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Session I: "Cross-cultural Death Penalty Experience"

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I would like to thank the European Commission, the American Bar Association and the Japan Federation of Bar Associations for inviting me to speak about the death penalty in the United States. I first want to say that our Japanese hosts have been especially gracious--I immediately felt welcomed here, and I want to thank you for that.

Today we are addressing the cultural aspects of the death penalty, and the United States is certainly a complex culture, made up of many different strands. It is difficult to define exactly what motivates the death penalty in our society, or why this punishment for crime is given a special importance by many people. What I would like to talk about today are some of the facts that illustrate a dramatic change in the death penalty (and perhaps even in our culture) that has been occurring over the past few years.

To understand this change, it is helpful to review the recent history of the death penalty. Ten years ago, in the mid-1990s, the death penalty in the United States was finally "succeeding" at what it had been formulated to do. The death penalty had been stopped by the United States Supreme Court in 1972 because it

was being arbitrarily applied. Many states, wishing to preserve the death penalty, then re-wrote their laws to meet the Court's requirements. The new laws were supposed to be carefully channeled so that only the worst offenders would be eligible for the death penalty, thereby eliminating its arbitrary quality. The death penalty resumed in 1976, though executions did not escalate quickly. There was one execution in 1977. The process was slow, there were many appeals, and some state laws were overturned.

In the 1990s, the United States began to experience a death penalty similar to that of the 1930s when nearly 200 people a year were executed. The number of executions went steadily up, reaching almost 100 executions in 1999. The number of people on death row kept rising as more and more people were sentenced to death. New states, such as Kansas and New York, added the death penalty to their statutes. In 1994, the federal government, which affects all 50 states but which had not been a significant participant in the death penalty, expanded its capital punishment statute so that 60 offenses were eligible for the death penalty, instead of just one offense previously.

Much of the public wanted the death penalty applied more often and more quickly. Moreover, we had just experienced a terrible act of terrorism in 1995 by one of our own citizens in the Oklahoma City bombing. In the wake of that, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 to speed up the death penalty, and the number of executions continued to rise.

The death penalty was supported by 80% of the American public in the 1990s. But surprisingly, a dramatic period of change began around the time of the new millennium. This would seem to be a very unlikely time for the death penalty to change in the U.S., given the cultural events taking place. In 2000, the U.S. elected a president, George Bush, who as governor of Texas presided over the most executions of any modern governor at the time--152 executions. He was not elected *because* of those executions or because of his death penalty position, but the election certainly symbolized that the U.S. was a country that had no problem with the death penalty.

We also experienced another act of terrorism in 2001--the attacks in New York and Washington, DC. These actions created a tremendous anger and resulted in many proposals to expand the death penalty. But despite these events, and despite the rise in the executions in the 1990s, the increase in the size of death row, the high level of public support for the death penalty and its affirmation through the electoral process, the death penalty has been in a sharp decline since 2000. Executions are down about 50%. In 2008 there were 37 executions compared to almost 100 in the 1999. The number of death sentences--and I think this is the most important measure of the death penalty because new sentences mean more executions and a larger death row--are down by over 60% since 1999. There were 300 death sentences a year throughout the 1990s. In 2007 there were 115 death sentences. That may sound like a lot, but it is far less than it had been.

In 2008, we are projecting that the number of sentences will remain low, close to the lowest they have been in 30 years since the death penalty was reinstated in the United States. Not all of the change is positive and in one direction. But the change is significant, and I think it is attributable to two causes: first, and Mr. Greco of the ABA pointed this out earlier, as the number of executions rose, lawyers from bar associations and law firms, journalism students, and concerned individuals from around the country started looking at these cases more closely, especially as executions neared. What they found in case after case was that the defendant had been wrongly convicted.

Thirteen people in Illinois, alone, were wrongly convicted and sentenced to death, many of them having come close to execution. One of them, Anthony Porter, had his case investigated by journalism students. They happened to review this case because their class met at a time when he had received a stay of execution based on his mental capacity, not because of his possible innocence. This was not an instance of the criminal justice system working well. This case illustrated how independent influences from outside the justice system could expose the problems in the death penalty. The students discovered that Porter could not have committed the crime that put him on death row. They found the actual perpetrator who confessed to the crime. Porter was freed, and the public was shocked at how a near tragedy was averted.

In the late 1990s, the number of exonerations from death row continued to grow, and the issue of innocence received confirmation from another outside source. The advent of DNA testing, which emerged in the 1990s and became

more sophisticated and prevalent in the late 1990s, confirmed that people, whom the courts and juries ensured us were guilty and deserving of death, were actually innocent.

DNA testing cast a new light on our criminal justice system. Even though the majority of the cases where inmates were freed from death row did not involve DNA testing, this scientific affirmation exposed deeper problems throughout the system. If DNA testing proved that in some cases the wrong person had been convicted and sentenced to death, then one had to be concerned about the many other cases in which no DNA evidence was available.

The second important contribution to the decline in the use of the death penalty that emerged in the 1990s was the introduction of the sentence of life without the possibility of parole. That has been a gradual process in the United States, and may not seem like progress from the perspective of those concerned about the high rate of incarceration in the U.S. But for the death penalty, it represents a critical alternative.

Jurors in death penalty cases are faced with the difficult task of possibly sentencing someone death, knowing that in 5 or 10 years new evidence might reveal that the wrong person was convicted. In the earlier years of the death penalty, the alternative to a death sentence was a life sentence in which the defendant might someday be released. A life-without-parole sentence has given jurors a *middle ground* between death and the possibility of release.

The number of death sentences has declined dramatically and the number of people serving life-without-parole sentences has increased. These two developments, innocence and life-without-parole, are changing the face of the death penalty in the United States.

As I mentioned earlier, however, all the change is not in one direction. The federal death penalty has been expanding and it has been aggressively pursued in the 14 states that do not have capital punishment. The number of people on the federal death row has gone up while the number of people on the states' death rows has declined.

Another disturbing development is happening in California. There are 670 people on death row in California. There have been 13 executions over the past 30 years, though none since 2006. Because there are so many cases, the system is slow and expensive. One solution would be to abolish the death penalty. But there are also efforts among some prosecutors to speed up the process and curtail appeals, perhaps by submitting proposed changes to a referendum of voters. With the largest death row in the country, an increase in the pace of executions there could have a dramatic effect on the whole country. Right now, executions remain on hold because of the controversy regarding lethal injections, but if that issue is settled many more execution dates could be set.

Finally, there are still many federal lawmakers who believe strongly in the death penalty and have been trying to accelerate executions. A proposed bill

entitled the Streamlined Procedures Act would have drastically curtailed death penalty appeals, but it did not pass. However, another provision attached to the revision of the Patriot Act recently did become law. It allows the U.S. Attorney General to approve states' systems of representation, thereby making them qualified for faster federal appeals.

It currently takes an average of 10.5 years from sentencing to execution in the United States. Some legislators want to shorten this to 5 years. Of course, the danger with such a system is that some of the 130 innocent people who had been freed from death row would have been executed before the evidence emerged to free them. Those cases took an average of 9 years from sentencing until when the inmates were freed to develop the necessary evidence of innocence. If the executions had occurred after 5 years, many of them would be dead.

We will hear from one of these individuals, Kirk Bloodsworth, shortly. His case was the first case where DNA evidence freed a death row inmate in the United States. That case took many years to develop. If we cut the appeals process down from 10 years to 5 years, we run the risk of executing the typical innocent person instead of freeing him.

So there are clearly trends that counterbalance the decline in the use of the death penalty in the U.S. Nevertheless, I believe that the drop in death sentences is the stronger trend because it has occurred not just this year, but consistently over the past 8 years. Moreover, there are other indications that the death penalty may be on the wane: New York has repeatedly rejected efforts to restore

its death penalty after it was overturned by the courts in 2004. New York was the last state to adopt the death penalty in 1995, and now it has abandoned capital punishment. Texas, which leads the country in executions, adopted the sentence of life without parole in 2005. We are already seeing a decline in death sentences in Texas. Illinois has had a moratorium on executions for 8 years. New Jersey abolished the death penalty in December 2007. Other states like Maryland, New Mexico, and Tennessee are considering abolition or reforms of their death penalty system. I think the prospects for the future are positive, but there are competing trends. Hopefully, the international movement away from capital punishment will buttress the turnaround on the death penalty that has been slowly emerging in the United States. Thank you.

Ronald Tabak from the United States: My question is for Mr. Dieter. The two speakers that spoke after you, one of them claimed that abolitionists in the United States are afraid to debate the subject, and the person after that, Mr. Hodgkinson, spoke about the danger of losing in legislatures what you have gained in litigation. I'd like you to comment on those statements in light of what happened in New York after the court decision there and what has happened regarding the mentally retarded and juveniles in the United States following enactment of legislation in various states. Thank you.