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# Introduction: Death Penalty and International Law

Davison M. Douglas
*William & Mary Law School*, dmdoug@wm.edu

# DEATH PENALTY AND INTERNATIONAL LAW

Davison M. Douglas*

In 2004, the United States celebrated the fiftieth anniversary of the Supreme Court's decision in *Brown v. Board of Education* in which the Court declared de jure segregated schools unconstitutional.[1] In recent years, many legal historians have noted the influence of international attitudes towards America's persistent embrace of racial segregation on the Court's deliberations in *Brown*.[2] Indeed, the brief of the United States in the *Brown* case was devoted in significant measure to the harm to America's foreign policy interests that resulted from the country's retention of de jure racial segregation.[3]

Will international attitudes have a similar impact on this country's use of the death penalty? This symposium does not address that question. But the articles that comprise this symposium do argue that there is a non-trivial relationship between international legal norms and the operation of the death penalty in the United States. These articles explore the various ways in which international norms do affect the use of the death penalty in this country.

Mark Warren, in his article *Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*, explores in part the impact of America's retention of the death penalty on American foreign policy.[4] Warren notes that some former U.S. diplomats have cited America's retention of the death penalty as a hindrance to the nation's interests. In 2003, for example, Harold Koh and Thomas Pickering wrote: "For a country that aspires to be a world leader on

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* Arthur B. Hanson Professor of Law, William & Mary School of Law.

[1] 347 U.S. 483 (1954).

[2] *See, e.g.*, MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 79–114 (2000).

[3] The United States Government's brief read in part:

> 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.

Brief for the United States as Amicus Curiae at 8, *Brown* (No. 1, 2, 4, 10), *quoted in* Mark Warren, *Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*, 13 WM. & MARY BILL RTS. J. 309, 317 (2004).

[4] Warren, *supra* note 3.

human rights, the death penalty has become our Achilles' heel."[5] Nine former diplomats filed an amicus brief with the United States Supreme Court in *McCarver v. North Carolina*, a 2001 case involving the execution of mentally retarded defendants, arguing that such executions:

> 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 States foreign policy interests. . . .
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> . . . The degree to which this issue has strained our diplomatic relations can be measured by the extent to which important bilateral meetings with our closest allies are now consumed with answering diplomatic demarches challenging these practices. The persistence of this practice has caused our allies and adversaries alike to challenge our claim of moral leadership in international human rights. If this Court were again to sustain the practice of executing people with mental retardation, it would provide fresh anti-American diplomatic ammunition to countries who have exhibited far worse human rights records.[6]

Warren discusses other incidents as well, such as the cancellation of a visit between Mexican President Vincente Fox and American President George W. Bush in protest of the American execution of a Mexican citizen in violation of his consular rights.[7]

In fact, one important issue involving the interplay of international legal norms and the death penalty in the United States has been the question of compliance with the Vienna Convention on Consular Relations that requires consular notice when a foreign national is facing criminal charges.[8] Both John Quigley, in his article *Suppressing the Incriminating Statements of Foreigners*,[9] and Linda Malone, in her article *From* Breard *to* Malvo*: Incompetency and Human Rights on the Fringes of*

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[5] 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, 25, *quoted in* Warren, *supra* note 3, at 315.

[6] Brief of Amici Curiae Diplomats, McCarver v. North Carolina, 532 U.S. 941 (2001) (No. 00–8727), 2001 WL 648607, at *5–6, *12, *quoted in part in* Warren, *supra* note 3, at 315–16.

[7] Warren, *supra* note 3, at 326–27.

[8] Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, para. 1, 21 U.S.T. 77, 596 U.N.T.S. 261.

[9] John Quigley, *Suppressing the Incriminating Statements of Foreigners*, 13 WM. & MARY BILL RTS. J. 339 (2004).

*the Death Penalty*,[10] explore the operation of the Vienna Convention in American death penalty cases. The Convention requires that foreign nationals arrested on criminal charges be granted access to their home-state consul and notified by the detaining authorities of their right to such access. But in several death penalty cases, this consular notice requirement has not been met, provoking intense international displeasure. Quigley's article explores "whether consular access involves a judicially cognizable right, whether the information about consular access must be provided prior to interrogating, and whether principles of international law call for the suppression of a statement made by a foreign national who was not informed about consular access."[11] Malone, in her article, also explores the application of the Vienna Convention on Consular Relations by reviewing the way in which various courts in recent years have treated violations of the convention. For example, in 2004, the International Court of Justice (ICJ) found that the United States had failed to meet the consular notice requirements of the Vienna Convention with respect to several dozen Mexican nationals. The court in that case ordered the United States to provide "review and reconsideration of the convictions and sentences of the Mexican nationals... by taking account" of the consular notification violations, but left unanswered several questions concerning the relief a criminal defendant is entitled to receive when consular notification rights have been violated.[12] In response, the Bush Administration directed the Texas state courts to comply with the ICJ ruling by providing a hearing for one of the affected Mexican nationals, but then withdrew the United States from that part of the treaty that grants the ICJ enforcement authority.[13]

Another central issue involving the interplay between international law and the death penalty in the United States has been the question of extradition. William Schabas, in his article *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*,[14] argues in part that "most developed countries now refuse to extradite fugitives to the United States without assurances that capital punishment will not be imposed."[15] Schabas also notes that some foreign nations have agreed to provide certain evidence to the United States in connection with the prosecution of 9/11 terrorists only after "receiving an assurance that the information would not be used to seek or impose the death penalty."[16] In a similar manner, Schabas notes

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[10] Linda A. Malone, *From* Breard *to* Atkins *to* Malvo*: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 363 (2004).

[11] Quigley, *supra* note 9, at 339.

[12] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), para. 153(9), *available at* http://www.icj-cij.org.

[13] Charles Lane, *Texas Accuses Bush of Trampling Its Autonomy in Death Penalty Case*, WASH. POST, Mar. 28, 2005, at A2.

[14] William A. Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 417 (2004).

[15] *Id.* at 422.

[16] *Id.* at 443.

that the European Union has decided to allow the United States to receive information on suspects from the Europol law enforcement agency only on the condition that the suspects not be subjected to the death penalty.[17]

Finally, Brian Tittemore, in his article *The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System*,[18] explores the interaction between international law and domestic capital punishment law by probing the influence of the decisions of international human rights tribunals upon the legal practices of various Caribbean nations. Tittemore argues that international legal standards have influenced domestic legal practices, noting, for example, that Caribbean courts on occasion have drawn "upon the terms of human rights instruments and the associated decisions of their supervisory institutions in order to give informed and progressive meaning and effect to the rights and freedoms enshrined in regional constitutions."[19]

In recent years, the interplay of international legal norms and America's domestic law — particularly its constitutional law — has been highly controversial, even provoking congressional efforts to bar reliance on non-domestic legal sources to interpret the U.S. Constitution.[20] For example, in the United States Supreme Court's recent decision in *Roper v. Simmons* declaring unconstitutional the death penalty for persons under the age of eighteen at the time their crimes were committed, the Court made note of "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[21] The Court's decision in *Roper* signals that the Court will likely continue to find international norms relevant when assessing the constitutionality of the death penalty.

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[17] *Id.* at 444.

[18] Brian D. Tittemore, *The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections*, 13 WM. & MARY BILL RTS. J. 445 (2004).

[19] *Id.* at 519.

[20] *See, e.g.*, Marsha F. Davis, *Don't 'Gag' U.S. Courts*, NAT'L L.J., Aug. 23, 2004 (discussing House Resolution 568 which would bar consideration of foreign or international legal precedents in interpreting the U.S. Constitution); Tim Wu, *Foreign Exchange: Should the Supreme Court Care What Other Countries Think?*, Slate (reporting a speech by Justice Scalia in which he criticized the reliance of American constitutional opinions on foreign precedents), *at* http://slate.msn.com/id/2098559 (Apr. 9, 2004); Anne-Marie Slaughter, *Courting the World: U.S. Judges Must Overcome a Culture of Legal Isolationism — Or Risk Being Left Behind*, FOREIGN POL'Y, March–Apr. 2004, at 78 (approving of reliance on foreign precedents in American legal decision making).

[21] Roper v. Simmons, 125 S. Ct. 1183, 1198 (2005). The Court in *Roper* also noted that Article 37 of the United Nations Convention on the Rights of the Child, which every nation in the world except the United States and Somalia has ratified, contains a prohibition on the juvenile death penalty. *Id.* at 1199. This aspect of the Court's decision provoked a vigorous rejoinder from Justice Scalia. *Id.* at 1225–28 (Scalia, J., dissenting).