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Comment

VENGEANCE IS WHOSE?: THE DEATH PENALTY AND CULTURAL RELATIVISM IN INTERNATIONAL LAW

JAMES H. WYMAN*

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I. INTRODUCTION

Rabi' Ragab Shahhata, an Egyptian citizen, and William Frank Parker, a resident of Arkansas, never met. Living in two different nations thousands of miles apart, both died on the same August day in 1996. The Egyptian and the Arkansan had one other fact surrounding their deaths in common: Parker was executed by the state of Arkansas,[1] while Shahhata was executed by the Egyptian government in Minya prison.[2] Although the United States, a country that is frequently viewed as emblematic of all that is Western, and Egypt, an ostensibly modern state that adheres to many Islamic traditions, have often been on opposing sides concerning international human

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1. *See Killer Who Became a Buddhist Executed*, L.A. TIMES, Aug. 9, 1996, at A10.

2. *See* Amnesty International, *Victims of the Death Penalty* (visited Oct. 24, 1996) <http://www.amnesty.org/ailib/intcam/dp/dplog.htm>.

rights norms, the desirability of a regularly imposed death penalty is one area where both concur.

What is curious about this agreement is perhaps not so much Egypt's stance, but that of the United States. Egypt, along with most of the states in the Islamic world, proclaims religious justifications for imposing the death penalty.[3] With the exception of Japan, however, the United States is the only well-established democracy that has not abolished the death penalty either de facto or de jure.[4] In fact, instead of following the trend of its Western allies toward abolition of capital punishment, the United States has recently taken measures to either streamline or expand its use.[5] This disagreement with its cultural counterparts, as well as the concomitant agreement with those states of entirely different cultural traditions, sheds an interesting light on the ongoing debate over the applicability of supposedly Western-derived international human rights norms to non-Western states.

Part II of this Comment examines the movement toward abolition of the death penalty in international law, focusing in particular on the attempts to create a consensus on capital punishment in the various human rights instruments promulgated since World War II. Part III explores the use of capital punishment in the United States, China, and some Islamic states. Part IV looks at the arguments that numerous publicists have put forth to justify applying alternative standards for human rights to non-Western states. Finally, Part V concludes that the split in the international community along non-cultural lines over the use of capital punishment lends significant credence to the notion that human rights are not culturally relative.

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3. *See* Ved. P. Nanda, *Islam and International Human Rights Law: Selected Aspects*, 87 AM. SOC'Y INT'L L. PROC. 321, 330 (1993).

4. *See* Amnesty International, *The Death Penalty: Facts and Figures 1996* (visited Oct. 22, 1996) <http://www.amnesty.org/ailib/intcam/dp/dpfacts.htm>. For a list of retentionist countries, see Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. TRANSNAT'L L. & POL'Y 517, 524-25 (1997). In the United States, the death penalty is retained in thirty-eight states and under federal law, *see, e.g.*, 18 U.S.C. § 3591 (1994 & Supp. I 1995) (enumerating grounds for imposition of death penalty); 10 U.S.C. § 852 (1994 & Supp. I 1995) (setting forth procedural requirements for imposition of the death penalty by court-martial).

5. *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214, 1217-26 (codified in scattered sections of 28 U.S.C.) (restricting use of federal habeas corpus in death penalty appeals); *see also* Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796, § 60002 (codified at 18 U.S.C. §§ 3591-3598 (Supp. I 1995) (imposing death penalty to punish, among other things, large-scale drug trafficking).

II. Capital Punishment as an Area of International Human Rights Concern

Capital punishment, and even human rights, generally were not seen as coming within the purview of international law until the period following World War II. The postwar concern over human rights, which had hitherto been regarded primarily as a domestic matter, was in large part engendered by the atrocities committed by Nazi Germany upon its own populace.[6]

A. *The Universal Declaration of Human Rights*

On December 10, 1948, the United Nations ("U.N.") General Assembly adopted the Universal Declaration of Human Rights ("UDHR").[7] Called "[t]he cornerstone of contemporary human rights law" by one publicist,[8] the UDHR contains two provisions relevant to the imposition of capital punishment. Article 3 provides that "[e]veryone has the right to life, liberty and security of person."[9] Article 5 states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[10] Although neither provision expressly prohibits the imposition of capital punishment, both are the result of a compromise reflecting a "common aspiration toward eventual abolition."[11]

During the drafting of Article 3, the United States and the United Kingdom offered proposals that specified the death penalty as an exception to the right to life.[12] Eleanor Roosevelt, Chair of the Drafting Committee of the Commission on Human Rights, and V. Koretsky, the Soviet delegate, both noted the nascent trend toward abolition of the death penalty in some states and suggested that the U.N. should not approve of capital punishment.[13] The committee adopted the current wording of Article 3 and forwarded it to the Commission on Human Rights, whose Working Group also adopted the wording of the text.[14] The U.N. Secretary-General then solicited

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6. *See* Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT'L L. 273, 278 (1993).

7. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt.1, U.N. Doc. A/810 (1948) [hereinafter UDHR].

8. WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 25 (1993).

9. UDHR, *supra* note 7, art. 3.

10. *Id.* art. 5.

11. Fitzpatrick & Miller, *supra* note 6, at 280.

12. *See* SCHABAS, *supra* note 8, at 33.

13. *See id.* at 33-34.

14. *See id.* at 35-37.

comments on the draft; two states, Brazil and New Zealand, attempted to reintroduce the death penalty as an exception to the right to life.[15] The Commission on Human Rights, however, barely touched on the issue of capital punishment during its deliberations and submitted the text as worded to the General Assembly.[16]

Nonetheless, during the debate over Article 3 by the Third Committee of the General Assembly, capital punishment received much attention. An amendment introduced by the Soviet Union would have abolished the death penalty "in time of peace."[17] Several states, such as Pakistan, Haiti, and Turkey, indicated general agreement with the principle of the Soviet amendment but felt that it was too controversial.[18] Other states, notably Costa Rica, Venezuela, and Uruguay, felt that the Soviet article fell short because it did not abolish the death penalty in wartime as well.[19] The Soviet amendment was defeated in committee by a roll-call vote of twenty-one to nine, with eighteen abstentions.[20] The committee then adopted the original draft by a vote of thirty-six to none, with twelve abstentions,[21] and the General Assembly adopted the UDHR without a dissenting vote, although there were several abstentions.[22]

While the UDHR is not binding, it is frequently viewed as a codification of customary international law.[23] Thus it is important to note that the compromise reached in the wording of Article 3, and its silence with respect to the death penalty, has been characterized as "reflect[ing] an overwhelming acceptance of abolition as a goal."[24] Although at the time the death penalty was widely regarded as an exception to the right to life, the failure to incorporate this view in the UDHR supports the notion that abolition of the death penalty was seen as a goal of the international community and an emerging norm of international law. For the most part, the few explicit

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15. *See id.* at 38.

16. *See id.* at 38-39. Much of the discussion by both the Drafting Committee and the Commission concerning the right to life provision dealt with the provision's impact on the abortion issue. *See id.* at 38, 41.

17. *See id.* at 41.

18. *See id.; see also id.* at 41-42 n.117.

19. *See id.* at 43; *see also* Fitzpatrick & Miller, *supra* note 6, at 283.

20. *See* SCHABAS, *supra* note 8, at 44. With the exception of Mexico and the Dominican Republic, both of which voted in favor of the Soviet proposal, votes for and against the amendment fell along the cold-war lines of the time. *See id.* at 44 n.137. Those states abstaining consisted in large part of an odd mix of abolitionist Latin American states and retentionist states such as Egypt, India, Lebanon, and Saudi Arabia. *See id.*

21. *See id.* at 45. The Soviet Union and several other states abstained. *See id.* at 45 n.148.

22. *See id.*

23. *See id.*

24. Fitzpatrick & Miller, *supra* note 6, at 283; *see also* SCHABAS, *supra* note 8, at 49.

dissents to that notion during the debate over the UDHR were based entirely upon grounds that capital punishment was a matter of domestic and not international concern.[25]

B. The International Covenant on Civil and Political Rights

The twenty-year drafting period of the International Covenant on Civil and Political Rights ("ICCPR"),[26] which was adopted by the U.N. General Assembly in 1966,[27] reflected the realization that the death penalty was indeed a human rights issue and within the scope of international concern.[28] The pertinent sections of Article 6 of the ICCPR provide:

> (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant . . . . This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
>
> . . . .
>
> (4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
>
> (5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
>
> (6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.[29]

Throughout the drafting period, Sweden and several Latin American countries, most notably Uruguay and Colombia, urged immediate abolition of capital punishment.[30] In 1957, Uruguay and Colombia introduced an abolitionist proposal: "Every human being has the inherent right to life. The death penalty shall not be imposed

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25. *See* Fitzpatrick & Miller, *supra* note 6, at 283.
26. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
27. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).
28. *See* Fitzpatrick & Miller, *supra* note 6, at 288-89.
29. ICCPR, *supra* note 26, art. 6, 999 U.N.T.S. at 174-75.
30. *See* Fitzpatrick & Miller, *supra* note 6, at 292-94.

upon any person."[31] Oddly enough, much of the opposition to the proposal came from states such as the United Kingdom, New Zealand, Australia, and Canada, all of which have since abolished capital punishment.[32] In addition, several Islamic states, including Morocco, Afghanistan, Saudi Arabia, and Indonesia, voiced opposition to the proposal while at the same time expressing hopes for eventual abolition.[33] The proposal was defeated by a roll-call vote of fifty-one to nine, with twelve members abstaining.[34] However, the proposal did lead to the adoption of abolitionist language in paragraphs 2 and 6 of Article 6,[35] adopted by the General Assembly in 1966. The ICCPR entered into force on March 23, 1976, following the thirty-fifth ratification.[36] The United States, which in 1968 expressed the view that no justification existed for the death penalty,[37] finally ratified the ICCPR in 1992 with extensive reservations to the death penalty provisions in Article 6.[38]

C. *The Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*

By 1971, the U.N. had expressly committed itself to a goal of abolishing the death penalty "in all countries."[39] In 1980, the General Assembly requested state comments on a Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty ("Protocol").[40] Article 1 of the draft Protocol, which was presented by the Federal Republic of Germany, provided that:

> (1) Each State party shall abolish the death penalty in its territory and shall no longer foresee the use of it against any individual subject to its jurisdiction nor impose nor execute it.

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31. U.N. GAOR 3d Comm., 12th Sess., Agenda Item 33, U.N. Doc. A/C.3/L.644 (1957). France introduced a watered-down proposal explicitly calling for eventual abolition. *See* U.N. GAOR 3d Comm., 12th Sess., 811th mtg. ¶ 32, U.N. Doc. A/C.3/SR.811 (1957).

32. *See* Fitzpatrick & Miller, *supra* note 6, at 295-96.

33. *See id.*

34. *See* SCHABAS, *supra* note 8, at 80.

35. *See id.*

36. *See id.* at 90.

37. U.N. GAOR 3d Comm., 23d Sess., 1557th mtg. ¶ 20, U.N. Doc. A/C.3/SR.1557 (1968).

38. *See* 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992); *see also* discussion *infra* Part III.A.

39. G.A. Res. 2857 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8429 (1971).

40. U.N. GAOR, 35th Sess., 96th plen. mtg., U.N. Doc. A/35/PV.96 (1980).

> (2) The death penalty shall not be re-established in States that have abolished it.[41]

As the draft Protocol was debated by different U.N. committees throughout the 1980s, comments from various states were submitted to the Secretary-General.[42] These comments were divided almost equally between abolitionist and retentionist states.[43] The bulk of the opposition to the Protocol came from Islamic states, of which Egypt expressed the most typical sentiment: "[T]he death penalty cannot be abolished in the cases where it is laid down as *hadd* (prescribed castigation decreed by God or the Prophet) or *qisas* (equal retribution) but . . . may be commuted in those cases where it is laid down as *ta'zir* (deterrent)."[44]

The draft Protocol was referred to a subcommission of the Commission on Human Rights. Throughout the debate over the draft, Islamic states repeatedly objected to its provisions and cast dissenting votes.[45] The draft finally emerged and was presented to the Third Committee of the General Assembly with the following language:

> (1) No one within the jurisdiction of a State Party to the present Protocol shall be executed.
>
> (2) Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.[46]

Although proponents of the Protocol hoped the Third Committee could adopt the Protocol by consensus, Saudi Arabia, observing that abolition of the death penalty was "incompatible with Islamic principle," insisted upon a recorded vote.[47] Almost all of the states that spoke in opposition to the draft were those with significant Muslim populations; references to Islamic law and the Qu'ran were made repeatedly.[48] Other Islamic states, such as Jordan, cited the deterrent effect of the death penalty as their reason for opposition.[49] Egypt went so far as to turn the debate over the protocol into a self-

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41. *Crime Prevention and Control*, U.N. GAOR 3d Comm., 35th Sess., Agenda Item 65, U.N. Doc. A/35/742 (1980).

42. *See* SCHABAS, *supra* note 8, at 164.

43. *See id.*

44. Nanda, *supra* note 3, at 330.

45. *See* Fitzpatrick & Miller, *supra* note 6, at 337-38.

46. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 3d Comm., 44th Sess., 82d plen. mtg., art. 1, U.N. Doc. A/RES/44/128 (1990).

47. U.N. GAOR 3d Comm., 39th Sess., 60th mtg. ¶ 22, U.N. Doc. A/C.3/39/SR.60 (1984).

48. *See* SCHABAS, *supra* note 8, at 169.

49. *See id.* at 169-70; *see also* Fitzpatrick & Miller, *supra* note 6, at 341.

determination issue, calling the Protocol "a racist, imperialist idea which certain countries were seeking to impose on the 115 countries which still had the death penalty."[50] On December 29, 1989, the General Assembly adopted the Protocol by a vote of fifty-nine to twenty-six, with forty-eight abstentions.[51]

All of the countries that voted against the Protocol, with the exception of the United States, China, and Japan,[52] were Islamic states or states with a considerable Muslim population.[53] Following its tenth ratification, the Protocol entered into force on July 11, 1991.[54] As of 1996, twenty-nine states had ratified it.[55]

III. USE OF THE DEATH PENALTY INTERNATIONALLY

A. United States

The United States appeared to be headed toward abolition of capital punishment in the late 1960s and early 1970s. In 1972, four years after the United States delegation to the U.N. had observed that there was no justification for the death penalty,[56] the U.S. Supreme Court struck down the death penalty laws of all states in *Furman v. Georgia*.[57] In a per curiam opinion, the Court held that the imposition of the death penalty under then-existing state laws violated the Eighth Amendment's prohibition against cruel and unusual punishment.[58] Because state laws conferred unguided discretion upon the sentencer in capital cases, the death penalty was being applied in an arbitrary fashion in violation of the Eighth Amendment. Such "death sentences [were] cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [The Eighth Amendment] cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[59]

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50. U.N. GAOR 3d Comm., 44th Sess., 52d mtg. ¶ 7, U.N. Doc. A/C.3/44/SR.52 (1989).

51. *See* SCHABAS, *supra* note 8, at 170.

52. Japan cited prematurity as its reason for voting against the Protocol. *See id.*

53. The states voting against the protocol were: Afghanistan, Bahrain, Bangladesh, Cameroon, China, Djibouti, Egypt, Indonesia, Islamic Republic of Iran, Iraq, Japan, Jordan, Kuwait, Malaysia, Maldives, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Sierra Leone, Somalia, Syrian Arab Republic, Sudan, United Republic of Tanzania, United States of America, and Yemen. *See id.* at 170 n.230.

54. *See id.* at 170.

55. *See* AMNESTY INTERNATIONAL, ABOLITION OF THE DEATH PENALTY WORLDWIDE: DEVELOPMENTS IN 1995 (AI Index ACT 50/07/96).

56. *See* U.N. GAOR 3d Comm., 23d Sess., 1557th mtg. ¶ 20, U.N. Doc. A/C.3/SR.1557 (1968).

57. 408 U.S. 238 (1972).

58. *See id.* at 239-40.

59. *See id.* at 309-10 (Stewart, J., concurring).

A majority of the Court, however, did not find the death penalty unconstitutional per se,[60] and a number of states rushed to reconfigure their death penalty laws to comply with the *Furman* Court's mandate to avoid arbitrary sentencing. The constitutionality of the new laws was addressed by the Court in *Gregg v. Georgia*.[61] The Court found that Georgia's redrafted death penalty statute was constitutional because it "channeled" the jury's discretion.[62] Death sentences could no longer be wantonly and freakishly imposed, the Court stated, because the jury was now "circumscribed by the legislative guidelines," which required it to find and identify at least one statutory aggravating factor before it could impose the death penalty.[63]

What was most striking about the *Gregg* decision was the Court's reliance upon retribution as one of "two principal social purposes" of capital punishment.[64] The death penalty, the Court stated, "is an expression of society's moral outrage at particularly offensive conduct."[65] The Court opined that retribution was neither a "forbidden objective" in criminal law; nor was it "inconsistent with our respect for the dignity of men."[66] The Court then again gave voice to its notion that the death penalty was simply a reflection of community outrage, an "expression of the community's belief" that death is the only appropriate sanction for certain crimes.[67]

Gregg's utilitarian approach, however, put the Court in a quandary. If the primary purpose of the death penalty was to satisfy the outrage of the community, how could the Court reconcile its endorsement of this purpose with its role as a protector of the individual against majoritarian excesses? This quandary quickly became apparent when, in *Woodson v. North Carolina*,[68] decided on the same day as *Gregg*, the Court invalidated North Carolina's mandatory death sentence for first-degree murder, which the state had implemented in an effort to comply with the *Furman* mandate of

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60. *See id.* at 310-11 (White, J., concurring) ("I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment.").

61. 428 U.S. 153 (1976).

62. *Id.* at 206.

63. *Id.* at 206-07

64. *Id.* at 183. The possibility of deterrence—an evaluation of which the Court felt was best left to legislatures, *see id.* at 186—was the other social purpose the Court found served by capital punishment. *See id.* at 183, 184-87.

65. *Id.* at 183.

66. *Id.*

67. *Id.* at 184.

68. 428 U.S. 280 (1976).

eliminating arbitrary and capricious sentencing.[69] The shortcoming of the North Carolina statute was that it eliminated any consideration of an individual's character and record as possible mitigating factors, and the Court stated that "the fundamental respect for humanity underlying the Eighth Amendment" required just such consideration.[70]

The *Woodson* decision spun off a separate line of cases distinct from *Furman*. These were typified by *Lockett v. Ohio*,[71] in which the Court held that death penalty statutes must treat capital offenders with the "degree of respect due the uniqueness of the individual."[72] However, the pursuit of individualized sentencing has inevitably led to the arbitrariness warned against in *Furman*, while the pursuit of consistency mandated by *Furman* has led to unfairness in capital sentencing.[73] Two sitting members of the Court have pronounced that the tension between these two constitutional principles is irreconcilable. They stated that the Court should abolish the principle of individual consideration underlying the *Lockett* line of cases,[74] rather than the death penalty itself, as Justice Blackmun, also recognizing this tension, suggested shortly before his retirement.[75]

Instead of addressing itself meaningfully to this constitutional conundrum, the Court has taken a deregulative approach to capital punishment, routinely upholding death sentences as long as they did not egregiously violate either *Furman* or *Lockett*. No longer is there talk of both deterrence and retribution as twin "social purposes"; rather, retribution alone has become the Court's mantra: "[T]he interest that we have identified as the principal justification for the death penalty is retribution."[76]

Although the Court is ostensibly insulated from the effect of public opinion,[77] its shifting approach to capital punishment over the

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69. *See id.* at 301.

70. *Id.* at 303-04.

71. 438 U.S. 586 (1978).

72. *Id.* at 605; *see also* Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

73. *See* Callins v. Collins, 114 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.").

74. *See* Graham v. Collins, 506 U.S. 461, 492 (1993) (Thomas, J., concurring); *see also* Walton v. Arizona, 497 U.S. 639, 656-73 (Scalia, J., concurring in part and concurring in the judgment).

75. *See Callins*, 114 S. Ct. at 1130 (Blackmun, J., dissenting from denial of certiorari).

76. Harris v. Alabama, 115 S. Ct. 1031, 1038 (1995).

77. *See Furman*, 408 U.S. at 443 (Powell, J., dissenting) ("[H]owever one may assess the amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery—not the core—of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, not a judicial, function."); *see also id.* at

past twenty years mirrors the shift in United States public opinion about the death penalty. For example, in the 1960s—the period leading up to the Court's decision in *Furman*—only thirty-eight percent of those surveyed favored the use of capital punishment.[78] By the 1990s, that figure had grown to seventy-six percent.[79] Three-fourths of the American public believe that when one human being kills another, it is appropriate for the state to execute that human being. Thus the Court—which, as discussed earlier, views retribution as the principal justification for the death penalty—can rely upon this "expression of the community's belief" to legitimize capital punishment. If American public opinion were firmly opposed to the death penalty, it would be difficult to deem retribution an acceptable justification for its application.

Instead of referring to public opinion, however, the Court's death penalty jurisprudence, grounded as it is in the constitutional considerations of the Eighth Amendment, continually refers to the "evolving standards of decency that mark the progress of a maturing society"[80] when attempting to gauge the permissibility of a particular application of the death penalty.[81] As the Court stated recently: "In discerning those 'evolving standards,' we have looked to objective evidence of how our society views a particular punishment today. The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[82] Thus instead of explicitly relying upon public opinion to justify the death penalty, the Court has relied upon the political judgment of state legislatures. Even more than at the national level, the judgments of state politicians *are*, out of political necessity, driven in large part by public opinion.

What is also interesting about the Court's death penalty jurisprudence is its gradual withdrawal from using international opinion

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330 (Marshall, J., concurring) ("Regardless of public sentiment with respect to imposition of one of these punishments in a particular case or at any one moment in history, the Constitution prohibits it.").

78. *See* Laurence A. Grayer, Comment, *A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, 23 DENV. J. INT'L L. & POL'Y 555, 559 (citing NICOLETTE PARISI, SOURCEBOOK ON CRIMINAL JUSTICE STATISTICS: 1978, at 326 (1979)).

79. *See id.* (citing Henry Schwarzschild, *The Death Penalty in the United States: A Commentary and Review*, *in* AMNESTY INTERNATIONAL, THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES 2, 8 (1995)).

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

81. Thirty-seven Supreme Court cases, most of which deal with the death penalty but all of which concern the Cruel and Unusual Punishment Clause of the Eighth Amendment, use the phrase "evolving standards of decency that mark the progress of a maturing society." Search of WESTLAW, SCT Database (Nov. 27, 1996).

82. Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (citations omitted).

as an indicium of whether the application of the death penalty is a disproportionate or excessive punishment. In the 1977 case of *Coker v. Georgia*,[83] the Court, in striking down the imposition of the death penalty for rape, observed that it had previously taken "pains to note the climate of international opinion concerning the acceptability of a particular punishment."[84] The Court found that it was not irrelevant that "out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."[85] Five years later, in *Enmund v. Florida*,[86] the Court explicitly adopted consideration of international opinion as part of its "disproportionality analysis" concerning capital punishment, in which the Court "looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter."[87]

By the end of the 1980s, however, the Court not only expressly discarded international opinion as an analytical consideration in death penalty cases, it also approved the imposition of the death penalty on juveniles in direct contravention of international law.[88] In *Stanford v. Kentucky*,[89] the Court held that it was constitutionally permissible for a state to execute a juvenile who was either sixteen or seventeen years-old at the time he or she committed a capital offense.[90] Writing for the majority, and employing the Court's "evolving standards of decency" language again, Justice Scalia noted:

> We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant. While "[t]he practices of other nations, particularly other

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83. 433 U.S. 584 (1977).

84. *Id.* at 596 n.10.

85. *Id.* (citing DEP'T OF ECON. AND SOC. AFF., UNITED NATIONS, CAPITAL PUNISHMENT 40, 86 1968)).

86. 458 U.S. 782 (1982).

87. *Id.* at 788-89.

88. "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . ." ICCPR, *supra* note 26, art. 6(5), 999 U.N.T.S. at 175. Although the United States did not ratify the ICCPR until 1992, and did so with reservations to article VI, *see supra* note 38 and accompanying text, most states of the world consider the execution of juveniles by the United States a violation of customary international law. *See* Grayer, *supra* note 78, at 562. The Inter-American Commission on Human Rights has held that because the U.S. Supreme Court has left it to state legislatures to decide whether the execution of juveniles is permissible, the United States thus has in place an arbitrary system of laws that violates the right to life and equality under international law. *See* Terry Roach v. United States, Res. No. 3/87, Case 9647, Inter-Am. C.H.R., 925th Sess., Mar. 27, 1987.

89. 492 U.S. 361 (1989).

90. *See id.* at 380.

democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so implicit in the concept of ordered liberty that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.[91]

In rejecting what it deemed inconclusive scientific evidence showing that juveniles lacked moral responsibility and were not deterred by the death penalty, the Court stated that its only job was to determine how society viewed the punishment:

> The punishment is either "cruel and unusual" (i.e., society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our job is to identify the "evolving standards of decency"; to determine, not what they should be, but what they are.[92]

On the same day the Court decided *Stanford*, it also held that a state could constitutionally execute a mentally retarded offender.[93] Again, this was arguably in violation of international law,[94] and, again, the Court trotted out its "evolving standards of decency language," reasoning that the existence of only two state statutes precluding the execution of the retarded did not "provide sufficient . . . evidence of a national consensus."[95]

The "national consensus" the Court refers to is, of course, the judgment of the United States' fifty state legislatures, which, as noted earlier, are generally sensitive to public opinion, even if the Court is not. And, where three-fourths of the American public are currently in favor of the death penalty,[96] it does not take political genius to recognize that the average state legislator would be foolish not to

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91. *Id.* at 369 n.1 (quoting Thompson v. Oklahoma, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting)).

92. *Id.* at 378.

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

94. Although the ICCPR does not expressly prohibit the imposition of the death penalty on the mentally retarded, most states of the world prohibit the practice. *See* John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 75 (1993). Thus the prohibition against executing the mentally retarded is at least a general principle, if not an express norm, of international law. The ICCPR, however, does expressly prohibit the arbitrary taking of life, ICCPR, *supra* note 26, art. 6(1), 999 U.N.T.S. at 174, and, as at least one publicist has argued, "where the condemned person is seriously lacking in understanding, the taking of life might be considered arbitrary." Quigley, *supra*, at 75.

95. Penry v. Lynaugh, 492 U.S. 302, 334 (1989).

96. *See supra* note 78 and accompanying text.

follow this expression of public opinion. However, this ostensible national consensus is anything but. Recall that only thirty years ago, most Americans were *not* in favor of capital punishment.[97] Moreover, the current support for the death penalty is entirely noncontextual: when pollsters ask if respondents still favor the death penalty where there is an alternative of a life sentence without parole along with restitution to the victim's family, support for the death penalty drops to approximately one-fourth of those surveyed.[98] Thus the national consensus on the death penalty is actually the proverbial mile-wide and inch-thick.

Although one can only speculate, the growth in the noncontextual support for the death penalty among Americans may be largely attributable to the concomitant growth in American media coverage of sensational murders. Although sensational journalism is not new, its introduction into American living rooms via television—typified by the notorious "blood and guts" coverage of the eleven o'clock news—is a development whose growth neatly parallels the growth of noncontextual support for the death penalty. State politicians, whose careers are generally closely tied to favorable media coverage, quickly realized that they could obtain even more of their life's blood by decrying any possible coddling of the perpetrators of sensational murders covered by television news.[99]

Thus instead of a national consensus rooted in evolving societal standards of decency, as the Supreme Court suggests, American attitudes toward the death penalty are shaped primarily by one of the more disposable artifacts of contemporary American culture, the local nightly television news. Feeding upon the public's revulsion of the sensational murders covered by television, politicians vow to respond to the gut reactions engendered by this sensationalism by enacting stricter death penalty laws. For this reason, America's death penalty laws do not derive from any deep-rooted cultural

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97. *See supra* note 78 and accompanying text.

98. *See* William J. Bowers, *Popular Support for the Death Penalty: Mistaken Beliefs, in* AMNESTY INTERNATIONAL, THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES 70-71 (1995).

99. *See* Max Frankel, *The Murder Broadcasting System*, N.Y. TIMES, Dec. 17, 1995, sec. 6 (Magazine), at 46 (wondering how long Americans will "tolerate the cult of violence that passes for 'local news' on television" and finding local newscasts "distinguishable only by the speed and skill with which they drive the audience from rage and fear to fluff and banter, leading the way to long commercials that exploit aroused emotion"); *see also* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 73 B.U. L. REV. 759, 781 (1995) ("Calling a press conference to announce that the police have captured a suspect and the prosecutor will seek the death penalty provides an opportunity for a prosecutor to obtain news coverage and ride popular sentiments that almost any politician would welcome.").

consensus, but rather from an interplay between politics and the media that has developed over the past thirty years. While this sort of politics is a part of American culture, it is not American culture itself because it is based primarily upon American reactions to media coverage instead of American cultural ideals.[100]

As a result, then, of politics, and *not* culture, over 3,000 American prisoners are currently under a sentence of death.[101] In 1995, fifty-six prisoners were executed in the United States, the largest number since executions resumed in 1977 after the short-lived *Furman* moratorium.[102] Moreover, with the Antiterrorism and Effective Death Penalty Act of 1996,[103] Congress has streamlined death penalty procedures by limiting recourse to federal courts for writs of habeas corpus,[104] which have historically protected criminal defendants from unfair state trials. The intent of the new law's sponsors was to speed up death row appeals from an average of eight years to two years.[105] Moreover, earlier legislation passed by Congress provided for the imposition of the death penalty at the federal level for those convicted of large-scale drug trafficking.[106] Such a law, which a number of legislators have vowed to pass again, would unquestionably put the United States in violation of international law. Article VI, section 2 of the ICCPR, to which the United States did *not* express reservations in 1992 when it was ratified, provides that a "sentence of death may be imposed for only the most serious crimes."[107] These recent proposed or actual expansions of the use of the death penalty had little to do with cultural attitudes that drug traffickers deserve execution or that prisoners linger on death row for too long. Rather, they are political responses to an American public whose fear of crime has been inflamed by sensationalistic media coverage.

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100. One can plausibly argue that if the media were to cease all coverage of sensational murders and cover instead every instance of a criminal defendant being wrongly accused and imprisoned (or even sentenced to death), American attitudes toward the death penalty would quickly change. Indeed, perhaps one reason that support for the death penalty was so low in the 1960s was because of the distrust of authority prevalent in that era.

101. *See* Amnesty International, *supra* note 4.

102. *See id.*

103. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).

104. *See id.* §§ 101-108, 110 Stat. at 1217-26.

105. *See* Amnesty International, *USA: New Law Restricts Death Penalty Appeals*, DEATH PENALTY NEWS, June 1996 (AI Index ACT 53/02/96).

106. *See* 18 U.S.C. §§ 3591(b), 3593 (1995).

107. ICCPR, *supra* note 26, art. 6(2), 999 U.N.T.S. at 174.

B. China

China carried out 2,050 known executions in 1994, three times as many as the rest of the world.[108] However, because Chinese authorities do not publish statistics about the death penalty—they are considered a "state secret"—this figure is believed to be a fraction of the actual total.[109] Under the 1980 Criminal Law, the death penalty in China applied to twenty-one offenses; it is now estimated that the penalty applies to sixty-eight.[110] These include:

> [M]urder, attempted murder, manslaughter, armed robbery, robbery, rape, causing injury, assault, habitual theft, theft, burglary, kidnapping, trafficking in women or children, prostitution, pimping, organizing pornography rings, publishing pornography, hooliganism, seriously disrupting public order, causing explosions, destroying or causing damage to public or private property, "counter-revolutionary sabotage," arson, poisoning of livestock, drug-trafficking, killing a tiger, corruption, embezzlement, taking bribes, fraud, speculation and profiteering, forgery, reselling value-added tax receipts, tax evasion, stealing or illegally manufacturing weapons, illegally possessing or selling firearms and ammunition, stealing or dealing in national treasures or cultural relics, selling counterfeit money and blackmail. [Further, some individuals] may have been executed for gambling, selling fake invoices, causing death through torture, bigamy and misappropriation of funds.[111]

Executions for minor offenses in China are commonplace. In 1994, for example, two peasants were executed for stealing thirty-six cows and $9,300 worth of agricultural machinery. Another individual was executed for having set fire to a car during a pro-democracy demonstration.[112] In addition, the rate of executions increases before major events, such as the 1995 U.N. Conference on Women, and after the announcement of crackdowns on crime, such as the anticorruption campaign begun in 1993.[113]

Criminal defendants in China are not given an attorney until shortly before trial.[114] Because often the presumption is that the defendant is guilty, the attorney argues for clemency rather than

108. *See* AMNESTY INTERNATIONAL, CHINA: NO ONE IS SAFE 44 (1996).

109. *See id.*

110. *See id.*

111. *Id.* at 45.

112. *See* Sonia Rosen & Stephen Journey, *Abolition of the Death Penalty: An Emerging Norm of International Law*, 14 HAMLINE J. PUB. L. & POL'Y 163, 173 (1993) (citing HUM. RTS. WATCH, WORLD REPORT 363 (1992)).

113. *See* AMNESTY INTERNATIONAL, *supra* note 108, at 45.

114. *See* Rosen & Journey, *supra* note 112, at 173.

innocence.[115] The 1983 "Decision of the National People's Congress Standing Committee Regarding the Procedure for Rapid Adjudication of Cases Involving Criminal Elements Who Seriously Endanger Public Security" states that defendants tried under this decision are considered guilty before trial.[116] Moreover, this decision also provides that to hasten trial procedures, defendants may be brought to trial without an advance copy of the indictment and even without warning of the trial itself.[117] Thus defendants can be tried without counsel and without knowing the charges they face until they appear in court.[118] In addition, defendants are not allowed to call witnesses or to cross-examine prosecution witnesses.[119]

Chinese criminal law provides for two types of death sentences: those to be carried out immediately and those with a two-year suspension.[120] The latter type of sentence has been criticized because it allows individuals who were minors at the time the offense was committed to be executed in violation of international law.[121] Prisoners sentenced to death are entitled to a single appeal.[122] These appeals are rarely successful and are apparently a mere formality.[123] Regardless of whether the prisoner appeals, approval of death sentences by the Supreme People's Court is required by law after review by the Higher People's Court and is nominally intended to insure accuracy in the administration of death sentences.[124] However, in 1983, the Higher People's Court was authorized to directly approve some death sentences in order to hasten judicial review.[125] Many death sentences are approved almost immediately after trial.[126] Moreover, Chinese law does not permit individuals sentenced to death to seek pardons or commutations of their sentences.[127] Executions take place as soon as the sentence is approved,

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115. *See id.*

116. *See* AMNESTY INTERNATIONAL, *supra* note 108, at 49.

117. *See id.* Although China is not a party to the ICCPR, this lack of notice violates what is arguably the customary international law norm reflected in the instrument, i.e., that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." *See* ICCPR, *supra* note 26, art. 9(2), 999 U.N.T.S. at 175.

118. *See* ICCPR, *supra* note 26, art. 9(2), 999 U.N.T.S. at 175.

119. *See* Rosen & Journey, *supra* note 112, at 173.

120. *See* Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 193 (1993).

121. *See* AMNESTY INTERNATIONAL, *supra* note 108, at 46.

122. *See id.*

123. *See id.*

124. *See* Finder, *supra* note 120, at 193.

125. *See id.* at 195; *see also* AMNESTY INTERNATIONAL, *supra* note 108, at 49.

126. *See* AMNESTY INTERNATIONAL, *supra* note 108, at 49.

127. *See id.*

usually via a shot to the back of the head.[128] For example, on May 31, 1996, three men were executed in Jilin province for robbing a car ten days earlier.[129]

China's use of the death penalty has frequently been overtly political. Immediately following the government's crackdown on the pro-democracy uprising in Tiananmen Square, authorities summarily executed dozens of protesters.[130] Several thousand more individuals were executed in connection with the Tiananmen Square uprising over the next two years.[131] Muslim nationalists in the western province of Xinjiang have also been subjected to the use of the death penalty as a political tool. In May 1995, five Muslim nationalists were executed. Three had been convicted of robbery and "causing explosions," and two had been convicted of "counter-revolutionary sabotage" and forming a "counter-revolutionary group," the Islamic Reformer's Party.[132]

China insists that its use of capital punishment, along with other human rights abuses, is justified by reasons of culture and national sovereignty. In an article written in 1987, Gao Mingxuan, Vice-Chair of the China Law Society and a law professor at the People's University of China, asserted that the death penalty was necessary in China "to protect the fundamental interests of the state and people, to safeguard our socialist construction and to secure and promote the development of productive forces."[133] In 1993, the head of the Chinese delegation to the World Conference on Human Rights, defending his country's human rights record, stated that "[c]ountries at different development stages or with different historical traditions and cultural backgrounds . . . have different understanding and practice of human rights."[134] Taken together, these statements provide an accurate insight into the use of the death penalty in China. The death penalty is used to "safeguard" a political system, and those who object to this use of capital punishment, the argument goes, simply do not understand the Chinese conception of human rights. This is no more than an excuse to use the death penalty in an

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128. *See id.* at 44, 49.

129. *See* AMNESTY INTERNATIONAL, *AI Calls on China to Stop Mass Executions*, DEATH PENALTY NEWS, June 1996 (AI Index ACT 53/02/96).

130. *See* AMNESTY INTERNATIONAL, *supra* note 108, at 49.

131. *See* Rosen & Journey, *supra* note 112, at 173.

132. *See* AMNESTY INTERNATIONAL, *supra* note 108, at 50.

133. Rosen & Journey, *supra* note 112, at 172 (quoting Gao Ming Xuan, *A Brief Dissertation on the Death Penalty in the Criminal Law of the People's Republic of China*, 58 REVUE INTERNATIONALE DE DROIT PENAL 400 (1987)).

134. Liu Huaqiu, Address at the World Conference on Human Rights, June 15, 1993 (on file with author).

expansive and arbitrary fashion to keep the populace in line and maintain a grip on power. In other words, as in the United States, the use of the death penalty is politically, not culturally, motivated.

C. *Islamic States*

Until the 1970s, virtually all Islamic states conceded the desirability of international law norms regarding human rights, even to the point of eventual abolition of the death penalty. This was generally seen as a present-day necessity by Islamic regimes.[135] With the advent of Islamic fundamentalism in the 1970s, however, more and more Islamic states began objecting to international norms for human rights and abolition of the death penalty, as being contrary to Shari'a, the historically formulated traditional law of Islam.[136] Shari'a was developed in the centuries following the prophet Mohammed's death in 632, and its formulation was essentially complete by the thirteenth century.[137]

Under traditional Shari'a, simple homicide is a capital offense justified by *qisas*, or retribution.[138] Apostasy, on the other hand, is a capital offense justified by *hadd*—which means that it is "a crime for which punishment is fixed and no deviation allowed."[139] Because apostasy involved changing one's religion in an era when state and religious boundaries were coterminous, apostasy was originally conceived of as being the equivalent of treason.[140] For example, the Ayatollah Ruhollah Khomeini charged the writer Salman Rushdie with apostasy when he issued his *fatwah* directing all Muslims to seek out and kill Rushdie.[141] Similarly, in 1985, seventy-six-year-old Mahmud Muhammad Taha, the leader of a Sudanese Muslim party that criticized then-President Nimeiri's revival of traditional Shari'a, was hanged by Sudanese authorities after being condemned to death for apostasy by Nimeiri.[142]

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135. *See* Fitzpatrick & Miller, *supra* note 6, at 296. During the drafting period of the ICCPR, several delegates from Islamic countries, while declaring themselves unable to support immediate abolition, expressed hopes that "the death penalty would be eliminated in due course." *Id.* at 296, note 97.

136. *See id.* at 337.

137. *See* David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT'L L. 27, 27 n.3 (1994).

138. *See id.* at 43.

139. *Id.*

140. *See id* at 44.

141. *See* Nanda, *supra* note 3, at 330.

142. *See id.* at 330-31.

1. *Pakistan*

Under the Pakistan Penal Code, which incorporates many elements of Shari'a, *hadd* mandates the death penalty for blasphemy, *zina* (fornication), rape, *haraabah* (robbery), and murder.[143] Other offenses for which the death penalty may be imposed under Pakistani law include waging war or abetting the waging of war against the state,[144] abetting mutiny,[145] kidnapping for ransom,[146] hijacking,[147] and harboring a hijacker.[148]

Specific evidentiary requirements have to be fulfilled if the *hadd* punishment is to be imposed for *zina*, rape, and *haraabah*. For *zina* and rape, either the accused must have confessed to the crime or four adult Muslim males of good reputation must testify to having seen the act.[149] For *haraabah*, defined as a "show of force for the purpose of taking away the property of another and [to] attack him or cause wrongful restraint or [to] put him in fear of death or hurt,"[150] the evidentiary requirements for *hadd* are fulfilled if either the accused confesses or if two adult Muslim males of good reputation testify to having witnessed the crime.[151] The offense of blasphemy has no specific evidentiary requirements. A person is guilty of blasphemy if he or she, "by words, either spoken or written, or by visible representations, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet . . . ."[152]

The death penalty for murder may be given as *qisas* upon the confession of the accused or the fulfillment of certain rules of evidence.[153] Under the Pakistani code, *qisas* for murder is defined as "punishment . . . causing [the convict's] death if he has committed [an intentional killing], in exercise of the right of the victim or a

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143. *See* AMNESTY INTERNATIONAL, PAKISTAN: THE DEATH PENALTY § 2 (1996) (AI Index ASA 33/10/96).

144. *See id.* (citing PAKISTAN PEN. CODE § 121).

145. *See id.* (citing PAKISTAN PEN. CODE § 13).

146. *See id.* (citing PAKISTAN PEN. CODE § 364).

147. *See id.* (citing PAKISTAN PEN. CODE § 402-B).

148. *See id.* (citing PAKISTAN PEN. CODE § 402-C).

149. *See id.* § 4.

150. *Id.* § 6 (quoting Pakistan Offences Against Prop. (Enforcement of Hudood) Ord. § 17(4)).

151. *See id.*

152. *Id.* § 5 (quoting PAKISTAN PEN. CODE § 295-C).

153. *See id.* § 3.

wali."[154] Heirs of the victim thus have a right to have *qisas* inflicted, although they may waive this right.[155]

Those convicted of *zina* and rape are sentenced to death by stoning in a public place.[156] Pakistani law does not prescribe the method of execution for those convicted of blasphemy.[157] The method of execution for other crimes is hanging.[158] Although death sentences for blasphemy, *zina*, and rape have been imposed in Pakistan, none have been carried out since the laws mandating their imposition went into effect in 1980.[159] In 1995, however, 144 people were sentenced to death; of these sentences, thirteen were for kidnapping, and four for blasphemy.[160]

Because Pakistani prosecutors are frequently the subject of threats and intimidation if they fail to prosecute blasphemy complaints, such accusations are frequently met with uncritical acceptance by the authorities.[161] The Pakistan Law Commission has recognized that the blasphemy law has been misused by assorted political and religious organizations with ulterior motives.[162] The Pakistani government announced some changes in the law in 1994. However, after widespread protest demonstrations in May 1995, the government clarified that it only intended minor procedural changes and that it would not repeal the law "as the government believed that there should be a deterrent to defiling the name of the prophet."[163]

2. *Iran*

The number of executions carried out in Iran since it became an Islamic republic in 1979 is unknown. Estimates of executions of those only suspected of opposition to the government number in the tens of thousands.[164] Capital punishment is also used for offenses

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154. *Id.* (quoting PAKISTAN QISAS AND DIYAT ORD.). A *wali* is the heir of the victim, or the provincial government if there is no heir. *See id.*

155. *See id.* In the instance of such a waiver, the death penalty cannot be inflicted as *qisas*. *See id.*

156. *See id.* § 4. Although the Pakistani government opposes public executions "as a matter of policy," calling them contrary to the Pakistan Constitution's guarantee of human dignity, government policy statements have no legally binding force. *See id.* § 10.

157. *See id.* § 5.

158. *See id.* § 10.

159. *See id.* § 2.

160. *See id.*

161. *See id.* § 5.

162. *See id.*

163. *Id.* (quoting Pakistani federal law minister Iqbal Haider).

164. AMNESTY INTERNATIONAL, IRAN: OFFICIAL SECRECY HIDES CONTINUING REPRESSION § 3 (1995) (AI Index MDE 13/02/95).

such as murder, espionage, engaging in "activities against the Islamic Republic of Iran," drug trafficking, and adultery.[165] Individuals arrested are never given information about the reasons for their arrest and are not notified of the charges against them until months, or even years, later.[166] Access to counsel is almost never allowed.[167]

Arrests for a particular capital offense often obscure the real reason a particular individual is arrested. For example, a seventy-seven-year-old Iranian Jew named Feyzollah Mechubad was executed in May 1994 after having been charged with espionage for the United States and Israel.[168] The ostensible basis for the charge was a series of telephone conversations Mechubad had with relatives in Israel and the United States.[169] However, according to reports received by Amnesty International, the real reasons for Mechubad's arrest were his religious beliefs and activities in Tehran's Jewish community.[170] During the last several months before his execution, his eyes were gouged out and he was repeatedly beaten.[171]

In addition to routinely executing individuals for criminal ofenses such as drug trafficking and murder—and also stoning to death women convicted of adultery—Iran also regularly executes political prisoners and those whose religious faiths are not recognized by the Iranian Constitution.[172] An estimated 200 Baha'is, whose faith is not sanctioned by the constitution, were executed between 1979 and 1992.[173] Iranian Kurds who are discovered by authorities to belong to either the Kurdistan Democratic Party of Iran or the Kurdish Komala group are, if formal charges are levied at all, usually charged with "activities against the Islamic Republic" and are executed after being tortured in prison for two or three years.[174]

IV. CULTURE CLASH: LOOKING BEHIND ALTERNATIVE AND RELATIVIST HUMAN RIGHTS STANDARDS

To justify the notion that current international human rights norms do not necessarily apply to states such as China and Iran,

165. *See id.* "Activities against" the Iranian government generally refer to membership in opposition groups whose aim is the overthrow of the government by force. *See id.*

166. *See id.* § 1.

167. *See id.*

168. *See id.* § 3.

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

several scholars and even non-Western governments themselves have employed the theory of cultural relativism. Originating in the field of anthropology, cultural relativism is used in international law to describe a "'cultural chasm' in which irreconcilable cultural differences preclude the pervasive realization of substantive international law and morality."[175] Because all cultures are equal, according to this view, the human rights practices of different cultures must be equally tolerated.[176] Different cultures have different traditions; thus each culture's human rights traditions are valid because they should be judged according to the culture from which they have sprung, and not according to "Western-derived" international law norms.

The theory of cultural relativism thus supports the view that different regions of the world should have different, regional norms. In Samuel P. Huntington's controversial *Foreign Affairs* article, *The Clash of Civilizations?*, the author posits the theory that in the aftermath of the Cold War, "the dominating source of conflict will be cultural."[177] Huntington carves the world into several civilizational regions, including, in addition to the West, an "Islamic civilization" and a "Confucian civilization."[178] Picking up Huntington's thesis, international legal scholars such as S. Prakash Sinha have advocated a system of "civilizational pluralism," in which states are "responsible for implementing the value ideas of their own respective civilizations" instead of subscribing to the single-category, normative scheme reflected in current international human rights instruments.[179]

Asian and Islamic governments, stung by criticism of their human rights practices, have been quick to adopt cultural relativism as their rationale for not fully implementing international human rights norms. In March 1993, three months before the Vienna World Conference on Human Rights, Asian governments held a regional meeting in Bangkok.[180] Out of this meeting came the Bangkok Declaration, a pervasively culturally relativistic document that rejected the application of "universal standards" of human rights in Asia and instead sought a regional standard that would take into

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175. Christopher C. Joyner & John C. Dettling, *Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law*, 20 CAL. W. INT'L L.J. 275, 275 (1990).

176. *See id.* at 289.

177. Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22, 22.

178. *See id.* at 25.

179. SURYA PRAKASH SINHA, LEGAL POLYCENTRICITY AND INTERNATIONAL LAW 146-47 (1996).

180. *See* Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 BUFF. J. INT'L L. 215, 216 (1996).

account economic, historical, and cultural factors unique to Asia.[181] China was in the forefront of those urging such an approach in Bangkok.

Three years earlier, the foreign ministers of the Organization of the Islamic Conference, to which all Islamic countries belong, met in Egypt and produced the 1990 Cairo Declaration on Human Rights in Islam.[182] The Cairo Declaration sets forth a series of nominal rights and freedoms, every one of which is subject to a qualifying clause in Article 24 that provides: "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'a."[183] Clarifying things even further is Article 25, which provides that the "Shari'a is the only source of reference for the explanation or clarification of any of the articles of this Declaration."[184]

The cultural solidarity seemingly evidenced by the two declarations, however, is decidedly suspect. On the face of it, one has great difficulty accepting China's claim of refuge in cultural relativity because of the very nature of its government: a Marxist-Leninist regime constituted in 1949 according to a borrowed Soviet political ideology. Moreover, the Cultural Revolution in the 1960s destroyed much of China's long-standing cultural heritage. Notwithstanding recent economic liberalization, the Chinese government represses religious freedom to the point where significant portions of Asian culture have been irreparably damaged.[185] A government that executes its people for burning a car during a political demonstration, stealing cows, or reselling value-added tax receipts seems to be more interested in maintaining a ruthless degree of political and economic control rather than the vague notion of unique cultural factors set forth in the Bangkok Declaration.

Equally vague is the "Islamic Shari'a," to which the individual rights of Muslims are ostensibly subject. The Shari'a is notoriously incomplete in the area of criminal procedure; indeed, this lack is the very reason Muslim states began borrowing laws from European

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181. U.N. DEP'T OF PUBLIC INFORMATION, FINAL DECLARATION OF THE REGIONAL MEETING FOR ASIA OF THE WORLD CONFERENCE ON HUMAN RIGHTS, 1996, at 3, U.N. Doc. A/CONF/157/ASRM/8, U.N. Sales No. DPI1766 (1996).

182. *See* Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 327.

183. Cairo Declaration, art. XXIV, U.N. GAOR, World Conf. on Human Rights, 4th Sess., Agenda Item 5, at 10, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993), *quoted in* Mayer, *supra* note 182, at 329.

184. Cairo Declaration, *supra* note 183, art. XXV.

185. For example, when China took over Tibet in 1949, it destroyed Tibet's Buddhist culture, tearing down temples and killing Buddhist monks. *See* Mayer, *supra* note 182, at 329.

countries in the nineteenth century.[186] How the Cairo Declaration purports to interpret Shari'a as a working legal code in a twentieth-century world is left unanswered—and thus, one would assume, left up to the individual Islamic state. Leaving interpretations of the eight-hundred-year-old Shari'a to individual states is what Sinha, an advocate of civilizational norms, calls "extreme relativism run amok, wherein a state becomes its own normative arbiter."[187]

Nevertheless, even the notion of an Islamic civilizational norm, supported by both Sinha and Huntington, presupposes the existence of a monolithic Islamic culture. However, there is no monolithic Islam: Iran, for example, calls itself an Islamic state, yet it is actually a regime formed according to a medieval interpretation of Twelver Shi'ism.[188] Saudi Arabia does not recognize Iran's Islamic authority, yet calls itself an Islamic monarchy.[189] Both countries regularly vilify each other and hold themselves out as true Islamic states.[190]

In similar fashion, Iran, Saudi Arabia, and other Islamic states such as Pakistan generally offer Islamic justification for their behavior only when it conflicts with international norms.[191] There is no other way to rationalize the obvious conflict with human rights norms presented, for example, by the execution of apostates, which contravenes international norms of both freedom of religion and the prohibition on the use of capital punishment for nonserious offenses. We thus see Islam—and culture—as pretext. "Islamic" human rights instruments afford a convenient cover for regimes whose main interest is the hold on political power that the invocation of such instruments affords them. The Cairo Declaration's utility as a bona fide guarantor of individual rights and freedoms seems all the more questionable in light of the fact that, during the Vienna World Conference on Human Rights in 1993, few Muslim countries spoke up in favor of the Cairo Declaration replacing the rights guaranteed in instruments such as the ICCPR.[192]

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186. *See id.* at 339 & n.126.

187. SINHA, *supra* note 179, at 147.

188. *See* Mayer, *supra* note 182, at 321.

189. *See id.*

190. *See id.*

191. *See id.* at 376. Governments such as Saudi Arabia apparently want "to have it both ways: to maintain that Islamic culture warrant[s] a culturally distinctive approach to rights, thereby providing a pretext for deviating from international norms, and to present Islamic versions of human rights as if they [are] basically consonant with the formulations found in international law." *Id.*

192. *See id.* at 377 (citing Liesl Graz, *Human Rights: The Vienna Declaration*, MIDDLE E. INT'L, July 9, 1993, at 14).

The insistence on the validity of a discrete number of civilizational human rights norms is at odds with the pluralistic underpinnings of cultural relativity. Cultural relativity rests upon the empirical observation that "the diversity of cultures can be endlessly documented."[193] The notion that there are Islamic or Confucian civilizational norms, while recognizing diversity on one level, utterly disregards diversity on progressively smaller levels ranging from groups within states down to the level of the individual. If one recognizes an Islamic civilizational norm that depends upon reactionary interpretations of the Shari'a to justify nonadherence to settled international human rights norms, one disregards the very existence of diverse and dissenting voices within the civilization itself. Indeed, the memberships of Islamic nongovernmental human rights organizations such as the Arab Organization for Human Rights are filled with Muslims who, "[f]ar from charging Western nations and international organizations with cultural insensitivity, . . . have encouraged outsiders to criticize human rights violations and . . . collaborated with international human rights organizations that were likewise committed to international norms."[194]

If anything, cultural relativity rests primarily upon a kind of cultural stereotyping, where anything nominally Western-derived is alien to and thus invalid in non-Western cultures. Much is made of Islamic and Asian "traditions" centered around the "primacy of the community" over individual rights.[195] Within such traditions, individuals who espouse human rights and individual autonomy are somehow seen as cutting against the stereotypical grain. Cultural stereotyping thus ends up ignoring the diversity of experience within cultures, standing up instead for the diversity of experience *among* cultures.

Moreover, there is a fatal flaw in the notion that civilizational norms based upon the primacy of communal over individual rights can even have their own standards of human rights. Groups are not human; individuals are. Without the individual, there is no group, yet the converse cannot be said. Thus human rights are, of their very essence, a recognition that individuals are human and possessed of certain rights and freedoms that the community cannot take away. Nevertheless, cultural relativists sanction the view that this

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193. Joyner & Dettling, *supra* note 175, at 277 (quoting R. BENEDICT, PATTERNS OF CULTURE 45 (1934)).

194. Mayer, *supra* note 182, at 364.

195. *See* Joyner & Dettling, *supra* note 175, at 287-88 (observing that the Confucian tradition consists of "communal obligations that enjoy primacy over individual rights" and that the Islamic tradition "posits . . . the primacy of the community").

recognition is the sole product of Western culture and inapplicable to non-Western cultures. Taken to its logical conclusion, this view essentially denies the humanity of those living in non-Western cultures.

Lurking behind the scenes in all of this, then, is the effort by the group to deny individuality—to deny humanity. The power of the group rather than the pretext of cultural relativism thus explains the nonadherence to international human rights norms. This can be seen rather vividly in the use of the death penalty internationally. The act of the state in executing a citizen is the ultimate denial of individuality; it says that the state is stronger than the individual. The source of an individual's human rights is the state rather than the individual's humanity. The state wields its power to extinguish the lives of humans who, in the view of the state, cross the line and encroach upon what the state believes is necessary to hold on to that power. In China, this means execution for disrupting economic and political conditions that bolster the regime. In states such as Pakistan and Iran, it means execution for transgressions against a religion that the regime invokes as the basis for its authority. In the United States, it means execution for committing a crime whose portrayal in the news media arouses the vengeful instincts of a majority of the government's political constituents.

The juxtaposition between the rationales of the United States and Islamic states for their respective use of the death penalty is interesting. Often seen as polar opposites on questions of human rights, both sides cite retribution as one of the main justifications for the death penalty. Retribution is justified, the U.S. Supreme Court stated, because a majority of state legislatures say it is; it is justified, say a number of Islamic states, because Shari'a says it is. Thus we have the use of retribution to legitimate what half of the international community has delegitimated. However, the use of retribution as justification for the death penalty stems at heart from a desire to hold onto political power, not from cultural considerations. Islamic states invoke Shari'a to legitimate their undemocratic regimes and human rights policies outside of international law norms. However, the assorted legislatures of the United States do not invoke culture when they pass stricter death penalty laws; they cite the agitation of their constituents, without whose support they would lose political power. Both denials of what is arguably an emerging international law norm—the abolition of the death penalty—are thus political, rather than cultural, in nature.

V. CONCLUSION

Critics of the universality theory of human rights cite the Western origins of international law norms to support their thesis that there should at least be a series of human rights norms that differ from civilization to civilization. The argument can more than plausibly be made that Western states arrived at a universally applicable standard first; arriving first does not make it "Western." Nevertheless, the United States does not subscribe to the Western norm of abolition of the death penalty; thus to what civilizational norm should it be held accountable? If there is a "Western" civilizational norm, the United States would be in violation by continuing to apply the death penalty. Shifting the focus to a more geographical basis, if there is an "American"/Western Hemisphere civilizational norm, the United States would also be in violation because most Latin American countries have abolished the death penalty. To what norm, then, should the United States be held accountable? A "death penalty civilizational norm"? This would put the United States in the company of China and Iran; however, it would make as much sense as other cultural alignments for human rights norms. Given that the United States and Islamic states have, in the recent past, publicly announced the desirability of an eventual abolition of the death penalty, their current reluctance to continue moving toward this goal (and align themselves with other members of the international community) has much less to do with enduring traditions of culture than simple politics. The invocation of culture to justify derogations from international human rights norms should be scrutinized for what it is: a political calculus.