Whose Law Is It Anyway? The Cultural Legitimacy of International Human Rights in the United States

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WHOSE LAW IS IT ANYWAY? 
THE CULTURAL LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS IN THE UNITED STATES

ELIZABETH M. BRUCH*

“The Court’s discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since ‘this Court . . . should not impose foreign moods, fads, or fashions on Americans.’” - Justice Antonin Scalia (2003).1

“It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.” - Justice Anthony Kennedy (2005).2

“We have our own law, we have our own traditions, we have our own precedents, and we should look to that in interpreting our Constitution.” - Justice Samuel Alito (2006).3

INTRODUCTION

The relationship between the United States and international law is complex and evolving, implicating political, cultural, and legal considerations. In the realm of international human rights law, the relationship is particularly and deeply contested. In recent years, the bounds of that relationship have been challenged in the national media, in public discourse, and in all three branches

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of the federal government. In an era where the public focuses much of its attention on the appropriate role of the judiciary, a series of United States Supreme Court decisions that cite to international human rights law have been controversial. In its 2002 decision in *Atkins v. Virginia*, its 2003 decision in *Lawrence v. Texas*, and its 2005 decision in *Roper v. Simmons*, the Supreme Court invoked international human rights law and the practice of other nations in resolving issues of fundamental rights to life and privacy.

The Court’s action has drawn both praise and vilification and has invited serious inquiry into the legitimacy of such a judicial approach. Most scholars who have undertaken this inquiry have considered the Supreme Court’s conduct from either a perspective of comparative constitutionalism, or as a


5. 536 U.S. 304 (2002) (prohibiting the execution of the developmentally disabled). Although the Court used the descriptive term of “mentally retarded,” which was the language used in the earlier proceedings, this Article will instead use the term “developmentally disabled” to refer to the individuals whose rights are at stake in the decision.


matters of the domestic implementation of international law. As an alternative to those perspectives, this Article examines the national controversy over the Supreme Court’s decisions in Atkins, Lawrence, and Simmons through the lens of international human rights law. When states undertake international human rights obligations, they become responsible for ensuring compliance with those obligations within their domestic legal orders. This state responsibility includes punishing violations of human rights, as well as respecting and ensuring the free exercise of those rights. Governments are expected to take degrees of deference to foreign materials, and generally opposing U.S. deference to these materials; Eskridge, supra, at 556-59 (approving use of foreign materials as indicative of an “emerging normative consensus,” as a matter of “international comity,” and as a recognition of “pluralism”); Joan L. Larsen, Importing Constitutional Norms from a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283, 1298 (2004) (criticizing domestic use of foreign materials unless there is adequate justification for its use); Yoo, supra, at 393 (opposing U.S. deference to foreign materials generally).

9. The main issue from this perspective is whether international law has become binding at the domestic level; of course, this would never be an issue regarding foreign law sources. See, e.g., Diane Marie Amann, “Raise the Flag and Let It Talk”: On the Use of External Norms in Constitutional Decision Making, 2 INTL. J. CONST. L. 597, 608-09 (2004).

10. The major human rights treaties contain general language of obligation to this effect. For example, Article 2 of the International Covenant on Civil and Political Rights provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.


11. Id.; see also Velásquez Rodríguez Case, 1988 Inter-Am. C.H.R. (ser. C) No. 4, at 164-65 (July 29, 1988) (The obligation of states to ensure free and full exercise of human rights “implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”).
the lead in creating domestic conditions that foster fulfillment of their international human rights obligations. The relative ease or difficulty of this implementation process depends largely on the degree to which the international standards comport with existing domestic values.12

Although the United States has often taken the lead globally in advancing international human rights, it has been notoriously reluctant to ratify international human rights agreements or to incorporate those agreements into domestic law.13 Some of this reluctance has stemmed from a U.S. perception that domestic law already provides significant protection for individual rights.14 This sense of international leadership and dominance persists in the current resistance to international law, but it has been increasingly overshadowed by concerns grounded in the converse notion of isolation and fear that other nations are now mandating standards for the United States.15 Despite frequent

12. Harold Hongju Koh, Why Do Nations Obey International Law?, 106 YALE L.J. 2599, 2645-46 (1997) (discussing the theory that internalized compliance and obedience will increase comportment with international law); see Abdullahi A. An-Na'im, State Responsibility Under International Human Rights Law to Change Religious and Customary Laws, in HUMAN RIGHTS OF WOMEN 167, 169 (Rebecca J. Cook ed., 1994) [hereinafter An-Na'im, State Responsibility] ("In practice, a state's willingness or ability to influence practices based on religious and customary laws depends on many factors, any of which could cause difficulty in situations where domestic religious and customary laws are likely to be in conflict with internationally recognized standards of human rights.").


14. See, e.g., Abdullahi A. An-Na'im, Round Table Discussion on International Human Rights Standards in the United States: The Case of Religion or Belief, 12 EMORY INT'L L. & RELIGION REV. 973, 977 (1998) [hereinafter An-Na'im, Round Table Discussion]. The remarks of participant Jeremy Gunn illustrate this idea: "[A]lthough the United States does not apply the international standards to itself, it nevertheless—with important exceptions—generally acts in accordance with international standards and often exceeds them." Id. Another participant, David Bederman, echoed this perception of a "culture of compliance" but noted the risks of the United States' sense of constitutional exceptionalism. Id. at 982.

15. See supra note 4; see also Phyllis Schlafly, Is Relying on Foreign Law an Impeachable Offense?, EAGLE FORUM, Mar. 16, 2005, http://www.eagleforum.org/column/2005/mar05/05-03-16.html (expressing outrage that the
claims of "American exceptionalism," the United States is currently engaging
in the same struggle that other nations undergo in the process of reconciling
international legal standards and obligations with domestic cultural values and
policy concerns. The United States Supreme Court has been, and continues to
be, an important part of that process by playing an appropriate, though limited,
role in advancing the cultural legitimacy of international human rights in the
United States.

The national controversy about the Supreme Court's decisions has been
misguided in several respects that merit brief clarification. As an initial point,
the public discourse on the issue regularly, and incorrectly, conflates
international law with "foreign law," which is the domestic law of other
nations. Moreover, the use of these collective "foreign" sources is often
characterized in a way that suggests that the Court has treated the sources as
binding or otherwise authoritative. In reality, the Supreme Court has cited
foreign law and international law in its decisions, but the Court has never

Supreme Court used foreign law and international opinion in its Simmons decision).

16. Three sources comprise international law: treaties, customary law, and general
principles of law. Restatement (Third) of Foreign Relations Law of the United States §
102 (1987). For example, in Roper v. Simmons, when the Supreme Court cited to the United
Nations Convention on the Rights of the Child, the Court called it an international authority.
543 U.S. 551, 575-76 (2005). When the United States is party to a treaty, that treaty is binding
on the United States as an international legal obligation. Restatement, supra, § 111. The
treaty is enforceable in U.S. courts if it is self-executing or if it has been implemented by
domestic legislation. Id. Customary international law is generally binding on all states. Id. §§
701-02.

17. Foreign law sources would include the laws of other countries or the decisions of their
national courts. For example, in Lawrence v. Texas, the Court cites foreign law when it cites to
the criminal legislation of the United Kingdom. 539 U.S. 558, 572-73 (2003). In conflating the
two, many have referred to both international law and foreign law as "foreign" sources, with the
pejorative connotations of that term. See, e.g., infra Part II.C. Foreign law, of course, would
not be binding on a U.S. court (although parties to litigation in a U.S. court may be bound in
some circumstances by foreign law).

18. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice
of the United States: Hearing Before the Comm. on the Judiciary, 109th Cong. 293 (2005),
Hearing] (Question by Senator Coburn: "My question to you is, relying on foreign precedent
and selecting and choosing a foreign precedent to create a bias outside of the laws of this
country, is that good behavior?" (emphasis added)); see also Alito Confirmation Hearing, supra
note 3, at 370 (Question by Senator Kyl: "What is the proper role, in your view, of foreign law
in U.S. Supreme Court decisions, and when, if ever, is citation to or reliance on these foreign
laws appropriate?" (emphasis added)).

19. For example, in Lawrence, the Court cited to British law repealing the criminal laws
punishing homosexual conduct. Lawrence, 539 U.S. at 572-73 (citing the United Kingdom's
Sexual Offences Act 1967, c. 60 § 1). Similarly, in Simmons, the Court cited British laws
prohibiting the execution of juveniles. Simmons, 543 U.S. at 577 (citing the Children and
Young Person's Act, 1933, 23 Geo. 5, c. 12 (U.K.), and the Criminal Justice Act, 1948, 11 & 12
suggested that the foreign or international law sources it cited were binding.\textsuperscript{21}

The \textit{Atkins}, \textit{Lawrence}, and \textit{Simmons} decisions are firmly grounded in domestic U.S. law.\textsuperscript{22}

So why is there a controversy at all? In the current international legal system, the formation and development of international law, including international human rights law, occurs primarily at the international level through the creation of bilateral and multilateral treaties and through interpretive mechanisms such as treaty-bodies and international tribunals. In contrast, the implementation of international human rights law is primarily entrusted to the national or domestic front.\textsuperscript{23} Through their governments, nation-states are the primary actors in developing and implementing international human rights law at both the international and national levels.\textsuperscript{24}


\textsuperscript{21} In its decisions, the Court has often taken pains to emphasize this. \textit{See infra} Part II.

\textsuperscript{22} \textit{See} discussion of decisions \textit{infra} Parts II.B-C.

\textsuperscript{23} The international mechanisms to monitor states' compliance with international human rights obligations include both “treaty bodies,” such as the Human Rights Committee (created to monitor compliance with the International Covenant on Civil and Political Rights), and non-treaty bodies, such as the Human Rights Commission, now the Human Rights Council (a subsidiary body of the United Nations to monitor general compliance with international human rights obligations). But these international mechanisms are generally considered to be avenues of last resort. \textit{See, e.g.}, ICCPR, \textit{supra} note 10, at art. 41(c) (requiring exhaustion of all available domestic remedies before the Committee will consider a matter); \textit{see also} Joan Fitzpatrick, \textit{The Role of Domestic Courts in Enforcing International Human Rights Law, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE} 247, 261-62 (Hurst Hannum ed., 3d ed. 1999) (describing the primacy of national mechanisms in protecting human rights). There is a presumption in favor of resolving problems at the national level, relying on national governments to set up their domestic systems to protect human rights, provide remedies for violations, and generally implement international human rights obligations. The primary role of the international mechanisms is to establish and develop normative standards.

\textsuperscript{24} International human rights law is essentially a modern, post-World War II phenomenon. Richard B. Bilder, \textit{An Overview of International Human Rights Law, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE}, \textit{supra} note 23, at 3, 4-5. The United States and the other victorious Allied Nations played a foundational role in the development of both the substantive components of international human rights law and the international monitoring mechanisms. \textit{Id.} United States historians note the important role played by Eleanor Roosevelt and others in developing the Universal Declaration of Human Rights, the foundational human rights document, which was later “codified” into the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. \textit{See} John P. Humphrey, \textit{HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE} 31-33, 42-43 (1984); John P. Humphrey, \textit{The Universal Declaration of Human Rights: Its History, Impact
Nonetheless, there is often popular concern that international human rights law at the domestic level represents the view of outsiders "imposed" on the nation, and that its domestic use offends national sovereignty and is sure to be out of step with domestic views and values. In the United States, this concern manifests itself in a wide range of contexts: from the popularity of "Get the US out of the UN" bumper stickers, or the dismissive presidential rhetoric and decision-making, to the proposed Congressional "Reaffirmation of American Independence Resolution." Most immediately, concerns about international law are threaded throughout the current controversy over the role of the judiciary and the concern that "activist judges" will influence or change domestic law in ways that are contrary to domestic values.

Concerns about judicial activism and the imposition of "foreign" values are not unique to the United States or to the area of international human rights law; they commonly appear in the human rights arena as an aspect of the

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26. The current administration has frequently expressed dissatisfaction and frustration with the United Nations. Many view the recent appointment of John Bolton as the U.S. Representative to the United Nations as a further indication of this dissatisfaction. Bolton is notorious for his anti-U.N. comments; Bolton has stated that "if 10 floors of the 38-story U.N. headquarters building were eliminated, 'it wouldn't make a bit of difference.'" Charles Babington & Dafna Linzer, Bolton Assures Senators of Commitment to U.N., WASH. POST, Apr. 12, 2005, at A1, A10. Bolton has also stated, "There is no United Nations. There is an international community that occasionally can be led by the only real power left in the world—that's the United States—when it suits our interests and when we can get others to go along." Editorial, Questioning Mr. Bolton, N.Y. TIMES, Apr. 13, 2005, at A18; see also Christian Bourge, Analysis: Bolton Controls Rhetoric, UNITED PRESS INT'L, Apr. 11, 2005 ("Bolton has a long history of criticizing multinational institutions, and the United Nations in particular . . .").

27. The Resolution, proposed by U.S. Rep. Feeney and others, states: That it is the sense of the House of Representatives that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States. H.R. Res. 97, 109th Cong. (2005).

28. Alito Confirmation Hearing, supra note 3, at 410 (statement of Senator Sessions: "We believe that there has been a liberal social agenda being promoted too often by the courts that is foreign to our history and contrary to the wishes of the American people."); see supra notes 4, 15.

29. For example, in the negotiations of the North American Free Trade Agreement, state
debate between universalism and cultural relativism. Most international human rights advocates, and many of the human rights instruments themselves, assert the universality of human rights standards. Skeptics often reject these sweeping claims in the name of “culture” and cultural relativism; similar arguments have been raised by governments that seek to avoid international human rights obligations, and increasingly by a wide spectrum of activists, policymakers, and scholars who challenge the hegemony of the “western” view of international human rights. In its relatively brief history, international and national authorities were concerned about submitting to a “supranational” authority. See Stephen Zamora, Allocating Legislative Competence in the Americas: The Early Experience Under NAFTA and the Challenge of Hemispheric Integration, 19 Hous. J. Int’l L. 615, 633 (1997).


The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil [sic] their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question. World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, ¶ I.1, U.N. Doc. A/CONF.157/23 (July 12, 1993).


32. The international community and its mechanisms are generally criticized for being dominated by western, developed nations, and further criticized because the membership of international bodies is overwhelmingly male, even when there is a broader geographical and racial distribution. See, e.g., Abdullahi Ahmed An-Na’im, Problems of Universal Cultural Legitimacy for Human Rights, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 331, 348-53 (Abdullahi Ahmed An-Na’im & Francis M. Deng eds., 1990) [hereinafter An-Na’im, Problems] (discussing the exclusion of non-western participants and perspectives in the early development of the international human rights regime); HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 36-37, 174-79 (2000) (identifying a “Southern” critique of the “Western origins, orientation and cultural bias” of the international legal order and noting that both the U.N. membership and its bureaucracy are dominated by men).
human rights law has attracted legitimate criticisms from those who were left out of the process of developing the international standards that they are now expected to embrace. Noted human rights scholar Abdullahi A. An-Na’im offers two main critiques: first, that the normative development of international human rights law has been limited by the dominant influence of the “cultures” that developed it; and second, that the real and perceived absence of cultural legitimacy at the domestic level has hindered implementation of international human rights law. These are, of course, related points because the more international human rights law reflects accepted domestic cultural values, the greater the likelihood of successful implementation of those laws at the domestic level.

An-Na’im has considered the importance of domestic cultural legitimacy for the successful implementation of international human rights standards primarily in areas of perceived conflict between human rights and Islam.

33. See An-Na’im, State Responsibility, supra note 12, at 171 (noting that the argument against universal cultural legitimacy of human rights on the ground that “the basic conception and major principles ... emerged from western philosophical and political developments” may be true in light of factors such as “the nature and context of the drafting process, the limitations of studies purporting to cover a variety of cultural perspectives on the subject and the quality of representation of non-western points of view”); see also An-Na’im, Problems, supra note 32, at 331 (noting that discrepancies between theory and practice in the human rights arena results from ineffective enforcement of procedures).

34. Others have also considered the role of cultural legitimacy as it relates to increasing compliance with international law. See Koh, supra note 12, at 2600-02. Koh identifies the process as Transnational Legal Process (TLP), which “promotes the interaction, interpretation, and internalization of international legal norms.” Id. at 2603. Koh distinguishes social, political, and legal internalization of norms, including explicit and implicit judicial internalization. Id. at 2656-57. Ryan Goodman and Derek Jinks also discuss coercion, persuasion, and acculturation as methods for ensuring compliance with international human rights law. Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 DUKE L.J. 621, 623 (2004). But others are more reluctant to endorse “internalization” of international norms. See Posner, supra note 8, at 34-36 (criticizing TLP on five grounds: “international law is not always good”; “judges are not always going to act the way we want them to”; “judges just don’t know much about foreign policy, foreign countries, and foreign law”; “courts are, by design, passive and reactive”; and “TLP is undemocratic”). These themes are echoed in some of the dissenting opinions discussed infra.

proposes a simple conceptual framework to evaluate and refine international human rights law and theory, both in terms of its future development and the success of efforts to implement it at the national level.\textsuperscript{36} Under this framework, internal discourse plays a central role in developing the needed cultural legitimacy for human rights norms in the domestic arena, and cross-cultural dialogue offers a supporting role to external views in that process.\textsuperscript{37}

This Article uses Professor An-Na’im’s “internal discourse – cross-cultural dialogue” theoretical framework to describe and evaluate the current debate in the United States over the use of international human rights standards domestically.\textsuperscript{38} Part I of this Article describes An-Na’im’s model for evaluating and advancing the cultural legitimacy of human rights in domestic contexts. It briefly addresses the critique that current international human rights norms reflect historical and existing power relationships in the international community. But it focuses on the interplay of internal discourse and cross-cultural dialogue in the domestic implementation of those norms. Part II scrutinizes the current debate about the role of international human rights law in United States courts through this internal discourse – cross-cultural dialogue structure as part of the process of increasing the cultural legitimacy of human rights in the United States. This Part considers the recent Supreme Court decisions in \textit{Atkins}, \textit{Simmons}, and \textit{Lawrence} that implicate both domestic constitutional law and, arguably, international human rights law: the prohibition of the death penalty for the developmentally disabled and for juveniles\textsuperscript{39} and the affirmation of the freedom of individuals to engage in private sexual behavior.\textsuperscript{40} This Part also briefly addresses the implications of

\begin{enumerate}
\item An-Na’im, \textit{State Responsibility}, supra note 12, at 167-69; \textit{see also} An-Na’im, \textit{Problems}, supra note 32, at 331 (discussing discrepancies between law and practice in the human right arena, despite the existence of elaborate standards). He urges testing and use of his framework in other domestic contexts, as well. An-Na’im, \textit{State Responsibility}, supra note 12, at 184-85.
\item An-Na’im, \textit{State Responsibility}, supra note 12, at 174.
\item An-Na’im himself has been involved in examining the right to freedom of religion in the United States and is beginning to consider questions of cultural legitimacy of human rights in the United States. \textit{See} An-Na’im, \textit{Round Table Discussion}, supra note 14, at 975 (presenting the proceedings of a conference on religious liberty in the United States and including remarks by An-Na’im). This Article does not focus on the issue of religious rights but will draw upon some of the general insights offered by conference participants regarding United States culture and the domestic approach to human rights.
\item Part II.A. considers the recent Supreme Court decisions in \textit{Atkins v. Virginia}, 536 U.S. 304 (2002) (prohibiting the execution of the mentally disabled) and \textit{Roper v. Simmons}, 543 U.S. 551 (2005) (prohibiting the execution of juveniles). The death penalty raises domestic constitutional concerns under the Eighth Amendment’s prohibition of “cruel and unusual punishment” and international human rights concerns under conventional and customary protection of the right to life and the prohibition of cruel, inhuman, or degrading treatment or punishment.
\item Part II.B. considers the recent Supreme Court decision in \textit{Lawrence v. Texas}, 539 U.S. 558 (2003) (finding a Texas statute criminalizing certain sexual behavior between same-sex
the recent changes to the Supreme Court membership. The Article concludes that both the Supreme Court's consideration of international and comparative law and the resulting controversy are appropriate aspects of the ongoing development of domestic law in accordance with international standards.

I. THE DEVELOPMENT OF DOMESTIC CULTURAL LEGITIMACY FOR INTERNATIONAL HUMAN RIGHTS NORMS AND LAWS

Understanding the process, and often the struggle, to develop cultural legitimacy for human rights standards at the domestic level requires an understanding of the recurring critiques of international human rights law, notably, that it is not truly "universal" and does not reflect widely shared values. It is within this context that the framework developed by An'Na-im, with its emphasis on internal discourse and the supplementary role of cross-cultural dialogue, takes on greater explanatory value and practical significance.

A. Is "International" the Same as "Universal"? An Overarching Critique of the Legitimacy of International Human Rights.

The United States was instrumental in the development of the modern international human rights movement. To much of the world, the United partners unconstitutional. The treatment of same-sex intimate relationships and conduct raises domestic constitutional concerns under the Fourteenth Amendment's protection of "liberty" interests and international human rights concerns under conventional and customary protection of the right to privacy and freedom from discrimination.

41. Part II.C. discusses the confirmation hearings of new Chief Justice John Roberts and new Justice Samuel Alito and the views they expressed regarding the use of international and foreign law in Supreme Court decisions.

42. See infra note 45 and accompanying text.

43. An-Na'im, State Responsibility, supra note 12, at 174.


My conviction that we had to have a world organization was so deep that I felt that no event, no matter how sad and unfortunate, should interfere with the drafting of the Charter of the United Nations. I felt that there was nothing I could do which would be more fitting to the memory of President Roosevelt than to go ahead with the conference.

Former President Harry S. Truman, Address at the Opera House 273 (June 24, 1955), www.un.org/depts/dhl/anniversary/stmt6j.pdf. "There have been women who have clearly left their mark on the history of the United Nations. Above all, there was Eleanor Roosevelt, who is linked to the Universal Declaration of Human Rights." Akmaral Arystanbekova, Diplomacy: Too Important to be Left to Men?, 39 UN CHRON. 62, 62 (Sept.-Nov. 2002), available at
Nations and the current international human rights legal regime profoundly reflect the values and priorities of the United States and other "western" democracies.\textsuperscript{45} International and domestic human rights advocates often struggle with incorporating these "universal" values, which are frequently viewed as not universal at all, into particular domestic contexts. As a starting point, An-Na'\textsuperscript{im} affirms the general importance of international human rights; yet he acknowledges the criticisms regarding the cultural bias inherent in the current system.\textsuperscript{46} This cultural bias comprises both procedural and substantive strands: first, the failure to include other ("non-western") perspectives in the process of developing the initial human rights standards and system of

\textsuperscript{45} One critical perspective on human rights is that "human rights as propounded in the west are founded on individualism and therefore have no relevance to Asia which is based on the primacy of the community." Yash Ghai, \textit{The Asian Perspective on Human Rights} (1993), www.hrsolidarity.net/mainfile.php/1993vol05no03/20611 (1993). "Some Asian' [sic] governments consider that the western pressure on them for an improvement in human rights is connected with the project of western global hegemony," which is to be achieved "partly through the universalisation of western values and aspirations, and partly through the disorientation of Asian state and political systems." \textit{Id}. The Chinese government has stated that "despite its international aspect, the issue of human rights falls by and large within the sovereignty of each state." \textit{Id}. The Bangkok Governmental Declaration recognizes "that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional peculiarities and various historical, cultural and religious backgrounds." \textit{Id}; \textit{see also} Makau Mutua, \textit{Savages, Victims, and Saviors: The Metaphor of Human Rights}, 42 HARV. INT'L L.J. 201, 210 (2001) ("[H]uman rights, and the relentless campaign to universalize them, present a historical continuum in an unbroken chain of Western conceptual and cultural dominance over the past several centuries.").

\textsuperscript{46} An-Na'\textsuperscript{im}, \textit{State Responsibility}, supra note 12, at 172 (noting that there is already "significant consensus" on international human rights and that they do provide some "level of protection"). An-Na'\textsuperscript{im} continues:

It is neither possible, nor desirable in my view, for an international system of human rights standards to be culturally neutral. However, the claim of such an international system to universal cultural legitimacy can only be based on a moral and political "overlapping consensus" among the major cultural traditions of the world. In order to engage all cultural traditions in the process of promoting and sustaining such global consensus, the relationship between local culture and international human rights standards should be perceived as a genuinely reciprocal global collaborative effort.

\textit{Id}. at 173.
protection;\textsuperscript{47} and second, the "western" philosophical and theoretical origins of the current standards and system.\textsuperscript{48} An-Na'\i m explains:

Most African and Asian countries did not participate in the formulation of the Universal Declaration of Human Rights because, as victims of colonization, they were not members of the United Nations. When they did participate in the formulation of subsequent instruments, they did so on the basis of an established framework and philosophical assumptions adopted in their absence. For example, the pre-existing framework and assumptions favored individual civil and political rights over collective solidarity rights, such as a right to development, an outcome which remains problematic today. Some authors have gone so far as to argue that inherent differences exist between the Western notion of human rights as reflected in the international instruments and non-Western notions of human dignity. In the Muslim world, for instance, there are obvious conflicts between Shari'a and certain human rights, especially of women and non-Muslims.\textsuperscript{49}

Many have questioned the notion of an exclusive "western" provenance to the ideas and values underpinning human rights standards.\textsuperscript{50} But there is validity to critiquing the process's lack of inclusiveness, which involved a limited number of actors, most of whom were operating from a western perspective.

The United States presents different challenges to the cultural legitimacy of international human rights norms, in light of its different history in the international community. The United States has a history of inclusion, and even dominance, rather than exclusion. In its foreign policy, the United States implicitly and often explicitly expects other nations to conform their domestic practices to international law, including international human rights law.\textsuperscript{51}

\begin{footnotes}
\item[47] An-Na'\i m, Problems, supra note 32, at 346-53.
\item[48] Id. at 346; An-Na'\i m, State Responsibility, supra note 12, at 171.
\item[50] See Catherine Powell, Introduction: Locating Culture, Identity, and Human Rights, 30 COLUM. HUM. RTS. L. REV. 201, 204-05 (1999) (discussing human rights principles as they relate to the traditions and philosophies of diverse non-western cultures (citing PAUL GORDON LAUREN, The Evolution of International Human Rights: Visions Seen 9-11 (1998))); see also Amartya Sen, Human Rights and Asian Values, THE NEW REPUBLIC, July 14 & 21, 1997, at 33, 40 ("Our ideas of political and personal rights have taken their particular form relatively recently, and it is hard to see them as 'traditional' commitments of Western cultures. . . . [A]ntecedents can be found plentifully in Asian cultures as well as Western cultures.").
\item[51] For example, "no [foreign] assistance may be provided . . . to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment." 22 U.S.C. § 2151n(a) (2000). In addition, "none of the funds made available to carry out this chapter, and none of the local currencies generated under this chapter, shall be used to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government or any program." 22 U.S.C. § 2420(a). The
United States civic, religious, and other non-governmental organizations do the same. Nonetheless, the United States shares with many other nations the phenomenon of resisting outside views on how its domestic laws should operate. In contrast to the Islamic nations of Africa and the Middle East, the United States played a significant role in the creation of the United Nations system and the International Bill of Rights; therefore, both should reflect values derived from and compatible with U.S. culture. But many in the United States perceive that this is not the case. Thus, the acceptance of international

Secretary or the Administrator “shall not enter into any agreement under this chapter to provide agricultural commodities, or to finance the sale of agricultural commodities, to the government of any country determined by the President to engage in a consistent pattern of gross violations of internationally recognized human rights.” 7 U.S.C. § 1733(j)(1). The United States has also applied human rights to grounds of inadmissibility. “Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402), is inadmissible.” Immigration and Nationality Act, Pub. L. No. 108-458, § 5502, 118 Stat. 3740, 3741 (2004).

52. Regarding Nigeria’s adoption of the Shari’a, Human Rights Watch has stated, “Whatever personal beliefs may prevail in different social and religious circles in Nigeria, the Nigerian government—both at federal and state level—remains bound by international obligations and conventions.” Human Rights Watch, Failure to Conform to International Human Rights Standards (Sept. 2004), http://www.hrw.org/reports/2004/nigeria0904/15.htm. “The UDHR is widely recognized as customary international law. It is a basic yardstick to measure any country’s human rights performance. Unfortunately, Cuba does not measure up.” Human Rights Watch, Cuba’s Repressive Machinery (1999), http://www.hrw.org/reports/1999/cuba/Cuba996-01.htm. “Cuban courts continue to try and imprison human rights activists, independent journalists, economists, doctors, and others for the peaceful expression of their views, subjecting them to the Cuban prison system’s extremely poor conditions.” Id. “While Cuba’s domestic legislation includes broad statements of fundamental rights, other provisions grant the state extraordinary authority to penalize individuals who attempt to enjoy their rights to free expression, opinion, press, association, and assembly.” Id. It has been recommended that “[t]he Cuban government should cease all prosecutions based on the individual’s exercise of fundamental rights to free expression, association, and movement,” and that “[t]he Cuban government should reform its Criminal Code, repealing or narrowing the definition of all crimes that are in violation of established international human rights norms and practices.” Id.

53. See supra notes 4, 15.

54. This should particularly be true with regard to civil and political rights. For example, the Declaration of Independence famously states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Universal Declaration of Human Rights echoes this language in its Preamble (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[,]”), in Article 1 (“All human beings are born free and equal in dignity and rights.”), and Article 3 (“Everyone has the right to life, liberty and the security of person.”), and in other provisions. UDHR, supra note 30, at 71-72.
human rights norms relies not solely on the nation’s involvement in the historic and ongoing development of those norms at the international level, but also on the domestic process of acceptance and implementation.

**B. Grounding the “Universal” in a Specific Cultural Context: Process and Bottom-Line Results.**

Ultimately, the current international system must operate as a starting point for any analysis or proposed change. The existing human rights regime has many strengths, including the simple facts of its existence and endurance as a legal and political framework. After more than sixty years of history, most participants and observers agree that certain shared fundamental values do exist, such as the prohibitions of genocide, slavery, torture, and systematic discrimination. Now, the focus of critical reform efforts should be on increasing the legitimacy, effectiveness, and inclusiveness of the existing human rights legal regime:

Since we already have an international system of human rights law and institutions, the process should seek to legitimize and anchor the norms of this established system within, and between, the various cultural traditions of the

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world. In other words, the norms of the international system should be validated in terms of the values and institutions of each culture, and also in terms of shared or similar values and institutions of all cultures. This can be achieved, I suggest, through what I call "internal discourse" within the framework of each culture, and "cross-cultural dialogue" among the various cultural traditions of the world. 57

"Internal discourse," defined as the discussion and debate on the application and implementation of human rights at the domestic level, is important in several respects. Internal discourse must serve as the primary mechanism for advancing the cultural legitimacy of human rights norms. 58 Human rights are presumed to be protected initially and primarily at the domestic level. 59 Additionally, internal discourse is important as a means to educate and socialize, which aids in developing both consensus and credibility for the standards adopted. 60 Internal discourse serves as a global equalizer of sorts, a manifestation of the reciprocal nature of the process. A nation with a visible internal process draws attention to its treatment of human rights issues, and also serves as a model for other nations. 61 At the same time, this visible

57. An-Na’im, State Responsibility, supra note 12, at 174. An-Na’im does not necessarily endorse the desirability of all existing human rights norms but instead is interested in using them as a starting point for further development.

58. See id. at 169 (given "the nature of international law in general, and its dependence on largely voluntary compliance and cooperation of sovereign states in the field of human rights in particular," it is necessary to seek greater consensus in the domestic cultural context). Accordingly, decisions about how to challenge particular domestic laws should be left to the process of internal discourse.

59. See supra note 24.

60. See An-Na’im, State Responsibility, supra note 12, at 174, 178-79. Addressing this issue in the context of reconciling international human rights with customary and religious laws in Muslim countries, An-Na’im explains:

[I]t is clear that the only viable and acceptable way of changing religious and customary laws is by transforming popular beliefs and attitudes, and thereby changing common practice. This can be done through a comprehensive and intensive program of formal and informal education, supported by social services and other administrative measures, in order to change people’s attitudes about the necessity or desirability of continuing a particular religious or customary practice. To achieve its objective, the program must not only discredit the religious or customary law or practice in question, but also provide a viable and legitimate alternative view of the matter.

Id. at 178.

61. An-Na’im provides two main rationales for the importance of internal discourse: First, internal validation is necessary in all cultural traditions for one aspect or another of the present international human rights system. . . . Second, for such discourse within one culture to be viable and effective, its participants should be able to point to similar discourse which is going on in the context of other cultures.

Id. at 174.
internal process underscores the notion that no nation is immune from having to adjust its national system to comport with international obligations. 62

The mechanism of cross-cultural dialogue functions as a significant counterpart and supplement to internal discourse. 63 Externally oriented actors may directly encourage dialogue in numerous ways, such as “international action to protect the freedoms of speech and assembly of internal actors . . . and assistance in developing and implementing campaign strategies.” 64 Cross-cultural dialogue may also involve strategic use of external resources, such as the laws and practices of different nations or “the exchange of insights and experiences about the concept of the particular human right and the sociopolitical context of its implementation” by internal actors. 65 In addition, reciprocity plays a role in increasing acceptance of cross-cultural input and in establishing basic thresholds for compliance with human rights standards. 66 But cross-cultural dialogue must function primarily as a supplement to internal discourse. There is always a risk that if external actors take an overly active role in the internal process of reinterpreting cultural norms, their involvement may be counter-productive and may even alienate those generally supportive of human rights norms. 67 Again, this is particularly true in areas that are suspicious of “western” influence based on a history of colonialism and religious conflict. 68

62. See id. (explaining that internal validation “might be necessary for civil and political rights in one culture, economic and social rights in another, the rights of women or minorities in a third, and so forth”).

63. See id. An-Na’im offers two main rationales regarding the importance of cross-cultural dialogue:

First, from a methodological point of view, all participants in their respective internal discourses can draw on each other’s experiences and achievements. Second, cross-cultural dialogue will enhance understanding of, and commitment to, the values and norms of human dignity shared by all human cultures, thereby providing a common moral and political foundation for international human rights standards.

Id.

64. Id. at 179. For example, the use of letter-writing or “urgent action” campaigns by Amnesty International and other non-governmental organizations are often directed at protecting the right to freedom of expression. See, e.g., Amnesty International, Act Now for Human Rights, http://www.amnesty.org/actnow/ (last visited Jan. 12, 2007) (including appeals to protect “human rights defenders”).

65. An-Na’im, State Responsibility, supra note 12, at 179.

66. See An-Na’im, Problems, supra note 32, at 345. For instance, in his approach to reconstructing the relationship between Islam and human rights, An-Na’im focuses on particular examples, such as the treatment of women and non-believers. See id. In arguing for a reinterpretation of existing Islamic law, he suggests incorporation of the principle of reciprocity as one way of reconciling the nondiscrimination principles of human rights with current interpretations of Shari’a law. Id.


Although An-Na‘im employs the internal discourse – cross-cultural dialogue construct to suggest means of reconciling international human rights standards with Islamic law in particular national contexts, this theoretical framework has broader application, as well. In this era of globalization, all nations face a similar challenge—to a greater or lesser degree—of reconciling international human rights standards with their existing national legal system, which incorporates both the formal legal structure and the informal influence of culture, religion, and custom. Resistance to human rights standards generally, or more commonly to particular rights, is rooted in this informal system of norms and values. Moreover, the resistance to international law at the domestic level rarely centers on the content of the norm itself, but rather on the interpretation and specific implementation of the norm in the particular domestic situation. Appreciation of this strategic interplay of internal

(“Formerly subjugated people’s suspicions of human rights values emanating from colonial powers must be viewed as part of the legacy of colonialism. The logic of these suspicions is easy to discern, as people denied autonomy seek to establish cultural self-determination. Misgivings about a human rights agenda originating from former colonizers is not unreasonable.”).

69. This expansive obligation is often reflected in general treaty language. See, e.g., ICCPR, supra note 10, at art. 2; see also CEDAW, supra note 56, at art. 3 (“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women . . . .”).

70. An-Na‘im’s definition of culture broadly includes religion and custom. An-Na‘im, Problems, supra note 32, at 335-36. He notes:
The prime feature underlying cultural legitimacy is the authority and reverence derived from internal validity. A culturally legitimate norm or value is respected and observed by the members of the particular culture, presumably because it is assumed to bring satisfaction to those members. Because there may be conflicts and tensions between various competing conceptions of individual and collective satisfaction, there is constant change and adjustment of the norms or values in any culture which are accorded respect and observance.

Id. at 336. Since this informal system of norms and values is particularly powerful in the context of discrimination against women, the obligations of parties to CEDAW are especially broad. The CEDAW Resolution states:
States Parties shall take all appropriate measures:
(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

CEDAW, supra note 56, at art. 5(a). The Resolution also states that CEDAW will “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” Id. at art. 2(f).

71. For example, few nations or activists currently would contest a general prohibition on discrimination on the basis of race or gender. But many would contest the meaning of that general prohibition in their particular domestic contexts. An-Na‘im discusses the interpretation of gender-based discrimination under Islamic law. See An-Na‘im, State Responsibility, supra
discourse and cross-cultural dialogue\textsuperscript{72} offers a simple methodology for approaching the complexities of implementing human rights standards in the wide variety of domestic contexts in today’s global community and for ensuring the cultural legitimacy—and ultimate effectiveness—of those standards.

II. A HUMAN RIGHTS CULTURE IN THE UNITED STATES SUPREME COURT

The role of the executive branch in international law is familiar: treaty-making, foreign policy development, and diplomacy.\textsuperscript{73} The role of the legislative branch is familiar, as well: providing advice and consent to treaties, and adopting implementing legislation.\textsuperscript{74} But less attention has been given to the important role of domestic courts in implementing the nation’s international obligations, particularly its international human rights law obligations.\textsuperscript{75} Domestic courts may directly apply international standards,\textsuperscript{76} but given the general nature of the standards at the international level, domestic courts also play a role by interpreting those standards in their domestic context.\textsuperscript{77} The


72. See An-Na’im, State Responsibility, supra note 12, at 174 (stating that “the combination of the processes of internal discourse and cross-cultural dialogue will, it is hoped, deepen and broaden universal cultural consensus on the concept and normative content of international human rights”).

73. \textit{RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES} § 303 (describing the President’s role in authorizing or approving international agreements).

74. \textit{Id.} (describing Congress’s role in authorizing or approving international agreements).

75. \textit{See id.} § 115 n.3 (explaining that “courts will give effect to international law ‘where there is no treaty, and no controlling executive or legislative act or judicial decision,’ and ‘in the absence of any treaty or other public act of their own government in relation to the matter’” (quoting The Paquete Habana, 175 U.S. 677, 700, 708 (1900)). The high courts of a few nations have been the exception; for example, the post-apartheid South African Supreme Court and the Canadian Supreme Court frequently cite to materials from other nations to support their holdings. See Sarah K. Harding, \textit{Comparative Reasoning and Judicial Review}, 28 \textit{YALE J. INT’L L.} 409, 416-17 (2003) (providing a case study of the Supreme Court of Canada); Cody Moon, Note, \textit{Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?}, 12 \textit{WASH. U. J.L. & POL’Y} 229, 232-39 (2003) (discussing the high courts of Canada, South Africa and Australia). Additionally, other high courts have drawn notice for high profile cases such as the British, Spanish and Chilean courts considering the Pinochet prosecution. See Amnesty International, \textit{The Case of Augusto Pinochet: Timeline}, http://news.amnesty.org/pages/pinochet_timeline (last visited Jan. 12, 2007) (highlighting the involvement of the United Kingdom and Chilean courts in the Pinochet case).

76. In United States courts, this happens when treaty provisions are self-executing or when the court applies customary international law. \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES} § 111.

77. This is specifically accounted for in the doctrine of “margin of appreciation” employed by the European Court of Human Rights and other international human rights bodies:
Supreme Court has had opportunities to ensure the direct implementation of international human rights standards domestically (and in turn, to play a role in developing international jurisprudence on human rights), but the Court has been cautious about doing so thus far.78

Nevertheless, the Court has increasingly played another perhaps more important role in advancing the cultural legitimacy of particular human rights standards. In the Supreme Court, Congress, and the public life, the current debates over the use of international law are truly about cultural legitimacy of the international human rights standards, rather than domestic implementation.79 What generates the passion is not whether a particular treaty or norm is self-executing, but whether the treaty or norm represents the values

Although the Commission and Court [now Court] invoke the principle of strict interpretation and thus the favourable balancing of individual rights against state interests, they in fact leave a certain amount of discretion for the states to decide whether a given course of action is compatible with Convention requirements. This state discretion is referred to as the "margin of appreciation."

DONNA GOMIEN, DAVID HARRIS & LEO ZWAAD, LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 215 (Council of Europe Publishing 1996). The doctrine reflects the view that "state authorities are in principle in a better position than the international judge" to assess the balance of rights in particular domestic contexts. Id. (quoting Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976)). Moreover, persuasive domestic jurisprudence finds its way back into the decisions of international bodies. For example, the European Court of Human Rights provides a list of its cases where it has drawn upon comparative law in its reasoning. See European Court of Human Rights, Selective Comparative Law Case List, http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+information/Selective+comparative+law+case+list/ (last visited Jan. 12, 2007).

79 The Supreme Court has a mixed history regarding the protection of individual rights. There are cases that pre-date the modern international human rights movement that still address important human rights issues including discrimination. See generally Korematsu v. United States, 323 U.S. 214 (1944) (analyzing the legality of a civilian exclusion order that curtailed the rights of a particular ethnic group); Plessy v. Ferguson, 163 U.S. 537 (1896) (finding that a statute that distinguished between races was constitutional); Bradwell v. State, 83 U.S. 130 (1872) (affirming the denial of a woman’s law practice application); Dred Scott v. Sandford, 60 U.S. 393 (1856) (dismissing an action brought by a slave because he was not considered a citizen). More recently, however, the Court has adopted a new mentality that progressively defines and even extends individual rights protection. See generally Roe v. Wade, 410 U.S. 113 (1973) (finding that abortion is within the scope of personal liberty guaranteed by the Constitution); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (finding that segregation was unconstitutional). But within the Court, much debate remains regarding the issue of domestic implementation and application of international law. For example, in another recent and controversial Supreme Court decision, the issue was not cultural legitimacy, but rather the complications of discerning and applying international human rights norms where there is statutory authorization to do so under the Alien Tort Statute. Sosa, 542 U.S. at 727-28. In that case, the Court did not focus on whether "international" norms made sense and helped us understand our own law, but on whether the norms could be directly applied. Id.
of the United States or the imposed values of outsiders. The Court’s decisions in Atkins, Simmons, and Lawrence embody and advance this ongoing internal discourse – cross-cultural dialogue process.

The United States Supreme Court’s opinions address the criminal law issues of the death penalty and the criminalization of particular sexual conduct, but they also raise important constitutional and human rights questions about individual liberty, privacy, and dignity. Both areas implicate values traditionally associated with the U.S. criminal justice system (deterrence, punishment, retribution, rehabilitation, and accountability) and strong religious and cultural values (vengeance, mercy, procreation, and the sanctity of intimate relationships).

Internal discourse regarding the imposition of the death penalty is active and enduring in the United States; the treatment of same-sex relationships and sexual conduct is also the subject of wide-ranging domestic debate. The
Supreme Court’s decisions in these areas reflect internal discourse and ultimately contribute to it. The decisions have generated controversy largely due to their content and outcomes, but also due in part to their explicit references to foreign and international law in support of their outcomes. The cross-cultural dialogue that appears in the decisions has been used as merely a supplement, yet it has provoked public outcry. On the issue of the death penalty, U.S. law and policy appears out-of-step with the worldwide trend towards abolition; on the issue of privacy and liberty in intimate conduct, the United States is arguably in the vanguard for protecting individual rights.

A. The “evolving standards of decency that mark the progress of a maturing society”\(^{86}\): Lessons from Atkins and Simmons about the Human Right to Life.

From an international human rights law perspective, although the standards regarding the death penalty continue to evolve, the standards are relatively well-established. There is a general consensus internationally that the death penalty conflicts with the right to life and the right to security of the person; thus, the death penalty should be abolished.\(^ {87}\) If exceptions are allowed, they are quite

(last visited Jan. 12, 2007).


87. All major human rights treaties provide for the right to life, the right to security of the person, and the right to be free from cruel, inhuman or degrading treatment. See ICCPR, supra note 10, at art. 6, 7, 9 ("Every human being has the inherent right to life. . . . No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . . Everyone has the right to liberty and security of person."); African Charter, supra note 24, at art. 4, 5, 6 ("Every human being shall be entitled to respect for his life and the integrity of his person. . . . All forms of. . . . cruel, inhuman or degrading punishment and treatment shall be prohibited. . . . Every individual shall have the right to liberty and to the security of his person."); American Convention on Human Rights: "Pact of San José, Costa Rica," art. 4, 5, 7, Apr. 8, 1970, 1144 U.N.T.S. 144, 145-46 [hereinafter ACHR] ("Every person has the right to have his life
narrow and framed within a context of moving toward eventual abolition.\textsuperscript{88} This is certainly true for the nations that the United States views as sharing its history, traditions and values.\textsuperscript{89} Moreover, most of the world favors abolishing the death penalty.\textsuperscript{90} The international preference for abolishing the death penalty is magnified when examining the specific contexts of execution of the developmentally disabled or of juveniles.\textsuperscript{91} Although many international

\section*{Respect for Rights} . . . No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. . . . Every person has the right to personal liberty and security."); Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, 3, 5, Nov. 4, 1950, 213 U.N.T.S. 222, 224, 226 [hereinafter European Convention] (“Everyone’s right to life shall be protected by law. . . . No one shall be subjected to torture or to inhuman or degrading treatment or punishment. . . . Everyone has the right to liberty and security of person.”).

88. For example, after the general assertion in Article 6 that “[e]very human being has the inherent right to life,” the ICCPR further provides:

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime. . . .

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

6. Nothing in this [A]rticle shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

ICCPR, supra note 10, at art. 6. The Second Optional Protocol to the ICCPR is specifically directed towards the abolition of the death penalty and provides, “Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.” Second Optional Protocol to the International Covenant on Civil and Political Rights art. 1 (entered into force on July 11, 1991).

89. For example, the European Convention sets out an explicit right to life in Article 2: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” European Convention, supra note 87, at art. 2. In addition, the Convention has established a specific protocol regarding the death penalty. See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, C.E.T.S. No. 114 (ratified by all members of the Council of Europe except Russia).

90. See supra note 87. For an up-to-date report of which countries currently practice the death penalty and which have abolished or abandoned it, see Amnesty International, Abolitionist and Retentionist Countries, http://web.amnesty.org/pages/deathpenalty-countries-eng (last visited Jan. 12, 2007).

human rights norms appear to lack consensus, either by treaty participation or by state practice, the norms regarding the human rights violations inherent in the death penalty are widely agreed upon. In fact, the United States is an anomaly regarding its death penalty doctrine. Nonetheless, internal discourse about the death penalty continues to occur, particularly in the United States. In fact, internal discourse is implicit in the standards set forth in the Constitution; the Eight Amendment’s prohibition of “cruel and unusual” punishment suggests an ongoing evaluation of the punishment against other standards to ensure that it is “graduated and proportioned to [the] offense.” In that evaluation, the Supreme Court established a standard that considers “the evolving standards of decency that mark the progress of a maturing society.” Not only does the Court’s standard contain an inherently comparative function, but the Court also firmly grounds its standard in “the duty of the government to respect the dignity of all persons.”

Although the United States has not abolished the death penalty, the Supreme Court has recently limited its scope: in Atkins v. Virginia, the Court

101/03, ¶ 47-50 (2003), available at www.cidh.org. The ICCPR, Article 6, also provides, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." ICCPR, supra note 10, at art. 6.

92. In the context of the juvenile death penalty, the Court in Simmons stated that "it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty." Roper v. Simmons, 543 U.S. 551, 577 (2005). Although some may suggest that the United States may ignore international human rights law because the country already has a culture of compliance with individual rights, that argument is not available in this context.

93. The Supreme Court is, of course, not the only participant in this discourse. See supra note 82 (listing active organizations that advocate in favor of and against the death penalty). The United States’ resistance to international pressure to abolish or limit the death penalty may reflect cultural values of independence and individual accountability, and cultural influences of fear, violence, and racism. Nonetheless, domestic and international advocates of human rights standards have been somewhat effective in changing the nation’s views in this area, often by using the method An-Na’im articulated, which reinterprets values embraced by and in the United States to argue against the death penalty.

94. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

95. Simmons, 543 U.S. at 560 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

96. Id. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

97. Id. at 560 (“By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”).

98. In 1972, the Supreme Court found that the death penalty violated the Eighth Amendment when its imposition was left to the sole discretion of juries; consequently, all states were required to rewrite their death penalty laws. Furman v. Georgia, 408 U.S. 238, 239-40 (1972). But in 1976, the Court allowed executions to resume in the United States. Gregg v. Georgia, 428 U.S. 153, 169 (1976).

prohibited the execution of the developmentally disabled, and in *Roper v. Simmons*, the Court prohibited the execution of juveniles. In both *Atkins* and *Simmons*, the Court evaluated the historical debate about the death penalty in the United States and, noting the evolution of public sentiment, reversed earlier decisions. The Court reviewed the "objective indicia of consensus" on the death penalty by looking to the actions of the individual states, professional associations, non-profit organizations, academia, and others with relevant information or perspective in assessing the "evolving standards of decency." The Court’s reliance on international materials in the *Atkins* and *Simmons* opinions created a greater controversy than the actual holdings themselves. The Court looked beyond resources in the United States to the practices of other nations, as well as the various perspectives within the international community. In both *Atkins* and *Simmons*, the Court’s analysis of the

100. 543 U.S. 551, 578 (2005).
101. Id. at 564-69; *Atkins*, 536 U.S. at 313-17.
103. The controversy also exists within the Court. Some Justices, notably Breyer, Kennedy and Ginsburg, support the use of international and comparative materials. See *supra* note 4; *infra* note 194. Other Justices are deeply opposed to the use of international and comparative materials, notably Scalia and Thomas. Justice Kennedy wrote the majority opinions in *Lawrence v. Texas* and *Roper v. Simmons*; Justice Stevens wrote the opinion of the Court in *Atkins v. Virginia*. Chief Justice Roberts has not yet had an occasion to address this issue in an opinion. But in his confirmation hearings, Chief Justice Roberts responded to questions about the use of international law in court decisions in the United States by stating: "I don’t think it’s a good approach... I’d accuse them of getting it wrong on that point, and I’d hope to sit down with them and debate it and reason about it." *Roberts Confirmation Hearing, supra* note 18, at 293 (statement of Judge John Roberts). He cited concerns arising under "democratic theory" and concerns regarding the problems of selectivity and lack of restraints on judicial discretion. *Id.* Justice Alito expressed similar, yet stronger, views regarding the same. *Alito Confirmation Hearing, supra* note 3; see *infra* Part II.C.
104. The Court’s references to international views and practices did not begin in the *Simmons* and *Atkins* opinions. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Court looked to the views of "other nations that share our Anglo-American heritage, and by the leading members of the Western European community." *Id.* at 830.
105. There have been an increasing number of direct interventions by other States on this issue. Most recently, other countries have used the Vienna Convention on Consular Relations to intervene in the cases of foreign death row inmates in the United States. *See, e.g.*, *Avena and
"evolving standards of decency" draws heavily upon the internal discourse regarding the death penalty and selectively deploys cross-cultural dialogue to increase the cultural legitimacy of the decision.

In Atkins, the Supreme Court addressed the issue of the constitutionality of the death penalty for the developmentally disabled. In 1989, the Court had examined this issue in Penry v. Lynaugh and concluded that the constitutional prohibition of cruel and unusual punishment did not preclude the execution of those who are developmentally disabled. But fourteen years later, the Court reached the opposite conclusion in Atkins. The main emphasis in Atkins was the changing nature of the internal discourse regarding the execution of those who are developmentally disabled. The Court detailed the actions of state legislatures to prohibit the imposition of the death penalty for the developmentally disabled in the years after its decision in Penry. The Court considered not only the number of states that had changed their laws, but also the "consistency of the direction of change" to determine that a national consensus had developed against the practice. The Court's only reference to a cross-cultural influence was in a footnote addressing the views of the "world community." But in the same note, the Court addressed the opinions of domestic professional and religious organizations, as well as polling data regarding the opinions of the American public. The Court briefly noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."

Given the majority's limited inclusion of cross-cultural perspectives in Atkins, the depth in which the dissenting opinions addressed the matter is quite surprising. In his dissent, then Chief Justice Rehnquist (joined by Justices Scalia and Thomas), wrote separately to "call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and


106. Simmons, 543 U.S. at 563; Atkins, 536 U.S. at 321.
107. See Atkins, 536 U.S. at 307.
110. See id. at 315-18.
111. Id. at 314-15. The Court noted that, in the intervening years, "the American public, legislators, scholars, and judges" had deliberated over the question and "[t]he consensus reflected in those deliberations" influenced the Court's conclusion. Id. at 307.
112. Id. at 315.
113. Id. at 316-17 n.21.
114. Id. (citing the Brief for European Union as Amicus Curiae). The Court found domestic support for its decision in a broad "social and professional consensus." Id. The Court also found international support from the overwhelming disapproval of the "world community" for the imposition of the death penalty for crimes committed by the developmentally disabled. Id.
115. Id.
religious organizations, and opinion polls." 116 Rehnquist rejected any comparative aspect to the evaluation of the "evolving standards of decency": "I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination... For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant." 117 Justice Scalia, in his dissent (joined by Chief Justice Rehnquist and Justice Thomas), escalated the rhetorical approach of the dissent in rejecting the views of the international community: "[T]he Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called 'world community,' and respondents to opinion polls." 118 Both dissenting opinions sought to limit or qualify the sources the Court may consider in evaluating the domestic internal discourse regarding the death penalty. 119 Moreover, by focusing exclusively on a "national consensus" and dismissing outside views "imposed" on Americans, the dissenting Justices forcefully rejected the majority's consideration of cross-cultural dialogue. 120

In Simmons, the Court followed a path of analysis similar to the analysis in Atkins in addressing the constitutionality of the death penalty for a juvenile under age eighteen at the time the crime was committed. 121 Prior to the Court's decision in Penry, which allowed the execution of the developmentally disabled, in Stanford v. Kentucky, 122 the Court concluded that the execution of juveniles over age fifteen, but under age eighteen, was not cruel and unusual punishment. 123 In Simmons, the Court overruled Stanford. 124 As in Atkins, the

116. Id. at 322 (Rehnquist, C.J., dissenting).
117. Id. at 324-25. Rehnquist noted that earlier decisions in this area looked to international opinions, but contended that the Court had since rejected this practice. Id. at 325.
118. Id. at 347 (Scalia, J., dissenting). Scalia continued: Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."
Id. at 347-48 (quoting Thompson v. Oklahoma, 487 U.S. 815, 868-869 n.4 (1988) (Scalia, J., dissenting)).
119. See id. at 322-24 (Rehnquist, C.J., dissenting); id. at 347-48 (Scalia, J., dissenting).
120. Id. at 324-25 (Rehnquist, C.J., dissenting); id. at 347-48 (Scalia, J., dissenting).
121. See Roper v. Simmons, 543 U.S. 551, 555-56 (2005) (addressing whether it is constitutionally permissible "to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime").
123. See id. at 380; see also Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (concluding that it would offend "standards of decency" to execute any offender under the age of sixteen at the time of the crime).
124. Simmons, 543 U.S. at 574.
Court began by evaluating the internal discourse regarding the execution of juveniles. The Court noted that at that time, thirty states prohibited imposition of the death penalty on juveniles and that the trend of legislative action since its decision in Stanford had consistently moved closer towards prohibition of the imposition of the death penalty on juveniles. The Court in Simmons found this trend particularly striking in light of the "general popularity of anticrime legislation," including a trend toward "cracking down" on juvenile crime in other respects. The Court in Simmons also considered the underlying social purposes of the death penalty, which it identified as retribution and deterrence, and concluded that neither purpose is advanced by executing juveniles, given their "diminished culpability." Essentially, the Court in Simmons concluded that recognition of human dignity and special consideration for vulnerable groups, such as juveniles, outweigh the values of deterrence and retribution under today's standards of decency in the United States.

The Court's conclusion about the standards of decency in the United States, however, is strongly buttressed through cross-cultural dialogue:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in Trop, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."

In the last section of the Simmons opinion, the Court discussed both the relevant international law and the practices of other nations. The Court cited

125. Id. at 560-68.
126. This includes 12 states that reject the death penalty completely. Id. at 564.
127. But the trend towards prohibition of the execution of juveniles has moved at a much slower pace than the trend towards the prohibition of the execution of the developmentally disabled. Id. at 565 (comparing Atkins, the Court noted the "impressive" rate of prohibition of the death penalty for the developmentally disabled).
128. Id. at 566.
129. Id. at 571 ("Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.").
130. See id. at 571-74. The Court concluded that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." Id. at 573-74.
131. Id. at 575.
132. See id. at 575-78.
various international human rights treaties: the Convention on the Rights of the Child,\textsuperscript{133} the International Covenant on Civil and Political Rights,\textsuperscript{134} the American Convention on Human Rights,\textsuperscript{135} and the African Charter on the Rights and Welfare of the Child.\textsuperscript{136} The Court also looked to the practices of other nations and noted that since 1990, only seven other countries—Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China—have executed juveniles; each country has since either abolished or publicly disavowed the execution of juveniles.\textsuperscript{137} More specifically, the Court in \textit{Simmons} examined the United Kingdom’s abolition “in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins,” and noted that the United Kingdom abolished the use of the death penalty for juveniles over 50 years ago.\textsuperscript{138}

Perhaps anticipating the uproar that would result from the use of international materials, the Court stated that the “opinion of the world community” does not control the Court’s decision, but rather provides “respected and significant confirmation” for the Court’s conclusions.\textsuperscript{139} The Court then linked American values with international human rights standards to support its decision:

The [Constitution] sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political

\textsuperscript{133} \textit{Id.} at 576; \textit{see} Convention on the Rights of the Child, G.A. Res. A/44/25, at 171, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (Nov. 20, 1989). Article 37(a) provides: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age.” \textit{Id.} at art. 37. The United States is not a party to the Convention.

\textsuperscript{134} \textit{Simmons}, 543 U.S. at 576; \textit{see} ICCPR, \textit{supra} note 10, at art. 6(5). Article 6(5) states: “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . .” \textit{Id.} The United States is a party to the Covenant, but has entered a specific reservation that purports to exclude the U.S. practice of executing juveniles:

That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age. International Covenant on Civil and Political Rights, at 22, Mar. 24, 1992, S. Exec. Doc. No. 102-23 (1992). Interestingly, in \textit{Simmons}, the petitioner argued that the ICCPR and the U.S. reservation supported its case. \textit{See Simmons}, 543 U.S. at 567.

\textsuperscript{135} \textit{Simmons}, 543 U.S. at 576; \textit{see} ACHR, \textit{supra} note 87. Article 4(5) provides, in part: “Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age . . . .” \textit{Id.}


\textsuperscript{137} \textit{Simmons}, 543 U.S. at 577.

\textsuperscript{138} \textit{Id.} at 577-78.

\textsuperscript{139} \textit{Id.} at 578.
mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.  

Although the dissenting opinions would have reached a different result, they offered a somewhat parallel analysis. As in Atkins, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) disagreed with the majority’s assessment of the internal discourse on the death penalty for juveniles and rejected the use of cross-cultural dialogue to buttress that assessment.  

Again Scalia argued that the “evolving standards of decency” test permits the majority to impose its own views and values upon the nation. But he also raised an important point about the risk of selectivity in using international norms. Although he conflated foreign law with international human rights law, Scalia suggested that the members of the majority would reject the “reciprocity” aspect of cross-cultural dialogue in areas where it does not reflect their values.

Justice O’Connor, dissenting from the majority, wrote a separate opinion to underscore her disagreement with the majority’s assertion that a national consensus has emerged in opposition to the death penalty for juveniles. Nevertheless, O’Connor rejected Justice Scalia’s contention “that foreign and

140. Id.
141. Id. at 607-30 (Scalia, J., dissenting).
142. See id. at 607-08. Scalia stated: The Court thus proclaims itself sole arbiter of our Nation’s moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent. Id. at 608.
143. Id. at 624-27 (discussing foreign laws on the exclusionary rule, establishment of religion, and abortion). Scalia stated: The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry. Id. at 627.
144. Id. at 604 (O’Connor, J., dissenting).
international law have no place” in considering whether the punishment is cruel and unusual under evolving standards of decency.\textsuperscript{145} She stated:

\begin{quote}
[T]his Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.\textsuperscript{146}
\end{quote}

Thus, the simple framework for advancing the cultural legitimacy of human rights articulated by An-Na’im unfolded in the Supreme Court as follows: the Court evaluated domestic practices in light of the practices of other nations and examined international human rights standards to inform the understanding of domestic constitutional law and standards, which resulted in rejection of the juvenile death penalty.

\textbf{B. ”Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct”\textsuperscript{147}: Lessons from Lawrence about the Human Rights to Privacy and Freedom from Discrimination.}

From an international human rights law perspective, the norms regarding homosexual conduct are not as clear as those addressing the death penalty. The issue can be considered as a matter of nondiscrimination on the basis of sexual orientation or as a matter of individual or family privacy. If the issue is framed as a matter of nondiscrimination, it implicates a fundamental principle of international human rights law.\textsuperscript{148} Nondiscrimination is highlighted in expansive terms in the International Bill of Rights instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{149} Obligations of nondiscrimination are also included in the major

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{145} \textit{Id.} ("Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." (citations omitted)).
\item \textsuperscript{146} \textit{Id.} at 605.
\item \textsuperscript{147} \textit{Lawrence v. Texas}, 539 U.S. 558, 562 (2003).
\item \textsuperscript{148} The U.N. Charter includes nondiscrimination as fundamental principle of the United Nations. U.N. Charter art. 1, para. 3 (noting that one purpose of the United Nations is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion").
\item \textsuperscript{149} The Universal Declaration of Human Rights states: "All human beings are born free
\end{enumerate}
\end{footnotesize}
regional human rights treaties. Furthermore, two particular forms of discrimination—racial discrimination and discrimination against women—are the subjects of separate international conventions. So far, there has been only one specific treaty reference to nondiscrimination on the basis of sexual orientation, but much of the general treaty language prohibits discrimination on undefined “other” grounds. Though the issue of discrimination based on sexual orientation has received increasing international attention, the issue remains a relatively new subject of discussion at the international level.

150. See African Charter, supra note 24, at art. 2 (prohibiting discrimination based on “race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”); ACHR, supra note 86, at art. 1 (prohibiting discrimination based on “race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”); European Convention, supra note 87, at art. 14 (prohibiting discrimination on “any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”); see also The Cairo Declaration on Human Rights in Islam, G.A. Res. 49/19-P, Annex, at art. 1(a), U.N. Doc A/CONF.157/PC/62/Add.18 (June 9, 1993) (“All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex . . . or other considerations.”).


152. The Charter of Fundamental Rights of the European Union states: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” Charter of the Fundamental Rights of the European Union art. 21, para. 1, 2000 O.J. (C 364) 1, 13.

153. See supra notes 149-50 (prohibiting discrimination based on “other status” or “other social condition”).
Alternatively, if the issue of sexual orientation is framed as a matter of privacy rights, the situation is similar. There are numerous human rights provisions addressing issues of personal privacy, particularly in the context of intimate and familial relationships as well as other personal liberty interests. But there is no explicit language pertaining to same-sex relationships. The nations of Western Europe, whose values and history the United States views as most similar to its own, offer more explicit protection to same-sex relationships, either domestically or through the regional human rights mechanisms. But the privacy and liberty protection given to same-sex relationships remains a controversy in many places around the world.

Domestically, of course, the internal discourse on same-sex relationships and intimate conduct continues in the United States. Interestingly, in Lawrence v. Texas, the Court appeared to follow the internal discourse –

154. See ICCPR, supra note 10, at art. 23 ("The right of men and women of marriageable age to marry and to found a family shall be recognized."); ICESCR, supra note 30, at art. 10 ("The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society . . . ."); European Convention, supra note 87, at art. 8 ("Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except as in accordance with the law . . . ."); UDHR, supra note 30, at art. 16 ("[M]en and women of full age . . . have the right to marry and to found a family . . . . Marriage shall be entered into only with the free and full consent of the intending spouses.").

155. See supra note 85 (listing protections provided by Denmark, Norway, Sweden, Iceland, Finland, the Netherlands, Belgium, Spain, Germany, France, Luxembourg, Britain, Canada, Argentina, New Zealand, South Africa, Croatia, Hungary, Israel, Portugal, Slovenia, and Switzerland); see also Salgueiro da Silva Mouta v. Portugal, 1999-IX Eur. Ct. H.R. 309 (finding that the decision of a Portuguese court denying custody to a parent on the basis of sexual orientation discriminated against the applicant in violation of articles 8 and 14 of the European Convention).

156. "[T]he concept of family in the minds of the drafters of the Covenant was the traditional one of a man, a woman and, possibly, children. By introducing the concept of same-sex couples, Denmark was eroding the original concept and violating the basic principal of article 10." Committee on Economic, Social and Cultural Rights, Summary Record of the 12th Meeting, U.N. ESCOR, 20th Sess., 12th mtg. at 7, U.N. Doc. E/C.12/1999/SR.12 (May 6, 1999) (comments by Mr. Sadi). Canada's Parliament established a committee to research the issue; the committee determined "that the definition of marriage as the voluntary union between one man and one woman to the exclusion of all others was no longer acceptable under Canadian law." Committee on the Rights of the Child, Summary Record of the 895th Meeting, ¶ 61, U.N. Doc. CRC/C/SR.895 (Sept. 17, 2003) (statement of Mr. Farber of Canada). Same-sex couples were already raising children and, therefore, "the legalization of same-sex unions would provide such children with the same rights as those enjoyed by children from traditional marriages." Id.

157. The discourse regarding privacy interests and the prohibition of discrimination against same-sex relationships is at an earlier stage than the discourse concerning the death penalty. Religion and culture play powerful roles as the debate takes shape. But even in this context, human rights advocates are using values widely accepted in the United States, including nondiscrimination and privacy, to argue for a human rights-oriented approach.

cross-cultural dialogue construct in its rationale more closely than it did in the
death penalty cases. As in Atkins and Simmons, the Court evaluated the history
of the debate, noted changing public views, and overruled a previous decision
to reach a human rights-based result.159 Once again, the Court created
controversy by looking outside the United States to examine the practices of
other nations and the perspectives of the international community.160

The opinion in Lawrence began by re-characterizing the rights at stake.161
In the 1986 case, Bowers v. Hardwick,162 the Court upheld a Georgia statute
criminalizing certain same-sex intimate conduct, finding that the Constitution
does not confer "a fundamental right upon homosexuals to engage in
sodomy."163 Almost twenty years later in Lawrence, the Court invalidated a
similar Texas statute, framing the issue as a matter of private conduct in the
"exercise of... liberty" under the Fourteenth Amendment's Due Process
Clause.164 After re-characterizing the rights at stake in this more generous
manner, the Court undertook a reinterpretation of the historical treatment of
sodomy it relied upon in Bowers.

The Court in Bowers had quashed any sense of internal discourse on the
issue by connecting the criminalization of sodomy to "ancient roots" and
presenting a picture of a long and unchanged historical condemnation of
consensual sodomy.165 In Lawrence, the Court destabilized that notion by
carefully reexamining its history and reinterpreting sodomy prohibitions as
general condemnations of non-procreative sex, rather than as established
traditions of prosecuting homosexual conduct.166 The general condemnation of

159. Id. at 578-79.
160. Id. at 572-73. "To the extent Bowers relied on values we share with a wider
civilization, it should be noted that the reasoning and holding in Bowers have been rejected
elsewhere." Id. at 576.
161. Id. at 562 (noting that the case "involves liberty of the person both in its spatial and in
its more transcendent dimensions").
163. Id. at 190, 196.
164. Lawrence, 539 U.S. at 564. The Court characterized the liberty interest broadly as
"liberty of the person both in its spatial and in its more transcendent dimensions." Id. at 562.
The Court explained:
The laws involved in Bowers and here are, to be sure, statutes that purport to do no more
than prohibit a particular sexual act. Their penalties and purposes, though, have more far-
reaching consequences, touching upon the most private human conduct, sexual behavior,
and in the most private of places, the home. The statutes do seek to control a personal
relationship that, whether or not entitled to formal recognition in the law, is within the
liberty of persons to choose without being punished as criminals. Id. at 567.
166. Lawrence, 539 U.S. at 570-74. The Court stated that it was only in the 1970s that
states began singling out same-sex relations for criminal prosecution. Id. at 570 (noting that
only nine states have criminalized same-sex relations). The Court also noted that some of those
states have since moved towards abolishing the prohibitions. Id.
non-procreative sex has been the topic of much national debate; moreover, the private, intimate conduct of individuals has been subject to increasing protection by the Court for the past fifty years.\textsuperscript{167}

In \textit{Lawrence}, the Court openly addressed the importance of the social values at stake in this debate, particularly in the context of same-sex intimate conduct:

\"The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.\"\textsuperscript{168}

But the Court determined that recent laws and traditions are most relevant to defining the accepted scope of liberty.\textsuperscript{169} The Court found \"an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.\"\textsuperscript{170} After reviewing the current laws regarding intimate conduct, as in the death penalty cases, the Court relied upon the trend by individual states either to repeal laws criminalizing same-sex intimate conduct or to decline enforcement of those laws.\textsuperscript{171} The Court emphasized the powerful impact of such laws and their resulting prosecutions on human dignity and the fundamental importance of the liberty interests at stake.\textsuperscript{172}

\begin{itemize}
  \item 168. \textit{Lawrence}, 539 U.S. at 571.
  \item 169. \textit{Id.} at 571-72.
  \item 170. \textit{Id.} at 572.
  \item 171. \textit{Id.} at 573. The Court noted that the number of states with anti-sodomy laws dropped from twenty-five at the time of its decision in \textit{Bowers} to thirteen at the time of its decision in \textit{Lawrence}. In addition, only four of those states enforced their laws exclusively against homosexual intimate conduct. \textit{Id.} Even in states with sodomy laws, there was a pattern of non-enforcement in cases involving consenting adults acting in private. \textit{Id.}
  \item 172. \textit{Id.} at 575-76. The court expressed concern about the consequences of such laws, including public and private discrimination, stigma, risk of prosecution, and collateral consequences of conviction. \textit{Id.}
\end{itemize}
Nevertheless, the Court in Lawrence did not limit itself to consideration of the evolving national discourse. In its reevaluation of the historical and social context, the Court also included cross-cultural perspectives.\textsuperscript{173} It explained that the British Parliament had considered repealing laws punishing homosexual conduct as early as 1957 and took steps in that direction in the 1960s.\textsuperscript{174} The Court also mentioned the European Court of Human Rights’ 1981 decision in Dudgeon v. United Kingdom\textsuperscript{175} and subsequent case law following its precedent.\textsuperscript{176} In Dudgeon, the European Court found that the laws of Northern Ireland prohibiting homosexual conduct violated the European Convention on Human Rights.\textsuperscript{177} Noting that this “integral part of human freedom” has been recognized in many other countries, the Supreme Court concluded that it could not find justification for giving it less protection in the United States.\textsuperscript{178}

The majority decision in Lawrence used the language of human rights and human dignity, reframed the historical perspective to more fully reflect the ongoing internal discourse, and cited to cross-cultural developments protecting the interests at issue.\textsuperscript{179} In this way, the Court has recognized and advanced the cultural legitimacy of human rights norms protecting privacy and prohibiting discrimination for same-sex relationships. Moreover, despite their different outcomes, both the concurring and dissenting opinions also fit within this methodological framework.

The concurrence by Justice O’Connor framed the issue in the case as a matter of equal protection, rather than liberty and due process.\textsuperscript{180} O’Connor used the familiar language of the equal protection analysis to make an argument that reflects fundamental principles of nondiscrimination: “I am confident,
however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society. But O'Connor also noted that social values, such as national security and preserving the traditional institution of marriage, might be sufficient to overcome the value of equal treatment in other circumstances.

In his dissent, Justice Scalia emphasized a contrasting view of the internal national discourse and a fierce reaction to cross-cultural dialogue using stronger language than he used in the death penalty cases. He framed the issue squarely as a “culture war,” and he used this characterization to reject the Court’s involvement in advancing or determining that cultural evolution:

It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as “discrimination” which it is the function of our judgments to deter. So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously “mainstream”....

Scalia also strongly rejected the cross-cultural perspective incorporated by the majority opinion as “meaningless” but “[d]angerous dicta”: “Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct.”

In Lawrence, the Court followed the conceptual internal discourse – cross-cultural dialogue framework, but their analysis unfolded somewhat differently than in the death penalty cases. The Court focused primarily on reinterpreting the domestic history and discourse on intimate conduct, as broadly defined. The court used the language of human rights and human dignity, and it drew upon both the international human rights law developed by the European Court

181. Id. at 584-85 (O’Connor, J., concurring).
182. Id. at 585.
183. Id. at 602-03 (Scalia, J., dissenting). Scalia later clarified:
Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best.
Id. at 603.
184. Id. at 598 (emphasis added).
185. Id. at 562-571 (majority opinion).
of Human Rights and the domestic practice of the United Kingdom. In this way, the Court both recognized and advanced the cultural legitimacy of human rights norms protecting privacy and prohibiting discrimination. But because the international human rights norms at stake are less explicit and more contested both domestically and globally, the value of the cross-cultural perspectives is more problematic. As a result, the cultural legitimacy of the decision—and the human rights values it advances—is perhaps more tenuous.

C. Whose Law Will It Be? Looking Forward with the New Court.

Although the recent decisions in Atkins, Lawrence, and Simmons were authored by sitting members of the Court, the Supreme Court has undergone a recent change in composition. With the retirement of Justice O’Connor and the death of Chief Justice Rehnquist, the membership of the Court now includes new Chief Justice Roberts and Justice Alito. The internal discourse on the propriety of the Court’s consideration of international human rights standards was evident in both men’s confirmation hearings. Former Judge Roberts responded to questioning on the issue from Senator Coburn:

[Senator COBURN.] My question to you is, relying on foreign precedent and selecting and choosing a foreign precedent to create a bias outside of the laws of this country, is that good behavior?
Judge ROBERTS. Well, I don’t think it’s a good approach. I wouldn’t accuse judges or Justices who disagree with that, though, of violating their oath. I’d accuse them of getting it wrong on that point, and I’d hope to sit down with them and debate it and reason about it.

Senator COBURN. Can the American people count on you to not use foreign precedent in your decision making on the Supreme Court?
Judge ROBERTS. You know, I will follow the Supreme Court’s precedents consistent with the principles of stare decisis, and there are cases in this area,

186. Id. at 572-73.
of course. That's why we're having the debate. The Court has looked at those. I think it's fair to say, in the prior opinions, those are not determinative in the sense that the precedent turned entirely on foreign law, so it's not a question of whether or not you'd be departing from these cases if you decided not to use foreign law.189

Roberts also had a lengthy exchange with Senator Kyl on the issue.190 Senator Kyl specifically referred to Roper v. Simmons in his questioning.191 A few months later, then Judge Alito faced similar questions and he was even more explicit in his response:

[Senator Kyl.] What is the proper role, in your view, of foreign law in U.S. Supreme Court decisions, and when, if ever, is citation to or reliance on these foreign laws appropriate?
Judge Alito. I don't think that foreign law is helpful in interpreting the Constitution. Our Constitution does two basic things. It sets out the structure of our Government and it protects fundamental rights. The structure of our Government is unique to our country, and so I don't think that looking to decisions of supreme courts of other countries or constitutional courts in other countries is very helpful in deciding questions relating to the structure of our government.
As for the protection of individual rights, I think that we should look to our own Constitution and our own precedents...
We have our own law, we have our own traditions, we have our own precedents, and we should look to that in interpreting our Constitution...

[Senator Coburn.] The question I have for you—and I could not get Judge Roberts to answer it because of the conflict that might occur afterwards, but I have the feeling that the vast majority of Americans do not think it is proper for the Supreme Court to use foreign law... I just wondered if you had any comments on that comment.
Judge Alito. Well, I don't think that we should look to foreign law to interpret our own Constitution... I think the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world... The Framers did not want Americans to have the rights of people in France or the rights of people in Russia, or any of the other countries on the continent of Europe at the time. They wanted them to have the rights of Americans, and I think we should interpret our Constitution—we should interpret our Constitution. I don't think it's appropriate to look to foreign law.192

189. Roberts Confirmation Hearing, supra note 18.
190. Id.
191. Although Judge Roberts declined to comment on the specific case, he raised general concerns about the use of "foreign law" as contrary to democratic theory and as improperly expanding judicial discretion. Id.
192. Alito Confirmation Hearing, supra note 3. Alito also commented on the issue in response to questioning from Senators Leahy (affirming that English common law may help in
Both nominees were firm in their renunciation of the use of "foreign" law sources. This approach would accord with that of former Chief Justice Rehnquist, but differ from that of former Justice O'Connor. The other members of the Court are split in their attitudes toward the use of international law: Justices Kennedy, Stevens, Souter, Ginsburg and Breyer have referred to international law and will likely continue to do so; Justices Scalia and Thomas have been adamantly opposed to such use and will likely continue to be. Thus, one would expect that the addition of Chief Justice Roberts and Justice Alito will slightly shift the Court's willingness to consider, and certainly to cite, international and foreign law sources.

But it is not just the addition of new members to the Court that may change its willingness to consider international law and the practices of other nations. The public interest, and often public outcry, on this issue is likely to have an effect. The prominent questioning of the nominees by members of Congress, understanding United States law) and Kohl (clarifying that he does not think it is proper to look to foreign law in interpreting the constitution, but that it may be helpful in looking to the practices of foreign countries in how they organize their constitutional courts). Id.

193. Chief Justice Rehnquist was explicit in his views in Atkins v. Virginia:
I write separately, however, to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion. The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism. . . .

536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) (citation omitted). In contrast, Justice O'Connor wrote separately in Roper v. Simmons to affirm her view that it was appropriate for the Court to consider foreign and international law: "I disagree with Justice Scalia's contention that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." 543 U.S. 551, 604 (2005) (O'Connor, J., dissenting) (citation omitted).

194. See Simmons, 543 U.S. at 554; Lawrence, 539 U.S. at 561; Atkins, 536 U.S. at 305; see also Jeffrey Toobin, Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court, THE NEW YORKER, Sept. 12, 2005, at 42 (describing Justice Kennedy's "passion" for foreign and international law); Justice Ruth Bader Ginsburg, Remarks at the Annual Meeting of the American Society of International Law, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005), available at http://www.asil.org/events/AM05/ginsburg050401.html ("If U.S. experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others now engaged in measuring ordinary laws and executive actions against charters securing basic rights.").

195. See Simmons, 543 U.S. at 607 (Scalia, J., and Thomas, J., dissenting); Lawrence, 539 U.S. at 586 (Scalia, J., and Thomas, J., dissenting); Atkins, 536 U.S. at 321 (Scalia, J., and Thomas, J., dissenting); see also Lane, supra note 4, at A1 (accounting the debate between Justice Antonin Scalia and Justice Stephen G. Breyer at American University Washington College of Law over the Supreme Court's use of foreign law in its own decisions).

196. In fact, the use of these cross-cultural sources has become a part of the broader
the proposed Congressional Resolution to prohibit the use of foreign sources by the Court, and the public statements by members of the administration all suggest that the easiest course for the Court would be to refrain from further invocation of international law, practice, or norms. That would seem to be the politically wise choice, and given the supplementary part these sources have played in the decisions themselves, a choice with little real cost. Yet, such a conclusion ultimately reflects a misunderstanding of the importance of the dynamic at work in this process. The Court has an important function in both the internal, domestic discourse on human rights norms and in the ongoing cross-cultural dialogue on those norms. It remains to be seen what roles Chief Justice Roberts and Justice Alito will assume in that process, but it is unlikely that the Court will abandon its responsibility to participate in and stimulate dialogue completely.

CONCLUSION

The bounds and content of the relationship between the United States and other nations in the international community always provide interesting, and often provocative, questions. Equally provocative, at both the domestic and international levels, is the role that “outsiders” should play in changing the nature of a domestic legal or cultural system. The United States appears increasingly willing to be that outsider by providing guidance or insisting on the implementation of international legal obligations, including human rights obligations, in the domestic systems of other nations. The United States has been less willing to re-examine its own domestic laws and policies, viewing cross-cultural or international input as that of outsiders who are imposing their views on the nation; many in the nation believe that accepting outsider input would offend national sovereignty and be inconsistent with domestic views and values.

Does this resistance reflect the success of efforts to change international human rights standards to be more reflective of other cultural perspectives? If the controversial cases revolved around economic, social, and cultural rights, the assertion may be persuasive. But the decisions on the death penalty and sodomy laws involve basic civil and political rights, which have historically been viewed as most compatible with U.S. notions of individual rights. Is the rejection of international sources a reflection of a post-9/11 United States that views any outside involvement as suspect? It is true that there may be a more isolationist sentiment in the United States now, but the current debate about the death penalty long preceded the events of 9/11, and the controversy around same-sex relationships has no apparent connection to concerns about terrorism and national security.

internal discourse on the substance of the human rights norms at issue in the cases. See supra Part I.B.

197. See supra notes 4, 28 and accompanying text.
Perhaps Professor An-Na’im’s suggestions, which focus on the importance of the domestic cultural (and religious) context at any given time, provide a simple approach for examining a complex problem. American “exceptionalism” on this issue is not exceptional at all. The recent Supreme Court decisions—Atkins, Simmons, and Lawrence—suggest that there may be a growing openness to an internal re-examination on human rights protections in the United States and to a cross-cultural dialogue on these issues. But the outcry in response to the proposed use of human rights law suggests reasons to remain cautious. The confirmation hearings of both new Justices have included direct questioning on these decisions and the role of foreign and international law in Supreme Court decisions.

From a normative and legal human rights perspective, the significant issue is the development of cultural legitimacy, rather than purely formal implementation. If limiting or abolishing the death penalty is viewed as integral to a system of American justice and fundamental for the protection of the right to life, then it will be accepted in the United States. If recognizing the privacy of intimate relationships between persons of the same sex is considered a logical extension of the existing protection for intimate relationships and a commitment to equal treatment, then the political support will exist to ensure that liberty. If the values reflect the culture of the United States and can serve as both a model to and reflection of the values of the broader global community, then the laws and the implementation of those laws, both domestic and international, will follow.