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The Death Penalty: The USA in World Perspective

Roger Hood
All Souls College Oxford

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CBE, FBA, Professor of Criminology, Director of the Centre for Criminological Research and Fellow of All Souls College, University of Oxford, England. This is a revised version of an Edward Ball Chair Distinguished Lecture presented by the author at the Florida State University College of Law on April 2, 1996. The lecture was delivered under the auspices of the School of Criminology and Criminal Justice and the College of Law, Dean Daniel Maier-Katkin in the chair. This lecture was delivered only a short while before the untimely death of my friend and colleague Richard B. Lillich. It was a privilege and pleasure to have him in the audience, and it was he who encouraged me to put this piece into print. We had got to know each other well both at the University of Virginia and at All Souls in Oxford, where he had been a Visiting Fellow. In admiration of his many contributions to, and deep concern for, human rights and as a token of our friendship, I dedicate this article to his memory.

THE DEATH PENALTY: THE USA IN WORLD PERSPECTIVE

ROGER HOOD*

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I. INTRODUCTION

Coming from Great Britain, which has such close ties to the United States, I am reminded of the democratic values we share, as well as our common commitment to liberty and human rights. However, many of us in Britain and in Europe generally are puzzled, to say the least, by the American commitment to the death penalty and to its practice of execution. Indeed, many in Britain, seeing what has

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happened in the United States, believe that the death penalty is being more widely used in the world as a whole; however, as I shall show, the trend is entirely in the opposite direction.

The theme I have chosen for this article is this: where does the United States stand internationally as regards the use of capital punishment both in law and practice, and to what extent does it conform to developing norms and expectations of the international community?

The modern movement to abolish the death penalty has its roots deeply and firmly embedded in the liberal ideas which spawned the Enlightenment in Europe and which had such an abounding influence on the political ideals of the emergent United States of America. In the wake of Cesare Beccaria's inspiring treatise of 1764, *On Crimes and Punishments*,[1] the death penalty was abolished in Tuscany and Austria and came near to being abandoned in Russia.[2] Furthermore, in the United States, Pennsylvania was in the vanguard when it legislated in 1794 to abolish the death penalty for all crimes other than first degree murder.[3] Although these first attempts to achieve complete abolition were later reversed, the development of penal policies, influenced by a combination of humanitarianism and utilitarianism during the nineteenth century, soon put the issue back on the agenda of international debate. In the 1850s, American states were at the forefront: Michigan, Wisconsin, and Rhode Island all abolished the death penalty for murder.[4] Portugal, where there had been no executions since 1843, led the way in Europe in 1864, followed by Italy (where it was later reintroduced by the Fascists) and by Holland.[5] By the end of the nineteenth century, capital punishment was either in complete suspension or only very rarely resorted to in several European countries, in particular the Scandinavian states.

II. MODERN DEVELOPMENTS

When Professor Norval Morris, the distinguished penologist, carried out his survey for the United Nations, covering the years up to 1965, there were only twelve countries which had completely abolished

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1. CESARE BECCARIA, ON CRIMES AND PUNISHMENT (David Young trans., Hackett Publ'g Co. 1986) (1764).

2. *See* LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 [THE MOVEMENT FOR REFORM] 290-93, 299-300 (1948).

3. *See* 1953 Report of the Royal Commission on Capital Punishment: 1949-1953, Cmnd. 8932, at 168; *see also* WILLIAM J. BOWERS ET AL., LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 7-8 (1984).

4. *See id.*

5. *See* LEON RADZINOWICZ & ROGER HOOD, 5 A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (THE EMERGENCE OF PENAL POLICY) 671-76 (1986).

the death penalty, and a further eleven which had abolished it for murder and other ordinary offenses in peacetime.[6] Several more countries were abolitionist de facto, having executed no one for at least ten years.[7] A similar survey, completed for the United Nations twenty-three years later in 1988, revealed that the number of completely abolitionist countries had increased from twelve to thirty-five and those for ordinary offenses from eleven to eighteen.[8]

Since that time, the pace of change has been even more remarkable due largely to the freedom gained by new states and political changes in others. Over the short period from 1989 to 1995, an additional twenty-three countries abolished capital punishment completely and another three abolished it for ordinary crimes.[9] In other words, the annual rate at which countries have taken action to abolish the death penalty has increased from an average of about one and a half to nearly four a year. Furthermore, among the retentionist states, at least thirty have not executed anyone during the past ten years, and thirteen of these have become abolitionist de facto since 1989.[10] Of course, the creation of fifteen new states from the former Soviet Union, with all but one of them retaining the death penalty, inevitably distorts the comparison.[11] By the end of 1995, just about a third of all separate political entities had abolished the death penalty completely and nearly one in four had done so for all crimes committed in peace-time.

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6. These figures have been calculated from Norval Morris' *Capital Punishment: Developments 1961 to 1965* combined with other sources. *See* NORVAL MORRIS, CAPITAL PUNISHMENT: DEVELOPMENTS 1961 TO 1965, at 7-9, U.N. Doc. ST/SOA/SD/10, U.N. Sales No. E.67.IV (1967).

7. *See id; see also* MARC ANCEL, CAPITAL PUNISHMENT, U.N. Doc. ST/SOA/SD/9, U.N. Sales No. 62.IV.2 (1962).

8. *See* ROGER HOOD ,THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 7-8 (2d ed. 1996).

9. *See* MORRIS, *supra* note 6.

10. *See* HOOD, *supra* note 8, at 7-10; *see also Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty. Report by the Secretary-General*, U.N. ESCOR Comm. on Crime Prevention and Criminal Justice, Agenda Item 7, at 10-11, U.N. Doc. E/CN.15/1996/19 (1996) [hereinafter *Capital Punishment and Implementation of the Safeguards*].

11. *See Capital Punishment and Implementation of the Safeguards, supra* note 10, at 10.

Table 1[12]

Number of Abolitionist and Retentionist Countries in 1988 and 1955

	Complete Abolitionist	Abolitionist for Ordinary Offenses	De Facto Abolitionist	Retentionist	Total Number of Countries
1988	35 (19%)	18 (10%)	26 (14%)	101 (56%)	180
Dec. 1995	58 (30%)	14 (7%)	29 (15%	91 (47%)	192

However, a few countries have moved in the opposite direction. Three countries—the Philippines, Papua New Guinea, and Gambia (after a military coup)—reinstated the death penalty. Likewise, the death penalty was recently restored in two states in the United States, Kansas (in 1994)[13] and New York (in 1995),[14] making the number of retentionist states thirty-eight. In addition, attempts have been made to reinstate the death penalty in at least half the abolitionist states, including Michigan and Rhode Island.[15] At the same time, over 180 bills in thirty-eight of the United States were introduced in 1994 to expand the range of aggravating circumstances and to broaden the category of offenders subject to the death penalty.[16] Most of them failed, but they signify the mood in America on this subject. Furthermore, federal law in the United States was substantially widened by the Violent Crime Control and Law Enforcement Act of 1994,[17] which made capital punishment a discretionary penalty for more than fifty offenses, including some in which it was not necessary for death to have ensued from the act.

At least eleven countries formerly thought to have abandoned their use of the death penalty resumed executions, as did several American states. In 1988, twenty-five of the thirty-six states which had the death penalty had not executed any person for much longer than ten years. Yet, by 1995, this number had dwindled to twelve. Since 1990, Arizona, California, Washington, and Wyoming have resumed executions after a gap of more than a quarter of a century.[18] In other words,

12. *See* HOOD, *supra* note 8, at 9.
13. *See* KAN. STAT. ANN. § 21-4624 (1995).
14. *See* N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1996).
15. *See* HOOD, *supra* note 8, at 47-48.
16. *See id.*
17. Pub. L. No. 103-322, 108 Stat. 1796, § 60001-60022 (codified at 18 U.S.C. §§ 3591-3598 (1995)).
18. *See* HOOD, *supra* note 8, at 49-52.

suspension of capital punishment, even for lengthy periods, has not been shown to eradicate its use. Only complete abolition and a commitment to international conventions providing for abolition will do that.

III. INTERNATIONAL CONVENTIONS

Nineteen years ago, the United Nations General Assembly adopted a resolution to "progressively [restrict] the number of offenses for which the death penalty may be imposed with a view to the desirability of abolishing capital punishment."[19]

As international and human rights lawyers know, the adoption of protocols to conventions on human, civil, and political rights which endorse the abolition of the death penalty as an international goal is of great significance in pursuit of this end. In 1983, Protocol Number 6 to the European Convention on Human Rights[20] was endorsed by the Committee of Ministers of the Council of Europe, Article 1 of which provides for the abolition of the death penalty in peacetime. More recently, in 1994, the Parliamentary Assembly of the Council of Europe resolved that "the willingness to ratify the Sixth Protocol be made a prerequisite for membership of the Council of Europe."[21] The significance of this will be discussed later in this piece.

In December 1989, the United Nations General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR"),[22] Article 1 of which states: "No one within the jurisdiction of a State party to the Optional Protocol shall be executed"[23] (this also applies to offenses committed in peacetime only). Further, in June 1990, the General Assembly of the Organization of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty,[24] Article 1 of which calls

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19. G.A. Res. 32/61, U.N. GAOR, 32d Sess., Supp. No. 45, at 136, U.N. Doc. A/32/45 (1977).

20. *See* Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, Eur.T.S. No. 114, *reprinted in* 22 I.L.M. 538.

21. *See* Parliamentary Assembly of the Council of Europe, 1994 Sess., Recommendation 1246 (1994) on the Abolition of the Death Penalty and Resolution 1044 (1994) on the Abolition of Capital Punishment, para. 6.

22. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 3d Comm., 44th Sess., 82d plen. mtg., U.N. Doc. A/RES/44/128 (1990).

23. *Id.*

24. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. 73, *reprinted in* 29 I.L.M. 1447 (1990).

upon states to abstain from its use, although it does not place an obligation on them to erase it from the statute books.[25]

IV. THE DEATH PENALTY IN PRACTICE

It is one thing to have capital punishment on the statute books, but it is entirely another thing to actually use it. The number of death sentences and executions worldwide is unknowable without a commitment of all countries to report their practices. For example, it is suspected that there may have been over 5,000 executions in China in 1983 whereas Amnesty International could only report the 600 which came to their attention.[26] Of course, official executions are only part of the picture. The United Nations Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions had notice that over 2,300 extrajudicial executions took place in 1994 in fifty-one countries, and that was nowhere near the true total.[27] One only has to think of the number of summary executions that went unrecorded in Bosnia and Rwanda.

We have to rely on Amnesty International's valiant efforts in combing all available sources to get anywhere near an accurate picture. Their reports show that the number of recorded death sentences and executions has fluctuated enormously over the past fifteen years. There was a dramatic rise in death sentences and executions to over 3,000 in 1981, followed by a decline to just over 1,000 death sentences and fewer than 800 executions in 1986 and 1987. The optimism this inspired in abolitionists was soon shattered when the number of reported executions rose again to over 2,000. Indeed, 1994 saw the highest number of reported executions since 1981, but these were carried out by a limited number of countries (thirty-seven in 1994).[28] It is clear that many states have the death penalty but rarely use it.

It cannot be doubted that China, despite having an official policy of "killing only a few," is the country where, today, the majority of executions are carried out, seventy-seven percent of all those known in 1994. But Iran, Nigeria, Saudi Arabia, the United States, Singapore, Egypt, and the Ukraine also have executed relatively high numbers. Yet, figures are misleading if not seen in relation to the size of population

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25. *See id.* art. 1; *see also* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 162-77, 228-48, 279-83 (1993).

26. *See* HOOD, *supra* note 8, at 73.

27. *See Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Mr. Bacre Waly Ndiaye, Submitted Pursuant to Commission on Human Rights Resolution 1994/82,* U.N. ESCOR Comm. on Human Rights, 51st Sess., Agenda Item 12, at 118, U.N. Doc. E/CN.4/1995/61 (1994) [hereinafter *Report of the Special Rapporteur*].

28. *See* HOOD, *supra* note 8, at 71.

and ideally, if statistics were available, the number of offenses committed. For example, China is reported to have executed an average of 1,000 a year in the years 1989-1994, and Iran 600.[29] However, China has 1.2 billion people compared with Iran's 63 million. This means that Iran has been executing proportionately over ten times as many as China. In other words, China would have to execute over 10,000 a year to equal Iran's rate.

By comparison, in the United States during the year 1995, fifty-six persons were executed out of a population of 250 million, a rate per 100,000 population which is a quarter of China's known rate.[30] Not a small fraction you may think, particularly given the much more limited scope of capital punishment in the United States.

V. A REGION-BY-REGION PERSPECTIVE

Although the worldwide movement towards abolition has proceeded at an increasing pace, it has not occurred evenly across the Globe. Most of the recent abolitionist states are East European countries formerly under Soviet domination and in Africa south of the Sahara, both regions where very few countries were abolitionist seven years ago.

Table 2[31]

Countries Which Have Abolished the Death Penalty Since 1980

Country	Year	Abolished for all Offences	Abolished for Ordinary Offences
Cape Verde	1981	X	
France	1981	X	
Netherlands	1982	X	
Cyprus	1983		X
El Salvador	1983		X
Argentina	1984		X
Australia	1984	X	
Haiti	1987	X	
Liechtenstein	1987	X	
Cambodia	1989	X	
New Zealand	1989	X	
Andorra	1990	X	
Croatia	1990	X	
Czech Republic	1990	X	

29. *See id.* at 73.

30. *See* Hugo Adam Bedau, *The United States, in* CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS 45 (Peter Hodkinson et al. eds., 1996).

31. *See* HOOD, *supra* note 8, at 247.

Hungary	1990	X	
Ireland	1990	X	
Mozambique	1990	X	
Namibia	1990	X	
Nepal	1990		X
Romania	1990	X	
Sao Tome and Principe	1990	X	
Slovak Republic	1990	X	
Macedonia	1991	X	
Slovenia	1991	X	
Angola	1992	X	
Paraguay	1992	X	
Switzerland	1992	X	
Greece	1993		X
Guinea-Bissau	1993	X	
Italy	1994	X	
Mauritius	1995	X	
Moldova	1995	X	
South Africa	1995	X	
Spain	1995	X	

On the other hand, there has been a marked resistance to appeals for abolition in the United States and various other parts of the world, particularly in the Middle East and Asia. The list of retentionist countries is instructive.

Table 3[32]

Countries Which Have Retained the Death Penalty in Practice (as of March 1996)[33]

Afghanistan	Albania	Algeria
Antigua and Barbuda	Armenia	Azerbaijan
Bahamas	Bangladesh	Barbados
Belarus	Belize	Benin
Botswana	Bulgaria	Burkina Faso
Cameroon	Chad	China
Cuba	Democratic People's Republic of Korea (North Korea)	Dominica
Egypt	Equatorial Guinea	Eritrea
Estonia	Ethiopia	Gabon
Georgia	Ghana	Grenada

32. *See id.* at 246.

33. In all, ninety countries and territories have retained the death penalty for ordinary crimes. Most of them are known to have carried out executions during the past ten years; however, for some countries it is difficult to ascertain whether or not executions have in fact been carried out.

Guyana	India	Indonesia
Iran	Iraq	Jamaica
Japan	Jordan	Kazakhstan
Kenya	Kuwait	Kyrgyzstan
Lao People's Democratic Republic	Latvia	Lebanon
Lesotho	Liberia	Libyan Arab Jamahiriya
Lithuania	Malawi	Malaysia
Mauritania	Mongolia	Morocco
Myanmar	Nigeria	Oman
Pakistan	Poland	Qatar
Republic of Korea (South Korea)	Russian Federation	Saudi Arabia
Sierra Leone	Singapore	Somalia
St. Christopher and Nevis	St. Lucia	St. Vincent and the Grenadines
Sudan	Swaziland	Syrian Arab Republic
Taiwan	Tajikistan	Thailand
Trinidad and Tobago	Tunesia	Turkmenistan
Uganda	Ukraine	United Arab Emirates
United Republic of Tanzania	United States of America	Uzbekistan
Vietnam	Yemen	Yugoslavia
Zaire	Zambia	Zimbabwe

From the viewpoint of Europe, the attitude towards the death penalty in the United States and the practices involved are entirely foreign. Only two European nations retain the death penalty as punishment for murder: Belgium, where it is about to be abolished and where only one person has been executed since 1863; and Turkey, where no one has been executed since 1984 and whose membership in the Council of Europe means that executions are extremely unlikely to be resumed.

Why is Western Europe free of capital punishment? Largely because of the growing respect for human rights and the lack of evidence to support deterrence as the justification for executions. For example, Greece, which has recently abolished the death penalty, asserted in its reply to the latest United Nations survey that capital punishment was not in harmony with its constitution, which recognizes that "[h]uman life is of supreme value"; it added that, from the point of view of the general prevention of crime, "the efficiency of the death penalty has been proven non-existent."[34] Similarly, when Spain recently abolished it for all offenses against the state and under

34. HOOD, *supra* note 8, at 14.

military law, it declared: "What more degrading or afflictive punishment can be imagined than to deprive a person of his life."[35]

It is true that the British Parliament has debated the issue more than a dozen times in recent years, but on the last occasion, the majority against reinstatement was the largest ever. Not only was there no agreement on how capital murder might be defined (i.e., what classes of acts should be included that would not lead to arbitrariness in who received the death penalty), but the revelation of several miscarriages of justice in cases where the persons—mostly Irish convicted of terrorist murder—would have been executed has convinced many former advocates that a return to capital punishment could not be safely administered.

Eighteen European countries have now ratified the Sixth Protocol to the European Convention on Human Rights and fifteen are party to the Second Optional Protocol to the ICCPR.[36] Only Turkey and the United Kingdom stand out: Margaret Thatcher (now Lady Thatcher), consistent with her anti-European stance and her personal support for capital punishment, argued that allowing Members of Parliament an individual vote of conscience on the matter would be inconsistent.[37] Thus she hoped to keep the door open.

In Eastern Europe, the change has been remarkable. It began with East Germany in 1987, but with the collapse of communism, Romania, Hungary, the Czech and Slovak Republics, Slovenia, Croatia, and Macedonia all eliminated the death penalty.[38] Other countries, such as Poland, Albania, and Bulgaria appear likely to follow suit soon. Among the states of the former Soviet Union, Moldova abolished the death penalty upon joining the Council of Europe, and the Baltic States and Belarus are moving in this direction. Of greatest significance is the action of the Ukraine and Russia which, as a condition of membership of the Council of Europe, agreed in February 1996 to a moratorium on all executions.[39] The countries agreed to sign the Sixth Protocol within one year and ratify it within three years. This is a remarkable change because only five years ago the Soviet Union had an execution rate seven times higher than America as a whole. Indeed, six East European

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35. *Id.* at 14-15.

36. *See id.* at 11-12.

37. *See* SCHABAS, *supra* note 25, at 238 n.121.

38. *See* HOOD, *supra* note 8, at 16-23.

39. *See* AMNESTY INTERNATIONAL DEATH PENALTY NEWS, Mar. 1996, 1 (AI Index ACT 53/01/96). However, reports of executions, said to be at a mounting rate, have continued to come from Russia and the Ukraine, suggesting that it has breached the obligations it entered into on joining the Council of Europe.

countries have signed or ratified the Sixth Protocol, and four have signed or ratified the Second Optional Protocol to the ICCPR.

In Africa, south of the Sahara, where in 1987 all countries retained the death penalty, the situation is undergoing a transformation: Mozambique, Namibia (both of which have ratified the Second Optional Protocol), Angola, Guinea-Bissau, and Mauritius have all eliminated the death penalty.[40] The most dramatic change, of course, was in South Africa, beginning with the release of Nelson Mandela in 1990. By 1992, all executions were suspended pending the introduction of a Bill of Rights for the new South Africa. Despite the fact that the transitional constitution of 1993 was silent on whether or not the death penalty was permissible, the Constitutional Court, in the landmark judgment of *State v. Makwanyane*, which was handed down in June 1995, decided that it was incompatible with the prohibition against "cruel, inhuman or degrading" punishment and with a "human rights culture" which made the right to life and dignity the cornerstone of the South African Constitution.[41] Facing a situation where violence is endemic, the President of the Court insisted that the way to reduce violence is to create a culture where human rights are respected.

Nevertheless, it would be wrong to suggest that the death penalty throughout Africa is on the wane. Among other countries, Nigeria's frequency of executions (over 100 in 1994) stands out.[42] Many of these executions were done on a mass scale by firing squads in public.

In South America, where the abolitionist movement began in Brazil in the 1880s, there have been several periods when capital punishment has been reinstated, followed by renewed abolition as military dictatorships have come and gone. However, at present, the abolitionist tradition holds sway over most of the continent: seven countries are party to the Second Optional Protocol, and all these plus one other, to the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. The only country to carry out executions in the last ten years is Guyana, which is more akin culturally and politically to the Caribbean states, where the only countries to have abolished the death penalty are the Dominican Republic and Haiti.[43]

With only a few exceptions, the death penalty is on the statute books throughout Asia and the Pacific region. The exceptions are Australia and New Zealand, which are parties to the Second Optional

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40. *See* HOOD, *supra* note 8, at 27-29.
41. State v. Makwanyane, Case No. CCT/3/94, 1995 (3) SA 391 (CC) (S. Afr.).
42. *See* HOOD, *supra* note 8, at 30-31.
43. *See id.* at 43-44.

Protocol to the ICCPR and have a dominant political culture which is European rather than Asiatic; Hong Kong; several small Pacific island states; and Nepal, where it exists only for crimes against the Royal Family.

On the other hand, India, with its democratic traditions, continues to use capital punishment for "the rarest of rare cases," but what this means we do not know because no statistics have been published.[44] A lively debate ensues in Japan and South Korea, but with no signs that the abolitionists will hold sway. Far from there being any sympathy with the abolitionist cause, there is strong support for capital punishment in Singapore, Pakistan, Bangladesh, Myanmar (Burma), Vietnam, and China.

In the Middle East and North Africa, leaving Israel aside, strong support for capital punishment exists in every country, with the possible exception of Tunisia. It has been invoked with great severity in Iran and apparently in Iraq. Additionally, it is on the rise in Saudi Arabia and has been extended to terrorist offenses in Egypt and Algeria to combat fundamentalist insurrection. In many countries of the region, Islamic religion and law are invoked to support capital punishment. Iraq has said that abolition would be incompatible with its "religion, historical heritage and cultural values."[45] Sudan has stated that it is "a divine right of some religions . . . [which] is embodied in Islam and must be respected."[46]

What does this survey show? It shows that the United States, or at least the thirty-eight states and federal government which maintain the death penalty, are out of step with international opinion amongst those countries with whom they share a common political culture and, in relation to other matters, a concern for human rights. This can be seen in two respects: (i) in relation to standards aimed to ensure that if capital punishment is to be used, the rights of defendants are fully protected; and (ii) in the attitude of the federal government towards international conventions aimed at abolishing the death penalty altogether.

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44. *See id.* at 36-38.
45. *See id.* at 26.
46. *See id.*

VI. INTERNATIONAL STANDARDS PROTECTING THOSE FACING THE DEATH PENALTY

In 1984, the General Assembly of the United Nations endorsed a resolution adopted by the Economic and Social Council[47] which listed a series of nine safeguards guaranteeing protection of the rights of those facing the death penalty, on the understanding that "they would not be invoked to delay or prevent the abolition of the death penalty."[48]

These safeguards aim to ensure that capital punishment is implemented only for the most serious intentional crimes with lethal or other extremely grave consequences. The goals of the safeguards are as follows: to protect convicted persons from retroactive applications of the death penalty; to provide for the possibility of lighter punishments for those already under sentence of death; to exempt those under the age of eighteen at the time of the commission of the crime, pregnant women, new mothers, and those who are or have become insane; and to ensure that the death penalty is only applied where no possibility of wrongful conviction exists and has occurred after a fair trial with legal assistance. The safeguards further provide for appeals and the possibility of pardon or commutation of sentence and ensure that no executions are carried out until all procedures have been completed. Where capital punishment does occur, the safeguards are intended to ensure that it is carried out with minimal suffering.

Five years later, in face of evidence of further problems, the United Nations strengthened the safeguards by adding four more injunctions: (i) adequate time and facilities to prepare a defence; (ii) a provision for a mandatory appeal and mandatory review for clemency in all cases; (iii) a minimum age for death sentences and executions; and (iv) a provision that no person suffering from mental retardation or extremely limited mental competence should be sentenced to death, let alone executed.[49]

A review in detail of worldwide practices in relation to these safeguards is beyond the scope of this article. However, in the last quinquennial survey for the United Nations, all responding countries

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47. Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, U.N. ESCOR., 1st Sess., Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984).

48. RESOLUTIONS AND DECISIONS OF THE ECONOMIC AND SOCIAL COUNCIL: 1985 ECONOMIC AND SOCIAL COUNCIL OFFICIAL RECORDS, Supp. 1, 33 (1985). For more detailed references to the points made in this section, see HOOD, *supra* note 8, at 81-143.

49. *See* Implementation of the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1989/64, U.N. ESCOR, 1st Sess., Supp. 1, at 51, para. 1, U.N. Doc. E/1989/89 (1989).

put the best face on their performance.[50] More independent reports and academic research, particularly in the United States, show that all these safeguards are breached in one way or another in many parts of the world. The practice of some countries and some states of the United States appears to be in breach of several of these safeguards.

A. United Nations Safeguard 1

Safeguard 1 states that, in countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, and their scope should not go beyond intentional crimes with lethal or other extremely grave consequences. Safeguard 1 was vaguely and broadly drafted, obviously the result of political compromise, but the United Nations Human Rights Committee, established under the ICCPR, has stated that the concept of "most serious crimes" "must be read restrictively to mean that the death penalty should be a quite exceptional measure."[51]

It appears, however, that in many countries the offenses included in capital statutes go far beyond this restricted, if still imprecise, definition. For example, in twenty-three countries, various offenses against state security are capital offenses, and in at least sixteen of them, persons have been executed for political offenses.[52] Fifteen countries have executed persons for sex offenses including rape, sodomy, adultery, and incest. In China people have been executed for organizing prostitution and, in both China and Iran, for distributing pornography. Various economic offenses, including profiteering, currency offenses, smuggling, bribery, and corruption of officials, are capital offenses in at least sixteen countries, armed robbery, in at least five, and apostasy (renunciation of Islam), in six Moslem states.[53] According to the latest information, the death penalty is available for some sixty-five offenses in China, where executions have been reported for car theft, smuggling cigarettes, which have "an adverse effect on society," hooliganism, and various economic offenses.[54]

In 1979, a survey of penalties for drug trafficking in 125 countries revealed that the death penalty could be imposed in ten of them. By 1995, the number of countries with capital punishment for such offenses had risen to at least twenty-six: fifteen in Asia, ten in the

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50. *See Capital Punishment and Implementation of the Safeguards*, *supra* note 10, at 3-5.
51. *See* HOOD, *supra* note 8, at 57.
52. *See id.* at 58.
53. *See id.* at 63.
54. *See id* at 64-65.

Middle East, North Africa, and the United States.[55] In the United States, the death penalty has been introduced into federal law by the Violent Crime Control and Law Enforcement Act for large scale drug offenses as part of a continuing criminal enterprise and for a leader of such enterprises who knowingly directs, advises, authorizes, or assists anyone in attempts to kill someone in order to obstruct the course of justice.[56] Serious as these crimes are, do they fall within the spirit of Safeguard 1?

In other respects, the reformed state death penalty statutes, which are intended to restrict capital punishment in the United States to the most egregious cases, do fall within the spirit of Safeguard 1. They are undoubtedly an improvement over statutes which were ruled unconstitutional in 1972 because of the extraordinary arbitrariness of execution—like being struck by lightning, as Justice Stewart put it. Nevertheless, legal and criminological analysis reveals a substantial degree of remaining arbitrariness in the selection of cases for execution. Given that the nature, seriousness, and circumstances of murder meets the threshold required, the reasons why people are executed have as much to do with factors relating to their personal biography, their economic status, the status and race of their victim, and the way the case is processed through the system, as it has to do with the seriousness of the offense committed.

B. United Nations Safeguard 3

The laws of at least twenty countries do not prohibit the execution of persons who were under eighteen years of age at the time the offense was committed.[57] In 1989, the Supreme Court in the joint cases of *Stanford v. Kentucky* and *Wilkins v. Missouri*, held that it was not unacceptable to the values of contemporary society to impose the death penalty on those aged sixteen and seventeen.[58] Only thirteen of the thirty-eight states have set the minimum age at eighteen.[59] In twenty-one states the minimum age remains sixteen, despite the fact that most of the juveniles who have received the death sentence have been shown to have an unusually high incidence of neurological impairment, psychiatric disorders, low IQ, and histories of being seriously abused.[60] Furthermore, a study of all cases between 1973 and 1991

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55. *See id.* at 60-62.
56. 18 U.S.C. §§ 3591(b), 3593 (1995).
57. *See* HOOD, *supra* note 8, at 87.
58. 492 U.S. 361, 361 (1990).
59. *See* HOOD, *supra* note 8, at 86-87.
60. *See id.* at 87.

showed that most juveniles were disadvantaged by the fact that mitigating factors had not been properly investigated and had not been brought forward effectively at either trial or appellate proceedings.[61] Between 1990 and 1995, thirty-six "juveniles" were sentenced to death, and at the end of this period, forty-two were on death row in twelve different states.[62] Furthermore, the practice of executing them has not ended. Four men who were juveniles when they committed the crime were executed in the last six months of 1993, as many as in the preceding seven years.[63] Indeed, six of the nine executions known worldwide to have been inflicted throughout the world between 1990 and 1994 on "juvenile-convicts" occurred in the United States, and one each in Saudi Arabia, Pakistan, and Yemen.[64]

When the United States ratified the ICCPR in 1992, it stated: "The United States reserves the right, subject to its constitutional restraints, 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 crimes committed by persons below eighteen years of age."[65] The United Nations Human Rights Committee held this incompatible with the object and purpose of the convention, and it has therefore been argued by William Schabas that the reservation is invalid and if the United States continues to execute juveniles, it will be declared in breach of international law.[66]

A few prisoners who have shown distinct signs of mental illness may have been executed in recent years in the United States. The case of Richie Ray Rector, executed in Arkansas in 1992, is often cited as an example.[67] *Commonwealth v. Fahy*[68] and *Commonwealth v. Logan*[69] are also cited as examples of cases where the death sentence was upheld and enforced on mentally ill defendants. In *Logan*, the defendant, who

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61. *See* D. A. Robinson & O. H. Stephens, *Patterns of Mitigating Factors in Juvenile Death Penalty Cases*, 28 CRIM. L. BULL. 246, 246-75 (1992).

62. *See* HOOD, *supra* note 8, at 88.

63. *See* VICTOR STREIB, THE JUVENILE DEATH PENALTY TODAY: PRESENT DEATH ROW INMATES UNDER JUVENILE DEATH SENTENCES AND DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES: JANUARY 1, 1973 TO JUNE 30, 1995, at 3 (1995).

64. *See* AMNESTY INTERNATIONAL, JUVENILES AND THE DEATH PENALTY: EXECUTIONS WORLDWIDE SINCE 1985 (1995) (AI Index: ACT 50/05/95).

65. *See* William A. Schabas, *Les reserves des Etats-Unis d'Amerique au pacte international relatif aux droits civils et politiques en ce qui a trait a la peine de mort*, 6 REVUE INTERNATIONALE DES DROITS DE L'HOMME 137, 137-50 (1994).

66. *See* William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277 (1995); *see also* U. N. Human Rights Comm., 53d Sess., 102d. mtg. HR/CT/401, Mar. 29, 1995.

67. *See* 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992).

68. 516 A.2d 689 (Pa. 1986).

69. 549 A.2d 531 (Pa. 1988).

had tortured and killed a twelve-year-old girl, was executed despite the fact that the jury had found that he "was under the influence of extreme mental or emotional disturbance."[70] The problem is that when death penalty statutes make future dangerousness one of the criteria for imposing capital punishment, mental instability may no longer be seen as a mitigating factor, but rather as an aggravating factor, even though many studies have shown the unreliability of predictions on future dangerousness; nor, apparently, has the problem been resolved by the 1986 judgment in *Ford v. Wainwright*,[71] which held that people should not be executed as long as they remain mentally incompetent. All this has done is to present psychiatrists with an acute ethical dilemma when treating the mentally ill on death row.[72]

The allegations relating to the execution of the mentally retarded are even more serious. The United Nations Special Rapporteur on extrajudicial, summary, and arbitrary executions noted in 1994 that both Japan and the United States had apparently executed such persons.[73] However, these allegations are not at all new. It has been claimed that six of the ninety-three executed in America between 1976 and 1987 had intelligence quotients of between fifty-nine and seventy.[74] In *Penry v. Lynaugh*,[75] the Supreme Court decided that mentally disordered offenders were not "categorically" exempt from capital punishment and that the defendant, who was mentally retarded with an IQ of 50-65, who had organic brain damage and a history of considerable physical and emotional abuse as a child, should not be spared the death penalty.[76] The Court found that although the mental retardation diminished his blameworthiness, it increased the probability of dangerous behavior in the future.[77] This decision was very unpopular. Seventy-one percent of those responding to a national opinion poll believed that mentally retarded persons should not be executed.[78]

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70. Bruce Ledewitz, *Sources of Injustice in Death Penalty Practice: The Pennsylvania Experience*, 95 DICKINSON L. REV. 651, 657-61 (1991).

71. 477 U.S. 399 (1986).

72. *See, e.g.*, KENT S. MILLER & MICHAEL L. RADELET, EXECUTING THE MENTALLY ILL: THE CRIMINAL JUSTICE SYSTEM AND THE CASE OF ALVIN FORD 175-76 (1993).

73. *See Report of the Special Rapporteur*, *supra* note 27, ¶ 380.

74. *See* AMNESTY INTERNATIONAL, THE UNITED STATES OF AMERICA: THE DEATH PENALTY 86, 87 (1987).

75. 492 U.S. 302 (1989).

76. *See id.* at 302, 307-08.

77. *See* William A. Schabas, *International Norms on Execution of the Insane and Mentally Retarded*, 4 CRIM. L.F. 95 (1994).

78. *See* Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, 74 JUDICATURE 322, 324 (1991).

A groundswell of opinion, especially following the execution of Jerome Bowden, who had an IQ of 65, in Georgia in 1988, led that state to be the first to pass a bill prohibiting the execution of such persons. At least ten states have followed suit, although Florida has not.[79] In 1993, Robert Sawyer, who had an IQ of 68 and a long history of commitments to the state mental hospital, was executed in Louisiana.[80]

C. *United Nations Safeguard 4*

According to Safeguard 4, no persons are to be executed while there is any room for an alternative explanation of the facts. Of course, all countries say that only the guilty are executed. Who would admit that the innocent were sacrificed? Nevertheless, we know that mistakes are made: we have had them in England. Here, as you may know, Hugo Bedau and Michael Radelet's exhaustive study shows that at least twenty-three innocent persons have been executed in the United States,[81] and a Congressional Report in 1993 noted that, since 1973, at least forty-three persons have been released from death row with significant evidence of their innocence, some of them having been convicted on the basis of perjured testimony or because the prosecution improperly withheld exculpatory evidence.[82] Mistakes are inevitable, and, to my mind, it is astonishing to read the utilitarian argument seriously put forward by Stephen Markman and Paul Cassell in the *Stanford Law Review* that the execution of a few innocent persons is justified if the gains of doing so help to control murder by deterring others.[83] Even if that were true, the sacrifice of life as a means to an end is surely in conflict with a liberal conception of human rights.

D. *United Nations Safeguard 5*

Safeguard 5 is about ensuring fair procedures, and it is in relation to adequate legal representation that American states have been most

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79. These states are: Arkansas, Colorado, Indiana, Georgia, Maryland, Kansas, Kentucky, New Mexico, Tennessee, and Washington. Bills were also presented in Colorado, Mississippi, Ohio, and Pennsylvania in 1993, North Carolina and Pennsylvania in 1994, and in Texas in 1995.

80. *See* HOOD, *supra* note 8, at 101.

81. *See* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 272 (1992).

82. *See Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary*, 103d. Cong., 1st Sess., *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions* 2, 8 (1993).

83. *See* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STANFORD L. REV. 121, 122-23 (1988); *see also* Bedau & Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STANFORD L. REV. 161 (1988); Lawrence C. Marshall, *In Spite of Meese*, 85 J. CRIM. L. & CRIMINOLOGY 261 (1994).

severely indicted, both at the trial and appellate stages. Although it was established in *Strickland v. Washington* in 1984 that defendants in capital cases had a right to *effective* counsel,[84] the reality in many cases is very different. Court-appointed lawyers are not only comparatively poorly paid, but far too many of them are inexperienced as well. As many as a half have been found to be handling their first capital case.[85] According to Stephen Bright, the Director of the Southern Centre for Human Rights, the best an attorney in 1991 could be paid in the South was fifty dollars an hour, more usually a rate of thirty dollars for time spent in court and twenty for out-of-court work.[86] Justice Brennan, writing in 1994, concluded: "Notwithstanding the heroic efforts of resource centers and appellate projects throughout the country, the meager hourly rates and expenditure caps that many states impose on appointed counsel in capital cases do not suggest that a solution to this crisis is imminent."[87]

If there were time, I would also have commented on the influence of the requirement that juries be "death qualified" (i.e., members not be opposed to the death penalty) on jurors' willingness to convict, on their attitudes towards defendants' rights, and on the social skew it creates in capital juries.

Furthermore, there is no doubt that the new capital statutes have drawn the boundaries of eligibility to include a far greater number of cases than prosecutors, judges, and juries are willing to see sentenced to death and executed. Thus there is much room for prosecutors to exercise their discretion in selecting the charge, in deciding whether to accept a plea of guilty in return for not seeking the death sentence, and in the zeal with which the aggravating features of the case are presented. These decisions vary by state and within states. This inevitably produces an unacceptable element of arbitrariness and discrimination into the system. Professor Baldus and his colleagues have estimated that only six to fifteen percent of death-eligible cases result in a death sentence, and even fewer, of course, in an execution. Bearing in mind that those who kill may not know whether what they are doing is death-eligible or not, my estimate is that the probability of being

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84. 466 U.S. 668 (1984).

85. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, but the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

86. *See id.*

87. William A. Brennan, Jr., *Neither Victims nor Executioners*, 8 NOTRE DAME J. L. ETHICS & PUB. POL'Y 1, 3 (1994).

executed for a culpable homicide is about one in a thousand.[88] The implications for deterrence are obvious.

E. United Nations Safeguard 6

Safeguard 6 provides the right to appeal. There have been reports from a number of countries, notably China and Iran, of people being executed without an appeal being heard.[89] Death warrants have been issued before all avenues of appeal have been exhausted in Malaysia, and there is no right of appeal from verdicts of military courts and special tribunals in a number of countries. The recent execution of the writer and human rights activist Ken Saro-Wiwa in Nigeria is a tragic case in point.

Of course, the United States' complex system of state and federal review allows many years to pass before cases come to a conclusion and executions can proceed. For this reason, and to contain costs, there have been attempts to curtail the process by restricting the right to make habeas corpus petitions. In 1989, the Supreme Court ruled in *Teague v. Lane*[90] that, in general, federal habeas corpus petitioners would not be allowed to benefit from any new rules pertaining to the application of the death penalty unless the rules had been introduced prior to the defendant's conviction becoming final.[91] In other words, new rules would no longer be retroactively applied to benefit prisoners on death row. This is surely a breach of Safeguard 2!

Two years later in 1991, in *McCleskey v. Zant*,[92] the Supreme Court ruled that prisoners would be obliged to set forward all their legal arguments at first appeal or show good cause why it had not been filed earlier: a stiff test, to say the least, when appeals have to be filed within a short period after conviction.[93] Furthermore, the Supreme Court required federal courts to reject all claims if the proper procedures had not been followed in state courts.[94] This may not sound unreasonable, but to make it fair would require the kind of expert legal assistance so rarely available to poor defendants. For instance, Roger Coleman filed his appeal three days late in Virginia. It was his attorney's error. However, the Supreme Court decided in 1991 that Coleman had thereby

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88. *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 235 (1990).

89. *See* HOOD, *supra* note 8, at 119.

90. 489 U.S. 288 (1989).

91. *Id.* at 308; *see also* WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 19-23 (2d ed. 1994).

92. 499 U.S. 467 (1991).

93. *See id.* at 493-95.

94. *See* Coleman v. Thompson, 501 U.S. 722, 731-32 (1991).

procedurally defaulted and refused to hear his constitutional claim before he was executed.[95]

Once on death row, those who are indigent (which nearly everyone is) are not entitled to a state-appointed attorney beyond their first appeal. Despite heroic efforts by the NAACP Legal Aid and Defense Fund and the various Resource Centers (recently renamed Post-Conviction Defender Organizations), the funds are entirely insufficient to provide the assistance required. The sixteen attorneys at the Texas Death Penalty Resource Center were so overwhelmed by cases that there were seventy-five death row inmates in 1993 with no representation, many of whom were scheduled for execution within five weeks.[96] And now that the Resource Centers have lost their federal funding, the situation is set to get worse, not better.

F. United Nations Safeguard 7

Safeguard 7 provides for automatic review for pardon or clemency, but in reality, this is largely a fictional, nugatory process, for it is exceptionally rare for a pardon to be granted. Leaving aside pardons granted in two states, New Mexico and Ohio, there has been on average only one true grant of clemency per year over the past two decades.[97] It may be said that this is because only those who have committed the most egregious crimes are executed. However, studies show that this is not the case. Warren McCleskey was executed even though he had originally been offered a plea bargain by the prosecutor.[98] Indeed, in Florida, John Spinkellink, the first person chosen when executions were resumed, was said by the Assistant Attorney General to be "[t]he least obnoxious individual on death row in terms of the crime he committed . . . ."[99] The fact of the matter is that clemency proceedings move a judicial decision into the political arena, where votes, rather than the lives of murderers, count.

G. United Nations Safeguard 8

Safeguard 8 states that no one shall be executed while appellate or pardon proceedings are pending, but this does sometimes happen. In

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95. *See id.* at 729-30.

96. *See* DEATH PENALTY INFORMATION CENTER, THE FUTURE OF THE DEATH PENALTY IN THE US: A TEXAS-SIZED CRISIS 19 (1994).

97. *See* Michael J. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 297-98 (1993); Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-1991).

98. *See* McClesky v. Zant, 499 U.S. 467, 472 (1991).

99. Jack Greenberg, *Capital Punishment as a System*, 91 YALE L. J. 908, 926 (1982).

1994, Glen Ashby was executed in Trinidad while the Privy Council in London was considering the merits of hearing his appeal.[100] Of course, this remedy may be rendered less useful if the grounds for appeal themselves are curtailed. Thus in *Herrera v. Collins*, the Court upheld a Texas procedural rule preventing defendants—even those convicted of capital crimes—from obtaining a new trial based on newly discovered evidence unless the evidence had been filed within thirty days of the conclusion of the trial.[101] Herrera's family had come forward with new evidence some eight years after the original trial, namely that the appellant's deceased brother was the murderer. Chief Justice Rehnquist held that the right recourse in such a case was a clemency hearing.[102] Leaving aside that pardons are not appropriate for the innocent, the Chief Justice should have known that this would not in fact be a remedy. Herrera was executed without receiving a full hearing by the Texas Board of Pardons and Paroles. I am informed that subsequently the police officer whose evidence was crucial in the case was imprisoned for perjury and corruption.

H. United Nations Safeguard 9

The last of the United Nations safeguards refers to carrying out the punishment so as to inflict the minimum level of suffering. How can this be done? Some countries still execute persons in public. They are killed by hanging, stoning, shooting by firing squads, and beheading in the public square.

In the United States, as of 1994, twenty-five states have chosen lethal injection as their means of execution.[103] Apart from ethical objections from the medical profession to being involved in this process,[104] death by lethal injection has not proven to be a method which can be administered without suffering in all cases. The electric chair has excited even greater controversy, with reports of "botched executions" which have not resulted in instantaneous unconsciousness and death.[105] Nevertheless, the Canadian Supreme Court extradited a

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100. *See Report of the Special Rapporteur, supra* note 27.

101. 506 U.S. 390 (1993). This case was argued before the United States Supreme Court by H. Talbot D'Alemberte, President of Florida State University.

102. *See id.* at 417.

103. *See* AMERICAN COLLEGE OF PHYSICIANS ET AL., BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES 6-12 (1994).

104. *See, e.g.*, Council on Ethical & Judicial Affairs, American Med. Ass'n, *Physician Participation in Capital Punishment*, 270 J. AM. MEDICAL ASS'N 365 (1993).

105. *See* Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over a Century*, 35 WM. & MARY L. REV. 551 (1994).

defendant named Kindler[106] to Pennsylvania to face execution in the chair, a decision which the United Nations Human Rights Committee did not dispute. However, the committee did hold Canada to be in breach of the ICCPR for extraditing another prisoner to California to face execution in the gas chamber,[107] a method which has subsequently been ruled unconstitutional by a federal judge.[108]

The method of execution is only one consideration. Other considerations include the length of time that prisoners are on "death row" and the conditions of their confinement. Prisoners in America are not the only ones to suffer what has become known, perhaps rather imprecisely, as "the death row syndrome."[109] In Japan, one person was recently executed after spending twenty-three years on death row, the conditions of which Amnesty International described as inhuman and degrading.[110]

There are now over 3,000 prisoners in the United States under sentence of death. I must say that it shocks British people that a prisoner, after spending eighteen years in confinement on death row, can be executed for a crime committed when he was aged nineteen. Precisely this happened in Utah as recently as 1992. In Britain, he would certainly have been prepared for release while passing through the prison regime, and unless the circumstances were particularly egregious he would probably have been released on license before serving eighteen years. It is known that the reactions of prisoners on death row are similar to those of terminally ill hospital patients, exacerbated by the physical conditions of confinement for up to twenty-two hours a day. Such conditions have been described in one of the best studies as "an austere world in which condemned prisoners are treated as bodies kept alive to be killed."[111] Dead Man Walking indeed![112]

The opinion of international courts contrasts with the silence of the United States Supreme Court on this subject. In 1989, the European

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106. *See* Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779 (Can.); *see also* Keith Highet et al., Note, Kindler v. Canada (Minister of Justice), 87 AM. J. INT'L L. 128, 128 (1993).

107. *See* William A. Schabas, *Soering's Legacy: The Human Rights Committee and the Judicial Committee of the Privy Council Take a Walk Down Death Row*, 43 INT'L & COMP. L.Q. 913, 916-17 (1994).

108. *See* Fierro v. Gomez, 865 F. Supp. 1387, 1415 (N.D. Cal. 1994).

109. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); *see also* Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: the Death Row Phenomenon as a Case Study*, 40 ST. LOUIS U. L.J. 699 (1996).

110. *See* AMNESTY INTERNATIONAL, JAPAN: RESUMPTION OF EXECUTIONS AND ILL-TREATMENT OF PRISONERS ON DEATH ROW (Oct. 1993) ASA 22/09/93.

111. Robert Johnson & John L. Carroll, *Litigating Death Row Conditions: The Case for Reform*, *in* PRISONERS AND THE LAW 8-1, 4-7 (Ira P. Robbins ed., 1985).

112. *See* HELEN PREJEAN, DEAD MAN WALKING (1993).

Court of Human Rights ruled that it would be a breach of the provisions of the European Convention of Human Rights for the United Kingdom to extradite a prisoner named Soering to Virginia because his inevitably long wait on death row would amount to inhuman and degrading treatment.[113] However, the *Kindler* case in Canada,[114] mentioned previously, shows that there is still no international consensus on this issue. In relation to the very long periods of confinement under sentence of death in Jamaica and other countries of the Caribbean, often in shocking conditions, the Judicial Committee of the Privy Council, which hears appeals from various small Commonwealth countries, decided that no prisoner should wait more than five years under sentence of death and hinted that three years should probably be the maximum.[115] The practice in the United States is again out of line with this opinion.

VII. THE UNITED STATES, THE DEATH PENALTY, AND INTERNATIONAL CONVENTIONS

I have already mentioned that when the United States ratified the ICCPR, it entered reservations as far as convicted juveniles were concerned. It also entered a reservation to Article Seven, which concerns cruel and unusual punishment, stating that it could only agree to be bound by it "to the extent that cruel and inhuman or degrading treatment or punishment" means that prohibited by the Fifth, Eighth, or Fourteenth Amendment of the United States Constitution.[116] In other words, it was unwilling to accept the judgment of the Human Rights Committee that the use of the gas chamber constituted such punishment.[117] This illustrates the reluctance of the United States to change its practices of capital punishment. Not surprisingly, the United States is one of the few Western Countries, including Britain, which are not party to the Second Optional Protocol to the ICCPR. When the Second Protocol was adopted, most of the countries which were opposed (and Britain was not one of them) were those with a predominantly Muslim population, but included Japan and the United States.[118]

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113. *See Soering*, 161 Eur. Ct. H.R. (ser. A).

114. Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779 (Can.).

115. *See* Pratt v. Attorney General for Jamaica, [1993] 4 All E.R. 769 (P.C.) (appeal taken from Jam. Sup. Ct.); *see also* William A. Schabas, *Execution Delayed, Execution Denied*, 5 CRIM. L.F. 180, 191-92 (1994).

116. *See* HOOD, *supra* note 8 at 149.

117. *See* Multilateral Treaties Deposited with the Secretary-General, Status as of Dec. 31, 1994, at 126, U.N. Doc. ST/LEG/SER.E/13, U.N. Sales No. E.95.V.II (1995).

118. The countries which voted against adoption of the Second Optional Protocol were: Afghanistan, Bahrain, Bangladesh, Cameroon, China, Djibouti, Egypt, Indonesia, Iran, Iraq,

VIII. CONCLUSIONS

All of this, I hope, will have highlighted two issues. First, why is the United States so out of step with countries which share similar social and political values, in particular the liberal value of respect for individual human rights?

Second—and I speak to those who favor retention here—whatever one may think about the awfulness of many murders, however much one may long for the satisfaction of exacting retribution on those who commit them, whatever hopes one may have for its effectiveness as a deterrent, it simply cannot be administered, as I have tried to show, without producing overriding disadvantages and abuses of human rights. It is for this reason that Justice Lewis Powell, formerly a staunch defender of the death penalty, has now come to the conclusion that capital punishment should be abolished.[119]

It is, after all, used in the United States with such rarity that it has a political symbolic significance rather than any direct utility in controlling the rate of murder. It has become an issue in which popular sentiment can trump issues of justice and rights. I am not denying the value of symbols, but in parading this symbol, the states have inevitably produced arbitrariness, racial and economic discrimination, and some shocking practices which undermine the fundamental aim of the penalty, which is to proclaim the value of human life and enforce respect for it.

Japan, Jordan, Kuwait, Maldives, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Sierra Leone, Somalia, Syrian Arab Republic, Tanzania, United States, and Yemen. Malaysia and Sudan later advised the secretariat that they had also intended to vote against. *See* SCHABAS, *supra* note 32, at 170 n.230.

119. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994).