A DEATH PENALTY PRIMER: REVIEWING INTERNATIONAL HUMAN RIGHTS DEVELOPMENT & THE ABA RESOLUTION FOR A MORATORIUM ON CAPITAL PUNISHMENT IN ORDER TO INFORM DEBATES IN U.S. STATE LEGISLATURES

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I. THE ILA CONFERENCE

More than half of the world’s nations have either abolished or no longer practice the death penalty.\(^1\) In this coming year, the opportunity for a vast expansion in the number of nations which no longer adhere to the death penalty appears almost certain because of events which occurred in 1997, some of which are detailed here. I was fortunate to be able to bring together a group of outstanding scholars and an outstanding practitioner to a panel on the death penalty\(^2\) at the International Law Weekend '97.\(^3\) The focus of the weekend meeting was on practical applications of public international law in domestic judicial and other proceedings, a topic broad enough to encompass the development of limits on the use of the death penalty in international law, and the application of these developments to United States death penalty practices.

The topic for the ILA panel, Implementing the ABA Resolution Limiting the Death Penalty: Bringing the International Movement to Limit (Or Ban) the Death Penalty Home to the United States, sought to stimulate a recognition away from the parochial attitudes of mainstream America. Those attitudes are frequently found in local state legislatures, where the

1. Fifty nine countries have totally renounced the penalty. (Amnesty lists fifty eight; and Georgia has enacted a new criminal code prohibiting the death penalty); see Amnesty International, The Death Penalty: List of Abolitionist and Retentionist Countries (Mar. 1996), HUGO BEDEAU, THE DEATH PENALTY IN AMERICA 78-Table 6-1 (1997), (listing fifty seven countries). Fifteen countries have abolished the death penalty except for extraordinary crimes. Id. at 80, Table 6-2. Twenty-seven countries with the penalty have suspended all executions and have not had an execution in ten years. Id. at 81 (listing 28 countries).

2. The speakers, all of whom have expertise on the death penalty are: William Schabas, Professor and Chair, Department des sciences, Universite du Quebec a Montreal, Ved P. Nanda, John Evans University Professor and Thompson G. Marsh Professor of Law, University of Denver College of Law; John Quigley, Ohio State University College of Law; and practitioner Ron Tabak, of Skadden, Arps, Slate, Meagher & Flom and Chair of the Death Penalty Committee of the Individual Rights and Responsibilities Section of the American Bar Association. (While I will mention some highlights brought to the panel by the panelists, I will let their works speak for them). My thanks to each of them for adding to my knowledge as well as the knowledge of others about the death penalty. I also wish to thank them for many of the ideas which were gleaned from their talks, and are elaborated here.

3. The annual event of the American Branch of the International Law Association held from November 6-8, 1997, at the House of the Association of the Bar of the City of New York.
death penalty is a highly politicized tool. As Professor Quigley commented, the United States is becoming increasingly isolated from the rest of the world, so much so that other countries are increasingly unwilling to extradite persons to the United States.

What could be a better topic than trying to open up the insular and populist American thought and beliefs often reflected in state legislatures by bringing to local discussions the debates and understandings which are occurring in international public law. Those discussions are increasingly limiting the application of the death penalty, and more generally, increasing calls for moratorium and abolition. The United Nations Human Rights Committee has voiced concerns about the extensive application of the death penalty in the United States. Until the late 1960's, the death penalty had little or no role in American electoral politics. However, that has now changed since there has been both an increase in the politicization of the death penalty and a concomitant decrease in the use of executive clemency. Few Americans realize the harsh direction to which American penal law has committed itself, its interrelatedness to politics or the possible long term effects upon both our democracy and our economy.

One of the darker sides of elected representative democracies is that the elective process often results in failing to foster leadership to broaden opinions, but instead has the opposite effect of causing elected representatives to merely reiterate the unreflected, uneducated, and racist responses of the majority. Thus, there is a tendency in elected

4. See discussion infra, note 10 and accompanying text.
8. Id.
9. A colleague at the University of Uppsala in Sweden once remarked that concern about imprisonment was a mark of a free society, and that when a society locked up a significant percentage of its people it was, by definition, no longer a free society.
10. See MICHAEL TONRY, MALIGN NEGLECT-RACE, CRIME, AND PUNISHMENT IN AMERICA (1995). Tonry points out that the targeting of prisoners for political advantage rose to its current popularity in the United States during the volatile period of extraordinary growth in the prison population since about 1980. See also David Bruck, Keynote Address: Political and Social Misconceptions Fueling the Death Penalty, 13 T.M. COOLEY L. REV. 863, 864 (1996). The death penalty's saturation of political life now extends to how we choose our presidents. [It] became the defining event of the 1988 Presidential campaign, and may have cost the election for the Democratic nominee, Massachusetts Governor Michael Dukakis. By 1992, the next Democratic nominee, learned from Dukakis' mistake. In
democracies to suppress leadership and in the case of the death penalty, to substitute emotional rhetoric for reasoned judgment. A death penalty in which government takes the life of a citizen should be cause for great alarm when political motivation is suspected and the trauma it causes to the community can be viewed as being done for individual political gain.

Of equal concern, as the Title implies, is that the ILA panel sought to focus on the national direction taken by the preeminent lawyer organization in the United States, the American Bar Association, when on February 3, 1997, the House of Delegates of the American Bar Association passed a resolution urging states not to carry out the death penalty in their jurisdictions until the imposition of the death penalty is carried out in a manner which would ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and minimize the risk that innocent persons will be killed.

the middle of the New England primary, Governor Bill Clinton rushed home to Arkansas to preside over the execution of a brain-damaged inmate so impaired that he planned to vote for Mr. Clinton after his execution.

See Bedeau, supra note 1, at 18. "For several years it has been virtually impossible for any candidate for high elective office in the states - governor, attorney general, appellate court judge — to appear hesitant over (much less opposed to) the death penalty." See also, Phoebe Ellsworth & Samuel R. Gross, Hardening of the Attitudes: American's Views on the Death Penalty in THE DEATH PENALTY IN AMERICA 90 (H. Bedeau, ed. 1997).

11. See Robert D. Kaplan, Was Democracy Just a Moment?, THE ATLANTIC MONTHLY, 280, Dec., 1997, at 56, quoting Thomas Paine: "Society is produced by our wants and government by our wickedness." It was the crude and reactionary philosophy of Thomas Hobbes which placed security ahead of liberty in a system of enlightened despotism, from which the Founders drew philosophical sustenance.

12. See David Bruck, supra note 10, at 865.

The depressing part of the [Susan] Smith case was that it did not strike most people as odd, in the face of the terrible catastrophe to that community represented by the deaths of Michael and Alex Smith out at John D. Long lake, that the only response from the criminal justice system was to descend into nine months of costly legal maneuvering and eye gouging in court over whether it would be better to kill this suicidal young woman or let her suffer out her life in prison. In a traumatized community, this melodrama of retribution was just not a very logical way to get about the work of healing. Yet, that is what the legal system had to offer. When the battle was over, all the legal system had to congratulate itself about was that it had managed not to make an almost unimaginably horrible human disaster any worse.

Few Americans appear to have any awareness of the seriousness of the state of American death penalty practice. Not only has that practice been condemned by international bodies as inimicable to current worldwide thought, but that condemnation has now been opened for debate in the national discourse. The American Bar Association has now recommended and endorsed a resolution calling for a moratorium on the death penalty. The accompanying report to that resolution highlights the many serious deficiencies in the application of the death penalty in America and highlights reasons for the call for a nationwide moratorium.\footnote{Report of the American Bar Association Section of Individual Rights and Responsibilities Section of Litigation (Accompanying the Resolution, supra, note 13) [Hereinafter Report].}

This panel sought to promote discourse on how and why evolving limitations on the death penalty are being invoked in the international community, and how these trends might be informative in implementing the American Bar Association’s Resolution calling for a moratorium on the use of the death penalty by states and the federal government in the United States.

II. THE ABA RESOLUTION

A. What it Does

The American Bar Association Resolution adopted in 1997 calls for states “not to carry out the death penalty”\footnote{Resolution, supra note 13, introductory paragraph.} until the jurisdiction has implemented policies and procedures that are consistent with ABA policies. The purpose is to “ensure that death penalty cases are administered fairly and impartially in accordance with due process”\footnote{Id.} and to “minimize the risk that innocent persons may be executed.”\footnote{Id. para. (i).} The policies which are referred to in the resolution include: the ABA Guidelines for the appointment and performance of counsel in Death Penalty cases (adopted Feb. 1989)\footnote{Id.} and Association policies intended to encourage competency of counsel in capital cases. (Adopted Feb. 1979, Feb. 1988, Feb. 1990, and Aug. 1996);\footnote{Id.} to preserve the courts’ authority and responsibility to exercise independent judgment on the merits of constitutional claims in federal \textit{habeas corpus} proceedings as well as in state post-conviction proceedings.
(adopted Aug. 1982, Feb. 1990);20 "Striving to eliminate discrimination in capital sentencing on the basis of race" — of the victim or the defendant (Adopted Aug. 1988, Aug. 1991);21 and "Preventing execution of mentally retarded persons (adopted Feb. 1989)22 and persons who were under the age of 18 at the time of their offenses (adopted Aug. 1983)."23

B. Why it is Necessary

The reasons behind the ABA resolution are not found in some philosophical book, but in the actual practice in the United States. Appointed counsel, including habeas counsel, have often undertaken the tasks without proper training.24 The fault for this lies both with the appointing mechanisms25 and with the gross underfunding that "pervades indigent defense,"26 and with the general reluctance of local experienced counsel to take these cases.27 The results have been, as expected, disastrous. In one case, defense counsel not only presented little mitigating evidence, but also made no objections at all, as he told the jury that the death penalty was appropriate.28 In Ross v. Kemp, the defense counsel was a drug addict dependent on drugs during trial who was later convicted and

20. Id. para. (ii).
22. Id. para. (iv).
23. Id.
24. Id.
26. Id. “[S]ome states simply assign lawyers at random from a general list — a scheme destined to identify attorneys who lack the necessary qualifications and, worse still, regard their assignments as a burden. Other jurisdictions amply ‘contract’ systems, which typically channel indigent defense business to attorneys who offer the lowest bids.”
27. In some rural counties in Texas, an appointed attorney is paid no more than $800.00 for representation in a capital case. Id. at 7. In Virginia, the hourly rate is about $13.00. Id. at 8. In one Alabama case, the attorney was given a total budget of $500.00 which included all the money for investigative and expert services. Id.
sentenced to prison on state and federal drug charges. In Frey v. Fulcomer, defense counsel complied with a state statute limiting mitigating evidence, not knowing that that statute had been declared unconstitutional three years earlier.

Defunding of the regional death penalty centers established by Congress to improve death penalty representation in the federal courts has further increased the urgency of the ABA Resolution. Those regional centers had achieved a success rate of forty percent, indicative of the need for improvement in state court representation in death penalty cases.

In the Anti-Terrorism and Effective Death Penalty Act of 1996, Congress established deadlines for filing federal habeas petitions, by placing limits on federal evidentiary hearings into the facts underlying federal constitutional claims, putting severe restrictions on second or successive habeas claims, and seemingly barring federal courts from determining constitutional violations where state courts had erred in making a contrary determination.

C. What is Needed Now to Implement It

It is imperative that State Bar Associations be moved to adopt the ABA Resolution and to increase awareness of the dismal state of death penalty representation as well as the other serious violations of due process in death penalty litigation.

III. THE INTERNATIONAL COMMUNITY & RECENT CALLS FOR MORATORIUM AND ABOLISHMENT OF THE DEATH PENALTY

There is a renewed energy in the international community towards moratorium and abolishment of capital punishment throughout the world, and in one sense the ABA Resolution is a continuation of that movement. This year there were many new calls in regional and world bodies for abolition of the death penalty.

31. Congress ended funding for Post-Conviction Defender Organizations (PCDO’s) which handled many capital post-conviction cases. (See Report, supra note 14, at 3).
34. The advances discussed here were part of the presentation of Bill Schabas at the ILA Weekend. Please see his paper for further discussion.
A. The European Parliament

On October 2, 1997, the foreign ministers of the fifteen European Union Member States signed the Treaty of Amsterdam. There are three main objectives to the Treaty, of which only one, the launching of the Euro, has been given prominence in American newspapers. Two other objectives of the Treaty have escaped notice. The first of these is the planned expansion of the European Union (EU) to encompass the Central and Eastern European states as well as Turkey and Cyprus. This will create a vast economic, political, and human rights union with vast implications for the balance of power in the Western world.

The last objective is the implementation of human rights norms stated in the Treaty of Amsterdam itself. On July 16, 1997, President Jacques Santer spoke on the year 2000 Agenda, a plan to have major components of the treaty in place by the year 2000. The Treaty "underpins the abolition of the death penalty in all EU member states." A declaration concerning the abolition of the death penalty is included in the final act, which declares that the death penalty is no longer applied by any EU member state. The new treaty also includes a sanctions provision for serious and persistent violations of human rights.

As indicated, the treaty also allows for institutional reform and expansion of the EU to include the former Eastern Bloc countries. The treaty will now have to be ratified by the national parliaments.

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35. The Treaty is available at <http://ue.eu.int>. The website also has news releases and other information about the E.U. and the Treaty.
36. Id.
37. Id.
38. Summit Sees EU Stumble Onwards in Amsterdam — part 2 of 2, EUROPEAN REPORT, June 19, 1997, available in 1997 WL 8517656. Under Section III, Final Act, the Treaty has adopted the final text of the Declaration on the Abolishment of the death penalty. That declaration reads as follows: 1. Declaration on the Abolishment of the Death Penalty. With reference to Article F(2) of the Treaty on European Union, the Conference recalls that Protocol NO. 6 to the European Convention for the Protections of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and which has been signed and ratified by a large majority of Member States, provides for the abolition of the death penalty. In this context, the Conference notes the fact that since the signature of the above mentioned Protocol on 28 April 1983, the death penalty has been abolished in most of the member states of the Union and has not been applied in any of them.
39. Id.
Treaty has been called "A charter of rights for citizens of EU." The Treaty also gives the EU a stronger voice in international affairs, with a new foreign-policy planning unit to be set up inside the EU Council of Ministers.

However, even outside of the Treaty of Amsterdam, the EU has been a force for the abolishment of the death penalty. Paving the way for the extension of the EU into the former Eastern Block countries, the EU has been active in assessing anti-death penalty activities in the countries being considered for future inclusion in the EU. On November 28, 1997, the EU formally welcomed the Georgia Parliament's adoption of a new penal code in which they abolish the death penalty in Georgia. "An EU Presidency declaration greeted the move as 'an important step in strengthening democracy and the rule of law,' and encouraged Georgia to persevere in that direction, in particular with a view to early accession to the Council of Europe." The Joint EU/Lithuania Parliamentary Committee held an inaugural meeting in Vilnius in October, Lithuania being one of five candidates identified by the European Commission as being insufficiently ready to start negotiations in early 1998. The Joint committee "encouraged NGO involvement in monitoring of human rights, and called on Lithuania to speed up the abolition of the death penalty." The first meeting of the EU/Latvia Joint Parliamentary Committee took place in Riga on Nov. 3 and 4, 1997, preliminary to work on accession to the EU, and among the negotiations, was a call for "formally abolishing the death penalty." The first meeting of the Joint European Union-Estonian Parliamentary Committee with Estonia was held in Tallinn on Oct. 27-29, 1997, and the Joint Parliamentary Committee supported "the Estonian Government and Riigikogu in their effort to abolish the death penalty."

A United States delegation, which included Professor Julian Bond and National Coalition to Abolish the Death Executive Director Steven Hawkins met Jose Maria Gil-Robles, the President of the European Union


43. Euronews, 11/17/97 (Deutsche Presse-Agentur).

44. Euronews - 11/28/97. Membership in the European Parliament is granted only to nations that have been admitted to the Council of Europe.

45. Euronews - 10/11/97.

46. Euronews - 11/13/97.

and Renzo Imbeni, a European Parliament Vice-President, as well as Jeroen Schokkenbrock, Head of the Human Rights Section of the Council of Europe in Strasbourg, in France in December, 1997. The purpose of a series of meeting was “to urge European political leaders to sponsor the adoption of a resolution in the European Parliament.” The Resolution invites companies that are considering locating a manufacturing plant or making a major capital investment in the United States to give priority to those twelve states and the District of Columbia that do not have capital punishment. The basis of the resolution is that in order to join the EU countries must abandon the use of capital punishment. Asking the European companies to show “the same respect for human rights when they cross the Atlantic,” the resolution will be presented by a number of both American and European representatives, and the resolution has the support of a large number of anti-death penalty organizations. The goal is to brand us as a “pariah nation,” a status that the United States is creating for itself with its growing use of the death penalty.

The resolution grew out of an international discussion between the National Coalition to Abolish the Death Penalty (NCADP), the National Association of Criminal Defense Lawyers and Hands Off Cain, an Italian non-governmental organization working to abolish the death penalty.

B. The Council of Europe

The Council of Europe’s now 40 member States, with 800 million citizens, put abolition at the top of the list of priorities in 1997, agreeing in October, 1997, to call for the universal abolition of the death penalty. The two day proceedings were hosted by President Jacques Chirac, who stated: “It is the first time that 40 heads of state and government have

49. Id.
50. Id.
52. Id.
53. Id.
54. Hawkins, supra note 51.
55. Id.
56. Bernard Besserglik, Council of Europe Seeks Wider Role on European Stage, AGENCE FR. - PRESSE, Oct. 12, 1997, available in 1997 WL 13412204., Representation at the two day meeting was very high: “Virtually every country in Europe — all 40 Council members, together with four candidate members — attended, sending its highest possible representation. Only two states were absent: Belarus, suspended for human rights violations, and Serbia, which has not applied to join.” Id.
gathered around a table to talk in the same terms about such essential issues as man’s place in society, his rights, his dignity, and social progress.” The Council of Europe had condemned the death penalty as a violation of human rights, stating in a preliminary paper that the Council “believes the death penalty can no longer be regarded as an acceptable form of punishment from a human rights perspective.”

The Russian Federation and the Ukraine agreed to a moratorium on the death penalty in order to obtain membership in the Council of Europe in 1996. Since then, 62 persons have been executed in Russia. In January, 1997, a special commission of the European Parliament met to discuss how Russia had not met her commitments. “Of special concern is Russia’s failure to abolish capital punishment and to impose a moratorium on carrying out death sentences passed since Russia’s admission to the Council of Europe.” Instead of the Russian Federation being thrown out of the Council, the Russian Federation ended up being influenced by it.

Yet, Russia still maintains the death penalty despite its promises. In 1996, Boris Yeltsin tried to decree a moratorium on capital punishment, but this was defeated by the Duma, Russia’s lower house of Parliament. However, on Dec. 17, 1997, the Duma passed a draft law which requires that the country’s president approve each death sentence handed down by the courts. Although the proposed legislation has yet to pass the upper house and then be agreed upon by the Duma again, this marks a step towards the fulfillment of Russia’s promises.

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57. Id.
59. Id. The Council requires that within three years of admission new member states ratify Article 1 of Protocol 6 of the European Convention for the Protection of Human Rights.
61. Id.
62. Id.
63. Id.
65. Id.
66. Id.
67. Id.
C. The United Nations Human Rights Commission

The Human Rights Commission met at its headquarters in Geneva for its annual meeting in March and April, 1997, with more than 200 non-governmental organizations participating. This year the Commission passed its first resolution condemning capital punishment, putting the death penalty at the forefront of international human rights. The United States was the only Western nation voting against the resolution. The Commission resolution urged “countries to consider abolishing capital punishment. The resolution, sponsored by Italy but not legally binding, passed in Geneva, 27-11. Fourteen nations abstained.”

The resolution also called on all countries that have not yet abolished the death penalty “to suspend executions, with a view toward the definitive elimination of capital punishment.” Lastly, it also called upon countries which still practice state-sponsored executions “to spare adolescents under 18 (when the crime was committed) and pregnant women.”

D. The United Nations Human Rights Committee

Few Americans or their local or national representatives are aware that when the United Nations Human Rights Committee reviewed the report of the United States on implementation of the Covenant on Civil and Political Rights, they found conditions surrounding the use of the death penalty in the United States to be among the most serious problems placing the United States out of compliance with the Covenant.

In the Report of the High Commissioner for Human Rights, Annual General Assembly Report of the Human Rights Committee, the


69. 1996 Set Grim Record for Executions: Amnesty, AGENCE FR.-PRESSE, Apr. 4, 1997, available in 1997 WL 2089763. This is the first time the death penalty became an accepted part of the agenda of the United Nations. Last year an attempt to approve a motion on the death penalty in the General Assembly failed. Id.


71. Id.

72. Gonzalez, supra note 68.

73. Agence Fr.-Presse, supra note 69. (Material in parenthesis added).

United States Report was reviewed. The Committee agreed with the report of the delegation that American courts are not prevented from seeking guidelines from the Covenant in interpreting American law. However, the Committee expressed regret and concern over the lack of knowledge about the Covenant by the judiciary, noting:

The Committee regrets that members of the judiciary at the federal, state and local levels have not been fully made aware of the obligations undertaken by the State party under the Covenant, and that judicial continuing education programmes do not include knowledge of the Covenant and discussion of its implementation.

However, the Committee expressed even more serious concern over the application of the death penalty in America, stating:

The Committee is concerned about the excessive number of offenses punishable by the death penalty in a number of states, the number of death sentences handed down by courts, and the long stay on death row which, in specific instances, may amount to a breach of Article 7 of the Covenant. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain states. It also deplores provisions in the legislation of a number of states which allow the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to be a lack of protection from the death penalty of those mentally retarded.

Finally, the Human Rights Committee recommended:


76. Id. para. 276, which states in full: "[t]he Committee takes note of the position expressed by the delegation that, notwithstanding the non-self-executing declaration of the U.S., American courts are not prevented from seeking guidelines from the Covenant in interpreting American law."

77. Id. para. 280.

78. Id. para. 281.
The Committee urges the State party to revise federal and state legislation with a view of restricting the number of offences carrying the death penalty strictly to the most serious crimes, in conformity with article 6 of the Covenant and with a view eventually to abolishing it. It exhorts the authorities to take appropriate steps to ensure that persons are not sentenced to death for crimes committed before they were 18. The Committee considers that the determination of methods of execution must take into account the prohibition against causing avoidable pain and recommends the State party to take all necessary steps to ensure respect of article 7 of the Covenant. 79

E. Extradition

Extradition from other countries to the United States is seriously hampered by the death penalty practices found within the United States. Since the Soering decision 80 by the European Court of Human Rights, there has been an increased resistance to extradition requests by the United States where the defendant may face the death penalty in the United States. 81 While Soering was not based upon a view that the death penalty itself was contrary to the Convention, it held that circumstances relating to a death sentence, called the Death Row Phenomena, could result in a violation of Article 3, prohibiting inhuman and degrading treatment or punishment. 82 It is almost systematic now that the United States government will give assurances that the death penalty will not be imposed because it is often a necessary precondition to the obtaining of extradition.

IV. TWO PROHIBITION STATES

The ultimate aim of any discourse is to focus on those states which apply the death penalty since they are in the majority. However, since I live in an abolitionist state, Michigan, I am particularly interested in stopping further extension to those States which do not currently employ the death penalty. During October and November, 1997, two States that currently ban the death penalty, Michigan and Massachusetts, were

79. Id. para. 296.
81. Comments by Bill Schabas at the ILA conference.
subjected to legislative attempts to reintroduce death penalty practices. In 
Michigan, attempts to bring the death penalty back are almost always on 
the agenda. The bill is introduced by a legislator who has little 
information and has almost no understanding about the serious and difficult 
problems which having a death penalty raises.

V. THE LOCAL DISCOURSE

The October, 1997, Michigan death penalty public hearing 
occurred over a referendum, Resolution M, which attempted to place on 
the ballot a resolution that anyone who killed a corrections officer could be 
sentenced to death. To make this change, the Michigan Constitution 
would have to be altered. In the 1964 Constitution, thanks to the work of 
Eugene Wanger and Tom Downs, among others, the death penalty was 
prohibited.

On Thursday evening, October 2, 1997, I received a phone call 
from Beth Arnovitz, the director of the Michigan Council on Crime and 
Delinquency, telling me that the referendum, Resolution M, would be 
heard the following Tuesday morning, October 7th. Beth is the Paul 
Revere of the well-organized and responsive community in Michigan 
which opposes the death penalty. This gave us a little over 4 days to 
organize a response. We are also more fortunate in having the Governor, 
John Engler, also opposing the death penalty. The issue comes up almost 
routinely every one to three years. On Tuesday, October 7th, the House 
Judiciary Committee, chaired by Ted Wallace, met as planned. In the past 
four days a great deal of organizational work had been done. People had 
organized a bus up from Detroit. Religious groups had organized. Sister 
Monica from the Catholic Conference and the Team for Justice were there. 
I represented the Religious Society of Friends. Many other religious 
groups were present. Professors were there, including myself, Justin 
Brooks from my institution, and Andrea Lyons from the University of 
Michigan. Jim Neuhardt and Marty Tieber from the Defenders, Wendy 
Waggenheim, the lobbyist from the American Civil Liberties Union, were 
there, and Pat Clark from the Michigan Council on Crime and 
Delinquency were there. Overall, there were more than one hundred 
persons who turned out on such short notice. There was only the bill’s 
sponsor and one other lobbyist for the Michigan Corrections Officers

84. See Eugene G. Wanger, Historical Reflections on Michigan’s abolition of 
85. Michigan Senate Joint Resolution F, which would have amended the state 
constitution to permit reinstatement of the death penalty was filed in 1994.
Union who were there in favor of the bill. At the end of the three-and-a-half hour hearing the chairperson, Representative Ted Wallace, declared that "the committee will issue a report that there is overwhelming opposition to capital punishment . . . There is no need for a vote or further hearings. . . . [T]he measure [is] dead." There are now four bills calling for the imposition of the death penalty that have been introduced in this legislative session, each one garnering for its sponsor a little time in the limelight and a chance for more votes.87

The Massachusetts House of Representatives voted eighty one to seventy nine, on October 28th, 1997, to bring the death penalty back to Massachusetts.88 The death of a ten year old boy and a series of murders had created a lynch mob mentality in the state.89 A slightly different bill had already passed the Senate. Thus, the House-Senate conference committee had to come up with a compromise bill. The Senate easily passed the compromise bill.90 Paul Hill and Sister Helen Prejean lobbied for the abolitionists while families of some murder victims lobbied for the compromise legislation.91 The end result came down to one vote.92 Representative John P. Slattery (D) then changed his vote, bringing the tally to an eighty-eighty tie.93 When asked why he changed his vote, he responded that he could not accept that the legislation might apply to teenagers under the age of 18 or that it would weaken protections for minority defendants.94

But perhaps most he was influenced by the British au pair trial: "It left me feeling that we can't always be certain that we executed the right guy, and if we can't be certain of that, then I have a very big problem with the death penalty."95

86. The wording of this last statement is taken from Hawkins, supra note 51, at 5.
87. Two in the Senate, SJRC and SJRD; and two in the House, SJRC and HJRM.
88. Hawkins, supra note 51, at 3.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Rice, supra note 48, (see supra note 88 to finish).
95. Id. at 7.
VI. COSTS & OVERLOAD IN PRISONS – THE FACTS & THEIR IMPORTANCE TO THE DEATH PENALTY DEBATE

Many states, including Michigan have serious problems in their prisons and corrections system. The build-up of prisons in the United States during the last twenty years has been phenomenal. In 1996, the total number of prisoners in the United States reached 1.7 million, costing more than 30 billion dollars. United States incarceration at year-end, 1996, totaled 427 sentenced inmates per 100,000 persons, up from 292 per 100,000 in 1990. In Michigan, the number of people imprisoned has risen from less than 8,000 two decades ago to over 43,000 today. The cost of the prisons is 1.3 billion dollars annually in Michigan, outspending higher education. In California, the number of prisoners has risen from 19,000 twenty years ago to over 150,000 persons today. There, the taking of services from other budgets is more direct and observable. There, the impact on education is more direct; the increase in funding for prisons has been directly proportional to the loss of funds to higher education. Not one new University in California has been built since the build-up of the prisons has commenced.

VII. WRONG CONVICTIONS: WHY THEY OCCUR AND THEIR IMPLICATIONS FOR THE DEATH PENALTY

In the last four years seventeen inmates sentenced to death in the United States have been found innocent and freed. In Illinois, nine men have been found innocent and freed in the ten years since the death penalty was reinstated there. Eight of the nine men were found innocent after

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97. Id.
99. For example,
100. Ky Henderson, How Many Innocent Inmates Are Executed, 24 HUMAN RIGHTS, No. 4, 10.
101. Id.
intervention from outside sources, indicative that without outside intervention, the errors would not have been detected.\textsuperscript{102}

All of the cases involved heinous crimes, and six of the nine involved people of color convicted and sentenced to death for interracial murders. In four of the cases, a rape was involved.\textsuperscript{103}

In Illinois, about forty lawyers, judges and legal organizations signed a petition for a one-year moratorium to investigate what had happened in these cases.\textsuperscript{104} A number of factors appear to be involved in why these errors occurred. First is the use of poor counsel.\textsuperscript{105} As Ron Tabak has suggested, “The quality of lawyers at trial for defendants in capital cases is often abysmal, such that you can wind up getting the death penalty more because of how bad your lawyer was than because of how bad you were.”\textsuperscript{106}

Secondly, the “extreme pressure from the public on law enforcement to capture, convict, and give the death penalty in these cases leads to faulty police work — some accidental, some deliberate.”\textsuperscript{107} As an example, two men were sentenced to death after being framed by the police in Chicago, even though the police learned who the real killers were just days after the murders. But, by then, since they had framed the innocent men, they could not expose their fraudulent work at that point.\textsuperscript{108}

Thirdly, the politicization of the death penalty, and its feature in the running for political office, keep the emotional climate going. “Going for and getting the death penalty in well-publicized cases looks good to most constituents.”\textsuperscript{109} What is not stated is that political advocacy of the death penalty by politicians running for political office provides an avenue of political opportunism with all of the associated costs being borne by the taxpayer.

VIII. ADDING TO EXISTING HARSH PENALTIES: GETTING THE TRUTH OUT

The political manifestations become chilling when a representative or senator parades the families of the victim of some terrible crime. I
would suspect that asking any family of a victim of whether they would choose a policy going towards the prevention of such a crime rather than imposing the death penalty upon a person who already will spend the rest of their life in prison, that family would seek prevention and ask that the money be channeled into the community. But they are not given that choice. Rather, the death penalty is suggested to them as the only alternative.

Michigan's criminal penalties are among the harshest in the world, and adding the death penalty would add almost nothing more. Michigan was the first political entity in the Western world to abolish the death penalty. The state has never brought it back. Abolition occurred in 1847, effective 1848. Michigan punishes those who commit first degree murder with a mandatory life sentence, with no possibility of probation or parole. There is no other alternative sentence available. Unfortunately, most citizens do not know this and a random sample from among my students elicits the belief that the ordinary penalty for first degree murder is 8 years.

This is consonant with a recent study that indicated that "only 4% of respondents believed murderers sentenced to life actually spend their whole lives in jail; the average estimate of a 'life sentence' was 15.6 years."

Michigan provides a penalty of mandatory life imprisonment for first degree murder. First degree murder in Michigan follows the language, originating in Pennsylvania, that willful deliberate and premeditated murder and felony-murder constitutes first degree murder. MICH. COMP. LAWS. ANN. § 750.316. The statute mandates life imprisonment without any possibility of probation or parole. The only way in which a convicted first-degree murderer will be released is through pardon by the Governor (unlikely since the Willie Horton phenomena). However, legislators frequently have done little to educate the public about this fact of Michigan law.

This ignorance of existing law is endemic throughout the State and is fostered by the media. For example, fifteen years ago in Michigan, a young man confessed to murdering four young girls. He is now often referred to as a serial killer. Almost weekly, the newspapers report accounts of how this serial killer and mass murderer is about to be released from prison. What is either missing from the accounts or placed at the end of the story is the fact that this young man was allowed to plead to one count of manslaughter, one count of attempted murder and a rape count, and was sentenced to fifteen years imprisonment, which is now about to expire. Having a death penalty would certainly not have impacted upon his punishment at all, but the public does not make those distinctions, and the Donald Miller story is often used as an example of why the state should have a death penalty.

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112. Wanger, supra note 84.

113. See supra note 110.

years".  In states with tough sentencing requirements, “few citizens realize that this is so.”

In 1993, Bowers did a study which was replicated the same year by Dieter in a national poll. Bowers asks respondents:

‘If convicted murderers in this state could be sentenced to life in prison with absolutely no chance of ever being released on parole or returning to society, would you prefer this as an alternative to the death penalty?’ In all five states (California, Florida, Georgia, Nebraska, New York) where this question has been asked, more people have preferred this form of life imprisonment. (Bowers, 1993). Adding a requirement that the murderer be required to work in prison industries for money that would go to the families of their victims further diminishes support for the death penalty.

IX. THE DERELICTION OF DUTY BY LEGISLATORS

Legislators have a duty to inform themselves of the serious problems that implementing a death penalty imposes. Few bother to garner even the most basic information about the implementation of a death penalty. For example, many legislators still erroneously believe that the death penalty decreases the cost of imprisonment. Quite the contrary, the death penalty imposes an enormous financial burden on the prison budget, since killing a prisoner can cost up to ten times what it costs to keep a prisoner in a prison for life. I am aware of no legislator who has informed any constituent of this fact. When the current penal system is already creaking from the costs of the criminal justice system and is taking money which previously went to higher education and to the communities, legislative leadership must be called into question as to why these important matters of fiscal responsibility have not been revealed to the public.

116. Id.
117. Id.
119. Id. See also Justin Brooks & Jeanne H. Erickson, The Dire Wolf Collects His Due While the Boys Sit by the Fire: Why Michigan Cannot Afford to Buy into the Death Penalty, 13 No. 3 T.M. COOLEY L. REV. 877 (1996).
When a bill seeking to impose the death penalty is brought up for hearing, one issue which needs exploration is whether the author of the legislation has considered the impact of this legislation upon the state budget, and whether it would raise local or state taxes, and its impact on the provision of other services. For example, would any responsible representative or senator sponsor a bill calling for a multi-million dollar stadium without having any blueprint or estimate of the costs involved? Why would any serious and competent legislator introduce legislation calling for the death penalty without researching the issue of costs?

The most basic responsibility of any legislator is to investigate the full impact and cost of legislation that they are sponsoring. Anything less reflects poor judgment on the part of the sponsor.

X. CONCLUSION

When considering death penalty legislation, the debate should be realistic. Abstract discussions of good and evil, or the bizarre asking of the question of whether, in the abstract, one is in favor or opposes the death penalty, clouds the debate. Intense scrutiny should be focused on the politician who is sponsoring the bill. One way to determine whether the politician is simply looking for easy votes is to question their knowledge on the topic and whether they have done their homework (other than the political homework).

The purpose of this panel at the ILA Conference was to integrate the various strands towards moratorium and abolishment of capital punishment as it affects those efforts in the United States. It is astonishing that Americans have so little appreciation of either the changes which are being wrought within the American criminal justice system, or of the changes in the other direction which are occurring throughout the world. It is the hope that this panel and this article will stimulate thinking in these directions.

Knowledge makes the key difference. Knowledge about alternatives to violence, about alternatives to executions, makes the death penalty less attractive. Given information about capital punishment as it is practiced, about the limitations of the criminal justice system to determine guilt or innocence, about the failings of a very seriously flawed system, about the lack of proportionality in application, about the death penalty’s inevitable highly politicized content, and its numerous errors, few Americans continue to adhere to the rectitude of such punishment.