

December 2004

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Mark Warren, *Death, Dissent, and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*, 13 Wm. & Mary Bill Rts. J. 309 (2004), <https://scholarship.law.wm.edu/wmborj/vol13/iss2/3>

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# DEATH, DISSENT AND DIPLOMACY: THE U.S. DEATH PENALTY AS AN OBSTACLE TO FOREIGN RELATIONS

Mark Warren\*

*"This is barbaric and unworthy of a state based on the rule of law."*<sup>1</sup>

## INTRODUCTION: A HERITAGE OF PROTEST

Widely believed to be the innocent victims of an unfair trial, two foreign nationals facing execution in the United States had captured the attention of the world. Rallies in their support attracted huge crowds in London and Paris, in Buenos Aires, Johannesburg, Bombay and Tokyo. Petitions for mercy flooded the governor's office, signed by half a million people worldwide. The Italian head of state, former Nobel prize winners, and the Vatican joined in the global appeal for clemency, all to no avail. The world watched as the final days ticked away, transfixed by the last-minute battle to obtain a new trial amid a mounting storm of domestic and international protest. Citing procedural default and deference to state law, the appellate courts refused to intervene.

The news that Nicola Sacco and Bartolomeo Vanzetti had died in the Massachusetts electric chair sent hundreds of thousands of protesters pouring into the streets of cities on six continents. Tanks and troops cordoned off the United States Embassy in Paris to protect it from rioters; in Geneva, demonstrators roamed the city destroying everything American, even attacking theaters showing Hollywood films.<sup>2</sup> Around the world, hundreds were injured or arrested in demonstrations that degenerated into riots. An editorial cartoon on the front page of one French newspaper portrayed the Statue of Liberty holding an electric chair

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<sup>1</sup> Roger Cohen, *U.S. Execution of German Stirrs Anger*, N.Y. TIMES, Mar. 5, 1999, at A14 (quoting German Justice Minister Herta Daubler-Gmelin, responding to the execution of German national Walter LaGrand in Arizona).

<sup>2</sup> *Geneva Mob Stones League's Offices: Attacks American Shops, Burns Movie Films and Storms Police Station*, N.Y. TIMES, Aug. 23, 1927, at 5.

aloft, while another showed Uncle Sam trying to remove bloodstains from the American flag.<sup>3</sup>

For millions of people at home and abroad, the *Sacco-Vanzetti* case had come to embody the perceived political failings of the United States: preaching freedom and democracy while indelibly stained by racism, class oppression and injustice. And for an entire generation of progressive writers, artists, and activists, those unstoppable executions in August of 1927 confirmed a growing sense of America as a reactionary power that had abandoned its founding principles. Writing fifty years later, novelist Katherine Anne Porter still saw "this event in Boston as one of the most portentous in the long death of the civilization made by Europeans in the Western world."<sup>4</sup>

Other death penalty cases in the United States would trigger outbursts of protest in the decades that followed; like Sacco and Vanzetti, most were emblematic of the radical politics of a turbulent era. After the International Labor Defense (the legal arm of the American Communist Party) intervened in Alabama to challenge the unfair death sentences imposed on a group of Black teenagers, the Scottsboro Trials of the 1930s became global symbols of American racism. The Rosenberg spy case generated a clemency campaign that galvanized millions of left-wing activists across Europe, with support from international celebrities like Albert Einstein, Jean-Paul Sartre, and Diego Rivera. One case gained prominence through the eloquence and publicity skills of the prisoner himself; when death-row author Caryl Chessman faced execution in 1960, a support group presented California lawmakers with a clemency petition containing two million signatures gathered around the world.<sup>5</sup> After Chessman's highly publicized death in the gas chamber, crowds attacked U.S. embassies in Lisbon, Stockholm, Montevideo, and dozens of other cities across Europe and South America.<sup>6</sup>

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<sup>3</sup> *Paris Police Crush New Red Outbreak; Riots in Provinces*, N.Y. TIMES, Aug. 25, 1927, at 10. For an excellent overview of the case (including the international reaction) see Doug Linder, *The Trial of Sacco and Vanzetti*, University of Missouri-Kansas City School of Law (2001), available at <http://www.law.umkc.edu/faculty/projects/ftrials/SaccoV/s&vaccount.html> (last visited Feb. 6, 2004). See also Katherine Anne Porter, *The Never-Ending Wrong*, ATLANTIC MONTHLY, June 1977, at 38, 48. Other information on the international controversy generated by the case is available on the Internet site of the Sacco Vanzetti Project, at <http://www.saccovanzettiproject.org/pages/summary.htm>, and the Court TV Famous Cases site, at <http://www.courtTV.com/archive/greatesttrials/sacco.vanzetti/> (both last visited Oct. 13, 2004).

<sup>4</sup> Porter, *supra* note 3, at 38, 48.

<sup>5</sup> Clark Howard, *The True Story of Caryl Chessman*, Crime Library, at [http://www.crimelibrary.com/notorious\\_murders/classics/chessman/50.html?sect=1](http://www.crimelibrary.com/notorious_murders/classics/chessman/50.html?sect=1) (last visited Feb. 5, 2004).

<sup>6</sup> EDMUND G. (PAT) BROWN & DICK ADLER, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW 51 (1989).

Thus, on one level, international opposition to the death penalty in America is nothing new. But much has changed since two otherwise obscure anarchists were executed in Massachusetts a lifetime ago, not least of all global perceptions of the death penalty itself. What began largely as politically motivated demonstrations against selected executions has evolved into something more complex and much more significant to the conduct of the United States' foreign relations. Today's demonstrators are united, not by ideology, but by a human rights ethos that sees all executions as equally repugnant, from beheadings in Saudi Arabia to lethal injections in Texas. The flashpoint for protest has now become the punishment itself, and the opponents to it include friendly nations and transnational bodies — powers that the United States can ill afford to alienate. Moreover, America's perceived addiction to executions has become the metaphor *par excellence* for the widening divide between the United States and its traditional allies over a broad range of multilateral concerns, from treaty compliance to global security. Sacco and Vanzetti would be amazed.

### I. CONTINENTAL DRIFT

In October 2003, the United States was reminded once again that its intractable position on capital punishment had become intolerable to the forty-five-nation Council of Europe.<sup>7</sup> The United States is now at risk of losing its observer status in the highly influential organization because of its failure to take steps toward a moratorium on all executions.<sup>8</sup> The Council's Parliamentary Assembly declared that dialogue on the issue has "largely failed with the U.S." and that it was becoming increasingly difficult for the Council to accept in its midst "observer states which carried out executions."<sup>9</sup> In 2001, the Assembly had passed a resolution deploring this "fundamental difference in values" between it and the United States, deciding henceforth only to grant observer status "to states which strictly respect a moratorium on executions or have already abolished the death penalty."<sup>10</sup> Clearly, loss of access to such a major European forum would be a body blow to the already shaky trans-Atlantic relationship.

Diplomatic shunning of the United States for its retention of the death penalty is a recent phenomenon, although the seeds of discord were first sown four decades ago. By the 1960s, political support for the death penalty was withering away and

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<sup>7</sup> See *Council of Europe Presses U.S., Japan on Abolishing Death Penalty*, AGENCE FRANCE-PRESSE, Oct. 1, 2003, 2003 WL 71372858.

<sup>8</sup> See *id.*

<sup>9</sup> *Id.* (quoting The Council of Europe, Parliamentary Assembly).

<sup>10</sup> Resolution 1253, *Abolition of the Death Penalty in Council of Europe Observer States*, para. 10–11, available at <http://assembly.coe.int> (adopted by the Parliamentary Assembly on June 25, 2001 (17th Sitting)).

its use was in decline in most Western countries, including the United States.<sup>11</sup> In 1965, the United Kingdom eliminated hanging as the penalty for murder;<sup>12</sup> two years later, Canada established a de facto moratorium on executions.<sup>13</sup> A 1966 opinion poll found support for capital punishment in the United States had dropped to forty-two percent, an all-time low.<sup>14</sup> The death of the death penalty in the liberal democracies seemed to be only a matter of time.

A window of opportunity for total abolition appeared to open when the United States Supreme Court struck down all state death penalty statutes in 1972.<sup>15</sup> But public attitudes toward law-and-order issues were hardening, and state legislatures moved quickly to amend their capital trial and sentencing procedures. In July 1976, the Supreme Court affirmed Georgia's new death penalty statute and held that the punishment itself was not inherently unconstitutional.<sup>16</sup> The society most like America embarked on a diametrically opposite course just two weeks later when the Canadian House of Commons voted to abolish capital punishment for all civilian crimes.<sup>17</sup> That same year, Portugal celebrated the ousting of a totalitarian regime with a new constitution banning the death penalty, a pattern that would repeat in many emerging democracies throughout the years to come.<sup>18</sup> By the end

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<sup>11</sup> See *People v. Anderson*, 493 P.2d 880, 897–99 (Cal. 1972) (citing United Nations data for the conclusion that capital punishment had become “literally, an unusual punishment among civilized nations”), *cert. denied*, 406 U.S. 958 (1972), *superseded by* CAL. CONST. art. I, § 27. See also *Furman v. Georgia*, 408 U.S. 238, 291–93 (1972) (Brennan, J., concurring) (documenting “steady decline” in executions in the United States, leading to de facto moratorium in 1967).

<sup>12</sup> *Murder Act (Abolition of Death Penalty)*, 1965, c. 71 (Eng.).

<sup>13</sup> Although the 1967 amendment to the Criminal Code still permitted the death penalty for the murders of on-duty police officers or prison guards, the comparative rarity of those offenses and the Canadian government's policy of automatic commutation of death sentences effectively prevented any further executions in Canada.

<sup>14</sup> Robert M. Bohm, *American Death Penalty Opinion, 1936–1986: A Critical Examination of the Gallup Polls*, in *THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH* 113, 116 (Robert M. Bohm ed., 1991).

<sup>15</sup> *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (holding that imposition and carrying out of death penalty in cases before Court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

<sup>16</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that punishment of death for the crime of murder did not, under all circumstances, violate the Eighth and Fourteenth Amendments).

<sup>17</sup> On July 14, 1976, after a series of lengthy debates, the House of Commons passed Bill C–84, which eliminated the death penalty from the Canadian Criminal Code and replaced it with a mandatory life sentence.

<sup>18</sup> See PORT. CONST. art. 24 (declaring that “[h]uman life is inviolable” and that “[i]n no case shall the death penalty be applied”). As the wave of democratization spread across Eastern Europe, abolition followed promptly; in 1989–90 alone, Romania, Slovenia, the Czech and Slovak Republic and Hungary all eliminated the death penalty.

of the twentieth century, the United States stood entirely alone as the only Western industrialized nation still to retain the death penalty.

The United States' isolation on a core social policy issue would be little more than a statistical curiosity if the death penalty did not arouse such strong feelings abroad and cast so much discredit on America's human rights leadership. Reflecting on his four years as U.S. Ambassador to France, Felix Rohatyn observed:

[N]o single issue evoked as much passion and as much protest as executions in the United States. Repeated protests in front of the embassy in Paris, protests at our consulates and, just recently, a petition signed by 500,000 French men and women delivered to our embassy in Paris were part of a constant refrain.<sup>19</sup>

Sustained exposure to this criticism brought Rohatyn around from favoring the death penalty to supporting a moratorium on executions, concluding that "some 300 million of our closest allies think capital punishment is cruel and unusual and it might be worthwhile to give it some further thought."<sup>20</sup> A senior correspondent with *Newsweek* predicted that the "values gap" between the Old and New World would "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."<sup>21</sup>

Unquestionably, adverse public reaction to particularly troubling capital cases adds to negative perceptions of America abroad. The news that Spanish national Joaquin Martinez had been sentenced to death on the basis of questionable evidence sparked public outrage in Spain.<sup>22</sup> King Juan Carlos appealed to U.S. authorities, while the Spanish public contributed hundreds of thousands of dollars to a defense fund.<sup>23</sup> Martinez was eventually acquitted of all charges following a highly-publicized retrial and returned to a tumultuous welcome in Spain.<sup>24</sup> Within days of his return, Martinez had become "a symbol of Europe's disdain for a U.S. execution policy seen as applying mostly to the poor, nonwhite and the mentally deficient."<sup>25</sup>

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<sup>19</sup> Felix G. Rohatyn, *America's Deadly Image*, WASH. POST, Feb. 20, 2001, at A23.

<sup>20</sup> *Id.*

<sup>21</sup> 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.

<sup>22</sup> Associated Press, *Spain Welcomes Freed Inmate*, ST. PETERSBURG TIMES, June 10, 2001, [http://www.sptimes.com/News/061001/State/Spain\\_welcomes\\_freed\\_.shtml](http://www.sptimes.com/News/061001/State/Spain_welcomes_freed_.shtml).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Carol J. Williams, *The McVeigh Execution: Most from Abroad See the U.S. as This Side of Barbaric: Reaction: From Europe to the Middle East, Majority of the Media*

When Joseph O'Dell faced execution in Virginia despite an unresolved claim of innocence, the European response dwarfed domestic expressions of concern.<sup>26</sup> The Pope and Mother Teresa appealed for clemency<sup>27</sup> as a member from the European Parliament and an official of the Italian consulate flew to Virginia to meet with the state governor.<sup>28</sup> In the days leading up to the execution, nearly ten thousand protesting calls and faxes were logged by the governor's office, mostly from Italy.<sup>29</sup> The mayor of Palermo made O'Dell an honorary citizen and publicly joined in the crusade to save his life.<sup>30</sup> In stark contrast, only about a dozen protestors gathered outside of the prison for a candlelight vigil as O'Dell's last hours approached.<sup>31</sup> After the execution, the city of Palermo chartered a plane to return the body for a public funeral and burial in a cemetery normally reserved for aristocrats and Mafia dons.<sup>32</sup> His tombstone describes O'Dell as "killed by Virginia, U.S.A., in a merciless and brutal justice system."<sup>33</sup>

Large segments of global opinion now view the United States' retention of the death penalty as incompatible with its self-proclaimed moral leadership of the international community.

"For us, what the Americans are doing is completely incomprehensible, that such an advanced country can be involved in such an act of barbarism," said Henry Leclerc, president of the Human Rights League. "No European country does this. No advanced country does this. America is doing it along with countries like China and Russia and other countries that have terrible human rights records. To us, it looks the same as if the Americans were endorsing torture or slavery."<sup>34</sup>

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*Condemn the McVeigh Death Penalty*, L.A. TIMES, June 12, 2001, at A16, <http://pqasb.pqarchiver.com/latimes/advancedsearch.html>.

<sup>26</sup> See Philip Pulella, *Tears Flow in Rome as O'Dell Executed in Virginia*, REUTERS, July 23, 1997, Factiva, Doc. 1ba0000020011002dt7o022m7.

<sup>27</sup> *Virginia Inmate Executed Despite International Campaign: Appeals From Pope, Mother Teresa Fail to Save Him*, CNN, July 23, 1997, at <http://www.cnn.com/US/9707/23/o.dell/> [hereinafter *Pope, Mother Teresa Fail*].

<sup>28</sup> Laura LaFay, *Palermo Mayor Pleads for Life of Beach Slayer*, VIRGINIAN-PILOT, July 22, 1997, at A1, <http://welcome.hamptonroads.com/archives/>.

<sup>29</sup> *Pope, Mother Teresa Fail*, *supra* note 27.

<sup>30</sup> Laura LaFay, *Palermo Mayor Pleads for Life of Beach Slayer*, VIRGINIAN-PILOT, July 22, 1997, at A1.

<sup>31</sup> *Pope, Mother Teresa Fail*, *supra* note 27.

<sup>32</sup> Jeffrey Fleishman, *Italians Fight U.S. Use of Death Penalty*, PHILA. INQUIRER, Aug. 20, 2000, at A1.

<sup>33</sup> *Id.*

<sup>34</sup> Suzanne Daley, *Europeans Deplore Executions in the U.S.*, N.Y. TIMES, Feb. 26, 2000, at A8 (quoting Henry Leclerc, Human Rights League President).

## II. THE HUMAN RIGHTS DIVIDE

Many theories have been advanced to explain why the United States has parted company with other kindred nations on such a defining social question; differences of history, culture and politics may all be contributing factors.<sup>35</sup> Stereotypes abound on both sides of the divide, but the least distorting way to measure the depth and breadth of the rift is likely through the lens of evolving human rights standards.

In October 2003, the prestigious *Foreign Service Journal* devoted an entire issue to an absorbing new topic in American diplomatic circles. *World Opinion Weighs In: The Death Penalty and U.S. Diplomacy* presented a range of viewpoints on “the ways U.S. support for capital punishment affects, and is affected by, international opinion.”<sup>36</sup> In the keynote article, two recent retirees from the highest ranks of American diplomacy warned:

During our time in the State Department, both in bilateral meetings with scores of nations and at various multilateral fora, we became aware that the United States’ continuing adherence to the death penalty was becoming a growing issue and source of direct approaches to the United States by other nations. . . .

. . . .

. . . For a country that aspires to be a world leader on human rights, the death penalty has become our Achilles’ heel.<sup>37</sup>

When the United States Supreme Court prepared to hear arguments in 2001 on the constitutionality of the death penalty for defendants with mental retardation, a group of nine former U.S. diplomats took the extraordinary step of filing an amicus curiae brief in opposition to the practice.<sup>38</sup> Continuing to condone the execution of mentally-retarded offenders “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 United

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<sup>35</sup> See, e.g., Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002) (identifying and discussing ten popular theories).

<sup>36</sup> *World Opinion Weighs In: The Death Penalty and U.S. Diplomacy*, FOREIGN SERV. J., Oct. 2003, at 19, available at <http://www.afsa.org/fsj/2003.cfm>.

<sup>37</sup> Harold Hongju Koh & Thomas R. Pickering, *American Diplomacy and the Death Penalty: For a Country That Aspires to Be a World Leader in Human Rights, the Death Penalty Has Become Our Achilles’ Heel*, FOREIGN SERV. J., Oct. 2003, at 19, 20–25, available at <http://www.afsa.org/fsj/oct03/koh&pickering.pdf>.

<sup>38</sup> See Brief of Amici Curiae Diplomats at 7, 9, *McCarver v. North Carolina*, 532 U.S. 941 (2001) (No. 00–8727).



States foreign policy interests,” the diplomats told the Court.<sup>39</sup> “The persistence of this practice has caused our allies and adversaries alike to challenge our claim of moral leadership in international human rights.”<sup>40</sup>

Countries that retain the death penalty have become adept at deflecting U.S. criticism of their human rights lapses. “The Chinese raise the issue at every possible opportunity,” according to Harold Hongju Koh, former Under-Secretary of State for Human Rights and author of the diplomats’ amicus brief.<sup>41</sup> “I would go into meetings with them, and we’d have a set of points, and for the first 20 minutes, they’d talk about the death penalty.”<sup>42</sup> Following a grossly unfair military trial in Turkey, the United States exerted heavy diplomatic pressure to undo the death sentence imposed on Kurdish guerrilla leader Abdullah Ocalan.<sup>43</sup> The Turkish government acidly responded by questioning the authority of the United States to ask another country to forego the death penalty, or to make a case against Ocalan’s execution given its own campaign against terrorism.<sup>44</sup> Other countries have gone so far as to cite U.S. retention of the death penalty to legitimize their own appalling domestic practices, as Nigeria did in response to fierce international criticism over cases in which unwed mothers accused of adultery were sentenced to death by stoning.<sup>45</sup>

Stripped of its diplomatic gloss, the U.S. position is provocative: it may administer the death penalty as it sees fit, without regard to human rights norms, until its Supreme Court or legislators declare otherwise. For nations adhering to the primacy of international law informed by human rights developments, this is an infuriatingly disdainful world view — the quintessential expression of American exceptionalism. And for an international community committed to the eventual elimination of the death penalty everywhere, U.S. intransigence is both the principal obstacle and the litmus test for the success of the global abolition movement itself.<sup>46</sup>

Justifications offered by U.S. diplomats have done little to counter international criticism. At a recent meeting of the fifty-four-member Organization for Security and Cooperation in Europe (OSCE), the U.S. delegate explained developments in

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<sup>39</sup> *Id.* at 7.

<sup>40</sup> *Id.* at 9.

<sup>41</sup> Raymond Bonner, *Veteran U.S. Envoys Seek End to Executions of Retarded*, N.Y. TIMES, June 10, 2001, at 3 (quoting Harold Hongju Koh).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Government Disagrees with E.U. over Death Penalty*, DAILY TRUST (Nigeria), Feb. 14, 2002, <http://allafrica.com/stories/200202140277.html>.

<sup>46</sup> Roger Hood, *Capital Punishment: A Global Perspective*, 3 PUNISHMENT & SOC’Y 332, 342–43 (2001).

the use of the death penalty in the United States to punish juveniles, the mentally ill, and the mentally retarded.<sup>47</sup> Following a well-worn path, the delegate observed that:

[T]he use of the death penalty in the United States is a decision left to democratically elected governments at the federal and individual state levels. . . . [W]hile international law requires limiting capital punishment to the most serious crimes and requires certain safeguards, most notably due process, it does not prohibit capital punishment.<sup>48</sup>

The punishments prescribed in a democratic society, “should reflect the will of the people, freely expressed and appropriately implemented.”<sup>49</sup>

This populist approach to human rights obligations contrasts sharply with the position adopted by the United States when it came under sustained international attack for its racial segregation policies in the 1950s.<sup>50</sup> When *Brown v. Board of Education*<sup>51</sup> reached the Supreme Court, the U.S. government filed a supporting amicus brief that acknowledged — and effectively deflected — world criticism.<sup>52</sup> In language that would serve with equal justice to describe the death penalty controversy today, the government’s brief stressed the negative impact of racial segregation on the global image and authority of the United States:

Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy. The sincerity of the United States in this respect will be judged by its deeds as well as by its words. . . . [T]he continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.<sup>53</sup>

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<sup>47</sup> Francis Gaffney, Statement Delivered to the OSCE Human Dimension Implementation Meeting, United States Mission to the OSCE, at [http://www.usosce.rpo.at/warsaw/Death\\_Penalty.pdf](http://www.usosce.rpo.at/warsaw/Death_Penalty.pdf) (Oct. 9, 2003).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 154 (2002) (discussing the U.S. government’s response to international criticism of racial segregation policies).

<sup>51</sup> 349 U.S. 294 (1952).

<sup>52</sup> Brief for the United States as Amicus Curiae at 8, *Brown* (No. 1, 2, 4, 10), available at <http://curiae.law.yale.edu/html/347-483/022.htm>.

<sup>53</sup> *Id.*

Half a century later, the President of the European Parliament released an open letter to the American public on a social issue attracting the same kind of international concern as racial segregation once did.<sup>54</sup> The letter addressed the apologetic notion that the death penalty was permissible so long as it reflected the popular will:

When President Kennedy put an end to the racial segregation that was still in place in certain states, he had the courage, probably at the risk of his own life, to go against the wishes of a large number of people who were determined to maintain the existing system even by violent means. Do today's politicians really wish to appear a pale shadow of those great visionaries who forged the American nation's unity and set it on the path to greatness?

Not out of any desire to stand as judge, but in a spirit of true friendship towards one of the world's leading countries, I express the wish that the United States will join Europe in banning the death penalty, a punishment which no longer has any place in our world as the new millennium opens.<sup>55</sup>

The open letter is remarkable, but hardly unique. Since 1998, the European Union has intervened repeatedly in U.S. executions through clemency appeals or by conveying its abolitionist views directly to local legislators.<sup>56</sup> Given the general reluctance of nations to intrude on each other's internal affairs, what could legitimize direct interventions that circumvent diplomatic channels? The answer lies in the evolving interpretation of human rights norms, a process that has done more to transform the global death penalty debate than any other development in the modern era.

In 1971, the UN General Assembly gave voice to the mounting conviction within the international community that the death penalty was no longer an acceptable exception to the right to life. Resolution 2857 affirmed:

In order fully to guarantee the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the

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<sup>54</sup> Press Release, Nicole Fontaine, President, European Parliament, Open Letter to the People of the United States of America (Sept. 15, 2000), *available at* <http://barnabei.com/news.htm>.

<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g.*, Letter from Joao da Rocha Paris, Ambassador of Portugal, Representative of the President of the European Union, to the Governors of the States Having the Death Penalty (Feb. 24, 2000) (regarding the Illinois moratorium), *at* <http://www.eurunion.org/legislat/DeathPenalty/Governors.htm>.

main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries.<sup>57</sup>

Coinciding with a general trend toward liberalized sentencing, the human rights imperative of progressive restriction helped expand the ranks of countries that were repealing the death penalty in law or repudiating it in practice.<sup>58</sup> That same rationale also provided the justification for nations to express their concerns when other UN member states failed to meet minimum international standards in capital cases. A series of UN resolutions and initiatives followed, including the adoption of new safeguards exempting from execution all defendants with mental retardation or mental illness.<sup>59</sup> Meanwhile, back in the United States, the pace of executions was accelerating and the scope of death penalty statutes was steadily increasing.<sup>60</sup>

The new zeal to confront the death penalty as a human rights concern was particularly striking within the Council of Europe. In 1985, just eight years after the last execution in western Europe, the Council brought forward the first regional human rights instrument requiring abolition of the death penalty.<sup>61</sup> By 1994, a commitment to abolition had become a prerequisite for membership in the Council of Europe and in the European Union.<sup>62</sup> Abolitionism became a potent lever exerted on human rights practices throughout the European sphere of influence. Turkey, for instance, agreed not only to commute Abdullah Ocalan's

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<sup>57</sup> G.A. Res. 2857, U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8429 (1971).

<sup>58</sup> Hood, *supra* note 46, at 337.

<sup>59</sup> E.S.C. Res. 1989/64, at 51, U.N. Doc. E/1989/91 (1989) (eliminating the death penalty for "persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution").

<sup>60</sup> Death Penalty Information Center, *Executions by Year*, at <http://deathpenaltyinfo.org/article.php?scid=8&did=146> (charting annual U.S. execution rate between 1976 and 2003); Death Penalty Information Center, *Recent Developments in Capital Punishment*, at <http://deathpenaltyinfo.org/article.php?scid=15&did=411#1994> (noting expansion of federal death penalty statute in 1994 to include some 60 crimes).

<sup>61</sup> Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Europ. T.S. No. 114. The Protocol was opened for signatures April 28, 1983. Council of Europe, *Death is Not Justice*, at [http://www.coe.int/T/E/Com/Files/Themes/Death-penalty/e\\_brochure.asp](http://www.coe.int/T/E/Com/Files/Themes/Death-penalty/e_brochure.asp).

<sup>62</sup> Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, *The Death Penalty in the OSCE Area*, at 14 n.24 and accompanying text, 15 n.28 (2002) (noting abolition as prerequisite of membership in the Council of Europe as per Protocol No. 6 to the ECHR as of October 1994 and establishment of EU membership criteria in 1993 that require abolition of the death penalty), at [http://www.osce.org/documents/odihr/2002/09/1499\\_en.pdf](http://www.osce.org/documents/odihr/2002/09/1499_en.pdf).

capital sentence, but also to relinquish the death penalty altogether, as the price of entry into the European community of nations.<sup>63</sup> By the turn of the millennium, the European Union had made opposition to the death penalty a cornerstone of its global foreign policy and was spending some six million dollars annually on abolition projects from China to the Caribbean.<sup>64</sup>

The tidal wave of new legal thinking about capital punishment crested in 1989 with the passage of the Second Optional Protocol to the International Covenant on Civil and Political Rights.<sup>65</sup> Ratified by some fifty nations to date, the protocol binds its parties to abolition of the death penalty, which “contributes to enhancement of human dignity and progressive development of human rights.”<sup>66</sup> Only two industrialized countries opposed approval of the Second Optional Protocol when it came before the UN General Assembly: Japan and the United States.<sup>67</sup> For the first time since the birth of the UN, the United States could no longer claim leadership in the field of human rights protection.

### III. AGAINST THE LAW OF NATIONS

Veteran diplomats and human rights observers were stunned when the United States lost its seat on the UN Commission on Human Rights in 2001, marking the first time that America was not represented since the Commission’s formation in 1947. Among the factors offered to explain the lack of voting support from

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<sup>63</sup> Law No. 4771, adopted on August 3, 2002, abolished the death penalty in Turkey except in time of war and imminent threat of war. On January 9, 2004, Turkey signed the European Convention protocol abolishing the death penalty in all circumstances, including during war. Both measures came in response to demands from the European Union for reforms to Turkish law. *Turkey Agrees Death Penalty Ban: Turkey Has Agreed to a Total Ban on Capital Punishment*, BBC NEWS, Jan. 9, 2004, at <http://news.bbc.co.uk/2/hi/europe/3384667.stm>.

<sup>64</sup> *10 October: World Day Against the Death Penalty — EU Reaffirms Its Position Against the Death Penalty*, European Union (Oct. 9, 2002), at [http://europa.eu.int/comm/external\\_relations/human\\_rights/news/ip03\\_1364.htm](http://europa.eu.int/comm/external_relations/human_rights/news/ip03_1364.htm).

In 2002, approximately € 4.9 million were allocated [by the EU] to projects aiming at raising public awareness in retentionist countries through public education, outreach to influence public opinion, studies on how states’ death penalty systems comply with minimum standards, informing and supporting strategies for replacing the death penalty and efforts for securing the access of death row inmates to appropriate levels of legal support and training for lawyers.

*Id.*

<sup>65</sup> See G.A. Res. 44/128, U.N. GAOR, 44th Sess., Annex 1, 82d plen. mtg., U.N. Doc. A/RES/44/128 (1989).

<sup>66</sup> *Id.*

<sup>67</sup> Roger Hood, *The Death Penalty in International Perspective*, Paper Given at the Amnesty International Seminar in Moscow (Sept. 16, 1991) (on file with author).

European delegations was the death sentencing and execution of juvenile offenders in the United States.<sup>68</sup> "Children's rights and the death penalty are important issues for the Europeans," one experienced Commission participant pointed out, while another observer saw the vote as "a resentment of a certain arrogance to bully other countries into going along with them."<sup>69</sup> Editorialists in the United States were quick to point out a connection between America's loss of face and its retention of the death penalty.<sup>70</sup>

America's toleration of the juvenile death penalty has long exemplified its pick-and-choose approach to human rights commitments. The United States signed the International Covenant on Civil and Political Rights (ICCPR) in 1977 but did not move to ratify it until fifteen years later.<sup>71</sup> Preserving the United States' stature as a human rights role model was a significant motivating factor for the Senate ratification committee:

In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact of U.S. efforts in the human rights field.<sup>72</sup>

If anything, it was the subsequent U.S. ratification of the ICCPR with chains attached that appeared conspicuous and hypocritical. The Senate's consent came with a long list of reservations, declarations, and understandings, notably a reservation to Article 6(5) in order to allow the imposition of capital punishment "for crimes committed by persons below eighteen years of age."<sup>73</sup> Eleven countries formally objected to the juvenile death penalty reservation, chiefly on the grounds that it was contrary to the provision of the treaty permitting no derogation from Article 6.<sup>74</sup> The Human Rights Committee later declared such reservations

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<sup>68</sup> Peter Ford, *Aloof U.S. Loses Clout at UN*, CHRISTIAN SCI. MONITOR, May 7, 2001, at 10, <http://csmonitor.com/cgi-bin/durableRedirect.pl?durable/2001/05/07/p10s1.htm>.

<sup>69</sup> *Id.* (quoting Claudine Haenni and Mark Thompson, respectively).

<sup>70</sup> See, e.g., Harold Hongju Koh, Editorial, *A Wake-Up Call on Human Rights*, WASH. POST, May 8, 2001, at A23.

<sup>71</sup> *United States Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645 (1992), reproduced from U.S. S. EXEC. REP. No. 102-23 (102d Cong., 2d Sess.).

<sup>72</sup> *Id.* at 649.

<sup>73</sup> 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992).

<sup>74</sup> The objecting State parties were Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden. AMNESTY INT'L, AI INDEX: ACT

incompatible with the object and purpose of the Covenant, recommending that the United States “review its reservations, declarations and understandings with a view to withdrawing them, in particular reservations to article 6, paragraph 5.”<sup>75</sup> In response, the U.S. representative “disagreed that customary international law established a clear prohibition [of use of the death penalty] at the age of 18.”<sup>76</sup> Of the 149 parties to the ICCPR, only the United States has entered a specific reservation to Article 6(5), and no other country openly espouses the legality of juvenile death sentences.

The embarrassment of losing its seat on the Human Rights Commission for one year had no moderating effect on U.S. diplomacy in Geneva. Whenever its domestic executions are criticized, the United States still largely ignores the Commission’s protective mechanisms; the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions recently deplored “the fact that the Government of the United States has only replied to 5 out of the 35 communications transmitted over the last two years.”<sup>77</sup> A 2003 Commission resolution on the rights of the child called upon states that still retain the death penalty to abolish it as soon as possible for those aged under eighteen at the time of the commission of the offence.<sup>78</sup> The United States proposed an amendment to delete that language, because it “flatly rejected the call for the abolition of the death penalty for juvenile offenders.”<sup>79</sup> Fifty-one nations voted against the amendment, including such human rights paragons as Cuba, Libya and China, while only the United States voted in favor.<sup>80</sup> Delegates from Syria, the European Union and the Group of Latin American and Caribbean Countries expressed their regret that an issue on which there was such broad consensus needed to be put to a vote at all.<sup>81</sup>

This international consensus found full voice after the United States Supreme Court agreed to revisit the constitutionality of the juvenile death penalty during

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50/004/2003, THE EXCLUSION OF CHILD OFFENDERS FROM THE DEATH PENALTY UNDER GENERAL INTERNATIONAL LAW 2–3 (2003), [http://web.amnesty.org/library/pdf/ACT-500042003ENGLISH/\\$File/ACT5000403.pdf](http://web.amnesty.org/library/pdf/ACT-500042003ENGLISH/$File/ACT5000403.pdf).

<sup>75</sup> *Id.* at 3 (quoting the Human Rights Committee).

<sup>76</sup> *Id.* at 11 n.9 (citing Summary Record, U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1405th mtg. at 5, U.N. Doc. CCPR/C/SR.1405 (1995) (statement of Mr. Harper)).

<sup>77</sup> *Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions Report of the Special Rapporteur, Asma Jahangir*, U.N. Commission on Human Rights, 60th Sess., Agenda Item 11(b) ¶ 55, U.N. Doc. E/CN.4/2004/7 (2003).

<sup>78</sup> E.S.C. Res. 2003/86, U.N. ESCOR, 59th Sess., U.N. Doc. E/CN.4/2003/L.11/Add.8 (2003).

<sup>79</sup> Press Release, United Nations, Commission on Human Rights Adopts Resolution on Situation in Iraq; Concludes Substantive Work, U.N. Doc. HR/CN/1047 (Apr. 25, 2003), available at <http://www.un.org/News/Press/docs/2003/hrcn1047.doc.htm>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

its 2004 term. In an amicus curiae brief filed in *Roper v. Simmons*,<sup>82</sup> forty-eight nations took the position that “the execution of persons below 18 years of age at the time of their offenses violates widely accepted human rights norms”<sup>83</sup> and constitutes a breach of *jus cogens*.<sup>84</sup> A group of eighteen Nobel Peace Prize winners from nations worldwide reaffirmed their position that “‘unconditional adherence to international law is essential’ and that the ‘death penalty is . . . especially unconscionable when imposed on children.’”<sup>85</sup> More pointedly still, a brief submitted by retired U.S. diplomats argued that persisting “will further the diplomatic isolation of the United States and inevitably harm foreign policy objectives . . . . International organizations have gone so far as to threaten the United States with economic sanctions or loss of standing due to this aberrant practice of executing juvenile offenders.”<sup>86</sup>

The United States has also suffered stinging diplomatic rebukes for its restrictive interpretation of the rights conferred on foreign detainees under the Vienna Convention on Consular Relations (VCCR). After two Mexican nationals were executed in the United States in 1997, despite a failure by the arresting authorities to notify them of their right to consular contact, Mexico requested an advisory opinion from the Inter-American Court of Human Rights.<sup>87</sup> At issue were the requirements of due process “when a court sentences to death foreign nationals whom the host State has not informed of their right to communicate with and seek

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<sup>82</sup> *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 72 U.S.L.W. 3310 (U.S. Jan. 26, 2004) (No. 03-633). After the Missouri Supreme Court set aside the death sentence of Christopher Simmons on the grounds that his execution would now be unconstitutional, the United States Supreme Court granted certiorari on the sole question of whether the Cruel and Unusual Punishments Clause of the Eighth Amendment bars infliction of the death penalty on offenders who were under the age of eighteen at the time of the offense.

<sup>83</sup> Brief of Amici Curiae the European Union and Members of the International Community at 1, *Simmons* (No. 03-633).

<sup>84</sup> Sometimes translated as “the compelling law,” *jus cogens* refers to a select group of practices so widely condemned by the international community as to constitute a peremptory norm of international law which may never be transgressed, notwithstanding any domestic law to the contrary. Classic examples include the universal ban on torture, genocide, slavery and war crimes. Whether a practice condoned by the United States can be said to constitute a breach of a recognized universal norm may be debatable, but there is little doubt that its elimination in the only nation which still openly allows it would elevate the ban on the juvenile death penalty from an emerging norm to the status of *jus cogens*.

<sup>85</sup> Brief of Amici Curiae Nobel Peace Prize Laureates at 2, *Simmons* (No. 03-633) (quoting The Final Statements of the Fourth World Summit of Nobel Peace Laureates (Nov. 30, 2003), *available at* <http://www.ipnw.org/NobelPeaceSummit2003.html>).

<sup>86</sup> Brief of Amici Curiae Former U.S. Diplomats at 23-24, *Simmons* (No. 03-633).

<sup>87</sup> See Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. 487, OEA/Ser.L/VIII.47, doc. 6 (2000).



assistance from the consular authorities of the State of which they are nationals.”<sup>88</sup> In a striking expression of regional solidarity, six Latin American countries intervened to support Mexico’s position that consular assistance is an essential attribute of due process in capital cases.<sup>89</sup> Predictably, the United States argued that the VCCR confers no rights on individual foreign nationals (let alone human rights) and that the only remedy available for a breach of consular obligations was an apology to the affected State with a promise of improved treaty compliance.<sup>90</sup> No interveners supported the U.S. position.

The willingness of so many unlikely Davids to take on Goliath over a domestic death penalty issue was a blow to U.S. prestige in the region, with more damage yet to come. Squarely rejecting the United States’ position, the Inter-American Court determined that Article 36 of the VCCR confers specific legal and human rights on foreign detainees.<sup>91</sup> Any death sentence carried out in breach of these requirements would constitute an arbitrary deprivation of the right to life.<sup>92</sup> After participating fully in the proceedings, the State Department responded to the unfavorable decision by declaring that the Inter-American Court “is not charged with resolving disputes under or interpreting the VCCR, and its decision is in no way binding on the United States.”<sup>93</sup>

Over U.S. opposition, the advisory opinion was quickly endorsed at the United Nations. Mexico successfully proposed an amendment to a draft resolution on migrants’ rights, in order to take note of the Inter-American Court ruling “regarding the Right to Information about Consular Assistance within the Framework of Due Process Guarantees.”<sup>94</sup> The United States objected, requesting a recorded vote on the amended paragraph. In response, 121 nations voted in favor of the text, while not a single country joined the United States in opposing its adoption.<sup>95</sup> Adding salt

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<sup>88</sup> *Id.*

<sup>89</sup> The intervening States were El Salvador, Honduras, the Dominican Republic, Guatemala, Paraguay and Costa Rica. Mexico’s position was also supported by several non-governmental organizations, U.S. law professors and defense attorneys. *See id.* at paras. 9–14, 26.

<sup>90</sup> *Id.* at para. 26 (summarizing original brief submitted by the United States).

<sup>91</sup> *Id.* at para. 141.

<sup>92</sup> *Id.*

<sup>93</sup> Letter from David R. Andrews, Legal Adviser to James K. Robinson, Assistant Attorney General, Criminal Division, Department of Justice A–10 (Oct. 15, 1999) (filed with the First Circuit Court of Appeals in *United States v. Nai Fook Li*, 206 F.3d 56 (1st Cir. 2000)), available at <http://www.state.gov/s/1/6151.htm>. *See also* U.S. Supplemental En Banc Brief at 9 n.2, *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 1999) (Nos. 98–50347, 98–50305), available at <http://www.state.gov/s/1/6151.htm>.

<sup>94</sup> Press Release, United Nations, Citing Terrorism as Violation of Human Rights, Social Committee Calls for Internationalism, Regional Cooperation Against It, U.N. GAOR 3d Comm., 54th Sess., 52d mtg. U.N. Doc. GA/SHC/3566 (1999).

<sup>95</sup> *Id.*

to the United States' diplomatic wounds, resolutions emphatically reaffirming the importance of individual consular rights and taking note of the advisory opinion have been endorsed by consensus in every subsequent session of the UN General Assembly.<sup>96</sup>

The State Department has continued to downplay the significance of consular rights in U.S. death penalty cases and to minimize its own international responsibilities whenever those concerns arise. Following a heated exchange with reporters over Mexico's efforts to obtain clemency for Javier Suárez Medina, a Department spokesperson declared: "We have taken no position, if that's clear enough, no position on this [clemency] petition. That's a matter for the Texas authorities to do. We, though, play the role of passing along this type of message from the Government of Mexico."<sup>97</sup> Another official told the international media that the case "involves the State Department in some small regard."<sup>98</sup>

This "small regard" for binding consular treaty obligations in death penalty cases has come to symbolize a wider anxiety within the international community: the waning U.S. commitment to the international rule of law. Recent galling examples include the United States' refusal to ratify the Kyoto Protocol after signing on in 1998, unilateral withdrawal from the Anti-Ballistic Missile Treaty after nearly thirty years of enforcement, and the decision to "unsign" the Rome Statute of the International Criminal Court after initially participating in its development. Reporting on the failure of the United States to respond to a compulsory judgment on consular rights issued by the International Court of Justice (ICJ), Amnesty International wrote:

At a time when harmonious relations between nations are increasingly dependent on compliance with international treaties and tribunals, the USA appears to be poised on the brink of repudiating its international legal obligations. The consequences of such a policy would be ominous, both for the United States' own foreign relations and for the entire international community.<sup>99</sup>

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<sup>96</sup> G.A. Res. 54/166, U.N. GAOR, 54th Sess., Supp. No. 49, Agenda Item 116, U.N. Doc. A/RES/54/166 (2000). *See also* G.A. Res. 55/92, U.N. GAOR, 55th Sess., Supp. No. 49, Agenda Item 114, U.N. Doc. A/RES/55/92; G.A. Res. 56/170, U.N. GAOR, 56th Sess., Supp. No. 49, Agenda Item 199, U.N. Doc. A/RES/56/170; G.A. Res. 57/218, U.N. GAOR, 57th Sess., Supp. No. 49, Agenda Item 109, U.N. Doc. A/RES/57/218.

<sup>97</sup> Daily Press Briefing, U.S. Department of State (Aug. 13, 2002), <http://www.state.gov/r/pa/prs/dpb/2002/12644.htm>.

<sup>98</sup> National Security Council Briefing for Foreign Media, U.S. Department of State (Aug. 14, 2002), <http://fpc.state.gov/12693.htm>.

<sup>99</sup> UNITED STATES OF AMERICA: A TIME FOR ACTION — PROTECTING THE CONSULAR RIGHTS OF FOREIGN NATIONALS FACING THE DEATH PENALTY, AMNESTY INT'L, AI INDEX:

## IV. STRAINING BILATERAL RELATIONS

Irreconcilable differences over the death penalty have significantly affected U.S. bilateral relations, particularly in the field of criminal justice procedures. Announcing the signing of a new extradition treaty with the United States, the Austrian government emphasized the long delay caused by a single issue. "For several years the question of extradition in case of an impending death sentence remained open," the official statement noted.<sup>100</sup> "Austria thereby had to insist on its point of view that in case of extradition a death sentence must not be imposed, even if its execution would have been excluded by the treaty or binding assurances were to be given that a death sentence would not be executed."<sup>101</sup> Half a world away, Australian sources revealed in February 2004 that negotiations with the United States to place sky marshals on flights between the two countries had stalled over a single point of disagreement. Australian officials were insisting on an advance guarantee that none of its citizens apprehended on planes operated by an American air carrier would face the death penalty for any offense, and U.S. officials were reluctant to grant an open-ended promise.<sup>102</sup>

Shortly after his appointment as Mexican Foreign Minister, Jorge Castañeda described the controversy over consular rights violations in the cases of death-sentenced Mexican nationals in the United States as a "strain on bilateral relations."<sup>103</sup> Just how significant that strain had become was soon made clear. After Texas executed Mexican national Javier Suárez Medina despite protests by seventeen nations over the violation of his consular rights,<sup>104</sup> President Vicente Fox abruptly cancelled his scheduled official visit to meet with President Bush at his Texas ranch. The diplomatic snub was "an unequivocal sign of our rejection of the execution," a Mexican government spokesperson told a hastily assembled news conference.<sup>105</sup>

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AMR 51/106/2001, 12 (2001), [http://web.amnesty.org/library/pdf/AMR511062001-ENGLISH/\\$File/AMR5110601.pdf](http://web.amnesty.org/library/pdf/AMR511062001-ENGLISH/$File/AMR5110601.pdf).

<sup>100</sup> Press Release, Austrian Press and Information Service, Extradition Treaty Between Austria and the United States Signed (Jan. 8, 1998), <http://www.austria.org/press/44.html>.

<sup>101</sup> *Id.*

<sup>102</sup> *One Point Holds Up Sky Patrol*, AUSTL. ASSOC. PRESS, Feb. 1, 2004, [http://www.news.com.au/common/story\\_page/0,4057,8561647%255E2,00.html](http://www.news.com.au/common/story_page/0,4057,8561647%255E2,00.html).

<sup>103</sup> Bruce Shapiro, *Dead Reckoning*, THE NATION, Aug. 6, 2001, <http://www.thenation.com/doc.mhtml%3Fi=20010806&s=shapiro> (quoting Jorge Castañeda).

<sup>104</sup> The countries that intervened in support of a judicial stay of execution or executive commutation of sentence were Mexico, Argentina, Brazil, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Panama, Paraguay, Poland, Slovenia, Spain, Switzerland, Uruguay, and Venezuela.

<sup>105</sup> Jeff Franks, *Texas Executes Cop Killer Despite Mexico's Pleas*, REUTERS, Aug. 14, 2002, available at <http://www.sanluisobispo.com/mld/sanluisobispo/news/nation/386-4993.htm>.

“Mexico trusts that the cancellation of this important presidential visit will contribute to strengthening the respect of all states for the norms of international law, and conventions that regulate the coexistence of nations,” Fox’s office declared in a written statement.<sup>106</sup>

Despite the high priority placed by the Bush administration on improving Mexico-U.S. relations, the Mexican reaction clearly caught the White House off-guard, leaving the future of the bilateral relationship uncertain. The *Washington Post* editorialized that the controversy “shows that there is a tangible cost in international affairs to the American — particularly the Texan — fondness for executions” and that even supporters of the death penalty “ought to wonder why killing Mr. Suarez is worth further irritating already complicated relations” with Mexico.<sup>107</sup>

The Suárez execution was not the first flash of foreign anger over lethal violations of consular rights. After the 1998 execution, in Arizona, of Honduran national José Roberto Villafuerte, a number of Americans imprisoned in Honduras were nearly lynched by other prisoners in retaliation.<sup>108</sup> Riot police were required to protect the U.S. embassy in Mexico City following the 1993 execution of Ramon Montoya in Texas.<sup>109</sup> Mexican authorities also had to quarantine American prisoners for their own safety after they received death threats from other inmates.<sup>110</sup> As the hearse carrying Montoya’s coffin crossed the border into Mexico, eight thousand demonstrators began singing the Mexican national anthem.<sup>111</sup> “It wasn’t simply an execution, but something that injured the very sense of national dignity among Mexicans,” commented Liliana Flores Benavides, secretary of the Border Affairs Commission.<sup>112</sup>

Some responses by state executive officials to legitimate consular concerns have been downright churlish, as though calculated to infuriate foreign opinion. The Arizona Pardons Board heard impassioned testimony from the German Ambassador and was presented with petitions bearing 50,000 signatures from German citizens asking the panel to spare the lives of Karl and Walter LaGrand.<sup>113</sup>

<sup>106</sup> Office of the President of Mexico, *President Fox Cancels Proposed Texas Tour in Repudiation of the Execution of Javier Suárez Medina* (Aug. 14, 2002), at <http://www.presidencia.gob.mx/actividades/index.php?contenido=3504.html>.

<sup>107</sup> *Death and Foreign Affairs*, WASH. POST, Aug. 17, 2002, at A16.

<sup>108</sup> *Reos Intentan Vengarse con Estadounidenses Muerte de Villafuerte*, LA TRIBUNA (Honduras), Apr. 23, 1998, <http://www.latribuna.hn/1998/abril/23/nacion.htm>.

<sup>109</sup> Gregory Katz, *Texas’ Execution of Mexico Citizen Stirs Outrage Among Countrymen*, DALLAS MORNING NEWS, Mar. 26, 1993, at 20A.

<sup>110</sup> *Id.*

<sup>111</sup> Mike Esterl, *Outrage Grows After U.S. Execution of Mexican*, NEWS MEX., Feb. 21, 1994.

<sup>112</sup> *Id.*

<sup>113</sup> M. Scot Skinner, *Hull Rejects Pleas to Spare Two Germans on Death Row*, ARIZ. DAILY STAR, Feb. 23, 1999, at 1B, Factiva, Doc. tucs000020010830dv2n000yo.

Even before the Board could announce its recommendation, however, Governor Hull declared that she would not commute the death sentences under any circumstances.<sup>114</sup> The Board later took the unprecedented step of recommending a 60-day reprieve to allow for the orderly consideration of Germany's emergency legal application to the ICJ (which had binding jurisdiction over the VCCR dispute), but the Governor refused to halt the execution.<sup>115</sup> After Walter LaGrand's eighteen-minute ordeal in the gas chamber, a leading Arizona newspaper ran a sampling of editorials from the German press.<sup>116</sup> Predictably, all of the editorials angrily condemned Arizona for proceeding with the execution.<sup>117</sup>

The ambivalent response of the State Department to the case of Paraguayan national Ángel Francisco Breard had lasting foreign relations consequences. At the same time that the U.S. Solicitor General was urging the Supreme Court to permit the execution despite a preventive order obtained by Paraguay from the ICJ, Secretary of State Madeleine Albright was writing to the Governor of Virginia to urge, "with great reluctance," that he stay the execution.<sup>118</sup> While acknowledging Virginia's legal right to proceed, Albright argued that ignoring the International Court "could be seen as a denial by the United States of the significance of international law . . . and thereby limit our ability to ensure that Americans are protected when living or traveling abroad."<sup>119</sup> Denying his Vienna Convention claims as procedurally defaulted, the Supreme Court sealed Breard's fate by absolving Virginia authorities of any legal obligation to grant an executive reprieve based on the ICJ order.<sup>120</sup> Ángel Breard was executed some three hours later.

On her way to the Summit of the Americas the next day, the Secretary of State observed that advisement of consular rights "is something that we will insist on and do insist on when one of our citizens is in trouble abroad."<sup>121</sup> Albright declared that Breard had received a fair trial despite the absence of consular involvement, adding that "we believe that we did the right thing" in response to the

<sup>114</sup> *Id.*

<sup>115</sup> LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 465, at para. 31 (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

<sup>116</sup> Ken Keuffel Jr., *Wave of German Anger Over Executions Expected to Build*, ARIZ. DAILY STAR, Mar. 7, 1999, at 1B, Factiva, Doc. tucs000020010830dv370038u.

<sup>117</sup> *Id.*

<sup>118</sup> Jonathan I. Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT'L L. 666, 671-72 (1998) (quoting Letter from Madeleine Albright, Secretary of State, to James Gilmore, Governor of Virginia (Apr. 13, 1998)).

<sup>119</sup> *Id.*

<sup>120</sup> Breard v. Gilmore, 523 U.S. 371 (1998) (per curiam) (denying certiorari and holding that state authorities' violation of consular notification provisions of the Vienna Convention had no continuing consequences of the kind which would permit Paraguay to bring suit against the state under Eleventh Amendment exemption).

<sup>121</sup> Angus MacSwan, *Albright Says US Did "Right Thing" over Execution*, REUTERS, Apr. 15, 1998, available at [http://www.turkishdailynews.com/old\\_editions/04\\_17\\_98/for3.htm#f30](http://www.turkishdailynews.com/old_editions/04_17_98/for3.htm#f30).

controversy.<sup>122</sup> The reply from the Paraguayan government was swift. “The United States has been the champion of democracy . . . let them be the first ones to demonstrate to us the principles of democracy, let them also respect human rights,” Deputy Foreign Minister Leila Rachid exclaimed.<sup>123</sup> With Latin America still abuzz over the execution, the Summit of the Americas endorsed a declaration seeking “full respect for, and compliance with,” the VCCR, “especially as it relates to the right of nationals . . . to communicate with a consular officer of their own State in case of detention.”<sup>124</sup>

Several months later, the State Department issued a public apology to the “Government and people of Paraguay” for the violation of Ángel Breard’s consular rights.<sup>125</sup> “We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas,” the statement acknowledged; “We cannot have a double standard.”<sup>126</sup> In exchange for the apology, Paraguay withdrew its case at the ICJ; just days later, Washington removed Paraguay from its trade piracy blacklist.<sup>127</sup> Paraguayan authorities publicly denied any connection between the two events.<sup>128</sup> In private, however, officials reportedly confirmed that a deal had been brokered whereby the United States avoided certain defeat at the ICJ and Paraguay was spared U.S. economic sanctions for not cracking down on the counterfeiting of brand name consumer goods worth one hundred million dollars annually.<sup>129</sup>

But the ghost of Ángel Breard was not so easily laid to rest. Two years later, the ICJ chided U.S. authorities for failing to act on its order to halt the execution of German national Walter LaGrand, a measure that was “binding in character and created a legal obligation for the United States.”<sup>130</sup> When Mexico sought provisional measures in 2003 to protect three of its nationals facing imminent execution despite undeniable consular rights violations, the court’s response underscored its mounting impatience with the United States. No longer was the provisional order framed as a request with which the United States should comply; instead, the United States was instructed that it “shall take all measures necessary

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Second Summit of the Americas, Santiago Plan of Action, Apr. 19, 1998, 37 I.L.M. 947, 959.

<sup>125</sup> Press Release, U.S. Department of State, Statement Released in Asuncion, Paraguay (Nov. 4, 1998), available at <http://www3.sympatico.ca/aiwarren/editorials.htm>.

<sup>126</sup> *Id.*

<sup>127</sup> See Carlos Montero, *Paraguay: A Trade Off with the United States*, INTER PRESS SERV., Nov. 12, 1998, <http://www.sunsonline.org/trade/process/followup/1998/111607-98.htm>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 465, at para. 110 (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

to ensure” that the named individuals would not be put to death pending the court’s final judgment.<sup>131</sup>

Despite the ICJ’s insistent language, there was a widespread sense that the United States might not comply. The degree to which U.S. prestige had been diminished by repeated disregard of the world court’s rulings was reflected in a Canadian newspaper editorial on the latest ICJ order: “Surely the idea of U.S. exceptionalism, of a shining ‘city on a hill,’ should not include a defence of capital punishment, against international opinion and international law. That would be an awfully sad corruption of the idea, and not one likely to make the U.S. any friends.”<sup>132</sup>

Whether by accident or design, no execution dates were scheduled for the protected nationals during the year-long ICJ proceedings brought by Mexico. However, before the ICJ could issue its judgment, an Oklahoma court abruptly set an execution date for Osbaldo Torres Aguilera, one of the three protected nationals.<sup>133</sup> The Mexican Foreign Ministry condemned the ruling as a deliberate violation of the ICJ order and announced that President Fox would raise the issue in his upcoming meeting with President Bush.<sup>134</sup> Once again, bilateral relations that had just begun to mend seemed destined to be strained at the highest levels.

On March 31, 2004, the ICJ issued its binding judgment in the *Case Concerning Avena and Other Mexican Nationals*.<sup>135</sup> Noting its “great concern” that an execution date had already been set for Osbaldo Torres, the Court ruled that the United States must provide effective judicial review and reconsideration of the effects of the Vienna Convention violations in his case and that of fifty other Mexican citizens under sentence of death.<sup>136</sup> The decision prompted a spate of editorials across the United States urging full compliance with the ICJ judgment, if only to safeguard the consular rights of U.S. citizens detained overseas.<sup>137</sup> As one editorialist concluded, “[i]t’s hard to argue that your right should be respected when you deny that right to others.”<sup>138</sup>

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<sup>131</sup> *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2003 I.C.J. 128, at para. 59 (Feb. 5), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

<sup>132</sup> *Executing Foreigners*, TORONTO GLOBE & MAIL, Feb. 6, 2003, at A16.

<sup>133</sup> *Mexico’s Fox to Complain to Bush on Planned Execution*, REUTERS, Mar. 2, 2004, Factiva, Doc. LBA0000020040302e0320039o.

<sup>134</sup> *Id.*

<sup>135</sup> *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

<sup>136</sup> *Id.* at paras. 21, 138, 140.

<sup>137</sup> See, e.g., *Keeping Your Word — Texas Can’t Afford to Ignore Federal Treaties*, DALLAS MORNING NEWS, Apr. 12, 2004, at 14A, available at <http://www.dallasnews.com/archive/>.

<sup>138</sup> *Id.*

Just days before the scheduled execution of Osbaldo Torres, the looming crisis in U.S. relations with Mexico was averted by an unprecedented combination of judicial deference and executive action. Responding to Torres's application citing the ICJ judgment in *Avena*, the Oklahoma Court of Criminal Appeals indefinitely stayed his execution and ordered an evidentiary hearing to determine "whether Torres was prejudiced by the State's violation of his Vienna Convention rights."<sup>139</sup> That same day, Oklahoma Governor Brad Henry acted on the recommendation of the Pardon and Parole Board by commuting the death sentence.<sup>140</sup> "I took into account the fact that the U.S. signed the 1963 Vienna Convention and is part of that treaty," Henry noted; "[i]n addition, the U.S. State Department contacted my office and urged us to give 'careful consideration'" to the treaty violation.<sup>141</sup> The Governor reiterated that Torres "had not been notified of his right to contact the consulate of his native Mexico to seek legal representation" and that the consular treaty "is also important in protecting the rights of American citizens abroad."<sup>142</sup> It remains to be seen if other U.S. states will follow Oklahoma's example by giving serious consideration to the ICJ ruling in similar cases of foreign nationals facing execution.

## V. THE BUSH FACTOR

A commentator writing in the *Foreign Service Journal* lamented that "the picture many foreigners have of America as a reckless, gun-totin', cowboy nation that hands out the death penalty willy-nilly is a false one."<sup>143</sup> Perhaps so, but nothing could have done more to reinforce that stereotype than the election of George W. Bush to the presidency. "He's the world champion executioner," said former French Justice Minister Robert Badinter following the election.<sup>144</sup> "He is a horrible symbol of your mania for the death penalty."<sup>145</sup> The *Daily Mail*, the most conservative of major British newspapers, noted in its profile of the president-elect that he was "best known for signing 153 death warrants."<sup>146</sup>

Along with the sheer number of executions carried out during his term as governor of Texas, Bush's responses to a string of prominent cases exacerbated his

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<sup>139</sup> Torres v. Oklahoma, No. PCD-04-442, slip op. at 2 (Okla. Crim. App. May 13, 2004).

<sup>140</sup> Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), available at <http://www.governor.state.ok.us>.

<sup>141</sup> *Id.* (quoting Governor Henry).

<sup>142</sup> *Id.*

<sup>143</sup> Greg Kane, *The Myth of the Cowboy*, FOREIGN SERV. J., Oct. 2003, at 39, 42, available at <http://www/afsa.org/fsj/oct03/kane.pdf>.

<sup>144</sup> T.R. Reid, *Many Europeans See Bush as Executioner Extraordinaire*, WASH. POST, Dec. 17, 2000, at A36 (quoting Robert Badinter).

<sup>145</sup> *Id.* (quoting Robert Badinter).

<sup>146</sup> *Id.* (quoting the *Daily Mail*).



negative international image. A widely-reported 1999 interview in *Talk Magazine* shocked world sensibilities with its portrayal of the presidential-hopeful viciously mocking the unsuccessful appeal for mercy made to him by Karla Faye Tucker.<sup>147</sup> After refusing to stay the execution of Irineo Tristan Montoya despite an unconsidered consular rights violation and the State Department's intervention, Bush blandly assured "the people of Mexico that Mr. Montoya had a fair trial, ample opportunity to be heard and the full protections of the Constitution."<sup>148</sup> Many Canadians were incensed by Bush's apparent indifference to the case of Stanley Faulder, who spent more than a decade on death row without any contact with Canadian authorities because of yet another consular rights violation.<sup>149</sup> During a press conference dominated by questions about the international campaign to have Faulder's death sentence commuted to life imprisonment, Bush snapped, "No one is going to threaten the governor of the state of Texas . . . . We're not going to let people come into our state, commit capital murder and get away with it."<sup>150</sup>

Not surprisingly, Governor Bush's international reputation as a merciless executioner followed him into the White House. French officials refused to extradite notorious fugitive James Charles Kopp without first obtaining binding assurances against the death penalty from U.S. authorities. Kopp's French attorney noted, "[g]iven what we know of the opinions of the current American President, we must stay extra vigilant."<sup>151</sup> It took three months to negotiate Kopp's return with the Justice Department, which eventually acceded to the French demand that the death penalty would not be "requested, pronounced or applied."<sup>152</sup>

As President Bush flew to Europe for his first goodwill tour abroad, demonstrators there were converging on U.S. embassies to protest the execution of mass-murderer Timothy McVeigh.<sup>153</sup> The White House released a statement describing the execution as part of "the good that overcomes evil."<sup>154</sup> In his own public statement, the President of the Council of Europe declared that McVeigh

<sup>147</sup> See, e.g., David Yepsen et al., *Candidates Take Swipes at Bush*, DES MOINES REG., Aug. 11, 1999, <http://www.dmregister.com/news/stories/c4789004/8641218.html>; *Republican Foe Says Bush Mocked Woman Who Was Put to Death*, HOUS. CHRON., Aug. 12, 1999, at A2.

<sup>148</sup> Christy Hoppe, *Texas Executes Mexican Despite Protests; Bush Refuses to Issue Stay; Rally Briefly Turns Tense*, DALLAS MORNING NEWS, June 19, 1997, at A1, Factiva, Doc. dal0000020011006dt6j00w1f.

<sup>149</sup> See Renae Merle, *Death Penalty Opponents Plead for Canadian's Life*, ASSOCIATED PRESS, Dec. 8, 1998, Factiva, Doc. aprs000020010915duc80p97d.

<sup>150</sup> *Id.* (quoting Governor George W. Bush).

<sup>151</sup> Shapiro, *supra* note 104 (quoting Hervé Rouzaud-Leboeuf).

<sup>152</sup> *Id.* (quoting the French court).

<sup>153</sup> Jerome Socolovsky, *McVeigh Execution Prompts Protests as Europe Awaits Bush*, ASSOCIATED PRESS, June 12, 2001, Factiva, Doc. aprs000020010710dx6c09dp5.

<sup>154</sup> Press Release, Office of the Press Secretary, Bush Statement on Execution of Timothy McVeigh (June 11, 2001), [http://www.usembassy.it/file2001\\_06/alia/a1061110.htm](http://www.usembassy.it/file2001_06/alia/a1061110.htm).

was “a cold-blooded murderer. He will not be missed. But the way he died was sad, pathetic and wrong . . . . It is high time the United States rethought its attitude to the death penalty and aligned its position with the great majority of the free and democratic world.”<sup>155</sup> In faraway New Zealand, the leading newspaper echoed those sentiments, asserting that “the United States has diminished itself” in taking McVeigh’s life, committing an “offence on humanity.”<sup>156</sup> The French daily *Le Monde* responded with a front-page editorial cartoon showing a stadium full of Americans watching the execution, all wearing glasses for a better view.<sup>157</sup>

When Bush arrived in Spain to begin his European tour, the local press insisted on grilling him about the case of Joaquin Martinez, the Spanish national who had just been exonerated and released from death row in Florida.<sup>158</sup> An opinion survey found popular support for the death penalty stood at only fourteen percent in Spain; no Spanish political party supported its reinstatement, not even for the Basque separatists who, like Timothy McVeigh, had killed scores of innocent civilians in recent terrorist attacks.<sup>159</sup> Demonstrations greeted the U.S. President at every stop on his tour, protesting his positions on a range of global concerns: the environment, disarmament, globalization, and the death penalty.<sup>160</sup> Following his European visit, an international opinion poll found a deep distrust of President Bush and his foreign policy.<sup>161</sup> More than two-thirds of people in Germany, Italy and France disagreed with Bush’s support for the death penalty; only his decision to reject the Kyoto Protocol on global warming and to withdraw from the ABM weapons treaty drew higher disapproval ratings.<sup>162</sup>

Ironically, the election of a doctrinaire death penalty proponent to the U.S. presidency may prove to be the best thing that ever happened to the international abolition movement. Bush’s seeming intransigence over executions can have an electrifying effect on foreign opinion. For example, after Governor Bush refused to consider clemency for Stanley Faulder in 1998, support among the Canadian public for reinstatement of the death penalty dropped by nearly twenty points and has never rebounded.<sup>163</sup> The policies of the Bush Administration bring together a

<sup>155</sup> Press Release, Council of Europe, Statement by Lord Russell-Johnston on the Execution of Timothy McVeigh (June 11, 2001), [http://press.coe.int/cp/2001/415a\(2001\).htm](http://press.coe.int/cp/2001/415a(2001).htm).

<sup>156</sup> Editorial, *Execution Hollow and Degrading Act*, N.Z. HERALD, June 12, 2001, <http://www.nzherald.co.nz/index.cfm?ObjectID=194386>.

<sup>157</sup> Suzanne Daley, *The Reaction Abroad; Almost as One, Europe Condemns McVeigh Execution*, N.Y. TIMES, June 12, 2001, at A27.

<sup>158</sup> See Socolovsky, *supra* note 154.

<sup>159</sup> Daley, *supra* note 158.

<sup>160</sup> *Demonstrators Greet Bush in Europe Tour: Roundup*, PEOPLE’S DAILY, May 27, 2002, [http://english.people.com.cn/200205/27/eng20020527\\_96505.shtml](http://english.people.com.cn/200205/27/eng20020527_96505.shtml).

<sup>161</sup> PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, BUSH UNPOPULAR IN EUROPE, SEEN AS UNILATERALIST (2001), <http://people-press.org/reports/display.php3?ReportID=5>.

<sup>162</sup> *Id.*

<sup>163</sup> Janice Tibbetts, *Support for Death Penalty Falls*, MONTREAL GAZETTE, Dec. 31, 1998,

host of foreign constituencies that might not otherwise coalesce: environmentalists, pacifists, anti-globalization groups, and proponents of international justice, among others. No single issue in that seemingly eclectic mix generates the same visceral opposition as a highly-publicized U.S. execution. In the phrase coined by the conservative French newspaper *Le Figaro*, President Bush is “the toxic Texan.”<sup>164</sup> Rightly or not, his unabashed support for the death penalty has come to symbolize all that divides contemporary America from its sister cultures around the world.<sup>165</sup>

#### CONCLUSION: THE NEW GLOBAL REALITY

In March 2001, Secretary of State Colin Powell met for the first time with a high-level European Union (EU) delegation to discuss mutual foreign policy concerns. At the insistence of the EU, the use of the death penalty in the United States was added to the agenda.<sup>166</sup> Responding to the Swedish Foreign Minister, Powell reiterated that there was a broad consensus within the United States in support of capital punishment, that both Presidential candidates had endorsed it and that the American position was unlikely to change in the foreseeable future.<sup>167</sup> It was an inauspicious beginning to a relationship that already faced deep divisions over trade practices, military policy, environmental standards, and diplomacy in the Middle East.

Some mainstream foreign policy observers were quick to dismiss these European concerns over the death penalty as inconsequential or insincere. One commentator dubbed the issue a “false crisis” in the transatlantic partnership,<sup>168</sup> while another described it as “a club to beat America . . . a statement that while you may be a superpower we’re far morally superior.”<sup>169</sup> Despite a germ of truth, these critiques ultimately ring hollow. Resurging anti-Americanism undoubtedly swells the chorus of condemnation, but there is also no denying the revulsion that allied nations feel toward the death penalty or the sincere distress that its retention by the United States causes. Nor can the dispute be reduced to a simple clash between American values and European elitism — not when the countries advocating universal abolition are as culturally varied as Brazil, Nepal and Namibia. Perhaps

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at A8, available at <http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/jan99/0092.html>.

<sup>164</sup> J.F.O. McAllister, *Mad at America*, TIME (London), Jan. 12, 2003, <http://www.time.com/time/europe/magazine/2003/0120/cover/story.html>.

<sup>165</sup> *Id.*

<sup>166</sup> Toby Harnden, *Bush Team Angry over EU Pressure on Death Penalty*, DAILY TELEGRAPH (LONDON), Mar. 8, 2001, at 15.

<sup>167</sup> *Id.*

<sup>168</sup> Antony J. Blinken, *The False Crisis over the Atlantic*, FOREIGN AFF., May/June 2001, at 35.

<sup>169</sup> Harnden, *supra* note 166.

most importantly, the consistency of international responses in the fateful years since has reduced such dismissive assessments to wishful thinking.

For a brief time following the terrible attacks of September 11, 2001, it appeared as though differences over criminal justice issues might be swept aside by the mutual international zeal to apprehend and punish those responsible. Surely, any international crisis could sway other nations to cooperate unreservedly with American justice, it would be the threat of global terrorism. Yet, despite intense and prolonged diplomatic pressure by the United States, abolitionist countries have held firmly to their principles.

Rather than receding in importance, the death penalty controversy has advanced steadily to the center of post-September 11th foreign policy considerations. A new extradition agreement with the United States was delayed by nearly a year as EU officials sought and obtained the right to refuse any return without guarantees that the death penalty would not be imposed or carried out.<sup>170</sup> The prospect of U.S. military tribunals imposing death sentences at Guantánamo Bay sent shock waves through the Western coalition. "The death sentence cannot be applied by military courts as this would make the international coalition lose the integrity and credibility it has so far enjoyed," warned European Commission spokesman Diego de Ojeda.<sup>171</sup> Even the capture of Saddam Hussein prompted controversy, after President Bush suggested that execution would be the appropriate punishment.<sup>172</sup> The Portuguese Prime Minister, a vocal supporter of the U.S.-led invasion of Iraq, declared in an interview that "under no circumstances should the death penalty be applied."<sup>173</sup> UN Secretary General Kofi Annan stressed that any trial for Hussein must meet international standards.<sup>174</sup> "As secretary general, as the UN, as an organization, we are not going to now turn around and support the death penalty," he insisted.<sup>175</sup>

This is the new reality within which U.S. diplomacy must function. The day is long gone when the United States could credibly argue that retention of the death penalty is a purely internal matter with no transnational repercussions. The rules for acceptable international conduct are changing, and the United States increasingly

<sup>170</sup> Agreement on Extradition, June 25, 2003, U.S.-E.U., art. 13, 43 I.L.M. 749.

<sup>171</sup> *EU Against Death Penalty for U.S. Terror Suspects*, REUTERS, July 4, 2003, Factiva, Doc. lba0000020030704dz7400ngp (quoting Diego de Ojeda).

<sup>172</sup> Beth Gardiner, *Death Penalty for Saddam Faces Critics*, ASSOCIATED PRESS, Dec. 17, 2003, Factiva, Doc. APRS000020031217dzch000kf.

<sup>173</sup> *Talk of the Times*, MANILA TIMES, Jan. 10, 2004, <http://www.manilatimes.net/national/2004/jan/10/yehey/opinion/20040110opi8.html> (quoting Prime Minister Jose Manuel Durao Barroso).

<sup>174</sup> *Annan Opposes Death Penalty*, BOSTON GLOBE, Dec. 16, 2003, [http://www.boston.com/news/world/articles/2003/12/16/annan\\_opposes\\_death\\_penalty?mode=PF](http://www.boston.com/news/world/articles/2003/12/16/annan_opposes_death_penalty?mode=PF).

<sup>175</sup> *Id.* (quoting UN Secretary General Kofi Annan).

finds itself on the wrong side of what is now a fundamental human rights issue. America's split with its Western colleagues over the propriety of executions has moved beyond polite disagreement and is directly impacting foreign policy objectives and undermining important bilateral relations. Participation in executions, however indirectly, is a line that many countries crucial to U.S. security interests simply will not cross. As the Council of Europe's Secretary-General wrote in an article directed at American readers, these developments "are not symptoms of an ephemeral trend, but the consequence of a profound belief that the death penalty has no place in a civilized democracy."<sup>176</sup>

Nonetheless, there are some encouraging signs that the death penalty divide between America and its allies is not a chasm. The United States Supreme Court recently abolished the death penalty for prisoners with mental retardation,<sup>177</sup> and is reconsidering the constitutionality of executing juvenile offenders.<sup>178</sup> The number of death sentences imposed in the United States has declined precipitously in recent years, while public confidence in the fairness and reliability of the ultimate punishment is eroding.<sup>179</sup> The Governor of Illinois first declared a moratorium on executions and then emptied death row, and the political sky did not fall.<sup>180</sup> Sensing the shift in the public mood, major presidential candidates have dared to qualify their support for capital punishment for the first time in more than a decade.<sup>181</sup> Even the recent replacement of gas chambers and electric chairs with ostensibly painless lethal injection technology may signal a moderating cultural

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<sup>176</sup> Walter Schwimmer, *Death Penalty in U.S. Must Be Rethought*, INT'L HERALD TRIB., Jan. 25, 2001, at 9, [http://www.coe.int/T/E/Com/Files/Themes/Death-penalty/e\\_schwimmer\\_herald.asp](http://www.coe.int/T/E/Com/Files/Themes/Death-penalty/e_schwimmer_herald.asp).

<sup>177</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by the Eighth Amendment).

<sup>178</sup> *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 540 U.S. 1160 (U.S. Jan. 26, 2004) (No. 03-633).

<sup>179</sup> See DEATH PENALTY INFORMATION CENTER, *THE DEATH PENALTY IN 2003: YEAR END REPORT: DOUBTS CONTINUE AS DEATH PENALTY NUMBERS DECLINE IN 2003 1* (2003), <http://www.deathpenaltyinfo.org/YER-03-F.pdf> ("The death penalty continued its recent attrition in 2003, with executions, death sentences, and the death row population all lower than a few years ago. Public support for the death penalty dropped to its lowest level in 25 years."); Humphrey Taylor, HARRIS INTERACTIVE, *More than Two-Thirds of Americans Continue to Support the Death Penalty*, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=431](http://www.harrisinteractive.com/harris_poll/index.asp?PID=431) (finding only forty-one percent of respondents believe the death penalty is a deterrent, the lowest figure in twenty-seven years, and that ninety-five percent believe innocent people are sometimes convicted of murder).

<sup>180</sup> See Kevin McDermott, *Illinoisans Are Split Closely on Ryan's Commutations*, ST. LOUIS POST-DISPATCH, Feb. 7, 2003, at A1, <http://www.stltoday.com/help/archives/advancedsearch>.

<sup>181</sup> See Nedra Pickler, *Candidates Apart on Death Penalty*, MILWAUKEE J. SENTINEL, Feb. 27, 2004, at 8A, Factiva, Doc. MLWK000020040227e02r00099.

attitude toward retribution.<sup>182</sup> However tentatively, it is just possible that the United States has begun retracing the abolitionist steps taken by other Western societies over thirty years ago. In the long run, the familial difference over capital punishment may turn out to be less one of temperament than of timing.

For the fiftieth anniversary of their executions, the Governor of Massachusetts proclaimed a memorial day to commemorate and exonerate Sacco and Vanzetti.<sup>183</sup> The proclamation noted:

[T]hat all human institutions are imperfect, that the possibility of injustice is ever-present, and that the acknowledgement [sic] of fault, combined with a resolve to do better, are signs of strength in a free society . . . .

. . . .

Simple decency and compassion, as well as respect for truth and an enduring commitment to our nation's highest ideals, require that the fate of Nicola Sacco and Bartolomeo Vanzetti be-pondered by all who cherish tolerance, justice and human understanding.<sup>184</sup>

This is the kind of leadership that U.S. diplomacy should provide, yet cannot offer: the strength to acknowledge that every execution is incompatible with democratic ideals, and the resolve to once again champion those evolving human rights standards that mark the progress of a maturing global society. The stigma of the United States as one of the world's leading executioners deprives its diplomacy of the moral high ground, while at the same time affording an unassailable rallying point for the growing opposition to American hegemony abroad.

Retention of capital punishment distances the United States from its closest partners in ways both symbolic and tangible, and the costs of that isolation are rising steadily. The pernicious influence of the U.S. death penalty on foreign affairs will only compound over time, until the day that America finally reverses its solitary and shameful course.

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<sup>182</sup> Michael L. Radelet, *Trends in the United States Toward Abolition of the Death Penalty* (2002) (unpublished manuscript, on file with the William & Mary Bill of Rights Journal).

<sup>183</sup> Proclamation by Michael S. Dukakis, Governor of Massachusetts, July 19, 1977, <http://www.saccovanzettiproject.org/pages/context/dukakis.htm>.

<sup>184</sup> *Id.*