



1-1-1998

Will Religious Teachings and International Law End Capital Punishment Symposium: Thoughts on Death Penalty Issues 25 Years after Furman v. Georgia.

Robert F. Drinan

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Environmental Law Commons](#), [Health Law and Policy Commons](#), [Immigration Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Military, War, and Peace Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Robert F. Drinan, *Will Religious Teachings and International Law End Capital Punishment Symposium: Thoughts on Death Penalty Issues 25 Years after Furman v. Georgia.*, 29 ST. MARY'S L.J. (1998). Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol29/iss4/3>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

WILL RELIGIOUS TEACHINGS AND INTERNATIONAL LAW END CAPITAL PUNISHMENT?

ROBERT F. DRINAN, S.J.*

I. Introduction.....	957
II. The New Opposition of the Catholic Church to the Death Penalty.....	960
III. Customary International Law and the Death Penalty.....	964
IV. Conclusions and Hopes	966

I. INTRODUCTION

If the number of deaths involved in a problem constituted the measure of its importance the death penalty would receive a very low rank.

In 1996 there were 5,139 executions worldwide. At least 4,367 of these occurred in China. Nations with over 100 executions included the Ukraine (167), Russia (140) and Iran (110).

The United States had 56 executions in 1996 and 74 in 1997.

More children die each day from starvation than are executed in a year. In addition, some 20,000 persons are slain each year by handguns in the United States and hundreds of thousands die around the world each year from preventable causes.

The difference, of course, between these immense tragedies is that the government itself decides who dies and who lives among those charged with a serious crime. It is this assertion of a nation's claimed right to kill murderers that has made the death penalty a profound problem.

Could it be that a world where only 5,139 executions were carried out last year (some 90 percent of which occurred in China) is on its way to a global ban on the use of the death penalty? And if this is so why is the United States stubbornly resisting the trend toward the elimination of capital punishment? I have discussed and dialogued about the death penalty for many years with lawyers, politicians, and prosecutors. Their differing attitudes are not easy to catalogue or categorize. Those attitudes derive from something very profound in the psychological outlook of these observers of the human scene. What is evermore baffling and frus-

* Professor, Georgetown University Law Center.

trating is the fact that these observers often cannot articulate the reasons for their varying views. They cannot really explain why, on balance, they think that their weighing of the arguments for and against the death penalty justifies their ultimate position.

The fact that over 70 percent of the American people favor the death penalty is another unsolvable part of the mystery surrounding capital punishment. Why do almost three-fourths of the people of America favor a punishment which has been de jure or de facto virtually outlawed in all nations except China? How can Americans favor a penalty which has been outlawed in every European nation as well as any other country with whom the United States compares itself?

The baffling resistance of the American people to the worldwide growing ban on the death penalty was discussed in *The Economist* on February 14, 1998. In a review of four new books on capital punishment *The Economist*, generally a conservative weekly, concluded that "it is high time that Americans, no matter how strongly they feel about retribution, start to assess the death penalty not with their hearts, but with their heads."¹

The article that led to this conclusion reviewed the mountainous research data which shows the bias and discrimination that seem to be endemic to the application of the death penalty and the possibility of error. The article entitled "Cruel and Evermore Unusual" notes that only four nations—Iran, Pakistan, Saudi Arabia and Yemen join America in executing prisoners who were under 18 years of age at the time of their crime.

The state of Texas is filled with its own anomalies. In 1997, Texas executed 37 people—more than all the other states combined. On February 3, 1998, Texas executed Karla Faye Tucker, age 38, despite her religious conversion in jail and the support of important authorities in the Christian Coalition. The fact that this woman was the first female to be executed since the Civil War in Texas did not seem to bother the authorities or the people of Texas. The capricious nature of the circumstances of this execution—like so many others—did not deter the taking of Ms. Tucker's life.

Nor did appeals from Pope John Paul II or the European Parliament in Strasbourg. One has to ask if it is sheer revenge that prompts officials to demand the ultimate sentence. Or is it retribution based on some theory of a life for a life? Both the proponents and opponents of the death penalty have to admit that there are deeper hidden irrational elements that are appearing in the manner in which capital punishment is carried out in the United States.

1. *Cruel and Ever More Unusual*, THE ECONOMIST (Feb. 14, 1998).

The traditional arguments against the death penalty are repeated again and again by Amnesty International and a wide variety of non-governmental organizations. But they fall on deaf ears. For over 30 years approval of the death penalty in America has continued to rise among almost every social class or category. One partial explanation is the veneration which citizens have for the rulings of the United States Supreme Court. When the Supreme Court in 1976 gave its blessing to the use of the death penalty it was almost as if the American public could no longer even hear any arguments against capital punishment. One has to wonder of course what American public opinion would be today if the Supreme Court had never altered the very critical view of the death penalty which it issued in 1972.

One has to think that there is an element of racism in America's abiding approval of the death penalty. It has been reported again and again that between 1930 and 1989, 2,115 of the 3,979 persons executed in the United States were black. The United States Supreme Court in the *McCleskey* decision virtually eliminated the possibility of utilizing the racial argument as a basis of setting aside the death penalty.²

The other arguments against the death penalty are familiar and somewhat shop-worn. The number of errors in the use of the death penalty is shocking. The facts in the classic article by Professors Hugo Bedau and Michael Radelet in the *Stanford Law Review* in 1987 have not been seriously challenged; they are collected and supplemented in a book issued in 1992 by these authors.³ In this volume the authors have documented 416 miscarriages of justice in the area of the death penalty from 1900 to 1990.

The execution of innocent defendants has played a part in successful movements to abolish the death penalty in Michigan in 1846 and in England in 1965.

The argument that the death penalty deters crime is another weary strand in the debate over capital punishment. Despite the overwhelming statistics indicating that states and nations without the death penalty do not have more crime, the argument is ignored or dismissed by the 70 percent of Americans who approve of the death penalty.

How then can the American people and politicians be persuaded to join Europe, Latin America, South Africa and scores of other nations that have abolished the death penalty?

There is some reason to think that a call for a moratorium on the application of the death penalty by the House of Delegates of the American Bar Association in February 1997 might influence public opinion. The

2. *McCleskey v. Zant*, 499 U.S. 467 (1991).

3. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *STAN. L. REV.* 21, 23 (1987).

vote of that organization, usually a conservative body, was 280 to 119. The vote of this organization of 370,000 lawyers did not call for a phasing out of the death penalty but only for a moratorium until the several conditions previously mandated by the ABA are fulfilled. These conditions included such elementary requests as competent counsel, adequate due process and the sparing of the lives of juveniles and mentally retarded persons.

But nothing seems to alter the conviction or the fixation of the majority of the American people that the death penalty is necessary, effective and substantially fair.

Americans know or should know that 41 percent of the 3,200 persons on death row are black, even though blacks make up only about 12 percent of the U.S. population. Americans probably do not know, but should learn, that one-third to one-half of the death row inmates who get adequate counsel eventually prevail in post-conviction remedies.

There is solid evidence from public opinion polls that if people understand that convicts can be incarcerated for life with no possibility of parole, then their approval of the death penalty substantially declines.

Although it is not clear what, if any, arguments or statistics will stop capital punishment in America, two relatively new moral forces opposed to the death penalty may be promising—the new and strong opinion of the Catholic Church against the death penalty and the evermore vigorous repudiation of capital punishment by customary international law. Both deserve exploration.

II. THE NEW OPPOSITION OF THE CATHOLIC CHURCH TO THE DEATH PENALTY

Legal, moral and constitutional arguments will continue to be made against the death penalty. But as suggested above, it is not clear that they will be effective in the United States. Arguments based on international law and the United Nations Covenants will also be urged. Again, the obsession of the American people is obsession with fighting crime by favoring harsh penalties may continue to preclude a rational approach to the death penalty. It could be, of course, that the cost of executing a prisoner—up to \$1.2 million by some estimates—could deter the seemingly enduring determination of many people to take the life of those who themselves took a life.

While all arguments in the debate about the supreme penalty seem to be ineffective, there is some reason to think that the articulate and aggressive opposition of American religious bodies to the death penalty may become an effective deterrent. Analogies can be made to the strong religious roots of the abolitionist movement in the years 1800-1860 and in

the anti-Viet Nam movement in America's churches in the 1960s and 1970s.

It is possible to imagine that America's churches and synagogues joined by groups like the American Civil Liberties Union and Amnesty International, could change public opinion in America so that the United States would join the ever increasing number of nations that now refuse to allow their convicts to be executed by being gassed, hanged, shot, electrocuted or injected—the five ways now used by 38 states to kill those on death row.

The near unanimity of the churches in America against the death penalty is impressive. The new and vigorous opposition of the Catholic Church is a recent phenomenon which deserves the closest scrutiny. Indeed it could well be a development of global significance.

But again candor must be expressed about the effectiveness of arguments from religious principles. If Texas is an example, then the recent pronouncements of Catholic leaders have been rejected. On October 20, 1997, the Catholic bishops of Texas enlarged on their previous declarations about the unjust nature of the death penalty. The bishops reiterated the fact that since the reinstatement of the death penalty in 1976, the Catholic bishops, echoing the unanimous sentiment in all parts of the Catholic Church, declared that "capital punishment, along with abortion and euthanasia, is inconsistent with the belief of millions of Texans that all life is sacred."

The bishops lamented the fact that large numbers of Americans, including Catholics, support capital punishment "even in the light of strong arguments of its ineffectiveness, its racially-biased application and its staggering cost, both materially and emotionally."

The bishops mention the other arguments against the death penalty: It does not deter, all of the western democracies have abolished it, and in Texas it costs \$2.3 million on average to prosecute and execute a person as compared to \$400,000 for life imprisonment. The bishops also recall that in 350 capital cases over the past twenty years convicted persons were found not to have committed the crimes for which they were convicted; of those cases 25 persons were executed before their innocence was discovered.

The episcopal announcement concluded by stating that capital punishment "contributes to a climate of violence in our state." Bishop John McCarthy of Austin revealed that his fellow bishops were "appalled" at the rapid rise in executions in Texas.

If the Catholic bishops of Texas are this strong and Texas still leads the nation in the number of executions is there some reason to think that religious voices can deter a practice that has somehow mysteriously attained the approval of a large majority of America's citizens?

Could the strange support of the death penalty in the United States decline if the voice of America's religious leaders were heard? No one can say but the abolitionist movement might have a more convincing argument against the death penalty from the voice of religion than they may now realize. Opposition to the death penalty is not universal among America's religious leaders, but those groups which do not disapprove of it are generally muted in their support. It might also be significant that the Reverend Pat Robertson and many leaders of the fundamentalist religious right opposed the death penalty in the case of Ms. Tucker in Texas. The reasons offered by those advocating clemency for Ms. Tucker seem to suggest that they might well be re-examining their views on capital punishment—at least in the case of those persons on death row who become born again Christians.

Catholic leaders have recently been engaged in a revisitation of the death penalty. Indeed something almost monumental may have occurred in the dramatic recent change in the Catholic Church's attitude towards the death penalty. An important 1997 book entitled *The Death Penalty: An Historic and Theological Survey* by Dr. James J. Megivern, a professor at the University of North Carolina, surveys in 641 pages the centuries-old journey of the Catholic Church with respect to its position on the death penalty. Dr. Megivern has set forth the startling approval of the death penalty by some of the foremost theologians in Christian history. He quotes Origen, Aquinas, Suarez and a wide variety of Catholic authorities who for many centuries approved the death penalty.

The attitude of the Catholic Church towards the death penalty was explained in 1960 in the semi official Vatican journal *La Civiltà Cattolica* by Anthony Messineo, S.J. who contended:

“The Church, from the fathers to St. Thomas Aquinas down to our own day, with unswerving unanimity, taught the legitimacy of capital punishment, and that therefore it could confidently be affirmed that the death penalty was in perfect accord with Christian thought.”

The dramatic transformation of Catholic teaching of the death penalty began after Vatican II. It was, as Dr. Megivern wrote, a “revolutionary repudiation of capital punishment”.⁴ Dr. Megivern writes that there are “few, if any, counterparts where such rapid change . . .” has occurred in the entire history of the Church.⁵

For centuries the Catholic Church fought for the sacred right to life. Its strictures on war were severe. It may have tolerated the taking of life

4. JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* 457 (1997).

5. *Id.*

during the Crusades, but overall, century, after century the church preached the sanctity and inviolability of all human life. Dr. Megivern can offer no definitive answer as to why the church “approved and uncritically blessed” the direct taking of life.⁶ How could this lonely, unlikely exception, the one and only case of allowing direct destruction of human life ever have been able to obtain approval?

Change began with Pope John XXIII and came to at least a partial flowering during Vatican II. In paragraphs 27 and 28 of Vatican II’s “Constitution on the Church in the Modern World” the bishops wrote:

“Everyone must consider his every neighbors without exception as another self, taking into account first of all his life and the means necessary to living it with dignity. . . . In our times, a special obligation binds us to make ourselves the neighbour of every man . . . The teaching of Christ even requires that we forgive injuries, and extends the law of love to include every enemy, according to the command of the New Law.”⁷

These sentiments were developed in 1974 in the first statement of opposition to the death penalty by America’s Catholic bishops. That condemnation has been repeated and made more insistent at regular intervals since 1974. Catholic bishops nationally and locally have spoken out against capital punishment with unanimous vigor and persistence.

These statements echo and amplify the new Catholic catechism authorized by Pope John Paul II. The twenty-seven paragraphs explaining the fifth commandment in the catechism released in the United States in 1994 are prefaced by this stern reminder of the sanctity of all human life:

“Human life is sacred because from its beginning it involves the creative action of God and remains forever in a special relationship with the Creator, who is its sole end. God alone is the lord of life from its beginning until its end: no one can under any circumstance claim for himself the right directly to destroy an innocent human being.”⁸

The catechism does not denounce capital punishment with all the specificity that abolitionists in the world would desire, but it is a total change from the Church’s catechism issued in 1566. After the catechism was promulgated, Pope John Paul II criticized the death penalty with such sharpness that the catechism’s treatment of capital punishment needs to

6. *Id.*

7. PASTORAL CONSTITUTION: ON THE CHURCH IN THE MODERN WORLD—*Gaudium et Spes*, Proclaimed by His Holiness, Pope Paul VI on Dec. 7, 1965, at ¶¶27–28 (visited Sept. 1, 1998) <<http://www.christusrex.org/www1/cdhn/v4.html>.

8. CATECHISM OF THE CATHOLIC CHURCH ¶ 2258, at 544 (citing Congregation for the Doctrine of the Faith, instruction, *Dominum vitae*, intro. 5).

be clarified and amended. The nuances seem not to be important—at least to America's Catholic bishops. Since the United States revived the death penalty in 1976 the Catholic leaders of America have issued a long list of statements rejecting the death penalty.

The Catholic bishops, led by the late Cardinal Joseph Bernardin, use the analogy of the seamless garment to embrace the need to preserve all life by prohibiting abortion, the death penalty and nuclear war.

Dr. Megivern's book is the first that seeks to analyze the amazing change in the teaching of the Catholic Church on capital punishment. The church made the change because it examined the gospels more thoroughly, heard the cry of the world for pity even for murderers and recognized that global law directs that the death penalty is not a deterrent, is not necessary and indeed reduces those who authorize the execution to the same status as the murderers.

Apparently there has been no clear change in the Islamic world comparable to what has happened in Catholic theology. It is noteworthy that in Muslim nations there is at least a *de facto* cessation of the use of the death penalty. It is interesting to speculate whether the extraordinarily large number of executions in China can be traced to the suppression of all religions in that country by the Communists after 1949 when they seized that nation.

The strange case of death threats by Iran against the life of Salmon Rushdie focussed world attention on the dictates of the Islamic law that any Muslim who repudiates his faith must have his life taken away. For a decade Iran has continued this threat based on Rushdie's alleged defection from the faith of his childhood in one of his novels. The world can hardly believe that this vendetta is mandated by any religion or that a modern state feels obliged to carry it out. But the curious if not bizarre case demonstrates that religious dogma has sometimes been used throughout history to justify the death penalty.

III. CUSTOMARY INTERNATIONAL LAW AND THE DEATH PENALTY

As the number of nations opposed to a certain practice increase there is formed what jurists call customary international law. Such a law is binding on all nations even though ways to enforce such a law are rudimentary or nonexistent.

Certain types of torture and cruelty are now outlawed by several human rights covenants as well as decisions by international bodies.

The International Covenant on Civil and Political Rights, ratified by over 100 nations including the United States, prohibits in Article VII not only "torture, inhuman and degrading punishment and treatment" but

also cruel treatment and punishment.⁹ That language, also present in the United Nations Convention Against Torture, a treaty also ratified by the United States, has become consecrated in the law and literature about internationally recognized human rights. The definition of torture is quite clear in international law while the meanings of “cruel” and “inhuman” and “degrading” are evolving

Unfortunately, the United States, while agreeing to ratify the Convention Against Torture, insisted on a specific reservation making it clear that the United States was ratifying the Convention Against Torture but only in so far as its prescriptions do not go beyond the ban on “cruel and unusual” punishment in the eighth amendment. Several nations and jurists scolded the United States for taking such a narrow view of its obligation under the treaty. The reservation, at least theoretically, gives the United States the right to resist any enlargement of terms like cruel, inhuman or degrading. The United States, in other words, has solemnly refused to restrict the use of the death penalty beyond the strictures of eighth amendment—in defiance of its obligation to follow world law. Yet international law is moving beyond the “cruel and unusual” terms included in the eighth amendment in the Bill of Rights as created by the United States in 1791. The European Court of Human Rights and the United Nations Committee on Torture have expanded the terms of cruel, inhuman and degrading to include conduct which, although abhorrent, would pass muster under the traditional jurisprudence associated with the eighth amendment.

Could the language forbidding cruel, inhuman or degrading treatment be eventually expanded to include the indignities and denials of human dignity that are involved in a death sentence? At least one ruling of the European Court of Human Rights has followed that path. In the case of *Soering v. United Kingdom* in 1989 the European Court of Human Rights refused to extradite a citizen of Germany to Virginia where he was wanted on a murder charge involving the possibility of being sentenced to death.¹⁰ The European Court of Human Rights was adamant that the anticipated long-time on death row constituted inhuman and degrading treatment and as a result extradition was denied.¹¹ Eventually, the authorities in Virginia relented and removed the possibility of the sentence of death and the defendant was extradited.

The *Soering* decision is not entirely clear with respect to misgivings of the European Court of Human Rights about the death penalty. It is,

9. International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N. Doc. A/6316, 999 U.N.T.S. (entered into force Mar. 23, 1976).

10. *Soering v. United Kingdom*, 11 Eur. Ct. H.R. Rep. 439 (1989).

11. *See id.*

however, a forerunner of many rulings that may eventually mean that long periods of time on death row and the pain inevitable in an execution amount to a violation of the ban on cruel, inhuman or degrading treatment. There are, to be sure, many debates to be resolved before the death penalty can be said to be contrary to customary international law, but the undeniable trend is in that direction.

On a less grand plateau, it may be that international tribunals will declare that one or more particular kinds of executions violate basic international standards. Presumably, disemboweling as a method of execution would be forbidden, as would crucifixion or a slow death by stoning.

In one decision by the European Court of Human Rights, the *Tyrer* case, it was held that the birching of a boy on the Isle of Man is forbidden by the European Convention on Human Rights because it involved "institutionalized violence" and corporal punishment by a stranger.¹²

A repudiation of cruel, inhuman or degrading treatment or punishment is a very recent development in world law. The development could profoundly influence moral standards and open up entirely new vistas in the way society treats its members.

The emergence in Europe of higher standards for human rights was one of the major factors in the elimination of the death penalty in every nation of Europe. A similar development followed from the American Convention of Human Rights, which also led to the cessation of capital punishment in all of Latin America.

Could the new and adamant opposition of the Catholic Church to the death penalty and the evermore specific adjudication of the ban on cruel, inhuman or dangerous treatment or punishment lead to the phasing out of the death penalty? No one can predict, but it is useful to remind ourselves that, very often, the moral aspirations of one generation become the binding laws of the next generation.

IV. CONCLUSIONS AND HOPES

After reviewing the world scene on the death penalty and assessing the powerful moral forces working to abolish it one has to ask whether these and other great moral forces upgrade the world's morality or just change the nature of the evils in which the human family indulges.

It is depressing to note that the twentieth century was in all probability the bloodiest and most savage century in human history. It witnessed two world wars, the Holocaust, Nagasaki and Hiroshima and millions of people killed in ethnic wars in Africa and the former Yugoslavia. The list

12. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. Rep. 14, 14-17 (1978).

goes on—the countless Chinese killed in the Cultural Revolution and the numberless victims of Stalin’s gulag.

If the human race eliminated the official state killing authorized by the death penalty would there be a somewhat higher standard of public morality that would prompt a more restrained attitude on the part of private actors in dealing with their supposed enemies?

The temptation to kill one’s adversary is one of the most primitive and savage of all the gross temptations which afflict human beings. The desire to make enemies disappear led in the last few decades of the twentieth century to the development of government-sponsored “disappearances” in Latin America and elsewhere. In Argentina alone the official report of the government entitled “Nunca Mas” conceded that 8,000 persons had been “disappeared” by the military junta that controlled that country from 1976 to 1983. The officials who engineered their slaughter appealed to what they portrayed as a moral right of the government to execute those individuals it deemed to be enemies of society.

If the death penalty receded on the world scene as a legitimate punishment for crime would governments be more restrained in the way they view the legitimacy of any death caused by government actors? The question is too amorphous to elicit a very definite answer but the question is worth asking—again and again.

From the dawn of civilization nations have claimed the right to punish and even kill those who opposed the basic objectives of the country. Spies, traitors, military deserters and assassins have throughout history been deemed to be enemies who would be killed in the name of patriotism. If world law forbade the death penalty, would the centuries-old prerogatives claimed by sovereign nations to destroy their enemies be curbed in the face of new international rules and sanctions?

World law since 1945 has made incredible progress in promoting and protecting democratic regimes which are devoted to preserving human rights. The fiftieth anniversary on December 10, 1998, of the adoption of the Universal Declaration of Human Rights of 1948 illustrates the total transformation of the world scene. Some 100 new nations have been liberated by the colonial countries that controlled them for two or three centuries. The number of nations in the United Nations has risen from 48 to 184. Democratic regimes, especially in Latin America, are more numerous than ever before in human history.

The two dozen covenants and declarations on human rights issued by the United Nations and ratified by an ever increasing number of countries have had an impact that is not precisely measurable. Yet the several committees of the United Nations which regularly monitor compliance with United Nations treaties by their signatories will surely have an impact in what Amnesty International calls the “mobilization of shame.”

The sad and incomprehensible factor in the explosion of human rights around the world is the reluctance and the resistance of the United States to join fully in this moral revolution. Ironically, it was the United States that, more than any other nation, authored the United Nations Charter and the Universal Declaration of Human Rights. Unfortunately, the United States has refused to ratify some of the major human rights treaties which have emerged from the unprecedented adoption by the old and new nations of the world of the basic elements of human rights. The resistance by the United States to accede to world law is uniquely visible and dramatic in America's retention of the death penalty in defiance of the decisive change in all of the nations most respected by Americans.

Is this a temporary aberration? Does it resemble America's persistence in retaining slavery long after England in 1833 freed all of the slaves in the British Empire?

Assuming that the death penalty is living on borrowed time in world law will the Congress and the legislatures of the 38 states that allow capital punishment change their attitudes once it is clear that the death penalty violates customary international law? It is unlikely but possible.

The differences between America's law and global law on the death penalty are reflected by the United States. Most states without the death penalty must struggle on a regular basis to prevent the reenactment of capital punishment in these communities.

How can Michigan, Minnesota and Massachusetts continue to resist any attempts to revive the death penalty in those states? What moral traditions or political forces operate in those states that do not prevail in California or New York?

Why, moreover, do southern states lead in the number of executions and persons on death row? Why are Texas, Florida and Georgia the leaders in the number of executions? The different traditions and approaches in these states demonstrate that approval and use of the ultimate punishment is not directed or dictated by rational, intellectual and legal facts but by dark forces steeped in the traditions, psyche and prejudices of various segments of the population.

In the ultimate analysis of what moral forces govern a society it must generally be concluded that law alone is a feeble instrument. Laws will not be enacted or enforced unless there is a moral consensus to support them. Underlying every enforceable law there has to be a clear understanding of its moral objectives and a willingness to accept it.

A law prohibiting the death penalty that was not widely supported could conceivably result in lynchings or murders financed by a mob. The United States, however, despite all of its resistance to world law and its chronic attraction to violence, has an unusually high rate of obedience to

law. Indeed some observers have remarked that law is now about the only binding element that America possesses.

The clear and unequivocal recommendation by national and international religious groups and the ever clearer mandate of customary international law suggests that Americans, who are undeniably adherents to the rule of law, may soon defer to religious leaders and to world law and abandon the death penalty.

Such a change would echo around the world just as the ruling and the rhetoric of *Brown v. Board of Education*¹³ in 1954 shaped the constitutions and laws of scores of newly independent nations which came into existence in the 1950s and 1960s.

All of this is small comfort to the 3,200 persons on death row in America. Their lawyers include in their briefs documented evidence that the law regulating the death penalty is fraught with false assumptions and erroneous conclusions. Some day, hopefully soon, these briefs will come to the attention of a judge or a court, which will enjoin an execution because it violates world law and thereby United States constitutional law. It may be that the United States Supreme Court will deny review and thereby allow that bold decision by a courageous judge to control a federal circuit or a state.

In the interim, religious leaders, academics and activists in the area of human rights, along with every lawyer and law student who nourishes the preciousness of every human being must continue to say that if Cain cannot murder Abel no government can kill a human being however heinous his crime.

13. 347 U.S. 483 (1954).

