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Capital Punishment in the United States

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Faculty Editorial:

State Department Dishonored Our Treaty Obligations

*By Richard J. Wilson**

Angel Breard, a citizen of Paraguay, was executed by the commonwealth of Virginia on April 14 despite the best efforts of his own lawyers and lawyers for the government of Paraguay to put a temporary hold on that state's determined efforts to kill him. Since his death, I can't escape the feeling that a voice has been whispering in my ear. It asks me to explain the willful failure of the U.S. government to live up to our obligations under a 30-year-old treaty. And it asks why it fell to a state governor to effectively decide the legal force of a decision of an international tribunal.

Five days before Breard's scheduled execution, the Paraguayan government obtained a favorable decision from the International Court of Justice, asking the U.S. government to put off Breard's death until the 15 judges of the ICJ had a chance to review his case more fully. That action followed months of repeated efforts by Paraguay, always rebuffed, to appear in our courts on Breard's behalf. Secretary of State Madeleine Albright also sent a strongly worded letter to Virginia Gov. James Gilmore urging him to delay the execution until the ICJ had the chance to complete its review.

Gov. Gilmore chose instead to follow the decision of the U.S. Supreme Court, which decided by a vote of 6-3, five days *after* the ICJ had ruled, not to stay the execution. The Supreme Court ruled against Breard only an hour before his scheduled execution. Once Breard was dead, Gilmore said that deferring to the ICJ would have had, in his exact words, "the practical effect of transferring responsibility from the courts of the commonwealth and the United States to the International Court."

The precise legal issue in Angel Breard's case had to do with the interaction of treaties and domestic statutes, an often complex interplay that is only dimly understood by most lawyers, let alone the general public. Specifically, it involved the application of a treaty, the Vienna Convention on Consular Relations, to which almost 160 countries are parties. Countries that sign a treaty agree to be legally bound by its terms, much as they would be bound by a multiparty contract.

In the Vienna Convention, those 160 countries agreed to "promptly" advise foreign citizens who are arrested in that country that they have a right to contact immediately a representative of their own government—specifically, their consulate. This is not new law. The United States formally agreed to be

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Capital Punishment in the United States

by Sarah Oppenheim

Twenty five years ago, in *Furman v. Georgia,* the U.S. Supreme Court considered whether the death penalty violated the Eighth Amendment prohibition on cruel and unusual punishment. The Court explained that the lack of uniform standards for the application of the death penalty resulted in arbitrary and discriminatory sentencing, violating the Eighth Amendment prohibition on cruel and unusual punishment. The death penalty was thus rendered unconstitutional. In response to this decision, states modified their death penalty legislation to accommodate the concerns of the Court. In the 1976 case, *Gregg v. Georgia,* the Court

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upheld the constitutionality of the death penalty, as applied under the new statutes.

The Court explained that the lack of uniform standards for the application of the death penalty resulted in arbitrary and discriminatory sentencing, violating the Eighth Amendment prohibition on cruel and unusual punishment.

In the 25 years since the Court's decision in *Furman,* an international movement to abolish the death penalty has grown based on the human rights principles of the right to life and the right to be protected from cruel, inhuman, or degrading punishment both of which can be found in the UN Universal Declaration of Human Rights. The UN Universal Declaration of Human Rights, borrowing from the American Bill of Rights, emphasizes the right to life. The death penalty inherently contradicts this principle. In 1976, the United Nations adopted the International Covenant on Civil and Political Rights (ICCPR), which, in Article 6, recognizes the death penalty as an exception to the right to life. Article 6 includes safeguards for implementation of the death penalty and denotes abolition of the death penalty as its ultimate objective. The United States signed the ICCPR in 1992, entering a reservation on Article 6.

In 1989, the UN General Assembly adopted the Second Optional Protocol to the ICCPR Aimed at the Abolition of the Death Penalty. To emphasize the notion that abolition of the death penalty reflects human progress, the first sentence of the Second Optional Protocol states that "abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights." The United States is not expected to sign the Second Optional Protocol because countries are unable to make reservations to optional protocols.

In 1984, the UN General Assembly passed a resolution entitled "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," which outlines standards for the application of capital punishment. The document does not call for the abolition of the death penalty, but establishes nine

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safeguards. The safeguards include the right to due process, appeal, and imposition of capital punishment only after final judgment by a "competent court after legal process which gives all possible safeguards to ensure a fair trial." The safeguards recommend a prohibition on the imposition of the death penalty on persons who committed a crime before the age of 18, pregnant women, and the insane.

The European Convention on Human Rights, in Article 2 recognized the right of a state to impose the death penalty, but in 1983, Protocol Six to

Abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights.

the European Convention on Human Rights was adopted abolishing execution in times of peace. This protocol effectively established Europe as an abolitionist continent. In 1994, the Parliamentary Assembly of the Council of Europe declared that "the willingness to ratify the Sixth Protocol will be made a prerequisite for membership in the Council of Europe."

Similarly, the American Convention on Human Rights, Article 4, states that "every person has the right to have their life respected." Generally considered the first international abolitionist document, the Convention establishes clear standards promoting the movement

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toward abolition. It limits application of the death penalty to crimes presently affected and bars states from reintroducing capital punishment once it has been abolished. The U.S. is not a party to the American Convention. The UN General Assembly considered a resolution calling for an international ban on executions by the year 2000. This progressive attempt to abolish the death penalty failed in 1994 due to disagreements over amendments. Opponents of the resolution argued that there was no clear consensus on the appropriate use of execution. Additionally, opponents argued that the resolution interfered with the sovereign right of states to devise and implement their own criminal justice system.

While an average of two countries per year outlaw capital punishment, the United States, which considers itself a leader in the protection of human rights, has rejected this trend. The statistics indicate that a majority of Americans support the use of the death penalty and it is generally perceived by the public to be applied with sufficient due process.

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Despite this image, great concern exists about the application of the death penalty in the United States. In February 1997, the American Bar Association issued a statement calling for an immediate moratorium on executions until policies can be instituted which "(1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed."

Rather than join the international movement toward abolition of the death penalty, the United States adheres to the belief that execution is not cruel and unusual punishment if it is applied in a non-arbitrary and nondiscriminatory manner. In the seminal case *Furman v. Georgia,* the Supreme Court criticized the lack of standards for implementing the death penalty. Furman, an African-American, killed a homeowner while breaking into a house. Furman's case was joined with two other capital cases involving African-American defendants. The Court explained that the lack of standards governing the imposition of the death penalty allowed prejudices to seep into the sentencing decision, resulting in the unconstitutional and selective application of the death penalty.

Since its invention in 1890, more than 1,000 persons have been executed in the electric chair.

Three years later, the Court in *Gregg v. Georgia* held that the death penalty does not violate the Constitution. The Court explained that its concerns in Furman could "be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." The Court upheld Georgia's revised death penalty statute, finding these criteria were met through the bifurcated trial and sentencing hearing, sufficient jury instructions regarding aggravating and mitigating circumstances, and the state supreme court's review of the death sentence to ensure that punishment is consistent with similar cases and not disproportionate to the crime.

Three years later, the Court in *Green v. Georgia* held that the death penalty does not violate the Constitution.

In the companion case to *Gregg, Woodard v. North Carolina,* the Court held that North Carolina's revision of its death penalty statute, which implemented a mandatory death sentence for capital crimes, was unconstitutional. The Court explained that the mandatory imposition of the death penalty in certain cases insufficiently addressed the concerns regarding unguided discretion in sentencing outlined in *Furman.* The Court held that North Carolina's statute failed to account for the individual facts of each case and was over-inclusive. Mandatory sentencing did not eliminate arbitrariness or discrimination within the system, and was unable to accommodate the possibility of error or mitigating factors.

The U.S. death penalty system today is a complex system of layers. The state legislature defines the structure of the system, including such factors as whether the sentence is imposed by judge or jury, how defense counsel is assigned to indigent defendants, and the aggravating and mitigating factors to be considered for sentencing. These factors are often broadly defined to compensate for the individual facts of each case (such as "the crime was particularly cruel or heinous"), but this allows varying interpretations. Then, the prosecutor decides whether to prosecute the crime as a capital offense, or whether to accept a plea bargain. If the case is tried, the jury determines innocence or guilt, and the sentencing jury or judge decides whether to impose the death penalty. Once a person is sentenced to death, they may file appeals, if possible, to the Supreme Court.

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Both supporters and opponents of the death penalty recognize the problems inherent in this complex system. Supporters criticize the inefficiency and

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expense created by the various hearings and appeals, while opponents argue that the system does not adequately address the problems of arbitrariness and discrimination.

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Justice Thurgood Marshall, in "Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit," and published in the Columbia Law Review in January 1986, stated that "[d]eath penalty litigation has become a specialized field of practice, and even the most well intentioned attorneys are often unable to recognize, persevere, and defend their client's rights. Often trial counsel simply are unfamiliar with the special rules that apply in capital cases."

The foremost cause for the arbitrariness in the imposition of the death penalty is the quality of the defense attorney, demonstrated by the fact that approximately 33% of cases are overturned on appeal. Most prisoners on death row are indigent, and thus represented by public defenders. Many defense attorneys, moreover, are inexperienced in capital cases. Appointment of defense counsel varies by jurisdiction. Often, the appointment process is based on patronage and judges may appoint attorneys who they know support the death penalty. In other jurisdictions, defense counsel is chosen from local attorneys who are inexperienced, insufficiently paid, and lack resources to investigate their client's case. In the 1984 case *Strickland v. Washington,* the Court adopted a "highly deferential" standard of "reasonably effective assistance" for counsel. To maintain a claim of inadequate counsel, the petitioner carries a heavy burden, not only of proving counsel was inadequate, but that this prejudiced the trial.

The location of the trial also causes inconsistency in the application of the death penalty, because it is implemented regionally, by state and jurisdiction. Thirty-eight states have legalized the death penalty, and the majority of executions take place in the former confederate states, in an area referred to as the Death Belt (Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas). Because discretion to request capital punishment is granted to prosecutors, and whether to impose it is decided by judges, the district in which a trial takes place directly affects its outcome. The death penalty is a political issue, and in areas where the local prosecutors and judges are elected, there is significant political pressure to enforce the death penalty as demonstrative of a 'tough on crime' stance.

Additionally, racial discrimination continues to influence the system,

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despite the requirement that death sentences be imposed in a nondiscriminatory manner. Significant amounts of statistical evidence support the claims of racial bias. The Baldus study, conducted in Georgia in the 1970's, found that people convicted of killing a white person were four-times as likely to be sentenced to death than people convicted of killing a non-white person. In the 1987 case *McClesky v. Kemp,* the Supreme Court held that Georgia could carry out death sentences despite racial discrepancies, because the petitioner was unable to prove that there was a discriminatory purpose to the imposition of his sentence. The Court accepted racial disparities as "an inevitable part of our criminal justice system" and stated that "any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.'" This position seems to contradict Justice Douglas' statement in *Furman* that "[i]t would seem incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."

In *Furman,* the Court recognized that execution holds a unique position in the criminal justice system, and structured the debate over capital punishment in terms of the procedures used to obtain the sentence, rather than on the validity of the act under the Eighth Amendment of the Constitution. The Court continued its analysis in the 1958 case *Trop v. Dulles,* in which Chief Justice Warren wrote that the "Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" Because the death penalty continues to have strong support in the United States, the Court believes execution is not considered cruel and unusual in American society.

As the international movement to abolish the death penalty grows, other nations are attempting to influence the United States, using international law and public opinion. In September 1997, Bacre Waly N'diaye, the United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Execution visited the United States to investigate allegations regarding the arbitrary and racist manner in which the death penalty is applied. While he was invited by the Clinton administration, his requests to meet President Clinton, Vice-President Gore, Secretary of State Albright, Attorney General Reno and members of the Supreme Court, were all denied. His visit provoked a public response from Senator Helms, Chair of the Senate Foreign Relations Committee, who felt Mr. N'diaye was insulting the American legal system and that his visit was an "absurd UN charade."

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While the domestic effort to end executions focuses on the procedures involved in imposing the death penalty, attempts to repeat the holding in *Furman v. Georgia* results in little response from the justice system because of public support for the use of execution. The public, which is generally uninformed about the criminal justice system, represents a significant source of political pressure on prosecutors and judges to enforce the death penalty. Thus, for the United States to demonstrate an "evolving standard of decency" in conjunction with the rest of the world, the use of capital punishment must be challenged in the public arena if it is ever to be prohibited in the legal arena.