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Warren Allmand

Stephen B. Bright

Rubin "Hurricane" Carter

Dorean Marguerite Koenig

William A. Schabas

See next page for additional authors

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Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law

Cover Page Footnote

Professor Dorean Marguerite Koenig is a Professor of Law at the Thomas M. Cooley Law School in Lansing, Michigan, where she teaches criminal and constitutional law and has engaged students in work on the death penalty, including litigation on death penalty cases. Professor Koenig works with the Michigan Coalition opposing capital punishment and has testified before the Michigan Legislature in opposition to various bills that would institute the death penalty in Michigan. * Stephen B. Bright is the recipient of the ABA's 1998 Thurgood Marshall Award presented by the Section of Individual Rights and Responsibilities. Mr. Bright has served as the Director of the Southern Center for Human Rights in Atlanta, Georgia, for more than fifteen years. The Center is a public interest law firm that represents clients in criminal trials, prison civil rights actions, and death penalty cases. In 1988, Mr. Bright successfully argued *Amadeo v. Zant*, 486 U.S. 214 (1988), which resulted in the United States Supreme Court's vacating a conviction and death sentence because of racial discrimination. Mr. Bright also has successfully challenged improperly imposed death sentences in several other cases. * Rubin Hurricane Carter, who now makes his home in Toronto, spent almost twenty years in prison for a crime he did not commit. About to fight for the world middle-weight boxing championship, Mr. Carter (along with John Artis) was arrested, convicted, and sentenced to death for the 1966 murder of three whites in a New Jersey bar. In 1976, the New Jersey Supreme Court overturned the conviction based on the recantation of the state's key witnesses, but at a new trial, where the same witness was allowed to recant his recantation, Mr. Carter was convicted again. In 1985, Mr. Carter was finally able to present his claim of innocence to a United States District Court, which ruled that Carter's conviction had been based on "racism rather than reason and concealment rather than disclosure," and Mr. Carter was freed on a writ of habeas corpus. In February 1988, the 22-year-old indictment against Mr. Carter was dismissed on the state's own motion. Mr. Carter now heads the Toronto-based Association in Defense of the Wrongly Convicted and is an outspoken lecturer on such diverse subjects as literacy, education, and the death penalty. * William A. Schabas is a Professor of International Human Rights Law at the Département des sciences juridiques of the Université du Québec à Montréal, a Department he chaired from 1994-1998. Professor Schabas is a member of the Quebec Human Rights Tribunal and is the honorary President of the Canadian Human Rights Foundation. In 1998, the Social Sciences and Humanities Research Council of Canada awarded Professor Schabas the Bora Laskin Research Fellowship in Human Rights. He is the author of several books, including *The Abolition of the Death Penalty in International Law* (1997), and is President of "Hands Off Cain," an international non-governmental organization based in Rome, Italy, dedicated to the abolition of the death penalty. * Honourable Warren Allmand, P.C., Q.C., is the President of the International Centre for Human Rights and Democratic Development in Montreal, Quebec, Canada. The Centre is an independent Canadian non-profit, charitable organization mandated to defend and promote the rights and freedoms enshrined in the International Bill of Human Rights and to encourage the development of democratic societies. Mr. Allmand was a Member of the House of Commons from 1965 to 1997 and also has served in the Cabinet as Solicitor General, Minister of Indian Affairs and Northern Development, and Minister of Consumer and Corporate Affairs. * Dr. W.L. Seriti is Co-Chair of Law Society of South Africa and practices law with Seriti, Mavundla & Partners in Pretoria, South Africa. During the course of the last year, Dr. Seriti was appointed acting judge on the Venda High Court and on the Northern Cape High Court. During the drafting of the Constitution of the Republic of South Africa, Dr. Seriti served as a technical advisor. Dr. Seriti completed his master's degree on the death penalty and examined the entire administration of justice, particularly the criminal justice system in South Africa.

Authors

Warren Allmand, Stephen B. Bright, Rubin "Hurricane" Carter, Dorean Marguerite Koenig, William A.

Schabas, and W. L. Seriti

HUMAN RIGHTS AND HUMAN WRONGS: IS THE UNITED STATES DEATH PENALTY SYSTEM INCONSISTENT WITH INTERNATIONAL HUMAN RIGHTS LAW?¹

Warren Allmand, Stephen B. Bright, Rubin "Hurricane" Carter, Dorean Marguerite Koenig, William A. Schabas, and W. L. Seriti

PROFESSOR KOENIG:²

If we go back to our roots, there are roots of abolition in this country that we have lost and we have forgotten. Michigan and Wisconsin abolished the death penalty in the 1800s and have not brought it back. In Pennsylvania, you will find that in the eighteenth century the work of Cesare Beccaria, *On Crimes and Punishments*, had great influence. It advocated moderation in punishment and called for an end to capital punishment.³ Beccaria believed that harsh punishments would teach people to act violently.⁴ The reason we have degrees of murder in the United States is that there was a movement to limit the death penalty in Pennsylvania, and Beccaria influenced it. Those are our roots. I think we have forgotten them, and that we have to find them again.

The ABA Resolution for a moratorium on executions is a call to action. In this meeting today we want to bring together the work that is happening on the ABA moratorium and the work that the people like Steve Bright do—the everyday work in the trenches of trying to fight back this horrible blight of executions. We want to combine this with the very effective worldwide movement towards abolishment that has resulted, to date, in over half the countries of the world no longer effectively having a death penalty.

A dozen years ago, I was told I was going to die. I saw a surgeon and was told I needed surgery. I was really tough. I figured I could know anything, so I said, "How long do you think I have to live?" and

1. These were the panelists' opening remarks at the 1998 ABA Annual Meeting of the Section of Individual Rights and Responsibilities, held in Toronto, Canada, on August 3, 1998.

2. Professor Dorean Marguerite Koenig is a Professor of Law at the Thomas M. Cooley Law School in Lansing, Michigan, where she teaches criminal and constitutional law and has engaged students in work on the death penalty, including litigation on death penalty cases. Professor Koenig works with the Michigan Coalition opposing capital punishment and has testified before the Michigan Legislature in opposition to various bills that would institute the death penalty in Michigan.

3. See Cesare Beccaria, *On Crimes and Punishment* 42-52 (Bobbs-Merrill Co. 1963) (1764).

4. See *id.* at 43-44.

“What will it be like?” He said, “I predict you have about six months to live and it is going to be a horrible death.” He then went on to describe exactly how I was going to die and how horrible it would be. The first thing I did was to get another doctor. Of course, the first doctor was wrong in his prediction.

But in the very, very dark days that followed my discussion with the first doctor, I learned two things about myself. The first was the unique value of life to the individual. I did not want to lose my life. I really, really did not want to lose my life, and the preciousness of that life just took on new meaning to me. I thought about that and I thought about how everybody’s life is of unique and precious value to them. The second thing I learned is that I looked through my life and thought, “What have I done that has any redemptive value to it?” It was great, great comfort to me that I had been part of a wonderful team with Deval Patrick and Skip Babbs and others who had saved the life of Carl Songer, a death row inmate in Florida.

Carl had come down from Oklahoma, and he had shot a policeman who had young children. Carl was sleeping by the side of the road in his car, and the policeman woke him up, and they both shot their guns. It was a terrible crime. Carl’s parents traveled from Norman, Oklahoma down to Florida to be with him during the trial. Carl’s attorney, before the sentencing phase began, turned to them and said, “You might as well go home. They’re not going to allow you to testify, because that’s not the sort of thing that will be allowed into the record or influence the jury.” So, they very reluctantly went home.

I thought Carl’s habeas corpus case was a real winner. The judge himself, during our successive habeas hearings, admitted on the record that he had applied a wrong standard in sentencing Carl Songer to death and that wrong standard was one of the reasons why Carl’s parents had been told to go home. I found out during that time how very, very difficult death penalty cases are and how very much they are different. They are not ordinary cases. They are politically motivated cases in which judges are very frightened to make the determination that is necessary in the case. The public has very strong feelings about death penalty cases but very little information about them.

With Carl Songer we came right up to the point of death. He was to be executed at seven in the morning. It was about four in the afternoon of the day before, and we were waiting for the Eleventh Circuit Court of Appeals three-judge panel to decide what it was going to do. The result was that we got a one-day stay from the panel at about 4:30 in the afternoon. The next day the Eleventh Circuit decided to hear the case *en banc*.⁵ The denial of the habeas corpus petition was unanimously overturned.⁶ I felt very grateful.

5. See *Songer v. Wainwright*, 758 F.2d 552, 552 (11th Cir. 1995).

6. See *Songer v. Wainwright*, 769 F.2d 1488, 1488 (11th Cir. 1995) (*en banc*).

I feel a great deal of sympathy for those whose job in the trenches ends in the death of clients. I think that it very frequently does because of the standards for implementing the death penalty that apply today. One of my students is going to be working in Kentucky on death penalty cases. One of the defendants there is Kevin Stanford, who was seventeen when he was charged with committing murder, was convicted, and sentenced to death.⁷

I have learned a lot from Bill Schabas, who is here today. He says that the United States and the Cook Islands are the only countries that have not ratified the Convention on the Rights of the Child, which prohibits the execution of children who were under the age of eighteen when the crime was committed. We join the countries of Iran, Pakistan, Saudi Arabia, and Yemen as the only countries in the world that allow the execution of juveniles—people who are almost certainly immature when they commit their crimes.⁸

I want to discuss some of the things that happened in 1997 that are very important in showing the worldwide movement towards abolition of the death penalty. First, the Treaty of Amsterdam was signed on October 2, 1997. As President Jacques Santer said, "The Treaty underpins the abolition of the death penalty in all European Union member states." In that treaty they adopted the text of the Declaration on Abolition of the Death Penalty. We can expect to see the number of countries in the European Union expand in the next coming years; they are all going to have to abolish the death penalty before they will be allowed to join the European Union.

Second, the Council of Europe now has over 800 million citizens within its ambit. The abolition of the death penalty was put at the top of the list of its priorities in 1997. It is calling for universal abolition of the death penalty.

Third, in March and April of 1997, the United Nations Human Rights Commission passed its first resolution condemning capital punishment. It called on all countries to suspend executions. The United States was the only western nation voting against that resolution. It indicates, unfortunately, that we are becoming isolated from the rest of the world.

Fourth, the United Nations Human Rights *Committee* has reviewed the report of the United States on the Covenant on Civil and Political Rights. One of the main points of contention the Committee had with the United States concerned the death penalty. The Committee said this posed a most serious problem, placing the United States out of compliance with the Covenant, which, as you know, the Senate ratified and is binding law in the United States. The Committee based its conclusion that the United States was out of compliance mainly on the

7. See *Stanford v. Kentucky*, 492 U.S. 361, 366 (1989).

8. See *infra* notes 81-87 and accompanying text.

excessive number of offenses subject to the death penalty and the number of death sentences imposed. It also looked at the long stays on death row and the lack of protection from the death penalty for children and the mentally retarded.

Bacre Waly Ndiaye, who was the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, prepared a report released earlier this year, after investigating the United States death penalty last year. In his report, he listed a number of violations of universal human rights that the United States is engaging in.

At this point, I would like to present our first speaker, Stephen Bright.

MR. BRIGHT:⁹

The United States has over 3500 people under sentence of death.¹⁰ The states have executed over 500 people in the last twenty years—seventy-four of them in 1997.¹¹ In some states, such as Texas and Virginia, executions have become routine. Texas, at the start of this year, had carried out 166 executions in the last twenty years.¹² One county in Texas—Harris County, which includes Houston—is responsible for more executions than any *state* except Texas.¹³ Virginia comes in second with over 50 executions over the past 20 years.¹⁴ It is troubling that only a few people pay attention to what is happening when people are executed in Virginia, in Texas, and in many other states now that so many people have been put to death. That is why meetings like this are so important.

The growing use of the death penalty in the United States is contrary to the trend in the rest of the world. The number of countries that allow the death penalty are now in the minority, and the trend is certainly towards abolition. Fifty years ago, only eight countries had

9. Stephen B. Bright is the recipient of the ABA's 1998 Thurgood Marshall Award presented by the Section of Individual Rights and Responsibilities. Mr. Bright has served as the Director of the Southern Center for Human Rights in Atlanta, Georgia, for more than fifteen years. The Center is a public interest law firm that represents clients in criminal trials, prison civil rights actions, and death penalty cases. In 1988, Mr. Bright successfully argued *Amadeo v. Zant*, 486 U.S. 214 (1988), which resulted in the United States Supreme Court's vacating a conviction and death sentence because of racial discrimination. Mr. Bright also has successfully challenged improperly imposed death sentences in several other cases.

10. See NAACP Legal Defense and Educational Fund, *Death Row USA Reporter*: Current Service 1239 (1998).

11. See Death Penalty Info. Ctr., *Death Penalty Information Center* (visited Mar. 25, 1999) <<http://www.essential.org/dpic/dpicexec.html>> [hereinafter *Death Penalty Information Center*].

12. See Death Penalty Info. Ctr., *State Executions* (visited Mar. 25, 1999) <<http://www.essential.org/dpic/dpicreg.html>>.

13. See Armando Villafranca, *A Man of Conviction*, *Houston Chron.*, Nov. 29, 1998, at A1.

14. See *Death Penalty Information Center*, *supra* note 11.

abolished the death penalty for all crimes.¹⁵ Today the number is sixty-three.¹⁶ Additionally, a total of 103 countries have abolished the death penalty in law or practice.¹⁷

A small number of countries account for a large percentage of the executions which take place in the world every year. Last year, according to Amnesty International, forty countries in the world carried out executions.¹⁸ But four of those countries—the United States, China, Iran and Saudi Arabia—accounted for eight-five percent of those executions that took place.¹⁹

The United States leads the world in the execution of children, that is, people under eighteen at the time crimes have been committed. Since 1990, only five other countries—Iran, Pakistan, Saudi Arabia, Nigeria, and Yemen—have executed children.²⁰ But none of them has executed as many children as the United States.²¹

The United Nations Convention on the Rights of the Child prohibits the execution of those who committed crimes when they were under the age of eighteen.²² The United States has signed but has not ratified that convention.²³ It is difficult for the United States to lecture China on human rights violations when it leads the world in the execution of children.

Viewed from Europe, Mexico, Australia, and South Africa, executions in the United States have become growing targets of curiosity and condemnation.²⁴ People in those countries have difficulty understanding why America retains a punishment that has been abandoned by their countries and virtually every other western democracy. Yet, the position of many people in the United States has been to disregard international opinion, to continue to wage a “war on crime” by expanding the use of the death penalty, and to ignore international law in doing so. That became a little more difficult during this last year as it became apparent that the practices of the states in carrying out ex-

15. See Eric Prokosch, *Human Rights v. The Death Penalty: Abolition and Restriction in Law and Practice, in Europe: A Death-Penalty-Free Zone* (forthcoming 2000) (manuscript at 1, on file with *Fordham Law Review*).

16. See *id.* (manuscript at 1).

17. See *id.* (manuscript at 9).

18. See *id.* (manuscript at 9).

19. See *id.* (manuscript at 9).

20. See Amnesty Int'l USA, *The USA to Confirm its Position as World Leader in Killing Child Offenders* (last modified Jan. 25, 1999) <<http://www.amnestyusa.org/news/1999/25101099.htm>>.

21. See *id.*

22. See *Convention on the Rights of the Child*, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 171, U.N. Doc. A/44/49 (1989) (noting age limit).

23. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 402 (1998).

24. See Richard Boudreaux, *To Italy, A U.S. Convict Symbolized the Crime of Capital Punishment*, L.A. Times, Aug. 17, 1997, at A11.

ecutions could not escape the attention and disapproval of other countries and international human rights organizations.

Virginia executed a national of Paraguay, Angel Breard, whose trial and conviction violated the Vienna Convention on Consular Relations.²⁵ The Convention requires a country that arrests a foreign national to notify the consul for that person's country.²⁶ Virginia ignored the requirement in Breard's case—it did not notify the consul for Paraguay that he had been arrested. The International Court of Justice at the Hague asked that Breard's execution be stayed until it could decide whether there had been a violation of international law.²⁷ But the United States Supreme Court, in a *per curiam* opinion, denied a stay of execution.²⁸ The Solicitor General of the United States urged the Court to allow the execution. The Court did so. Meanwhile, the Secretary of State, Madeline Albright, wrote the Governor of Virginia and asked if he would stop the execution so that the International Court of Justice could consider the case. He did not, and Breard was executed.²⁹ This is the second time recently in which Virginia has executed a foreign national in violation of the Vienna Convention. This is the sort of behavior expected from a rogue nation, but it should not be practiced by one of the United States.

Virginia's cavalier attitude toward its international obligations has a major impact on the quality of legal representation a foreign national receives in its courts. The courts of Virginia will assign a poor person facing the death penalty a lawyer that most people would not want representing them on a traffic matter, and will pay that lawyer so little that it is impossible to investigate and prepare the case properly. On the other hand, in some cases in other states where the consul *has* been notified, their governments have hired real lawyers to represent them. They have avoided the death penalty because the lawyers did what lawyers are supposed to do: investigate the case, present the evidence, and have an adversary trial, as opposed to the sort of summary, perfunctory trial which often results in a death sentence in Virginia.

Utah's indifference to the danger of racial discrimination in the infliction of the death penalty did not escape the attention of the International Commission on Human Rights of the Organization of American States. The Commission found a number of violations of the Declaration of the Rights and Duties of Man in the process that

25. See Marcia Coyle, *Are 65 Illegally on Death Row in U.S.?*, Nat'l L.J., Apr. 27, 1998, at A16.

26. See *id.*

27. See Brooke A. Masters & Joan Biskupic, *Killer Executed Despite Pleas; World Tribunal, State Department Had Urged Delay*, Wash. Post, Apr. 15, 1998, at B1.

28. See *Breard v. Greene*, 118 S. Ct. 1352, 1356 (1998).

29. See Masters & Biskupic, *supra* note 27.

led to the execution of William Andrews, an African-American man.³⁰ Andrews and two other African-American men were tried before an all-white jury in Utah at a time when the Mormon church held the view that people of color were inferior and would not be admitted to heaven. All of the African-American citizens in the jury venire were struck with challenges for cause or peremptory strikes. At one point during the trial, a juror received a note with a picture of a scaffold and a stick figure hanging from it, and the words "Hang the Niggers." No court, state or federal, ever held a hearing on where the note came from, who wrote it, what the jurors did with it, or what the impact on the jurors was.³¹ William Andrews and one of his co-defendants were put to death.

In addition, the United Nations Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions issued a report about the death penalty in the United States finding racial discrimination, poor quality of lawyers for people who have the misfortune of having lawyers appointed by the courts, and the execution of the mentally ill, the mentally retarded, and children.³² The report echoes the American Bar Association's call for a moratorium on capital punishment because of those deficiencies in the process. It also echoes findings made two years ago by the International Commission of Jurists with regard to the death penalty in the United States.³³ The rest of the world is watching and is appalled by what it sees.

I recently participated in a debate with the former Attorney General of Georgia, Michael Bowers, a proponent of the death penalty. In that debate Bowers asked, "Are we going to listen to people from places like France to decide how we are going to run our court system here? Are we going to listen to people from Sweden tell us what to do? from Canada? and Mexico? These people don't understand our customs. They don't understand our practices."

Of course, when people from outside Georgia questioned the practice of slavery before the Civil War, the Attorney General of Georgia at that time would say the same thing—that these "outsiders" did not understand the customs, the practices, and the peculiar institution of slavery. During the era of "separate but equal," Georgia responded

30. See Mike Carter, *Commission Censures Execution; Hi Fi Killer's Rights Violated, Group Says; Commission Censures U.S. For Execution*, Salt Lake Trib., Mar. 6, 1998, at B1.

31. See *Andrews v. Shulsen*, 485 U.S. 919, 922 (1988) (Marshall, J., dissenting from the denial of certiorari).

32. See *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependant Countries and Territories: Extrajudicial, Summary, or Arbitrary Executions, Report of the Special Rapporteur*, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., Provisional Agenda Item 10, U.N. Doc. E/CN.4/1998/68* (1997) [hereinafter *Report of the Special Rapporteur*].

33. See International Commission of Jurists, *Administration of the Death Penalty in the United States: Report of a Mission* (1996).

to criticisms about the way it was treating people of color by telling outsiders not to question its practices, customs, and traditions. From those experiences, we should have learned that it may be wise to listen to those from outside who question our practices.

One example of what passes for justice in courts of states that are sending people to death row, but is shocking to others, is provided by a trial in Houston, which, as I mentioned, executes more people than any other jurisdiction in the United States. The Houston Chronicle carried this account of the trial:

Seated beside his client—a convicted capital murderer—defense attorney John Benn spent much of Thursday afternoon’s trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the [case against his client], George McFarland

When [the judge] finally called a recess, Benn was asked if he truly had fallen asleep [when he was supposed to be defending a man in] a capital murder trial.

“It’s boring,” the 72-year-old, longtime Houston lawyer explained.³⁴

When Judge Doug Shaver, who was presiding, was asked how he could preside over a case where the lawyer was sleeping during the trial, the judge responded that the Constitution guarantees a lawyer, but it does not guarantee that the lawyer will be awake.³⁵ Judge Shaver must be a strict constructionist.

His comments would be amusing and perhaps laughed off as an aberration except that the Texas Court of Criminal Appeals upheld George McFarland’s conviction and death sentence.³⁶ The majority actually went so far as to say that perhaps—although there is no evidence of this—the lawyer decided to sleep during the trial as a strategy to get sympathy for his client.³⁷

Even more troubling is that George McFarland’s case is only one of three cases tried in Houston, the capital of capital punishment, in which the defense lawyer has slept during the capital trial. Both Calvin Burdine and Carl Johnson were represented by Joe Cannon, a man who’s known to try cases, as he says, “like greased lightning,” who does not bother the court by filing a lot of motions or making objections, and who has the distinction of having more people under

34. John Makeig, *Asleep on the Job?: Slaying Trial Boring, Lawyer Says*, Houston Chron., Aug. 14, 1992, at A35.

35. *See id.*

36. *See* McFarland v. State, 928 S.W.2d 482, 494 (Tex. Crim. App. 1996) (en banc).

37. *See id.* at 505 n.20.

death sentence than any other lawyer in Houston.³⁸ In both of those cases, there was testimony by the clerk of the court, jurors, and other people that Mr. Cannon was sleeping at times during the trial. Calvin Burdine's case was just upheld in *Ex Parte Burdine*;³⁹ the court said a sleeping lawyer did not violate the right to counsel.⁴⁰

In Carl Johnson's case, neither the Texas Court of Criminal Appeals nor the United States Court of Appeals for the Fifth Circuit had the courage to publish its opinion. It is hard to blame them. That case is something to be ashamed of. Both upheld Carl Johnson's conviction and sentence, even though his lawyer slept during his trial, and Johnson was put to death just two years ago.⁴¹

I recently handled a case in Georgia in which I was examining the lawyer who tried the case. Much like Mr. Benn, he was an old-time lawyer who took court appointments to defend poor people for token amounts of money because that was the only business he could get. He was a Georgia lawyer, and he represented my client in a Georgia trial. At some point during my examination of him, I mentioned the case of *Gregg v. Georgia*.⁴² That was the case that upheld Georgia's death penalty statute in 1976,⁴³ after the death penalty had been declared unconstitutional in *Furman v. Georgia*.⁴⁴ A lawyer trying a death case in Georgia should be familiar with the *Gregg* decision, which is the basic starting point of modern capital punishment law. Yet, it became clear that the lawyer had never heard of the *Gregg* case. When asked if he knew the case, he answered that he did not. When asked about *Furman v. Georgia*, he answered that he had never heard of it either. I asked him about several other landmark cases on capital punishment—cases that any lawyer defending a case ought to know—and he had never heard of any of them. Finally, I asked if he could just tell me any case from any court with which he was familiar. He thought about it for a long time and finally said he could not name a case. I thought that he would surely say *Miranda v. Arizona*.⁴⁵ Anyone who watches television or reads the newspapers has heard of the *Miranda* case. But this gentleman had not.

38. Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, Wall St. J., Sept. 7, 1994, at A1.

39. 901 S.W.2d 456 (Tex. Crim. App. 1995) (en banc).

40. *But see id.* at 457 & n.1 (Maloney, J., dissenting) (quoting testimony of clerk of court that "defense counsel was asleep on several occasions on several days over the course of the proceedings" and "was asleep for long periods of time during the questioning of witnesses").

41. *See* David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. Rev. 691, 694-95 (1996) (describing case of Carl Johnson, who was executed by Texas even though his lawyer slept through much of proceedings).

42. 428 U.S. 153 (1976).

43. *See id.* at 207.

44. 408 U.S. 238, 239-40 (1972).

45. 384 U.S. 436 (1966).

I asked him if he had ever used an expert witness in his entire practice. It certainly would have been good if he had used one in the case of my client. The defense was that what occurred was an accident. All the lawyer did was cross-examine the person from the state crime laboratory about how the gun fired. What the lawyer did not know and the state's expert did not tell him was that the gun had a design defect which caused it to fire accidentally. The manufacturer of the gun had changed the design of the gun in later models in order to correct this defect. The jury never had this critical information.

When asked if he had ever used an expert, the lawyer thought about it for a long time and finally said he might once have used a doctor. When asked if he had ever had an investigator during his entire forty-year career at the bar, the lawyer said he had *never* employed the services of an investigator. Indeed, in Wallace Fugate's case, he did not even ask for one penny for investigation, not one penny for an expert. Nevertheless, the United States District Court for the Middle District of Georgia found that, under the lax standard of *Strickland v. Washington*,⁴⁶ Mr. Fugate was not denied effective assistance of counsel.⁴⁷

If a country is going to have the death penalty, at the very least it should provide those facing it with a lawyer. The American Bar Association and other professional organizations should be concerned about that. It is a disgrace to our profession and to our justice system that courts allow these kinds of lawyers to be representing people in capital cases. A patient who went to a doctor who had never heard of penicillin and was not treated properly because of the doctor's lack of knowledge would have a pretty good case of malpractice. Yet the courts says that a lawyer who is completely ignorant of the law and has never used an investigator passes constitutional muster. Such a lawyer is like a doctor who has never heard of penicillin and never used a stethoscope.

Some poor people have faced death alone in the United States. Georgia has established time frames for every stage of post-conviction review in capital cases—motions must be filed in 60 days after the petition is filed, the hearing must be held within 180 days, a decision must be rendered within 60 days of receiving briefs, and so forth.⁴⁸ Exzavious Gibson, a condemned man, did not have a lawyer, so he filed a pro se form petition that a lot of people on death row file in order to avoid being barred by the statute of limitations. His case was promptly set for a hearing. The hearing started as follows:

The Court: Okay. Mr. Gibson, do you want to proceed?

Gibson: I don't have an attorney.

46. 466 U.S. 668 (1984).

47. See *Fugate v. Turpin*, 8 F. Supp. 2d 1383, 1388 (M.D. Ga. 1998).

48. See Ga. Super. Ct. R. 44.6, 44.9, 44.12 (1999).

The Court: I understand that.

Gibson: I am not waiving my rights.

The Court: I understand that. Do you have any evidence you want to put up?

Gibson: I don't know what to plead.

The Court: Huh?

Gibson: I don't know what to plead.

The Court: I am not asking you to plead anything. I am just asking you if you have anything you want to put up, anything you want to introduce to this Court.

Gibson: But I don't have an attorney.⁴⁹

Nevertheless, the court went ahead with the hearing. The state was represented by an assistant Attorney General who specialized in capital habeas corpus cases. After his former attorney had been called as a witness against him, Gibson was asked if he wanted to conduct the cross-examination:

The Court: Mr. Gibson, would you like to ask Mr. Mullis any questions?

Gibson: I don't have any counsel.

The Court: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?

Gibson: I'm not my own counsel.

The Court: I'm sorry, sir, I didn't understand you.

Gibson: I'm not my own counsel.

The Court: I understand, but do you want, do you, individually, want to ask him anything?

Gibson: I don't know.

The Court: Okay, sir. Okay, thank you, Mr. Mullis, you can go down.⁵⁰

Gibson tendered no evidence, examined no witnesses, and made no objections. The judge denied Gibson relief by signing an order prepared by the Attorney General's office without making a single change.

Some outstanding lawyers and firms have volunteered through the ABA Death Penalty Representation Project, directed by Elisabeth Semel, to take a capital case pro bono. Some death row inmate may have the good fortune to get outstanding legal representation. But others may end up with no lawyer at all, as Gibson did.

49. Transcript of hearing of Sept. 12, 1996, at 2-3, *Gibson v. Turpin*, Super. Ct. of Butts Co., Ga., No. 95-V-648 (on file with author).

50. *Id.* at 67.

Gibson did not know how to cross-examine. He did not ask any questions. He was completely incapable of representing himself. Much later—the judge had put everyone else on a very tight deadline, but not himself—the judge signed an order that the Attorney General of Georgia had prepared, without changing a single word of it, denying Exzavious Gibson habeas corpus relief.⁵¹

Those who are lawyers, who are trustees of justice, who care about the integrity of our system, should be deeply troubled by these and many other examples of inadequate representation.⁵² The major reason for it is lack of money. In Alabama, all a lawyer may receive for time spent out of court representing a person in a death penalty case is \$20 an hour, up to a limit of \$1,000.⁵³ If a lawyer spends a thousand hours, which is about what it takes to get ready for a case, he or she is going to get \$1 an hour. It is not possible to get very good legal representation, in Alabama or anywhere else, for \$1 an hour. Call one of the law firms there and ask it to prepare a will or something else simple and offer to pay \$1 an hour.

Poor people facing the death penalty are represented primarily by two groups of lawyers. One is made up of young inexperienced lawyers who are conscripted by the courts to take a case, and often never do a second case, so there is no building up of any expertise. Another group is made up of the old, broken-down lawyers, some of whom are drug addicted, some of whom are alcoholic, and some of whom are so completely lacking in knowledge, ability, and initiative that they cannot do anything but take court appointments and try to handle as many cases as possible. There are also conscientious, dedicated lawyers, but often they cannot afford to do more than a few capital cases. Many judges appoint lawyers from the first two groups but not the third.

Some lawyers who take court appointments do not even have offices. I once saw a judge quip when a lawyer reached in his jacket pocket, "Counsel, I see you're going back to your office." The judge thought that was funny, but it is not. The judiciary and the bar should not see these lawyers as court jesters, colorful characters there for their amusement. They should see them as major deficiencies in our system of justice. Poor people whose lives and liberty are at stake should be well-represented, as well as any corporation is represented.

The special counsel, Kenneth Starr, has spent more money on his investigation of President Clinton than the whole public defender system of the state of Kentucky spends in two years. Perhaps we need to

51. The Georgia Supreme Court upheld the denial of counsel and the denial of the petition. See *Gibson v. Turpin*, No. S97R1412, 1999 WL 79655, at *10 (Ga. Feb. 22, 1999).

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

53. See Ala. Code § 15-12-21(d) (1995).

know whether the President engaged in sexual acts with an intern and whether he is telling the truth about it, but it is not nearly as important as whether people are going to live or die.

MR. CARTER:⁵⁴

It is indeed a great honor for me to be here this morning. In fact, given my history over the past sixty-two years, after spending twenty of those years in prison and almost being executed myself, it is a great pleasure for me to be *anywhere* today.

But there is nothing pleasing in the fact that there are over 3000 people on death row in the United States facing execution for things they may or may not have done. It is absolutely obscene that the United States is the only Western industrialized nation that still maintains the anachronism of the death penalty.

This gathering is absolutely vital and necessary. I truly lack the words to tell you how much it means when you are sitting on death row waiting to be executed, to know that there are people like you attending events like this, that there are people who truly care about justice, and that there are people who really care about life itself. It really gives us hope. In a place as hopeless and desperate as prison, there is nothing more important than hope: hope that something can happen, hope that wrongs can be righted.

And wrongs *can* be righted. My presence here is living proof of that. I consider it a great privilege to be on the Board of Directors of the Southern Center for Human Rights, an organization that fights tirelessly and endlessly against the death penalty. So, I would be remiss if I did not address this ominous issue myself.

It is absolutely impossible to speak about doing away with the death penalty without speaking first about habeas corpus, politics, popular culture, and fear. I recently heard someone say, "The law is just politics by other means; crime is politics and the death penalty is the politics of crime." I really do not know what that means, but what is driving the current push in the United States to clamp down on habeas corpus if not politics? And what drives politics if not fear?

54. Rubin Hurricane Carter, who now makes his home in Toronto, spent almost twenty years in prison for a crime he did not commit. About to fight for the world middle-weight boxing championship, Mr. Carter (along with John Artis) was arrested, convicted, and sentenced to death for the 1966 murder of three whites in a New Jersey bar. In 1976, the New Jersey Supreme Court overturned the conviction based on the recantation of the state's key witnesses, but at a new trial, where the same witness was allowed to recant his recantation, Mr. Carter was convicted again. In 1985, Mr. Carter was finally able to present his claim of innocence to a United States District Court, which ruled that Carter's conviction had been based on "racism rather than reason and concealment rather than disclosure," and Mr. Carter was freed on a writ of habeas corpus. In February 1988, the 22-year-old indictment against Mr. Carter was dismissed on the state's own motion. Mr. Carter now heads the Toronto-based Association in Defense of the Wrongly Convicted and is an outspoken lecturer on such diverse subjects as literacy, education, and the death penalty.

Roger Keith Coleman, a Virginia coal miner, was killed, not by a coal mining accident, but simply because his petition for a writ of habeas corpus was rejected by a United States federal court.⁵⁵ His case received an unprecedented amount of media attention. He was on talk shows from Larry King to Donahue to Good Morning America, letting not a moment go by without protesting his innocence. Even Time magazine came out with a powerful cover story which made a strong showing of Coleman's innocence.⁵⁶

I had an opportunity to speak with Roger Coleman one day before the State of Virginia murdered him. His clarity, his eloquence, and his presence of mind under that dreadful thing that was hanging over him impressed me. At one point, a prison nurse interrupted our conversation; she was concerned because Roger had missed his scheduled medication for a sore shoulder. I said to him, "Brother, this is crazy. Here the State is about to take your life and they're worried about your health." Roger laughed, and I laughed too, but I cried the next day when I saw him being carried from the prison in a body bag.

Roger Coleman was barred from presenting his evidence of innocence to a federal court. His petition for a writ of habeas corpus was rejected because of a procedural technicality.⁵⁷ His petition had been filed one day late.⁵⁸

What does that mean to us? If we should see on the evening news that the bank where we have been keeping our life savings has just been held up, what would we do? We would cry bloody murder. We would do everything we could to catch the thief and get our money back. We would not be complacent about that. We would know that a theft has occurred and we would be legitimately outraged. Likewise, if Congress tried to reduce our Social Security benefits, we would view that as robbery, because we know that if not today, then one day that will affect us, and we would holler.

The question I would like to pose here is: Why is the same thing not happening now that the great writ is under attack and our freedom account is being looted? Where is the outrage? People in the United States were taken for over \$5 billion in the savings and loans debacle. Why do we not realize that with the limitations placed on the writ of habeas corpus, we are being robbed of something as real as money, and far more valuable?

This seemingly insignificant piece of paper, the writ of habeas corpus, is the only thing that prevented me from languishing in prison for the rest of my life, from wasting away and dying in prison. The reality of that prospect is worse than whatever you can imagine. This

55. See *Coleman v. Virginia*, 465 U.S. 1109, 1109 (1984).

56. See Richard Lacayo, *You Don't Always Get Perry Mason*, Time, June 1, 1992, at 38.

57. See *Coleman v. Thompson*, 504 U.S. 188, 189 (1992) (Blackmun, J. dissenting).

58. See *id.* (Blackmun, J., dissenting).

simple piece of paper, the writ of habeas corpus, was the key to my freedom. The key that Roger Coleman in Virginia and Lionel Herrera in Texas did not have. Today, they are both dead. This simple piece of paper, these few words, "It is ordered that the petition of Rubin Carter for a writ of habeas corpus hereby is granted," gave me back my life and gave precious hope to so many others.

The great writ is indeed something tangible. It is not abstract, but real, and the concrete right of every man, woman, and child in the United States. It is our birthright to be free from arbitrary, capricious, unjust, unconstitutional judgment, confinement, or execution. The writ of habeas corpus is the one life-affirming jewel in the crown of thorns we know as the criminal justice system.

But now there are forces at work in the United States trying to limit our access to it even further. Our freedom account is being looted. The work that the ABA, the Southern Center for Human Rights, the Association for and in Defense of the Wrongly Convicted, the Centurian Ministry, and Larry Marshall's organization in Chicago are undertaking to try to safeguard the writ of habeas corpus would make the Argean stables that Hercules had to clean up look like light work.

In 1966, I was at the peak of my career, a professional prizefighter about to fight for the championship of the world. But the next thing I knew, I was fighting for my very life, on trial in Criminal Court. I was accused of murdering three people in a New Jersey bar,⁵⁹ and I did not even drink then. I do now. The State sought the death penalty. The odds of my being alive today were not exactly in my favor. All three murder victims were white. The jury was all white. The judge, the police, the State's witnesses, and the prosecutors were all white. I am black.

The State's case was based principally on the testimony of two career criminals, themselves suspects in the crime. With the incentive of a \$10,000 reward, they claimed they saw me at the scene.⁶⁰ I was convicted even though I did not remotely fit the description of the assailants; even though the two surviving victims could not and did not identify me and even said it was not me; even though I had a number of alibi witnesses placing me elsewhere at the time of the crime; even though I passed a lie detector test showing that I had no involvement; and even though I had been exonerated by two separate grand juries.⁶¹ Luckily, if you can call the hell of a triple life sentence or spending twenty years in prison luck, I escaped execution. There is a rush to death in our society, a chilling climate of anti-crime hysteria and fear. That is our real adversary here—fear. We cannot turn on the television or open up the newspaper without the specter of violent

59. See *State v. Carter*, 255 A.2d 746, 748 (N.J. 1969).

60. See *id.*

61. See *id.* at 749-50.

crime menacing our living rooms, scaring us to death. Fear is really at the heart of everything. Fear feeds prejudice, inflames passions, enclouds judgment. When you fear someone, anything is possible. You can then justify anything, psychologically and legally, from slavery to segregation to anti-Semitism to the McCarthy witch hunts. You can justify the erosion of the Constitution and the Bill of Rights, and you can justify the wholesale application of the death penalty against minorities, the poor, the disadvantaged, and the disenfranchised.

What can we do about it? As history has shown, we cannot do anything if we let ourselves become overwhelmed, jaded, and cynical. My attorneys, Myron Beldock and Professor Leon Friedman, both New Yorkers, took up my case after I had long since run out of money. They worked on my behalf for over ten years without any expectation of ever being financially compensated. They did it, they say, because it was the right thing to do. They did it pro bono and they are the first to proclaim how much richer they are for having done it. As Mr. Beldock likes to say, "Money is not the only currency." He also likes to say, and I guess this is a lawyer's joke, "People make counterfeit money, but in many more cases, money makes counterfeit people."

More often than not, the law is studied only as an abstraction, and we forget that laws critically affect human lives, that human lives are literally at stake. You have the power to make a difference. You can save lives. Is that important? "The petition of Rubin Carter for a writ of habeas corpus is hereby granted."⁶² It has been almost thirteen years now since the Honorable J. Lee Sarokin penned his big, bold, beautiful signature beneath those lines. Without the tireless efforts and dedication of people like yourselves and the Southern Center for Human Rights, I would not have this document today and I sure as hell would not be here in Canada with you this morning, free and alive.

So, is your work important? I defy anyone to tell me that it is not.

PROFESSOR SCHABAS:⁶³

When we ask whether the United States is in violation of international law on the subject of the death penalty, what exactly are we talking about? Unfortunately, there are a lot of people in Washington

62. *Carter v. Rafferty*, 621 F. Supp. 533, 560 (D.N.J. 1985).

63. Professor William A. Schabas is a Professor of International Human Rights Law at the Département des sciences juridiques of the Université du Québec à Montréal, a Department he chaired from 1994-1998. Professor Schabas is a member of the Quebec Human Rights Tribunal and is the honorary President of the Canadian Human Rights Foundation. In 1998, the Social Sciences and Humanities Research Council of Canada awarded Professor Schabas the Bora Laskin Research Fellowship in Human Rights. He is the author of several books, including *The Abolition of the Death Penalty in International Law* (1997), and is President of "Hands Off Cain," an international non-governmental organization based in Rome, Italy, dedicated to the abolition of the death penalty.

and elsewhere who shrug their shoulders and say, "Who cares what international law has to say?"

The good news is that elsewhere in the world, many people are very concerned about what international law has to say about capital punishment. This explains why abolition has made so many strides forward in the past ten years. Steve Bright gave us some of the figures about that progress.⁶⁴

Let me give a few examples of how international law has moved forward the agenda on abolition of the death penalty. In South Africa, by a judgment of the new Constitutional Court in June of 1995, the death penalty was abolished.⁶⁵ That judgment was later confirmed in the new Constitution of South Africa.⁶⁶ In a subsequent opinion,⁶⁷ the eleven members of the new Constitutional Court make frequent and regular reference to international law on the subject of the death penalty, to the decisions of the Human Rights Committee of the United Nations, to the various international legal instruments, and to the judgments of the European Court of Human Rights. It is clear that in coming to its conclusion that the death penalty violates the right to life and violates the prohibition of cruel, inhuman, and degrading treatment or punishment, the South African Constitutional Court was enormously influenced by international law on the subject of the death penalty.

Some months later, the Russian Federation abolished the implementation of the death penalty.⁶⁸ South Africa and the Russian Federation together represent perhaps 200 million people.⁶⁹ Russia took its action because Russia was anxious to become a member of the Council of Europe, headquartered in Strasbourg. The Council of Europe told Russia that if it wanted to join the Council of Europe, it had to impose a moratorium on executions and then abolish the death penalty.⁷⁰

64. See *supra* notes 9-23 and accompanying text.

65. See *State v. Makwanyane*, Case No. CTT/3/94 (South Africa CC June 6, 1995), reprinted in 16 Hum. Rts. L.J. 154 (1995); William A. Schabas, *South Africa's New Constitutional Court Abolishes the Death Penalty*, 16 Hum. Rts. L.J. 133, 133 (1995).

66. See Schabas, *supra* note 65, at 135.

67. *State v. Williams*, Case No. CCT/20/94 (South African CC June 9, 1995), available in Microsoft Word format at <<http://sunsite.wits.ac.za/wits/law/judgements/williams.doc>>.

68. See Anatolyi V. Naumov, *The New Russian Criminal Code as a Reflection of Ongoing Reforms*, 8 Crim. L.F. 191, 196 (1997).

69. See Robert J. Cottrol, *Submission Is not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. Colo. L. Rev. 1029, 1036 n.16 (1998) (noting that Russia's population is 150 million people); *South Africans View Illegal Immigrants as Economic Thieves*, Star Trib., Nov. 27, 1998, at 33A (noting that South Africa's population is approximately 37 million).

70. Eur. Parl. Ass'n Res. 1097, 24th sitting (June 28, 1996), available at Parliamentary Assembly of the Council of Europe, Resolution No. 1097 (1996) on the Abolition of the Death Penalty in Europe (visited Apr. 9, 1999) <<http://stars.coe.fr/ta/ta96/eres1097.html>>.

Russia is not alone in this. Through actions in Eastern Europe and Russia since 1991, the frontier of the death penalty has been pushed back from somewhere along the Elbe or the Oder River to the Pacific Ocean. The question is how we impress this message upon the United States as a way to advance the agenda on the abolition of the death penalty.

The beginning of international law and the death penalty is really the Universal Declaration of Human Rights, whose fiftieth anniversary we celebrate this year.⁷¹ Article 3 of the Universal Declaration of Human Rights says that everyone shall have the right to life.⁷² The members of the Commission on Human Rights asked the Secretariat (which at the time was headed by a Canadian law professor, John P. Humphrey) to prepare a draft of the Universal Declaration. Humphrey came up with a forty-eight article draft.⁷³ He did so by looking at all the constitutions in the world and a number of drafts of the Universal Declaration that had come from non-governmental organizations and from other bodies from some governments. He put them all together and said that what he produced was kind of a common denominator, what we would find if we just took everything and sorted it out.⁷⁴

One of the first articles in that draft said that everyone shall have the right to life except in the execution of a sentence duly pronounced by a duly constituted court.⁷⁵ Underneath, where all the footnotes were, he said where this came from. Of course, American lawyers will recognize that it comes from the Fifth Amendment. There were similar provisions, because of the influence of the American Bill of Rights, in other domestic constitutions.

When Eleanor Roosevelt reviewed this draft, she said that the last part, which says "except in the execution of a sentence pronounced by a duly constituted court," should be deleted. She said that although we were not there yet, because most countries in the world still imposed the death penalty, we were heading in that direction, and we would not want the Universal Declaration of Human Rights to stand in the way of the progressive development of human rights law on the subject of capital punishment.⁷⁶

71. See *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., art. 3, U.N. Doc. A/811 (1948), reprinted in 43 Am. J. Int'l L. 127, 127 (Supp. 1949).

72. See *id.* at 128.

73. See John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Judicial Character*, in *Human Rights: Thirty Years After the Universal Declaration* 21-37 (B.G. Ramcharan ed., 1979).

74. See *id.*

75. See *id.*

76. See William A. Schabas, *War Crimes, Crimes Against Humanity and the Death Penalty*, 60 Alb. L. Rev. 733, 740 (1997).

Here we are, fifty years after the adoption of the Universal Declaration of Human Rights on December 10, 1948, by the General Assembly of the United Nations. We are much closer to the ideal that Eleanor Roosevelt had envisaged in 1948. That ideal is reflected in the text of the Universal Declaration, which makes no reference to capital punishment and at least implicitly—if we read the preparatory work on the Declaration—sends the message that international human rights law is heading in the direction of, and is oriented towards, the abolition of capital punishment.

That provision, Article 3 of the Universal Declaration of Human Rights, is the framework on which international human rights law has developed since 1948. There are a number of more detailed standards or norms in international human rights dealing with the death penalty that have progressively shrunk the scope of the death penalty, imposed an increasing number of restrictions on its use, and indicated that the abolition of the death penalty has to be the objective of international human rights.

I recently participated in the diplomatic conference on the International Criminal Court. The International Criminal Court statute, which was adopted by 120 states in favor to seven opposed, does not include the death penalty.⁷⁷ The maximum sentence for the worst criminals known to humanity who can be judged by the International Criminal Court, which was just established at the diplomatic conference, is life imprisonment.⁷⁸ It is life in prison with parole review that is mandatory after twenty-five years, even without any request by the inmate.⁷⁹ That is in sharp contrast with the last major experiment in international criminal justice—the Nuremberg trials—where the death penalty was not only provided for but was in fact imposed on many of those found guilty.⁸⁰

I will now briefly discuss a few of the international standards and compare them with practice in the United States. The first subject I will speak to is the issue of juvenile executions. Steve Bright has already spoken about this to some extent. Juvenile executions are prohibited by the International Covenant on Civil and Political Rights,⁸¹ article 6, paragraph 5. This International Covenant is the treaty that was adopted to give a binding effect to the principles set out in the Universal Declaration. Article 6, paragraph 5 states that no person shall be executed for a crime committed under the age of eighteen.

77. Rome Statute of the International Criminal Court, art. 77, U.N. Doc. A/CONF.183/9 (1998).

78. *See id.*

79. *See id.*

80. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, *adopted* Aug. 8, 1945, art. 27, 82 U.N.T.S. 279, 300; Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* 609-11 (1992).

81. *See* International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976).

Similar provisions appear in a number of other human rights treaties: the American Convention on Human Rights,⁸² the Geneva Conventions dealing with armed conflict,⁸³ and, most recently, the United Nations Convention on the Rights of the Child,⁸⁴ which binds essentially all countries in the world, including the United States. While the United States has not yet ratified the Convention on the Rights of the Child—for all intents and purposes it is the only state in the world now not to have ratified that important international Convention—the United States has signed it. Pursuant to international law and the Vienna Convention on the Law of Treaties, the United States is bound to respect the object and purpose of the Convention on the Rights of the Child until such time as it ratifies the treaty.⁸⁵ So, I would say that all states in the world including the United States are now bound not to impose juvenile executions.

The United States recently ratified the International Covenant on Civil and Political Rights and logically, therefore, is bound by the prohibition on juvenile executions contained in article 6, paragraph 5. The United States formulated a reservation to article 6, paragraph 5, which in essence said, "We ratify the treaty, but we do not ratify all of it. There are some things in there that we don't want to be bound by and we want to be cut out from that part of the treaty." A sharp debate ensued. Eleven European countries took the very unusual step of objecting publicly to this reservation by the United States, by filing public declarations with the United Nations. The Human Rights Committee, the body charged with implementing the International Covenant on Civil and Political Rights, said in 1995 that the reservation by the United States was invalid.⁸⁶ I think that means that, pursuant to this decision of the Human Rights Committee, the United States is very clearly in violation of its international obligations when it executes juveniles, or individuals, for crimes committed while under the age of 18.

82. American Convention on Human Rights: Pact of San José, Costa Rica, adopted Nov. 22, 1969, art. 4., 1144 U.N.T.S. 123, 146 (entered into force July 18, 1978).

83. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, § 4, art. 68, 75 U.N.T.S. 287, 330; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, art. 77, § 5, 1125 U.N.T.S. 3, 39; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, Relating to the Protection of Victims of Non-international Armed Conflicts, adopted June 8, 1977, art. 6, § 4, 1125 U.N.T.S. 609, 614; see William A. Schabas, *The Death Penalty for Crimes Committed by Persons Under Eighteen Years of Age*, in *Monitoring Children's Rights* 603, 603-19 (Eugen Verhellen ed., 1996).

84. 28 I.L.M. 1448, 1470, art. 37, § a (1989).

85. See Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 18, 1155 U.N.T.S. 331.

86. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, Comments of the Human Rights Committee, U.N. Doc. CCPR/C/79/Add.50 (1995), § 14.

I hesitate when I say “juveniles” because they are not juveniles by the time they get to be executed. Many of them are well into their thirties by the time they get to this point. For example, Stanford, whose case the Supreme Court decided in 1989, was seventeen years old at the time of the crime but is now a middle-aged man in prison.⁸⁷

That brings me to the next point—what we call the death row phenomenon. That is the issue of whether it is proper, whether it respects the prohibition on cruel, inhuman, and degrading treatment or punishment, to execute an individual who has already spent a lengthy period of time under sentence of death. Litigation on this issue began in the United States in the Caryl Chessman case in the late 1950s. In Chessman’s case, the California Supreme Court ruled that executing him twelve or thirteen years after the crime was legal.⁸⁸ This decision just followed a judicial election, and some observers said that if the previous judges had stayed on the bench, he would have won the case.

In international law, the death row phenomenon has become a very major issue, mainly in an indirect sense. The leading case on this came before the European Court of Human Rights in Strasbourg in 1989. The Court was confronted with a case of a man named Soering, who was due to be extradited to Virginia for a capital crime.⁸⁹ He was nineteen or twenty years old at the time of the trial, and had been over eighteen when the crime was committed.⁹⁰ Soering argued, based on statistics, that he was likely to spend six to eight years on death row in Virginia if he were extradited and sentenced to death.⁹¹ The European Court of Human Rights said that that was cruel, inhuman, and degrading treatment or punishment, and that it violated the European Convention on Human Rights.⁹² As a result, for all intents and purposes now, nobody is extradited from Europe to the United States without an undertaking pursuant to extradition treaties that the death penalty will not be imposed.

Case law on the death row phenomenon has continued to advance. In 1993, the Judicial Committee of the Privy Council, which is a form of international tribunal, ruled in a case coming from the Commonwealth Caribbean that even six to eight years was too long.⁹³ The Privy Council decision, in the case of *Pratt*, said that five years was the length of time that could be tolerated before somebody was executed.⁹⁴

As you are no doubt aware, a great many of the 3000 cases in the United States exceed five years. But the jurisprudence on this of the

87. See *Stanford v. Kentucky*, 492 U.S. 361, 365 (1989).

88. See *People v. Chessman*, 341 P.2d 679, 699-700 (Cal. 1959).

89. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), at 1 (1989).

90. See *id.* at 11.

91. See *id.* at 25.

92. See *id.* at 50.

93. *Pratt v. Attorney Gen.*, 4 All. E.R. 769, 788-89 (1993).

94. See *id.*

European Court, of the Privy Council, and of other international and national courts has really yet to be developed within the United States. In one case, *Lackey v. Texas*,⁹⁵ which came before the Supreme Court a few years ago, the Supreme Court bumped it back to the lower courts for further litigation.⁹⁶ A couple of Supreme Court justices said the case law from Europe and elsewhere was interesting, but did not suggest that they were going to buy into it.⁹⁷

Thus, the gauntlet has been set down on the issue of the death row phenomenon. My view, if I am ever appointed to the United States Supreme Court, is that the United States is in violation of international law on the subject of the death row phenomenon. Moreover, by ricochet, the United States is also in violation of the Eighth Amendment, because the Eighth Amendment essentially includes the same norm as the International Covenant on Civil and Political Rights and the other instruments.

In 1957, the United States Supreme Court in *Trop v. Dulles*⁹⁸ said that the Eighth Amendment should be interpreted according to "evolving standards of decency."⁹⁹ Where do we get these evolving standards of decency? In *Gregg v. Georgia*,¹⁰⁰ the Supreme Court said it would get them by looking at what the state legislators do.¹⁰¹ I would say that where you really should get the evolving standards of decency from are the European Court of Human Rights in Strasbourg, the United Nations Human Rights Committee, the United Nations Commission on Human Rights in Geneva, and the Judicial Committee of the Privy Council in London.

Steve Bright spoke about procedural fairness, and I will simply add a few words about the *Breard* case. Breard, who was sentenced to death as a foreign national, was entitled under article 36 of the Vienna Convention on Consular Relations to be in communication with his consulate and, logically therefore, to have access to a competent lawyer. This is what Paraguay has argued.¹⁰² It said that its consulate should have been contacted and told that Angel Breard was there in prison awaiting trial, because it would have looked after him.

Paraguay is not the only state that has this grievance with the United States; Canada has the same grievance. For example, a Canadian named Stan Faulder, sits on death row in Texas.¹⁰³ Faulder was convicted under circumstances similar to Breard's. The Canadian

95. 514 U.S. 1045 (1995).

96. *See id.* at 1047.

97. *See id.* at 1046-47.

98. 356 U.S. 86 (1958).

99. *Id.* at 101.

100. 428 U.S. 153 (1976).

101. *See id.* at 173-76.

102. *See Breard v. Greene*, 118 S. Ct. 1352, 1354 (1998).

103. Kathleen Kenna, *Court Turns Down Faulder Appeal Bid*, *Toronto Star*, Jan. 26, 1999, at 1.

government is mad as hell about this and is fighting through diplomatic channels with the United States on this issue. There are other Canadians as well who have been convicted and sentenced to death and are awaiting execution in violation of this international treaty. Canada has, through this treaty, a contract with the United States. It is an international multilateral treaty. Under this contract, the United States is supposed to inform Canadian nationals if they are arrested in the United States of their right to communicate with their consular officials. But that is not being done.

Someone might say that the Vienna Convention is not that important. A few months ago, the International Court of Justice issued an order saying to the United States that it was not to proceed with the execution of Angel Breard.¹⁰⁴ But the Governor of Virginia violated that order. Ironically, the only other time such an order has been requested of the International Court of Justice was at the request of the United States, in 1979. Under the very same treaty, the United States asked that the International Court of Justice issue an interim order against Iran, and it did so.¹⁰⁵ The United States then went to the Security Council saying that Iran had to be made to respect that, because it was international law. Yet, the United States had an order issued against it in April 1998 by that same International Court of Justice, and the United States Supreme Court said "we cannot do anything about that." The Governor of Virginia said he was going ahead with the execution, and the United States violated that treaty.¹⁰⁶

I will conclude with one final issue that deals with international standards on the death penalty and which has been violated at least in some states. This is the issue of the method of execution. International tribunals, more particularly the Human Rights Committee of the United Nations, have recently addressed the issue of the method of execution, stating that some methods of execution constitute cruel, inhuman, and degrading treatment or punishment.

Ng was an individual who was extradited from Canada to the United States.¹⁰⁷ His lawyer filed a petition with the Human Rights Committee. Among the arguments he invoked was that Ng, who was subject to execution in the gas chamber in California, would be executed by a method that violated the international prohibition on cruel, inhuman, and degrading treatment or punishment. The Human Rights Committee agreed with him and ruled that would be a viola-

104. *Order of 9 April 1998—Request for the Indication of Provisional Measures* (visited Mar. 9, 1999) <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_toc.htm>.

105. *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)*, 1979 I.C.J. 21 (interim order of Dec. 15, 1979).

106. *See Breard*, 118 S. Ct. at 1357 (Breyer, J. dissenting) (citing Brief of United States as Amicus Curiae).

107. *See Extradition to California to Face Death Penalty by Cyanide Gas Asphyxiation Violates Art. 7 of the Covenant*, Ng v. Canada, 15 Hum. Rts. L.J. 149, 149 (1994).

tion of the International Covenant.¹⁰⁸ A few states, including Florida, still use the electric chair.¹⁰⁹ They do not use it very adroitly, sometimes even burning people's heads off. I have no doubt that the electric chair, too, would be ruled to be a violation of international law.

The real issue is how to get this before the American public, before the American courts, and before American legislators. Other places in the world that did not care at all about international human rights law five years ago, such as Russia and South Africa, have now changed their laws because of international human rights law. I think that this is one of the ways in which we will move towards abolition of the death penalty within the United States.

When the International Covenant on Civil and Political Rights was originally being drafted back in the early 1950s, Eleanor Roosevelt was a member on the United States delegation. After the 1952 election, she was removed from the delegation. John Foster Dulles took charge of the file on human rights. He issued a declaration saying that the United States would never ratify the International Covenant on Civil and Political Rights, which was then being negotiated.¹¹⁰ Dulles said that the United States did not need it or any other international human rights treaties, because it had the American Bill of Rights.¹¹¹ I do not want to denigrate the American Bill of Rights, which has made an enormous contribution historically to the development of human rights. But we have to recognize that the International Covenant on Civil and Political Rights also makes a very major and important contribution.

What is significant is that Dulles was wrong. As Yogi Berra said, "Never say never." The United States did ratify it, in 1992. It was the 115th state to ratify it.¹¹² I think the reason it ratified it is that the United States could not remain outside of the international human rights system. It could not do what Dulles said. Dulles hoped that international human rights doctrine would flounder and fail, but it did not. It grew. It thrived. It continued to develop and continues to develop. The proof is that in 1992 the United States felt compelled to ratify the International Covenant on Civil and Political Rights.

It tried to get in on its own terms. It tried to get in with reservations. It tried to buy into international law at no cost. But the international community has thrown it back at the United States and said, in effect, "No. If you're coming in, you're coming in on the international terms. You must respect, among other things, the prohibition

108. *See id.* at 157.

109. *See Death Penalty Information Center, supra* note 11.

110. *See* William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 *Brook. J. Int'l L.* 277, 279 n.12 (1995).

111. *See id.*

112. *See id.* at 277.

against the execution of juveniles." I am convinced that development—from Dulles in 1953 to President Bush in 1992, because it was Bush who did it then—will eventually mean that the progressive abolition of the death penalty, which we see internationally, is going to influence the development of law within the United States itself.

MR. ALLMAND:¹¹³

The question put to us today is whether United States death penalty policy is consistent within international human rights law. I do not think this is the right question. The death penalty is not really a legal issue, but a moral and political one. What would it prove if the United States system is consistent with international human rights law? If it were, would that justify the application of the death penalty in the United States? At one time international human rights permitted slavery, apartheid, and other human rights crimes. The real question is whether the United States death penalty system is consistent with twentieth century international moral standards, consistent with enlightened world public opinion, and consistent with recent international legal pronouncements and decisions.

Of course, it is always interesting for lawyers to debate the legality of issues. Lawyers being what they are could construct the sketchy argument that the United States death penalty is consistent with international human rights law. After all, while the Universal Declaration of Human Rights, in article 3, says that everyone has the right to life, liberty, and security of person,¹¹⁴ and, in article 5, states that no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment,¹¹⁵ neither article explicitly forbids the death penalty. This is supported by article 6, subsection 2 of the International Covenant on Civil and Political Rights, which says that a sentence of death may be imposed only for the most serious crimes.¹¹⁶ As a result, lawyers and legislators in the United States might argue that the death penalty in their country is consistent with international human

113. Honourable Warren Allmand, P.C., Q.C., is the President of the International Centre for Human Rights and Democratic Development in Montreal, Quebec, Canada. The Centre is an independent Canadian non-profit, charitable organization mandated to defend and promote the rights and freedoms enshrined in the International Bill of Human Rights and to encourage the development of democratic societies. Mr. Allmand was a Member of the House of Commons from 1965 to 1997 and also has served in the Cabinet as Solicitor General, Minister of Indian Affairs and Northern Development, and Minister of Consumer and Corporate Affairs.

114. See *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., art. 3, U.N. Doc. A/810 (1948), reprinted in 43 Am. J. Int'l L. 127, 128 (Supp. 1949).

115. See *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., art. 5, U.N. Doc. A/810 (1948), reprinted in 43 Am. J. Int'l L. 127, 128 (Supp. 1949).

116. See International Covenant on Civil and Political Rights, Dec. 19, 1966, pt. III, art. 6, § 2, 999 U.N.T.S. 171, 174-75.

rights law in that it is only being used for murder, the most serious of crimes.

On the other hand, one could argue, and I would say with much greater credibility, that the entire spirit of these articles I referred to is contrary to the death penalty and focuses and foresees its eventual abolition. It is significant that these articles were passed in 1948 and then 1976, and have since been bypassed by much stronger statements in later treaties and resolutions, some of which have been referred to already. The 1989 Convention on the Rights of the Child states, in article 37A, that capital punishment shall not be imposed on children under eighteen years of age.¹¹⁷ The 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights provides for the total abolition of the death penalty.¹¹⁸ The same is true of the 1970 Protocol to the American Convention on Human Rights and the 1983 Sixth Protocol to the European Convention on Human Rights.¹¹⁹

Furthermore, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions under the United Nations Commission on Human Rights published a report in December 1997 not only condemning extrajudicial executions, but the death penalty in general.¹²⁰ The two are related, because once the death penalty is justified in certain circumstances, an environment is established where less scrupulous individuals can justify it in a much wider range of circumstances. On April 4, 1998, the Special Rapporteur made a further statement, in which he said that the application of the death penalty in the United States is tainted by racism, economic discrimination, politics, and an excessive deference to victims' rights.¹²¹ He noted that (as has been referred to earlier today) the United States is one of only five countries to permit the execution of defendants who committed their crimes before they were eighteen years of age, in violation of the International Covenant of Civil and Political Rights, which the United States has ratified.¹²² The other countries are Iran, Pakistan, Saudi Arabia, and Yemen.¹²³ At the same time, earlier this year, he and the United Nations Commission on Human Rights called for a worldwide

117. See *Adoption of Convention on the Rights of the Child*, U.N. GAOR 3d Comm., 44th Sess., Agenda Item 108, U.N. Doc. A/44/736 (1989).

118. See *International Covenants on Human Rights: Report of the Third Committee*, U.N. GAOR, 44th Sess., Annex, Agenda Item 98, at 14, U.N. Doc. A/44/824 (1989).

119. See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, Europ. T.S. No. 114.

120. See *Report of the Special Rapporteur*, *supra* note 32.

121. See Mark Tran, *US Singled Out as Death Penalty Is Condemned*, *Guardian* (London), Apr. 4, 1998, at 16.

122. See International Covenant on Civil and Political Rights, *supra* note 116, 999 U.N.T.S. at 175.

123. See *supra* note 20.

moratorium on capital punishment.¹²⁴ It is interesting to note that as of 1996, 102 states were abolitionists in law or in practice and only ninety retentionists.¹²⁵ So the majority of states in the world are abolitionists.

The most recent and perhaps the most important decision was taken on July 17, 1998, when 120 nations voted to establish a permanent International Criminal Court for war crimes, crimes against humanity, and genocide.¹²⁶ They overwhelmingly rejected proposals to include the death penalty as a sanction for these most serious crimes.¹²⁷ Some countries put forward amendments to include the death penalty, arguing that the crimes in question were the most serious crimes imaginable and consequently the most serious penalty—death—should apply. The majority said no. They said that the death penalty is no longer acceptable, that it is not only ineffective in curtailing the crimes in question, but also that those using it simply descend to the same moral level as the criminals themselves.

In earlier times, legislators could make a moral argument for capital punishment because they honestly believed it was an instrument of self-defense, a means of protection, and consequently, was justified. But in recent times, we have learned that this not so. Statistics have demonstrated over and over again that the application of the death penalty has not led to lower murder rates, and therefore better protection for the public.¹²⁸ As a matter of fact, the lowest murder rates are in countries that have abolished the death penalty.¹²⁹ Since the abolition of the death penalty in Canada in 1976, we have had a steady decline, with only 581 homicides last year for our entire country of twenty-six million people.¹³⁰ This is a rate of two per 100,000.

We now have considerable evidence that not only is the death penalty not a more effective deterrent to murder, but more seriously, the consequence of its use is ambiguous, uncertain, and unreliable. That is, it does not really protect the public against murder, and at the same time it is discretionary and capricious in its use from the laying of charges, to plea bargaining, to the decision of the court, to the granting of commutation. It is inequitable in its application, bearing more

124. See *Question of the Death Penalty: Commission on Human Rights Resolution 1998/8* (visited Jan. 16, 1999) <<http://unhchr.ch/html/menu4/chrres/1998.res/8.htm>>.

125. See *Status of the International Covenants on Human Rights: Question of the Death Penalty*, U.N. ESCOR, 54th Sess., Hum. Rts. Comm., U.N. Doc. E/CN.4/1998/82 (1998).

126. See Alessandra Stanley, *U.S. Dissents, but Accord Is Reached on War-Crime Court*, N.Y. Times, July 18, 1998, at A3.

127. See Daniel J. Brown, Note, *The International Criminal Court and Trial in Absentia*, 24 Brook. J. Int'l L. 763, 777 (1999).

128. See Dale Turner, *Death Penalty Isn't Way to Deter Crime or Deal Punishment*, Seattle Times, Apr. 23, 1994, at D5.

129. See *id.*

130. See *Murder Rate in Canada Drops 9% to 25-Year Low*, Orlando Sentinel, Oct. 28, 1998, at A14.

heavily on the poor and minorities. And it is irreversible when mistakes are made.

There were three cases in Canada recently where individuals were convicted of murder and, after years in prison, were found to be innocent. These are the cases of Moran, Marshall, and Prescott.¹³¹ Worse still, the use of capital punishment lessens respect for life. When individuals are deliberately put to death and the results of these executions are dubious in terms of the public good, the sole justification would appear to be retribution and revenge: a system of justice based on "an eye for an eye" and damn the consequences. We have to recall that the principal purpose of the criminal law, as part of the criminal justice system, is not to convict and punish but rather to prevent, deter, and reduce crime and thereby to protect the public.¹³² It is certainly not to perpetuate unfairness nor to be disproportionate, counterproductive, and to lessen respect for the legal system and for life, which I believe the practice of capital punishment is doing.

To return to the original question that was put to us, I believe that the death penalty as applied in certain states in the United States is not only contrary to international human rights law, certainly to the most recent expressions of international human rights law, but more important, but is contrary to the most thoughtful and developed international moral standards. It does not accomplish any good for society, but lessens respect for life and our systems of justice.

DR. SERITI:¹³³

In broad terms, South African law is comprised of Roman Dutch law, English law, statute law, constitutional, and customary law. In Roman Dutch law, the death penalty was a competent sentence for a variety of offenses. The same position obtained in English law and our customary law. The South African Criminal Procedure and Evidence Act of 1917 made the death penalty compulsory for murder under certain circumstances. In 1955, a new Criminal Procedure Act was promulgated. That Act also made the death penalty a competent sentence under certain circumstances.

At the time of passing of the above-mentioned Act, we had three capital offenses. But in 1958, capital offenses were increased to about eleven, for example, murder, housebreaking with possession of a dan-

131. See Barry Brown, *Opposition to Death Penalty Up Sharply in Canada*, *Poll Says*, Buffalo News, Jan. 3, 1999, at 7A.

132. See H.L.A. Hart, *Punishment and Responsibility* 76-78 (1968).

133. Dr. W.L. Seriti is Co-Chair of Law Society of South Africa and practices law with Seriti, Mavundla & Partners in Pretoria, South Africa. During the course of the last year, Dr. Seriti was appointed acting judge on the Venda High Court and on the Northern Cape High Court. During the drafting of the Constitution of the Republic of South Africa, Dr. Seriti served as a technical advisor. Dr. Seriti completed his master's degree on the death penalty and examined the entire administration of justice, particularly the criminal justice system in South Africa.

gerous weapon, etc. The reason given by politicians for passing a law that increased the number of capital crimes was that each of the new capital offenses was increasing rapidly in frequency and the courts had to have a strong deterrent power.¹³⁴

In 1962, sabotage was added as a capital offense.¹³⁵ In 1963, further offenses were added to the list of capital offenses, namely, undergoing training or obtaining information that could further the objects of communism, and advocating broad economic or social change in South Africa by violent means through the aid of a foreign government or institution.¹³⁶

In 1977, a new Criminal Procedure Act was once more promulgated. The Criminal Procedure Act 51 of 1977 once more made capital punishment a competent sentence under certain circumstances. This Act sets forth our present Criminal Procedure, although it has now been amended on several occasions. Consequently, at the time of the advent of our new democratic Constitution, the death penalty was still one of the competent sentences in terms of our Criminal Code.

Capital punishment has always been subjected to severe criticism. In South Africa, during 1947, the Landsdown Commission was set up. Its purpose was to investigate penal and prison reforms.¹³⁷ When dealing with the death penalty, one of the commissioners stated that capital punishment is an outdated form of punishment, based on the old notion of simple retribution, which notion has no place in the modern world.¹³⁸

Punishment is the sanction of criminal law. Normally, the difficulty in criminal punishment is in balancing the interests of society with the interests of the individual offenders. There are different theories of punishment.¹³⁹ Some have been developed as moral justification for punishment and have been instrumental in the classification of the nature of punishment.¹⁴⁰ According to one of the said theories, namely, the preventive theory of punishment, one of the purposes of punishment is the prevention of crime. Punishment is thus justified by the value of its consequence, i.e., prevention of crime.¹⁴¹ Crime is to be prevented in order to protect society. In certain circumstances, you might find that society is better protected by rehabilitating an offender than punishing him. Further, in terms of the deterrent theory, punish-

134. See § 4 of Criminal Procedure Amendment Act 9 of 1958; House of Assembly Hansard 28 January 1958 Col 356.

135. See § 21 of General Law Amendment Act 76 of 1962.

136. See § 5 of General Law Amendment Act 37 of 1963.

137. See James O. Midgley, *Criminology: Corporal Punishment and Penal Policy: Notes on the Continued Use of Corporal Punishment with Reference to South Africa*, 73 J. Crim. L. & Criminology 388, 394-95 (1982).

138. See *id.* at 395.

139. See Hart, *supra* note 132, at 71-72.

140. See *id.*

141. See *id.*

ment must deter an individual and the community at large from committing offenses. The community is generally deterred by threat of possible punishment. The deterrent effect of punishment cannot be considered in isolation. Other purposes of punishment should also be looked at.

From the above, it is evident that the most cogent argument in favor of capital punishment is that it has a deterrent effect on would-be capital offenders. However, it is not necessary to execute an offender in order to deter him and other would-be offenders. Imprisonment can serve the same purpose. Life imprisonment without the possibility of parole would effectively incapacitate an offender from committing further offenses and would also deter other potential offenders.

Life imprisonment can also satisfy retributive considerations.¹⁴² It becomes unnecessary to resort to the barbaric death penalty, which serves no purpose that cannot be satisfied by the humane and effective life-long imprisonment. If life imprisonment can satisfy the retributive considerations and can also adequately protect society, the need or purpose of capital punishment disappears altogether. The continued use of capital punishment then becomes immoral, as it serves no useful purpose that cannot be served by other human and civilized forms of punishment.

The cold-blooded execution of an offender is an indication of how the State does not value human life, and this might escalate violence in a country.¹⁴³ The State must take a lead in showing people how the State values human life and the State must refrain altogether from any actions that the State needs the community to refrain from. The State must show and demonstrate that there can be no reason under the sun to take another's life. The State must show respect for human life and dignity.

After the demise of official racial discrimination in our country and the holding of the first non-racial elections, our country adopted an interim Constitution. The new interim Constitution came into effect on April 27, 1994, the date of our first non-racial elections. As stated earlier, at the time of the birth of our democratic society, section 277(1)(a) of the Criminal Procedure Act 51 of 1977 prescribed that the death penalty was a competent sentence for murder and other serious crimes.

Our Constitution is a product of negotiations conducted in the Multi-Party Negotiating Process. Capital punishment was the subject of debate before and during the Constitution-making process. In order to reach consensus, they did not deal with the question of the death penalty. The failure to deal specifically with the question of the

142. *See id.* at 85.

143. *See id.* at 88.

death penalty in the Constitution was not accidental, but was to facilitate the prompt finalization of our interim Constitution.

However, the South African Law Commission, in its report released during August 1991, entitled "Report on Group and Human Rights," had already described the imposition of the death penalty as "highly controversial." After receiving comments, the Commission suggested that our Constitutional Court should be required to decide whether a right to life expressed in unqualified terms in a draft Bill of Rights could be circumscribed by a limitation clause contained in the Bill of Rights. Consequently, the death sentence was neither sanctioned nor excluded, but was left to the Constitutional Court to decide whether the provisions of the pre-constitutional law making the death penalty a competent sentence for murder and other serious crimes are consistent with chapter 3 of the Constitution. chapter 3 is the chapter that deals with fundamental rights, the right to life, etc.

Section 4(1) of our Constitution states that the Constitution shall be the supreme law of the republic, and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency. Consequently, a Constitutional Court decision could invalidate the provisions of our criminal code.

In *State v. Makwanyane*,¹⁴⁴ the accused were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder, one count of attempted murder, and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. Their case came before the full bench of the Constitutional Court for the determination of the constitutionality of the death sentences imposed by the local division of the Supreme Court.

Advocate G. Bizos, who represented the South African Government at the hearing of the matter, informed the Court that the Government accepted that the death penalty is a cruel, inhuman and degrading punishment and that it should be declared unconstitutional, as it contravenes Section 11(2) of our Constitution. Also, during argument, counsel for the accused submitted that the death penalty for murder is a cruel, inhuman, or degrading punishment because it is an affront to human dignity, is inconsistent with the unqualified right to life entrenched in the Constitution, cannot be corrected in case of error or enforced in a manner that is not arbitrary, and negates the essential contents of the right to life and the other rights that flow from it.

144. 1995 (3) SA 391. For a discussion of the case, see School of Law, University of the Witwatersrand, Annual Survey of South African Law 1995, at 6, 14-15, 25-27, 29, 31-33, 43, 86-87.

The President of the Constitutional Court, Arthur Chaskalson, delivered the judgment of the Court. During the course of his judgment, he referred to chapter 3 of our Constitution which, as stated above, sets out the fundamental rights to which every person is entitled under the Constitution.¹⁴⁵ One such right is the right to life, which the death penalty violates.

Although no section of the Constitution specifically deals with the death penalty, there are sections that indirectly deal with the death penalty, such as Section 11(2), which prohibit cruel, inhuman, or degrading treatment or punishment. Other sections of the Constitution, which are of importance to the question of the constitutionality of the death penalty, and to which the Court referred, are the following:

Section 8: "every person shall have the right to equality before the law and to equal protection of the law."¹⁴⁶

Section 9: "every person shall have the right to life."¹⁴⁷

Section 10: "every person shall have the right to respect for and protection of his or her dignity."¹⁴⁸

Punishment must meet the requirements of sections 8, 9, 10, and 11 for it to be in accordance with our Constitution, and the death penalty is a flagrant violation of the said sections.

The Court said, "Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased under [chapter 3] of the Constitution."¹⁴⁹ Continuing in its condemnation of the death penalty, the Court said that the death penalty is a cruel penalty. It is also an inhuman punishment, for it involves a denial of the executed person's humanity, and is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the State. The court further said that capital punishment is imposed arbitrarily.¹⁵⁰ It cannot be gainsaid that poverty, race, and chance play roles in the outcome of capital offense cases and in the final decision as to who should live and who should die.

Unjust imprisonment, which is possible, is also a great wrong, but if discovered, the prisoner can be released and compensated. But the killing of an innocent person is irreversible. The Court referred to Canadian Law, German Law, and International Conventions, and came to the conclusion that the death penalty is indeed a cruel, inhuman, and degrading punishment, and that it violates the right to life, and consequently, it is unconstitutional.

145. See 1995 (3) SA 391, paras. 100-02.

146. S. Afr. Const. § 8.

147. S. Afr. Const. § 9.

148. S. Afr. Const. § 10.

149. See 1995 (3) SA 391, para. 103.

150. See *id.* para. 104.

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights contained in chapter 3 of our Bill of Rights. By committing ourselves to a society founded on the recognition of human rights, we are required to value these two rights above all others. The Court further said that retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity, which are the most important of all the rights contained in chapter 3 of our Bill of Rights. It has not been shown that the death sentence would be materially more effective to deter or prevent murders and other more serious crimes than would be the alternative sentence of life imprisonment. Taking into account the arbitrary manner in which the death penalty is imposed, the possibility of mistake and the lack of clear evidence that the death penalty is more effective in protecting society and deterring possible capital offenders, a case has not been made for the justification of the death penalty.

Some few years ago, I conducted a limited research project. I interviewed some prisoners who were on death row. After the interviews, it was clear to me that most people who commit serious crimes do so under the false impression that their schemes are so good that they will never be arrested. The question of the death penalty never came to their minds, as they thought that they would never be arrested. If the death penalty, which was still on our statute books at that time, was playing any significant role in deterring would-be offenders, the said death row offenders would not have committed the offenses for which they were convicted.

In my opinion, life-long imprisonment without the possibility of parole, coupled with sufficient and visible policing, are likely to effectively protect society and deter would-be offenders, and do not have the negative elements of the death penalty.

Notes & Observations