THE DEATH PENALTY IN AMERICA

Hopkins @ Home

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Welcome to Hopkins @ Home!

I am Steven Schneebaum, Practitioner-in-Residence and Interim Director of the International Law & Organizations Program at the School of Advanced International Studies in Washington, D.C., and it is a great pleasure to be able to speak with you this afternoon.

The topic of my talk today is The Death Penalty in America. In the interest of full disclosure, I need to state my standpoint on this issue at the outset. I have represented men on Death Row since the mid-1980s. Two of my clients have been executed: one in Texas in 1995, and one in Virginia in 2000. And my colleague, Cynthia McCann, and I are currently battling the State of Alabama to save the life of our client who has been on the Row since 1997.

I am a categorical death penalty opponent. But my goal here is not to advocate for a position on capital punishment as such. It is to explain how the death penalty is applied in the United States today. As a lawyer, I can make a case for judicial execution in the abstract. But the problem with the debates that all too frequently occupy the political space is that the law does not operate in the abstract. It affects real people, and has real consequences, including in this instance the difference between life and death. So the question must be seen as a very practical one, and I propose to frame it in these terms: does the application of the death penalty in America today satisfy the standards that a democratic society requires for the laws and principles by which it is governed?

What are those requirements? I suggest that we look at four principles that are fundamental elements of the rule of law. We should – indeed we must – insist that every part of our legal system not just aspire to, but reflect, these values. And this must be true not only on paper, in our founding documents, but in practice.

This exercise, testing whether high-sounding language of our Constitution translates into reality, has been a significant influence on our nation's history. Everyone remembers the words of Lincoln's address at Gettysburg: he described the country over which he presided as "conceived in Liberty, and dedicated to the proposition that all men are created equal." Yet that country was in the midst of a horrific war to determine whether "that nation, or any nation so conceived and so dedicated, can long endure." We still face that challenge.

The four propositions that I argue are integral to any legal regime worthy of that description are these:

1. The law must apply to all of its subjects **equally**, and in particular must take no inappropriate account of such immutable factors as race, sex, religion, national origin, age, or sexual orientation;
2. The law must be **predictable**, meaning that outcomes of legal processes, even if they should never be mechanical and soulless, may not be arbitrary or inexplicable;
3. The law must be **proportionate**, by which I intend that the severity of the state's response to acts offending against its good order must be capable of adjustment, depending on the nature of the act and the culpability of the offender; and
4. The law must be **consistent** with the principles and practices followed in the rest of the world, or when it differs, the divergences must be justifiable, paying what Thomas Jefferson called "a decent respect to the opinions of mankind."

Having stated the tests this way, it will be no surprise that the death penalty in America, as it is interpreted and applied today, flagrantly fails each and every one. The empirical evidence behind that claim, I argue, is clear.

Equality, predictability, proportionality, and consistency with the values of the community of nations: I propose to look at each in turn. But before we do that, let me present a few statistics to give our review of the facts some context, and a little history, so that the analysis I am offering makes sense.

I. Some Numbers

There are, as of this very moment, approximately 2,550 men and women on Death Row somewhere in America. With the imminently anticipated statutory change in Virginia – which will become the first former Confederate State to abandon the practice -- 27 States, the Federal government, and the military retain the death penalty. However, this number is a bit misleading. Three of those States (CA, OR, and PA) currently have governor-imposed moratoria: that is, all writs of execution have been suspended, with various provisions for when or whether they may be revived. 730 of the total number of prisoners under death warrants are in one of those States.

In addition, 14 other States have the penalty on the books, but have not conducted an execution in five or more years. Only five executed someone in 2020: Alabama, Georgia, Missouri, Tennessee, and Texas. And of course, in its twilight months, the Trump Administration ordered the execution of 13 Federal prisoners over a period of six months, more than all of those killed by the United States in the seven decades between 1950 and 2019.

There has been a significant drop in executions over the last 10 years. There were 295 judicial killings between 2011 and 2020, or an average of under 30 per year, while between 1991 and 2010 the annual average was 55. In 1999, the high-water mark, 98 people were put to death in this country, 35 of them (one every 10 days) in the State of Texas alone.

More dramatic still has been the sharp decline in new death sentences pronounced. In each year during the 1990s, between 250 and 310 capital sentences were handed down across the country. In 2011, that number dropped for the first time to below 100. Since 2015, the number has been less than 50, and last year, only 18 new death sentences were issued (and five of those were in California, a moratorium State).

II. Some History

Judicial executions were, of course, commonplace in the early days of the country. Thirty-two executions were carried out, mostly by hanging, in the original 13 States in 1787, the year the Constitution was ratified. And while the Fifth Amendment specifically makes reference to "capital crimes," the Eighth Amendment also forbids "cruel and unusual punishments," and the Fifth and Fourteenth require that all convictions and sentences be rendered in accordance with "the due process of law." Both of those open-textured phrases have been the subjects of extensive legislative and judicial interpretation since the very first days of the Republic.

In 1972, in the landmark case of *Furman v. Georgia*, the Supreme Court held, by five votes to four, that the death penalty as then administered was a violation of both constitutional guarantees. What made death sentences "cruel and unusual" and a denial of "due process" was the arbitrariness by which they were handed out. Juries had too much discretion in rendering their decisions, and prosecutors too much latitude in their arguments that a defendant deserved to die. The obvious potential for decisions to reflect racial prejudice, especially but not exclusively in the south, was constitutionally unacceptable.

Between 1968, when *Furman* was first reviewed at the lower court level, until 1976, not a single person was executed in the United States. However, States intent on restoring the practice took *Furman* not as a condemnation but as a challenge. If arbitrariness was, so to speak, the fatal flaw in their sentencing schemes, it could be fixed: by reducing or removing discretion, and by adopting statutes that appeared to require a measure of control over the kinds of cases that were potentially capital, and the kinds of defendants who would be eligible for the ultimate sentence.

Four years after the *Furman*, the Court found that the State of Georgia had succeeded in satisfying the constitutional objections. In *Gregg v. Georgia*, the Supreme Court approved as not cruel and unusual, and not violative of due process, a formula that split capital trials in two. In the first phase, the jury is tasked with the usual assignment of determining, unanimously and beyond a reasonable doubt, that the defendant is guilty of the crime charged, which must be specifically defined by law to contemplate the possibility of a capital sentence. And after the conviction, the jury is required to address the penalty to be imposed. It must take into account aggravating factors presented by the State, and mitigating ones offered by the defense. Aggravators may include the awfulness or brutality of the crime of which the defendant has now been convicted: was there excessive violence, or gratuitous abuse, such as making the victim beg for her life? Other aggravators could be that the crime involved homicide of a child, or multiple

murders, or the killing of a police officer, or a contract killing. States have great latitude in developing their own lists.

The defendant, by the same token, must have the opportunity to offer mitigation evidence, urging a sentence less than death. It might be statutory – the age or mental capacity of the perpetrator, for instance – or it could simply be evidence to demonstrate that death would not be, in Justice Sandra Day O'Connor's words (in a decision released on the same day as *Gregg*), "a reasoned moral response to the defendant's background, character, and crime."

That is the law today in all jurisdictions that conduct capital trials. All provide for the bifurcation of proceedings into guilt and punishment stages. The jury, incidentally, has the power to recommend, but not to issue, a sentence. In every State but one, if the jury recommends against the death penalty, the judge may not impose it. And if the jury recommends death, the judge has discretion to dial the sentence back to life imprisonment. The one remaining State that permits what is called "judicial override" – that is, the decision by a judge to impose a death sentence against the wishes of the jury – is Alabama. More of that later.

Although *Gregg* lifted the constitutional ban on capital punishment, the Supreme Court has not definitively slammed the door on the Eighth Amendment argument concerning "cruel and unusual punishment." "To determine whether a punishment is cruel and unusual," the Court has pronounced, "courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" Applying those elusive "evolving standards," the Court forbade the execution of individuals with intellectual disabilities in 2002, as well as those below the age of 18 at the time they committed the murders of which they were convicted, in 2005. And in 2008, the Court limited the application of the death penalty to homicide crimes. This, by the way, ended one especially nefarious use of capital punishment, which was to allow the execution of Black men for sexual violence against white women, while white men who committed identical crimes against Black women were virtually never condemned to die.

Subject to those and a few other constraints, however, the States are permitted a wide margin of appreciation in deciding precisely what categories of homicides might make a perpetrator eligible for the ultimate punishment.

Over the last several years, the majority of death penalty "impact litigation" reaching the Supreme Court has focused on the methods of execution. Most States direct the use of lethal injection as the sole means of conducting judicially-sanctioned killings. The protocols for carrying out executions have been challenged repeatedly, on the grounds that lethal drug "cocktails" subject prisoners to undue pain and suffering.

The Court, however, with its decidedly conservative majority, has shown little patience for such cases. Interestingly, however, while the Court has refused to intervene, pharmaceutical manufacturers have been less reluctant. Drug companies, in Europe in particular, have refused to supply products to be employed to end, rather than to preserve, human life. This has not,

however, had the effect it was probably intended to have: instead of deterring executions, it has impelled States intent on conducting them to investigate unproven or even archaic means. My client in Alabama, for instance, has recently been presented with the option of allowing the State to asphyxiate him with nitrogen gas, just in case the necessary drugs are not available on the day he is scheduled to die.

I hope I have now laid sufficient groundwork to conduct a sensible examination of the four questions with which I began my talk. If you are not persuaded that I have done so, please let me know during the Q&A.

III. The Analysis of the Four Factors

1. Is the death penalty in America applied equally?

In a word, no. It is not. Not even close. Inequalities may be seen in two critical respects: race and geography. The latter is perhaps more obvious, and former more insidious. Let's look at both.

As I have told you, there are about 2,550 people on Death Row in America today: 2,500 men, and 50 women. Of those 2,550, 1,062 are Black: 42% of the total, roughly three times the portion of the U.S. population that is Black. All minorities – people who are Black, Hispanic, Asian, or American Indian – make up 38% of the population of our country, but 58% of the population of Death Row. The probability that such disparities are the result of chance are small, but we do not need to speculate: numerous facts give us clues as to what is really going on here.

If we are looking for the really dramatic evidence of race being a significant influence on who gets the death penalty and who does not, we need to look not at the race of the perpetrators, but at the race of the victims. And what we see may be shocking. Of the 17 people executed in the United States last year, five were Black. Bad enough. But of those 17, only two were convicted of murdering a Black victim. And this is not an anomaly: it is a well-documented pattern.

As long ago as 1987, this very issue was presented to the Supreme Court. An exhaustive study of the death penalty in the State of Georgia demonstrated that, even after taking all non-racial variables into account, "defendants charged with killing white victims were 4.3 times [more] likely to receive a death sentence than defendants charged with killing Black victims." The Court in *McCleskey v. Kemp* did not contest the accuracy of those numbers. Rather, the 5-4 majority held that the disparity did not matter, because there was no evidence that it had been the result of a conscious, deliberate mechanism by law enforcement personnel or prosecutors. This was, and remains, a jaw-dropping conclusion: after all, disparate impact can be accepted as proof of discrimination even in employment disputes without any demonstration that it was intentionally brought about.

And there is more. In States, like Texas, where the death penalty is most common, it is the high-population counties where it is most frequently sought. And of course in urban areas minority populations are highest. Of the 570 people executed in Texas since 1982, 238 – 42% -- were

convicted of homicides in the three most populous counties: Harris (Houston), Dallas, and Bexar (San Antonio), which during the relevant period represented less than a third of the population of the State.

Harris County has been a hotbed of death penalty prosecutions for at least two decades. But the problem is not limited to Texas. As Justice Stephen Breyer recently observed in a Supreme Court dissenting opinion, from 2004-2009, "just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for **all** death sentences imposed nationwide."

What explains this? In many U.S. States, local prosecutors, and even local judges, are popularly elected, sometimes even in party-affiliated elections. "Law and order" makes for a powerful political platform. Prosecutors who seek the death penalty, and judges who impose it, present themselves to the voters as defenders of law and order, and judges' willingness to send defendants to Death Row demonstrably improve their chances of keeping their jobs. And in a majority-white jurisdiction, where racial animus may lie not very far beneath the surface, there is a clear if perverse incentive for death sentences to be political resume-builders.

Obviously, because more than half of the U.S. States either do not have the death penalty on the books or do not impose it in practice, similar crimes are manifestly not treated equally across the country. All of these facts demonstrate beyond doubt that capital punishment in the United States is not applied equally. Whether a defendant, and a crime, are death-penalty eligible depends, in addition to the facts and circumstances of the crime and the elements of proof available to the prosecution, on the race of the victim, the race of the perpetrator, and the place where the event occurred. The death penalty as applied in America clearly fails the first criterion of this analysis: it is not consistent with the aspirational words carved above the entrance to the Supreme Court building: "Equal justice under law."

2. <u>Is the death penalty applied predictably?</u>

Perhaps the facts and figures I have presented already demonstrate the answer to this question. But there is more to consider: even within a State and within a county, is there any consistency in the outcomes of capital prosecutions?

To answer these questions, we have to look a little more closely into the types of crimes that potentially qualify as capital murder, and the types of considerations that might be presented as aggravators, enhancing susceptibility for execution, and as mitigators, suggesting the opposite.

In no American jurisdiction is capital punishment available for simple first-degree murder, even with the clearest premeditation and greatest malice aforethought. "Capital murder" is "murder-plus," and in most places, that largely means first-degree murder in the course of committing another first-degree felony, almost always robbery or rape. But, of course, to obtain a conviction for any offense, the State must prove every element of the crime beyond a reasonable doubt, to

the unanimous satisfaction of the jury. Often, therefore, a capital murder trial will turn not on whether the defendant killed the victim brutally and viciously as charged, but whether the independent felony has been proved. And on the jury's view of that separate crime, the life of the defendant hangs in the balance.

In a Texas case, for instance, there was little doubt that the defendant, a hitchhiker, killed the driver who picked him up. But the defendant was also accused of stealing the victim's wallet, which he adamantly denied. Notwithstanding the brutality of the crime, it could not be a capital offense absent that element. In effect, the theft of a few dollars became the fulcrum on which the case turned, and when the State failed to carry its burden of proof, the culprit was sentenced to life imprisonment for first-degree murder.

That is not, of course, the only quirk in death penalty cases in which relatively insignificant factors determine the ultimate question. How does a jury interpret an instruction that age may be considered a mitigating factor? Say the defendant was 18 at the time of the crime. We were all 18 once: are we to understand that 18-year-olds are impressionable and unformed, unable to resist impulses that might lead them to violent crime? But if that is the case, then how can a death sentence ever be an 'Individualized moral response" to the act of an 18-year-old? And since this defendant teenager has been convicted of a violent crime, what does it mean to take his age into account as mitigation?

Once a defendant has been found guilty and sentenced to death, and his appeals from both have been exhausted, it is open to him to seek collateral review of both the conviction and the sentence, first in State and then in federal court. That means that he may seek a writ of habeas corpus: a control on the power of the government codified by the British Parliament in 1679, during the reign of Charles II. The writ requires the state to justify, according to law, the detention of a person in its custody. It is considered so fundamental to our legal system that the Constitution itself provides that "the privilege of the writ" may virtually never be suspended.

Collateral review is not the equivalent of another appeal. A petitioner may not argue before the reviewing court that he is not in fact guilty, or reformulate his defenses that the jury has already rejected. But he may put before the court his claim that his trial was corrupted by illegality, or that he was denied a constitutional right. It is at this stage where the prisoner may present his claim that, for example, he was not permitted to confront his accuser, or to compel the testimony of witnesses in his defense, or to be tried by a jury properly composed of his peers. And it is here that he may complain that he was not afforded effective assistance of counsel, as required by the Sixth Amendment.

As might be expected, capital defendants are almost never able to afford counsel on their own. And capital representation is extraordinarily intensive in time and resources. So nearly every person at risk of a death sentence is represented at trial either by public defenders – a corps of lawyers notoriously overworked and underpaid, often simultaneously tasked with multiple full-time cases under impossible time pressures – or by attorneys who sign up to rosters maintained

by local courts, to take on defense cases as contractors to the State. Many public defenders, and many lawyers who make themselves available for appointment, are truly outstanding professionals. Many are motivated by a desire to make a difference in how justice is administered, as they would say, one defendant at a time.

But some are not. Some are lawyers simply down on their luck, with nowhere else to turn for a livelihood. Some are coming to the end of their careers and are burned out. And no matter how dedicated they may be, they are at the mercy of the system that engaged them. In Alabama, at the time our client was tried in 1996, his counsel was paid $20 per hour for investigation, interviewing his client and any witnesses, preparation, drafting and filing of motions, and any other pretrial necessities, and $40 per hour for time in court, including presenting the defense at a capital trial.

One should not be surprised, therefore, at the horrific pictures that emerge from the caselaw reviewing the performance of defense counsel in death penalty cases. There are reported instances of attorneys falling asleep, or being drunk, during proceedings. There are instances of newly-admitted lawyers, just weeks after having been called to the Bar, being handed capital cases to defend. It is hardly surprising that appointed counsel may be very far from diligent in investigating the crimes of which their clients are accused, or the backgrounds of the clients themselves that may provide mitigation should they be convicted of capital murder.

In our current case, appointed counsel was experienced in criminal defense. But for some reason lost in history, he did not interview a single potential defense witness. He spent a total of half an hour on the phone with his client's seriously dysfunctional parents, and learned nothing about his upbringing, if it is even accurate to use that word. He did no investigation of the statutory aggravators on which the State indicated that it intended to rely to obtain a sentence of death.

Tony Barksdale was convicted of capital murder, and the trial proceeded to the punishment phase. And there, defense counsel offered no opening statement, called no witnesses, introduced but a single document into evidence, and rested. In the case in mitigation of sentence – that is, the case in which he had to show the jury why his client should not be executed – counsel spoke a total of 21 words. The defense presentation lasted less than a minute, and the closing argument five minutes.

Is that shocking? Well, I think so. But here is something more shocking: on collateral review, the local court signed an order denying habeas corpus, every word of which was written by the prosecution. That disposition of the case was upheld by the Alabama Court of Criminal Appeals as constitutionally permissible, and the State and U.S. Supreme Courts denied further review.

After State remedies are exhausted, a prisoner has one final opportunity in federal court, to obtain a writ of habeas corpus if it can be established that State proceedings involved constitutional violations. But a claim of ineffective assistance of counsel obviously cannot be entertained from every defendant who believes he was convicted unfairly. So how do courts decide? Suffice it to say that each and every element coming into play in such cases has been the

subject of extensive, and by no means always consistent, judicial interpretation. And where the outcome – literally a matter of life and death – depends on such vagaries, the last adjective that could be ascribed to the system is "predictable."

And it gets even worse. President Clinton, a vocal death penalty supporter, signed into law a legislative monstrosity entitled the "Antiterrorism and Effective Death Penalty Act" of 1996. That statute was intended to cut back sharply on the availability of federal relief for State death penalty convicts. And it has done just that: creating an impenetrable mass of linguistic thickets, providing a new list of ways in which federal constitutional claims can be foreclosed before they are even raised, depending upon whether certain words were or were not included in pleadings filed at the State level.

In a few cases, including one as recently as last year, the Supreme Court has stepped in to prevent obvious injustice resulting from what is essentially the collusion of prosecutors and State judges to see death sentences affirmed and carried out. But despite the factors that might cause an observer to expect a sympathetic ear on the High Court, the vast majority of habeas petitions are simply denied without opinion. Ours, incidentally, is currently pending: we expect to hear from the Supreme Court by the end of April.

3. Is the death penalty applied proportionately?

Punishment is proportionate to the crime – as logic and good order dictate that it should be – if it reflects the factfinder's assessment of both the offense and the offender. Many who defend the death penalty as a law enforcement device declaim that there are some crimes so horrible, and some criminals so evil, that society needs no further justification for putting those people to death. Let's put aside the philosophical or theological question of whether there are human beings who can be said to be beyond redemption – certainly the New Testament provides no support for that view. But the role assigned to juries in deciding who lives and who dies asks them to engage in rank speculation. In Texas, for example, juries must opine on whether they believe that the defendant would commit another crime of violence if he were allowed to live. But how can anyone know that? And how can we be sure that even the 12 members of the same jury asked that question are understanding it in the same way?

In this context, it would be remiss of me to ignore what many people feel is the most powerful argument against the death penalty: it is irreversible, and should an innocent person be executed, the State itself would have committed an indefensible homicide. Like many capital defense lawyers, I am drawn into this debate somewhat reluctantly. I do not know, and I submit that it cannot be known, how many "innocent" people have been executed in the United States. Surely there have been capital cases in which perfectly viable defenses were ignored, or were excluded by prosecutors' misconduct or judges' clear errors. But even in those cases, how can we, who were not on the jury, be confident that the defendant was "innocent," since that question was not asked in the courtroom?

The word “innocent” is not a precise legal term. Juries never declare a defendant “innocent”: that is not what as at issue in a criminal trial. If by “innocent” we mean that the defendant did not commit the offense, but was a hundred miles from the scene, then of course the prospect of killing him is simply barbaric. But what if he did pull the trigger – that is, he was responsible for the homicide – but the factors categorizing the crime as capital murder were absent? He was guilty of murder, but not of capital murder. And of course this is a common occurrence, and it is troubling even though the defendant was not “innocent” of crime.

The bottom line is that the death penalty is simply not, as a matter of fact, reserved for “the worst of the worst.” Nor does the “whatabout” argument – the one that asks about the mass murderers, the Adolf Hitlers, the Osama bin Ladens – have any discernible relationship to reality.

There is no guarantee, to begin with, that you and I will necessarily agree in our assessment of the instances of indisputable inhumanity. Some people believe that, as creatures made in God’s image, we cannot resign our membership in the human race, with all the rights and privileges it brings. But even if we do agree that a small number of notorious figures have by their actions relinquished the right to live, it is most illogical to base a criminal justice system on the premise that we might someday have to determine the sentence for the convicted architect of a Holocaust.

It is far too easy for a jury not only to convict someone who admits to being a member of a gang, or who has never held a “proper job,” or who has lived his life at the margins of society, for the crime of capital murder, but then also to impute to him the additional motives required in aggravation of sentence. It is far too easy to ignore the evidence of a deprived, abusive, or abandoned upbringing, that might be offered in mitigation. Whether an individual has in some sense sacrificed the right to live, is a question that is at best ungoverned, subject to the prejudices and presuppositions to which we are all ourselves susceptible.

Some in this audience may be old enough to remember the moment, during the first debate in the 1988 presidential campaign, when Michael Dukakis, the Governor of Massachusetts and a death penalty opponent, was asked by the reporter Bernard King, “whether he would support the death penalty should his wife, Kitty, be raped and murdered.” His answer was this: “No, I don't, Bernard. … I've opposed the death penalty during all of my life. I don't see any evidence that it’s a deterrent, and I think there are better and more effective ways to deal with violent crime.” That bloodless answer may well have sealed the fate of his longshot chances for the presidency (although the race-baiting by the George H.W. Bush campaign that followed surely took its own toll).

Of course, every time someone is “raped and murdered,” that person had someone, perhaps many someones, who felt for her as Gov. Dukakis obviously felt for his wife. The death penalty cannot be allowed when the victim is my daughter, but not when she is yours. The answer to King’s question is that we have a legal order in our society precisely to prevent personal inclinations to vengeance from being carried out. To allow Michael Dukakis’s, or your, or my,

feelings to determine how society deals with those who have offended against its rules is to invite chaos. So would Gov. Dukakis like to kill the person who mutilated someone he loved? Probably. But that is not relevant to whether we should tolerate the use of the death penalty.

No, there is no evidence for the view that the death penalty in America is reserved for "the worst of the worst."

4. Finally, is the death penalty consistent with the laws and practices of other countries?

There is, of course, a vibrant debate among lawyers, academics, and judges about the proper role, if any, of international and foreign law in understanding our Constitution. Justice Breyer has for years been the most prominent champion of a flexible approach to that question, while Justices Thomas and Alito are, and the late Justice Scalia was, the leading opponents. But as Justice Kennedy, no liberal himself, made clear, when the drafters of the Constitution used such phrases as "cruel and unusual punishment," they clearly anticipated that the interpretations of their words would change over time. Obviously what we deem "cruel" in 2021 is far different from what the white Christian male landowners who drafted the Bill of Rights – many of whom purported to own other human beings as property – thought was "cruel" in 1791.

The United States stands nearly alone among the nations of the developed world is its use of capital punishment. The Organization for Economic Cooperation and Development has 36 members: those states most advanced according to economic and social metrics. Of those 36, precisely two, the United States and Japan, still provide for judicial execution as punishment for crimes. It has been abolished everywhere else.

This element of the much-vaunted "American exceptionalism" is not seen as a detail or an endearing quirk among even our closest allies. To the contrary, membership in the Council of Europe requires repudiation of the death penalty, and its rejection remains an important focus of concern around the world.

The fact that the U.S. is an outlier on this issue, of course, does not mean that we are wrong. But it does mean that the spirit of the times, as seen through the lens of western democratic states, no longer countenances this practice. Yes, the International Covenant on Civil and Political Rights, in force since 1976, does not require parties to abolish capital punishment. But it urges abolition, and international human rights law has embraced numerous instruments to promote that goal. To the question, then, whether our adherence to the practice is consistent with the laws and principles of our peers in the international community, the answer most certainly is, again, no.

IV. Conclusion

I hope I have succeeded in demonstrating, in this presentation, that the death penalty as applied in the United States today cannot be reconciled with the fundamental tenets of our democracy. It is not applied equitably, predictably, or proportionally. And it is simply out of synch with the values inspiring virtually every other country on earth of our stage of economic and cultural development.

Members of the audience still attentive by this point will perhaps have noticed two empirical arguments to which I have not even alluded. I have not argued that capital punishment is demonstrably not a deterrent to crime, or that it is an enormous waste of economic resources. Although I think that both of those statements are true, even if both could be disproved in fact, neither could be said to justify the death penalty as it is applied in America today,

With that, let me again thank the organizers of Hopkins @ Home for inviting me to deliver this talk. I hope I have provoked some critical thinking, and perhaps have challenged some assumptions that listeners had previously entertained. I do hope I will be able now to try to answer your questions, and of course I am grateful to all in virtual attendance for your interest and attention.

Thank you!