
The Case for Abolition in the United States Based on International Law and the Death Row Phenomenon

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[O]ur experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out an execution after the lapse of so much time, reinforces my opinion that contemporary decisions "to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process."

Justice Stevens' Opinion, *Thompson v. McNeil*, 129 S. Ct. 1299 (2009)

Introduction

Although there is far from any resemblance of international consensus on the lawfulness of the death penalty, it is undeniable that, particularly in the western world, there is something of a trend toward abolition. International and regional human rights instruments did not at their inception expressly proscribe capital punishment per se, although they did attempt to limit the circumstances under which death sentences can be handed down and regulate the manner in which they can be carried out. More recently, human rights instruments have been complemented by optional protocols, explicitly proscribing the death penalty, often with compelling incentives for ratification.¹

At present, the United States stands among those nations bucking the abolitionist trend, with the States of Texas and Virginia at the forefront of retentionist efforts.² This

article analyses the status of the death penalty under treaty-based and customary international law. It next examines the extent to which the United States considers itself bound by the norms of international law and the effect this has on its application of the ultimate punishment. Finally, the article asserts that the limited international law by which the United States considers itself bound, coupled with the guarantees explicitly provided for in the United States' federal and state constitutions, already provides a compelling, if largely rejected, argument in favour of abolition.

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It would be an understatement to describe the death penalty debate as broad, with far reaching legal, political, religious and social connotations. Thus, for the purposes of brevity, this article focuses primarily on two areas where international law is particularly relevant; the death row phenomenon and the United States'

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execution of foreign nationals.

International Law and the Death Penalty

Treaty-Based International Law

Death penalty debate in the post-war era might be said to be fuelled by the emergence of international human rights law,³ with a shift in focus away from the state and towards the individual. The Universal Declaration of Human Rights⁴ enshrines the right to life but explicitly excepts the death penalty. The International Covenant on Civil and Political Rights (ICCPR)⁵ is more specific, enshrining the right to life but expressly permitting the death penalty within narrowly-prescribed circumstances.⁶ Both instruments contain absolute prohibitions of torture.

Regional human rights instruments follow largely the same framework. Article 2 of the European Convention of Human Rights (ECHR)⁷ provides that “[e]veryone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” Article 3 provides for the absolute prohibition of torture. Article 4 of the American Convention on Human Rights (ACHR)⁸ expressly permits the death penalty as an exception to the right to respect for a person’s life, but contains five clauses limiting the application of the death penalty, including obligations to exempt minors and the elderly from the punishment, and restrictions on reintroduction in abolitionist nations.⁹

These instruments were later complemented by optional protocols prohibiting the death penalty. On 15 December 1989, the United Nations General Assembly adopted the second optional protocol to the ICCPR, which requires State Parties to abolish the death penalty. The ECHR has two optional protocols, one requiring abolition except in peacetime¹⁰ and one requiring abolition in all circumstances.¹¹ Entry to the European Union is dependent on the ratification of the first optional protocol. On June 8 1990, the General Assembly of the Organisation of American States adopted the Protocol to the ACHR to abolish the death penalty.¹²

There is debate as to the significance of the absence

of explicit prohibition of the death penalty in international human right instruments; over whether treaty-based international law views abolition as an end goal or whether it residually permits the death penalty. The retentionist argument is that the fact that explicit prohibition can be found only in optional protocols indicates precisely that abolition is optional and that the death penalty is therefore permissible as an exception to the universally recognised right to life. Proponents of abolition maintain that abolition was the intention of the drafters of these instruments, as early as the 1948 inception of the UDHR, but that it wasn’t then politically feasible to expressly prohibit capital punishment. Consequently, a graduated approach was necessary to achieve abolition.¹³ The framing of the relevant articles, as well as the discussions leading to and following their adoption, lends credence to this proposition. In 1971, for example, the General Assembly passed Resolution 2857¹⁴ which states: “In order to fully guarantee the right to life, provided for in Article 3 of the UDHR, the main objective to be pursued is to progressively restrict the number of offences for which the death penalty can be imposed with a view to abolishing this punishment in all countries.” This suggests that the United Nations, in passing the UDHR, as well as later, more specific instruments, viewed abolition rather than restriction as an end goal.¹⁵

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Other Sources of International Law

The trend toward abolition theory is also supported by customary international law, international legal practice, and decisions in other jurisdictions based in international law. If it is

accepted, or can be proved that the death penalty, as practiced, constitutes a cruel, inhuman or degrading treatment or punishment, it follows that the death penalty is prohibited by customary international law. It is well-recognised that the prohibition of torture constitutes *jus cogens*, or a peremptory norm of international law,¹⁶ and if we accept, as proposed, that capital punishment breaches this threshold, abolition should also constitute *jus cogens*.

International Courts and Tribunals do not permit the death penalty as a possible punishment. The death penalty was not available as a punishment in either of the ad hoc tribunals established by the United Nations Security Council in Rwanda and the Former

Yugoslavia, nor is it available as a punishment under the Rome Statute of the International Criminal Court.¹⁷ Although the issue of the death penalty was controversial at the inception of such bodies, particularly in the case of Rwanda, its absence indicates that, although abolition is not yet an established international norm, where courts and tribunals are created in the name of the international community, they will not hand down death sentences.

Major decisions in other jurisdictions have deferred to the trend toward abolition. In the South African Constitutional Court case of *Makwanyane*,¹⁸ the death penalty was held to be unconstitutional. In addition to well-reasoned arguments surrounding the lack of preventative effect of the punishment,¹⁹ the arbitrariness and prejudice in the South African system,²⁰ and the huge potential for error, the court alluded to the weight of international opinion on the issue:

“The movement away from the death penalty gained momentum during the second half of the present century with the growth of the abolitionist movement. In some countries it is now prohibited in all circumstances, in some it is prohibited in times of war, and in most countries that have retained it as a penalty for crime its use has been restricted to the most extreme cases.”²¹

Undeniable parallels can be drawn between pre-*Makwanyane* death penalty practice in South Africa and the current mechanisms of the United States. The *Makwanyane* judgment itself contained abject criticism of the United States’ confused interpretation of its own constitution, and portrayed the capital punishment system in the United States as an undesirable model to follow.²² By extension, the line of reasoning that enabled capital punishment to be declared unconstitutional in South Africa, including recognition of international human rights norms, could be used to the same effect in the United States. However, as described

below, the American judiciary has adopted a different approach, both to constitutional

interpretation and to international law.

International Law and the United States

The United States is well known for its maverick approach to international law, in relation to the obligations it has imposed on itself through accession to international and regional human rights instruments, through the margin of appreciation it affords itself in interpreting these obligations, and in its recognition of the authority of international courts. When the United States ratified the ICCPR in 2002, it entered reservations to Articles 6 and 7, preserving its right to execute individuals under the age of 18 at the time of the

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commission of the offence,²³ and declaring that it would only be bound by the prohibition on cruel, degrading or inhuman treatment to the extent to which cruel or unusual treatment or punishment is prohibited by the Fifth, Eighth

and Fourteenth Amendments to the Constitution as interpreted by the U.S. Supreme Court.²⁴ A similar reservation was entered during ratification of the Convention against Torture, in order to maintain the United States’ position on the execution of people who were minors at the time they committed the offence. The United States has not ratified the United Nations’ Convention on the Rights of the Child (UNCRC)²⁵ and, although it is a signatory to the ACHR, it has not ratified it.²⁶

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for a number of reasons. First, it has been previously established or at least accepted that the United States Constitution permits capital punishment. Although in 1972 the Supreme Court in *Furman v. Georgia*²⁷ held that the death penalty was contrary to the Eighth and Fourteenth Amendments, and that all then-existing death penalty statutes were unconstitutional, this was not directed at the punishment per se, but the arbitrary and capricious nature in which it was administered.²⁸ A

four-year period of de facto moratorium ensued

while states revised their death penalty statutes. In 1976, the Supreme Court in *Gregg v. Georgia*²⁹ upheld a death sentence imposed by the state of Georgia, and affirmed the constitutionality of the revised death penalty statutes of Georgia, Florida, Texas and North Carolina.

Second, the U.S. Constitution is less well-positioned than international treaties to permit individuals to enforce their rights. The Constitution is couched in negative terms, placing limits on state power, whereas the ICCPR, the UDHR and the ACHR contain positive, directly enforceable rights conferred on the individual.

A third reason why the U.S. Constitution poses problems for abolitionists is that the Constitution is far older than the international and regional human rights instruments. Therefore it is clear that when the Constitution was framed abolition was not a consideration. The Fifth Amendment expressly references capital punishment³⁰ and at present, the more conservative half of the Supreme Court is prepared only to give effect to the express intention of the framers, rather than interpret the Constitution in accordance with “evolving standards of decency.” According to this interpretative test, because capital punishment was expressly permitted by the Fifth Amendment, it cannot be considered cruel and unusual per se, under the Eighth Amendment.

Foreign Nationals and Consular Access

A major area in which the United States has ignored the dictates of international law relates to the executions of foreign nationals. Under the Vienna Convention on Consular Relations (VCCR), to which the United States has been an unreserved party since 1960, an arrested foreign national must be informed of his right to access the consular post of his home state.³¹ The consular officers of a national arrested or imprisoned in another state are entitled access to the defendant, in order to converse, correspond and arrange for legal representation.³² The United States has sentenced, and executed, a number of foreign nationals in the absence of any advice of their right to consular access. Further, executions have taken place whilst national and international legal proceedings pertaining to the issue of consular access remained pending. In 1998, a Paraguayan national named Angel Breard was executed in Virginia.³³ Despite an International Court of Justice (ICJ) order, and a letter from United States Secretary of State to the Governor of Virginia, the Supreme Court refused to stay the execution. Paraguay withdrew its case before the ICJ after receiving an

apology from the United States.

In 1999, Germany bought a case before the ICJ in relation to two of its nationals sentenced to death in Arizona, brothers Karl and Walter LaGrand.³⁴ The case was not heard until after the execution of Karl and the day before the scheduled execution of Walter. The ICJ ordered that the execution be stayed pending a final decision by the ICJ.

The U.S. Solicitor General informed the Supreme Court that such an order had no binding effect. The Governor of Arizona simply ignored the order, as well as the advice of his own clemency board, and Walter La Grand was executed the following day. In its counter memorial submitted to the ICJ in 2000, the United States opined that an apology was sufficient.³⁵ In 2001, the ICJ held that the United States had breached its obligations to the LaGrand brothers.³⁶

In 2004, the ICJ found once again that the United States had failed to advise foreign nationals sentenced to death of their consular rights under the VCCR. In *Mexico v. USA*, or the *Avena case*,³⁷ the ICJ held that the United States had violated its VCCR obligations in respect of 51 foreign nationals on death row in various U.S. states, and that in 34 cases the United States had deprived Mexico of the right to arrange for legal representation.

President Bush subsequently issued a memorandum ordering states to discharge their duties under *Avena*, and to review the cases of all Mexican nationals under sentence of death in the United States.³⁸ In 2005, the United States withdrew from the optional protocol to the VCCR, subjecting it to the adjudication by the ICJ. Since this chain of events, the United States Supreme Court has been afforded a number of opportunities to consider the extent of its international obligations under the VCCR. The Court held in *Sanchez-Llamas v. Oregon*³⁹ that evidence of incriminating statements made by the defendant, admitted into court in violation of Article 36 of the VCCR, need not be suppressed.⁴⁰

Sanchez-Llamas did not concern an individual named in the *Avena* judgment. In 2008, however, the Supreme Court considered the case of Jose Medellin,⁴¹ one of the individuals named in the *Avena* ruling, and held that *Avena* is not enforceable under United States law, and that international treaties such as the VCCR are not self-executing. The Court stated that neither *Avena* nor the President's memorandum constituted directly enforceable federal law that pre-empted state limitations on the filing of successive habeas petitions. Jose Medellin was executed in Texas on August 5, 1998, following

denial of his appeal for clemency.

These cases demonstrate a pattern of misunderstanding of, and disrespect for, international law. First, the supposition by the United States that an apology will suffice as reparation for executions carried out under such circumstances suggests that it considers such actions to be diplomatic faux pas, rather than the human rights abuses that they demonstrably are. Unfortunately, the meek acceptance of these apologies by the home states of the executed serves only to permit such a conclusion. Further, the overruling of international judgments in *Medellin* and *Sanchez-Llamas*, and the subsequent withdrawal from international treaties in which it had expressly agreed to be bound by such judgments, provide pertinent examples of the United States' rather low regard for international court judgments.

Where International Norms Prevail

There are limited examples where the United States has bowed to international pressure, if not formally accepted international norms by ratifying the treaties in which they can be found. In *Atkins v. Virginia*,⁴² the Supreme Court expressly deferred to international condemnation in finally holding that it was unconstitutional to execute individuals suffering from mental retardation. A footnote to the opinion of the Court provides: "Within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." In a dissenting opinion, Chief Justice Rehnquist took issue with this deference, writing: "I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."⁴³ And Justice Scalia claimed to award the "world community" argument the prize for the Court's most feeble effort to fabricate "national consensus."⁴⁴ Despite these objections

from two conservative justices, both of whom reject the notion that the Constitution should be interpreted in accordance with evolving standards of decency, the Court voted 6 to 3 to abolish execution of the mentally retarded. In doing so, a majority of justices ruled in a manner consistent with international consensus on the issue.

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Similarly, in *Roper v. Simmons* a sharply divided Supreme Court held that it was unconstitutional to execute individuals who committed their crimes as juveniles. The 5-4 decision brought United States policy on the issue of minors into line with international norms. The opinion of the Court once again explicitly considered international opinion, and accepted that the United States was alone in its official sanction of the juvenile death penalty,⁴⁶ a line of reasoning which again drew substantial criticism from Justice Scalia

who predictably dissented.⁴⁷ Notwithstanding these decisions, the United States has yet to ratify the UNCRC. Nor has the United States explicitly retracted reservations made in respect of Articles 6 and 7 of the ICCPR.

The Death Row Phenomenon

There is no consensus regarding the precise definition of the death row phenomenon, and no formal recognition under either domestic or international law. Generally speaking, however, the death row phenomenon can be described as a combination of circumstances, including severe mental trauma and physical deterioration, that afflicts prisoners under sentence of death.⁴⁸

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length of time is not quantified. Exact time specifications would undoubtedly create a ticking clock effect and place an increasing burden on those condemned to death as this clock ran down. In the 1994 case of *Pratt and Morgan*, however, the Privy Council examined a plethora of international treaty-based law and case law before advising that any delay of five or more years would likely constitute “inhuman and degrading punishment or other treatment.” Ultimately, the Privy Council advised the Jamaican Privy Council to commute to life all death sentences for persons who had spent more than 5 years on death row.⁵⁰

Second, there is a requirement of ill treatment. The conditions in which death-row inmates are housed must be sufficiently harsh to contribute to the condemned prisoner’s mental and/or physical deterioration. This requirement is not usually difficult to satisfy; death row conditions the world over are notoriously poor. This is particularly true given that condemned prisoners are not sentenced to prison terms. Incarceration is merely a form of incapacitating individuals whilst their appeals are exhausted. Rehabilitation is not a consideration on death row. Since prisoners are simply warehoused while they await execution, there is little to no oversight of what conditions attend pre-execution incarceration.

The third requirement is that the inmate must be under a genuine sentence of death; there must be a real risk that the sentence will be carried out.⁵¹ According to Sadoff, “[i]t is not enough that an inmate experiences psychological distress at the possibility that he might one day be executed, unless the death penalty poses a real and present threat.” It need not necessarily be guaranteed by precedent that an individual will be executed in order for the death row phenomenon to be invoked; in certain jurisdictions far more individuals are sentenced to death than are eventually executed. It is, however, a necessary prerequisite of establishing the existence of the death row phenomenon that, at the time the sentence is handed down, and throughout the duration of imprisonment, the individual is living the real and present danger of being exterminated by the state.

It has been suggested that the death row phenomenon can exist without a death sentence, provided that the requirements of ill-treatment and time are satisfied,⁵² although without the possibility of execution, the conditions of incarceration might be better evaluated according to ordinary criteria regarding torture and ill treatment. It is fair to say, even if only for the purposes of conciseness, that the death row phenomenon cannot realistically be detached from the death penalty itself.⁵³

The United States and the Death Row Phenomenon

Modern American death penalty jurisprudence and practices frequently conspire to establish the prerequisites for the death row phenomenon. First, the average time between sentence and execution has steadily increased since executions were temporarily suspended following *Furman v. Georgia*. In Texas, a state that would lay claim to having a relatively efficient system of capital punishment, the gap between death sentence and execution is currently 10.26 years. Nationwide, the average period of time an American prisoner spends on death row prior to execution is 12.83 years.⁵⁵

Second, the conditions on death row are also notoriously severe, akin to solitary confinement restraints placed on non-capital prisoners. Although specifics vary from state to state, prisoners on death row in the United States are routinely locked down 23 hours a day, exercised in isolation, denied education and work programs, denied radios and/or communal television to alleviate tedium, subjected to arbitrary and unjustified searches and confiscation of personal property, and denied contact visits up to and including the day of execution.

These restrictions are imposed for various reasons, including ease of administration and the perceived absence of any need to prepare detainees for reintegration into society. Whilst isolation is purportedly justified on death row due to the dangerous nature of certain offenders, it is imposed by default rather than as a punishment for rule infractions. By the same token,

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there is little to no possibility of increased liberty for good behaviour. Incarceration on death row is not viewed as a punishment in and of itself, as death penalty inmates are not actually sentenced to a prison term. As such, the conditions that inmates are subjected to merely constitute treatment while awaiting punishment – execution – despite the fact that a decade will likely pass before the prisoner is strapped to a hospital gurney and poisoned to death. The reality is, however, that the prolonged period of pre-execution incarceration constitutes a secondary punishment, to which the defendant has not been sentenced. The detrimental effect on the physical and mental health of individuals held in conditions of solitary confinement is well-documented,⁵⁶ and well-recognised by the institutions that impose them. The treatment of death row prisoners and general population inmates held in solitary confinement frequently violate international human rights norms.⁵⁷ Articles 7 and 10 of the ICCPR prohibit torture and cruel, inhuman and degrading treatment or punishment, while simultaneously guaranteeing the right to humane treatment for those deprived of liberty.

The third pre-requisite to the death row phenomenon is also easily satisfied. Whilst the rates at which different states sentence and execute offenders vary considerably, there is no reason to assume that a death sentence won't be carried out simply because sentencing rates are far higher than execution rates. The arbitrary method by which execution dates are set creates a situation in which inmates are aware that at any time after the finalisation of the appeals process a date could be set for their execution. The fact that there is no way to predict with any certainty whether or when a "serious" execution date will be set undeniably exacerbates the psychological damage suffered by condemned prisoners.

External Critique of United States' Death Penalty Procedure

The United States' continued embrace of capital punishment has attracted international criticism. Increasingly, the death row phenomenon is at the heart of the conflict. Notwithstanding withering criticism, such as that offered by the South Africa Constitutional Court in *Makwanyanwe*, the United

States has repeatedly espoused that such condemnation will not affect its stance, in any area. A more pertinent example of external criticism and one that may impact slightly on the United States' interests in addressing crime issues is the refusal of other nations to extradite individuals to the United States in instances where they may face the death penalty.⁵⁸ The most famous example of this, and indeed the origin of the concept of death row phenomenon, is the European Court of Human Rights (ECtHR) case of *Soering v. UK*⁵⁹, now some 20 years old. In *Soering*, the court recognized the existence of the death row phenomenon and found that the cumulative effect of its three constituent elements constituted a violation of Article 3 of the European Convention on Human Rights (ECHR) in that they amounted to a "cruel, degrading or inhuman treatment or punishment." On this basis, the court refused to permit the extradition of Jens Soering, a German national accused of killing two people in the state of Virginia. Soering was eventually extradited, after assurances were given by the prosecutor that death wouldn't be sought.

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Soering paved the way for other nations to refuse to extradite individuals to States where they may face the death penalty. In June 1996, the Supreme Court of Italy refused to extradite Pietro Venezia to the United States despite assurances that the death penalty would not be sought.⁶⁰ In 2001, the Supreme Court of Canada refused to extradite an individual from Canada to the United States on

the grounds that to do so would contravene its constitution.⁶¹

Internal Criticism

Of course, *Soering* and other cases do little to further the abolitionist cause in the United States. It is certainly true that the international community can have a persuasive influence. The United States is, for example, all too aware of the detrimental effect its stance on capital punishment has on the willingness of other nations to co-operate, through extradition treaties, in the war on terror. Any leverage gained, however, will be in relation to individual cases and as *Soering* proved, can be dealt with using diplomatic assurances, which not only add to the arbitrariness of the system, but for which there is no legal redress if ignored. Far more

compelling is explicit recognition from within the Supreme Court that extended periods of detention prior to execution violate the Eighth Amendment.

Two Supreme Court justices have on more than one occasion issued opinions questioning both the lawfulness and the value of executing people who have spent significant periods on death row. In *Lackey v. Texas*,⁶² the Supreme Court denied an application for a writ of certiorari predicated on the argument that the execution of a prisoner who had been on death row for 17 years violated the Eighth Amendment's prohibition against cruel and unusual punishment. Without dissenting from the Court's opinion, Justice Stevens said that the issue was an important, undecided one and questioned whether executions after such extensive delays could still satisfy the principal social purposes of capital punishment – retribution and deterrence. According to Justice Stevens.

“It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. . . . The additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.”⁶³

Justice Stevens next turned to the cases of *Gregg v. Georgia*⁶⁴ and *Furman v. Georgia*,⁶⁵ highlighting statements indicating that unusually long periods of detention prior to execution were neither envisaged by the framers of the U.S. Constitution, nor conducive to the justifications for capital punishment;

“As Justice White noted, when the death penalty ‘ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal

contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”⁶⁶ See also *Gregg v. Georgia*, 428 U. S., at 183 (“[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering”).”

Finally, Justice Stevens expressly cited foreign law cases as support for Lackey's contention that his execution would violate the Eighth Amendment.

“Petitioner's argument draws further strength from conclusions by English jurists that ‘execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689.’⁶⁷ As we have previously recognized, that

section is undoubtedly the precursor of our own Eighth Amendment. See, e.g., *Gregg v. Georgia*, 428 U. S., at 169-170. . . . Finally, as petitioner notes, the highest courts in other countries have found arguments such as petitioner's to be persuasive. See *Pratt v. Attorney General of Jamaica*.⁶⁸

The *Lackey* case and its interpretation of *Gregg* and *Furman* have sparked ongoing internal dialogue in the Supreme Court about the compatibility of long delays with the Eighth Amendment. In the cases of *Knight* and *Moore*,⁶⁹ certiorari was denied in the joint applications of a man who had spent nearly 25 years on Florida's death row and one who had spent nearly 20 years on Nebraska's. Justice Thomas, delivering the opinion of the Court, suggested that death row inmates should be prohibited from relying on the Eighth Amendment in cases of undue delay before execution when they have chosen to attempt to avail themselves of the appeals process to which they are entitled.⁷⁰

Justice Breyer, in a dissenting opinion, countered that the delay was attributable to the appellate system itself rather than any abuse by the defendants, and reiterated the sentiments espoused in *Lackey* that long delays prior to execution may breach any threshold established by the Eighth Amendment:

Justice Thomas suggested that death row inmates should be prohibited from relying on the Eighth Amendment in cases of undue delay before execution when they have chosen to attempt to avail themselves of the appeals process to which they are entitled.

“Both of these cases involve astonishingly long delays flowing in significant part from constitutionally defective death penalty procedures. Where a delay, measured in decades, reflects the State’s own failure to comply with the Constitution’s demands, the claim that time has rendered the execution inhuman is a particularly strong one. I believe this Court should consider that claim now.”

Like Justice Stevens in *Lackey*, Justice Breyer turned to foreign cases for support, citing examples from Europe, the Caribbean, and India. He acknowledged that the argument was a constitutional one, and that foreign law has no binding effect on the United States,⁷¹ but that “[i]n these cases, the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their views are useful even though not binding.”

The debate on the influence of international and foreign law has raged outside the courtroom. In 2005, Justices Breyer and Scalia spoke publicly about their judicial philosophies or decision-making methodologies during a January American University discussion of “The Relevance of Foreign Law Materials in US Constitutional Cases.”⁷² Justice Scalia, famously one of the most conservative of the Supreme Court judges, staunchly opposed any consideration of foreign law, saying;

“I do not use foreign law in the interpretation of the . . . Constitution If you told the Framers . . . we’re after something that will be just like Europe, they would have been appalled. . . . (W)hat does the opinion of a wise Zimbabwean judge (or a wise member of the House of Lords law committee) . . . have to do with what Americans believe?”

Justice Breyer reiterated the more flexible approach he had been prepared to adopt in cases before the Supreme Court, arguing;

“England is not the moon, nor is India. Neither is a question of ‘cruel and unusual punishment’. . . . If, in a ‘cruel and unusual punishment’ case, everyone in the world thinks (some)thing is at least worth finding out (then we should consider that). I do not often put references to foreign materials in my opinions. I do so occasionally when I believe that a reference will help lawyers, specialists, or the public at large better understand the issue or the views expressed in my opinions. If the foreign materials have had a significant impact on my thinking, they may belong in the opinion because

an opinion should be transparent. It should reflect my actual thinking.”

Although it is encouraging to see jurists in the upper echelons of the United States’ court system debating the merits of international law, it is an indulgence that they can afford. Unfortunately for those sentenced to death, the Supreme Court rarely decides their fate.⁷³ Attorneys who represent defendants and inmates are seldom in a position to present claims founded in international law. Even if that were untrue, the claims would be presented to State or Federal courts that would be unwilling or unable to entertain them. The sad reality is that, even if a majority of the Supreme Court agreed that a case presented a novel claim,⁷⁴ most would not consider such arguments to have merit.

More recently, the Supreme Court denied relief in the case of *Thompson v. McNeil*⁷⁵ in respect of an applicant who had spent 32 years on death row. Justice Thomas reiterated the mantra that prisoners who choose to exercise their right to appeal should not be permitted to seek relief based on time spent in prison.⁷⁶ Justice Breyer dissented from the Court’s opinion, arguing that “a petitioner’s decision to exercise his right to seek appellate review of his death sentence did not automatically waive a claim that the Eighth Amendment proscribes a delay of more than 30 years.”⁷⁷ He added that, in the case at hand, the petitioner was not wholly responsible for the inordinate delay.⁷⁸

In a separate opinion, Justice Stevens discussed the wider implications of the case, pointing to the high error rate in death sentencing as evidence that delays are inescapable;

“The reversible error rate in capital trials is staggering. More than 30 percent of death verdicts imposed between 1973 and 2000 have been overturned, and 129 inmates sentenced to death during that time have been exonerated, often more than a decade after they were convicted. Judicial process takes time, but the error rate in capital cases illustrates its necessity. We are duty bound to ‘insure that every safeguard is observed’ when ‘a defendant’s life is at stake.’”⁷⁹

Justice Stevens indicated that the appropriate answer may not be to speed up the appeals process, or to curtail the opportunity a petitioner has to argue his case on appeal, but rather to remove the death penalty from the equation altogether.

“[O]ur experience during the past three decades has demonstrated that delays in state-sponsored

killings are inescapable and that executing defendants after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out an execution after the lapse of so much time, reinforces my opinion that contemporary decisions 'to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process.'"

Although he didn't dissent from the majority opinion, Justice Stevens' comments in *Thompson*, combined with similar statements he has made in other cases, indicate that there is explicit recognition from within the United States Supreme Court that death sentences will necessarily involve inmates spending significant amounts of time awaiting punishment. The conclusion that this, coupled with the conditions of incarceration and the ever-present threat of the sentence being carried out, makes the punishment "unacceptably cruel" is realisable even in the absence of any meaningful discussion of international law, from the dictates of the United States Constitution. Further, the time needed in order to ensure the soundness of any conviction for a capital offence undermines the lauded aims of retribution and deterrence. Although this provides a powerful argument in favour of abolition, the reality is that it will require more judges to go significantly further before abolition can be seen as a realistic goal.

Potential for Change?

Despite the Supreme Court's stance on capital punishment, the United States is arguably, in many ways, a partly abolitionist nation. The recent actions of certain States, the musings of others, and the fact that many of the 35 States that still have capital punishment on their statute books might be considered de-facto abolitionist means that the death penalty is now only still active in a few strongholds. Furthermore, state by state abolition has involved active discussion of the compatibility of the death penalty with the United States Constitution, demonstrating that the argument espoused by Justices Breyer and Stevens can, given the right political circumstances, and the right jurists, provide legal and constitutional justification for revocation of the death penalty. On March 19,

2009, New Mexico became the most recent State to repeal the death penalty.⁸¹ Governor Bill Richardson signed the bill into effect following a 24-18 vote in the State Senate.

Ironically, it is arguably federalism itself that prevents the national consideration of abolition based on international law. Federalism isolates state politics from international pressure,⁸² and States that like to act contrary to the dictates of the Supreme Court are less likely still to consider themselves bound by international legal norms, no matter what their customary status.⁸³ A 1996 report by the International Commission of Jurists found that in the USA there was "a general lack of awareness among state officials, and even judges, lawyers, and teachers, of the obligations under the international instruments that the country had ratified."⁸⁴ The

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Supreme Court has the power to declare the death penalty unconstitutional. Certain commentators have postulated that this is a possibility in the future. Hood, for example states:

"It is not inconceivable that before many years have passed the Supreme Court will decide, in line with the practice of those countries with which it shares a common intellect and legal culture, that capital punishment is truly beyond the standard of decency expected of a liberal democratic nation."⁸⁵

This prediction should not simply be dismissed as unabashed optimism. Cases such as *Roper v. Simmons*⁸⁶ demonstrate that the liberal wing of the Supreme Court is willing to delineate its boundaries of decency in accordance with commonly-accepted international norms. The evolving standards of decency test can be interpreted so as to include international standards of decency. It remains, however, extremely unlikely that the Supreme Court in its current configuration would abolish capital punishment. Such a move would likely require radical change in the Court's make-up. Although President Obama's Supreme Court nominee Sonia Sotomayer is regarded as a liberal judge who opposes the death penalty, she is replacing another liberal, Justice David Souter, and is therefore currently capable of little more than maintaining the status quo. The same can perhaps be said of the newest justice, Elena Kagan, who replaces liberal Justice John Paul Stevens. The more conservative judges seem to be reluctant to retire, at least when

doing so would empower President Obama to make another lifelong Court appointment.

Public opinion is also a factor in the possibility of abolition in United States. It is true that abolitionist states have not become so by referendum.⁸⁷ In the unlikely event that the American public supported abolition, this would directly affect neither judicial nor legislative initiatives on the issue. It remains the case though, that judges, district attorneys, and governors are most often elected officials, likely to take tough anti-crime positions. Although the death penalty has been proven time and again to not be a deterrent, and it arguably draws resources and debate away from initiatives which address the true causes of crime, it remains perhaps the most emphatic statement of a zero-tolerance approach, and one much loved by the American right.

A sentence of death requires consensus from a death-qualified jury; that is twelve individuals unanimously deciding that an individual is guilty of a capital crime, and that there is not sufficient mitigation to warrant a lesser sentence than execution. In truth, many in the United States are unaware of the realities of capital punishment, and for many capital jurors the first test of their conviction that they believe in and support capital punishment is in court, when they are bound to answer specific questions, “apply the law,” and are often left feeling that they had no choice but to condemn the defendant to death. Public awareness of the true lack of deterrence of capital punishment, of its true financial cost, of the conditions and periods of confinement on death row, of the possibility of life without the possibility of parole for those genuinely guilty of the most heinous crimes, of the enormous error rate in capital sentencing, and of the almost undeniable truth that the United States has executed innocent people, might lead more Americans to reconsider their pro-death penalty views. In turn, this could lead to the election of officials without a pro death-penalty bias, making it more difficult for state prosecutors to consistently select juries willing, able and eager to hand out death sentences.

Conclusion

There is an international trend toward abolition. Capital punishment, where practiced in such a manner as to permit sufficient scrutiny to ensure that legally and factually innocent people are not executed, necessitates that those sentenced to death be subjected to harsh conditions of confinement, under the ever present threat of death, for extended periods of time. The combination of these three factors amounts to what has become known as the death row phenomenon, and constitutes a cruel, inhuman and degrading punishment, if not torture, absolutely prohibited in both treaty-based and customary international law. Although the right to life is not absolute, the need

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for effective review of death sentences and the absolute prohibition of torture means that the death penalty can no longer be shoehorned into the category of lawfully justifiable exceptions to the right to life. This conclusion can be reached not only when scrutinising international human rights instruments, but also in relation to the United States Constitution, evidenced by the fact that certain American states and Supreme Court justices have opined that the death penalty violates the

Eighth Amendment. Furthermore, the lauded aims of retribution and deterrence, which are used to justify capital punishment, are no longer realisable after extended periods of time. As such the death penalty is manifestly unworkable.

Unfortunately in the United States, the ascendancy of the Constitution over international law and the isolating effect that federalism has on states’ ability to be swayed by the international community means that abolition will be achieved, if at all, by large scale political change in the American executive and judicial branches, or by a huge swing in public opinion regarding capital punishment. The life tenure of Supreme Court justices means that this process will take time. For now, at least, retentionist states such as Texas and Virginia will continue to be permitted to hand down and carry out executions.

- ¹ For example, a necessary pre-requisite for membership of the European Union is ratification of the optional protocol of the European Convention on Human Rights.
- ² In 2008, Texas executed 18 people, and Virginia 4. Sixteen additional executions were carried out in 7 other states. As of 15 May 2009, there were 14 executions in Texas, 1 in Virginia, 1 in Oklahoma, 1 in Florida, 2 in Georgia, 2 in South Carolina, 3 in Alabama and 1 in Tennessee. See <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>.
- ³ See Roger Hood and Carolyn Hoyle, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 18 (Oxford University Press 2003) (“The dynamo for the new wave of abolition was the development of international human rights law”).
- ⁴ Adopted and Proclaimed by the United Nations General Assembly on December 10, 1948.
- ⁵ Adopted and opened for signature and ratification on 16 December 1966, but did not enter into force until 23 March 1976 when it received sufficient ratification in accordance with Article 49.
- ⁶ ICCPR Art. 6(2): “In countries which have not abolished the death penalty, a sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.”
- ⁷ In force since 3 September 1953.
- ⁸ In force since 18 July 1978.
- ⁹ ACHR Art. 4(4). The death penalty shall not be re-established in states that have abolished it.
- ¹⁰ Protocol No. 6 to the European Convention on Human Rights and Fundamental Freedoms concerning the abolition of the death penalty. 28 April 1983.
- ¹¹ Protocol No. 13 to the European Convention on Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances. 3 May 2002.
- ¹² As of February 2009, the protocol had 11 signatures.
- ¹³ See William Schabas, *International Law and Abolition of the Death Penalty*, 55 Wash. and Lee L. Rev. 797 (1998). As we have seen, in several instruments, the death penalty is expressed as a limitation to the right to life. But it is a unique limitation, born of political compromise rather than respect for collective rights, and couched in terms that express the desirability of its abolition.
- ¹⁴ Resolution 2857 (XXVI) of 20th December 1971.
- ¹⁵ Erick Prokosch, *THE DEATH PENALTY V. HUMAN RIGHTS. THE DEATH PENALTY ABOLITION IN EUROPE*, (Council of Europe Publishing 1999).
- ¹⁶ Article 53 of the 1969 Vienna Convention on the Law of Treaties defines a peremptory norm of international law as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Whilst this is not currently true of prohibition itself it is widely accepted that it is the case for torture. Prohibition of the death penalty is a peremptory norm of international law if it constitutes torture, as it arguably does.
- ¹⁷ According to Article 77(b) of the Rome Statute, the maximum penalty is life imprisonment “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” This is true despite the fact that the Court’s jurisdiction is limited to such crimes as genocide, war crimes, crimes against humanity and aggression. The United States is no longer a party to the Rome Statute, having “unsigned” the treaty in 2002 and declaring its previous signature to have no legal effect.
- ¹⁸ *State v. T Makwanyane and M Mchunu* - Case No. CCT/3/94 (Death Penalty) (1995).
- ¹⁹ Justice Didcott, *id.* (“The high incidence of crime cannot simply be attributed to the failure to carry out death sentences.”)
- ²⁰ President Chaskalson, *id.* (“It cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases. Poverty and race mean that some are more likely than others to be condemned to die.”)
- ²¹ President Chaskalson, *id.*
- ²² *Id.* at 85 (“The United States’ jurisprudence has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishments, but also permits, and contemplates that there will be capital punishment. The acceptance by a majority of the United States Supreme Court of the proposition that capital punishment is not per se unconstitutional, but that in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless litigation. Considerable expense and interminable delays result from the exceptionally-high standard of procedural fairness set by the United States’ courts in attempting to avoid arbitrary decisions. The difficulties that have been experienced in following this path, to which Justice Blackman and Justice Scalia have both referred, but from which they have drawn different conclusions, persuade me that we should not follow this route.”).
- ²³ That 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.
- ²⁴ That the United States considers itself bound by Article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.
- ²⁵ The only other State to have failed to ratify the United Nations’ Convention on the Rights of the Child is Somalia.
- ²⁶ The United States has since prohibited the execution of individuals who were minors at the time of the commission of the offence. See *Roper v. Simmons* discussed *infra* note 45 and accompanying text.
- ²⁷ *Furman v. Georgia*, 408 U.S. 238 (1972).
- ²⁸ *Id.* (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”) (opinion of Justice Stewart).

²⁹ *Gregg v. Georgia, Proffitt v. Florida, Jurek v. Texas, Woodson v. North Carolina, and Roberts v. Louisiana*, 428 U.S. 153 (1976).

³⁰ No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

³¹ VCCR, Art. 31(b) provides “If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.”

³² *Id.*; Art. 31(c).

³³ Amnesty International, *The Execution of Ángel Breard: Apologies Are Not Enough*. AMR 51/027/1998 1 May 1998.

³⁴ *LaGrand case, (Germany v. United States of America)*, International Court of Justice, Press Releases and Summary 2001/16 & 2001/16 bis, June 27, 2001.

³⁵ International Court of Justice, *LaGrand case, (Germany v. United States of America)*, Counter-Memorial Submitted by The United States of America 27 March 2000. “The United States acknowledges that there was a breach of the Vienna Convention obligation of consular notification in the cases of Karl and Walter LaGrand. The United States has apologized to Germany for that breach, and is working to prevent any recurrence.”

³⁶ *Supra* note 23.

³⁷ *Avena and other Mexican Nationals (Mexico v. USA (Avena))* 2004 ICJ 128, 31 March 2004.

³⁸ U.S. President George W. Bush: Memorandum for the U.S. Attorney-General Regarding Compliance with the ICJ’s *Avena* Decision.

³⁹ *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

⁴⁰ *Id.* “Even assuming without deciding that the Convention creates judicially enforceable rights, suppression is not an appropriate remedy for a violation, and a State may apply its regular procedural default rules to Convention claims.”

⁴¹ *Medellín v. Texas*, 552 U.S. 491 (2008).

⁴² *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴⁶ *Id.* “The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court’s determination that the penalty is disproportionate punishment for offenders under 18. The United States is the only country in the world that continues to give official sanction to the juvenile death penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the

centrality of those same rights within our own heritage of freedom.”

⁴⁷ Scalia, *id.* “More fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. . . . The Court should either profess its willingness to reconsider all these matters (abortion, double jeopardy and jury trials) in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry.”

⁴⁸ Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner’s Rights Under International Law*, 11 EJIL 833 (2000).

⁴⁹ *Pratt v. Attorney General for Jamaica*, (1994) 2 A.C. 1 (Privy Council 1993) (Jamaica).

⁵⁰ *Id.* at §101: “These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute ‘inhuman or degrading punishment or other treatment.’ If, therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the Constitution, the Governor-General now refers all such cases to the JPC who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to section 17(1).”

⁵¹ David A. Sadoff, *International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon*, 17 Tulane J. of Int’l and Comparative L. 77 (2008) (“It is not enough that an inmate experiences psychological distress at the possibility that he might one day be executed, unless the death penalty poses a real and present threat. Courts are not inclined to provide relief for a Phenomenon claimant where, for example (i) A state has capital punishment but, as a practical matter, never imposes it; (ii) A state might one day consider lifting an existing moratorium on executions; or (iii) A person is serving time for a non-capital offence in one State even though he faces the possibility of a death sentence in another state once that sentence has been served.”)

⁵² See Yin, Tung, *Can “Death Row Phenomenon” Be Confined to Death Row Inmates?* (February 2005). U Iowa Legal Studies Research Paper No. 05-11. Available at SSRN: <http://ssrn.com/abstract=673464> or DOI: 10.2139/ssrn.673464.

⁵³ *Supra* note 13, at 7.

⁵⁴ Texas Department of Criminal Justice Website.

⁵⁵ U.S. Department of Justice Department of Justice Statistics. <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st11.htm>.

⁵⁶ See Atul Gawande, *Hellhole: The United States holds tens of thousands of inmates in long-term solitary confinement. Is this torture?* Annals of Human Rights, The New Yorker, March 30, 2009.

⁵⁷ Elizabeth Hanowsky, *The Death Row Phenomenon is a Violation of the Limitations Placed on Capital Punishment Under International Human Rights Law*, Human Rights Council 4th Session, Agenda Item:

Special Procedures/ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions/ Special Rapporteur on Torture.

⁵⁸ According to Schabas, *supra* note 13, “Extradition has become an important indirect way in which international law promotes the abolition of the death penalty.”

⁵⁹ *Soering v. The United Kingdom* 11 Eur. Ct. H.R. (ser. A) (1989).

⁶⁰ The extradition of a fugitive indicted for a crime for which capital punishment is provided by the law of the requesting state would violate Articles 2 and 27 of the Italian Constitution, regardless of the sufficiency of the assurances provided by the requesting state that the death penalty would not be imposed or, if imposed, would not be executed.

⁶¹ *United States v. Burns* [2001] 1 SCR 183, reversing *Kindler v. Canada* [1991] 2 SCR 779.

⁶² *Lackey v. Texas*, 514 U.S. 1045 (1995).

⁶³ *Id.* at 518.

⁶⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976) (“The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders”).

⁶⁵ *Furman v. Georgia*, 408 U.S. 238, 312 (1972).

⁶⁶ *Id.* (opinion concurring in judgment).

⁶⁷ *Riley v. Attorney General of Jamaica*, [1983] 1 A. C. 719, 734, 3 All E. R. 469, 478 (P. C. 1983) (Lord Scarman, dissenting, joined by Lord Brightman).

⁶⁸ *Pratt v. Attorney General of Jamaica*, [1994] 2 A.C. 1, 4 All E. R. 769 (P. C. 1993).

⁶⁹ *Knight v. Florida* (98-9741); *Moore v. Nebraska* (99-5291) decided December 18, 2009.

⁷⁰ *Id.* “I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”

⁷¹ *Id.* “Obviously this foreign authority does not bind us. After all, we are interpreting a Constitution for the United States of America.”

⁷² See *Executing Capital Punishment: International Law Influences on the Death Penalty Debate in the United States*, Lecture, May 14, 2008, Lund University, Sweden.

⁷³ Although defendants and petitioners may go to the Supreme Court on direct appeal, as well as State

Habeas and Federal Habeas Proceedings, it is rare that the Court will actually hear the case. On direct appeal the Supreme Court receives 9,000 requests to be heard every year and hears about 100 cases. It hears even fewer in Habeas Corpus proceedings.

⁷⁴ Although the United States Constitution has no specific criteria governing what cases the Supreme Court will hear, certain Supreme Court cases discuss the novelty of the claim presented.

⁷⁵ *Thompson v. McNeil*, 129 S. Ct. 1299 (2009).

⁷⁶ *Id.* at 1300. “It makes “a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.” *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995).

⁷⁷ *Id.* at 1303.

⁷⁸ *Id.* “In any event the delay here resulted in significant part from constitutionally defective death penalty procedures for which petitioner was not responsible.”

⁷⁹ *Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.).

⁸⁰ *Baze v. Rees*, 553 U.S. 35 (2008).

⁸¹ *Death Penalty is Repealed in New Mexico*, The New York Times, March 18, 2009.

⁸² Hood, *supra* note 3, at 127.

⁸³ See, e.g., *Medellin v. Texas*, *supra* note 31, where the Supreme Court accepted Texas’ arguments that Texas law governing successive habeas applications trumped both a judgment of an international court, by whose judgments the United States had agreed to be bound, and a memorandum directing state courts to review cases related to the judgment.

⁸⁴ International Commission of Jurists, *Administration of the Death Penalty in the United States* (1996).

⁸⁵ Hood, *supra* note 3, at 39.

⁸⁶ 543 U.S. 551 (2005).

⁸⁷ For example in *Makwanyane*, *supra* note 18, the Constitutional Court of South Africa recognized that public opinion was in favour of the death penalty, but concluded that the question was not one of public support, but one of constitutional interpretation. For further discussion see Sangmin Bae, *WHEN THE STATE NO LONGER KILLS: INTERNATIONAL HUMAN RIGHTS NORMS AND ABOLITION OF CAPITAL PUNISHMENT*, (State University of New York Press 2007).