The Death Penalty and Human Rights:
U.S. Death Penalty and International Law

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Introduction

Gradually, in the course of social evolution, a consensus forms among nations and peoples that certain practices can no longer be tolerated. Ritual human sacrifice is an example; slavery, too, has been largely abandoned; physical torture is widely condemned by most nations. Vestiges of these practices may continue, but those are aberrations that further underscore the fact that the world has turned against these practices.

A majority of countries in the world has now abandoned the use of the death penalty. But the world has not yet formed a consensus against its use. The most populous country in the world, China, executes thousands of people every year, and the most powerful country, the United States, uses it regularly. Eighty-four countries retain the use of capital punishment. However, the number of countries employing the death penalty is declining and it is possible that worldwide opinion and pressure will gradually influence all countries to abandon this practice.

This paper will look at the trend towards abolition of the death penalty as it has emerged over recent decades. It will trace the development of capital punishment as a human rights issue in the international forum, and examine recent challenges to the death penalty in the United States.

The debate about the death penalty within the U.S. does not usually employ the terminology of human rights. Nevertheless, the use of the death penalty in the U.S.

intersects with international law and is challenged by it. Using different terms and a different legal analysis, the U.S. may be coming to a similar conclusion: the death penalty is no longer acceptable in modern society, given what we know about its arbitrariness and mistakes, and given the alternatives that are now in place.

The thesis of this paper is that international law and an analysis based on human rights are useful means to address the death penalty in the U.S. Although the U.S. uses other terms in protecting basic rights, and has carefully insulated itself from key human rights treaties regarding the death penalty, there is now a new openness to discuss the problems of capital punishment. Particularly around the issue of innocence, criticism of the death penalty within the U.S. and the concerns of the international human rights community stand on common ground. If the U.S. is headed toward the abolition of the death penalty, the next few years will be crucial in determining whether that process is rapid, or drawn out over many decades.

The Trend Towards Worldwide Abolition

In 1986, 46 countries had abolished the death penalty for ordinary crimes.[1] Sixteen years later, the number of countries in the same category had almost doubled to 89.[2] Moreover, another 22 countries had stopped using the death penalty in practice, bringing the total of non-death penalty countries to 111, far more than the 84 countries which retain an active death penalty. Roger Hood, in his book about world developments in the death penalty, noted that: "The annual average rate at which

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1. See Amnesty International, *United States of America: The Death Penalty* 228 (Appendix 12) (1987) (exclusive of crimes committed under military law or in time of war) .
2. See Amnesty International, "Facts and Figures on the Death Penalty,"

countries have abolished the death penalty has increased from 1.5 (1965-1988) to 4 per year (1989-1995), or nearly three times as many."[3] International law expert, William Schabas, noted that fifty years ago this topic did not even exist because there were virtually no abolitionist countries.[4]

For a world in which the death penalty has been practiced almost everywhere for centuries, this is a dramatic turnaround. Although formal abolition of the death penalty dates as far back as 1867 for Venezuela and 1870 for the Netherlands, and even earlier for the state of Michigan (1846), most of the movement towards elimination of capital punishment has been fairly recent.[5]

Human Rights as a Basis for Abolition and Reform

The reasons why countries have abolished the death penalty in increasing numbers vary. For some nations, it was a broader understanding of human rights. Spain abandoned the last vestiges of its death penalty in 1995, stating that: "the death penalty has no place in the general penal system of advanced, civilized societies . . . . What more *degrading or afflictive punishment* can be imagined than to deprive a person of his life . . . ?"[6] Similarly, Switzerland abolished the death penalty because it constituted "a flagrant violation of the *right to life and dignity*. . . ."[7] Justice Chaskalson of the South African Constitutional Court, stated in the historic opinion banning the death penalty under the new constitution that: "The rights to life and dignity are the

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http://web.amnesty.org/rmp/dplibrary.nsf/index?openview (June 2002).
3. R. Hood, *The Death Penalty: A World-wide Perspective* 8 (2d edit. 1996).
4. See Schabas, *The Abolition of the Death Penalty in International Law* 1 (1997).
5. See Schabas, note 4, at 5-6.
6. See Hood, note 3, at 15 (Spain had abolished the death penalty for ordinary crimes in 1978).
7. *Id*. at 14.

most important of all human rights . . . . And this must be demonstrated by the State in everything that it does, including the way it punishes criminals."[8]

The Human Rights Debate

Defining the death penalty as a human rights issue is a critical first step, but one resisted by countries that aggressively use the death penalty. When the United Nations General Assembly considered a resolution in 1994 to restrict the death penalty and encourage a moratorium on executions, Singapore asserted that "capital punishment is not a human rights issue."[9] In the end, 74 countries abstained from voting on the resolution and it failed.

Similarly, Trinidad and Tobago, in withdrawing from the human rights convention of the Organization for American States and preparing to resume executions, insisted that "The death penalty is not a human rights issue."[10]

However, for an increasing number of countries the death penalty is a critical human rights issue. In 1997, the U.N. High Commission for Human Rights approved a resolution stating that the "abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights."[11] That resolution was strengthened in subsequent resolutions by a call for a restriction of offenses for which the death penalty can be imposed and for a moratorium on all executions, leading eventually to abolition.[12]

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8. Makwanyane and Mchunu v. The State, 16 HRLJ 154 (Const. Ct. of S. Africa 1995).
9. See Hood, note 3, at 55.
10. L. Rohter, "In the Caribbean, Support Growing for the Death Penalty," N.Y. Times, Oct. 4, 1998, at 14.
11. United Nations High Commission for Human Rights Resolution, E/CN.4/1997/12 (April 3, 1997).
12. *Id*. at E/CN.4/1998/L.12 (Mar. 30, 1998); E/CN.4/2001/L.93 (April 25, 2001).

The member states of the Council of Europe have established Protocol 6 to the European Convention on Human Rights calling for the abolition of the death penalty.[13] Similarly, an optional protocol supporting the end of the death penalty has been added to the American Convention on Human Rights.[14]

The European Union has made the abolition of the death penalty a precondition for entry into the Union, resulting in the halting of executions in many eastern European countries which have applied for membership. Russia commuted the death sentences of over 700 people on death row, and is considering legislative change leading to abolition.[15] Poland has voted to end the death penalty, as has Yugoslavia, Serbia and Montenegro.[16] Most recently, Turkey moved closer to admission to the European Union when its Parliament voted to abolish the death penalty except in times of war.[17]

Challenging the death penalty is not seen solely as an internal matter among nations. Many European countries, along with Canada, Mexico, and South Africa, have resisted extraditing persons to countries like the United States unless there are assurances that the death penalty will not be sought. The Council of Europe has threatened to revoke the U.S.'s observer status unless it takes action on the death penalty.[18] Mexico has recently begun a program to provide legal assistance to its foreign nationals facing the death penalty in the U.S. As discussed more fully below,

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13. European Treaty Series (ETS) 114 (Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (1955)).
14. Organization of American States Treaty Series 73 (Protocol to the American Convention on Human Rights, 1144 UNTS 123 (1979).
15. See Associated Press, June 3, 1999 (Boris Yeltsin commuted 716 death sentences).
16. See Death Penalty Information Center, http://www.deathpenaltyinfo.org/dpicintl.html (visited Aug. 5, 2002).
17. See "Turkish Parliament, Looking to Europe, Passes Reforms," New York Times (AP), August 4, 2002.

these Mexican citizens were usually not afforded their rights under the Vienna Convention on Consular Relations. This same violation led Paraguay and Germany to pursue relief at the International Court of Justice in the Hague for their foreign nationals facing execution in the U.S.

The United States, Human Rights, and the Death Penalty

The U.S. is committed to the pursuit of international human rights as evidenced by President Clinton's signing of an Executive Order on the 50th anniversary of the U.N.'s Declaration on Human Rights in 1998. The Order stated:

> It shall also be the policy and practice of the Government of the United States to promote respect for international human rights, both in our relationships with all other countries and by working with and strengthening the various international mechanisms for the promotion of human rights, including . . . those of the United Nations . . . .[19]

Despite this commitment, and despite the fact that the founding of the United States was based on the recognition of certain "unalienable rights,"[20] the concept of human rights per se as it applies *within* the U.S. is rarely discussed. The notion of human rights is almost exclusively focused on other countries.[21] A search on the Internet for the term "human rights" in conjunction with the term "United States" mainly yields a discussion of international issues with references to organizations such as Amnesty International, Human Rights Watch, and the United Nations.

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18. See Associated Press, June 26, 2001.
19. Executive Order: Implementation of Human Rights Treaties, Dec. 10, 1998 (President Clinton).
20. The Declaration of Independence of the Thirteen Colonies, In CONGRESS, July 4, 1776.
21. See, e.g., D. Cole, "We've Long Been Death Penalty Outlaws," Legal Times, April 27, 1998, at 23 (U.S.'s criticism of human rights abuses in other countries, but not at home) .

The U.S. frequently exhibits concern about human rights violations in other countries, such as China or Cuba. But within the United States, a different terminology is used. U.S. laws speak of "civil rights" or "constitutional rights." Civil rights focus on securing equality under the law for certain groups, such as racial minorities or women. Groups or individuals claiming abuse by the government couch their complaints in terms of their civil or constitutional rights, not their "human rights," not only in courts, but in the public forum. This may be due to the assumption that human rights are a "given" within the U.S., or simply to the U.S.'s reliance on a constitution that uses different terminology to express similar principles.

Hence, the evolution of death penalty law in the U.S. does not speak in terms of "human rights," and is not likely to do so in the future. The recent concern about the death penalty and the wave of reforms are mainly concerned with the *process* by which it is applied and with the limits of what is constitutional under the Eighth Amendment's ban on "cruel and unusual punishment." The notion that the death penalty should be abandoned because it is a violation of human rights would not reverberate with many Americans. Rather their concern is expressed in terms of fairness, risks of fatal error, or simply the morality of the death penalty. Nevertheless, the underlying principles of human rights and U.S. constitutional rights are similar.

Comparable Concepts in the U.S. Courts

The federal courts' consideration of the death penalty begins with the assumption that it *is* constitutional and that it *is not* a "cruel and unusual punishment." That is chiefly because the death penalty clearly existed as a legal punishment at the time the Eighth Amendment was adopted in 1791, thereby demonstrating the founding fathers' constitutional approval. Moreover, the Fifth Amendment (and later the Fourteenth Amendment, adopted in 1868) clearly anticipates the deprivation of life, provided "due process" has been accorded the defendant.

If the death penalty was determined to be a violation of unalienable rights (comparable to "human rights"), it would be possible (though difficult) to amend the Constitution so that the government could not take a person's life as a punishment for crime. But a more likely path towards abolition would be that individual states will choose to halt this practice. In fact, 12 states and the District of Columbia already do not allow the death penalty. The U.S. Constitution provides a minimum amount of protection, below which the laws of the states may not go. But states certainly can provide *more* protection than the Constitution requires.

So far, the majority of U.S. states have shown an uninterrupted intention to retain capital punishment throughout their history. Thus, challenges to the death penalty have focused on procedural defects: the selection of juries; an indigent defendant's right to a lawyer at the government's expense; or the arbitrary application of the death penalty, i.e., that those chosen to die are legally indistinguishable from those who are allowed to live.

Many procedural rules have shaped the Supreme Court's oversight of the death penalty. The Court has rejected the notion that the punishment itself is cruel and unusual because of its taking of human life.[22] Nevertheless, the history of the death penalty in the U.S. is one in which the punishment has been applied to an increasingly narrower class of crimes, and has excluded an increasingly broader group of defendants. To a significant extent, those restrictions on the death penalty parallel a fuller understanding of human rights around the world.[23]

Early American criminal law was brought over substantially from England, which allowed the death penalty for many crimes. In the U.S., the death penalty could be applied for murder, but also for rape, robbery, treason, and even blasphemy.[24] Gradually, the list of death eligible crimes has been shortened to essentially one: murder. Laws continue to exist which allow the death penalty for other crimes, but no one is on the state or federal death rows for a crime which did not involve the death of another person.

The Supreme Court determined that the death penalty was a disproportionate punishment for the crime of rape in which the victim did not die;[25] it reached a similar conclusion for the crime of robbery.[26] Even felony murders in which the defendant did not intend to kill or harm the victim and did not demonstrate a reckless indifference to human life by his actions, are not punishable by death, even if a victim dies.[27] These

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22. Gregg v. Georgia, 428 U.S. 153 (1976).
23. See, e.g., International Covenant on Civil and Political Rights, Article 6, below note 34 (urging limitations on the death penalty where it is still in use).
24. See S. Banner, *The Death Penalty: An American History* 5-6 (2002).
25. Coker v. Georgia, 433 U.S. 584 (1977).
26. Hooks v. Georgia, 433 U.S. 917 (1977) (per curiam).
27. Enmund v. Florida, 458 U.S. 782 (1982).

decisions stem from the Court's concept that "death is different"[28] as a punishment-- a notion similar to the human rights precept that life can only be taken out of utmost necessity.

This is not to say that there are no counter-pressures to expand the death penalty to more crimes. In fact, states have been successful in adding to the specific kinds of murder which are death-eligible. In many states, almost any murder can result in the death penalty, despite the U.S. Supreme Court's ruling that statutes are to be narrowly tailored to select only the worst offenders.[29]

Also, the federal death penalty was greatly expanded in 1994 and includes crimes such as certain attempted murders, certain drug crimes, and espionage, even if no one directly died as a result of the defendant's actions.[30] So far, no one has been given the death sentence for these non-murder offenses, though that may change soon.

The Supreme Court has gradually carved out groups of people who may not receive the death penalty. In 1986, it decided that those who are legally insane may not be executed (at least as long as this mental condition continues).[31] In 1988, the Court declared that a defendant who was 15 years of age at the time of his crime could not be executed, at least in a state that had not specifically determined the appropriate minimum age for the death penalty.[32] The Court later refused to raise the minimum age to 18,[33] though it may revisit that issue as public sentiment changes.

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28. See, e.g., Woodson v. North Carolina, 428 U.S. 280 (1976).
29. See Gregg v. Georgia, 428 U.S. 153 (1976).
30. See generally, 18 U.S.C. §§ 3591-99 (1994).
31. Ford v. Wainwright, 477 U.S. 399 (1986).
32. Thompson v. Oklahoma, 487 U.S. 815 (1988).
33. Stanford v. Kentucky, 492 U.S. 361 (1989).

Interestingly, one group of people has been excluded from the death penalty by international treaty: pregnant women. The U.S. has signed and ratified the *International Covenant on Civil and Political Rights* (ICCPR),[34] which forbids such executions, and the U.S. has acknowledged this prohibition.[35] (The ICCPR also forbids the execution of those who were under 18 years of age at the time of their crime, but the U.S. took a reservation to that section of the treaty and continues to carry out such executions, as discussed below.)

Evolving Standards of Decency

From an international perspective, perhaps the most important in the line of cases restricting the death penalty was the recent decision of the U.S. Supreme Court in *Atkins v. Virginia*, regarding a defendant with mental retardation.[36] Once before, in 1989, the Court had looked at this identical issue and decided that the execution of such defendants was constitutional. In its earlier decision, the Court narrowly (5-4) held that it was not cruel and unusual to apply the death penalty generally to the mentally retarded, though such a condition should be considered by the jury on an individual basis.[37] The Court noted that only two states prohibited such executions, and so it hardly could be said that a national consensus had formed against this practice.

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34. International Covenant on Civil and Political Rights, 999 UNTS 171 (1976), at Art. 6.
35. See U.S. Reservation to Article 6 of the ICCPR, UN Doc. ST/LEG/SER.E/13, p.175.
36. Atkins v. Virginia, 536 U.S. ___ (No. 00-8452, June 20, 2002).
37. Penry v. Lynaugh, 492 U.S. 302 (1989).

But within a relatively short period of time, the Court agreed in 2001 to re-hear this issue. By the time the Court was ready to announce its decision, the number of states that prohibited this practice had grown to 18, including 5 new states just within the past year. Although 18 states does not even constitute a majority of the 38 states with the death penalty, it represented a clear trend away from this practice. Far fewer than 20 states have actually carried out such executions in recent years, and there were other indications of a new consensus, as well. In its analysis, the Court relied less on the exact number of prohibiting states and more on "the basic concept underlying the Eighth Amendment [which] is nothing less than the dignity of man. . . ."[38] This, too, echoes in the words of human rights protections.

In its 6-3 decision forbidding the execution of the mentally retarded, the Court made an important reference to the international opposition to such death sentences. The execution of the mentally retarded had been raising concerns within the international community for some time. The 1999 meeting in Geneva of the U.N. Commission on Human Rights led to a resolution calling on nations "not to impose the death penalty on a person suffering from any form of mental disorder."[39]

The U.N.'s Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, following his visit to the United States in 1997, also called for a halt to the

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38. *Atkins*, 536 U.S. at ___, citing Trop v. Dulles, 356 U.S. 86, 100 (1958).
39. Commission on Human Rights resolution, 1999/61 (58th Meeting, April 28, 1999).

use of the death penalty on the mentally retarded, stating that such executions were "in contravention of relevant international standards."[40]

The reason that such international opinion makes a difference is that what constitutes cruel and unusual punishment is based on "evolving standards of decency." The Supreme Court first formalized this flexible interpretation of the Eighth Amendment's Cruel and Unusual Punishment clause in *Trop v. Dulles*.[41] In doing so, it looked to international standards. The Court held that denying Albert Trop his citizenship for desertion in time of war was cruel and unusual. The Court cited world-wide opinion, stating: "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."[42]

But when considering whether executing juvenile offenders was cruel, that international perspective was lost. Justice Scalia, in the opinion upholding the death penalty for juvenile offenders aged 16 or 17, explicitly rejected the notion that world-wide perceptions of decency were relevant to the Court's consideration.[43] By contrast, Justice Brennan, in dissent, harkened back to the Court's precedent in *Trop:* "Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved."[44]

This disagreement among the Justices was again evident in *Atkins*, but this time Justice Scalia was in the minority, along with Justices Rehnquist and Thomas. Justice

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40. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions by Mr. Bacre Waly Ndiaye, E/CN.4/1998/68/Add.3, at ¶ 145.
41. 356 U.S. 86 (1958) (plurality opinion).
42. *Id*. at 102.
43. Stanford v. Kentucky, 492 U.S. 361, 370, n.1 (1989).

Stevens, who wrote the majority opinion in *Atkins*, underscored the use of international opinion in evaluating the standard of decency: "Moreover, within the *world community*, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[45]

Justice Rehnquist's views were sharply different. He wrote in dissent:

> I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. . . . if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant.[46]

The resolution of this disagreement will be critical in determining the influence of the human rights community on the U.S. death penalty.

Juvenile Offenders

It seems likely that the Court will also revisit the practice of executing juvenile offenders. When challenged internationally, the official U.S. position on juvenile executions has been one of resistance. Nevertheless, the opposition among the states has been slowly growing, though it has not been as dramatic as the rejection of the death penalty for the mentally retarded. Since the Supreme Court allowed the execution of 16- and 17-year-olds, no state which had an age limit of 18 has sentenced anyone to death younger than that age.[47] The two most recent states which adopted the death penalty, Kansas and New York, have barred the death penalty for juvenile

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44. *Id*. at 390 (Brennan, J., dissenting).
45. Atkins v. Virginia, 536 U.S. ___, n. 21 (2002) (citing the Brief for The European Union as Amicus Curiae in McCarver v. North Carolina, O. T. 2001, No. 00—8727, p. 4) (emphasis added).
46. *Atkins*, 536 U.S. at ___ (Rehnquist, C. J., dissenting) (internal citations omitted).
47. See V. Streib, "The Juvenile Death Penalty Today: Death Sentences And Executions For Juvenile Crimes, January 1, 1973 - June 30, 2002" (2002)

offenders. The states of Washington, Montana and Indiana recently raised their age to 18, and Florida's Supreme Court raised that state's eligibility age from 16 to 17.[48] A majority of U.S. states now either forbids executions altogether, or at least bars juvenile executions. Moreover, public opinion is turning against such use of the death penalty: 69% of the public in a recent Gallup Poll opposed the death penalty for juvenile offenders.[49]

The international opposition to such executions is even more pronounced than that regarding the mentally retarded. The practice of executing those who were under 18 at the time of their crime is directly prohibited by the *International Covenant on Civil and Political Rights* (ICCPR), by the U.N. *Convention on the Rights of the Child*, and the *American Convention on Human Rights*. So broad is the acceptance of this ban that it is widely recognized as a peremptory norm of customary international law,[50] i.e., a principle so universally accepted that it precludes reservations.

The International Covenant on Civil and Political Rights

The ICCPR is perhaps the most important human rights treaty in existence. The U.S. State Department praised it as "the most complete and authoritative articulation of international human rights law that has emerged in the years following World War II."[51] The treaty was forged from the founding principle of the U.N.'s Universal

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48. See *id*.
49. See Gallup News Service, May 20, 2002.
50. See, e.g., Schabas, note 4, at 87, quoting UN Human Rights Commission; but see Brief of the Solicitor General of the United States, Domingues v. Nevada, 528 U.S. 963 (1999), cert. denied (maintaining that the execution of juvenile offenders was not forbidden under customary international law).
51. U.S. Dept. of State, *Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights, July, 1994*, at i (introduction).

Declaration of Human Rights, which states simply: "Everyone has the right to life, liberty and security of the person."[52]

The ICCPR was adopted 18 years later and seeks to limit the death penalty where it is still applied. With respect to juvenile offenders, Article 6 of the treaty states, in part:

> 5. Sentence of death shall not be imposed for crimes committed by *persons below eighteen years of age* and shall not be carried out on pregnant women.[53]

Today, the ICCPR has received almost universal endorsement, with 148 countries as parties to the treaty, including the U.S., which ratified the Covenant in 1992, but with reservations. Ratification of a treaty signals a country's willingness to be bound by the treaty. Reservations carve out some exception to the complete adherence by a country to a treaty. Substantive reservations, such as the one the U.S. took to the ICCPR to allow the continued execution of juveniles, are highly controversial.

The U.S. was one of only three countries which took reservations to Article 6 of the ICCPR in ratifying the Covenant.[54] The U.S. reservations remain in place and have been criticized in international forums.

The U.S. Reservation to Article 6 is quite broad and reads:

> The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on *any person* (other than a pregnant woman) duly convicted under existing or future laws permitting

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52. Universal Declaration of Human Rights, G.A. Res. 217 A (III) (1948).
53. International Covenant on Civil and Political Rights, 999 UNTS 171 (1976), at Art. 6 (emphasis added).
54. See Schabas, note 4, at 82-83. Norway's and Ireland's reservations became moot when they abolished the death penalty.

> the imposition of capital punishment, *including such punishment for crimes committed by persons below eighteen years of age*.[55]

Reservations which contradict the "object and purpose" of the treaty are considered invalid.[56] Eleven countries formally protested the U.S.'s reservation to Article 6 and have stated that this reservation should not be allowed.

France's objection criticized the U.S.'s reservation as: "incompatible with the object and purpose of the Convention."[57] Sweden objected because: "Reservations of this nature contribute to undermining the basis of international treaty law. All parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties."[58]

One measure of the ICCPR's overall effectiveness has been the virtual elimination of the execution of juvenile offenders around the world. Amnesty International reported that since 1998 the U.S., the Democratic Republic of the Congo, and Iran were the only exceptions to the rule.[59] Despite the U.S.'s official reservation in the treaty, the federal death penalty statute cannot be applied to juvenile offenders, and the direction of state law is towards raising the age of eligibility, thus leaving the door open for more change in the future.

Other Treaties Implicating Juveniles

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55. U.S. Reservation to Article 6 of the ICCPR, UN Doc. ST/LEG/SER.E/13, p.175 (emphasis added).
56. See Schabas, note 4, at 81-82.
57. *Id*. at 316.
58. *Id*. at 318.
59. Amnesty International, "UNITED STATES OF AMERICA -Too young to vote, old enough to be executed: Texas set to kill another child offender." AI-index: AMR 51/105/2001, 31/07/2001.

The *U.N. Convention on the Rights of the Child* also specifically prohibits the use of the death penalty for juvenile offenders. Article 37(a) of this treaty states: "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."[60] Every country in the world has ratified this treaty, except the U.S. and Somalia.[61] President Clinton signed the treaty, but the Senate is concerned with the conflict between the death penalty practice of many states in the U.S. regarding juveniles and Article 37(a).[62]

Similarly, the U.S. has signed but not ratified[63] the *American Convention on Human Rights*. Twenty-five countries of the western hemisphere have ratified this treaty, which states: "[C]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age."[64]

While the U.S.'s full participation in these important human rights treaties is stymied by its continued use of the death penalty against juveniles, these treaties offer an area of common ground and basic principles to which the U.S. and most other countries adhere.[65]

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60. G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49 (1989).
61. See B. Crossette, Tying Down Gulliver With Those Pesky Treaties, N.Y. Times, Aug. 8, 1999 (Week in Review).
62. Indeed, former President Bush refused to even sign this accord because "it is contrary to some state laws, because it prohibits certain criminal punishment, including the death penalty, for children under age eighteen." T. McNulty, "U.S. Out in Cold, Won't Sign Pact on Children," Chicago Tribune, Sept. 30, 1990, at 4.
63. Under the U.S. Constitution, the President signs international treaties, but they are ratified by the Senate, which advises and consents with the President. Under international law, a country is expected to abide by a treaty it has signed, even as it awaits final ratification. See International Commission of Jurists, *Administration of the Death Penalty in the United States* 33 (June 1996).
64. Amer. Conv. on Human Rights, Article 4(5); OASTS N.36 (1979).
65. Justice Sandra O'Connor of the U.S. Supreme Court, remarked: "I think domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the

Innocence and Human Rights

Nowhere do the principles of U.S. law and the ideals of human rights meld more completely than around the issue of innocence. The concern about mistakes in capital cases is the most powerful driving force towards a re-evaluation of the death penalty in the U.S. today. Supreme Court Justices, legislators, conservative political leaders and commentators have all expressed deep concerns about revelations of innocent people on death row in recent years. From a human rights' perspective, the danger of executing an innocent person has played a key role in the abolition of the death penalty in other countries.[66]

Surprisingly, this issue has only been peripherally explored in U.S. courts. While it is certainly true that guilt or innocence is the ultimate focus of all criminal procedures, defendants who are convicted generally challenge their conviction tangentially by pointing to unfair or unconstitutional procedures used in their arrest or trial. A bold claim of simple innocence is both rare and disfavored.[67]

The spate of innocent defendants who have been released from death row in recent years has played a leading role in changing the death penalty debate. Governor George Ryan of Illinois, a Republican supporter of the death penalty, declared that the system was so infected with error that the executions in his state had to be immediately

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United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations." S. O'Connor, *Federalism of Free Nations, in International Law Decisions in National Courts* 13, 18 (T. Franck & G. Fox eds., 1996).

66. See, e.g., Bedau, et al., *Miscarriages of Justice in Potentially Capital Cases*, 40 Stanford L. Rev. 21, 22-23 (1987).

67. See Herrera v. Collins, 506 U.S. 390 (1993).

stopped, thereby opening the door to an examination of many of the criticisms that have been raised about the death penalty over the years.[68]

Not even the most ardent death penalty proponent would suggest that the risk of executing innocent people raises no serious concerns. Conservatives such as Pat Robertson, George Will, and most recently Justice Sandra Day O'Connor of the U.S. Supreme Court, have voiced serious doubts about the death penalty. It has now become more acceptable for politicians to criticize and even oppose capital punishment. Expressing concerns about protecting the innocent could hardly be equated with being soft on crime.

While a claim of actual innocence made by one individual on death row is a factual matter, the *risk* of executing innocent people is a much broader issue, and one which combines both legal issues and the principles of human rights. The 102 people who have been released from death row since 1973, the repeated exonerations through DNA testing and the work of journalism students, the startling realization that the system has many times come close to executing the wrong person, have led many people to the conclusion that the death penalty can no longer be tolerated.

It was the *risk* of another error that led Governor George Ryan of Illinois to declare a moratorium on all executions in his state, after it was revealed that 13 people were exonerated in the same time that 12 were executed. It was the *risk* of executing an innocent person, who would then have no recourse in the courts, that recently led a

68. See K. Armstrong & S. Mills, "Ryan: 'Until I can be sure,'" Chicago Tribune, Feb. 1, 2000.

federal judge in New York to declare the death penalty lacked due process. Judge Rakoff held that the death penalty was unconstitutional:

> In brief, the Court found that the best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not merge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty, a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence.[69]

A similar conclusion was recently drawn by the *Arizona Republic,* a newspaper in a staunchly pro-death penalty state, that editorialized for the death penalty for many years. The *risks* associated with the death penalty have become so high that they shifted the balance from support to opposition. The paper explained the basis for its new position against the death penalty:

> The argument against the death penalty has become more profound and salient. Simply put, we now know beyond dispute that the criminal-justice system wrongly sentences people to death. We even know their names, because since 1970, 101 of them have subsequently been found innocent.
>
> Moreover, the pace of exonerations has been accelerating, due in part to the wider use of DNA evidence. . . .
>
> The theoretical argument that the criminal-justice system, being a human institution, is bound to be fallible is no longer theoretical. It's a reality, and public policy must confront it.[70]

It is at this point that the reformists and the abolitionists begin to come together. Can the death penalty be sufficiently reformed, or must it be repealed to protect innocent defendants? So, too, those in the U.S. who approach the death penalty from a constitutional perspective are asking the same questions as those who approach it from

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69. United States v. Quinones, No. 53 00 Cr.761 (JSR) (U.S. Dist. Ct., Southern Dist. of N.Y. 2002) (Rakoff, J.) (the ruling, so far, only affects the defendants in this case).
70. Editorial, The Arizona Republic, July 28, 2002.

a human rights perspective: can this punishment be justified, given the risks it presents to innocent life?

Of course, challenges focused on innocence can be overstated. For example, it probably would do little good for human rights advocates to criticize the U.S. for executing innocent people. There is, in fact, insufficient proof to assert that this has definitively happened in recent years. But a mutual agreement to take immediate steps to ensure that innocent people no longer face the risk of execution is an ideal that many countries could aspire to. While the U.S. is not likely to renounce its *right* to employ the death penalty, it may ultimately choose to forego that right if many innocent lives are demonstrably at risk.

Further Applications of International Law to the U.S. Death Penalty

The Execution of Foreign Nationals

The most direct challenge to the U.S. death penalty under international law has involved the execution of foreign nationals, especially when they have not been accorded their rights under the *Vienna Convention on Consular Relations*.[71] The U.S., along with at least 164 other countries of the world, has long been a party to the Vienna Convention. Article 36 of this Convention requires officials in the U.S. who place foreign nationals under arrest to inform them of their rights to confer with the consular

[71]. Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261 (April 24, 1963) (ratified by the U.S. in 1969) (hereinafter Vienna Convention).

officials of their home country.[72] This provision, which is binding on all states under the U.S. Constitution, has been regularly ignored.

To begin with, international law, even when ratified by the U.S., is often unfamiliar to officials in state government. As one spokesman for the California Attorney General's office said, "Californians elect their legislators and their governor to write the laws . . . and they should not have to abdicate that authority to foreign treaties approved by someone in Washington."[73]

Furthermore, there is a pervasive lack of knowledge about law enforcement's obligations under the Vienna Convention. Police have routinely failed to notify foreign nationals of their rights, partly because they are unaware of the law. Gerald Arenberg, executive director of the Association of Retired Police Chiefs noted: "In my 47 years in law enforcement, I have never seen anything from the State Department or FBI about this" duty to inform arrestees.[74]

And former New York Police Commissioner Howard Safir, when asked about the Vienna Convention, first said he had never heard of it, and then, after a brief explanation, remarked: "Oh, right, that treaty we're not enforcing."[75]

Even when they are aware of the treaty, law enforcement officials may believe it is inapplicable. Joe Owmby, a prosecutor in Texas, argued at a capital trial that the Vienna Convention was irrelevant because it was not a Texas law. "If you pick up the

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72. *Id*. at Article 36(1)(b).
73. S. Meisler, "Activists Say Courts Abuse Rights of Juvenile Defendants," L.A. Times, Nov. 18, 1998 (quoting Rob Stutzman).
74. M. Jacobs, "Foreigners on Death Row Seek Link to Diplomats," S.F. Daily Journal, Nov. 5, 1997.
75. L. Ballard, *The Vienna Convention, Consular Access, and Other Assistance Available to Foreign Nationals: A Guide for Criminal Defense and Immigration Attorneys*, at n. 6 (1998) (on file with DPIC).

criminal code," he said afterwards, "it doesn't say anything about the Geneva [sic] Convention."[76]

Although over 140 foreign nationals have been sentenced to death since capital punishment was reinstated in 1976, the issue began to emerge when Carlos Santana of the Dominican Republic was executed in Texas in 1993. Two days later, Ramon Montoya of Mexico was also executed in Texas. Montoya's execution was met with outrage and street protests in Mexico, which strongly opposes the death penalty.[77] Mexico subsequently began intervening at earlier stages in death penalty cases. A fundamental problem became clear: neither Mexico nor the many defendants of Mexican citizenship had been notified at the time of arrest of their rights under the Vienna Convention. Research has revealed at least 56 Mexican citizens on death rows across the U.S., and a similar number of citizens from other countries, have been sentenced to death without proper consular notification.[78]

The issue reached the highest courts of both the U.S. and the world with the pending execution of Angel Breard in Virginia in 1998. Like most of the other foreign nationals on death row, Breard was not informed of his consular rights when arrested for murder in 1992. Breard was a citizen of Paraguay who had come to the U.S. in 1986.

At trial, he had rejected the advice of his appointed American lawyers, refusing a plea agreement offered by the state and insisting on testifying in his own defense.

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76. A. Villafranca, "Consulate Issue Raised in Trial of Mexican Convicted of Murder," Houston Chronicle, Oct. 2, 1997.
77. "Texas Executes a Mexican Killer, Raising a Furor Across the Border," N.Y. Times, Mar. 26, 1993.
78. See "Are 65 Illegally on Death Row in U.S.?," National Law Journal, April 27, 1998, at A16; see also M. Warren, Human Rights Research, note 87 below.

Breard admitted his involvement in the crime, but claimed he was compelled by a satanic curse placed on him by his father-in-law.[79] While such an admission may have garnered leniency in a Paraguayan court, here it sealed his fate. Advice from his consulate about these distinctions might have made a critical difference. Instead, he was found guilty and sentenced to death in 1993.

Paraguay attempted to intervene on his behalf in the appeals process, claiming that if Breard had received early advice from his government, he would have avoided the mistakes he made at trial. However, intervention was barred by the Eleventh Amendment to the U.S. Constitution, which forbids suits by foreign countries against a state.[80] While this matter was being further appealed, Paraguay filed suit in the International Court of Justice at The Hague. In that forum, Paraguay asked for a ruling to prevent the imminent execution of Breard because of the U.S. violation of the Vienna Convention. The International Court, recognizing that there was not sufficient time before the execution to adequately hear from both sides and render a decision, unanimously ruled that the execution should be delayed, at least until the court could fully review the matter. [81]

The U.S. Response

The U.S. Supreme Court, on the eve of the scheduled execution, considered the various petitions that had been presented to lower courts by Paraguay and by Angel

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79. See B. Masters, "World Court Tells U.S. To Halt Va. Execution," Washington Post, April 10, 1998, at C1.
80. See Breard v. Greene, 140 L.Ed.2d 529, 538 (1998) (per curiam).
81. Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America) No. 99 (International Court of Justice, April 9, 1998).

Breard himself. The Court refused to stay the execution, primarily because it found that Breard had not raised his claim regarding the Vienna Convention in a timely manner.[82] This procedural bar, the court held, not only precluded Breard's individual claim, but also any influence of the International Court of Justice. Breard was then executed on April 14, 1998.

The implications of Breard's execution and of other similar cases are broad. U.S. citizens travel frequently around the world. If arrested, they often depend on help from the U.S. Embassy in understanding and defending against charges from a variety of legal systems quite different from their own. Other countries can impress on the U.S. the importance of mutual cooperation in protecting the basic rights of foreign nationals.

The President of the European Union, in challenging a similar case of Stanley Faulder, a Canadian national denied his consular rights in Texas, warned of the consequences of disregarding international law: "The EU (European Union) is seriously concerned that this disregard of Texan Authorities in a case where someone is under prosecution for a capital crime may lead to erosion of international consular protection."[83]

The U.S. is constantly in need of international cooperation on such matters as defense, drug enforcement, economics, and human rights.[84] Perhaps in recognition of

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82. *Breard*, 140 L.Ed. at 537.
83. Letter from Helmut Tuerk, Austrian Ambassador to the U.S., to Gov. George W. Bush of Texas, Dec. 8, 1998 (on file with DPIC).
84. Ironically, the U.S. was the first country to appeal to the International Court of Justice to enforce the Vienna Convention. When Iran seized the U.S. Embassy and held Americans hostage in 1979, the U.S. sought and secured a ruling from the International Court condemning Iran's action. But with a ruling adverse to the its position, the U.S. has chosen not to comply. United States Diplomatic and Consular Staff in Iran (U.S. v. Iran), 1980 ICJ Rep. 3 (Judgement of May 24).

this need, the State Department has undertaken an information campaign to alert law enforcement officers about their duties under the Vienna Convention.[85] Another positive sign was a recent decision by the Oklahoma Court of Criminal Appeals overturning the death sentence of Gerardo Valdez, a Mexican national facing execution. At the eleventh hour, the court reduced his sentence to life, noting that his attorney and the state should have assisted the defendant in contacting the Mexican consulate, which could have provided assistance.[86]

Seventeen foreign nationals have been executed in the U.S. since the death penalty was reinstated in 1976. At least 122 foreign nationals from 33 countries are facing execution in the U.S. as of July, 2002, so this issue will surely grow in importance.[87]

Racial Bias and Human Rights

Three of the key human rights treaties that the U.S. has ratified condemn punishments meted out in an arbitrary or discriminatory way. The ICCPR forbids any arbitrary use of the death penalty.[88] The *U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which was adopted by the U.N. General Assembly in 1984,[89] signed by President Ronald Reagan in 1988, and ratified by

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85. See U.S. Dept. of State, *Consular Notification and Access* , periodically updated, (instructions for law enforcement officials).
86. See New York Times, July 21, 2001; Valdez v. Oklahoma, No. PCD - 2001-1011 (Ct. of Crim. App., May 1, 2002). See also, United States v. Lombera-Camorlinga, 170 F.3d 1241 (9th Cir. 1999); Ademodi v. State, No. 90063152 (4th Dist. Minn. Dec. 21, 1998).
87. See Mark Warren, Human Rights Research, at http://www.deathpenaltyinfo.org/foreignnatl.html.
88. See ICCPR, note 34, at Art. 6(1).
89. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A.Res. 39/46 (Dec. 17, 1984).

the United States in 1994, forbids torture and the infliction of severe pain or suffering *"based on discrimination of any kind."*[90] And the *International Convention on the Elimination of All Forms of Racial Discrimination* (the Race Convention), signed by the U.S. in 1966 and ratified in 1994, requires parties to "guarantee the right of everyone, *without distinction as to race*, . . . equality before the law" and all tribunals of justice.[91]

The U.N.'s Special Rapporteur and the International Commission of Jurists, following their visits to the U.S. in 1997 and 1996 respectively, decried the evidence of racial bias in the use of the death penalty. The Jurists noted:

> The Mission is of the opinion that . . . the administration of capital punishment in the United States continues to be discriminatory and unjust -- and hence 'arbitrary' --, and thus not in consonance with Articles 6 and 14 of the Political Covenant (ICCPR) and Article 2(c) of the Race Convention.[92]

More recently, the Inter-American Commission on Human Rights found the U.S. in violation of international law for the 1992 execution of William Andrews in Utah. Despite evidence of racial discrimination on the part of the jury at Andrews's trial in the form of a note found saying, "Hang the Niggers," the Utah court declined to hold an investigatory hearing and proceeded with the trial and death sentencing. U.S. courts upheld the sentence. The Commission's ruling advised the U.S. to pay adequate compensation to Mr. Andrews' next of kin for this injustice.[93]

The official U.S. response to this criticism has been denial, despite an extensive array of conclusive studies pointing to racial discrimination in the death penalty. In a recent overview of research on the subject of race and the death penalty in the U.S.

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90. *Id*. at Art. 1(1) (emphasis added).
91. G.A. Res. 2106 A (XX) (Dec. 21, 1965), at Art. 5 (emphasis added).
92. International Commission of Jurists, note 63, at 68, § vi.

published in the Cornell Law Review, researchers found relevant race data in 29 of the death penalty states. In 90% (26/29) of these states, there was evidence of race-of-victim disparities (i.e., under otherwise similar circumstances, a defendant was more likely to receive a death sentence if the victim was white than if the victim was black).[94] These results were consistent with the conclusion of a 1990 General Accounting Office review finding similar patterns of racial bias across the country in the death penalty.[95] Such persistent and pervasive reports should invoke remedial action, but almost nothing has been done.

The U.S. Supreme Court held in 1987 that to establish a federal constitutional violation, discrimination must be proven on an individual case basis, not with statistical patterns of bias.[96] But the Court said that legislative bodies could provide statutory remedies relying on statistical evidence. However, the U.S. Congress has failed to pass such legislation, which would allow broad challenges to the racially discriminatory application of the death penalty. The U.S.'s ratification of the Race Convention, as well as the ICCPR and the Torture Convention, along with the requirement that the U.S. regularly report about its compliance, presents other parties to the treaties the chance to raise questions about race and the death penalty in the appropriate forum.

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93. Inter-American Commission on Human Rights, Report No. 57/96 (1998).
94. D. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell Law Rev. 1638, 1661 (1998).
95. U.S. Gen. Acct. Ofc., *Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities* (1990). Another recent study found that nearly 98% of the country's district attorneys responsible for the decision to seek the death penalty are white. Only 1% are black. See J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 Cornell Law Rev. 1811 (1998).
96. See McCleskey v. Kemp, 481 U.S. 271 (1987).

Time on Death Row -- Degrading Treatment

The typical U.S. death row inmate spends nine years in a 6 by 9 foot isolated cell, with little chance for exercise, visitors, or contact with other human beings, and uncertain of when his death sentence will be carried out. Such physical and psychological mistreatment has been likened to torture.[97]

A series of decisions in international courts has found such prolonged confinement on death row to be cruel and inhuman punishment. One of the leading cases in this vein was decided by the European Court of Human Rights, involving what has come to be called "the death row phenomenon," that is, the additional suffering inflicted through years of often solitary confinement under a sentence of death.

In the case of Jens Soering, a German national who committed murder in Virginia and then fled to England, the European Court, which was considering his extradition appeal, held that his extradition to the U.S. would be a breach of Article 3 of the European Convention on Human Rights forbidding inhuman and degrading treatment. Despite the fact that some of the delay on death row might be due to the defendant's own appeals, such treatment was deemed unacceptable:

> However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many

97. See R. Hanley, "Judge Orders Death Penalty with a Five-Year Deadline," N.Y. Times, May 8, 1999, at A17 (judge describing time on death row as "a cruelly whimsical cat toying with a mouse.").

> years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.[98]

Soering was eventually returned to the U.S. after Virginia agreed not to seek the death penalty. The European Court's ruling on extradition was based on other factors in his case, as well as the death row phenomenon. Hence, it was not clear if extensive confinement under threat of execution alone was enough to render a death sentence a human rights' violation. In a subsequent case, *Pratt and Morgan,* involving Jamaican citizens, a British court ruled that it was.

Earl Pratt and Ivan Morgan were arrested for the crime of murder in Jamaica in 1977 and sentenced to death two years later. After a lengthy period of incarceration on death row and appeals to various courts, they were finally granted relief in 1993 by the Judicial Committee of the Privy Council, a British court with final jurisdiction for 16 countries of the British Commonwealth. The Privy Council held that the prolonged detention on death row constituted cruel, inhuman and degrading treatment, in violation of Jamaica's Constitution. The death sentences were commuted to life.[99]

The decision of the Privy Council in *Pratt and Morgan* held that confinement for longer than five years on death row is inhuman punishment and reduced the death sentences to life. Hundreds of prisoners in many of the countries subject to the Privy Council were affected.[100]

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98. Soering v. United Kingdom and Germany, 11 EHRR 439 (European Ct. of Human Rts, Series A, Vol. 161, July 7, 1989).
99. Pratt et al. v. Attorney General for Jamaica et al. , 4 All E.R. 769 (Privy Council, 1993).
100. See H. Mills, "Death Row Prisoners Escape the Gallows," The Independent, Nov. 3, 1993, at 6.

Time on Death Row in U.S. Courts

The issue of extremely long and torturous time on death row as being a cruel and unusual punishment was presented to the U.S. Supreme Court in a case from Texas. Clarence Lackey had been on death row for 17 years when he petitioned the Supreme Court to decide whether such an extensive and deprived confinement, only partly due to his own appeals, constituted cruel and unusual punishment. The Court declined to take the case,[101] but two Justices wrote separately that Lackey had raised an important and undecided issue.

Justice Stevens recalled that the reinstatement of the death penalty in 1976 rested on its serving two principal societal purposes: retribution and deterrence. "It is arguable," Stevens wrote, "that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death."[102]

Similarly, Justice Breyer, in dissenting from the Supreme Court's refusal to hear the case of William Elledge from Florida, said Elledge's argument that 23 years under sentence of death is unusual and "especially cruel" was worth considering.[103] Breyer also noted the importance of the Supreme Court's addressing this question because of international concerns.[104]

On a state level, some judges have taken corrective action in light of the lengthy time inmates have spent on death row. The Florida Supreme Court recently struck down a death sentence because of the 12-year delay in holding an evidentiary hearing

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101. Lackey v. Texas, No. 94-8262 (U.S. March 27, 1995).
102. *Id*. at 1 (Stephens, J., mem. respecting denial of cert.)
103. Elledge v. Florida, 1998 WL 440561 (U.S. Fla.) (Breyer, J., dissenting from a denial of cert.).

for Ronnie Jones.[105] Judge Charles Wells wrote: "I cannot accept any excuse or have any tolerance for the state placing a person on death row and allowing a person to linger there for the period of time, or even near the period of time, that has occurred in this case."[106]

In New Jersey, a judge sentenced a man to death, provided that the execution is carried out in 5 years. The judge called the typical death penalty process "unacceptably cruel."[107]

The U.S. tried to make sure that it could sidestep this issue on an international level by filing a specific reservation to the Torture Convention:

> The United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, *including any constitutional period of confinement prior to the imposition of the death penalty*.[108]

Although this reservation seems to preclude reliance on the Torture Convention, at least until the Supreme Court first finds the practice to be unconstitutional under U.S. law, it is important to reflect on the lessons of *Atkins v. Virginia*. There, international opinion contributed to a new evaluation of the evolving standards of decency that allowed the Court to bar the execution of the mentally retarded.[109] So, too, the international standards on extended confinement on death row could affect the Court's willingness to take, and favorably decide, this issue.

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104. *Id*.
105. Reuters, June 17, 1999.
106. Jones v. State, 24 Fla. Law W. S 290 (Fla. June 17, 1999) (Wells, J., concurring).
107. See Hanley, note 97.
108. *Torture Convention*, note 89, U.S. Reservation I(4) (emphasis added).

Conclusion

The U.S. is already a party to a number of fundamental human rights treaties that impact capital punishment. To some extent, the U.S. has isolated itself from the most direct effects of these treaties through reservations or by invoking domestic law. But the U.S. is committed to the underlying human rights principles of these treaties and these instruments can serve as a starting point for reforming and restricting the death penalty from a human rights perspective.

The issue of innocence has particular ramifications for the U.S. death penalty. The impact of over 100 people who faced execution walking free has raised moral, legal, and constitutional questions in the U.S. It also provides an opening for those who approach the death penalty from a human rights perspective: every country committed to the preservation of human rights will want to avoid any unnecessary measures which threaten innocent life.

While that ultimate question is being settled, there is ample room for reform and restrictions on the death penalty. Recent U.S. Supreme Court decisions have demonstrated an openness to the opinion of other nations in evaluating the evolving standards of decency that will ultimately determine the boundaries of acceptable punishment. Within this framework, many perspectives should be welcome.

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[109]. See notes 36-46, above, and accompanying text.