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THE DEATH PENALTY, INTERNATIONAL LAW, AND HUMAN RIGHTS

John Paul Truskett[†]

I. INTRODUCTION

"[H]ow long soever it hath continued, if it be against reason, it is of no force in law."¹

– Sir Edward Coke

The criminal justice systems of all nations contextualize the death penalty debate by providing multiple interpretations by which an analysis of the death penalty can be conducted. Empirical studies worldwide yield interesting results and reveal a continuing evolution towards death penalty abolition. While retentionist nations impose capital punishment as the highest criminal penalty, worldwide norms beg decisions of life and death be weighed carefully in the calculus of punishment. The comprehensive analysis of institutionalized killing in the international sphere revolves around human rights and the arbitrariness of treaties. In an increasingly global society where

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1. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF ENGLAND § 80 (17th ed. 1817).

transnational law evolves, protecting people from the death penalty is a crucial human rights consideration. Abolition is necessary in promoting humankind's dignity under international law.

Today the majority of nations have abolished the death penalty either completely or in practice. By April 2004, seventy-nine countries had abolished the penalty, fifteen countries were abolitionist for ordinary crimes, and twenty-three countries were "abolitionist de facto."² One hundred seventeen nations are completely abolitionist in law or practice;³ however, seventy-one countries have executed at least one individual over the past ten years.⁴ Most of the eighty-four remaining retentionist nations are in Asia, North Africa, and the Middle East.⁵ Conversely, European and Latin American countries are generally abolitionist.⁶ The U.S. and some Caribbean nations are the only retentionist Western jurisdictions.⁷

Three nations a year have abolished capital punishment for all crimes from 1990 to 2000.⁸ The abolitionist trend includes nations in Africa, the Americas, Asia, and Europe.⁹ Over fifty nations have eliminated the death penalty with only three nations reinstating it since 1985,¹⁰ indicating abolitionist nations rarely reintroduce the penalty. The only country resuming executions is the Philippines, while two other nations, Gambia and Papua New Guinea, retain

2. *The Death Penalty: An International Perspective*, DEATH PENALTY INFORMATION CENTER, at <http://deathpenaltyinfo.org/article.php?did=127&scid=30> (last visited Feb. 12, 2004) [hereinafter *An International Perspective*]. "Abolitionist de facto" means the nation retains capital punishment in law, but has failed to execute any offenders for over ten years. Moreover, the nation is believed to have a policy of not executing offenders. *Facts and Figures on the Death Penalty*, AMNESTY INTERNATIONAL, Apr. 2004, at <http://web.amnesty.org/pages/deathpenalty-facts-eng> (last visited Apr. 20, 2004) [hereinafter *Facts and Figures*].

3. *An International Perspective*, *supra* note 2.

4. ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 14 (3d ed. 2002).

5. *Id.*

6. VICTOR STREIB, *DEATH PENALTY IN A NUT SHELL* 271 (2003).

7. HOOD, *supra* note 4, at 14.

8. *Facts and Figures*, *supra* note 2.

9. *Id.*

10. *Id.* First, countries abolishing the penalty in Africa include Mauritius, Angola, Cote d'Ivoire, Mozambique, and South Africa. Second, abolitionist nations in the Americas include Canada and Paraguay. Third, countries abolishing the death penalty in Asia include Hong Kong and Nepal. Finally, abolitionist nations in Europe include Azerbaijan, Estonia, Turkmenistan, Georgia, Bulgaria, Poland, Lithuania and Ukraine. *Id.*

capital punishment only in theory since neither country carries out executions.¹¹

The U.S. is a serious advocate of the death penalty; thus, it is among unfamiliar company and segregates itself from traditional Western European allies.¹² The "big eight" nations retaining the penalty are China, Nigeria, India, Indonesia, Pakistan, Japan, Russia, and the U.S.¹³ While these eight countries account for fifty-seven percent of the world's population, they represent the great minority of countries clinging to an archaic concept of justice to justify the premeditated killing of humans.¹⁴ In the beginning of the twentieth century, the penalty was routine worldwide;¹⁵ however, nearly eighty-four of all modern executions take place in the U.S., China, Iran, and Viet Nam.¹⁶ U.S. retentionism is out of place because China, Iran, and Viet Nam rarely share fundamental human rights policies and no country as advanced as the U.S. continues capital punishment into the twenty-first century.¹⁷ Retentionist countries are generally communist or third-world countries¹⁸ and are consistently the world's worst human rights abusers.¹⁹

Scholars look to the U.S. for a great majority of empirical studies concerning capital punishment.²⁰ Intellectuals in countries abandoning the penalty, such as Western Europe, have lost almost all interest in a fight they have already won.²¹ Therefore, the overwhelming majority of current and valid empirical studies concentrate on the U.S. situation.²²

This comment focuses on evolving international human rights standards and the impact of retaining the death penalty worldwide.

11. *Id.*

12. Clive Stafford-Smith, *Killing the Death Penalty with Kindness*, in *MACHINERY OF DEATH* 269, 270 (David R. Dow & Mark Dow eds., 2002).

13. *Id.*

14. *Id.* at 271.

15. *Id.*

16. *Facts and Figures*, *supra* note 2.

17. *Id.*; see also STREIB, *supra* note 6, at 272.

18. RITA J. SIMON & DAGNY A. BLASKOVICH, *A COMPARATIVE ANALYSIS OF CAPITAL PUNISHMENT: STATUTES, POLICIES, FREQUENCIES, AND PUBLIC ATTITUDES THE WORLD OVER* 17 (2002).

19. Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 *OR. L. REV.* 97, 97 (2002).

20. HOOD, *supra* note 4, at 5.

21. *Id.*

22. *Id.*

Part II examines international law; Part III examines executing juveniles; and Part IV focuses on executing foreign nationals. Next, Part V discusses executing innocent persons; Part VI assesses cost; and Part VII discusses the theological notions associated with state imposed killing. Additionally, Part VIII examines the retributive theory and Part IX discusses transnational abolition. Finally, Part X looks to the future of capital punishment and the dawning of a worldwide abolition.

II. INTERNATIONAL LAW

*"The increasing use of the death penalty in the United States and in a number of other states is a matter of serious concern and runs counter to the international community's expressed desire for the abolition of the death penalty."*²³

– Mary Robinson, U.N. High Commissioner for Human Rights

A. Introduction

International treaties exist today aiming to end the death penalty²⁴ because countries ratifying and signing one of the treaties promise to take an abolitionist stance. Additionally, the United Nations (U.N.) calls on retentionist nations "to progressively restrict the number of offences for which capital punishment might be

23. RICHARD C. DIETER, INTERNATIONAL PERSPECTIVES ON THE DEATH PENALTY: A COSTLY ISOLATION FOR THE U.S. (1999), available at <http://deathpenaltyinfo.org/article.php?scid=45&did=536> (last visited Feb. 12, 2004).

24. SIMON & BLASKOVICH, *supra* note 18, at 18.

These three treaties are: the Second Optional Protocol to the International Covenant on Civil and Political Rights, which has been ratified by 43 countries, with the promise of 5 more countries who will ratify it at a later date; Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by 37 European states; and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, which has been ratified by 6 American countries and has been signed by 2. Protocol No. 6 calls for the abolishment of the death penalty in times of peace. The other two call for total abolishment of the death penalty, but allow the states to retain the penalty in times of war.

Id.

imposed."²⁵ A minority of countries has failed to eliminate the penalty despite the transnational call for abolition.²⁶

Nations defying international agreements and ignoring the entreaties of allies increasingly position themselves as violators of human rights regarding capital punishment.²⁷ Irreverence for international human rights law and the tribunals protecting it poses risks for retentionist countries.²⁸ Nations executing juvenile offenders show disrespect for a growing worldwide consensus by killing foreign nationals who were never afforded their right to consul and ignoring transnational norms against expanding the penalty.²⁹ Therefore, the adverse effects on retentionist nations through loss of credibility, prestige, and future endangerment of its citizens abroad are inevitable.³⁰

B. Universal Declaration of Human Rights

Although the majority of nations have abolished capital punishment in law or practice, the international community continues to promulgate treaties facilitating worldwide eradication.³¹ In 1948, the United Nations General Assembly (UNGA) adopted the Universal Declaration of Human Rights (UDHR).³² The UDHR establishes an individual's right of protection from deprivation of life and proclaims no person shall be made to suffer degrading or cruel punishment.³³ The UNGA finds capital punishment violates both basic rights.³⁴

C. International and Regional Treaties

In 1966, the UNGA adopted the International Covenant on Civil and Political Rights (ICCPR),³⁵ which imposes two requirements

25. HOOD, *supra* note 4, at 75.

26. *Id.*

27. DIETER, *supra* note 23.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Death Penalty Facts: International Human Rights Standards*, AMNESTY INTERNATIONAL, at http://www.amnestyusa.org/abolish/international_h_r_standards.html (last visited Feb. 10, 2004).

32. G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), available at <http://www.un.org/Overview/rights.html> (last visited Feb. 2, 2004).

33. *See id.*

34. *See id.*

35. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter G.A. Res. 2200A].

constraining the death penalty's use.³⁶ First, the treaty places strict due process requirements on the punishment.³⁷ Second, the treaty states the death penalty cannot be inflicted upon offenders less than eighteen years of age at the time the crime was committed.³⁸ Finally, the ICCPR states no person should be made to suffer torture or be subjected to degrading, inhuman or cruel punishment.³⁹ In 1992, the U.S. ratified this treaty, binding it under the Supremacy clause of the Constitution.⁴⁰ The ICCPR has been ratified by 149 nations and eight more have signed the covenant, indicating intent to become a party.⁴¹

Moreover, the UNGA adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP2) in 1989.⁴² The ICCPR-OP2 specifically aims to abolish the death penalty entirely and further supports the spirit of the UDHR.⁴³ However, the ICCPR-OP2 permits nations to retain capital punishment in wartime if the nation reserves that right when ratifying or acceding to the Protocol.⁴⁴ The U.S. has neither signed nor ratified the ICCPR-OP2, while most of its closest allies have approved the Protocol.⁴⁵ For example, the United Kingdom, Spain, Germany, Australia, and Italy have all ratified the Protocol.⁴⁶ The ICCPR-OP2 has been ratified by forty-nine nations and seven more have signed it, indicating their intention to become parties.⁴⁷

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty (PAC), adopted in 1990, calls for the

36. Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1087, 1094 (2002).

37. *Id.*

38. G.A. Res. 2200A, *supra* note 35, art. 6.

39. *Id.* art. 7.

40. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 9 (2002), *available at* <http://193.194.138.190/pdf/report.pdf> [hereinafter RATIFICATIONS OF HUMAN RIGHTS TREATIES] (last visited Feb. 12, 2004); *see also* U.S. CONST. art. VI, § 1, cl. 2.

41. RATIFICATIONS OF HUMAN RIGHTS TREATIES, *supra* note 40.

42. G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, at 207, U.N. Doc. A/44/49 (1989).

43. *Id.* art. 1.

44. *Id.* art. 2.

45. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 39; *see also* *Ratification of International Treaties*, AMNESTY INTERNATIONAL, at <http://web.amnesty.org/pages/deathpenalty-treaties-eng> (last updated Jan. 29, 2004) [hereinafter *Ratification*].

46. *Id.*

47. *Id.*

abolition of capital punishment.⁴⁸ Nations can reserve their right to impose the death penalty in wartime if the reservation is made while acceding or ratifying the Protocol.⁴⁹ The U.S. has neither signed nor ratified the treaty; however, six American nations have ratified the PAC, and one is not bound by it but has signed on.⁵⁰

Furthermore, several international treaties provide for the termination of the death penalty. The Council of Europe adopted Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty (ECHR6) in 1985.⁵¹ Death penalty abolition is now a prerequisite to joining a modern Europe and has become a benchmark of European human rights policy.⁵² Forty-one European nations, including the U.S.'s closest ally, the United Kingdom,⁵³ have ratified the ECHR6 and three others are signatories.⁵⁴ Additionally, the Council of Europe adopted Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR13) in 2002.⁵⁵ The ECHR13 calls for abolition of capital punishment without exception.⁵⁶ Seven nations have either ratified or acceded to the ECHR13 and thirty-two nations, including the United Kingdom, have signed, but have yet to ratify the ECHR13.⁵⁷

The Vienna Convention on Consular Relations and Optional Protocols (VCCR) was created in 1963 to guarantee defendants a fair trial.⁵⁸ Due process requires notice, opportunity to prepare a

48. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *opened for signature* June 8, 1990, art. 1, O.A.S. T.S. No. 73, *available at* <http://www.oas.org/juridico/english/sigs/a-53.html> (last visited Feb. 11, 2004).

49. *Id.* art. 2.

50. *Facts and Figures*, *supra* note 2.

51. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Nov. 1, 1998, Europ. T.S. No. 114 [hereinafter Protocol No. 6].

52. Koh, *supra* note 36, at 1105.

53. *Ratification*, *supra* note 45.

54. *Id.*

55. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in the All Circumstances, Apr. 28, 1983, Europ. T.S. No. 187 [hereinafter Protocol No. 13].

56. *Id.*; *see also Facts and Figures*, *supra* note 2.

57. Protocol No. 13, *supra* note 55.

58. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; *see also Death Penalty Facts: International Law*, AMNESTY

competent defense, to understand the charges, to have access to an interpreter, and the protection against a forced or coerced confession.⁵⁹ The U.S. ratified the VCCR in 1969, making the U.S. subject to the language of the treaty.⁶⁰

The Convention on the Rights of the Child (CRC) unequivocally prohibits capital punishment for juveniles.⁶¹ The U.S. is the only one out of the nearly 200 nations failing to ratify the CRC; the most widely ratified international treaty in history.⁶² President Clinton signed the treaty in 1995;⁶³ however, the U.S. Senate failed to ratify it.⁶⁴

III. EXECUTING JUVENILES

The U.S. is one of only a handful of countries executing offenders under the age of eighteen.⁶⁵ The first ICCPR stipulation, ratified by the U.S., obliges nations to refrain from imposing the death penalty on juveniles because the weight of international consensus demands recognition; the second stipulation creates an ethical benchmark the U.S. chooses not to enforce.⁶⁶ This type of international common law, or *jus cogens*, preempts opposing norms and requires compliance even

INTERNATIONAL, at http://www.amnestyusa.org/abolish/intl_law.html (last visited Feb. 2, 2004) [hereinafter *Death Penalty Facts*].

59. *Death Penalty Facts*, *supra* note 58.

60. *Id.*

61. G.A. Res. 44/125, U.N. GAOR, 44th Sess., Supp. No. 49, art. 37(a), U.N. Doc. A/44/49 (1989).

62. STREIB, *supra* note 6, at 277.

63. DIETER, *supra* note 23.

64. STREIB, *supra* note 6, at 277.

65. *Id.* at 274-77; *see also* Steiker, *supra* note 19, at 97-98. Since 1990, only seven countries have killed prisoners who were under 18 years of age at the time of their crime. Those eight countries are: the Democratic Republic of Congo, Iran, Saudi Arabia, Nigeria Yemen, China, Pakistan, and the United States. *Id.*; *see also* *Stop Child Executions! Ending the Death Penalty for Childhood Offenders*, AMNESTY INTERNATIONAL, at <http://web.amnesty.org/pages/deathpenalty-children-eng> (last visited Feb. 6, 2004). From 1990 to September 2003, the U.S. conducted nineteen of the thirty-five child offender executions worldwide. Hence, the U.S. carried out more child executions than all other countries combined. *Id.*; *see also* Koh, *supra* note 36, at 1104. During 1999, the only other nation continuing to execute juveniles besides the United States was Iran. U.S. President Bush has officially labeled Iran as a member of the "Axis of Evil." *Id.*

66. STREIB, *supra* note 6, at 275-78.

by nations who have not yet embraced this international law.⁶⁷ *Jus cogens* is “[a] mandatory norm of general international law from which no two or more nations may exempt themselves or release one another.”⁶⁸ The U.N. High Commissioner on Human Rights, in an attempt to prevent the execution of a juvenile in Virginia, called upon U.S. authorities to “reaffirm the customary international law ban on the use of the death penalty on juvenile offenders.”⁶⁹ The U.S., one of the only countries in the world continuing to execute juvenile offenders, isolates itself from a nearly unanimous international community.⁷⁰

Analogously, the U.S. was one of the last nations to officially execute mentally retarded criminals.⁷¹ In *Atkins v. Virginia*,⁷² the U.S. Supreme Court, in applying the Eighth Amendment and considering the evolving standards of decency, held by a majority of six to three that capital punishment was excessive.⁷³ Moreover, the Court concluded that the state’s power to execute a mentally retarded offender is tempered because of substantive restrictions in the U.S. Constitution and because the deficiencies of mentally retarded criminals diminish their personal culpability.⁷⁴ The Court stated, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁷⁵ In *Atkins*, the Court’s analysis factored in worldwide disapproval of killing individuals who are less mentally culpable for their conduct, and the rarity of executions to find the killing of mentally retarded offenders unconstitutional.⁷⁶

67. *Id.* at 278. The U.S. Supreme Court announced January 26, 2004 that it will consider the constitutionality of executing juvenile offenders. *Roper v. Simmons*, 124 S. Ct. 1171 (2004).

68. BLACK’S LAW DICTIONARY 864 (7th ed. 1999).

69. HOOD, *supra* note 4, at 119 (quoting AMNESTY INTERNATIONAL, U.S.: FAILING THE FUTURE: DEATH PENALTY DEVELOPMENTS, MARCH 1998-MARCH 2000 57 (2000)).

70. STREIB, *supra* note 6, at 274. The only other country that admitted executing a juvenile in 2003 was China. *Facts and Figures*, *supra* note 2.

71. HOOD, *supra* note 4, at 127.

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

73. *Id.* at 305. Chief Justice Rehnquist and Justice Scalia in their dissent stated that viewpoints of other countries are irrelevant under a U.S. constitutional calculus. Harold Hongju Koh & Thomas R. Pickering, *American Diplomacy and the Death Penalty*, 80 FOREIGN SERVICE J. 19, 24 (2003).

74. *Atkins*, 536 U.S. at 316.

75. *Id.* at 316 n.21.

76. STREIB, *supra* note 6, at 273. Moreover, key swing voters on the U.S. Supreme Court are giving more credence to international opinion as evidenced in *Lawrence v.*

However, the U.S. has reserved its right to execute juveniles under both the ICCPR and the PAC.⁷⁷ Since the U.S. failed to ratify the CRC,⁷⁸ in 1999, the U.S. Solicitor General stated, "the United States is not obliged under customary international law or US treaty obligations to exempt children."⁷⁹ This statement is based on a belief the U.S. can continue killing juveniles because it made a reservation to Article 6(5) of the ICCPR.⁸⁰ The U.S. Supreme Court's recent decision in *Atkins*, prohibiting capital punishment for the mentally retarded, gives hope that the Court will rule execution of juvenile offenders unconstitutional.⁸¹

Justice Stevens, after writing the majority opinion in *Atkins*, stated capital punishment for juveniles would be the "next area for debate."⁸² Urging state legislatures to challenge the issue, Justice Stevens stated the U.S. is "out of step with the views of most countries in the Western world."⁸³ Moreover, in October of 2002, Justices Breyer, Ginsburg, Souter, and Stevens declared the execution of juveniles a "shameful practice"⁸⁴ and further stated that "[t]he practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society."⁸⁵

IV. EXECUTING FOREIGN NATIONALS

We cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate. It is evident from the record before this Court that the Government

Texas and *Grutter v. Bollinger*. In *Lawrence*, Justice Kennedy considered opinions from the European Court of Human Rights and the British Parliament advisory committee to uphold the privacy rights for consenting adults in sexual relations. Additionally, in *Grutter* Justice Ginsburg cited international law concerning the transnational understanding affirmative action. Richard C. Dieter, *International Influence on the Death Penalty in the U.S.*, 80 FOREIGN SERVICE J. 31-38 (2003).

77. HOOD, *supra* note 4, at 114.

78. STREIB, *supra* note 6, at 277.

79. HOOD, *supra* note 4, at 119.

80. *Id.*

81. *Id.*

82. DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2002: YEAR END REPORT 3 (2002), available at <http://www.deathpenaltyinfo.org/yrendrpt02.pdf> (last visited Feb. 5, 2004) [hereinafter DEATH PENALTY YEAR END REPORT].

83. *Id.*

84. *Id.*

85. *Id.*

of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing We believe trial counsel, as well as representatives of the State who had contact with Petitioner prior to trial and *knew* he was a citizen of Mexico, failed in their duties to inform Petitioner of his right to contact his consulate.⁸⁶

- Oklahoma Court of Criminal Appeals

A. *Right to Consul*

As of April 2004, the U.S. death row housed 118 foreign prisoners from at least thirty-one different nations.⁸⁷ The U.S. has executed seventeen foreign nationals since 1993;⁸⁸ however, a substantial number of detained nationals were never informed of their right of consular notification upon arrest.⁸⁹ The consular notification argument was dismissed on appeal permitting executions to continue in eighty-two percent of the cases.⁹⁰ Retentionist nations violate international law by refusing detained nationals the right of consular notification and assistance.⁹¹

An individual's right of protection in foreign nations is the right of consular protection.⁹² A consul is "[a] governmental representative living in a foreign country to oversee commercial and other matters involving the representative's home country and its citizens in that foreign country."⁹³ In 1969, the U.S. ratified the VCCR,⁹⁴ which allows

86. *Valdez v. Oklahoma*, 46 P.3d 703, 710 (Okla. Crim. App. 2002); see also *Foreign Nationals: Current Issues and News*, DEATH PENALTY INFORMATION CENTER, Jan. 1, 2004, at <http://www.deathpenaltyinfo.org/article.php?scid=31&did=579#developWarren> (last visited Feb. 4, 2004) [hereinafter *Foreign Nationals*].

87. DEATH PENALTY YEAR END REPORT, *supra* note 82, at 8; see also DEATH PENALTY INFORMATION CENTER, *Reported Foreign Nationals Under Sentence of Death in the U.S.*, at <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31> (last visited Apr. 20, 2004).

88. *Death Penalty Facts: International Law*, AMNESTY INTERNATIONAL, at http://www.amnestyusa.org/abolish/intl_law.html (last visited Feb. 5, 2004).

89. *Id.*

90. See *id.* This reference refers to the number of cases raising the claim on appeal and does not refer to the number resulting in executions since all alleged offenders were executed.

91. See generally *id.*

92. Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT'L L. 375, 390 (1997).

93. BLACK'S LAW DICTIONARY, *supra* note 68, at 310.

foreign nationals⁹⁵ detained outside their country the right to notify their government of the detention without delay.⁹⁶ The U.S. consistently fails to provide foreign nationals with consular protections, thus violating the VCCR.⁹⁷ The American government insists on reserving the right to consul abroad for U.S. citizens but fails to abide by the VCCR obligations domestically.⁹⁸ When U.S. state and local officials detain foreign nationals, the prisoners are not ensured of their right to consular access.⁹⁹

Under the VCCR, nations' authorities must notify detained aliens that their consulate will be notified upon request.¹⁰⁰ Article 36 of the VCCR that states due process rights of arrested nationals are inherent rights¹⁰¹ because detained nationals have the right to be informed of due process and diplomatic agents must be notified without delay.¹⁰² The VCCR serves three fundamental purposes: first, it facilitates communication between detained foreign nationals and consular officials;¹⁰³ second, it allows consular officials and foreign prisoners to discuss critical legal information, which is vital because potential language and culture differences may preclude the prisoner's plenary understanding of the surrounding circumstances;¹⁰⁴

94. William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 268-69 (1998). United States President Nixon formally ratified the VCCR on November 12, 1969 and the treaty was entered into force on December 24, 1969. *Id.*

95. *Foreign Nationals and the Death Penalty in the United States*, DEATH PENALTY INFORMATION CENTER, Feb. 1, 2003, at <http://www.deathpenaltyinfo.org/foreignnatl.html> (last visited Feb. 4, 2004). A "foreign national", for purposes of this comment, is "any individual under sentence of death in the USA who does not possess United States citizenship." *Id.*

96. Aceves, *supra* note 94, at 257.

97. *Id.*

98. *Id.* at 259.

99. *Id.* at 260.

100. RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 979 (2d ed. 2001).

101. AMNESTY INTERNATIONAL, *THE DEATH PENALTY WORLDWIDE: DEVELOPMENTS IN 2001* 17 (2002), available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ACT500012002ENGLISH/\\$File/ACT5000102.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ACT500012002ENGLISH/$File/ACT5000102.pdf) (last visited Feb. 12, 2004) [hereinafter *DEVELOPMENTS IN 2001*].

102. COYNE & ENTZEROTH, *supra* note 100, at 979.

103. Aceves, *supra* note 94, at 259.

104. *Id.*

finally, the VCCR allows member nations to oversee the handling of their nationals while abroad.¹⁰⁵

When foreign nationals are sentenced to death in the U.S. and are not informed of their right to contact a consular representative, they can argue their right to consul was breached and their sentences should be commuted because the VCCR was violated.¹⁰⁶ Refusing nationals the right to contact a diplomatic agent inhibits nationals from contacting family members, understanding differences in the legal systems, preparing for trial, acquiring an interpreter and *amicus* briefs, presenting diplomatic appeals, and therefore, prevents the presentation of mitigating evidence in the trial's sentencing phase.¹⁰⁷ Consuls perform a crucial role because they gather testimony in foreign lands and produce evidence on the foreign national's behalf.¹⁰⁸ Furthermore, where an alien is in a mortal predicament, a consul's intervention may change the course of plea negotiations.¹⁰⁹ The consul aids the foreign prisoner in attaining a fair trial by procuring witnesses and bringing them before the court for examination.¹¹⁰ Therefore, a foreign national's right to consul enhances fundamental fairness in trials, and ensures compliance with the VCCR's language and spirit.¹¹¹

Violating the VCCR by failing to disclose international rights to foreign nationals prompts the International Court of Justice (ICJ) to render adverse decisions.¹¹² For example, by a margin of fourteen to one the ICJ ruled in favor of Germany, who sued the U.S. because the U.S. breached Article 36 of the VCCR.¹¹³ The U.S. executed two German men despite local authorities knowing their nationality, yet never informing the men of their right to consular notification under the VCCR.¹¹⁴ Furthermore, the U.S. failed to disclose the arrests and convictions of the two German nationals to the German authorities until ten years after the two German men were initially detained.¹¹⁵

105. *Id.*

106. Uribe, *supra* note 92, at 409.

107. *Id.* at 411; *see also* COYNE & ENTZEROTH, *supra* note 100, at 979.

108. Uribe, *supra* note 92, at 411.

109. *Id.* at 418.

110. *Id.* at 411.

111. *Id.* at 411-12.

112. *An International Perspective*, *supra* note 2.

113. *Id.*

114. *Id.*

115. *Id.*

Hence, the ICJ found the U.S. in violation of the VCCR and upheld the consular rights of foreign nationals on American soil.¹¹⁶

Moreover, the ICJ ruled the U.S. must refrain from executing three Mexican detainees on U.S. death rows.¹¹⁷ The U.N. Court required a halt on the executions pending further investigations concerning whether fifty-one Mexicans on death row were informed of VCCR rights granting the Mexican government power to offer legal help.¹¹⁸ Presiding ICJ Judge Guillaume ordered, "[t]he United States shall take all measures necessary to ensure that (the men) are not executed pending final judgment in these proceedings."¹¹⁹ Mexico's Foreign Ministry attorney alleges the U.S. court system provides Mexican nationals on death row with non-Spanish speaking public defenders who have never represented a defendant in a capital murder trial.¹²⁰ Therefore, Mexico asserts the U.S. breached the VCCR by neglecting to grant consular notification and assistance to Mexican nationals accused of death-eligible crimes.¹²¹

In addition to its general consular notification obligations under the VCCR, the U.S. is bound by separate bilateral consular agreements with fifty nations.¹²² Under the language of these treaties, the member country is required to immediately notify the

116. *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 1069 (June 27); see also *Foreign Nationals*, *supra* note 86.

117. Associated Press, *World Court: U.S. Must Stay Executions*, Feb. 5, 2003, available at <http://www.cbsnews.com/stories/2003/02/05/world/main539403.shtml> (last visited Feb. 4, 2004).

118. *Id.*

119. *Id.* Press Release 2003/45, International Court of Justice (Dec. 23, 2003), at http://212.153.43.18/icjwww/ipresscom/ipress2003/ipresscom2003-45_mus_20031223.htm (last visited Feb. 20, 2004). *Id.* Public hearings concluded December 19, 2003 and the court began deliberating. On March 31, 2004, the United Nations' highest judiciary, the ICJ, held that the U.S. violated the consular rights of 51 Mexican foreign nationals on death row. The decision behooves the U.S. to review every case to determine how the violations impacted the sentences and convictions. International Court of Justice, *Press Release: Mexico v. United States of America*, at <http://212.153.43.18/icjwww/idocket/imus/imusframe.htm> (last visited Apr. 20, 2004).

120. *See id.*

121. *See id.*

122. *Foreign Nationals and the Death Penalty in the United States*, *supra* note 95; see also U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, CONSULAR NOTIFICATION AND ACCESS, INSTRUCTIONS FOR FEDERAL, STATE, AND OTHER LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM, pt. 5, available at <http://travel.state.gov/notification5.html> (last visited Feb. 4, 2004).

diplomatic agent of an arrest.¹²³ Thus, the VCCR and fifty bilateral treaties bind the U.S. to provide foreign nationals with consular rights inside U.S. borders.¹²⁴

The violations of the VCCR by the American judicial system persist because federal and local authorities remain largely unaware of the VCCR's mandate.¹²⁵ Decentralization of prosecutorial and police functions among state and local authorities frustrates implementation of the VCCR.¹²⁶ The arresting officer is bound by law to inform arrestees of their *Miranda* rights.¹²⁷ The arrestee must be advised of the "right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."¹²⁸ If police were to additionally inform detained nationals upon arrest of their right to consular notification and assistance by incorporating the right of consular assistance into the reading of the *Miranda* rights, then the U.S. would comply with the VCCR.¹²⁹ Incorporating into the *Miranda* rights the rights of foreign nationals substantially improves the arrested national's state of affairs.¹³⁰ Therefore, many international human rights agreements adopted by both the U.N. and the U.S. secure the right to consular notification and serve as proof to the universal importance of consular rights to the international community.¹³¹

B. *Legitimacy of Worldwide Treaties*

The failure of retentionist nations to prevent detained nationals' executions adversely impacts future international relations.¹³² The nature of political relationships, both formal and informal, will continue to suffer unless international law is respected and obeyed.¹³³ For instance, countries may deny U.S. nationals' consular rights when

123. *Foreign Nationals and the Death Penalty in the United States*, *supra* note 95. The average amount of time allowed for notifying the consulate is 72 hours following the arrest. *Id.*

124. *Id.*

125. Uribe, *supra* note 92, at 422.

126. *Id.* at 423.

127. *Id.*

128. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

129. Uribe, *supra* note 92, at 423.

130. *Id.*

131. *See generally* DEVELOPMENTS IN 2001, *supra* note 101.

132. Aceves, *supra* note 94, at 324.

133. *Id.*

detained if the U.S. fails to advise foreign nationals of their consular rights upon arrest in America; thus, countries may doubt America's plenary commitment to the rule of law.¹³⁴ Hence, the failure of the U.S. to abide by the VCCR and provide consular notification undermines the ICJ's legitimacy and perpetuates other nations' tendencies to consciously ignore international tribunal rulings.¹³⁵

Cases involving international treaties and domestic obligations are increasingly frequent in the twenty-first century.¹³⁶ Therefore, it is crucial for retentionist nations, like the U.S., to develop effective procedures protecting both foreign sovereigns' and foreign nationals' rights.¹³⁷ Failure to implement competent methods to protect those rights erodes the legitimacy of the retentionist nations' commitments to the rule of law and destroys the effectiveness of treaties worldwide.¹³⁸

C. *Refusals to Extradite*

Abolitionist countries increasingly rely on international law to preclude extraditing¹³⁹ American citizens facing capital charges to the U.S.¹⁴⁰ An exhaustive list of countries including Germany, Mexico, France, Spain, Canada, South Africa, Italy, and the United Kingdom have stipulated any extradition to the U.S. must first be met with assurances the accused will not be subject to capital punishment.¹⁴¹ For example, following the terrorist attack on September 11, 2001, Spain warned the U.S. it would refuse to extradite Al-Qaeda suspects unless Spain was given a guarantee the death penalty would not be imposed.¹⁴² On November 13, 2001, U.S. President Bush authorized the formation of Military Tribunals, placed either inside or outside the U.S., to try foreign nationals accused of terrorism.¹⁴³ Moreover,

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Aceves, *supra* note 94, at 324.

139. DEVELOPMENTS IN 2001, *supra* note 101, at 36. "International extradition, as distinct from deportation and expulsion, is the formal process by which one country surrenders to a second country an individual who stands accused or convicted of a crime committed within the territorial jurisdiction of the requesting state." *Id.*

140. COYNE & ENTZEROTH, *supra* note 100, at 939.

141. *See generally* DIETER, *supra* note 23.

142. HOOD, *supra* note 4, at 155.

143. *Id.*

the tribunals were granted the right to impose the death penalty.¹⁴⁴ In December 2001, U.S. Attorney General John Ashcroft toured Germany, Spain, Italy, and the United Kingdom to discuss international efforts against terrorism.¹⁴⁵ However, Ashcroft's attempts to obtain Western Europe's compliance on extraditing terrorist suspects were futile because those individuals could be executed under U.S. domestic law.¹⁴⁶ The degree of procedural protections accorded to the accused is equivocal and it is unknown whether the suspects will be executed following a finding of guilt.¹⁴⁷

In 1989, the European Court of Human Rights held that the United Kingdom would be in violation of Article 3 of the ECHR if it were to extradite a prisoner facing death in the U.S.¹⁴⁸ The Court's reasoning was that the lengthy death row wait was cruel and degrading punishment.¹⁴⁹ The Judicial Committee of the Privy Council in London attempted to define an acceptable waiting period on death row to serve the offenders' human rights interests.¹⁵⁰ The Privy Council held that executing a prisoner after five years on death row amounted to inhuman and degrading punishment.¹⁵¹ The Privy Council also stated a two-year wait may also be inhumane.¹⁵²

Moreover, by a margin of nine to zero, the Canadian Supreme Court held extradition to the U.S., without confirmation that death would not be imposed, breached Section 7 of the Canadian Charter of Rights and Freedom.¹⁵³ The Court's unanimous 2001 decision requires the Canadian government to obtain guarantees that the ultimate sanction will not be imposed in extradition cases.¹⁵⁴ The Court reasoned psychological trauma to death row inmates and lengthy delays violate due process and the penalty's finality makes

144. *Id.*

145. DEVELOPMENTS IN 2001, *supra* note 101, at 37.

146. *Id.*

147. HOOD, *supra* note 4, at 155.

148. *Id.* at 112; *see also* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 34 (1989).

149. HOOD, *supra* note 4, at 112.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*; *see also* United States v. Burns, [2001] S.C.R. 7. Once Canada had been guaranteed the individuals would not face the death penalty, the individuals were permitted to surrender to the U.S. to face trial in American courts. *Id.*

154. DEVELOPMENTS IN 2001, *supra* note 101, at 18-19.

any premeditated killing of a prisoner an inhuman act.¹⁵⁵ Because of this, Canada holds the death penalty unacceptable and refuses to extradite individuals facing such punishment.¹⁵⁶

The European Parliament formally approved a proposal on judicial cooperation between the U.S. and the European Union to fight terrorism on December 17, 2001.¹⁵⁷ The resolution requires all signatory nations to have plenary respect for ECHR precepts.¹⁵⁸ The European Union demanded the U.S. abolish the death penalty; ultimately, reminding all member Nations of their obligations.¹⁵⁹ Consequently, the U.S. must first guarantee the penalty will not be imposed and procedures will be carried out in good faith before extradition occurs.¹⁶⁰

In May 2001, the South African Constitutional Court (SACC), held that the U.S. must make assurances the accused will not face capital punishment before handing over the individual to the U.S.¹⁶¹ For example, South African officials summarily deported a Tanzanian national named K. K. Mohamed to the U.S. because he was an accused accomplice to the 1998 bombing of the U.S. embassy in Tanzania.¹⁶² The Tanzanian national was without an attorney when interrogated, held without any means of communication, and summarily deported to the U.S.¹⁶³ Following extradition, the SACC stated the procedure was unlawful whether framed as an extradition or a deportation.¹⁶⁴ The SACC further ruled, "the immigration authorities failed to give any value to Mohamed's right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment."¹⁶⁵ After Mohamed was convicted, the jury spared his life by sentencing him to life without the possibility of parole.¹⁶⁶ The jury forewoman stated the majority of the jury concluded executing Mohamed would make him a martyr in the eyes of potential terrorists, cause others to

155. HOOD, *supra* note 4, at 113.

156. *Id.*

157. DEVELOPMENTS IN 2001, *supra* note 101, at 15.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. DEVELOPMENTS IN 2001, *supra* note 101, at 19.

164. *Id.*

165. *Id.*

166. *Id.* at 20.

exploit his death and justify future terrorist acts.¹⁶⁷ Another suspect in the 1998 bombings, named M. M. Salim, will not face state-sanctioned death because the U.S. assured German authorities that Salim would not be subjected to the death penalty if extradited to the U.S.¹⁶⁸

V. INNOCENCE

*"The forfeiture of life is too absolute, too irreversible, for one human being to inflict it on another, even when backed by legal process. And I believe that future generations, throughout the world, will come to agree."*¹⁶⁹

– Kofi Annan, U.N. Secretary General and 2001 Nobel Peace Prize Recipient

A. *Violating Justice and Humanity*

Capital punishment is an emotionally charged issue in which the majority of proponents do not question their own personal beliefs regarding retribution and deterrence.¹⁷⁰ Conversely, death penalty opponents are likely to base their beliefs on individual humanitarian concerns.¹⁷¹ Empirical studies consistently show few proponents' beliefs are swayed by persuasive evidence that the penalty is unfair, arbitrary, and fails to deter crime.¹⁷²

B. *Institutional Homicide Errors*

The most persuasive argument for abolishing the death penalty is the prospect that an innocent person will be executed.¹⁷³ For example, one survey asked, "[r]egardless of how you feel about the death penalty, which of the following reasons do you think is the best reason to oppose the death penalty . . . ?"¹⁷⁴ The most frequent reason given

167. *Id.*

168. *An International Perspective*, *supra* note 2.

169. *Id.*

170. Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management* 10 (1999) (unpublished Ph.D. dissertation, The University of Tulsa) (on file with The University of Tulsa Library).

171. *Id.*

172. Samuel R. Gross, *Update: American Public Opinion on the Death Penalty - It's Getting Personal*, 83 CORNELL L. REV. 1448, 1458 (1998).

173. *Id.*

174. *Id.* at 1462.

was "[i]nnocent[s] may be killed' (33%)".¹⁷⁵ Respondents chose this reason before "[i]mmoral to kill' (21%), '[t]oo expensive' (12%), '[p]rison more severe' (11%), '[n]ot a deterrent' (10%), and '[r]acist punishment' (3%)." ¹⁷⁶ Executing innocent persons outrages the entire population. Mistakes regarding non-capital punishment cases are remittable; the innocent person can be spared. On the other hand, the state could never compensate innocents postmortem. Consequently, since human error is inevitable, retentionist criminal justice systems are irreparably damaged when innocents are slayed by the state.

Illinois Governor George Ryan announced a moratorium on executions in May 1999 after learning at least thirteen death row inmates were exonerated.¹⁷⁷ Illinois law and journalism students proved thirteen death row inmates in Illinois were innocent.¹⁷⁸ Since only twenty-five inmates sat on death row in the state, over half the prisoners sentenced to death in Illinois were not guilty.¹⁷⁹ Moreover, four of the thirteen exonerated prisoners were fully pardoned because their confessions were obtained through prolonged police torture.¹⁸⁰ Republican Governor Ryan declared, "I cannot support a system which, in its administration, has proven to be so fraught with error, and has come so close to the ultimate nightmare, the state's taking of innocent life."¹⁸¹

The U.S. is not alone in its concern. Reports from many different countries spanning the globe reveal wrongly convicted persons stand to suffer state-sanctioned death.¹⁸² Miscarriages of justice are likely when there is a "crackdown" on crime or when notorious crimes place pressure on police to make a hurried arrest.¹⁸³ A longitudinal study examining capital convictions and appellate process between 1973 and 1995 found eighty-nine percent of individuals initially sentenced

175. *Id.*

176. *Id.*

177. HOOD, *supra* note 4, at 69.

178. Koh, *supra* note 36, at 1107.

179. *Id.*

180. *The Oprah Winfrey Show: The Governor Who Emptied Death Row* (NBC television broadcast, Jan. 15, 2003). Three prisoners were set free while the fourth serves time for an unrelated crime. *Id.*

181. HOOD, *supra* note 4, at 69.

182. *Id.* at 132. "These reports have come from Belize, China, Japan, Malawi, Malaysia, Pakistan, Papua New Guinea, the Philippines, Trinidad and Tobago, and Turkey (which stated this was not the case in its response to the survey)." *Id.*

183. *Id.* at 133.

to death were determined undeserving of death after the original trial's errors were corrected.¹⁸⁴ The number of errors is greatest in countries using the death penalty the most.¹⁸⁵ The U.S. has exonerated over 113 individuals from death row following conclusive proof of their innocence.¹⁸⁶ America has released 3.43 persons from death row each year for the past thirty years because they were proven guiltless.¹⁸⁷ A number of nations have recently exonerated prisoners sentenced to death and admitted the individuals had been wrongly convicted.¹⁸⁸ These nations include Belize, China, Japan, Malaysia, Malawi, Pakistan, the Philippines, Trinidad and Tobago, and Turkey.¹⁸⁹ Therefore, because it is unlikely criminal justice systems have found and eliminated every error, and since the punishment is irreversible by nature, the likelihood that innocents have been or will be executed is significant.¹⁹⁰

C. Egregiously Incompetent Defense Lawyers

The most common cause of errors at trial for death row defendants is the defense attorney.¹⁹¹ In seventy-six percent of U.S. cases, the defense attorney missed crucial evidence that might have mitigated the accused's sentence or would have proven the defendant was innocent.¹⁹² Even Supreme Court Justice Sandra Day O'Connor, a long-time proponent of capital punishment, conceded to the incompetence of defense lawyers in capital cases¹⁹³ when she stated, "the system may well be allowing some innocent defendants to be executed."¹⁹⁴

Defendants are more likely to have their case favorably appraised by the judicial system if they receive proper advice from skilled counsel.¹⁹⁵ In the U.S., where the lion's share of research is conducted, studies show choosing to advance to trial instead of

184. *Id.* at 135.

185. *Id.*

186. DEATH PENALTY YEAR END REPORT, *supra* note 82, at 6; see also *Facts and Figures*, *supra* note 2.

187. DEATH PENALTY YEAR END REPORT, *supra* note 82, at 6.

188. SIMON & BLASKOVICH, *supra* note 18, at 51.

189. *Id.*

190. HOOD, *supra* note 4, at 71.

191. *Id.* at 135.

192. *Id.*

193. *Id.* at 71.

194. *Id.*

195. *Id.* at 143.

pleading guilty considerably increases the likelihood of suffering a death sentence.¹⁹⁶ In Florida and Georgia defendants having private as opposed to court-appointed attorneys are significantly less likely to be sentenced to death.¹⁹⁷ In Georgia, a defendant is up to 260 percent more likely to receive a death sentence if represented by a court-appointed attorney.¹⁹⁸ Most court-appointed lawyers are underpaid when compared to privately appointed counsel.¹⁹⁹ Practically all death row prisoners in the U.S. are poverty-stricken and most of them are without legal counsel.²⁰⁰ Consequently, indigent defendants are severely disadvantaged because they lack access to expert counsel.

Academic literature and the case reporters find in most trial phases that defendants receive unsatisfactory legal representation in death eligible cases.²⁰¹ Supreme Court Justice William J. Brennan stated, "the meagre 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."²⁰² Moreover, Justice O'Connor declared, "perhaps it is time to look at minimum standards for appointed counsel in death penalty cases and adequate compensation for appointed counsel when they are used."²⁰³ Minimum

196. HOOD, *supra* note 4, at 143.

197. *Id.*

198. *Id.* However, whether a defendant is successful in averting a death verdict depends largely on the finances and resources backing the defense effort. For example, the Defender Association of Philadelphia (DAP), Philadelphia's public defender office, has a perfect record over the past eleven years for keeping its clients off death row. Not a single one of DAP's clients has been sentenced to death. DAP sets a good example of what a capital defense can do when adequately funded. Each DAP client has two lawyers, a private investigator, psychologists, and mitigation experts. Conversely, the private attorneys who are court-appointed, handling four out of every five cases in Philadelphia, may get only \$2,000 for expenses and as little as \$400 in attorneys fees for each trial day. Private attorneys alone are responsible for the sixty-one individuals sentenced to die in Philadelphia since the DAP started handling capital cases in 1993. Thus, death-eligible defendants in the U.S. may not have adequate legal help from overworked and underpaid lawyers. CNN, *Lawyers: Money Matters in Death Penalty Defense*, Apr. 17, 2004, at <http://www.cnn.com/2004/LAW/04/07/capital.defense.ap/index.html> (last visited Apr. 20, 2004).

199. HOOD, *supra* note 4, at 143.

200. *Id.*

201. *Id.* at 144.

202. *Id.*

203. *Id.* at 146.

standards must be implemented in life-or-death cases requiring competent defense counsel.²⁰⁴

D. Abolitionist Movement Members

In 1997, the American Bar Association (ABA) made a general appeal for a national moratorium on capital punishment.²⁰⁵ Additionally, respected world leaders Nelson Mandela, Pope John Paul II and Mary Robinson, U.N. High Commissioner for Human Rights, have called for death penalty abolition.²⁰⁶ The ABA is concerned because access to the appellate courts is restricted, new evidence regarding innocence is rarely heard, and racial disparities exist in the administration of the penalty.²⁰⁷ Distressed with the unevenness of representation, the ABA states that defendants whose lives hang in the balance need adequate counsel the most and almost never receive sufficient representation.²⁰⁸ The ABA concluded the situation is one where fundamental due process is systematically lacking in capital cases.²⁰⁹ Thus, the largest association of American attorneys and some of the world's most respected leaders, basing their opinions on extensive study of the death penalty process, posit the penalty is inequitable and must be abolished.²¹⁰

VI. COST

*"Elimination of the death penalty would result in a net savings to the state of at least several tens of millions of dollars annually, and a net savings to local governments in the millions to tens of millions of dollars on a statewide basis."*²¹¹

– Joint Legislative Budget Committee of the California Legislature

204. *Id.* at 147.

205. HOOD, *supra* note 4, at 146.

206. DIETER, *supra* note 23.

207. SIMON & BLASKOVICH, *supra* note 18, at 49.

208. HOOD, *supra* note 4, at 146.

209. See AMERICAN BAR ASSOCIATION, RESOLUTION ON THE DEATH PENALTY REPORT WITH RECOMMENDATIONS NO. 107 (1997), available at <http://www.abanet.org/irr/rec107.html> (last visited Feb. 12, 2004).

210. Ronald J. Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 CORNELL L. REV. 1431, 1439 (1998).

211. *Death Penalty Facts: Cost*, AMNESTY INTERNATIONAL, at <http://www.amnestyusa.org/abolish/cost.html> (last visited Feb. 6, 2004) [hereinafter *Cost*].

Balancing the high costs associated with the penalty and the need to maintain a reasonable crime prevention budget poses substantial problems.²¹² Taking into account the appellate process, the best legal counsel attainable, and the lengthy confinement of inmates, the people have a gigantic bill to pay.²¹³ Assessments conducted in the U.S. reveal the state pays between \$2 million and \$3.2 million for each execution.²¹⁴ One Florida execution costs taxpayers \$3.2 million as opposed to \$600,000 for life imprisonment.²¹⁵ A study of four U.S. states found the death penalty is much more expensive than life without parole.²¹⁶ This evidence prompted members of the Illinois Commission studying the penalty to favor abolition.²¹⁷

Moreover, while spending money is necessary for the non-violent punishment of criminals, a nation's allocation of money for acts of vengeance is peculiar.²¹⁸ It would make more sense for a society to spend money on the prevention of murders than on attempts at making murder victims' families acquire closure with revenge rituals.²¹⁹ For example, money spent pursuing executions could provide for more police officers, additional education, psychiatric treatment for prisoners, drug rehabilitation and domestic violence programs.²²⁰ Additionally, the courts would be freed of the vexatious litigation that death penalty cases create.²²¹ Therefore, crucial crime fighting and prevention agendas are slashed while exorbitant capital punishment systems are perpetuated and their cost ignored in retentionist nations.²²²

212. HOOD, *supra* note 4, at 170.

213. *Id.*

214. *Id.*

215. *Cost*, *supra* note 211.

216. *Id.*

217. GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 198-99 (2002), available at http://www.state.il.us/defender/report/complete_report.pdf.

218. Stafford-Smith, *supra* note 12, at 271.

219. *Id.*

220. See Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 401, 401 (Hugo Adam Bedau ed., 1997).

221. *Id.*

222. *Id.* at 402.

VII. THEOLOGICAL NOTIONS

No valid theological stance calls for inflicting pain and modern theology aims to protect people from pain.²²³ Some religious communities have called for abolition of the penalty.²²⁴ For instance, the Catholic Church, Reform and Orthodox Jewish movements, and most Protestant groups have banded together to protest capital punishment.²²⁵ Since its beginnings, the U.S. continues to be governed primarily by lawmakers who are members of the Christian faith.²²⁶ Many Christians believe redemption should be left to God, and when the state accelerates a person's death, it destroys any redemptive opportunity the individual had before a natural death.²²⁷ Hence, most modern world religions emphasize forgiveness, mercy, and sympathy.²²⁸

Major religion teachings emphasize proportionality as opposed to vengeance.²²⁹ Many Christians maintain the penalty should be abolished because it is unethical, sinful, and wicked.²³⁰ Although the Old Testament of the Bible could be interpreted to prescribe death as the punishment for a number of offenses,²³¹ private acts of vengeance were limited by allowing officials to exact only an eye for an eye under

223. Interview with Terrence Luce, Professor of Psychology, the University of Tulsa, in Tulsa, Okla. (Jan. 16, 2003).

224. *Id.*

225. HOOD, *supra* note 4, at 69.

226. See generally NORMAN COUSINS, 'IN GOD WE TRUST' THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS (1958). The author acknowledges there are many other religions existing in international settings. The Christian religion dominates the "Theological Notions" portion of this comment primarily because the majority of the population in the U.S., the only industrialized nation in the world continuing to openly impose the death penalty, is Christian.

227. See *Conservatives Rethink Death Penalty*, CHRISTIANITY TODAY, April 6, 1998, available at <http://www.christianitytoday.com/ct/8t4/8t419a.html> (last visited Feb. 6, 2004).

228. *The Death Penalty: Questions and Answers*, AMNESTY INTERNATIONAL, available at

[http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ACT500012000ENGLISH/\\$File/ACT5000100.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ACT500012000ENGLISH/$File/ACT5000100.pdf) (last visited Feb. 12, 2004) [hereinafter *Questions & Answers*].

229. Interview with Henry F. Knight, Professor of Religion, the University of Tulsa, in Tulsa, Okla. (Feb. 11, 2003).

230. SIMON & BLASKOVICH, *supra* note 18, at 6.

231. ROGER H. CROOK, AN INTRODUCTION TO CHRISTIAN ETHICS 210 (1990). See generally GARDNER C. HANKS, AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST CAPITAL PUNISHMENT 211 (1997). Hebrews would refer to the "Old Testament" as the "Hebrew Scriptures." See *id.* at 210.

biblical law.²³² The New Testament teaches Christ removed the retribution requirement by dying on the cross for man's sins.²³³ Consequently, Christ's crucifixion assured Christians they should never again fear the retribution of God's anger.²³⁴

Inconsistent statements concerning God's opinion of the penalty permeate the Old Testament.²³⁵ The Old Testament also contains contradictory statements regarding God's conception of the atonement of sins expressed by the "eye for an eye" rationality.²³⁶ For example, Cain was anxious about society's retribution after murdering his brother Abel and was afraid anyone who came upon him would justifiably kill him.²³⁷ However, God promised Cain vitality by stating, "whosoever shall kill Cain, shall be punished sevenfold."²³⁸ Thus, Cain's death was non-essential expiation in God's eyes.²³⁹

The crucifixion is considered the supreme sacrifice to Christians.²⁴⁰ Christians believe the sins of man were forgiven through the shedding of Jesus Christ's blood. Do logic and reason behoove authorities to slay slayers, thus attempting to restore moral balance through sacrifice?²⁴¹ Christianity professes Jesus Christ made the ultimate sacrifice for all by dying on the cross, thereby eliminating any need for vengeance.²⁴² The New Testament documents a transformation from vengeance to mercy through the most infamous sacrifice.²⁴³ Death penalty proponents relying on the Old Testament and its rationale have yet to understand fully the significance of the New Testament because a selective analysis of the Scriptures shows only half the story.²⁴⁴ Consequently, killing a killer

232. Stafford-Smith, *supra* note 12, at 271.

233. SIMON & BLASKOVICH, *supra* note 18, at 6.

234. *Id.* Those believing in Jesus Christ view his resurrection as legitimizing the claims that He was God's son. Thus, many believing Jesus Christ was crucified (sacrificed himself for the sins of all mankind) and subsequently resurrected, use these occurrences as evidence and posit that believers in Jesus Christ should never fear the retribution of God's anger.

235. *Id.*

236. *Id.*

237. *Genesis* 4:13-14.

238. *Genesis* 4:15.

239. SIMON & BLASKOVICH, *supra* note 18, at 6.

240. *Id.* at 7.

241. *Id.*

242. *Id.*

243. *See generally id.*

244. *Id.*

would not restore moral balance when the morality is based on the theological notions of Jesus' sacrifice.²⁴⁶

Books of the Bible such as Exodus,²⁴⁶ Leviticus,²⁴⁷ and Deuteronomy,²⁴⁸ contain the "eye for an eye" passage.²⁴⁹ In Exodus, the phrase is used to illustrate distinctions made based on the degree of damage.²⁵⁰ Furthermore, premeditation and the surrounding circumstances are weighed in the analysis.²⁵¹ Exodus illustrates that alternative forms of payment such as property or money can be made in exchange for the offender suffering physical damage.²⁵² If the doctrine is applied strictly, it justifies imposing the death penalty for an accidental killing, which is inherently unreasonable.²⁵³

The passages in Exodus and Deuteronomy also prove Old Testament law allows capital punishment.²⁵⁴ The Old Testament prescribes death for an exhaustive list of offenses including striking one's parent, sorcery, idolatry, bestiality, the worship of other gods, and even requires execution for a stubborn son.²⁵⁵ None of these offenses inflicts death on the object of the act. Because Old Testament law allows the death penalty for many lesser offenses, the death penalty is disproportional.²⁵⁶

In the only New Testament passage directly referencing the ultimate sanction, Jesus rejects the death penalty.²⁵⁷ When a woman committed adultery, a crime punishable by death, Jesus stated, "[l]et him who is without sin among you be the first to throw a stone at her."²⁵⁸ At the least, Jesus said the crime of adultery does not necessitate death; and at the most, Jesus said no crime should be punishable by death.²⁵⁹ Moreover, Jesus commuted capital punishment in a culture that commonly executed adulterous

245. SIMON & BLASKOVICH, *supra* note 18, at 6.

246. *Exodus* 21:22-36.

247. *Leviticus* 24:13-23.

248. *Deuteronomy* 19:16-21.

249. SIMON & BLASKOVICH, *supra* note 18, at 7.

250. CROOK, *supra* note 231, at 210.

251. *Id.*

252. *Id.*

253. *See id.*

254. *Id.*

255. *Id.* at 210-11.

256. *See* CROOK, *supra* note 231.

257. *John* 7:53-8:11.

258. *John* 8:7.

259. *See* CROOK, *supra* note 231.

women.²⁶⁰ Therefore, in the capital punishment context, Jesus set the precedent that humans deserve mercy and sin should be forgiven.²⁶¹

The majority of mainline denominations never use the "eye for an eye" passage as the primary message or moral of the Scripture.²⁶² God's conduct is an example of vengeance versus reality that refuses to retaliate against individuals in the three passages employing the "eye for an eye" passage.²⁶³ Because death penalty supporters base their argument on this passage, and since God did not use the "eye for an eye" passage to act or retaliate against individuals, reliance on the passage as a justification for the death penalty is wrong.²⁶⁴

The *lex talionis* doctrine is too easily read literally as a logic of revenge.²⁶⁵ The biblical term an "eye for an eye" is meant to express a logic of proportionality.²⁶⁶ This proportional logic emphasizes the punishment imposed or the justice must fit the injustice.²⁶⁷ Therefore, the biblical roots of just punishment, that one must deal with the notion of proportionality in punishment, is the heart of the *lex talionis* tradition.²⁶⁸

VIII. RETRIBUTIVISM

*"Revenge is a powerful undercurrent in all societies I believe that the deterrence hypothesis is frequently nothing more than a veneer for revenge."*²⁶⁹

– Dane Archer, Social Psychologist

A. *Lex Talionis*

Retributivism espouses the principle that penalties are justified because the offender is morally culpable and deserves punishment.²⁷⁰

260. *Id.*

261. *Id.*

262. SIMON & BLASKOVICH, *supra* note 18, at 8. Evangelical/conservative Christians are more likely to rely on this passage to justify their support of the death penalty.

263. *Id.*

264. *Id.*

265. Interview with Henry F. Knight, *supra* note 229.

266. *Id.*

267. *Id.*

268. *Id.*

269. John Wilkes, *Murder in Mind*, PSYCHOLOGY TODAY, June 1987, at 31.

270. Claire Finkelstein, *An A Priori Argument Against the Death Penalty*, in U. PA. L. SCH.: PUB. L. & LEGAL THEORY RES. PAPER SERIES 32 (2002), available at http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID347323_code021106630.pdf?abstractid=347323 (last visited Feb. 12, 2004).

Retributivists have relied on the *lex talionis* doctrine to explain specific penalties.²⁷¹ *Lex talionis* is “[t]he law of retaliation, under which punishment should be in kind - an eye for an eye, a tooth for a tooth, and so on.”²⁷² Proponents are unable to justify the death penalty because a literal interpretation of the *lex talionis* doctrine is unreasonable.²⁷³ An exact application of the doctrine is absurd because the state does not “rape rapists, assault assailants, or burgle the home of burglars” in the name of the people.²⁷⁴ For reasons of morality, the state refrains from these actions.²⁷⁵ Although it would be just to torture torturers, moral considerations must be weighed against inhumane punishment.²⁷⁶ Since the purpose of this 3,000-year-old law was to limit revenge, the *lex talionis* argument is based upon weak tradition.²⁷⁷ Hence, the *lex talionis* doctrine must be limited by doing to the person as nearly as possible what the person did to the victim without exacting the same harm.²⁷⁸

A retributivist is not required to support the death penalty because the doctrine of *lex talionis* is absurd when viewed under a theory of specific equality.²⁷⁹ For instance, torturing torturers and raping rapists would be truly cruel and unusual.²⁸⁰ However, when analyzed under a theory of general equality,²⁸¹ *lex talionis* calls for proportional punishment.²⁸² The retributivist believes a serious crime deserves a serious punishment.²⁸³ For example, murder, a serious crime, may deserve life without the possibility of parole, a serious punishment.²⁸⁴ The modern retributivist can say a murderer’s

271. *Id.*

272. BLACK’S LAW DICTIONARY, *supra* note 68, at 924 (7th ed. 1999).

273. Finkelstein, *supra* note 270, at 32.

274. *Id.*

275. Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering Van Den Haag*, 14 PHIL. & PUB. AFF. 115, 127 (1985).

276. *Id.* at 128.

277. Stafford-Smith, *supra* note 12, at 271.

278. Reiman, *supra* note 275, at 127.

279. Interview with Russell L. Christopher, Professor of Law, the University of Tulsa College of Law, in Tulsa, Okla. (Jan. 27, 2003).

280. *See* Reiman, *supra* note 275, at 127-28.

281. Russell L. Christopher, *Detering Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 845, 849 (2002).

282. Interview with Russell L. Christopher, *supra* note 279.

283. *Id.*

284. *Id.*

deserved punishment need not be the death penalty.²⁸⁵ The only way the retributivist can defend the penalty is by creating a logical and proportional system pairing crimes with punishments without insisting the punishment precisely fit the crime.²⁸⁶ Therefore, as long as serious crimes are given serious punishments, retributivists are not compelled to support the death penalty.²⁸⁷

The moral equivalence theory is a promising retributivist theory because it limits the deserved penalty.²⁸⁸ This theory relies on the common sense concept that a moral equivalence can be determined between crimes and punishments.²⁸⁹ For instance, the offender deserves to endure pain that equals the pain suffered by the victim; however, the suffering style need not match.²⁹⁰ Even Immanuel Kant, philosopher and father of retributivism, posited a narrow exception to specific equality analogous to the moral equivalence theory.²⁹¹ Therefore, the moral equivalence theory proposes the state should inflict the closest tolerable penalty to the harm caused by the offender.²⁹²

The worldwide trend toward death penalty elimination is one aspect of the civilizing enterprise of modern nations.²⁹³ Justice is served where the criminal's punishment demonstrates the sincere belief that the criminal deserves the plenary allotment of the *lex talionis* doctrine while authorizing less punishment.²⁹⁴ As long as there is the sincere belief the criminal's just deserts is maintained, it is just to show mercy to murderers if they can be punished in an adequately grave way.²⁹⁵ For instance, life without the possibility of parole may be a civilized alternative to the death penalty.²⁹⁶ Prisoners condemned to prison for the rest of their natural lives are "civilly

285. See Stephen Nathanson, *Does it Matter if the Death Penalty is Arbitrarily Administered?*, 14 PHIL. & PUB. AFF. 149 (1985).

286. Finkelstein, *supra* note 270, at 32.

287. Interview with Russell L. Christopher, *supra* note 279.

288. Finkelstein, *supra* note 270, at 34.

289. *Id.*

290. *Id.*

291. See TOM SORRELL, MORAL THEORY AND CAPITAL PUNISHMENT 149-50 (1987) (discussing Kant's philosophy on punishment).

292. Finkelstein, *supra* note 270, at 34.

293. See generally Reiman, *supra* note 275, at 115.

294. *Id.* at 130.

295. *Id.*

296. *Id.*

dead" because they suffer the death of freedom.²⁹⁷ Murderers would exchange their civil lives for their victims' natural lives.²⁹⁸ Consequently, life without the possibility of parole, a sentence requiring murderers to live the rest of their lives in prison, is severe and represents the significance of harm inflicted on the victim and society.²⁹⁹

The death penalty should be forbidden in modern societies.³⁰⁰ Lowering the tolerance for the pain suffered by humankind characterizes an advancing civilization.³⁰¹ A civilization's stage is indicated by the public's rejection of human suffering.³⁰² Moreover, this civilizing gesture is even more powerful when society refuses to commit gruesome acts to offenders deserving the ultimate sanction.³⁰³ Therefore, civilization's advancement requires conscious reductions in the atrocious acts humans tolerate against other humans.³⁰⁴

A retribution ideology creates a system opposing change.³⁰⁵ For instance, reversing a conviction is nearly impossible, especially on grounds of innocence in the U.S., because the individual is forever labeled guilty following conviction.³⁰⁶ Newly discovered evidence of innocence is precluded because thirty-three states have a statute of limitations of six months.³⁰⁷ Prosecutors support these statutes because they consider the exoneration of an innocent individual as an unequivocal attack against the criminal justice system.³⁰⁸ Innocent persons are not protected under current laws revealing a need for statutes extending time limits on new evidence.³⁰⁹ For instance, statutes increasing access to DNA and other technological methods proving a person's innocence or guilt should be favored.³¹⁰ DNA evidence has been instrumental in exonerating at least eleven death

297. *Id.*

298. *See id.*

299. Reiman, *supra* note 275, at 131.

300. *See id.* at 147.

301. *Id.* at 135.

302. *Id.*

303. *Id.* at 136.

304. *Id.*

305. SIMON & BLASKOVICH, *supra* note 18, at 53.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

row inmates between 1982 and 2002.³¹¹ The defendant's culpability is crucial and use of reliable technology and valid methods such as DNA analysis helps discern the truth when the evidence exists.³¹²

B. Brutalization Hypothesis

The brutalization theory states that the execution of offenders incites capital crimes³¹³ and operates on three planes.³¹⁴ First, potential killers are stimulated during the period following an execution.³¹⁵ The would-be killers seek mortal vengeance because they identify with the state's executioner role instead of resolving conflict non-violently.³¹⁶ Secondly, the drama accompanying executions arguably incites some to seek notoriety.³¹⁷ Finally, some people already predisposed toward violence seek this fate as a substitute to suicide.³¹⁸ The brutalization theory argues that the message executions send to people stimulates violence and justifies slaying as vengeance.³¹⁹

Studies show publicized executions merely defer future murders.³²⁰ Data analyzing the number of homicides committed ten weeks before and ten weeks after an execution reveal a significant increase in the number of overall homicides.³²¹ The study suggests that every execution increases the number of homicides by an average of 2.4 incidents.³²² In another study, conducted in New York between 1906 and 1963, the results pointed in the same direction.³²³ Monthly execution rates of murderers were analyzed and results indicated that just one execution doubled the quantity of homicides the month following an execution.³²⁴ A more recent study conducted in Oklahoma examined the impact of its first execution in twenty-five

311. SIMON & BLASKOVICH, *supra* note 18, at 49.

312. *Id.* at 53.

313. See WILLIAM J. BOWERS ET AL., LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982 271, 301-02 (1984).

314. HOOD, *supra* note 4, at 211.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. HOOD, *supra* note 4, at 219.

321. *Id.*

322. *Id.*

323. *Id.*

324. BOWERS, *supra* note 313, at 298-99.

years³²⁵ and found an increase in the quantity of some types of homicides.³²⁶ Thus, this brutalization occurs by employing the death penalty, which causes would-be killers to lower their inhibitions against killing.³²⁷

IX. TRANSNATIONAL ABOLITION

*"Perhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life."*³²⁸

– Benjamin N. Cardozo

A. *Death Fails to Deter*

1. Empirical Studies

Assessments conducted over the past seventy years yield no convincing evidence proving state executions are a more effective crime deterrent than life without the possibility of parole.³²⁹ Transnational homicide rates show the U.S. has a significantly higher murder rate than any U.S. governmental counterpart.³³⁰ For example, from the early 1960s to the late 1970s the homicide rate in the U.S. increased dramatically to levels far surpassing other Western industrialized nations.³³¹ During this same period, the Western European and U.S. policies regarding capital punishment diverged further.³³² In 1990, the U.S. homicide rate was 450 % over Canada's rate, 900 % over France and Germany's, and 1300 % over the United Kingdom's.³³³ As of 1998, the U.S. homicide rate remained up to four times higher than the majority of Western nations.³³⁴ Statistics continue to show a consistent lack of deterrent effect when the state imposes executions, providing persuasive proof that retentionist

325. John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 108 (1994).

326. *Id.* at 129.

327. *Id.*

328. BENJAMIN N. CARDOZO, LAW AND LITERATURE 93-94 (1931).

329. HOOD, *supra* note 4, at 213.

330. Steiker, *supra* note 19, at 102.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

nations would experience a decrease in crime if they lessen reliance upon capital punishment.³³⁵

Although the likelihood of executing a person for capital homicide is low, retentionist nations assert deterrence justifies capital punishment.³³⁶ For instance, Saudi Arabia and China claim their crime rates have diminished because of the deterrent death penalty factor.³³⁷ A July 2000 study reported the five retentionist nations with the highest homicide rates had an average of 41.6 murders per 100,000 people.³³⁸ Conversely, the five abolitionist nations with the highest homicide rates showed an average of 21.6 murders per 100,000 people.³³⁹ This international assessment reveals abolitionist nations average at least twenty fewer murders per 100,000 people.³⁴⁰ The study finds the average murder rate for the U.S. retentionist states is eight percent per 100,000 people, while U.S. abolitionist states' murder rate is less than five percent.³⁴¹ Thus, since the results reveal homicide rates are consistently greater in retentionist nations, the results bolster the argument that death as a punishment fails to deter.³⁴²

A longitudinal outlook solidifies abolition's beneficial effects³⁴³ because Canadian figures yield the homicide rate per 100,000 was reduced from a high of 3.09 in 1975 to 2.41 in 1980.³⁴⁴ The 1976 abolition of capital punishment for murder in Canada was followed by a diminution in the country's homicide rate.³⁴⁵ For instance, the rate in 1999 was even lower at 1.76 per 100,000.³⁴⁶ Since Canada abolished the penalty, its homicide rate diminished by forty-three percent between 1975 and 1999.³⁴⁷ Therefore, abolition does not result in a dramatic rise in the homicide rate, contrary to what some retentionists argue.³⁴⁸

335. HOOD, *supra* note 4, at 214.

336. SIMON & BLASKOVICH, *supra* note 18, at 39.

337. *Id.*

338. *Id.* at 40.

339. *Id.*

340. *See id.*

341. *Id.*

342. SIMON & BLASKOVICH, *supra* note 18, at 40.

343. *Facts and Figures*, *supra* note 2.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *See generally Facts and Figures*, *supra* note 2.

In January 2002, Taiwan's legislature eliminated a long-standing law requiring capital punishment for specific violent crimes such as robbery or kidnapping.³⁴⁹ A top Taiwanese official stated, "[w]e failed to deter crime even by imposing the severest criminal punishment."³⁵⁰ Since the penalty fails to deter, Taiwan intends to fully abolish the death penalty for the most severe crimes.³⁵¹

A 1995 poll asking 386 U.S. county sheriffs and police chiefs whether they believed the ultimate sanction significantly lessened the number of homicides produced interesting results.³⁵² Two-thirds of the those surveyed did not believe the death penalty reduces the incidence of homicide whatsoever.³⁵³ Eighty-two percent did not think murderers ponder possible punishments and therefore would not be deterred by a vague threat of death upon conviction.³⁵⁴ Only one-third of the police chiefs supported the death penalty because they thought executions deterred potential murderers.³⁵⁵ Hence, the overwhelming majority of America's public servants on the front lines of the fight against crime agree capital punishment is ineffective.³⁵⁶

A rare inquiry into capital punishment's deterrent effects conducted outside the U.S. assessed differences in homicides and violent crime in 293 nations.³⁵⁷ The study found no correlation in the relationship between the mean number of executions and the incidence of either armed robbery or murder.³⁵⁸ Countries were matched in pairs by historical development, economic factors, and demographic variables.³⁵⁹ The pairs shared a border, but held differing laws regarding the death penalty's use.³⁶⁰ The study found support for a deterrent effect was lacking and results yielded higher violent crime rates in retentionist nations.³⁶¹

Moreover, a ten year study utilizing statistics from 110 nations analyzing international homicide rates found capital punishment fails

349. *An International Perspective*, *supra* note 2, at 6.

350. *Id.*

351. *Id.*

352. HOOD, *supra* note 4, at 241.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. SIMON & BLASKOVICH, *supra* note 18, at 45.

358. HOOD, *supra* note 4, at 216.

359. SIMON & BLASKOVICH, *supra* note 18, at 45.

360. *Id.*

361. *Id.*

to deter homicidal criminals.³⁶² Researchers hypothesized that nations incite citizens to commit additional criminal violence when they impose violent punishment on human beings.³⁶³ In essence, "the state can make violence the coin of its realm" since human violence is a result of social forces more than the product of biological drive.³⁶⁴ For instance, the U.S. and New Zealand share many similarities despite a discordant view of the death penalty, yet New Zealand is far less violent.³⁶⁵ While New Zealand is a cosmopolitan, multicultural, frontier-based society, its murder rate is fifty times lower than the U.S.'s.³⁶⁶ While New Zealanders and Americans share similar societal approaches, New Zealanders refuse to impose the death penalty.³⁶⁷ The violence imposed by the retentionist American government appears to incite violence in its own citizenry.³⁶⁸

Mature social sciences refuse to draw conclusions from just one investigation because that assessment may be fatally flawed for countless reasons.³⁶⁹ In order to decipher the truth, science requires conclusions be drawn from a preponderance of the evidence.³⁷⁰ In the aggregate, the studies conducted in fields of psychology, anthropology, and sociology overwhelmingly show capital punishment fails to diminish homicide rates.³⁷¹ Because reliable and valid evidence points to the lack of a deterrent effect, the death penalty should be abolished.

2. Invisible Executions

Retentionist governments argue capital punishment deters certain illegal conduct and is a "cure" for crime.³⁷² Saudi Arabia and China perform executions in public because they assume potential criminals are only deterred by observable killings; to be effective, an execution must stun spectators to deter future killers.³⁷³ Conducting private executions fails to shock the onlooker, thus failing to deter

362. Wilkes, *supra* note 269, at 27.

363. *Id.* at 27-28.

364. *Id.* at 28.

365. *Id.*

366. *Id.*

367. *Id.*

368. Wilkes, *supra* note 269, at 31.

369. *Id.*

370. *Id.*

371. *See generally id.*

372. *See generally* Stafford-Smith, *supra* note 12, at 271.

373. *Id.*

because observers do not know what punishment to fear.³⁷⁴ The United Kingdom's attempts in the mid-twentieth century to deter crime through public hangings were futile because viewing dangling persons failed to evoke sufficient fear.³⁷⁵ Presumably, public execution, by its nature, would present a more direct consequence of a crime; however, the United Kingdom's public execution experience not only failed to deter crime, but also incited criminal behavior during the event.³⁷⁶ Therefore, if a state carefully censors its executions, as does the U.S., it limits what observers see and further diminishes deterrent effects.³⁷⁷

Executions are not broadcast because political figures do not have the will to kill, even when capital punishment is carried out in the most humane fashion.³⁷⁸ Politicians fear televising executions in the twenty-first century because it only illuminates death's reduced deterrent effect.³⁷⁹ The U.S. chooses midnight as its hour of death, while some retentionist countries carry out executions in private without observers.³⁸⁰ Japan is one of the only remaining democratic nations retaining the penalty and goes even further by not announcing any details regarding executions.³⁸¹ Without prior notification, Japan secretly executed three people on November 30, 2001.³⁸² Covert executions destroy deterrence because potential killers only fear consequences they are allowed to know.³⁸³

Exposing the population to state-imposed killing likely reveals the brutality lying in a nation's attachment to the death penalty, unveiling and inviting spectators' "bad taste."³⁸⁴ Since the state refuses to expose the public to the act of execution, the court of last resort is precluded from intervening,³⁸⁵ thus preventing people from protesting.³⁸⁶ Therefore, the death penalty's existence in nations

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. Stafford-Smith, *supra* note 12, at 271-72.

379. *Id.* at 272.

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. HOOD, *supra* note 4, at 103 (citing AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 189-208 (2001)).

385. *Id.*

386. *Id.*

shielding their population from the brutality of state-imposed killings depends upon the execution's invisibility.³⁸⁷

B. The U.S. Constitution

The U.S. Constitution's Supremacy Clause states, "all Treaties made, or which shall be made, under the Authority of the U.S., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³⁸⁸ The highly esteemed Restatement (Third) of the Foreign Relations Law of the U.S. stresses this basic principle and behooves the Executive Branch to wield the necessary authority guaranteeing the faithful execution of transnational agreements.³⁸⁹ Read literally, treaties ratified by the U.S. are equally as binding on America's capital punishment system as any other principal provision of law.³⁹⁰ Since the U.S. ratified the VCCR,³⁹¹ the VCCR retains the status of "supreme Law of the Land," obligating U.S. authorities to move toward abolition.³⁹² Moreover, the U.S. Supreme Court held, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."³⁹³ Therefore, the U.S., as well as all other member nations, must fulfill legal obligations satisfying human rights because the language of the VCCR is binding.³⁹⁴

International treaty provisions encourage the diminution and abolition of capital punishment.³⁹⁵ For example, the ICCPR prohibits "cruel, inhuman or degrading treatment or punishment."³⁹⁶ The United Nations Human Rights Committee interprets the provision to mean steps toward abolition advance one's right to enjoy life.³⁹⁷ Although the U.S. ratified the ICCPR, it made provisional reservations and stipulated punishments are to be determined solely

387. *Id.*

388. U.S. CONST. art. VI, cl. 2.

389. Aceves, *supra* note 94, at 289.

390. STREIB, *supra* note 6, at 275.

391. *Id.* at 279. The U.S. ratified the VCCR on November 24, 1969. *Id.*

392. Uribe, *supra* note 92, at 407.

393. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

394. Uribe, *supra* note 92, at 408.

395. STREIB, *supra* note 6, at 275.

396. *Id.*

397. *Id.*

under the fifth, eighth, and fourteenth Amendments to the U.S. Constitution.³⁹⁸ Because the U.S. made reservations to the ICCPR, the U.S. is not obligated under that treaty to alter death penalty law and conform to international law and sentiment.³⁹⁹

C. Death-Qualified Juries in the U.S.

The phenomenon of U.S. death qualification is an important aspect in understanding capital punishment.⁴⁰⁰ In *voir dire*,⁴⁰¹ the judge and plaintiff's counsel strategically reject persons holding views adverse to the death penalty.⁴⁰² Juries are thus more likely to sentence a person to death upon conviction, less conscious of a person's due process rights, and are unrepresentative of the population, especially African American people and women.⁴⁰³ A series of studies reveals death-qualified Caucasian male jurors are 1.5 times more likely than African American or Hispanic jurors to sentence an individual to death.⁴⁰⁴

Moreover, in a case involving an African American defendant and a Caucasian victim, the racial structure of the jury substantially affects whether the defendant is sentenced to death.⁴⁰⁵ For instance, where there is at least one African American male juror, the chance of the defendant being sentenced to death in a African American-defendant Caucasian-case diminishes approximately thirty-four percent.⁴⁰⁶ After the judge reads the jury sentencing instructions and the jury makes its first vote on punishment, the divide increases because Caucasian jurors are over seven times more likely to take a pro-death stance on punishment.⁴⁰⁷ African American male jurors, who are three times less likely than whites to call for death as a punishment in the guilt phase of a murder trial, state three reasons for their views.⁴⁰⁸ First, they are significantly likely to have doubts

398. *Id.* at 275-76.

399. *Id.* at 276.

400. HOOD, *supra* note 4, at 149.

401. BLACK'S LAW DICTIONARY, *supra* note 68, at 1569 (7th ed. 1999). "A preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." *Id.*

402. HOOD, *supra* note 4, at 149.

403. *Id.*

404. *Id.* at 149-50.

405. *Id.* at 150.

406. *Id.*

407. *Id.*

408. HOOD, *supra* note 4, at 150.

about the individual's degree of culpability and thus question whether the individual is guilty of capital murder.⁴⁰⁹ Secondly, they are greatly sensitive to evidence of remorse.⁴¹⁰ Finally, they are less likely to be cognizant of future dangerousness when determining the just punishment in African American-defendant Caucasian-victim cases.⁴¹¹ Another study finds over one-fifth of citizens are routinely excluded from having their voice acknowledged by the Court.⁴¹² Modern capital juries remain unrepresentatively punitive concerning attitudes toward the death penalty.⁴¹³

D. Arbitrariness

Arbitrariness is different when dealing with the death penalty than it is with other crimes for two reasons.⁴¹⁴ First, death is a harsher punishment because it deprives the individual of life and of any future right of legal appeal.⁴¹⁵ If new facts are discovered or if the laws concerning the death penalty change, persons are precluded from further legal pleas.⁴¹⁶ Second, executions are unnecessary because there is no persuasive evidence that the death penalty prevents murders better than life without the possibility of parole.⁴¹⁷ The results of abolishing state-imposed killing are likely to be insignificant.⁴¹⁸ Capital punishment's threat value is weak because the chance of receiving the death penalty combined with the chance of being executed upon being sentenced to death is insignificant.⁴¹⁹ Consequently, the penalty is arbitrary because it is unnecessary, excessive, and useless.⁴²⁰

An Illinois study reveals an arbitrary administration of the penalty through prosecutorial discretion because only eighteen people

409. *Id.*

410. *Id.*

411. *Id.* at 150-51.

412. Craig Haney et al., "Modern" Death Qualification: New Data on its Biasing Effects, 18 LAW & HUM. BEHAV. 619, 631 (1994); see also, Donald N. Bersoff, *In the Supreme Court of the United States: Lockhart v. McCree* (Amicus Curiae Brief for the American Psychological Association), 42 AM. PSYCHOLOGIST 59, 63 (1987).

413. Haney, *supra* note 412, at 631.

414. Nathanson, *supra* note 285, at 161.

415. *Id.*

416. *Id.*

417. *Id.* at 162.

418. *Id.*

419. Finkelstein, *supra* note 270, at 10.

420. Nathanson, *supra* note 285, at 162.

were executed out of the 230 found guilty of murder.⁴²¹ Furthermore, only eight percent of those originally found sufficiently culpable for murder were sentenced to death.⁴²² A different longitudinal study, conducted in Illinois, found murderers are more likely to be executed in rural counties than in urban counties.⁴²³ Therefore, the death penalty, as practiced in the U.S., is arbitrary in administration and geographically inconsistent.⁴²⁴

Additionally, a study looking at the U.S. in the aggregate found the likelihood of executing a person charged with a homicide is extremely low; around one in 1,000.⁴²⁵ When restricting the analysis to those homicides that are statutorily "death eligible," the likelihood of a death sentence is only ten percent.⁴²⁶ Furthermore, the probability of actually being executed following a death sentence is between 0.6 and 1.25 per 100.⁴²⁷ Executions are also rare in countries that employ capital punishment the most.⁴²⁸ As a good example, executions were only imposed in approximately two percent of all alleged murder cases in South Africa between 1978 and 1979, before the country fully abolished the penalty.⁴²⁹

E. Public Opinion

Elected representatives should determine penal policy⁴³⁰ because several countries have abolished the death penalty with the preponderance of the population supporting the measure.⁴³¹ Legislators in Western liberal parliamentary democracies are not required to follow popular opinion.⁴³² For example, Germany in the late 1940s, the United Kingdom in the 1960s, Canada in the 1970s, and France in the 1980s, each abolished the death penalty despite a population of roughly two-thirds favoring the punishment.⁴³³ The United Kingdom and Canada Parliaments both rejected numerous

421. HOOD, *supra* note 4, at 193.

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.* at 212.

426. *Id.*

427. HOOD, *supra* note 4, at 212.

428. *Id.*

429. *Id.*

430. *Id.* at 234.

431. Steiker, *supra* note 19, at 109.

432. HOOD, *supra* note 4, at 234.

433. *Id.*; see also Steiker, *supra* note 19, at 109.

attempts to reinstate the ultimate sanction by wide margins,⁴³⁴ although at the time polls in both countries showed the majority of citizens welcomed a return of capital punishment.⁴³⁵ European death penalty support has diminished over the past three decades; however, government-induced abolition preceded the fall in public support.⁴³⁶

Analogously, every Austrian political party is abolitionist although a significant section of the citizenry is retentionist.⁴³⁷ Historically, the push to abolish capital punishment has been upheld by legislators even though the majority of the population may favor it.⁴³⁸ Government officials must lead public opinion regarding criminal policy.⁴³⁹

Similarly, since governments hold such a great amount of power, they have the duty and responsibility to take positions that may be discordant with the general population concerning human rights.⁴⁴⁰ Governments are not justified in torturing a notorious criminal or oppressing an unpopular racial minority simply because the preponderance of the population favors the abuse.⁴⁴¹ For instance, slavery was legal and widely accepted until opposed on moral grounds following a fierce struggle against popular sentiment.⁴⁴²

A recent Gallup pole indicates seventy percent of Americans support the death penalty.⁴⁴³ Public support drops to fifty-two percent when the penalty is compared to a sentence of life without the possibility of parole.⁴⁴⁴ Another poll finds support for the penalty drops even lower when life without parole is added as an alternative.⁴⁴⁵ For instance, one poll shows forty-four percent favor life without parole while only thirty-eight percent endorse the death penalty.⁴⁴⁶ A different poll reveals fifty-seven percent favor stopping executions until an inquiry can be made into whether the penalty is

434. HOOD, *supra* note 4, at 234.

435. *Id.*

436. Steiker, *supra* note 19, at 109.

437. HOOD, *supra* note 4, at 234.

438. *Questions & Answers*, *supra* note 228.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 5-6.

443. DEATH PENALTY YEAR END REPORT, *supra* note 82, at 6.

444. *Id.*

445. SIMON & BLASKOVICH, *supra* note 18, at 35.

446. *Id.*

administered fairly.⁴⁴⁷ In some nations, seventy percent of those polled favor a moratorium to determine the fairness of capital punishment within the state.⁴⁴⁸ Consequently, although the modern American majority supports the penalty, juries generally opt not to use the ultimate penalty when presented with other less violent options.

Rare transnational polls indicate people favor a complete abolition of state-imposed killing. For instance, polls in Canada, Singapore, and South Korea show the abolitionist movement is growing rapidly.⁴⁴⁹ In Canada, support for the ultimate sanction has recently dropped dramatically.⁴⁵⁰ In 1987, public support for the penalty was at seventy-three percent; this number dropped to sixty-nine percent by 1995.⁴⁵¹ Currently, only fifty-two percent of Canadians support capital punishment, a decline in public support of over twenty percent in just sixteen years.⁴⁵² South Koreans are steadily moving toward abolition because a recent poll discovered thirty-six percent were opposed to capital punishment compared to just twenty percent in 1994.⁴⁵³ In Singapore, a poll found that thirty-two percent favored the penalty while sixty-eight percent favored abolition.⁴⁵⁴

Power, gender and race play key roles in determining whether one supports the death penalty or opposes it.⁴⁵⁵ Support for the penalty is significantly higher among a society's elite.⁴⁵⁶ A pattern prevailing in Japan, Canada, Australia, and America shows males are more likely to support capital punishment than females.⁴⁵⁷ African Americans and women are more likely to oppose the penalty than

447. DEVELOPMENTS IN 2001, *supra* note 101, at 39. The respondents were asked this question after being reminded that Governor Ryan of Illinois had halted all executions in Illinois pending a commission's review of the death penalty's application. *Id.*

448. HOOD, *supra* note 4, at 70.

449. DEVELOPMENTS IN 2001, *supra* note 101, at 39.

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.* at 39-40.

454. *Id.* at 39.

455. HOOD, *supra* note 4, at 237.

456. *Id.* "In the United States, for example, capital punishment is favoured more often by whites, the more wealthy, and by males, Republicans, and conservatives than by blacks, poorer people, women, Democrats, and liberals." *Id.*

457. SIMON & BLASKOVICH, *supra* note 18, at 37.

Caucasians and men.⁴⁵⁸ In Australia, Canada, and Japan, empirical studies show the more education respondents have, the more opposed they are to capital punishment.⁴⁵⁹

American juries are often not informed of their punishment options and are frightened into imposing the death penalty thinking the offender may be released in a number of years to do further harm. However, juries knowing that life without the possibility of parole is a substitute for capital punishment are prone to sentence the individual to life without the possibility of parole.⁴⁶⁰ Even a Houston District Attorney conceded, "I don't think you could get a verdict of death if the jury knows it can give life."⁴⁶¹ In Georgia, Indiana, and Virginia, juries cognizant of the life without parole alternative in capital murder cases gave more sentences of life without parole than the death penalty.⁴⁶²

F. Human Rights and International Isolationism

The death penalty is no longer a national policy issue because it is increasingly a polemical international problem.⁴⁶³ If the law's purpose is to deliver moral concepts to the citizens, then the death penalty is counterproductive.⁴⁶⁴ When a nation administers its will by killing, it legitimizes a conduct the law seeks to repress; thereby justifying the use of deadly force to execute humans.⁴⁶⁵

Nations retaining the penalty are adversely affected in areas of international relations.⁴⁶⁶ For instance, the execution of Mexican nationals by the U.S. has strained the relationship between Mexican President Vicente Fox and U.S. President George W. Bush.⁴⁶⁷ After Texas executed a Mexican national over President Fox's objections, he protested by canceling a trip to meet President Bush.⁴⁶⁸ Even tight

458. *Id.* at 35.

459. *Id.* at 37.

460. *Id.* at 35

461. Steve Chapman, *Finding the Right Punishment for Murderers*, TOWNHALL.COM, June 15, 2000, at <http://www.townhall.com/columnists/stevechapman/sc000615.shtml> (last visited Feb. 6, 2004).

462. *Id.*

463. HOOD, *supra* note 4, at 7.

464. *Id.* at 9.

465. *Id.*

466. STREIB, *supra* note 6, at 284.

467. *Id.*

468. *Id.*

alliances can be broken by a single state-level execution.⁴⁶⁹ Moreover, the U.S. stands to lose the ability to try international terrorists fleeing to foreign countries because those countries may not authorize extradition unless assurances provide that capital punishment will not be utilized.⁴⁷⁰ Consequently, the U.S. must decide what is more important: bringing international terrorists to justice, or arbitrarily executing less than one percent of death row individuals.⁴⁷¹

Supporting the death penalty in today's international political climate comes with a price. This practice allows a nation's allies and adversaries to question a country's moral leadership concerning international human rights.⁴⁷² For instance, the U.S. recently lost its seat on the U.N. Human Rights Commission because it continues to support the penalty.⁴⁷³ Countries with egregious human rights records now have diplomatic ammunition to use against retentionist countries.⁴⁷⁴ For example, China has arguably the worst human rights record in the history of the world yet freely raises America's use of capital punishment when facing protests of its own human rights practices.⁴⁷⁵

American isolationism is costly in a world whose voice for abolition steadily grows louder.⁴⁷⁶ A resolution revoking the U.S.'s observer status has passed the Council of Europe and declares unless America makes "significant progress" toward abolition, its status with the Council of Europe will be withdrawn.⁴⁷⁷ Analogously, the European Union has requested that the U.S. impose a moratorium on federal executions.⁴⁷⁸ European Parliament representatives have threatened that European companies will restrict investment to

469. *Id.*

470. *Id.*

471. *Id.*; see also DIETER, *supra* note 23. Germany requested the U.S. to stop pursuing the death penalty against Zacarias Moussaoui, suspected of conspiracy in the September 11th terrorist attacks. Germany has intelligence files on Moussaoui (a French citizen), but refuses to give them to American officials unless the U.S. assures German officials the death penalty will not be used. *Germany Withholds Moussaoui Evidence*, BBC NEWS, September 1, 2002 available at <http://news.bbc.co.uk/1/low/world/europe/2229231.stm> (last visited Feb. 14, 2004).

472. Koh, *supra* note 36, at 1106.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.* at 1123.

477. *Id.*

478. Koh, *supra* note 36, at 1123.

states not imposing executions.⁴⁷⁹ The death penalty issue is an American weakness, placing U.S. and Europe at odds concerning most human rights questions.⁴⁸⁰ America's reputation as the world's human rights leader is unequivocally damaged and thus its power to lead a league of countries based on moral principle is significantly diminished.⁴⁸¹

X. CONCLUSION

*"The death penalty's abolition has been envisaged for at least two centuries, and with the accelerating progress of the movement for abolition, the end of this dark tunnel is now in sight."*⁴⁸²

— William Schabas

International law fails to provide any concrete answers as to the death penalty's state. Over half the world's nations have abolished capital punishment in law or practice because they are cognizant that alternative punishments are effective. Supporting the death penalty undermines the U.S.'s credibility as the transnational moral authority. The U.S.'s role as world leader cannot rest upon affluence, technology, or military power. It must be solidly founded upon the realm of moral and human rights. Abolitionist nations should be responsible for educating the global community on the impact of state-sanctioned homicide by challenging ideological justifications for violence. When society accelerates death, it engages in inexcusable conduct without justification.

479. *Id.* at 1129-30.

480. HOOD, *supra* note 4, at 73.

481. Koh, *supra* note 36, at 1108.

482. DIETER, *supra* note 23.