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An Analysis of the Death Penalty Jurisprudence of the October 2007 Supreme Court Term

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An Analysis of the Death Penalty Jurisprudence of the October 2007 Supreme Court Term

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AN ANALYSIS OF THE DEATH PENALTY JURISPRUDENCE OF THE OCTOBER 2007 SUPREME COURT TERM

*Richard Klein**

INTRODUCTION

It was, once again, a notable and highly significant term of the Supreme Court when it came to decisions relating to the death penalty. The Court dealt with numerous basic concerns, such as the use of peremptory challenges to eliminate a juror due to the extra time that a capital prosecution may require,¹ whether the lethal injection used by most states in the country to implement the death penalty constituted cruel and unusual punishment,² whether the death penalty for the rape of a child constitutes cruel and unusual punishment,³ and whether a state's criminal procedure rules must give way in light of a ruling by the International Court of Justice and a Presidential instruction to the state to adhere to the World Court's decision.⁴

The Supreme Court's death penalty jurisprudence has been under a great deal of scrutiny in recent years as the Court has restricted the categories of people subject to capital prosecutions. In

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¹ *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008).

² *Baze v. Rees*, 128 S. Ct. 1520 (2008).

³ *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

⁴ *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

the 2005 case of *Roper v. Simmons*,⁵ the Court held that it was unconstitutional and a violation of the Eighth Amendment to impose the death penalty on those who were less than eighteen-years old when the crime was committed.⁶ In doing so, the Court reversed its earlier holding in *Stanford v. Kentucky*,⁷ which had upheld the death sentence for juveniles.⁸ In 2002, the Court in *Atkins v. Virginia*⁹ exempted those who were suffering from mental retardation from execution.¹⁰ The *Atkins* Court thereby reversed its decision of only thirteen years earlier, in *Penry v. Lynaugh*,¹¹ which had authorized such executions.¹²

I. *BAZE V. REES*

As a result of the Supreme Court's grant of certiorari in *Baze v. Rees*¹³ in September of 2007, there was a moratorium on the imposition of the death penalty in this country. The Supreme Court had decided to determine whether the means used by thirty out of thirty-six states to put someone to death was constitutional.¹⁴ Therefore, for

⁵ 543 U.S. 551 (2005).

⁶ *Id.* at 573.

⁷ 492 U.S. 361 (1989). The prior year, in *Thompson v. Oklahoma*, the Supreme Court overturned the death sentence for a fifteen-year-old, but did not decide the validity of the death penalty for sixteen and seventeen-year-olds. 487 U.S. 815, 838 (1988).

⁸ *Id.* at 380.

⁹ 536 U.S. 304 (2002).

¹⁰ *Id.* at 321.

¹¹ 492 U.S. 302 (1989).

¹² *Id.* at 340. In doing so, the Court emphasized the importance of understanding that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12.

¹³ 128 S. Ct. 1520 (2008).

¹⁴ *Id.* at 1525-26. Twenty-seven of the thirty-six states which have the death penalty, provide for the utilization of lethal injection as the exclusive method for implementing the penalty. *Id.* at 1527 n.1. At the time of the Court's decision in *Baze*, Nebraska was the only

a period dating from September of 2007 until the Supreme Court's decision in *Baze* came down in April 2008, there was no one subjected to capital punishment in this country. There was no majority opinion in *Baze*, even though the split in the Court was seven-to-two; Chief Justice Roberts authored the plurality opinion and was joined by Justices Kennedy and Alito.¹⁵ Justice Alito issued a concurrence,¹⁶ as did Justice Stevens;¹⁷ Justice Thomas joined Justice Scalia in a concurrence.¹⁸ Justice Breyer filed a separate concurring opinion,¹⁹ and Justice Souter joined in Justice Ginsburg's dissent.²⁰

The Eighth Amendment clearly prohibits the imposition by the state of "cruel and unusual punishment."²¹ The exact meaning of that phrase has, however, most certainly changed over the years. The earliest Supreme Court holdings, as illustrated by *Wilkinson v. Utah*,²² considered the language to apply exclusively to "punishments of torture."²³ The protection, therefore, was believed to apply to those who were imprisoned, and applied exclusively to the treatment

state whose laws had provided for electrocution to be the sole method of execution. *Id.* Lethal injection is the means that the federal government uses. *Id.* The first state to utilize the drug cocktail as the means for implementation of the death penalty was Oklahoma in 1978. Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 AM. CRIM. L. REV. 1101, 1104 (2008). The two drug cocktails became the now-widely-used three drug mix when Oklahoma in 1981 added potassium chloride. *Id.* at 1104-05.

¹⁵ *Baze*, 128 S. Ct. at 1525.

¹⁶ *Id.* at 1538.

¹⁷ *Id.* at 1542.

¹⁸ *Id.* at 1552. Justice Thomas filed a separate concurring opinion which was joined by Justice Scalia. *Id.* at 1556.

¹⁹ *Baze*, 128 S. Ct. at 1563.

²⁰ *Id.* at 1567.

²¹ U.S. CONST. amend. VIII.

²² 99 U.S. 130 (1879).

²³ *Id.* at 136. The Court, therefore, concluded that death by the firing squad did not constitute cruel and unusual punishment. *Id.* at 135.

of the incarcerated.²⁴ The Court had not held that the protections afforded by the Eighth Amendment were applicable to the states until 1962 in *Robinson v. California*.²⁵

The lethal injection that was under consideration by the Supreme Court in *Baze* is a three-drug cocktail.²⁶ The first drug which is given to the inmate, sodium thiopental, is supposed to anesthetize the person—put him to sleep so he cannot feel any pain when the second and third drugs are put into his system.²⁷ The problem was that it had been shown a number of times that the amount of anesthesia that was used in this first drug was simply not enough to put the person to sleep—the person would still feel the pain that comes about when drug number two and drug number three were shot into his system.²⁸ There was a research study that was published in the eminent medical journal, *Lancet*, in 2005, that analyzed forty-nine autopsies and showed that of all of the people who were put to death via this lethal injection cocktail, forty-three percent of them had not had a sufficient amount of anesthesia in their bodies to make certain that they were not feeling pain when the subsequent drugs were put into their bodies.²⁹ It is clear, and it is a given, that if someone is con-

²⁴ Justice Thomas' concurrence in *Baze* indicates that he still shares this perspective: "In my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." *Baze*, 128 S. Ct. at 1556 (Thomas, J., concurring). Thomas elaborated that, "the Eighth Amendment was intended to disable Congress from imposing torturous punishments." *Id.* at 1558.

²⁵ 370 U.S. 660, 675 (1962).

²⁶ *Baze*, 128 S. Ct. at 1527.

²⁷ *Id.*

²⁸ *Id.* at 1571-72 (Ginsburg, J., dissenting).

²⁹ Leonidas G. Koniaris et al., *Inadequate Anesthesia in Lethal Injection for Execution*, 365 THE LANCET 1412, Apr. 16–Apr. 22, 2005. Autopsy and toxicology results from Georgia, Arizona, North and South Carolina were all examined. *Baze*, 128 S. Ct. at 1564 (Thomas, J., concurring). A follow up research study to the Lancet analysis focused on Califor-

scious when the second and third drugs are injected into them, the pain that is suffered constitutes cruel and unusual pain, and is virtually unbearable.³⁰

Lower courts had found that execution by the three drug cocktail did constitute cruel and unusual punishment.³¹ In *Morales v. Tilton*,³² the Northern District of California court concluded that the lethal injection actually administered “create[s] an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment.”³³ The Supreme Court’s consideration of lethal injection had been limited, prior to *Baze*, by two cases, *Hill v. McDonough*³⁴ and *Nelson v. Campbell*.³⁵ Both of those cases emerged from emergency applications by an inmate for a stay in the execution of the death sentence, and examined only what procedures could be utilized to raise Eighth Amendment challenges.³⁶

The first dilemma that the Supreme Court focused on was that

nia and North Carolina. The authors concluded that there was “strong evidence that the lethal injection protocol provides a substantial risk of inadequate anesthesia both due to failures of process, as well as problems in the protocol design itself.” Teresa A. Zimmers & Leonidas G. Koniaris, *Peer-Reviewed Studies Identifying Problems in the Design and Implementation of Lethal Injection for Execution*, 35 FORDHAM URB. L.J. 919, 929 (2008).

³⁰ Zimmers & Koniaris, *supra* note 29, at 921.

³¹ See, e.g., Taylor v. Crawford, No. 05-CV-C-FJG, 2006 WL 1779035, at *8 (W.D. Mo. 2006), *rev’d*, 487 F.3d 1072 (8th Cir. 2007) (reversing the district court’s holding that found the protocol used violated the Eighth Amendment), *cert. denied*, 128 S. Ct. 2047 (2008).

³² 465 F. Supp. 2d 972 (N.D. Cal. 2006). Similarly, a federal district court judge in Tennessee concluded that the protocol presents a substantial risk that the inmate “will not be unconscious when the second and third drugs are administered.” Elizabeth Semel, *Baze v. Rees: Fearing Too Much Justice*, NAT’L L.J. 22, May 12, 2008.

³³ *Morales*, 465 F. Supp. 2d at 974.

³⁴ 547 U.S. 573 (2006).

³⁵ 541 U.S. 637 (2004).

³⁶ See *Hill*, 547 U.S. at 578, 584 (holding that a stay of execution is an equitable remedy that should not be unduly influenced by federal courts.); see also *Nelson*, 541 U.S. at 641, 650 (holding that the “ability to bring a §1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations”).

a state will not have an anesthesiologist present when the person is connected to the intravenous tubes delivering the anesthesia because the American Society of Anesthesiologists has declared it is against the profession's ethical standards to participate in state executions.³⁷ No medical doctor at all will be there, because the American Medical Association ("AMA") has declared that the obligation of doctors is to help their patients live a healthy life, and ought, therefore, not to be part of a state execution.³⁸ The same applies to the codes of nurses³⁹ as well as to EMT workers.⁴⁰ As a result, it is exclusively non-medical personnel who are charged with administering the machines responsible for causing the death. At the time that the first anesthesia is injected into the body of the inmate, the warden and the deputy warden are the only people in that room.⁴¹ They certify, based strictly on visual observation, that there is enough anesthesia given so

³⁷ *Baze*, 128 S. Ct. at 1536 (citing Brief for American Society of Anesthesiologists as Amici Curiae Supporting Neither Party, *Baze*, 128 S. Ct. at 1520 (No. 07-5439), available at <http://www.asahq.org/Washington/FinalASAAmicusBrief.pdf>)).

³⁸ *Id.* at 1539 (Alito, J., concurring) (citing American Medical Association Code of Medical Ethics, AMA Policy E.206 Capital Punishment (2000), available at <http://www.ama-assn.org/ama1/pub/upload/mm/369/e206capitalpunish.pdf>)). The policy noted that "a physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution." *Id.*

³⁹ *Id.* (citing American Nurses Association, Position Statement, Nurses' Participation in Capital Punishment (1994)). The Nurses Association's Position Statement holds that participation in an execution would constitute a "breach of the ethical traditions of nursing, and the Code for Nurses." *Id.* Therefore, a nurse is prohibited from participating "in assessment, supervision or monitoring of the procedure or the prisoner; procuring, prescribing or preparing medications or solutions; inserting the intravenous catheter; injecting the lethal solution; and attending or witnessing the execution as a nurse." *Id.*

⁴⁰ *Baze*, 128 S. Ct. at 1539-40 (citing The National Association of Emergency Medical Technicians, Position Statement on EMT and Paramedic Participation in Capital Punishment, June 2006, available at <http://web.archive.org/web/20060821052344/www.naemt.org/aboutNAEMT/capitalpunishment.htm>)).

⁴¹ *Id.* at 1569 (Ginsburg, J., dissenting).

the second and third drugs can be put into the body.⁴² There is no blood pressure taken.⁴³ There is no administration of the EKG, which is routinely given to an individual after anesthesia to ensure that a patient undergoing surgery will not sense the subsequent surgery.⁴⁴ The EKG is only utilized at an execution at the conclusion of the process to confirm that the prisoner has died.⁴⁵

Drug number two, which paralyzes the body and stops the breathing, also presents a problem.⁴⁶ Pancuronium bromide is such an untested drug, and so potentially painful, that veterinarians in twenty-three states are prohibited from using this drug.⁴⁷ The American Veterinary Medical Association (“AVMA”) bans the use of this drug.⁴⁸ In fact, both the AVMA, as well as the Humane Society, submitted amicus briefs to the Supreme Court maintaining that the use of drug number two constitutes cruel and unusual punishment and is inhumane.⁴⁹ Chief Justice Roberts, writing the opinion for the Court, and joined by Justices Alito and Kennedy, responded to this claim by stating that, “veterinary practice for animals is not an appro-

⁴² *Id.* There is no additional confirmation that the individual is not conscious; Kentucky has failed to use any additional, basic test to confirm this fact. *Id.*

⁴³ *Id.* at 1570.

⁴⁴ *Baze*, 128 S. Ct. at 1570 (Ginsburg, J., dissenting). Justice Ginsburg therefore concluded that there is no assurance that the anesthesia has been properly administered. *Id.* at 1571.

⁴⁵ *Id.* at 1528. Death does not always come so quickly. The longest execution on record occurred in Texas in 1998. The procedure lasted for two hours because prison officials had difficulty inserting the intravenous needles into the veins of the inmate. Shah, *supra* note 14, at 1106-07.

⁴⁶ *Baze*, 128 S. Ct. at 1527.

⁴⁷ *Id.* at 1535.

⁴⁸ AM. VETERINARY MEDICAL ASS’N, AVMA GUIDELINES ON EUTHANASIA (2007), available at http://www.avma.org/issues/animal_welfare/euthanasia.pdf.

⁴⁹ Brief for Dr. Kevin Concannon et al. as Amici Curiae Supporting Petitioners, *Baze*, 128 S. Ct. at 1520 (No. 07-5439), 2007 WL 3440946; Brief for Human Rights Watch as Amici Curiae Supporting Petitioners, *Baze*, 128 S. Ct. at 1520 (No. 07-5439), 2007 WL 3407043.

priate guide to humane practices for humans.”⁵⁰ Therefore, even though veterinarians believe that this drug is too harmful to be administered to animals, it is used to put humans to death. Justice Stevens, in his concurrence, concluded that drug number two is not warranted at all.⁵¹ It paralyzes someone, rendering that person incapable of expressing any pain he might be feeling.⁵² His vocal cords are paralyzed as well. Chief Justice Roberts, however, concluded that there was a state interest in utilizing drug number two; the state interest is in preserving the dignity of the procedure and avoiding the inmate suffering convulsions or seizures which could be perceived as signs of consciousness or distress.⁵³ In other words, Justice Roberts and the majority determined that it is better to have someone paralyzed, and not able to move so that the people watching the death procedure will not think the person is conscious and in pain.⁵⁴ Justice Ginsburg, in her dissent, concluded that drug number two should not be used, because it could prevent someone from being able to make it known that he is in excruciating pain.⁵⁵ And drug number three, potassium chloride, will most certainly cause such pain as it induces cardiac arrest.

⁵⁰ *Baze*, 128 S. Ct. at 1536.

⁵¹ *Id.* at 1543-44 (Stevens, J., concurring).

⁵² *Id.* at 1544.

⁵³ *Id.* at 1535 (majority opinion). Justice Stevens responded to this claimed state interest as a “woefully inadequate justification.” *Id.* at 1544 (Stevens, J., concurring). Justice Stevens explained that “[w]hatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable by an incorrect belief (which could easily be corrected) that the inmate is in pain, is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect.” *Baze*, 128 S. Ct. at 1544 (Stevens, J., concurring).

⁵⁴ *See id.*

⁵⁵ *Id.* at 1569 (Ginsburg, J., dissenting).

The Supreme Court has consistently found the imposition of the death penalty is not, per se, unconstitutional⁵⁶—a declaration repeated in *Baze*.⁵⁷ The Court has cited the Bill of Rights as a clear indication that the Founding Fathers had contemplated a death penalty.⁵⁸ The guarantee that no one should be “deprived of life” without due process of the law, assumed that one could be so deprived as long as due processes guarantees were in place.⁵⁹ Similarly, the Fifth Amendment requires an indictment for “a capital or otherwise infamous crime.”⁶⁰ Indeed, at one point, every state in the country had a death penalty provision.⁶¹

Michigan was the first state to abolish the death penalty in 1846, and it has never reinstated capital punishment.⁶² The *Furman v. Georgia*⁶³ holding by the Court, finding the death penalty statutes of two states to be unconstitutional, had the effect of stopping any execution by any state in the country, even though there were at the time approximately six hundred individuals on death row throughout the country.⁶⁴

Furman remains the longest decision in the history of the Court.⁶⁵ But the five-to-four decision was short lived. Part of the

⁵⁶ See, e.g., *Campbell v. Wood*, 511 U.S. 1119, 2125 (1994) (Blackmun, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 207 (1976); *Wilkerson*, 99 U.S. at 134-35.

⁵⁷ *Baze*, 128 S. Ct. at 1526-27 (majority opinion) (internal citations omitted).

⁵⁸ *Gregg*, 428 U.S. at 177.

⁵⁹ *Id.*

⁶⁰ U.S. CONST. amend. V.

⁶¹ *Gregg*, 428 U.S. at 177.

⁶² *Furman v. Georgia*, 408 U.S. 238, 338 (1972). However, Michigan retained the death penalty for the crime of treason. *Id.*

⁶³ 408 U.S. at 238.

⁶⁴ *Id.* at 417 (Powell, J., dissenting).

⁶⁵ Carol S. Steiker, *Furman v. Georgia*, in *DEATH PENALTY STORIES* 110 (John H. Blume

reason that it was necessary for the Court to revisit its decision so soon, was the lack of clarity that resulted from the Court's holding. As the *Congressional Digest* wrote the year following the *Furman* decision, "confusion resulting from the Supreme Court's ruling has resulted in a variety of responses among the states to different—and frequently conflicting—interpretations of how the decision affects their Capital Punishment laws."⁶⁶

If every means of putting someone to death is cruel and unusual, how will the country be able to implement what is considered to be a constitutional process? Whenever the Supreme Court has been confronted with the claim that the mode in which the state is putting someone to death constitutes cruel and unusual punishment, it has found the practice at issue was not cruel and unusual.⁶⁷ In 1879, in *Wilkerson v. Utah*,⁶⁸ the Court found that a firing squad did not constitute cruel and unusual punishment.⁶⁹ In 1890, in *In re Kemmler*,⁷⁰ the Court was confronted with the issue of whether the electric chair being used in New York State constituted cruel and unusual punishment.⁷¹ The Court found the electric chair did not constitute cruel and unusual punishment.⁷² In 1983, in *Gray v. Lucas*,⁷³ the Court found the gas chamber did not constitute cruel and unusual

Jordan M. Steiker, eds.) (2009). The decision consists of the 50,000 words.

⁶⁶ Steiker, *supra* note 64, at 115 (quoting *Congressional Digest*, January 1973).

⁶⁷ See *Gray v. Lucas*, 463 U.S. 1237 (1983); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson*, 99 U.S. 130.

⁶⁸ *Id.*

⁶⁹ *Id.* at 134-35.

⁷⁰ 136 U.S. at 436.

⁷¹ *Id.* at 441.

⁷² *Id.* at 443-44.

⁷³ 463 U.S. at 1237.

punishment.⁷⁴ The Court had concluded that some form of pain, some risk of pain, is bound to be part of this whole process.⁷⁵ Feeling pain was inevitable, and suffering some sort of pain did not constitute cruel and unusual punishment.⁷⁶

After the *Baze* decision upholding the constitutionality of the three drug lethal injection,⁷⁷ the moratorium was over; on that same day, Governor Schwarzenegger in California stated that, “[t]oday’s U.S. Supreme Court decision supports California’s lethal injection protocol and allows our case[s] to move forward.”⁷⁸ And move forward, they did, although not without problems.⁷⁹ The Court was really aware that its decision would impact many more states than just Kentucky, therefore, the Court’s guidance was clear: “A state with a lethal protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard” of showing impermissible and unconstitutional infliction of severe pain.⁸⁰

One very important aspect of *Baze*, was that for the first time, Justice Stevens opined that he had concluded that the death penalty was unconstitutional.⁸¹ Justice Stevens determined that there is no purpose of punishment served by the death penalty that cannot also

⁷⁴ *Id.* at 1239-40 (Burger, J., concurring).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Baze*, 128 S. Ct. at 1538.

⁷⁸ *See Semel*, *supra* note 32.

⁷⁹ Despite Governor Schwarzenegger’s proclamation, California’s executions remained on hold “because a state court ruled that the corrections department had failed to promulgate its protocol according to the requirements of the state’s administrative procedures act . . . [and] a federal judge who concluded that the state’s procedures violated the Eighth Amendment ha[d] yet to review the revised protocol to determine whether it satisfie[d] the *Baze* standard.” *Id.*

⁸⁰ *Baze*, 128 S. Ct. at 1537.

⁸¹ *Id.* at 1546 (Stevens, J., concurring).

be served by life without parole.⁸² He also concluded that race continues to play a factor in determining who receives the death penalty,⁸³ there is a high risk of executing the innocent,⁸⁴ and, the use of death qualified jurors presents such a problem in death penalty cases as to lead to the conclusion that the death penalty is unconstitutional.⁸⁵ The standard of “death qualified jurors” means that one can only sit on a death penalty case, even to consider the guilt or innocence of the defendant, if that individual is willing to impose the death penalty if the case were to be found to appropriately warrant such penalty.⁸⁶ Justice Stevens, therefore, had concluded that the jury that will be able to sit in any capital case will be one that is biased in favor of the prosecution.⁸⁷

Justice Stevens’ opposition on the death penalty was clearly and unambiguously stated:

In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the

⁸² *Id.* at 1547.

⁸³ *Id.* at 1551.

⁸⁴ *Id.*

⁸⁵ *Baze*, 128 S. Ct. at 1550.

⁸⁶ For a definition of a death qualified jury, see BLACK’S LAW DICTIONARY 712 (8th ed. 2004) (“A jury that is fit to decide a case involving the death penalty because the jurors have no absolute ideological bias against capital punishment”).

⁸⁷ *Baze*, 128 S. Ct. at 1550 (Stevens, J., concurring).

Eighth Amendment.”⁸⁸

His opposition to the death penalty is all the more notable since he had provided one of the decisive votes in *Gregg v. Georgia* in 1976, which permitted states after a four-year hiatus to once again implement a sentence of death.⁸⁹

In light of this opposition to the existence of a death penalty, one would expect that Justice Stevens would have found the Kentucky mode for imposing death to be unconstitutional. Such was not the case. Acknowledging that his determination as to the unconstitutionality of the death penalty “makes my decision in this case particularly difficult,”⁹⁰ Justice Stevens concluded that he was bound to adhere to the principle of stare decisis.⁹¹ In accord with the Court’s prior rulings regarding Capital Punishment, Justice Stevens determined that there was insufficient proof that Kentucky’s protocol was in violation of the Eighth Amendment.⁹²

II. *KENNEDY V. LOUISIANA*

In *Kennedy v. Louisiana*,⁹³ the Court was presented with an issue which required a comparison of the crime of child rape with that of murder. Is the child rapist as deserving of the death penalty as someone who takes the life of another? Does society’s rage and raw

⁸⁸ *Id.* at 1551 (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)).

⁸⁹ *Gregg*, 428 U.S. at 158, 206-07 (1976).

⁹⁰ *Baze*, 128 S. Ct. at 1552 (Stevens J., concurring).

⁹¹ *Id.* To this extent, Justice Stevens was in agreement with Justice Thomas who wrote that “the lawfulness of the death penalty is not before us.” *Id.* at 1567 (Thomas, J., concurring).

⁹² *Id.* at 1552 (Stevens J., concurring).

⁹³ 128 S. Ct. 2641 (2008).

emotion against someone who rapes a child mean that the death sentence would not be excessive, and that the death sentence would not be disproportionate under the Eighth Amendment? The issue in *Kennedy* was the constitutionality of the Louisiana statute enacted in 1995⁹⁴ which, for the first time in this country since 1972, declared that the rape of someone who is less than twelve years old would constitute a crime for which the perpetrator could receive the death penalty.⁹⁵ The defendant was convicted of raping an eight-year-old, and was sentenced to death in Louisiana.⁹⁶ In 1977, in *Coker v. Georgia*,⁹⁷ the Supreme Court had found the death penalty for the crime of rape was unconstitutional because it was disproportionate and excessive.⁹⁸ The difference between *Coker* and *Kennedy* was that the victim in *Coker* was an adult, and, as such, that case did not specifically deal with the rape of a child.⁹⁹

The *Coker* case was decided just one year after the *Gregg v. Georgia* decision had reactivated the death penalty.¹⁰⁰ The roots of *Coker's* holding that the death sentence was disproportionate to the crime of rape can be traced back to the 1910 case of *Weems v. United States*.¹⁰¹ Although not a death penalty case, *Weems* established the concept that an excessive sentence would constitute cruel and un-

⁹⁴ LA. REV. STAT. ANN. § 14:42 (West 1997).

⁹⁵ *Kennedy*, 128 S. Ct. at 2651. After Justice Kennedy's conviction and sentencing, the statute was amended and the age was increased from twelve to thirteen years. LA. REV. STAT. ANN. § 14: 42 (West 2007).

⁹⁶ *Id.* at 2648.

⁹⁷ 433 U.S. 584 (1977).

⁹⁸ *Id.* at 592.

⁹⁹ Compare *id.* at 587, with *Kennedy*, 128 S. Ct. at 2646.

¹⁰⁰ See generally *Gregg*, 428 U.S. at 153; *Coker*, 433 U.S. at 584.

¹⁰¹ 217 U.S. 349 (1910).

usual punishment.¹⁰²

The dissents of Justices Goldberg, Douglas, and Brennan in 1963 to a denial by the Court of an application for certiorari laid the groundwork for *Coker*. The *Rudolph v. Alabama*¹⁰³ case involved a capital conviction, and the dissenting opinion linked the matter to the increasingly important evolving standard of decency test. The Goldberg opinion noted the trend both domestically and internationally against a sentence of death for the crime of rape and stated that “the imposition of the death penalty by those States which retain it for rape violated ‘evolving standards of decency that mark the progress of our maturing society.’”¹⁰⁴

Yet by the time of *Furman v. Georgia* in 1972, sixteen states had statutes which did allow the death sentence for a rape conviction.¹⁰⁵ But in the years between 1972 and the 1977 *Coker* case, the numbers had dwindled and only three states had statutes designating rape a capital offense.¹⁰⁶ But the Court prior to *Coker* had invalidated the North Carolina statute in *Woodson v. North Carolina*¹⁰⁷ and the Louisiana statute in *Roberts v. Louisiana*.¹⁰⁸ The statutes of those two states had made the death penalty a mandatory sentence for rape and the Court held that such a provision was in violation of its holding in *Gregg v. Georgia*.¹⁰⁹

¹⁰² *Id.* at 383.

¹⁰³ 375 U.S. 889 (1963) (Goldberg, J., dissenting).

¹⁰⁴ *Id.* at 889-90 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))

¹⁰⁵ *Coker*, 433 U.S. at 593.

¹⁰⁶ *Id.* at 593-94.

¹⁰⁷ 428 U.S. 280 (1976).

¹⁰⁸ 428 U.S. 325 (1976).

¹⁰⁹ *Id.* at 333-34. *Gregg* had clearly held that the death penalty was appropriate only when

In recent years, when deciding whether the death penalty constitutes cruel and unusual punishment, the Court has increasingly utilized the evolving standards of decency test.¹¹⁰ In 2002, in *Atkins v. Virginia*,¹¹¹ the Court reversed a decision given thirteen years earlier regarding the execution of the mentally retarded.¹¹² The Court found there was an evolving standard of decency in this country which required a prohibition on the execution of the mentally retarded.¹¹³ Similarly, in *Roper v. Simmons*,¹¹⁴ decided in 2005, the Court reversed an earlier holding given seventeen years prior to *Simmons* regarding the execution of juveniles.¹¹⁵ As in *Atkins*,¹¹⁶ the Court found that standards of decency in this country had evolved and the Court was required to respond.¹¹⁷ The Court concluded that we should no longer execute people who were less than eighteen years old at the time they committed the crime.¹¹⁸

The *Kennedy* Court, in determining the standard of decency appropriate for deeming child rape to be a capital crime, proceeded by counting the number of states with statute similar to that of Louisiana. The Court determined that there were only six states that had enacted laws calling for the death penalty for individuals convicted of

there is a determination that aggravating factors apply that outweigh the mitigating factors in a specific case. *Gregg*, 428 U.S. at 199.

¹¹⁰ *Kennedy*, 128 S. Ct. at 2649.

¹¹¹ 536 U.S. 304 (2002).

¹¹² *Id.* at 321.

¹¹³ *Id.* at 318, 320.

¹¹⁴ 543 U.S. 551 (2005).

¹¹⁵ *Id.* at 573-74 (reversing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)).

¹¹⁶ *Atkins*, 536 U.S. at 318, 320.

¹¹⁷ *Roper*, 543 U.S. at 563-64.

¹¹⁸ *Id.* at 573.

child rape.¹¹⁹ The Court concluded that there was no demonstrated emerging standard of decency favoring the imposition of the death penalty upon someone who has been convicted of the rape of a child.¹²⁰ The Court, therefore, held that it was unconstitutional to permit the death sentence to be imposed on someone convicted of child rape.¹²¹

To be sure, such a finding by the Court was seen as callous and improper by many, not the least of whom were the two leading candidates for President of the United States. Barrack Obama's official statement clearly indicated his position:

I disagree with the decision. I have said repeatedly that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. The rape of a small child, 6 or 8 years old, is a heinous crime and if a state makes a decision that under narrow, limited, well-defined circumstances that the death penalty is at least potentially applicable, that that [sic] does not violate[] the Constitution.¹²²

The Republican candidate's comments were equally strong. John McCain's statement concluded, "that there is a judge anywhere in America who does not believe that the rape of a child represents the most heinous of crimes, which is deserving of the most serious of

¹¹⁹ *Kennedy*, 128 S. Ct. at 2656. Louisiana enacted such a statute in 1995. See LA. REV. STAT. ANN. § 14:42 (West 2008). Thereafter, five other states enacted similar child rape statutes: Georgia, see GA. CODE ANN. § 16-6-1 (West 2008); Montana, see MONT. CODE ANN. § 45-5-503 (West 2007); Oklahoma, see OKLA. STAT. ANN. TIT. 10, § 7115 (West 2009); South Carolina, see S.C. CODE ANN. § 16-3-655 (2008); and Texas, see TEX. PENAL CODE ANN. § 12.42 (Vernon 2007).

¹²⁰ *Kennedy*, 128 S. Ct. at 2656.

¹²¹ *Id.* at 2665.

¹²² MSNBC, *McCain, Obama Disagree With Child Rape Ruling*, June 26, 2008, <http://www.msnbc.msn.com/id/25379987/>.

punishments, is profoundly disturbing.”¹²³

The broad question presented is, perhaps, not one that is easily answered. Should not our penal system reflect the moral outrage that many feel toward any individual who has raped a child?¹²⁴ Should our laws, however, be mere expressions of raw vengeance that may conflict with our justice system’s recognized goal of dispassionate justice?¹²⁵ Society’s outrage at a child rapist may well be greater than that which would be directed to the perpetrator of a murder. The child victim has to live the remainder of his or her life traumatized by what the defendant has done. The family of the child victim can certainly be expected to suffer for years as well.

The case was another split decision. Justice Kennedy’s opinion of the Court was joined by Justices Stevens, Souter, Ginsburg, and Breyer;¹²⁶ Justice Alito’s dissent was joined by Justices Scalia, Roberts, and Thomas.¹²⁷ The Court noted the evidence illustrating the inherent weakness of child testimony.¹²⁸ In this very case, the eight-year-old girl who was raped had first insisted her stepfather, Kennedy the defendant, had not been the person who raped her—it

¹²³ National Review Online, Bench Memos, *McCain’s Reaction to Kennedy*, Wednesday, June 25, 2008, <http://bench.nationalreview.com/post/?q=MDAYMmY3YmUwY2IzZjhhNzFmOTcxOTZIN DQ4NzgyZGY=>.

¹²⁴ See, e.g., Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U. L. REV. COLLOQUY 17 (2008).

¹²⁵ See, e.g., Douglas A. Berman, Stephanos Bibas, *Emerging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355 (2008).

¹²⁶ *Eighth Amendment Death Penalty Punishment for Child Rape*, 122 HARV. L. REV. 296, 298 n.23 (2008).

¹²⁷ *Id.* at 300 n.38.

¹²⁸ *Kennedy*, 128 S. Ct. at 2663 (“The problem of unreliable, induced, and even imagined child testimony means there is a ‘special risk of wrongful execution’ in some child rape cases.”) (quoting *Atkins*, 543 U.S. at 321)).

was not until months afterwards that she said first that her stepfather was the person who raped her.¹²⁹ Immediately after the attack upon L.H., the police were called and she was taken to Children's Hospital.¹³⁰ L.H. had initially maintained at the scene of the crime as well as at the hospital, that two neighborhood boys had dragged her from the garage at her home to the yard and proceeded to rape her.¹³¹ One of L.H.'s doctors testified at the trial that L.H. had told all hospital personnel the same account of the rape.¹³² A psychologist conducted an interview of L.H. that lasted for three hours and was spread over several days.¹³³ The tape of the session contained the following comment by L.H.: "I'm going to tell the same story. They just want me to change it . . . They want me to say my dad did it. . . I don't want to say it. . . I tell them the same, same story."¹³⁴ The first time that L.H. had told someone that her father was the person who raped her was over three months later when she so informed her mother.¹³⁵ The Court noted the special risk in wrongfully executing an accused when a child is the only witness.¹³⁶ As is true with most rapes, of course, child rape typically occurs when there is no witness other than the victim of the attack.

Additionally, the Court concluded that if the crime of child rape carries with it the imposition of the death penalty, there is an in-

¹²⁹ *Id.* at 2647.

¹³⁰ *Id.* at 2646.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Kennedy*, 128 S. Ct. at 2646.

¹³⁴ *Id.*

¹³⁵ *Id.* at 2647.

¹³⁶ *See id.* at 2663.

creased probability that an individual who rapes a child may decide he has nothing to lose by proceeding to kill the victim since the sentence would be no harsher for that crime and would possibly enable the perpetrator to avoid detection.¹³⁷ The Court emphasized that the death penalty is for the worst of the worst; murder is unique both in showing the moral depravity of the defendant as well as in the harm that is caused to the victim.¹³⁸

Justice Alito's dissent maintained that the majority's decision had not given the appropriate interpretation to the fact that only six states had enacted statutes providing for the death penalty for the crime of child rape.¹³⁹ The majority of states thought *Coker* stood for the proposition that the death penalty for any kind of rape would be unconstitutional.¹⁴⁰ These six states, therefore, are not a real reflection of the totality of states, which may have desired to have the death penalty for child rape.¹⁴¹ Many states, which may have believed that the death penalty was appropriate for child rape, interpreted *Coker* as prohibiting any such statute.¹⁴² The majority, however, responded to Justice Alito's claim by highlighting the eight times in *Coker* where the Court repeated the phrase "an adult woman" or "an adult female" when considering the appropriateness of imposing the death penalty

¹³⁷ *Id.* at 2664.

¹³⁸ *Kennedy*, 128 S. Ct. at 2660 ("The latter crimes may be devastating in their harm, as here, but 'in terms of moral depravity and of the injury to the person and to the public,' . . . , they cannot be compared to murder in their 'severity and irrevocability.' ") (quoting *Coker*, 433 U.S. at 598)).

¹³⁹ *Id.* at 2672-73 (Alito, J., dissenting). The six states that capitalized child rape are as follows: Florida, Georgia, Louisiana, Mississippi, North Carolina, and Tennessee. *Id.* at 2651 (majority opinion).

¹⁴⁰ *Id.* at 2666 (Alito, J., dissenting).

¹⁴¹ *Id.*

¹⁴² *Id.* at 2668.

for the rape of an adult.¹⁴³ Justice Alito expressed strong disagreement with the claimed lack of a consensus as to child rape, and described the overall “growing alarm” relating to sexual abuse of children.¹⁴⁴ The Court concluded that “there is no clear indication that state legislatures have misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional.”¹⁴⁵ Louisiana was the only state since 1964 to have sentenced a person to the death penalty for the crime of rape of a child.¹⁴⁶

The Court in *Kennedy* drew a bright line rule—an absolute clear dividing line—maintaining that the death penalty is only going to be permitted for murder, i.e. intentionally causing the death of someone.¹⁴⁷ The Court’s decision was consistent with its earlier holding in *Enmund v. Florida*.¹⁴⁸ In *Enmund*, the Court had overturned the death sentence for a defendant who had participated in a robbery during which a murder was committed.¹⁴⁹ The Court’s determination was based on the fact that Enmund himself had not done

¹⁴³ *Kennedy*, 128 S. Ct. at 2654 (majority opinion).

¹⁴⁴ *Id.* at 2670 (Alito, J., dissenting). Harsher treatment of sexual offenders, including sexual registry laws, were also cited in support of an evolving consensus. *Id.* at 2670-71.

¹⁴⁵ *Id.* at 2656 (majority opinion).

¹⁴⁶ *Id.* at 2657. Since the conviction and sentence of *Kennedy*, another individual, Richard Davis, was also given the death sentence for the rape of a child in Louisiana.

¹⁴⁷ *Id.* at 2659.

Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken.

Id.

¹⁴⁸ 458 U.S. 782 (1982).

¹⁴⁹ *Id.* at 788.

the actual killing nor had any intention that the killing occur.¹⁵⁰ It did not matter how much violence was caused by what the defendant did as part of the commission of other crimes.¹⁵¹ It did not matter how many times the defendant might have raped someone; the death penalty is not an appropriate sentence unless there was the intention to cause death and death resulted.¹⁵² Justice Alito did not attempt to cover his dismay at the much anticipated decision of the Court: "And once all of the Court's irrelevant arguments are put aside, it is apparent that the Court has provided no coherent explanation for today's decision."¹⁵³

There is a fascinating postscript to the *Kennedy* decision, which occurred on October 1, 2008. The state of Louisiana petitioned for a rehearing on grounds that for the first time it realized that it had failed to present to the Court a provision of the Uniform Code of Military Justice, a provision which imposes the death penalty as punishment for the crime of child rape.¹⁵⁴ The state maintained that this was of significance and should impact the Court's consideration of whether there is an evolving sense of decency that the death penalty is appropriate for child rape.¹⁵⁵ The state of Louisiana claimed

¹⁵⁰ *Id.* In *Tison v. Arizona*, 481 U.S. 137 (1987), the Court, however, permitted the imposition of the death sentence for individuals who, although they themselves did not perform the killing, had actually participated in the events leading up to the murder. *Id.* at 158.

¹⁵¹ See *Enmund*, 458 U.S. at 796, 798, 801.

¹⁵² *Id.*

¹⁵³ *Kennedy*, 128 S. Ct. at 2673 (Alito, J., dissenting).

¹⁵⁴ *Id.* at 2641, *reh'g denied*, *Louisiana v. Kennedy*, 129 S. Ct. 1, *1 (2008). See also Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, July 2, 2008, at A1 ("A military law blog pointed out . . . that Congress, in fact, revised the sex crimes section of the Uniform Code of Military Justice in 2006 to add child rape to the military death penalty."). 10 U.S.C.A. § 920 (West 2006).

¹⁵⁵ *Kennedy, reh'g denied*, 129 S. Ct. at *1. The State maintained that a federal military statute authorizing the death penalty for rape, which had not previously been brought to the

that it learned of this fact only after the Court's decision in *Kennedy*, and, therefore, the state requested a rehearing.¹⁵⁶ The state's brief to the Court took the opportunity to respond to the Court's discussion in its holding of foreign countries' views regarding the use of the death penalty to buttress the Court's conclusion that there is not an evolving sense that capital punishment is an appropriate sentence for child rape.¹⁵⁷ Louisiana maintained that "the failure to consider domestic military law would *a fortiori* call into question any reliance on the laws and practices of foreign jurisdictions."¹⁵⁸

Most interesting, perhaps, is the inclusion in the appendix to the brief of the statements of Barack Obama and John McCain criticizing the Court's initial decision in the *Kennedy* case.¹⁵⁹ The state highlighted the import of the military code: "This Court has never held that military personnel could be subject to punishments that it deems 'cruel and unusual' for the rest of the population. . . . When Congress enacts a law, be it military or civilian, that law is relevant objective evidence of a national consensus."¹⁶⁰ The Court, however, refused the petition for the rehearing. The Court declared that a law, which relates strictly to the military, does not impact upon the fact there is still a consensus in the civilian context against imposing the

attention of the Court by either party, "calls into question the majority opinion's conclusion that there is a national consensus against capital punishment for rape of a child." *Id.* at *3 (Scalia J., concurring).

¹⁵⁶ *Id.*

¹⁵⁷ Final Brief on *Kennedy v. Louisiana*, SCOTUS, Supreme Court of the United States Blog, Lyle Denniston, Sept. 24, 2008, <http://www.scotusblog.com/wp/final-brief-on-kennedy-v-louisiana/#more-7956>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

death penalty for child rape.¹⁶¹

III. *SNYDER V. LOUISIANA*

*Snyder v. Louisiana*¹⁶² dealt with the issue of who can be qualified to sit as a juror in a death penalty case.¹⁶³ Once again, the issue presented itself as a claim of racial discrimination in jury selection.¹⁶⁴ The defendant in *Snyder* was black.¹⁶⁵ Out of the eighty-five potential jurors who were initially called as part of the jury pool, there were nine potential black jurors.¹⁶⁶ The prosecutor successfully challenged four of the blacks for cause.¹⁶⁷ The prosecutor used peremptory challenges to strike the remaining five prospective jurors.¹⁶⁸

Snyder's claim that the prosecution's use of its peremptory challenges were race-based focused on the challenge to two black jurors in particular.¹⁶⁹ The Court made it clear that the Constitution protects against the use of even one challenge in a discriminatory fashion and since the Court found that to be true in the first challenge that the Court considered, the second claim was not reached.¹⁷⁰

To understand *Snyder* we have to look at *Batson v. Ken-*

¹⁶¹ *Kennedy, reh'g denied*, 129 S. Ct. at *2.

¹⁶² 128 S. Ct. 1203 (2008).

¹⁶³ *Id.* at 1206.

¹⁶⁴ *Id.*

¹⁶⁵ *Louisiana v. Snyder*, 750 So. 2d 832, 839 (La. 1999).

¹⁶⁶ Lyle Denniston, Court Finds Flaws in La. Jury Choice, Supreme Court of the United States Blog, SCOTUS, March 19, 2008, <http://www.scotusblog.com/wp/?s=Court+Finds+Flaws+in+La.+Jury+Choice>.

¹⁶⁷ *Snyder*, 750 So. 2d at 839.

¹⁶⁸ *Snyder*, 128 S. Ct. at 1207.

¹⁶⁹ *Id.* at 1208.

¹⁷⁰ *Id.*

tucky,¹⁷¹ a 1986 case in which the Supreme Court held the elimination of even one juror based on that juror's race was unconstitutional, and that a subsequent conviction could not stand.¹⁷² What is required under the *Batson* scenario is that initially the defendant has to raise a *prima facie* case that the intent of the prosecutor in peremptorily challenging the particular juror was racially based.¹⁷³ Next, the prosecutor will attempt to claim that he did not challenge the person because of race; that there is some other reason, a neutral reason, something that has nothing to do with race which led to the challenge.¹⁷⁴

The use of the peremptory challenge, while not afforded protection in the Constitution, had been acknowledged by the Court to be "one of the most important of the rights" in our justice system¹⁷⁵ and "a necessary part of trial by jury."¹⁷⁶ The use of the challenge free of judicial control has "been viewed as one means of assuring the selection of a qualified and unbiased jury."¹⁷⁷ It certainly is the case that the peremptory challenge is often made as a result of limited information, an instinct or a hunch as a result of a quick first impression of a prospective juror.

The harm by discriminatory use of the peremptory challenge occurs not just to the defendant on trial. The Court in *Batson* recog-

¹⁷¹ 476 U.S. 79 (1986).

¹⁷² *Id.* at 100.

¹⁷³ *See id.* at 93-94 (citing *Washington v. Davis*, 426 U.S. 229, 239-42 (1976)).

¹⁷⁴ *Id.* at 94 ("[T]he State must demonstrate that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.' ") (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

¹⁷⁵ *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)).

¹⁷⁶ *Id.*

¹⁷⁷ *Batson*, 476 U.S. at 91.

nized that the equal protection rights of the excluded group are affected. The black population must be accorded the same opportunities and the same rights as the white population in order to have its proper role in the administration of justice.¹⁷⁸

Batson v. Kentucky significantly changed the prior holding of the Court in *Swain v. Alabama*¹⁷⁹ relating to the use of the peremptory challenge and possible racial discrimination. The Court in *Swain* held that a “State’s purposeful or deliberate denial to negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.”¹⁸⁰ The Court’s decision in *Swain* has been interpreted as requiring that in order for the peremptory challenge to be deemed improperly discriminatory, it must be shown that there have been “repeated striking of blacks over a number of cases.”¹⁸¹ *Batson*, however, established the principle that even one striking of one potential juror in one defendant’s case in an attempt to discriminate would be prohibited.¹⁸² The Supreme Court concluded that a change in *Swain*’s holding was required because the “interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors’ peremptory challenges are now largely immune from constitutional scrutiny.”¹⁸³

The ruling in *Batson* itself has been revised. It is not any

¹⁷⁸ *Id.* at 87.

¹⁷⁹ 380 U.S. 202 (1965).

¹⁸⁰ *Id.* at 203-04.

¹⁸¹ *Batson*, 476 U.S. at 92.

¹⁸² *Id.* at 95.

¹⁸³ *Id.* at 92-93.

longer necessary, since *Powers v. Ohio*,¹⁸⁴ that the race of the challenged juror be the same race as the defendant. The *Powers* Court emphasized the right of all individuals to partake in the justice system: "Jury service preserves the democratic element of the law, as it guards the rights of parties and ensures continued acceptance of the laws by all of the people. It 'affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law.'"¹⁸⁵

The reach of *Batson* was extended in 1992 in *Georgia v. McCollum*.¹⁸⁶ In this instance, the prosecution claimed that the defense should be barred from excluding jurors due to their race.¹⁸⁷ The Court held that such claim was legitimate; although state action may not be immediately apparent when defense counsel engages in discriminatory conduct, the Court held that the judge has to actually bring about the exclusion of the juror and thereby the requirement for action by the state is met.¹⁸⁸ In the final act, it was the court that had excused a juror based on race, and this is properly viewed as an "outcome that will be attributed to the state."¹⁸⁹

Batson was further expanded in *J.E.B. v. Alabama ex rel. T.B.*¹⁹⁰ The focus in this civil case was whether or not the rationale of the *Batson* holding should apply to gender-based peremptory chal-

¹⁸⁴ 499 U.S. 400 (1991).

¹⁸⁵ *Id.* at 407 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968)).

¹⁸⁶ 505 U.S. 42 (1992).

¹⁸⁷ *Id.* at 44-45.

¹⁸⁸ *Id.* at 52-53.

¹⁸⁹ *Id.* at 53.

¹⁹⁰ 511 U.S. 127 (1994).

lenges.¹⁹¹ The Court made it clear that it was not necessary to compare the discrimination faced by racial minorities with that of women.¹⁹² “It is necessary only to acknowledge that ‘our Nation has had a long and unfortunate history of sex discrimination,’ a history which warrants the heightened scrutiny we afford all gender-based classifications today.”¹⁹³ The Court concluded that gender discrimination in the jury selection process harms not only the litigants, but the individuals who are thereby excluded as jurors.¹⁹⁴

In *Snyder*, the prosecutor claimed that the challenge to the juror, Mr. Brooks, that was being reviewed by the Court was based, in part, on the perceived nervousness of the juror during questioning.¹⁹⁵ After the prosecutor had submitted the claimed neutral reasons for the challenge, it was up to the judge to determine whether it has been shown that race was the real reason for the prosecutor’s use of the peremptory challenge.¹⁹⁶ The *Snyder* Court carefully examined the explanation provided for challenging Brooks, who was involved in student teaching and was in his last year of college.¹⁹⁷ The prosecutor expressed some concern about juror Brooks being able to sit as a juror for as long as would be required.¹⁹⁸ Therefore, the judge had the clerk of the court contact the dean of the college Brooks was at-

¹⁹¹ *Id.* at 130.

¹⁹² *Id.* at 136.

¹⁹³ *Id.* (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

¹⁹⁴ *Id.* at 140-42.

¹⁹⁵ *Snyder*, 128 S. Ct. at 1208.

¹⁹⁶ *Id.* at 1207 (“[T]he trial court must determine whether the defendant has shown purposeful discrimination.”) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005) (Thomas, J., dissenting)).

¹⁹⁷ *Id.* at 1208.

¹⁹⁸ *Id.* (“My main concern is . . . that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn’t be a penalty phase.”).

tending to ask if it would be okay for Brooks to miss a couple of days.¹⁹⁹ The dean said there would be no problem if that were to occur.²⁰⁰

The prosecutor maintained that Brooks may have wished to be out student teaching instead of sitting at trial, and therefore there was a greater likelihood he would not find the defendant to be guilty of murder because he knew that if he found the defendant guilty, there would then need to be a penalty phase, which would take more time.²⁰¹ As a result, this juror would either find the defendant not guilty, or find him guilty of a lesser charge so the penalty phase would not kick in.²⁰² The trial itself was very short. The all-white jury convicted the defendant in one day. The jurors found Snyder guilty on Thursday, and on Friday during the penalty hearing, decided that the death penalty was the appropriate sentence.²⁰³ The whole matter took just two days.

The Supreme Court, in examining the record as to the prosecutor's use of his peremptory challenges, noted that there were fifty potential white jurors who had similarly expressed concern regarding commitments that would possibly interfere with their jury duty.²⁰⁴ The prosecutor, however, did not use any peremptory challenges in

¹⁹⁹ *Id.* at 1210.

²⁰⁰ *Snyder*, 128 S. Ct. at 1210 (“Doctor Tillman at Southern University said that as long as it’s just this week, he doesn’t see that it would cause a problem with Mr. Brooks completing his observation time within this semester.”).

²⁰¹ *Id.* at 1210.

²⁰² *Id.*

²⁰³ *Id.* at 1210.

²⁰⁴ *Id.* at 1206, 1211.

any of those cases.²⁰⁵ The Court commented that “[t]he implausibility of this explanation is reinforced by the prosecutor’s acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks,” the black juror who was challenged.²⁰⁶ Justice Alito’s opinion was clear: “The prosecutor’s proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent.”²⁰⁷

The second reason the prosecutor gave as an explanation for his selecting the black juror to challenge was that the juror—and this is the entire comment by the prosecutor—“looked very nervous to [him] throughout the questioning.”²⁰⁸ The juror had not been challenged on account of race, rather it was his nervous response to being asked questions on voir dire.²⁰⁹ The defense counsel responded to the trial judge, “hell, everybody out here looks nervous. I’m nervous.”²¹⁰ The judge allowed the challenge without providing any basis for his ruling.²¹¹ As a result, the entire jury in the capital prosecution of Snyder was white; the defendant was convicted and was sentenced to death by an all white jury.²¹²

Justice Alito, along with six other justices, concluded that the district attorney’s reasons were a pretext; they were designed to ap-

²⁰⁵ *Snyder*, 128 S. Ct. at 1211.

²⁰⁶ *Id.* at 1212.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1208.

²⁰⁹ *Id.*

²¹⁰ *Snyder*, 128 S. Ct. at 1214.

²¹¹ *Id.* at 1208 (The Judge stated, “[a]ll right. I’m going to allow the challenge.”).

²¹² *Id.* at 1207.

pear as if there was not an intention to discriminate.²¹³ What was of great significance, and perhaps the most important part of this case, was the justices' refusal to do what is so routinely done and was, in the view of Justices Thomas and Scalia, what should have occurred in this case: defer to the determination of the trial judge.²¹⁴ It has long been maintained that it is the trial judge who can best assess how credible the prosecutor is when the prosecutor presents to the court a neutral reason for the challenge.²¹⁵ The trial court is able to observe the demeanor of both the potential juror as well as the prosecutor and is best able to assess whether the prospective juror is someone who should be eliminated or not.²¹⁶ When the Supreme Court held that it was not just going to defer in cases like this, but would require more on the record and specifics showing this neutral reason is not just a pretext, it could be expected to have a significant impact. Trial judges may well conclude that they better think a little harder before they go ahead and simply accept any "neutral reason" as a justification for eliminating a potential juror, especially, perhaps when as in the case, the juror is the same race as the defendant.²¹⁷ More careful monitoring by the trial judge of the connection between race and the use of peremptory challenges may well result.²¹⁸

²¹³ *Id.* at 1212, 1213 (Thomas, J., dissenting).

²¹⁴ *Id.* at 1213, 1215.

²¹⁵ *Snyder*, 128 S. Ct. at 1213, 1215 (Thomas, J., dissenting) ("[I]n the absence of exceptional circumstances, we [should] defer to state-court factual findings.") (quoting *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion)).

²¹⁶ *Id.*

²¹⁷ *The Supreme Court 2007 Term-Leading Cases*, 122 HARV. L. REV. 346, 346-47 (2008) ("In practice, the presumption will encourage trial judges to produce a clearer record for appellate review, where demeanor-based strikes will continue to enjoy an almost talismanic immunity.").

²¹⁸ *Snyder*, 128 S. Ct. at 1213, 1215 (Thomas, J., dissenting). Justice Thomas' dissent,

IV. *MEDELLIN V. TEXAS*

In *Medellin v. Texas*,²¹⁹ the initial issue addressed was whether the World Court, the International Court of Justice (“ICJ”), could inform a state court what process it must follow in a criminal matter.²²⁰ The second concern of the Supreme Court was whether the President could instruct a state court as to the procedure it must follow in a criminal prosecution.²²¹

The Vienna Convention on Consular Relations,²²² which the United States and Mexico had each signed,²²³ requires a country that arrests a foreigner to inform that individual of his right to contact his embassy or consulate and request assistance in dealing with the prosecution of the charges against him.²²⁴ The U.S. ratified the Convention in 1969,²²⁵ there are currently 171 countries that are signatories to the treaty.²²⁶ The primary function of the Convention, as stated in its Preamble, is to “contribute to the development of friendly relations among nations.”²²⁷ The U.S. had also ratified the Optional

joined by Justice Scalia, criticizes the Court for second guessing the trial judge. The dissent emphasizes that it is the trial judge who is best able to assess the prosecutors’ motives for exercising a peremptory challenge. In the instant case, the determination by the trial court was a permissible view of the evidence presented to the judge. *Id.* at 1213, 1215.

²¹⁹ 128 S. Ct. 1346 (2008).

²²⁰ *Id.* at 1353.

²²¹ *Id.*

²²² Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention], available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

²²³ *Medellin*, 128 S. Ct. at 1352.

²²⁴ *Id.* at 1353.

²²⁵ *Id.*

²²⁶ United Nations Archive of the Vienna Convention on Consular Relations, <http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280050686> (last visited Apr. 18, 2009).

²²⁷ *Medellin*, 128 S. Ct. at 1353.

Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention.²²⁸ This Protocol provides that disputes which develop from an interpretation or an application of the Convention “shall lie within the compulsory jurisdiction of the International Court of Justice.”²²⁹ Either party to the dispute is able to bring the matter to the ICJ.²³⁰

The ICJ is the judicial arm of the United Nations,²³¹ and it came into existence the same year as the U.N. was established.²³² Since a primary purpose of the U.N. is to provide a basis for world peace and avoidance of armed conflict,²³³ the formation of a world court is basic to its mission. As Article 1 of the Charter of the U.N. states, the purpose of the U.N. is to “bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”²³⁴

A major issue in *Medellin* is what precisely is required as part of the obligation of the U.S. to comply “with an ICJ decision to which it is a party.”²³⁵ To Justice Stevens, who concurred in the

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ U.N. Charter art. 92.

²³² The formation of the U.N. occurred upon the ending of the Second World War in 1945. *Id.* at Introductory Note, para. 1. The ICJ Statute is annexed to and an integral part of the Charter itself. *Id.*

²³³ The Preamble to the U.N. Charter begins in the statement that the peoples of the United Nations are determined to “save succeeding generations from the scourge of war, which twice our lifetime has brought untold sorrow to mankind.” *Id.* at Preamble, para. 1.

²³⁴ *Id.* at art. 1, para. 1.

²³⁵ U.N. Charter art. 94, para. 1.

judgment of the Court in *Medellin*,²³⁶ this language did not require the U.S. to immediately comply with an ICJ ruling, but rather only to “promise to take additional steps to enforce ICJ judgments.”²³⁷ To Justice Stevens, it was not required that the U.S. incorporate the ICJ judgment into the domestic law of the U.S. And, especially, it was not for the U.S. *courts* to act to ensure compliance; it was for the political branches.²³⁸ And, in fact, it was for the politicians to determine not only the manner in which to comply, but even “whether to comply” with an ICJ judgment.²³⁹ In his opinion for the Court, Chief Justice Roberts emphasized that the Charter provision is “not a directive to domestic courts.”²⁴⁰ The “undertake to comply” language does not require that the U.S. “shall” or “must” comply with the decision of the ICJ.²⁴¹

If a treaty signed by the U.S. is considered to be a “self-executing one,” then the treaty once it is ratified has domestic effect. A “non-self-executing” treaty, however, does not, in and of itself, establish an enforceable federal law. Some treaties may clearly contain a provision stating that it is to be deemed self-executing, in other instances, implementing legislation is required. In the opinion of the Court in *Medellin*, the Vienna Convention was not self-executing and therefore legislative action was to be required before it became a rule

²³⁶ *Medellin*, 128 S. Ct. at 1372 (Stevens, J., concurring).

²³⁷ *Id.* at 1373.

²³⁸ *Id.* at 1373-74.

²³⁹ *Id.* at 1374.

²⁴⁰ *Medellin*, 128 S. Ct. at 1358 (majority opinion).

²⁴¹ *Id.* at 1373 (Stevens, J., concurring).

that the courts must enforce.²⁴²

The Court held that the President, through his Memorandum instructing state court compliance with the ICJ decision,²⁴³ had attempted to unilaterally convert the non-self-executing treaty into one that would have the force of domestic law.²⁴⁴ The President had no such power. The Constitution enables the President to “make” a treaty,²⁴⁵ but it is for Congress to determine if an international obligation arising from a non-self-executing treaty is to become domestic law.²⁴⁶

Medellin, a Mexican citizen residing in the state of Texas, had not been informed of his right to seek assistance from the Mexican Consulate when he was arrested for murder.²⁴⁷ He was convicted and sentenced to death; upon the direct appeal, both the sentence and the finding of guilt were sustained.²⁴⁸ Medellin then filed a writ of habeas corpus, claiming, for the first time, that he had never been informed of his rights under the Vienna Convention of Consular Relations.²⁴⁹ He claimed, therefore, that his conviction should not stand.²⁵⁰

The state court of Texas dismissed the writ, concluding it was too late;²⁵¹ this issue was never raised during trial,²⁵² nor on direct

²⁴² *Id.* at 1368.

²⁴³ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

²⁴⁴ *Medellin*, 128 S. Ct. at 1368.

²⁴⁵ U.S. CONST. art. II, §2.

²⁴⁶ *Medellin*, 128 S. Ct. at 1368-69.

²⁴⁷ *Id.* at 1354.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Medellin*, 128 S. Ct. at 1354. An individual may not ordinarily request a court post-

appeal.²⁵³ The Court determined that there is nothing on the merits that would challenge Medellín's conviction or sentence.²⁵⁴ The state court found that Medellín had "failed to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment."²⁵⁵ Mexico brought the matter to the ICJ claiming the United States had violated the Vienna Convention in fifty-one cases in which defendants were similarly situated.²⁵⁶ This was not the first time that such an action has been brought against the U.S. Paraguay and Germany had previously sued in the ICJ claiming that the U.S. had not informed defendants that they had the right to contact their countries' consular officials upon arrest.²⁵⁷ The ICJ found the United States to be in violation of the Vienna Convention, and ruled that the defendants who had been convicted in those cases were entitled to a review and reconsideration of their convictions.²⁵⁸ Medellín then filed a writ, again in Texas state court, relying on the ICJ holding.²⁵⁹ Meanwhile, President Bush issued a Memorandum instructing the state to comply with the ruling of the ICJ.²⁶⁰

President Bush, who had once been the governor of his home state of Texas, was acting to protect a Mexican foreigner who had

conviction judicial review to consider legal arguments that were not raised at trial.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 1354-55.

²⁵⁵ *Id.*

²⁵⁶ *Medellin*, 128 S. Ct. at 1355.

²⁵⁷ Valerie Epps, *Medellin v. Texas: A Case Worthy of Comment*, 31 SUFFOLK TRANSNAT'L L. REV. 209, 209-10 (2008).

²⁵⁸ *Medellin*, 128 S. Ct. at 1355.

²⁵⁹ *See id.*

²⁶⁰ *Id.*

been convicted of murder and sentenced to death.²⁶¹ He was instructing the Texas courts not to follow their longstanding and well-established criminal procedure rules, but instead to adhere to the ICJ ruling.²⁶² This demonstrates the extent to which the State Department and the President had concluded that the United States had violated international law by not following the Vienna Convention.²⁶³ The rule in Texas was that once someone filed one writ of habeas, they could not file another writ.²⁶⁴ There was no procedure for successive writs to be filed.²⁶⁵

The Texas court did, however, reconsider the matter as to acceptance of a second writ because a new writ had been filed relying on the ICJ decision and the President's instruction.²⁶⁶ The Texas court reiterated that there would be no exception made and that its

²⁶¹ This was particularly remarkable given the fact that the President had initially referred to the suit by Mexico as an "unjustifiable, unwise and ultimately unacceptable intrusion in the United States criminal justice system." Linda Greenhouse, *Supreme Court to Hear Appeal of Mexican Death Row Inmate*, N.Y. TIMES, May 2007, at A1.

²⁶² See Andrew McCarthy, *Medellin (and Bush) v. Texas*, available at <http://www.humanevents.com/article.php?id=22836#continueA> (Oct. 15, 2007); Death Penalty Information Center, *President Bush Orders Courts to Give Foreign Nationals on Death Row Further Review*, available at <http://www.deathpenaltyinfo.org/node/799> (last visited Feb. 19, 2009). The President's Memorandum may be viewed as part of the overall instrumentalist approach by the U.S. to international courts—international judicial authority will be used when it suits U.S. interests. John Cerone, *Making Sense of the U.S. President's Intervention in Medellin*, 31 SUFFOLK TRANSNAT'L L. REV. 279, 284 (2008).

²⁶³ *Ex Parte Medellin (Ex Parte Medellin I)*, No. WR-50191-03, 2008 WL 2952485, at *3 (July 31, 2008) (Price, J., concurring).

²⁶⁴ *Ex Parte Medellin (Ex Parte Medellin II)*, 223 S.W.3d 315, 323 (Tex. 2006); see also TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (2007) (stating, in pertinent part that, "[i]f a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts . . .").

²⁶⁵ *Ex Parte Medellin II*, 223 S.W.3d at 323.

²⁶⁶ *Id.*

criminal procedure rules would be adhered to.²⁶⁷ The Texas regulations prohibiting a second writ of habeas corpus was controlling and the Court refused to consider the renewed application.²⁶⁸ The Texas Court of Criminal Appeal concluded that neither the ICJ decision nor the President's Memorandum was to be considered as binding federal law that would invalidate the limitation in Texas on the filing of successive applications for habeas.²⁶⁹ Judge Cochran wrote, in a concurring opinion, that the White House had engaged in "an unprecedented, unnecessary, and intrusive exercise of power over the Texas court system."²⁷⁰

Chief Justice Roberts wrote the decision for the Court and found Texas was under no obligation to reconsider the matter on account of the World Court decision or in light of the President's memorandum.²⁷¹ No international court can instruct a state what criminal procedure rules it must follow.²⁷² This was a matter of domestic sovereignty.²⁷³ United States courts must retain judicial supremacy.²⁷⁴ The Supreme Court disregarded the Solicitor General's argument on behalf of the United States that the President had authority to take steps to implement its treaty obligation under the Vienna

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 332.

²⁶⁹ *Id.* at 352.

²⁷⁰ *Ex Parte Medellin II*, 223 S.W.3d at 356 (Cochran, J., concurring).

²⁷¹ *Medellin*, 128 S. Ct. at 1353 ("We conclude that neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.").

²⁷² *Id.* at 1356.

²⁷³ *Id.* at 1356-57.

²⁷⁴ *Id.* at 1360.

Convention as well as to implement rulings by the World Court.²⁷⁵

The opinion by Chief Justice Roberts for the Court is quite critical of the President's interference in the matter at hand. Not only does the Court refute the notion that President Bush had the *authority* to give the ICJ decision the force of law, but that the President was also implicitly *prohibited* from doing so.²⁷⁶ The Court cited James Madison's unambiguous statement that "the magistrate in whom the whole executive power resides cannot of himself make a law."²⁷⁷ To the Court, the President acted in violation of the separation of powers. The "Take Care" Clause of the Constitution relied on in *Medellin's* Brief²⁷⁸ gives the President the responsibility to "take care that the Laws be faithfully executed."²⁷⁹ To the Court in *Medellin*, this clause merely reflects the perspective that the President is not to enact laws, but only to execute the laws made by Congress.²⁸⁰

Justice Breyer's dissent was joined by Justices Souter and Ginsburg. It begins by citing the Supremacy Clause of the Constitution: all treaties "shall be the supreme Law of the land; and the Judges in every State shall be bound thereby."²⁸¹ The treaty's obliga-

²⁷⁵ *Id.* at 1368 ("Medellin adds the additional argument that the President's Memorandum is a valid exercise of his power to take care that the laws be faithfully executed We disagree."). The complexity of this case is unchallenged. During the oral argument before the Court, Chief Justice Roberts took the highly unusual step of permitting the scheduled one hour argument to proceed for an additional twenty-six minutes. Linda Greenhouse, *Case of Texas Murderer Engrosses Supreme Court*, N.Y. TIMES, Oct. 11, 2007, at A1.

²⁷⁶ *Medellin*, 128 S. Ct. at 1369.

²⁷⁷ *Id.* at 1369-70.

²⁷⁸ Brief for the United States, as Amicus Curiae Supporting Petitioner, *Medellin*, 128 S. Ct. 1346 (No. 06-984), 2007 WL 1909462 at *28.

²⁷⁹ U.S. CONST. art. II, §3.

²⁸⁰ *Medellin*, 128 S. Ct. at 1372.

²⁸¹ U.S. CONST. art. VI, cl. 2. Whereas it is clear that the Vienna treaty was broken by the failure to inform Medellin of his right to consular assistance, the question is what is the ap-

tions undertaken by the U.S. relating to the ICJ holdings “bind[s] the courts” in the same way that a law passed by Congress does.²⁸² Justice Breyer carefully presented an historical analysis of prior Court holdings that have interpreted the concept of self-executing treaties.²⁸³ The Court’s majority in *Medellin* is “misguided” in its emphasis on the absence or presence of language contained in a treaty regarding self-execution.²⁸⁴ The ramifications of the Court’s error can be significant. “[I]t erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.”²⁸⁵

Justice Breyer believed that the majority’s attention should have focused on the Supremacy Clause and the case law analyzing that clause’s applicability to treaties.²⁸⁶ Were the Court to have done so, a “better supported, more felicitous conclusion” would have been reached.²⁸⁷ The ICJ judgment is enforceable by the U.S. courts; no further legislative action is required.²⁸⁸ The relevant treaty provisions are, in fact, self-executing.²⁸⁹

The dissent is unusually strong. The majority’s failure “to take proper account of . . . precedent”²⁹⁰ may well result in the Nation

appropriate remedy.

²⁸² *Medellin*, 128 S. Ct. at 1376 (Breyer, J., dissenting).

²⁸³ *Id.* at 1377-80.

²⁸⁴ *Id.* at 1380-81.

²⁸⁵ *Id.* at 1381-82. Justice Breyer points to at least seventy treaties that contain provisions for dispute settlement by the IJC. *Id.* at 1387.

²⁸⁶ *Id.* at 1389.

²⁸⁷ *Medellin*, 128 S. Ct. at 1389 (Breyer, J., dissenting).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 1383.

²⁹⁰ *Id.* at 1392.

breaking its word.²⁹¹ The decision increases the likelihood that our Nation's reputation abroad will be diminished.²⁹² Perhaps most importantly, it will become increasingly difficult to enforce the judgments of international tribunals and therefore "weaken that rule of law for which our Constitution stands."²⁹³

Mexico had filed an amicus brief maintaining in no uncertain terms that Mexico was ready to help its nationals in death penalty cases in the United States and that Mexico wanted to provide assistance to Medellin.²⁹⁴ Lost in the shuffle of the Supreme Court's decision was any true consideration of the rights of Medellin himself. It was he who should have been told, but never was, that he had a right to receive assistance in his representation from the Mexican embassy.²⁹⁵ It was his rights that the Vienna Convention was designed to protect; his rights and those similarly situated had properly been the concern of the ICJ.²⁹⁶

Months after the Supreme Court's holding, there was a motion for a stay in the execution of the sentence.²⁹⁷ Medellin was about to be put to death. The Supreme Court determined five-to-four not to

²⁹¹ *Id.*

²⁹² *Medellin*, 128 S. Ct. at 1391 (Breyer, J., dissenting).

²⁹³ *Id.*

²⁹⁴ Brief for the Government of the United Mexican States as Amici Curiae Supporting Petitioner, *Medellin*, 128 S. Ct. 1346 (No. 06-984), 2007 WL 1849797 at *16-17.

²⁹⁵ *Id.* at 22.

²⁹⁶ "International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. . . ." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907 cmt. a (2008). The ICJ is not empowered to hear disputes between individuals, but only between nations. *Medellin*, 128 S. Ct. at 1360. The ICJ statute specifically provides that a decision of the court "has no binding force except between the parties." *Id.* The parties in the case before the ICJ were the United States and Mexico; Medellin himself was not a party.

²⁹⁷ *Medellin v. Texas*, 129 S. Ct. 360, 361 (2008).

grant any stay in execution.²⁹⁸ Justice Stevens' harshly worded dissent noted that the honor of this Nation was at stake—the obligations of this Nation to follow international law, to uphold its treaty obligations—its reputation was at stake.²⁹⁹ Justice Stevens concurred in the judgment in the prior *Medellin* case.³⁰⁰ It appeared as though he had expected either Texas or Congress to act appropriately and to comply with the ICJ decision.³⁰¹ However, by this application for a stay, it was clear that the legislatures were not going to act.³⁰² *Medellin's* execution, Justice Breyer wrote in his dissent, “will place this Nation in violation of international law.”³⁰³ But the Court did not grant the stay in the execution of the sentence, and within one hour after the Court's decision, which was handed down at 10pm on August 5th, *Medellin* was put to death by the state of Texas.³⁰⁴ Within moments, Mexico filed a formal diplomatic protest to the U.S. government in Washington.³⁰⁵

²⁹⁸ *Id.* at 361-62.

²⁹⁹ *Id.* at 362 (Stevens, J., dissenting) (“Balancing the honor of the Nation against the modest burden of a short delay to ensure that the breach is unavoidable convinces me that the application for a stay should be granted.”).

³⁰⁰ *Id.* at 362.

³⁰¹ Justice Stevens noted that he had written a separate opinion in *Medellin* to emphasize that Texas had the duty to act to remedy the treaty violation. *Id.*

³⁰² Justice Stevens noted that, “it appears that Texas has not taken action to address the serious national security and foreign policy implications” of the breach of the United States' treaty obligations. *Medellin*, 129 S. Ct. at 362.

³⁰³ *Id.* at 364 (Breyer, J., dissenting).

³⁰⁴ *Id.* at 361-62.

³⁰⁵ James C. McKinley, *Texas Executes Mexican Despite Objection from Bush and International Court*, N.Y. TIMES, Aug. 6, 2008, at A2. In its brief to the Court in *Medellin*, the Mexican government had stated that bilateral relations between the U.S. and Mexico would “unquestionably” be affected by the case. Linda Greenhouse, *supra* note 261, at A2.

V. CONCLUSION

It was a year of Supreme Court holdings relating to the death penalty that pleased neither capital punishment abolitionists, nor those strong supporters of the punishment. On the two most highly anticipated rulings, the Court itself was divided—although in what were perhaps unanticipated alliances.

No death sentence had been carried out in the U.S. from the time the Supreme Court had granted certiorari in *Baze v. Rees*,³⁰⁶ in October 2007, until it issued its opinion. This was not the first time that such a moratorium existed. At the time of independence, every state had enacted legislation providing for the death penalty.³⁰⁷ Michigan was the first state in 1846 to abolish its statute and has never enacted legislation to reinstate it.³⁰⁸

Public executions, by hanging or firing squad, were the methods used in the early years of our country. The Eighth Amendment protection against cruel and unusual punishment was held to be applicable only to the punishment of torture.³⁰⁹ It was not until the 1910 case of *Weems v. United States*³¹⁰ that the Court first held that a sentence which was excessive and disproportionate to the offense

³⁰⁶ 128 S. Ct. 1520 (2008).

³⁰⁷ See *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (“It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State.”).

³⁰⁸ The death penalty was, however, not abolished for the crime of treason. Judith Blum & Jordan Steiker, *Introduction*, DEATH PENALTY STORIES 1 (Foundation Press 2009).

³⁰⁹ Justices Thomas and Scalia maintain that view. In their concurring opinion in *Baze v. Rees*, Justice Thomas opines that “in my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain.” *Id.* at 1556 (Thomas, J., concurring).

³¹⁰ 217 U.S. 349 (1910).

committed, would be in violation of the Eighth Amendment.³¹¹

It was not until 1962, however, in *Robinson v. California*³¹² that the Court first incorporated and applied the prohibition against cruel and unusual punishment of the Eighth Amendment to the states.³¹³ Ten years later, the Court in *Furman v. Georgia*³¹⁴ declared in a landmark decision impacting virtually all of the death penalty statutes across the country that the laws as currently written were in violation of the Constitution.³¹⁵ The Court had answered in the affirmative the question posed in the petition for certiorari of Furman: “Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?”³¹⁶

But the moratorium on capital punishment was short-lived. The day after the *Furman* holding, the legislatures of five states declared their intention to formulate new statutes that would meet the Court’s concerns.³¹⁷ The President at the time, Richard Nixon, encouraged such a response by commenting that a death penalty was “needed.”³¹⁸ Four years later, the Court in *Gregg v. Georgia* approved a statute which provided for “guided discretion” and individualized determination by a jury as to who would receive a death

³¹¹ *Id.* at 382.

³¹² 370 U.S. 660 (1962).

³¹³ *Id.* at 667.

³¹⁴ 408 U.S. 238 (1972).

³¹⁵ *Id.* at 256-57 (Douglas, J., concurring).

³¹⁶ Petition for Writ of Certiorari, *Furman*, 408 U.S. 238 (No. 71-5003), 1971 WL 134167 at *1.

³¹⁷ Hugo Adam Bedau, *Gregg v. Georgia*, in DEATH PENALTY STORIES 129, 133.

³¹⁸ *Id.* at 135.

sentence.³¹⁹ The Georgia jury was required to consider and weigh the aggravating factors that may make a particular murder more deserving of a death penalty and contrast those factors to the mitigating circumstances relating to the crime itself or to the defendant's past.³²⁰

The *Baze*-created moratorium³²¹ had meant that there were the lowest number of executions in 2007 since the 1976 *Gregg* holding of the Court.³²² But any hope for the continuation of the moratorium ended with the holdings in *Baze*.³²³ The method of lethal injection used by virtually every one of the thirty-six states that provide for a death penalty³²⁴ was determined not to constitute cruel and unusual punishment.³²⁵

What constitutes cruel and unusual punishment was the focus of the Court in *Kennedy v. Louisiana*³²⁶ as well. Would the 1977 Court decision in *Coker v. Georgia*,³²⁷ prohibiting the death penalty for rape of an adult, be extended to also ban the execution of an individual convicted of raping a child? The *Coker* holding was a landmark and highly important one for the Court. It was the *Coker* decision that established the principle of utilizing a "prevailing standard of decency test" in judging whether a criminal sentence constituted

³¹⁹ *Gregg*, 428 U.S. at 206.

³²⁰ *Id.*

³²¹ See *supra* notes 13-14 and accompanying text.

³²² See PEW FORUM, AN IMPASSIONED DEBATE: AN OVERVIEW OF THE DEATH PENALTY IN AMERICA 1 (2008), <http://www.pewforum.org/docs>. There were only forty-two executions in 2007. *Id.*

³²³ For more information, see Justice Ginsburg's dissenting opinion, which was joined by Justice Souter. *Baze*, 128 S. Ct. at 1567-72 (Ginsburg, J., dissenting).

³²⁴ *Id.* at 1525-26.

³²⁵ *Id.* at 1552.

³²⁶ 128 S. Ct. 2641 (2008).

³²⁷ 433 U.S. 584 (1977).

cruel and unusual punishment in violation of the Eighth Amendment.³²⁸

Coker was the first time that the Court invalidated a sentence because such punishment was determined to be excessive and disproportionate to the crime for which the defendant had committed.³²⁹ It was this “excessiveness” analysis that led to the Court’s holding in 2002 that it was unconstitutional to execute someone who had been mentally retarded at the time of the commission of the crime.³³⁰ The same concerns regarding excessiveness led the Court to the 2005 holding in *Roper v. Simmons*,³³¹ which stated that it was unconstitutional to give a death sentence to an individual who was less than eighteen when the murder was committed.³³²

The excessive and disproportionate focus of the Court led to the five-to-four decision in *Kennedy*, which held that a death sentence for rape of a child was not constitutionally permitted.³³³ The “evolving standard of decency” test of *Coker* led the Court to engage in state-counting. Since only six states had enacted statutes providing for the death sentence for a child rapist,³³⁴ the standard of decency had not reached a point where a death sentence would be accept-

³²⁸ *Id.* at 603.

³²⁹ *Id.* at 598.

³³⁰ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

³³¹ 543 U.S. 551 (2005).

³³² *Id.* at 578.

³³³ *Kennedy*, 128 S. Ct. at 2664-65.

³³⁴ *Id.* at 2651. Justice Kennedy’s opinion for the Court refused to give any weight to legislation pending but not yet enacted in other states. *Id.* at 2656 (“It is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted. There are compelling reasons not to do so here.”).

able.³³⁵ The Court's bright line rule is an easy one to apply—death as a sentence for any crime other than murder is excessive and disproportionate to the crime committed by the offender. “[T]here is a distinction,” the Court observed, “between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other.”³³⁶ Intentional murder is unique, the Court held, in terms of the moral depravity of the perpetrator as well as the injury caused to both the victim and the to the public.³³⁷

The Court in *Snyder v. Louisiana*³³⁸ revisited an issue that has come to the Court a number of times in the past, the use of the peremptory challenges by the prosecutor to strike a potential juror from sitting in a death penalty proceeding. The Court most recently had dealt with this matter in the 2007 case of *Uttecht v. Brown*.³³⁹ The *Uttecht* issue, as in *Snyder*, was whether the trial court's acceptance of the prosecutor's challenge violated the defendant's due process rights to an unbiased, impartial and fair jury.³⁴⁰ *Uttecht*, like *Snyder*, involved a sentence of death.

The Antiterrorism and Effective Death Penalty Act³⁴¹ requires

³³⁵ The Court, in fact, concluded that “there is a national consensus against capital punishment for the crime of child rape.” *Id.* at 2657-58.

³³⁶ *Id.* at 2660.

³³⁷ *Id.*

³³⁸ 128 S. Ct. 1203 (2008).

³³⁹ 127 S. Ct. 2218 (2007).

³⁴⁰ *Uttecht*, 127 S. Ct. at 2222. For an in-depth analysis of *Uttecht v. Brown*, see Richard Klein, *An Analysis of Death Penalty Decisions from the October 2006 Supreme Court Term*, 23 TOURO L. REV. 793, 794-801 (2008).

³⁴¹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28 and 42 U.S.C.). See also 28 U.S.C. § 2254 (1996).

federal courts to defer to the determinations of the state trial courts as long as the lower courts adhered to a reasonable application of the facts.³⁴² But, whereas the Court in *Uttecht* had upheld the prosecutor's use of the peremptory challenge,³⁴³ the Court did not do so in *Snyder*.

The Court in *Snyder* was concerned with an alleged *Batson* violation. In the 1986 case of *Batson v. Kentucky*,³⁴⁴ the Court prohibited the prosecutor's use of a peremptory challenge to eliminate a juror due to his or her race.³⁴⁵ The initial jury pool for the *Snyder* trial consisted of eighty-five jurors, nine of whom were black. Four of the nine blacks were successfully challenged for cause, and the prosecutor used peremptory challenges to strike the other five.³⁴⁶

The all-white jury convicted the black defendant in one day and sentenced him to death on the following day.³⁴⁷ The Court in *Snyder*, in a seven-to-two decision, with Justice Alito writing the opinion for the Court, concluded that the reason provided by the prosecutor as the basis of the challenge was a pretext designed to strike the juror because of his race.³⁴⁸ Notable in the Court's decision was its refusal to simply defer to the trial court's determination that the challenge was not race-based.³⁴⁹ The Court's decision may well serve to give notice to the prosecutor as well as the trial judges that

³⁴² 28 U.S.C. § 2254(d)(2).

³⁴³ *Uttecht*, 127 S. Ct. at 2222.

³⁴⁴ 476 U.S. 79 (1986).

³⁴⁵ *Id.* at 100.

³⁴⁶ *Snyder*, 128 S. Ct. at 1207.

³⁴⁷ *Id.* at 1207, 1210.

³⁴⁸ *Id.* at 1212.

³⁴⁹ *See id.*

any reason given to the court to explain a use of a peremptory challenge after a *Batson* claim has been made must be carefully assessed to ensure that the explanation is not just a pretext for racial discrimination.

To state that the history and background of *Medellin v. Texas* is complex is an understatement. The issues presented concern the obligation of the U.S. to adhere to treaties it signs;³⁵⁰ the interrelationship between our national law and international law;³⁵¹ our foreign relations with Mexico;³⁵² the separation of powers amongst our executive, judicial, and legislative branches;³⁵³ the impact of a Presidential Memorandum instructing a state to proceed in contravention of its criminal procedure regulations;³⁵⁴ and lastly, the validity of a death sentence for Medellin.³⁵⁵

It is undisputed that the U.S. did not adhere to its treaty obligations under the Vienna Convention on Consular Relations.³⁵⁶ The U.S. was required to inform Medellin, a Mexican citizen, that he had a right to receive assistance from the Mexican Consulate.³⁵⁷ No such information was received by Medellin, who was convicted and sentenced to death.³⁵⁸ Mexico brought suit against the U.S. to the ICJ³⁵⁹ and the ICJ determined that the U.S. had violated the Vienna Con-

³⁵⁰ *Medellin*, 129 S. Ct. at 1391 (Ginsburg, J., dissenting).

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Medellin*, 128 S. Ct. at 1391 (Ginsburg, J., dissenting).

³⁵⁶ Vienna Convention, *supra* note 222, at art. 36(1)(b).

³⁵⁷ *Medellin*, 128 S. Ct. at 1353.

³⁵⁸ *Id.* at 1354.

³⁵⁹ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 16 (Mar. 31).

vention. Although the ICJ did not act as requested by Mexico to nullify the conviction of Medellín, the Court did order the U.S. to provide “review and reconsideration” of the conviction.³⁶⁰

The Texas criminal procedure statutes, however, prohibited a defendant from filing more than one writ of habeas corpus.³⁶¹ Medellín had filed a habeas petition before the ICJ decision had been issued, and the Texas courts prohibited a second filing.³⁶² President Bush, however, issued a Memorandum to the state courts to adhere to the decision of the ICJ.³⁶³ The Texas Court of Criminal Appeals did reconsider its refusal to entertain a second petition for a writ, but once again ruled that the Texas rules would control and no exception would be made.³⁶⁴ The ICJ decision had specifically stated that the review was to occur without regard to any state procedural default rules.³⁶⁵

The six-to-three decision of the Court in *Medellin* concluded the Texas rules would apply.³⁶⁶ Neither the ruling by the ICJ, nor the President’s Memorandum would act to preempt the limitations placed by Texas on successive habeas corpus petitions.³⁶⁷ A state may retain the power to choose whether or not to comply with a treaty that is

³⁶⁰ *Id.*

³⁶¹ *Medellin*, 128 S. Ct. at 1353.

³⁶² *Id.* at 1356.

³⁶³ *Id.* at 1355. The memorandum stated that the U.S. will discharge its obligations under the ICJ holding by having the state court give effect to the decision “in accordance with [the] general principles of comity.” *Id.*

³⁶⁴ The Texas court had previously affirmed the ruling of a lower court that Medellín had “failed to show that any non-notification affected the validity of his conviction and sentence.” *Ex Parte Medellin*, 223 S.W.3d 315, 322 (Tex. Crim. App. 2006).

³⁶⁵ *Medellin*, 128 S. Ct. at 1355.

³⁶⁶ *Id.* at 1372.

³⁶⁷ *Id.*

signed by the U.S. and ratified by Congress. The decision of the Court to uphold the right of the State of Texas occurred even though the impact of the holding, in the eyes of the three dissenting justices, may be of great concern. The holding, Justice Breyer wrote, complicates the President's role in determining foreign affairs, may worsen relations with Mexico, may harm Americans who may be arrested while traveling overseas, and may have the effect of "diminishing our Nation's reputation abroad as a result of failure to follow the 'rule of law' principles that we preach."³⁶⁸

Less than five months after the Court's decision, the matter was again back before the Court; Medellin was seeking a stay in his execution.³⁶⁹ Although the Court had not in its initial consideration of the *Medellin* case directly considered the matter of Medellin's death sentence, the death penalty played a major role in Mexico's decision to bring suit in the ICJ.³⁷⁰ The European Union, a strong opponent of the death penalty, and especially the continuing use by the U.S. of the death penalty, had joined an amicus brief on behalf of Medellin.³⁷¹

³⁶⁸ *Id.* at 1391 (Breyer, J., dissenting).

³⁶⁹ *Medellin*, 129 S. Ct. at 361.

³⁷⁰ See William Schabas, *International Law, the United States of America and Capital Punishment*, 31 SUFFOLK TRANSNAT'L L. REV. 377, 379 (2008).

³⁷¹ Brief for the European Union et al. as Amici Curiae in Supporting Petitioner, *Medellin*, 128 S. Ct. 1346 (No. 06-984), 2007 WL 1874804. Other amici briefs filed in Medellin's behalf include: Brief of International Court of Justice Experts as Amici Curiae Supporting Petitioner, *Medellin*, 128 S. Ct. 1346 (No. 06-984), 2007 WL 906700; Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner, *Medellin*, 128 S. Ct. 1346 (No. 06-984), 2007 WL 1886206; Brief of the American Bar Association as Amici Curiae Supporting Petitioner, *Medellin*, 128 S. Ct. 1346 (No. 06-984), 2007 WL 1886208. Those filed in support of Texas include: Brief of Washington Legal Foundation et al. as Amici Curiae Supporting Respondent, *Medellin*, 128 S. Ct. 1346 (No. 06-984), 2007 WL 2428385; Brief of the Commonwealth of Virginia et al. as Amici Curiae Supporting Respondent, *Medellin*, 128 S. Ct. 1346 (No. 06-984), 2007 WL 2428386; Brief of the Criminal Justice Legal Foun-

The Court, in a five-to-four decision, denied the application for a stay. The Court concluded that neither Congress nor Texas were likely to act to give legal weight to the ICJ order. It had been fourteen years since Medellín had initially been sentenced to death.³⁷² In spite of a strong dissent by Justice Breyer that “the execution would violate our international treaty commitments”³⁷³ and by Justice Stevens that the “honor of the Nation” is at stake,³⁷⁴ Medellín was executed one hour after the Court’s denial of the petition for the stay.

Although the Court’s decisions constituted a mixed bag—both for supporters and opponents of the death penalty—it was a very important term for the abolitionists. Justice Stevens, who voted in the majority back in 1976 in *Gregg v. Georgia* for the reinstitution of the death penalty after a four-year lapse,³⁷⁵ declared in *Baze v. Rees* that he now regarded the death penalty to be unconstitutional.³⁷⁶ He relied on his own experience as a jurist in his determination that a death sentence is patently excessive and constitutes cruel and unusual punishment. In doing so, Justice Stevens³⁷⁷ joined former Justices Brennan,³⁷⁸ Marshall,³⁷⁹ Blackmun,³⁸⁰ and Powell³⁸¹ in reaching a

dation et. al. as Amici Curiae Supporting Respondent, *Medellin*, 128 S. Ct. 1346 (No. 06-984), 2007 WL 2428388.

³⁷² *Medellin*, 129 S. Ct. at 362 (Stevens, J., dissenting).

³⁷³ *Id.* at 363 (Breyer, J., dissenting).

³⁷⁴ *Id.* at 362 (Stevens, J., dissenting).

³⁷⁵ *Gregg*, 428 U.S. at 158.

³⁷⁶ *Baze*, 128 S. Ct. at 1551 (Stevens, J., concurring).

³⁷⁷ Justice Steven cites Justice White stating that the imposition of the death penalty was “pointless” and had only “negligible returns.” *Id.* (*Furman*, 408 U.S. at 312 (White, J., concurring)).

³⁷⁸ *Furman*, 408 U.S. at 305 (“Today death is a uniquely and unusually severe punishment.”).

³⁷⁹ *Id.* at 360 (“[C]apital punishment . . . violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.”).

conclusion that the imposition of the death penalty is, per se, in violation of the Constitution.

³⁸⁰ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (“[T]he death penalty experiment has failed.”).

³⁸¹ Justice Powell’s repudiation occurred only after his retirement from the Court. See David Von Drehle, *Retired Justice Changes Stand on Death Penalty: Powell is Said to Favor Ending Executions*, WASH. POST, June 10, 1994, at A1.

