coalition of conscience can only suffer from a perception that the United States' internal practices pay only lip service to the opinions of mankind.

When U.N. Secretary General, Kofi Annan, now a Nobel Peace Prize winner, received a petition signed by 3.2 million people seeking an end

¹⁸² See <http://www.deathpenaltyinfo.org/internationalreport.html>, quoting Catholics Against Capital Punishment News Notes/ July 20, 1998 (quoting letter from Alan Donnelly to then-Texas Governor George W. Bush).

¹⁸³ Valdez, a victim of traumatic brain damage, was never notified of his consular rights. Mexico did not learn of his incarceration until twelve years after his arrest, just two months before his scheduled execution and after all avenues of appeal had been exhausted. The Oklahoma Pardon and Parole Board recommended that Valdez's death sentence be commuted to life in prison. Newly elected Mexican President Vicente Fox called Oklahoma Governor Frank Keating to support commutation, as did numerous foreign governments and the European Union. When Valdez's lawyers filed for habeas corpus in the Oklahoma Court of Criminal Appeals, they argued that the court must follow the ICJ's decision in *LaGrand* and vacate Valdez's death sentence as a remedy for Oklahoma's violation of Article 36. In September 2001, the court entered an indefinite stay of execution, and ordered the State of Oklahoma to respond. At this writing, the *Valdez* case remains pending. See Babcock, *supra* note 134. In early May, 2002, the Oklahoma Court of Criminal Appeals set aside Valdez's death sentence, finding that he had received ineffective assistance of counsel at 1989 trial. See *Valdez v. State*, 2002 OK CR 20, ___ P.3d ___ (May 1, 2002).

¹⁸⁴ See Philip Shenon and Neil A. Lewis, *A Nation Challenged: The Conspiracy Trial; U.S. to Seek Death Penalty for Moussaoui in Terror Case*, N.Y. TIMES, Mar. 29, 2002, at A20.; see also Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002) (arguing that death penalty applied by military commissions will jeopardize global war against terrorism).

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to global executions, he declared: "The forfeiture of life is too absolute, too irreversible, for one human being to inflict it on another, even when backed by legal process. And I believe that future generations, throughout the world, will come to agree."¹⁸⁵ The Secretary-General's words echo Justice Blackmun's closing plea in *Callins v. Collins*: "I may not live to see that day [when the Court abandons the death penalty], but I have faith that eventually it will arrive. [In the meantime, t]he path the Court has chosen lessens us all."¹⁸⁶

I hope this lecture shows that Justice Blackmun spoke the truth: our country's continued adherence to the death penalty lessens us, both as a nation and as a people. As Americans committed to transnational legal process, we must do what we can to make the day arrive when this nation, conceived in liberty, again pays decent respect to the world opinion on the death penalty.

¹⁸⁵ *Annan Supports Halt to Death Penalty*, WASH. POST, Dec. 19, 2000, at A20.

¹⁸⁶ *Callins v. Collins*, 510 U.S. 1141, 1159 (1994) (Blackmun, J. dissenting).