



1999

The Imposition Of The Death Penalty In The United States Of America: Does It Comply With International Norms?

Beverly McQueary Smith
Touro Law Center, bmcqueary-smith@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [International Law Commons](#)

Recommended Citation

McQueary Smith, Beverly (1999) "The Imposition Of The Death Penalty In The United States Of America: Does It Comply With International Norms?," *Touro Law Review*. Vol. 15 : No. 2 , Article 13.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol15/iss2/13>

This The Saliency of Race: Race in America is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

THE IMPOSITION OF THE DEATH PENALTY IN THE UNITED STATES OF AMERICA: DOES IT COMPLY WITH INTERNATIONAL NORMS?

*Beverly McQueary Smith**

A Black youth under arrest is violently assaulted when a plunger is repeatedly inserted into his anus at the police station where he is being held in Brooklyn, New York. He accuses the police officers who arrested him and not some fellow inmates. His name is Abner Louima.¹

* Professor of Law at Touro College Jacob D. Fuchsberg Law Center, Huntington, New York. B.A., 1970, Jersey City State College; M.A., 1974 Rutgers-The State University; J.D., 1977, New York University; LL.M., 1988, Harvard; President of the National Bar Association, 1998-99. She serves, or has served, on several boards: the Jersey City Medical Center, the Minority Environmental Lawyers Association, Consumers Union—the publishers of *Consumers Reports*, and since 1988, she has been a member of the Board of Governors of the National Bar Association (NBA). She chairs the Southern Africa Environmental Project and the newly formed National Campaign on Black Health. As President of the NBA, she represents some 18,000 black lawyers, judges, legal scholars and law students throughout the United States of America, and world. The author thanks the organizers of the International Association of Official Human Rights Agencies for the invitation to participate in their 50th Anniversary program. The author states that while the views expressed herein are her personal views and not necessarily those of the National Bar Association, (which will hold its 74th Annual Convention in Philadelphia, Pennsylvania, from July 24 to July 31, 1999), the NBA's opposition to the imposition of the death penalty in the United States remains constant because of its racist application.

¹ In August of 1997, Abner Louima was arrested by New York police officer Justin Volpe outside of a nightclub on Flatbush Avenue, in Brooklyn, New York. See John Kifner, *Nurse Says Some Hospital Supervisors Tried To Cover Up Facts in Police Beating Case*, N.Y. TIMES, Aug. 26, 1997, at B3. On the way to the station house, four officers allegedly beat Mr. Louima and a second Haitian immigrant. *Id.* at B3. Upon arrival at the 70th Precinct station, Officer Volpe, with the aid of two other police offers, allegedly took Mr. Louima into the bathroom and forced a wooden stick into his rectum and then into his mouth, resulting in a torn rectum, a lacerated bladder and broken teeth. See Dan Berry, *2d Police Officer Charged in Attack on Arrested Man*, N.Y. TIMES, Aug. 16, 1997, S1, at 1; Merrill Goozner, *NYC Cut in Crime*

In Pittsburgh, Pennsylvania, a Black youth guilty of Driving While Black (DWB), is stopped by the local police while driving a luxury car owned by a relative who is a professional athlete. At the end of the day, he lies brutally beaten and dead. The policemen did it.²

In New York City, Black people file numerous complaints against the police for using excessive force or shooting unarmed, alleged perpetrators in the back.³ In New Jersey, my son, who used to own a BMW and who worked the night shift at Merck Pharmaceuticals in Rahway, was repeatedly stopped by the state police as he drove the New Jersey highways en route to his home near Princeton, New Jersey. He, too, was guilty of DWB. These events characterize a society in which people countenance the infringement of the civil and, indeed human, rights of its citizens.

This paper will not address these instances of police misconduct, rather it will address very briefly the use of the ultimate sanction—execution—by a state. To set the context, the

Has Brutish Side, CHI. TRIB., Aug. 16, 1997, at 1. Mr. Louima was left in a precinct holding cell for more than 90 minutes before Emergency Medical Service arrived in response to a “low priority call” from the precinct involving “lacerations.” See Kifner, *Nurse Says Some Hospital Supervisors Tried To Cover Up Facts*, *supra*, at B3. After a 90-minute wait for a police escort, the ambulance left for the hospital. *Id.* Upon arrival at the hospital, officers told the medical staff that Mr. Louima had been injured in a homosexual act at a gay bar. See John Kifner, *Investigators Looking at New Allegations in Brutality Case*, N.Y. TIMES, Aug. 21, 1997, at B1. There are a total of 19 officers who have been disciplined in connection with the incident. *Id.* Officer Volpe has been criminally charged in the incident with sexual abuse and assault. *Id.* A second officer, who helped Volpe hold down the victim, was also criminally charged, as well as two other officers involved in the incident. See Barry, *2d Police Officer Charged in Attack on Arrested Man*, *supra*, S1, at 1.

² See Karen MacPherson, *Bill Targets Routine Police Stops of Black Drivers*, PITTSBURGH POST-GAZETTE, March 25, 1998, at A8.

³ See Gary Pierre-Pierre, *Complaints against Polise Rise, A Report Says*, N.Y. TIMES, October 28, 1998, at A4. See also AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT (June 1996).

first thing that will be discussed is prosecutorial discretion.⁴ Take two instances. The local police station receives a telephone call from a hysterical woman who cries that her husband is beating her. The police arrive, and because Mr. X is a black man, they take him into custody and arrest him. When Mr. X is booked, the police and prosecutors decide whether Mr. X will be charged with disturbing the peace or some species of assault and battery. In light of the fact that Mr. X has few resources and no lawyers among his social set, he remains behind bars for the weekend and until the judge provides him with a court-appointed lawyer for his first appearance. At that time, Mr. X's attorney can advise him to either plead guilty or not. His attorney will seek Mr. X's release on bail or not.

In another scenario, Mr. Y who graduated from law school ten years ago, has a similar dispute with his wife. She also calls the police. Now, when the police arrive they find a white man living in a middle or upper-class neighborhood. They may also recognize Mr. Y from court appearances in which he was representing someone. Again the police have a choice. They can elect to arrest Mr. Y or not. They may simply tell Mr. Y to leave the house and go and cool off, or to check into a hotel for the night. If, indeed, Mr. Y is taken to the police station, he may not be booked. That is, he may not be photographed and fingerprinted; he may be simply held for questioning. Even if he is charged with an offense, Mr. Y can immediately call former classmates or colleagues, members of the bar, to get him out on bail. Mr. Y's experience with his local law enforcement officials

⁴ *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The court stated that the defendant, Hayes, was properly chargeable under a recidivist statute, since he had been convicted of two previous felonies. *Id.* at 363. In our legal system, if the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. *Id.* See also Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1133 (1996) (stating that official acts of prosecutors unquestionably constitute state action and that prosecutors have relatively unfettered discretion in individual cases in deciding whom to prosecute and for what offense).

remains dissimilar to Mr. X's. Mr. X, may end up with a criminal record and Mr. Y will plea bargain to such an extent he will end up with no record of his altercation with his wife. The police play an important and crucial role in determining who gets arrested, charged and released on bail or not. They ultimately decide whether you earn three strikes and you are out.⁵

Similarly, prosecutors decide whether you get charged with a felony or a misdemeanor or whether they will prosecute you at all. They too exercise their discretion to determine whether you earn three strikes or not. Judges decide whether to grant a request for bail or not, whether a first-time offender will be diverted from the criminal justice system into a counseling or education program or whether a person will receive a prison sentence.

We come to the context of a homicide.⁶ Personal rage should not result in one person's killing another. All can see that we have a victim. We ask who did it and did they intend to do it? Our legal system characterizes categories of violations. Manslaughter can be involuntary or voluntary.⁷ Murder is listed according to degrees.⁸ In some jurisdictions, jurors can examine extenuating circumstances in mitigation of the defendant's

⁵ A habitual criminal is defined as a recidivist. A recidivist is a legal category in which criminals convicted of any crime can receive severe penalties ranging up to life imprisonment. BLACKS LAW DICTIONARY 640 (5th ed. 1979). 20 SETON HALL LEGIS. J. 108, (1997). On September 13, 1994, President Clinton signed the federal three strikes bill into law as part of the Violent Crime Control and Law Enforcement Act of 1994. This Act mandates life imprisonment for those who have been convicted of at least two serious violent felonies or any combination of two or more serious violent felonies or drug offenses in violation of the Controlled Substances Act.

⁶ The author notes that she does not condone killing of any kind.

⁷ N.Y. PENAL LAW § 125.20 (McKinney 1997). N.Y. Penal law § 125.20 defines what is manslaughter in the first degree. *Id.* See N.Y. PENAL LAW § 125.15 (McKinney 1997). N.Y. Penal law § 125.15 defines what is manslaughter in the second degree. *Id.*

⁸ N.Y. PENAL LAW § 125.27 (McKinney 1997). N.Y. Penal law § 125.27 defines what is murder in the first degree. *Id.* See also N.Y. PENAL LAW § 125.25 (McKinney 1997). N.Y. Penal law § 125.25 defines what is murder in the second degree. *Id.*

sentence.⁹ So a person who killed someone may serve a short sentence, like the *au pair* in Massachusetts or Amy Grossberg, the college student from the University of Delaware who killed her newborn infant, or the person may be sentenced to death.¹⁰

This paper examines who gets sentenced to death in the United States of America and also reviews some of the international laws, which establish the norms to which the United States of America should adhere. It concludes that as a world leader in the propagation of democratic ideals and the cause of human rights and justice, the United States falls woefully short of the moral imperative found in our Judeo-Christian ethic, in our United

⁹ *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *McCleskey*, a black defendant was convicted in Georgia state court of the murder of a white police officer. *Id.* at 283. In the sentencing phase, the jury found two aggravating factors to warrant the sentence of death, that it was committed during another felony, and that it was committed against a police officer on duty. *Id.* at 284-85. The Georgia Supreme Court affirmed his conviction and sentence. *Id.* at 285. He filed a writ of *habeas corpus* in Federal District Court, and cited a study prepared by Professor David C. Baldus and other scholars. *Id.* The study demonstrated a disparity in the application of the death penalty "based on the race of the victim, and, to a lesser extent, the race of the defendant." *Id.* at 286. The Court held that the study he provided did not prove that he was discriminated against personally on the basis of race, and therefore, he had no standing to argue that the Fourteenth Amendment's Equal Protection Clause had been violated. *Id.* at 292-93. The Court also stated that since *Gregg v. Georgia*, 428 U.S. 153 (1976) death penalty statutes have been limited so as to bifurcate the jury, require the jury to find at least one aggravating circumstance before imposing the death penalty, and allow for the defendant to introduce any mitigating circumstances to persuade the jury not to impose it. *McCleskey*, 481 U.S. at 302 (citing *Gregg*, 428 U.S. at 163-64).

¹⁰ *Commonwealth v. Louise Woodward*, 427 Mass. 659, 694 N.E.2d 1277 (1998). The author refers to the well-publicized case in which Louise Woodward, an *au pair*, who was living with the Eappen family and taking care of their baby, Matthew, was found guilty of second degree murder in the trial surrounding the baby's death. After the decision, the Superior Court by a decision handed down by Hiller B. Zobel, J., denied the defendant's motion for postjudgment relief but reduced the jury's verdict to involuntary manslaughter, vacated defendant's life sentence and sentenced defendant to time served. Both parties appealed and the Supreme Court held that the decision below with respect to the judge's discretion in reducing the verdict to involuntary manslaughter was valid. *See also State v. Grossberg*, 1998 WL 473030 (Del. Super.).

States Constitution and in the body of international law to which we ostensibly subscribe. This paper urges all citizens to support the cause of human and civil rights by seeking the repeal of the capital punishment in every state which permits it and lobbying vigorously for the commutation of sentences for all inmates on death row in prisons throughout the United States of America.¹¹

Whenever capital punishment has been in effect in the United States of America, states execute a disproportionately high number of Black and brown defendants.¹² According to an April 1998 report produced by the NAACP Legal Defense and Educational Fund, we have executed 451 people since the reinstatement of the death penalty in 1976.¹³ In 1995, 56 human beings were executed; in 1996, 45 people were killed under color of state law, and in 1997, 74 people were killed by state executioners.¹⁴ Of those executed as of April 1998, three were females and 448 were males.¹⁵ Approximately 55% of the defendants were white, 36.81% of the defendants were Black, 5.32% were Latino/a, 1.11% were Native American and .44% were Asian.¹⁶ Who were their victims? The white defendants

¹¹ The following is a list of jurisdictions with Capital Punishment statutes (* denotes jurisdictions that have statutes but no sentences imposed as of November 18, 1998): Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nebraska, Nevada, New Hampshire*, New Jersey, New Mexico, New York*, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming*, U.S. Government, and U.S. Military.

¹² Richard C. Dieter, *Twenty Years of Capital Punishment: A Re-evaluation* (visited Nov. 18, 1998) <<http://www.essential.org/dpic/dpic.r01.html#sxn4>> .

¹³ NAACP Legal Defense and Education Fund, DEATH ROW U.S.A. REPORTER CURRENT SERVICE at 1143 (1998).

¹⁴ *Id.*

¹⁵ *Id.* See also *Women and the Death Penalty* (visited Nov. 18, 1998) <<http://www.essential.org/dpic/womenstats.html>> . Three women have been executed since 1976 and they were: Velma Barfield-North Carolina November 2, 1984, Karla Faye Tucker-Texas February 3, 1998, Judy Buenoano-Florida March 30, 1998. *Id.*

¹⁶ See NAACP, *supra* note 13, at 1143.

killed 355 white victims and eight Black victims.¹⁷ Black defendants killed 133 white people and 66 black victims.¹⁸ What that means is that a Black defendant who killed a white victim was sentenced to death 21.77% of the time.¹⁹ Blacks in America are a numerical minority but are sentenced to death at a greater rate than our white counterparts.²⁰ In Connecticut, five people sit on death row.²¹ Three are Black and two are white.²² In New Jersey, my home state, seven blacks and eight whites await execution.²³ In short, the record shows that law enforcement officials impose the ultimate sanction, the death penalty, on Black people more readily than they do on white people.²⁴

PART TWO

Imposition of the death penalty flies in the face of our Judeo-Christian tenet which states, "thou shalt not kill."²⁵ It also violates the United States Constitutional prohibition found in the Eighth Amendment against cruel and unusual punishment.²⁶ This

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See supra* note 10.

²¹ *See State by State Death Penalty Information: Connecticut* (visited Nov. 18, 1998) <<http://www.essential.org/dpic/connecticut.html>>. This is as of July 1, 1998. Connecticut has not executed anyone since 1960. *Id.*

²² *Id.*

²³ *See State by State Death Penalty Information: New Jersey* (visited Nov. 18, 1998) <<http://www.essential.org/dpic/newjersey.html>>. This is as of July 1, 1998. New Jersey has not executed anyone since 1963. *Id.* One female and fourteen males sit on death row. *Id.*

²⁴ *See supra* note 11.

²⁵ *Exodus* 20:13 (New King James); *Deuteronomy* 5:17 (New King James). *See also* Mary Margaret Penrose, *Assisted Suicide: A Tough Pill To Swallow*, 20 PEPP. L. REV. 689, 696 (1993). The Sixth Commandment decrees that "Thou shall not kill." *Id.*

²⁶ U.S. CONST. amend. VIII states in pertinent part: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. *Id.* *See Furman v. Georgia*, 408 U.S. 238 (1972). The United States Supreme Court granted certiorari to review the affirmation of the Supreme Court of Georgia which imposed the death penalty on defendants

paper highlights the International Covenant on Civil and Political Rights, which the United States Senate ratified on June 8, 1992.²⁷ Under our Constitution, a treaty, once it is ratified, becomes part of the supreme law of the land.²⁸ It sits side by side with federal statutes and to the extent state law is inconsistent therewith, it overrules or trumps state law.²⁹ In the United States, each state determines whether a conviction for a particular offense will result in the imposition of the death penalty.³⁰ Thus, defendants who commit exactly the same offense could receive widely disparate sentences depending on whether the killing occurred in a jurisdiction which allows for capital punishment or not.³¹

convicted of murder and rape and reviewed the judgment of the Court of Criminal Appeals of Texas which affirmed the imposition of the death penalty on a defendant convicted of rape. *Id.* The United States Supreme Court held that the imposition and carrying out of the death penalty in cases before the court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Id.*; N.Y.CONST. art. I, § 5. The Cruel and Unusual Punishment Clause provides that "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor witnesses . . . detained. *Id.*

²⁷ 138 CONG. REC. S4781 (daily ed. April 2, 1992).

²⁸ U.S. CONST. art. VI. cl.2. The Supremacy Clause states in pertinent part:

The Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

Id.

²⁹ *See id.*

³⁰ *Gregg v. Georgia*, 428 U.S. 153 (1976) (stating that the essence of federalism was to let a state legislature determine its own penalty, and therefore the death penalty . . . was not unconstitutional). *Id.* at 186-87. *See also Graham v. Collins*, 506 U.S. 461, 468 (1993) (stating that States must control the discretion allotted to judges and juries to ensure the death sentences are not given out randomly).

³¹ *See id.* *See also supra* note 9.

Thus, ratification of a treaty can have paramount significance. It holds a signatory's conduct up for international scrutiny.³² The International Covenant of Civil and Political Rights was adopted by the United Nations in 1966, and by 1992 some 99 nations had signed and ratified it.³³ President Jimmy Carter signed the Covenant in 1978 and forwarded it to the Senate for consent to ratification.³⁴ Hearings on ratification were commenced by the Senate Foreign Relations Committee in 1980 but no action was taken.³⁵ In August 1991, President Bush urged the Senate to consent to ratify the Covenant.³⁶ The Senate Foreign Relations Committee held hearings on November 21, 1991.³⁷ The Association of the Bar for the City of New York, promptly submitted a statement asking the Senate to ratify the Covenant and its Optional Protocol that establishes a procedure for hearing individual complaints of violations of the Covenant.³⁸ The

³² Connie de la Vega, et al, *Can A United States Treaty Reservation Provide A Sanctuary For The Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735 (1998) (discussing that the United States reservation not to include in its adoption of the International Covenant on Civil and Political Rights the prohibition of the juvenile death penalty and how the United States is now under international scrutiny which will continue until the United States conforms to international norms on the issue).

³³ U.S. Senate Comm. On Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. REP. No. 102-23, at 1 (1992), reprinted in 31 I.L.M. 645 (1992). See also 138 CONG. REC. S4781-01 (daily ed. April 1992).

³⁴ Michael H. Posner et al, *Symposium: The Ratification of the International Covenant on Civil and Political Rights; Adding Teeth To United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DePAUL L. REV. 1209, 1212 (1993).

³⁵ *Id.*

³⁶ *Id.*

³⁷ 138 CONG. REC. S4781-01 (daily ed. April 1992) (statement by Hon. Claiborne Pell that because of domestic and international events at the end of 1979 this prevented the Foreign Relations Committee from moving to a vote on the covenant after hearings were completed).

³⁸ John Quigley, *Symposium: The Ratification of the International Covenant on Civil and Political Rights; The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DePAUL L. REV. 1287, 1288-91 (1993).

Association also asked the Senate not to adopt the reservations,³⁹ declarations⁴⁰ or understandings⁴¹ that would detract from the significance of the ratification.⁴² On June 8, 1992, the United States delivered to the United Nations its ratification of the covenant with five reservations, five understandings, four declarations and one proviso.⁴³ Under international law, a state may make a reservation provided that the treaty permits it and that the reservation is not incompatible with the objects and purposes of the treaty.⁴⁴ Thus, the reservation by the United States is arguably impermissible. Similarly under the Vienna Convention of the Law of Treaties such a reservation is incompatible with the objects and purposes of the Covenant.⁴⁵

³⁹ Reservations are the means by which nations alter or exclude treaty terms to individually limit the obligation or effect of the treaty. *See* Catherine Logan Piper, *Reservations To Multilateral Treaties: The Goal of Universality*, 71 IOWA L. REV. 295, 296 (1985).

⁴⁰ Declarations are used primarily to articulate a signatory's purpose, position, or expectation, concerning the treaty in question. *See id.* at 299.

⁴¹ Understandings are used to set forth a state's interpretation or explanation of a treaty provision. *See id.* at 298.

⁴² *See* Quigley, *supra* note 38, at 1291.

⁴³ *See* Senate Comm. On Foreign Relations, International Covenant on Civil and Political Rights, S EXEC. REP. No. 23, 102d Cong., 2d Sess. 6-10 (1992). *See also* Edward F. Sherman, Jr., *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing The Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69 (1994).

⁴⁴ Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should The Constitution Be An Obstacle To Human Rights*, 23 HASTINGS CONST. L.Q. 727, 819 (1996) (stating that countries are not expected to make reservations to international treaties that, in essence, allow them to escape their treaty obligations and particularly should not make reservations that would defeat the object and purpose of the treaty).

⁴⁵ *See generally* May 23, 1969, art. 53, 1155 U.N.T.S. 332, 8 I.L.M. 679. *See also* Jean Allain, *Maritime Wrecks: Where the Lex Ferenda of Underwater Cultural Heritage Collides With the Lex Lata of the Law of the Sea Convention*, 38 VA. J. INT'L L. 747, 775 n.74 (1998) (stating that under the Vienna Convention of the Law of Treaties, "suspension of the operation of a . . . treaty is allowable so long as the suspension in question is not prohibited by the treaty and does not effect the enjoyment by other parties of their rights under the treaty or the performance of their obligations and is not incompatible with the object and purpose of the treaty.").

The net result means that when most of the countries in the world abhor and prohibit capital punishment against juvenile offenders, who are under the age of 18 years of age at the time of committing the offense, the United States allows it.⁴⁶ Additionally, while many people of the world and the other signatories to the Covenant prohibit executions of pregnant women, the United States reserves for itself the right to kill them.⁴⁷ Amnesty International reported in 1991, that more than seventy countries that retain the death penalty by law have abolished it for people under the age of eighteen at the time of the crime.⁴⁸ Indeed, the United States remains alone among the industrialized nations in applying the death penalty to juvenile

⁴⁶ See Posner, *supra* note 34, at 1215. The article states that under existing Supreme Court precedent, criminal offenders may be executed for crimes committed at the age of 16 or older, leaving the United States as only one in a handful of countries that continues to allow this practice. See also *Stanford v. Kentucky*, 492 U.S. 321 (1978); Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311 (1993) (discussing the inconsistency between international and U.S. policies on executing offenders aged 18 or under).

⁴⁷ 138 CONG. REC. S4781, at S4783 (daily ed. April 1992) (statement made by Mr. Mitchell describing the reservations made by the United States). See Posner, *supra* note 34, at 1215. The article states that the Senate's ratification did not include a reservation from the Covenant's prohibition of the execution of pregnant women, however, sixteen states in the United States still have laws governing capital punishment which would allow such executions. *Id.* But see William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is The United States Still a Party?*, 21 BROOK. L. REV. 277, 283 (1995) (declaring that it is common practice for a state, when making a reservation, to give specific references to the domestic legislation that the state party intends to shelter from the treaty). The United States excluded pregnant women from the death penalty in its ratification and adoption of the Covenant. *Id.*

⁴⁸ AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY AND JUVENILE OFFENDERS 78 (October 1991). See also Edward F. Sherman, Jr., *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX INT'L L.J. 69, 72-73 & n.16 (1994) (discussing the discrepancies between the United States and international law regarding the issue of the death penalty for those under the age of 18).

offenders between the ages of sixteen and eighteen at the time of their crimes.⁴⁹

In December 1989, the United Nations General Assembly adopted the Second Optional Protocol to the Covenant.⁵⁰ That protocol obligates each State Party to “take all necessary measures to abolish the death penalty within its jurisdiction,” and acknowledges a worldwide effort to abolish capital punishment for all purposes.⁵¹ In 1983, Protocol 6 to the European Convention on Human Rights was adopted which abolished the death penalty in times of peace.⁵²

Our United States Senators argued that the reservations, declarations and understandings were necessary so that the treaty’s application would not be inconsistent with federal and state law.⁵³ They determined that the legislative process should

⁴⁹ See *supra* note 42. See also Victor L. Streib, *The Juvenile Death Penalty in the United States and Worldwide*, 4 LOY. POVERTY L.J. 173 (1998) (stating that despite a world of widely varying approaches to crime and capital punishment almost all jurisdictions have agreed to put aside the death penalty for juvenile offenders). A long list of countries around the world have prohibited the juvenile death penalty. *Id.* The Convention on the Rights of the Child states that “Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offenses committed by persons below the age of eighteen. *Id.* Despite these clear international standards the United States is still the world leader for imposing the juvenile death penalty to offenders. *Id.* at 174.

⁵⁰ See Connie de la Vega, *supra* note 32, at 753. See also Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1331 (1993).

⁵¹ *Id.* The author states that the International Covenant on Civil and Political Rights forbids the death penalty and wishes to abolish it for all persons and all purposes. *Id.*

⁵² See Nanda, *supra* note 46, at 1331. The article states that in 1983 Protocol 6 to the European Convention on Human Rights abolished the death penalty in times of peace. *Id.* The Sixth Optional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, opened for signature Apr. 28, 1983, entered into force Mar. 1, 1985, Europ. T.S. No. 114, *reprinted in* 22 I.L.M. 538 (1983).

⁵³ M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL

thread its way through the hollowed halls of Congress so that United States law would be in conformity with international norms. Thus, our credibility as a world power which seeks to force China and Nigeria to protect the human and civil rights of their citizens is seriously imperiled. No valid justification exists for the United States' stance. The International Covenant on Civil and Political Rights has been hailed as one of the most important international instruments of our generation, a modern Magna Carta for more than one hundred nations that have adopted it.⁵⁴ The United States of America loses its standing as a world leader supportive of human and civil rights because of its refusal to ratify this treaty without reservation.

The Covenant and its Optional Protocol set up a procedure for individuals to file complaints against signatories.⁵⁵ On the internet recently, there was an excerpt from the UN Human Rights Commission Report on Police Killings in the United States. The document is entitled, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to the United States of America."⁵⁶ Included are a few excerpts here.

The preliminary recommendations to the Government of the United States include the following: (a) All alleged violations of the right to life should be investigated, police officials responsible brought to justice and compensation provided to the victims.

L. REV. 1169, 1175 (1993) (stating that Senators Jesse Helms, Orrin Hatch, and Richard Lugar agreed that the reservations to the Convention were valid, because they believe no treaty to be supreme to the Constitution or the domestic laws of the United States).

⁵⁴ Louis Shultz, Jr., *The United States' Detention of Refugees: Evidence of the Senate's Flawed Ratification of the International Covenant on Civil and Political Rights*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 641, 677 (1997).

⁵⁵ Laurence R. Helfer et al, *Toward A Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 279 (1997).

⁵⁶ Barce Waly Ndiaye, *Extrajudicial, Summary, or Arbitrary Executions: Report by the Special Rapporteur* (visited Nov. 18, 1998) <<http://www.unhcr.ch/html/menu4/chrrep/98chr68.htm>>. Submitted pursuant to Commission on Human Rights Resolution 1997/61, United Nations Economic and Social Council Commission.

Further, measures should be taken to prevent recurrence of these violations.⁵⁷ (b) Patterns of use of lethal force should be systematically investigated by the Justice Department.⁵⁸ (c) Training on international standards on law enforcement and human rights should be included in police academies.⁵⁹ This is particularly relevant because the United States has taken a leading role in training police forces in other countries.⁶⁰ (d) Independent organs, outside the police departments, should be put in place to investigate all allegations of the right to life promptly and impartially, in accordance with principle 9 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.⁶¹ (e) To avoid conflicts of interest with the local district attorney's office, special prosecutors should be appointed more frequently to conduct investigations into allegations of violations of the right to life, to identify perpetrators and bring them to justice.⁶²

CONCLUSION

You and the organizations in which you are apart must act. Black people in the United States are dying or languishing on death rows in disproportionately high numbers. Capital punishment must be repealed. Amnesty must be given to death row inmates. The United States must become the moral standard bearer and fulfill its grand promises. We citizens must do our part to make it so.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*