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## Reflections on When "We, the People" Kill, 34 J. Marshall L. Rev. 713 (2001)

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# COMMENTARY

## REFLECTIONS ON WHEN “WE, THE PEOPLE” KILL

MICHAEL P. SENG\*

### INTRODUCTION

The death penalty continues to be under debate. In fact, the debate occupied most of the twentieth century.<sup>1</sup> Now that we have moved into the twenty-first century, one would hope that the matter could be put to rest so that deliberation can take place on more constructive topics, such as how to prevent crime, how to reconstruct our prison system so that it is not a breeding place for professional law-breakers, how best to rehabilitate prisoners, and finally how to eliminate the blighted conditions which produce so many of our criminals.

The reasons given for the death penalty—deterrence and retribution—or against the death penalty—the possibility of error, unequal application, and that it violates contemporary world standards and is inhumane—have generally not persuaded partisans on either side. Indeed, it would appear that reason has been abandoned in the death penalty debate and emotions and passion have been substituted in its place.

### I. ARGUMENTS IN SUPPORT OF CAPITAL PUNISHMENT: DETERRENCE AND RETRIBUTION

Deterrence, while often cited as a justification in earlier debates, has now been universally repudiated as a justification for

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1. In a famous debate that occurred in 1924 between Judge Alfred J. Talley of New York and Clarence Darrow, Judge Talley argued that the death penalty could be justified because it is a deterrent to those who would commit crime and to vindicate justice. Clarence Darrow argued against capital punishment. He disputed that it was a deterrent to crime, and he argued that it was reserved for the poor and the weak, that true guilt is difficult, if not impossible, for the justice system to determine, and that the death penalty cheapens life rather than vindicates justice. *See generally* CLARENCE DARROW ON CAPITAL PUNISHMENT (Chicago Historical Bookworks 1991) (1924) (containing the transcripts from Darrow's debate with Judge Alfred J. Talley and Darrow's closing argument in the Loeb-Leopold murder trial).

the death penalty. No widely accepted statistics or studies have shown that the death penalty deters crime, and rarely is deterrence trotted out as a reason for this most drastic of all remedies for criminal conduct.

Today most proponents of the death penalty base their opinion either explicitly or implicitly on retribution. To what extent the State should assume the role of God is questionable under any definition of the police power. The states may pass criminal statutes under their general police powers to protect the public welfare.<sup>2</sup> The federal government may pass laws to further any of the ends enumerated in the Constitution, and it may impose punishments for the violation of those laws to insure compliance.<sup>3</sup> But if the penalty does not rationally further the enforcement of the law, it is questionable that a state or the federal government can independently assume the divine power to redeem society by removing evil and restoring the balance that existed before the crime was committed.

Indeed, the imposition of death may well hamper attempts by the accused to make atonement. An example is that of Bill Witherspoon, who was convicted of murder and sentenced to death for the murder of a Chicago police officer.<sup>4</sup> After countless stays of execution, the United States Supreme Court eventually overturned Witherspoon's sentence<sup>5</sup> and the Illinois Supreme Court resentenced him to life imprisonment. During his detention on death row, Witherspoon counseled countless young men who were imprisoned in the Cook County Jail. Many of these young men testified at Witherspoon's parole hearing to the profound effect he had on their lives. After Witherspoon was eventually paroled to Detroit, Michigan, he continued to work with ex-offenders to deter them from the type of life he had led. Witherspoon's actions did not serve as satisfaction to the victim's family and may or may not have atoned for his crime. But if he indeed influenced even a few young persons to abandon a life of crime and to become positive members of society, his life served a purpose. Who, then, can state definitively whether society would have benefited more from his execution than it did from his

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2. The classic exposition on the police powers of the states is *Nebbia v. New York*, 291 U.S. 502 (1934).

3. The classic exposition on the powers of the federal government is *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

4. *Witherspoon v. Illinois*, 391 U.S. 510, 512 (1971).

5. *Id.* at 523. The Court held that the states could not exclude jurors who might not impose the death penalty so that the jury would lean towards death. *Id.* at 529. However, this decision was later undercut, if not effectively overturned, by the United States Supreme Court in 1985, when the Court ruled that jurors whose beliefs would "substantially impair" their ability to vote for death could be excluded. *Wainwright v. Witt*, 469 U.S. 412, 429 (1985).

remaining alive?

Nor does retribution aid the victim or the victim's family. While some families of murder victims claim that the death sentence of the perpetrator brings closure, many experts dispute this assertion.<sup>6</sup>

## II. ARGUMENTS IN OPPOSITION TO CAPITAL PUNISHMENT

### A. *Mistake and Caprice*

The most common arguments advanced against the death penalty are the possibility of a wrongful conviction for a capital crime as well as the discriminatory application of capital punishment against the large number of low-income and minority persons accused and convicted of capital crimes. Many supporters of the death penalty appear to be unmoved by even the most compelling evidence that mistake and caprice are essential attributes of the machinery of death. Professor Charles Black, in his essay, *Capital Punishment: The Inevitability of Caprice and Mistake*, written in 1974, persuasively argued that mistake is inevitable and that no standards can be devised that will prevent the arbitrary imposition of the death penalty.<sup>7</sup> Indeed, it was the presence of arbitrariness that influenced the United States Supreme Court in 1972 in *Furman v. Georgia*<sup>8</sup> to suspend the imposition of capital punishment under existing statutes. According to the three swing Justices, capital punishment as then administered lodged too much discretion in juries and judges. However, unlike Professor Black, the majority of the Justices in 1976 decided that the system could be fixed and upheld new statutes passed by many states that attempted to curtail the unbridled discretion of judges and juries in imposing the penalty of death.<sup>9</sup>

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6. ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH?: CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 197-212 (2000). See generally HELEN PREJEAN, C.S.J., DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993).

7. See generally CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974).

8. 408 U.S. 238 (1972). Two Justices, Brennan and Marshall, argued that no matter how administered the death penalty constituted "cruel and unusual punishment" under the Eighth Amendment. *Id.* at 375.

9. *Gregg v. Georgia*, 428 U.S. 153 (1976). Justice Blackmun voted to uphold the death penalty; however, in one of his last acts before retiring from the Supreme Court, Justice Blackmun conceded that there was no way that the death penalty could be administered fairly and that it should be found unconstitutional. *Callins v. Collins*, 510 U.S. 1141, 1146 n.2 (1994) (Blackmun, J., dissenting). Blackmun declared, "From this day forward, I no longer shall tinker with the machinery of death." *Id.* at 1145. Today, unlike in society at large, there is no consistent voice on the United States Supreme

A more conservative Supreme Court continued to shield the death penalty from attack during the remaining quarter of the twentieth century. Executions resumed again in 1983 with the execution of Gary Gilmore in Utah. In 1987, the Supreme Court, in *McCleskey v. Kemp*, rejected an attack based on virtually unchallenged statistics that the death penalty was more likely to be imposed in Georgia if the murder victim was black rather than white.<sup>10</sup> The Court held that a defendant could not argue that his sentence was disproportionate simply because other defendants did not receive the same penalty.<sup>11</sup>

By the century's end, Texas, under Governor, and later President, George W. Bush, led the way in administering death. Texas executed forty prisoners in 2000, alone.<sup>12</sup> Nonetheless, many people have questioned the fairness of the administration of capital punishment. Too many mistaken convictions have come to light, particularly because of new DNA testing. In 2000, Governor George Ryan of Illinois called a moratorium on the imposition of capital punishment in that state until the machinery of death could be fixed. It is questionable, however, whether new procedures can remove the doubts about the validity of the death sentence and the caprice under which it is meted out and administered.<sup>13</sup>

*Bush v. Gore*<sup>14</sup> supports the inferential argument that capital

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Court to oppose "the machinery of death."

10. *McCleskey v. Kemp*, 481 U.S. 279, 279-280 (1987).

11. *Id.* at 282.

12. A report issued by the Texas Defender Service reports that the Texas death system is deeply flawed. See generally A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY (Oct. 16, 2000), at <http://www.texasdefender.org/study/index.html> (providing an index to the various chapters of the study). It cites to cases where prosecutors deliberately presented false or misleading evidence or used "scientific evidence" of dubious reliability. See *id.* (discussing convictions by "junk science"), at <http://www.texasdefender.org/study/chapter3.html>. The report cited data that revealed patterns of disparity based on the race or sex of the victim. See *id.* (analogizing the disproportionate imposition of the death penalty on minorities to lynching), at <http://www.texasdefender.org/study/chapter4.html>. The report also criticized Texas for executing persons who were mentally retarded and for failing to provide the accused with sufficient legal representation or meaningful appellate review. See *id.* at <http://www.texasdefender.org/study/chapter5.html>.

13. Concerning Illinois imposition of a moratorium on capital punishment, see generally GOVERNOR RYAN DECLARES MORATORIUM ON EXECUTIONS, WILL APPOINT COMMISSION TO REVIEW CAPITAL PUNISHMENT SYSTEM, Jan. 31, 2000 (official press release), available at <http://www.state.il.us/gov/press/00/Jan/morat.html>; Wendy Cole, *Death Takes a Holiday, Illinois Halts Executions While Reviewing Mistakes*, TIME, Feb. 14, 2000, available at <http://www.time.com/time/magazine/articles/0,3266,38774,00.html>. For an excellent discussion of the way the death penalty is presently administered, see LIFTON & MITCHELL, *supra* note 6, at 42-69.

14. 121 S.Ct. 525 (2000). The Supreme Court obviously cannot limit the

punishment cannot withstand an equal protection challenge. Although *Bush* involved voting rights in a presidential election, the reasoning, based on the Equal Protection clause, is equally applicable to a challenge on the fairness of the administration of capital punishment. The question before the Supreme Court was whether a state court must ensure that, at a minimum, the rudimentary requirements of equal treatment and fundamental fairness are satisfied when it has the power to assure uniformity through a statewide remedy.<sup>15</sup> In *Bush*, the Florida Supreme Court ordered a recount of votes with no safeguards that the votes would be counted the same in different counties. Although the Supreme Court acknowledged that methods for counting votes are normally left to the state, it nonetheless held that the Equal Protection Clause of the Fourteenth Amendment gives the federal courts the power to intervene if the rights of voters are left to arbitrary and disparate treatment by the state.<sup>16</sup>

While the Fourteenth Amendment does not specifically protect the right to vote, the right to life is specifically listed in the Fourteenth Amendment.<sup>17</sup> Certainly, if a state or its courts cannot arbitrarily dilute or deny a person's right to vote because of the Equal Protection clause, then human life must also be given equal protection. *Furman v. Georgia*<sup>18</sup> and *Gregg v. Georgia*<sup>19</sup> addressed the discretion exercised by judges and juries, but they did not address the discretion of prosecutors. In most states, prosecutorial discretion is virtually unbridled on the question of who to charge for a crime, what crime to charge, and what penalty to request. This exercise of discretion can result in wide disparities between whether accused persons in different jurisdictions in the same state are forced to defend their lives in capital cases.<sup>20</sup> In addition, defense services vary significantly depending upon the jurisdiction where the defendant is charged. Ultimately, state supreme courts must decide whether a defendant was properly charged, properly found guilty, and properly sentenced. The failure of state supreme courts to enunciate "specific standards" to guide the discretion of

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precedential value of its decision in *Bush* by stating that the Court was only talking about the limited facts of that case. The Court's discussion of the Equal Protection Clause is clearly premised on principles applicable to equal protection arguments generally.

15. *Id.* at 529.

16. *Id.* at 532-33.

17. The Fourteenth Amendment guarantees that no "State shall deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV.

18. 408 U.S. 238 (1972).

19. 428 U.S. 153 (1976).

20. See LIFTON & MITCHELL, *supra* note 6, at 107-25 (describing the wide discrepancies in charging a defendant for a capital crime based on prosecutorial discretion).

prosecutors and to also guide the trial judge and their own review in these cases makes who is put to death a matter subject to caprice.<sup>21</sup>

After the moratorium on death announced by Governor Ryan of Illinois, the Illinois Supreme Court instituted some reforms. On January 22, 2001, the Court proposed minimum standards for defense attorneys and prosecutors who handle death cases,<sup>22</sup> the establishment of a Capital Litigation Bar, special training for judges assigned to death cases, standards relating to the disclosure of DNA evidence, discovery rules for sentencing hearings, and revised standards of ethics for prosecutors.<sup>23</sup> These rules should be very helpful in assisting defendants in capital cases to secure competent counsel and in preventing some mistaken convictions. However, the rules still do not address important questions, especially concerning the discretion exercised by prosecutors in seeking the death penalty and in negotiating plea agreements.

When the federal government reinstated the death penalty in 1988, the United States Justice Department instituted a policy that required United States Attorneys in the federal districts across the country to submit to the Attorney General for review and approval in any case where the United States Attorney wished to seek the death penalty. Beginning in 1995, the Justice Department instituted what is commonly known as the death penalty "protocol." United States Attorneys were required to submit all capital-eligible offenses, whether or not the United States Attorney intended to seek the death penalty in that case, to

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21. Prosecutors may be protected by separation of powers in the exercise of their discretion over whether to bring charges, against whom to bring charges, and what charges to bring. See *Manduley v. Superior Court*, 104 Cal. Rptr. 2d 140, 143 (Cal. App. 2001) (invalidating, despite the general rule, a special California proposition that allowed a prosecutor to determine, in his discretion, what sentencing scheme a court may impose on a juvenile if the charges are found true). However, separation of powers does not isolate prosecutors from a charge that they have discriminated in violation of equal protection. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (holding that claimant must show that federal prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose); *Baker v. Carr*, 369 U.S. 186, 226 (1962) (holding that the Equal Protection Clause allows courts to find a constitutional violation when the discrimination reflects no policy, but is simply an arbitrary and capricious action).

22. ILL. RULES OF PROF'L RESPONSIBILITY Rule 3.8 (concerning the special responsibilities of a prosecutor), available at [http://www.illinoisbar.org/CourtRules/Article8/rule3\\_8.html](http://www.illinoisbar.org/CourtRules/Article8/rule3_8.html).

23. See Steve Mills, *Bar Raised for Capital Case Trials*, CHI. TRIB., January 23, 2001, §1, at 1. Mills notes that the proposed changes include the following rules: Ill. S.Ct. R. 43 (Seminars on Capital Cases); Ill. S.Ct. R. 411 (Applicability of Discovery Rules); Ill. S.Ct. R. 412 (Disclosure to Accused); Ill. S.Ct. R. 416 (Procedures in Capital Cases); Ill. S.Ct. R. 417 (DNA Evidence); and Ill. S.Ct. Rules 701 & 714 (Capital Litigation Trial Bar).

a committee of senior Department attorneys, known as the Attorney General's Review Committee on Capital Cases, which made an independent recommendation to the Attorney General. Department policy specifically provided that bias based on characteristics such as an individual's race/ethnicity must play no role in the decision to recommend the death penalty. Despite these procedures, a report issued by the Justice Department on September 12, 2000, found stark racial and geographic disparities in the cases recommended for capital punishment.<sup>24</sup>

*Bush v. Gore* thus offers sound justification for dismantling the machinery of death. Rules and regulations promulgated by courts (as done by the Illinois Supreme Court), by legislatures (as done in many states immediately after the Supreme Court's decision in *Furman v. Georgia*), or by prosecutors (as done by the United States Department of Justice) can cure some of the mistakes made in the administration of death, but they are still only window dressing and do not reach the fundamental injustices and inequalities inherent in the system. As previously noted, proponents of the death penalty frequently base their position not so much on logic and law as on visceral reaction. One cannot assume that arguments that the death penalty cannot be fairly administered will be any more persuasive to them now than they were in the 1970s. Nonetheless, the number of persons bothered and outraged by the possibility that innocent persons on death row will be executed appears to be increasing. Therefore, arguments based on mistake and caprice should not be abandoned and will inevitably provoke a turnabout in the law.

### B. International Opinion

Nearly every civilized country of the world has abolished the death penalty. China and the United States are the notable exceptions. Although Article Six of the International Covenant on Political and Civil Rights allows signature states to impose the death penalty, it affirms the right to life and provides that the death penalty shall not be arbitrarily imposed.<sup>25</sup> The Council of

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24. See generally THE FEDERAL DEATH PENALTY SYSTEM—A STATISTICAL SURVEY (1988-2000), available at [http://www.usdoj.gov/dag/pubdoc/\\_dp\\_survey\\_final.pdf](http://www.usdoj.gov/dag/pubdoc/_dp_survey_final.pdf).

25. See Int'l Covenant on Political and Civil Rights, Dec. 16, 1966, Art. 6 (providing that the "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age"), available at [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm). Nonetheless, the United States Supreme Court has held that the United States Constitution permits a person under the age of eighteen at the time the offense was committed to be executed. *Sanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding that capital punishment for juvenile offenders is not cruel and unusual punishment). *But see Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (prohibiting the execution of a minor who was fifteen years old when he committed the

Europe and the Organization of American States require ratifying states to abolish the death penalty.<sup>26</sup> Moreover, the United Nations has also come out against capital punishment.<sup>27</sup>

Representative of the nations that have abolished the death penalty through their courts is the Ukraine.<sup>28</sup> The Ukraine has had a particularly troubled history and was the scene of countless slaughters and executions during the Stalin era.<sup>29</sup> Although Ukraine has not been a world leader in protecting human rights in the past, in 1999, a number of Deputies and Department Heads filed an action with the Ukraine Constitutional Court to test the validity of provisions of the Criminal Code of Ukraine. The Code was adopted in 1960 and effected in 1961, and it provided for the death penalty for certain enumerated crimes.

The constitutional challenge was based on the fact that the right to life in the Constitution of Ukraine was absolute, even though the Constitution itself was silent to the application (or non-application) of the death penalty. The Constitutional Court looked at the circumstances of the adoption of the Constitution and held:

Taking somebody's life by the state, as the result of enforcement of the death penalty as a type of punishment, even within the provision stated by law, is the annulment of the inalienable right of the person to life which is inconsistent with the Constitution of Ukraine.<sup>30</sup>

The Court also took into consideration that judicial error is always possible in a death case and incapable of correction once the sentence is executed along with the defendant. The Court further noted that the world's—and its own country's—experience showed that the death penalty was not an effective deterrence to crime.<sup>31</sup> The Court concluded:

As Ukraine is a social democratic and law-governed state (Article 1

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offense).

26. See generally European Convention on Human Rights, Apr. 28, 1983, Protocol 6 (concerning the abolition of the death penalty), available at <http://conventions.coe.int/treaty/en/Treaties/Html/114.htm>; Organization of American States Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, Resolution 1042, available at <http://www.cidh.oas.org/Básicos/Basic%20Documents/enbas6.htm>.

27. Report of the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders, U.N. Doc. A/CONF.87/14/Rev.1 (1981); Second Optional Protocol Aimed at the Abolition of the Death Penalty (1990) G.A. Res. 44/128, available at <http://www.un.org/documents/ga/res/44/a44r128.htm>.

28. On Constitutional Application of the 51 People's Deputies (Death Penalty Case), No. 1-33/99 (Constitutional Court of the Ukr. 1999) [hereinafter *Death Penalty Case*].

29. See PAUL R. MAGOCSI, A HISTORY OF UKRAINE 567-71 (1996) (discussing the Ukraine in the Soviet state).

30. *Death Penalty Case*, supra note 28.

31. *Id.*

of the Constitution of Ukraine), in which life and health, honor and dignity, immunity and security of the person are recognized as the highest social value (Article 3 of the Constitution of Ukraine), the death penalty as a type of punishment should be considered as inconsistent with the stated provisions of the Constitution of Ukraine.<sup>32</sup>

The Court also found that the death penalty violated Article Twenty-Eight of the Ukrainian Constitution, which was patterned after the European Convention of Human Rights. Article Three of the Convention provides that "nobody shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>33</sup> Thus, the Constitutional Court ultimately held that imposing the death penalty would thus be inconsistent with Ukraine's joining the Council of Europe.<sup>34</sup>

In 1776, when the United States sought its independence from England, the drafters of the Declaration of Independence appealed to the "opinions of Mankind."<sup>35</sup> The United States has led the world in many areas of the battle for the recognition of human rights. The Bill of Rights to the United States Constitution was the first attempt to put the rights of mankind together in a charter that was legally enforceable by the Courts. The United States was a leader in codifying the laws of war in the nineteenth century. In two world wars, the United States shed blood for the proclaimed goals of freedom and democracy. The United States was a leader in prosecuting Nazi and Japanese war criminals after World War II. It is widely accepted that the Supreme Court's outlawing of racial segregation beginning in *Brown v. Board of Education*<sup>36</sup> gave the United States credibility during the Cold War to enlist Third World nations in the fight against Communism and for Democracy. "A decent respect to the opinions of mankind"<sup>37</sup> also dictates that the United States should follow the international trend and dismantle its machinery of death.<sup>38</sup>

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32. *Id.*

33. UKR. CONST., art. III, available at <http://www.brama.com/uagov/conste.html>.

34. *Death Penalty Case*, *supra* note 28.

35. DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

36. See *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954) (overruling the "separate but equal" doctrine).

37. See generally Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215 (1992); James C.N. Paul, *The Human Right to Development: Its Meaning and Importance*, 25 J. MARSHALL L. REV. 235 (1992); Abdullahi Ahmed An-Na'Im, *Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent Regimes*, 25 J. MARSHALL L. REV. 267 (1992).

38. Justices on the United States Supreme Court differ in their approach to looking to international practices to interpret provisions of the United States Constitution. In *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988), Justice

### C. Ethical Concerns

Abolishing the machinery of death would eliminate many of the ethical questions that accompany the legal questions concerning the status of capital punishment. What is the responsibility of each of us—judge, juror, prosecutor, governor, warden, prison guard, and citizen, whether in favor of or against the death penalty—when someone is wrongly executed? How does the state get the right to kill if the People, either individually or collectively, do not possess the right to kill? Can one delegate one's guilt to another by washing one's hands of the whole affair with death? Are defense lawyers, even those opposed to the death penalty, giving the enforcement of death respectability by providing a defense to those on death row? On the other hand, can we leave persons accused of capital crimes without competent counsel? How can we reconcile our commitment to equal justice when we see that minorities and other disadvantaged individuals that society has neglected are among those most frequently put to death?

None of these are questions that have easy answers, especially if one concedes that the death penalty, either in principle or as administered, is unfair. The Germans have not solved the issue of guilt and responsibility for crimes committed during the Nazi era.<sup>39</sup> Nor have we resolved the issue of guilt and

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Stevens, joined by Justices Brennan, Marshall, and Blackmun stated:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.

*Id.* Justice Stevens further noted that the Court does recognize “the relevance of the views of the international community in determining whether a punishment is cruel and unusual.” *Id.* at 280 n.31. However, in *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989), Justice Scalia spoke for a majority of the Court and refused to look beyond the standards held by “modern American society as a whole”:

We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant. While “[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores, but text permitting, in our Constitution as well,” . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

*Id.* at 370 n.1.

39. See, e.g., DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996); INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (1991).

responsibility for slavery in the United States.<sup>40</sup> (However, one need not even equate capital punishment with the Nazi horrors or with slavery to see the problem.) Perhaps it is better to avoid the evil and wash our hands of it once and for all, rather than confront these concerns. Most clearly, the problem will not go away simply because we choose not to confront it.

### III. MEANS OF ABOLITION

A number of avenues are open to accomplish the abolition of the death penalty. The most likely avenue is through legislation. A number of states have abolished death as a penalty for ordinary criminal acts. Between 1972 and 1988, the federal government did not have legislation authorizing the death penalty. The problem with relying exclusively on legislation is obvious. With fifty-one different jurisdictions in the United States, the hope of accomplishing a uniform prohibition will be particularly difficult. This is particularly true in states like Texas where the machinery of death is a matter of collective identity and pride.

Another problem with legislation is that legislation is easy to undo. American public opinion on the subject of death can be very fickle. Americans are offended when it is disclosed that innocent people are on death row, such as when persons who have been sentenced to death are shown by DNA evidence to be unconnected to the crime. On the other hand, if a mass murderer is captured or a tragedy like the Oklahoma City bombing occurs, the first reaction of even the most humane persons is generally in favor of resurrecting the death penalty. It is certainly more expedient for politicians to advocate for stricter use of the death penalty than to come up with real solutions to the problems posed by crime.

A solution could be to draft death penalty legislation that only applies to mass murders or particularly heinous crimes, but such an answer raises all the problems that arose after states attempted to draft legislation to meet the concerns of *Furman v. Georgia*.<sup>41</sup> Our constitutional experience with free speech and other fundamental rights demonstrates that sometimes the public must be protected from itself when passions are aroused.

Thus, a federal constitutional standard is desirable. This can be achieved in two ways: through a Supreme Court opinion declaring that the death penalty cannot be administered consistently with due process and the Eight Amendment's prohibition against "cruel and inhuman punishment;"<sup>42</sup> or through a constitutional amendment. Actually, the present Supreme Court

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40. See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

41. 428 U.S. 238 (1972).

42. U.S. CONST. amend. VIII.

is ideally situated to accomplish the task of declaring capital punishment unconstitutional once and for all time. The Court is activist and not necessarily wedded to any rigid doctrine of "original intent." It is also pro-government in criminal cases. Its reputation is such that critics could not easily contend that the Court is soft on crime if it outlawed capital punishment. Irrefutable facts coupled with existing precedent in the area of equal justice could be used to structure an opinion that would settle the issue.

A constitutional amendment would require politicians to put away the easy rhetoric they use so successfully at election time to scare the public into believing that greater harshness will solve the crime problem. A constitutional amendment would require a massive effort at public education. Whether this could be accomplished without polarizing the nation is questionable. The money and emotion that is expended whenever gun control legislation is proposed indicates that a debate over a constitutional amendment to bar capital punishment could be equally divisive.

The President could negotiate and the Senate could ratify a treaty or one of the international agreements that proscribe the machinery of death. A treaty would supersede state laws and any laws passed by Congress prior to its ratification.<sup>43</sup> The President would take a political risk in leading a charge to bring the United States into conformity with the rest of the world, but it could and should be done.

The death penalty cannot be fairly administered. It conflicts with general civilized standards of behavior, and in most, if not all, cases, it is inhumane. Politicians, educators, religious leaders, and judges must aid the public in setting aside many of the prejudices and myths that support capital punishment and work for its abolition. Abolition would allow us to start looking at the challenge imposed by crime realistically and to come up with real solutions.<sup>44</sup>

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43. See *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam) (holding that a treaty that allowed an alien accused of a crime to contact his embassy could not be invoked because the petitioner procedurally defaulted his claim).

44. Mandatory life sentences without parole are often proposed as a substitute for the death penalty. This substitute serves the objective of protecting the public from recidivist criminals and, when juries are informed of this option, they often impose it rather than death. LIFTON & MITCHELL, *supra* note 6, at 154-56. It is indicative of the lag in thinking about criminology in the United States that little debate is raised about the legality and morality of the life without parole option.

The issue was seriously debated in Germany and resulted in a major decision by the German Constitutional Court. *Life Imprisonment Case*, 45 BVerfGE 187 (1997), reprinted in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 306-11 (1997). A criminal conviction for a drug-related murder resulted in a mandatory sentence of life imprisonment. *Id.* at 312. The German Constitutional Court

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noted that when the legality of the death penalty was debated in Germany in the 1960s, advocates of capital punishment argued that life imprisonment was a more cruel and inhuman punishment than the death penalty. The Court noted that the German Constitution protects and respects human dignity and that current attitudes were important in understanding the content, function, and effect of the basic rights in the Constitution. *Id.* at 308. The Court stated that:

Every punishment must justly relate to the severity of the offense and the guilt of the offender. Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.

*Id.* Consistent with this constitutional requirement, the Court continued:

A sentence of life imprisonment must be supplemented, as is constitutionally required, by meaningful treatment of the prisoner. Regarding those prisoners under life sentences, prisons also have the duty to strive toward their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and the destructive changes in personality that accompany imprisonment.

*Id.* The Court further commented that the state must do all in its power to facilitate the prisoner's reentry into society. Nonetheless, the Court held that life imprisonment for a murder of wanton cruelty is not senseless or disproportionate, but the judge must retain "some discretion in imposing a penalty that conforms to the constitutional principle of proportionality." *Id.* at 310.

Later, in the *War Criminal Case*, 72 BVerfGE 105 (1986), the Constitutional Court held that a sentencing court should not place "too heavy an emphasis on the gravity of the crime as opposed to the personality, state of mind, and age of the offender," and that "every offender sentenced to life imprisonment, whatever the nature of his crime, must be allowed to live in the realistic hope of regaining his freedom." *Id.* at 312.

