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USA: People can change. Will Texas?

After three decades on death row, clemency sought on rehabilitation grounds

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We then [in 1976] identified three societal purposes for death as a sanction: incapacitation, deterrence, and retribution. In the past three decades, however, each of these rationales has been called into question... I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents the pointless and needless extinction of life
Justice John Paul Stevens, US Supreme Court, 2008

I shot Officer Ablanado and I take responsibility for his death. In a few frightful seconds, I stole from you and the world the precious and irreplaceable life of a good man, and destroyed your worlds of shared love, dreams, and possibilities. In thirty-one years of imprisonment, I have had much time to contemplate my sin
David Lee Powell, Texas death row, 2009

John Paul Stevens and David Lee Powell have experienced the last 30 years of the USA's death penalty from very different vantage points.

John Paul Stevens took his seat as a judge on the US Supreme Court on 19 December 1975. Just over six months later, in *Gregg v. Georgia*, he joined his fellow Justices in giving the green light for executions to resume in the USA after a decade without them.¹ Since then, more than 1,200 men and women have been killed in execution chambers across the country. Today, more than 3,200 others await that fate. One of them is David Lee Powell. He was convicted of the murder of a police officer in the Texas capital, Austin, in May 1978. He has spent most of the last 32 years on death row.

People can change. The experience of Justice Stevens during his three decades on the Supreme Court, for example, has persuaded him that the death penalty is futile and cruel. In 2008 he wrote:

*"In *Gregg v. Georgia*, we explained that unless a criminal sanction serves a legitimate penological function, it constitutes gratuitous infliction of suffering in violation of the Eighth Amendment... I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State is patently excessive and cruel and unusual punishment..."²*

Justice Stevens is not the first judge on the US Supreme Court to turn against the death penalty based on his experience of capital justice. Twenty-four years after joining the Court in 1970, Justice Harry Blackmun, who had also concurred in the 1976 *Gregg* opinion, announced that "From this day forward, I no longer shall tinker with the machinery of death...I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed".³ When Justice Blackmun retired later that year, 1994, Justice Stevens became Senior Associate Justice on the Court.

On 9 April 2010, Justice Stevens wrote to President Barack Obama announcing his own intention to retire. His last day as an Associate Justice is due when the Supreme Court rises for the summer recess

this year.⁴ David Powell's last day is due a few weeks earlier. Shortly after 6pm on 15 June 2010, he is scheduled to be killed in the Texas execution chamber.

Much has been written about Justice Stevens in the weeks since he announced his retirement. Little has been reported about David Powell since 1 March 2010 when a Texas judge set his execution date. However, a voluminous clemency petition filed with the Texas Board of Pardons and Paroles on 25 May 2010 speaks – in the voices of many – of a condemned man who is not the same person who first arrived on death row in 1978. By way of introduction, his lawyer writes:

“David Powell was 27 years old when he was first committed to Texas’ death row in the fall of 1978 for the killing of Austin Police Officer Ralph Ablanedo. Mr Powell is 59 years old now and has been on death row for nearly thirty-two years. After a difficult period of adjustment in the first few months he was on death row – he became very depressed, quit eating, and was sent to Rusk State Hospital – Mr Powell became a model prisoner and extraordinary human being. For more than three decades, he has lived an exemplary life on death row, embodying and living human virtues as few of us do. It is this extraordinary record that calls for the commutation of Mr Powell’s death sentence to a life sentence...

Ever mindful of the immense hurt and loss he inflicted on Officer Ralph Ablanedo and his family, Mr Powell has lived his life on death row with profound humility and with an abiding sorrow. He knows that he can never make amends for what he did, and he knows that he will carry the shame and burden of what he did the rest of his life. He seeks only to live out his life to its natural conclusion, acutely mindful that he did not allow Ralph Ablanedo to do that.”

David Powell is facing execution because, as in the case of the more than 450 people put to death in Texas since 1977 and the 300-plus individuals on death row there today, a jury decided that he would probably commit future acts of criminal violence that would constitute a continuing threat to society if allowed to live, even in prison. A jury answering the so-called “future dangerousness” question in the affirmative is a prerequisite for a death sentence in Texas.⁵

The “future dangerousness” scheme is based on the goal of incapacitation. According to the incapacitation argument, a prisoner must be killed – incapacitated – in order to ensure that he or she never repeats the crime. Such a policy relies on the assumption that the state can accurately predict at the time of sentencing which defendants will repeat their crimes. Get it wrong – as the evidence suggests it is bound to in more cases than not – and the state takes the lives of individuals who might have been, or might already be, rehabilitated, or indeed who might never have re-offended. The death penalty carried through to its lethal conclusion rules out the possibility of rehabilitation and reconciliation. It puts forward the untenable notion that capital justice can be guaranteed to be free of error, and promotes what amounts to a counsel of despair – that certain human beings lack any capacity for positive change.

David Powell was sentenced to death in October 1978. Prior to his trial, the judge ordered that he receive a psychiatric examination to assess his competence to stand trial and his sanity at the time of the crime. The defence was not told that the experts would assess his future dangerousness, and David Powell himself had not been advised that he could remain silent. Yet both experts testified at the trial that, based on their examinations, they believed that David Powell would commit acts of future violence. In 1989, the US Supreme Court overturned the death sentence, noting that “for a defendant charged with a capital crime, the decision whether to submit to a psychiatric examination designed to determine his future dangerousness is literally a life or death matter which the defendant should not be required to face without the guiding hand of counsel”.⁶ David Powell was retried in 1991 and again sentenced to death. In 1994, this sentence was overturned by the Texas Court of Criminal Appeals because of an error in the judge’s instructions to the jury.

In 1999, a new sentencing hearing was held. As evidence of David Powell's future dangerousness, the prosecution relied primarily on the facts of the crime committed over two decades earlier.⁷ Apparently clutching at straws, it also presented evidence that when Powell was a teenager (he was now approaching 50), he had stolen a car and used false identification. The prosecution also sought to boost its case by pointing to evidence that David Powell had broken rules in prison: all were minor infractions spread thinly over the years since his conviction, such as having an extra pair of socks and shorts in his cell; not making his bed before 6am; playing his radio too loud; cursing at a guard when he was not allowed to have contact lens solution; and refusing to obey an order to remove a poster from the wall of his cell.

The defence sought to defend David Powell from the death penalty by arguing that – 21 years after the crime – he did not pose a future danger. It presented evidence that David Powell had been a law-abiding, promising student at the University of Texas until he started using drugs. His drug use developed into a debilitating addiction. By 1977 and 1978, according to the evidence, he “manifested the symptoms of a methamphetamine abuser: he was skinny, agitated, hyper-manic, unable to concentrate, paranoid, incoherent, and shaky”. By the time of the shooting, in the opinion of a Houston psychiatrist who had evaluated him, David Powell was insane as a result of his drug abuse.⁸ Once in prison, he stopped using drugs and returned to something like his former self; several prison guards testified that he was a model inmate. Nevertheless, the jury decided that he would pose a danger to society if allowed to live, even in prison, and sentenced him to death for a third time. He became one of 48 people sentenced to death in Texas in 1999, the highest in the state in any year since 1976 and a record to this day.

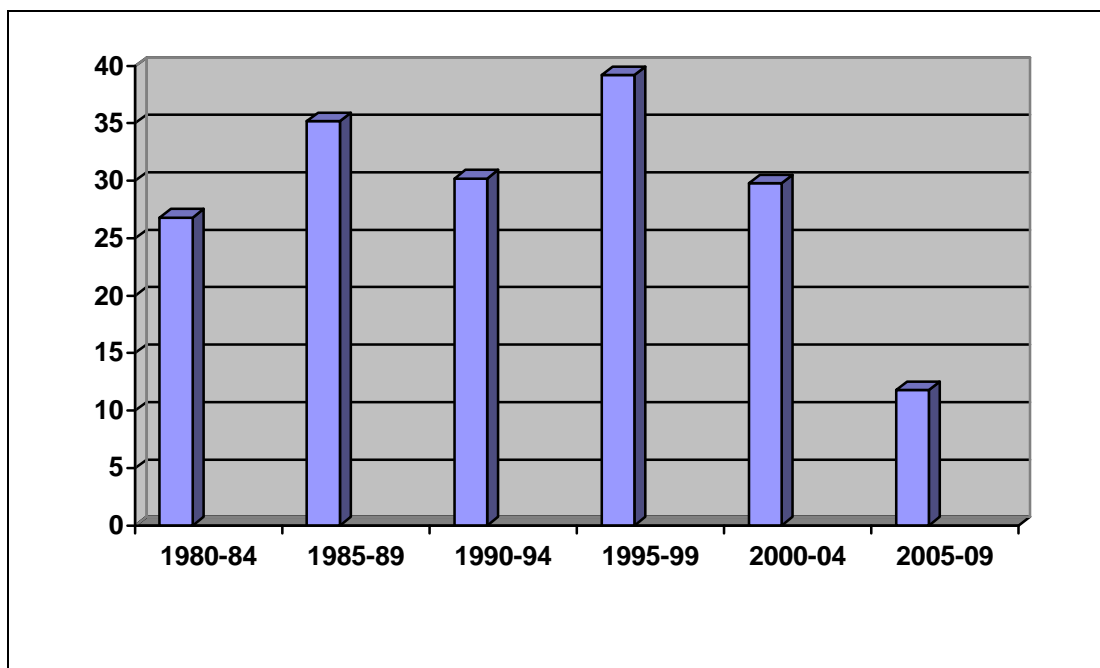


Chart 1: Average annual death sentences in Texas, 1980 to 2009

The alternative to the death penalty at the time David Powell was sentenced – for the juries in all three of his sentencing hearings – was life imprisonment *with* the possibility of parole. In his 2008 opinion revealing that he had come to view the death penalty as an excessive punishment, Justice Stevens said:

“While incapacitation may have been a legitimate rationale in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty. Moreover, a recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option. And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.”

Texas was the last of the USA's death penalty states to adopt life imprisonment without the possibility of parole. This sentence became an option for Texas capital jurors on 1 September 2005 – six years after David Powell's 1999 resentencing. Since then, death sentences in the state have dropped to under 15 a year. In 1978, the year David Powell was first sentenced to death, 33 people were sentenced to death in Texas. In 1991, the year of his retrial, he was one of 26 people sentenced to death there. As noted above, in 1999, the year of his third sentencing, 48 people were condemned to death in Texas, more in a single year than in the three years from 2007 to 2009 (see chart 2).

In a Texas capital trial today, if just one juror decides the defendant is not a "future danger" he or she will receive a sentence of life imprisonment without the possibility of parole. One of the jurors from David Powell's 1999 re-sentencing signed an affidavit on 17 May 2010 recalling that “several jurors believed that Mr Powell would not be dangerous if he stayed in prison”, but the jury answered yes to the “future dangerousness” question nevertheless. The former juror suggested that if life without parole had been an option at the time, “I believe that several jurors would have voted ‘no’ on the future danger question. I know I would have chosen life without parole as the appropriate punishment”.⁹

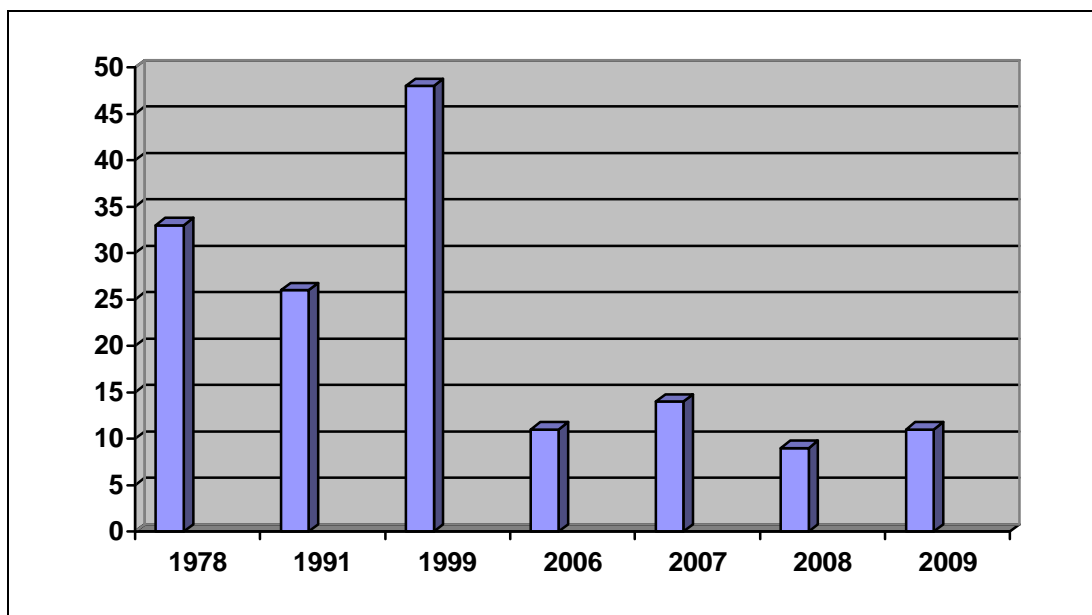


Chart 2. Death sentences in Texas in the years of David Powell's sentencing (1978, 1991 and 1999), and since Texas adopted life imprisonment without the possibility of parole

If some members of David Powell's jury were having doubts about sentencing David Powell to death in 1999 – at the peak of Texas death sentencing – how much greater would that doubt be today? Would it

be enough to puncture juror unanimity on the future dangerousness question and to end the state's pursuit of execution? The Texas Board of Pardons and Paroles should reflect seriously on this question, and to consider how the sentencing context and the condemned man have changed.¹⁰

The apparent belief among some of the jurors at David Powell's 1999 re-sentencing that he would not be dangerous in prison has been borne out by Powell's record on death row. Attached to the petition for commutation are numerous appeals for clemency from individuals who have known David Powell over the years, and who attest to his personal development and positive contributions to society while on death row. Indeed, according to the Houston psychiatrist, Dr Seth Silverman, who has treated him over the past two years, David Powell's positive contribution within the confines of death row is unequalled by any of those other prisoners with whom the psychiatrist has previously come into contact. In late 2007, David Powell developed serious mental health problems. He was having auditory and visual hallucinations and was considering suicide. His lawyer asked Dr Silverman to evaluate and treat David Powell. In a letter to the Board of Pardons and Paroles, dated 21 May 2010, Dr Silverman writes:

"David Powell has an exceptional ability to reach out and educate others. He can trace his own untoward footsteps and paths with great clarity and wisdom. David Powell has the ability to educate others about how his choices have resulted in a path that resulted in a severe criminal behavior. And he has the ability to educate others about how to learn and make better choices.

David Powell has unique insight, experience, and intellect that has helped others and in all medical probability if given the opportunity, will continue to help others to identify the likely consequences of their choices before they are made, and as a result, to make better choices. His ability to contribute positively to the lives of other inmates in TDCJ [Texas Department of Criminal Justice] is, in my years of experience as a forensic psychiatrist, unmatched".

David Powell's lawyer has interviewed a dozen Texas death row inmates, and a former death row inmate, about their interactions with his client over the years. Their affidavits, included in the clemency petition, speak of the positive guidance David Powell has provided them and others. For example:

- o Lester Bower (now 62, on death row since 1984): "David has dedicated a lot of time to helping others. He does not waste his time. He is always reading scientific digests. He is a very inquisitive person and I was drawn to that. You can read something in a book, but still not understand it. You could go to David and he could explain it... I love David like a brother. I have seen him grow as our hair has turned gray together. He is an open person who has encouraged me to be more open too. David makes a big difference to the people who interact with him. I have valued him greatly as someone who challenges me."
- o Roger Wayne McGowen (now 46, on death row since 1987): "David has been a very important person in my life. Whenever he was around me, he was always trying to teach me. He tried to teach everyone around him and to enrich their lives... David is one of the people that I am so glad I've met because he has made my life richer... He was like one of your favourite teachers at school, where you couldn't wait to get to their class... There are people back here in gangs, controlled by other people. He wouldn't shy away from them. He saw potential in people like that and encouraged them to think about things in another way... I really feel that David is my teacher, but he also is a very good friend... David constantly stayed on me about my diabetes. Anything he read about advancements in diabetes treatment, he would send to me... I can't think of anyone that has given me more – intellectually and spiritually. David still has so much to offer. There are so many people that can learn from him".
- o Rodney Reed: (now 42, on death row since 1998) "I consider David a friend, I never heard anything come out of his mouth in a negative light. He is an honest person. He is a conscious

- thinker and he gives me intelligent, stimulating conversations... David's friendship means a whole lot to me".
- Vaughn Ross (now 38, on death row since 2002): "Before coming to death row I had never been incarcerated before. David changed my view of what people on death row are like, you see on the media they make people look like monsters, inhuman, but David is kind, giving and understanding. David will talk to anyone, give anyone a chance... With me and David, I'd like to pick his brain, it helps keep me alive, stops me from shutting down. He stimulates me, he keeps me going... David is someone you want to be around, he keeps you going, he has that life in him, he has that spirit".
 - Charles Thompson (now 39, on death row since 1999): "David is a mentor to me on many levels, personal, legal, spiritual and intellectual. He is the 'old wise one', he is my go-to guy. David has inspired me to carry the torch, and continue to counsel and mentor those in need. It would be a tremendous loss not only to prison society, but to society as a whole, to take away a life that has touched so many lives".
 - Noah Espada (now 26, on death row since 2005): "He helped me to the pursuit of self education. He did this by stimulating my mind, he subtly inspired me through conversation. David helped me be honest with who I am here and now. He did this by leading by example... Meeting David showed me that learning never ends. He showed me this is not just about academic subjects, but learning about yourself and living more positively... There was a time when David noticed that I was becoming affiliated with a counterproductive group of people. He brought this to my attention so that I would refocus my attention to my friends and family knowing that anything thoughtless I did would hurt them more than it would me...".
 - Robert Will (now 31, on death row since 2002): "Over the eight years that I have known David I have seen him steadily work to be a positive influence. Many times he has helped relieve tension between inmates and between officers and inmates... David has always strongly promoted the idea that all forms of violence are completely and thoroughly unacceptable... If David is executed his death will take away a person who has had a profoundly positive impact on Texas Death Row."
 - Cleve Washington Foster (now 46, on death row since 2004): "David is like an uncle to me, I have known him five years, he supports me, emotionally and legally. I am actually from Kentucky, I got no-one here, no-one, so I rely on David heavily. I have no family here, I rely on David for support, he talks me through to another day, he talks me through, and out, of bad times – like when my appeals are denied... David is a positive influence on people on death row, especially the youngsters... When new kids get here, they are standoffish and David talks to them, tells them not to be scared, tries to calm them down."
 - Preston Hughes (now 44, on death row since 1989): "Dave always likes to help people out, he gives people anything he can... Dave is a strong man, mentally and physically, if he hadn't of helped me stay focussed, I probably would have lost my damn mind. After being locked up as long as he has I feel he's been punished enough and should not be killed".
 - Mariano Juarez Rosales (now 70, was on death row for 24 years): "David had a lot of hope. He just stayed positive. I was going through a depression, and David was the one who told me to go outside. He would tell me to keep seeing the psychiatrist, they can help you".
 - Ramiro Gonzales (aged 27 now, 18 at crime, on death row since 2006): "I have never had as much help as I received from Mr Powell in the year and half that we met and talked. He has helped me more than my own family. My vocabulary and understanding of many subjects has improved tremendously as a result of interacting with Mr Powell. He shared many reading materials with me, materials about poetry, theater, and philosophy... I call David Powell 'Mr Powell' because I consider him a teacher, an elder who deserves respect, and a father figure. My family does not have any contact with me, but Mr Powell gives me an incredible sense of belonging by listening to me, talking to me, and opening up to me on an emotional and intellectual level... Mr Powell used to give me scripts to read from plays. I would read them and

then talk about them with Mr Powell. He actually asked me for my opinion and then listened to me. This made me open up to Mr Powell, and he would explain to me other points of view about the play. This gave me a sense of belonging that doesn't exist in prison, and that never existed with my family... My biological father was incarcerated for the most of the first 18 years of my life... Mr Powell listened to me and taught me things that I never had the opportunity to do with my own father".

- o Bobby Lee Hines (aged 37 now, 19 at crime, on death row since 1992): "We talk a lot about family, about prison life and how it changes us. He is not the person that he describes himself as once was. To me David just about as sound a guy I know, he ain't gonna hurt nobody. David is respectful talking, calm-levelled, he always offer an extended hand to help a man out... When David walks into a day room it's like someone turned the light on, it's someone to talk to, he's not a dull person at all... I've had to deal with a lot of executions, I've lost a lot of friends, but David's execution wouldn't be just another day... I been around him so many years, it'd be crazy not to see him no more."
- o Clinton Young (aged 26 now, 18 at crime, on death row since 2003): "It is clear to me that David is remorseful for the death of the police officer. Not only for the loss of the officer's life, but for the pain it has caused the officer's family members... When he talks about how young the officer was and the pain the officer's family goes through, the degree of empathy David has is clear by the emotion he displays."

In 2009, David Powell wrote to the family of Officer Ralph Ablanedo. The letter was made public by the family, and has therefore been included in the clemency petition. It includes the following:

"I am infinitely sorry that I killed Ralph Ablanedo. I shot Officer Ablanedo and I take responsibility for his death. In a few frightful seconds, I stole from you and the world the precious and irreplaceable life of a good man, and destroyed your worlds of shared love, dreams, and possibilities... There is no excuse for what I did... In thirty-one years of imprisonment, I have had much time to contemplate my sin.

I can know only the smallest part of the grief I have given you. I do appreciate the magnitude of my wrong, and that compels me to address at least some of the harm I surely have caused, so you may know that I have tried to understand the consequences of my actions, so you may know my contrition...

Of course, every injury I inflicted on any one of your family, I inflicted on Officer Ablanedo. Everything I took from any one of you, I took from him. When I ended his life, I destroyed all that he gave to the world each day, all the dreams he cherished, and all the possibilities he might have realized. I denied him all the joys he savored and everyone he loved...

I wish only to offer you my most sincere apology. That may be all that I have to give. I am truly, deeply, and forever sorry for the evil that I have done, for the worlds of suffering I brought you when I killed your loved one, Ralph Ablanedo".

The Austin Police Association (APA) continues to support David Powell's execution. On 18 May 2008, the 30th anniversary of Officer Ablanedo's death, the APA took out a full page advertisement in the Austin American-Statesman newspaper announcing that Powell's federal appeal in the US Court of Appeals for the Fifth Circuit Court would be heard in New Orleans on 3 June 2008. After the hearing, attended by about 25 Austin police officers, the APA president was quoted in the newspaper as saying "hopefully this last appeal will be done and we can move on with setting an execution date so we can move on and the family of Ralph Ablanedo can finally get closure". Today, the APA website carries the news of David Powell's execution date and that the APA has chartered a bus for "friends and fellow police officers

wishing to travel to Huntsville” on the day of the execution.¹¹ Not all Austin police officers are in agreement, it would seem, however.¹² In an email forwarded to David Powell’s lawyer and included in the clemency petition, an Austin police officer, who says he generally supports the death penalty, states:

“I think David should have paid for his decisions and his crime with his life 25 years ago. I do not think that putting him to death today will serve any good purpose. The death penalty should be a deterrent to horrific crime, a message that such crimes will not be tolerated, and a means to ensure that someone who is capable of such crimes cannot repeat that behaviour ever again. That message loses its potency when 30 years pass before the sentence is carried out.¹³ If David Powell was the type of man who had been blaming society, or spewing forth anger at the injustice of it all, or had been violent while in prison, then I would have a different opinion, I suppose. The fact is, though,... the man who will be put to death for the killing of Ralph Ablanedo is not the man who committed the crime. This David Powell is an elderly man who has shown what I believe to be true understanding and remorse for his crime. This is a man who, in my feeble view, would not be any type of menace to society today and is not, in even any small way, the guy who killed that cop 32 years ago. Texas missed its opportunity to put that man to death and, in my view, accomplishes absolutely nothing in carrying out that man’s sentence on this man now...”¹⁴

David Powell has lived under a death sentence for more than half of his life. “We know”, wrote US Supreme Court Justice William Brennan in 1972, “that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.”¹⁵ In 2009, in the case of a Florida prisoner who, like David Powell, had been on death row for 32 years, Justice Stephen Breyer argued that the Supreme Court should take the case to decide whether or not “the Constitution permits that execution after a delay of 32 years – a delay for which the State was in significant part responsible.¹⁶ In the same case, Justice Stevens built on what he had said a year earlier in his *Baze v. Rees* opinion: “Our experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel.”¹⁷

Amnesty International opposes the death penalty in all cases, unconditionally, regardless of the crime, the identity of the offender, how long he or she has spent on death row, or the method chosen to kill the condemned prisoner. The death penalty is inherently cruel and degrading, incompatible with human dignity and widely held concepts of justice and decency. To end the death penalty is to abandon a destructive, diversionary and divisive public policy, which not only runs the risk of irrevocable error, but is also costly, to the public purse as well as in social and psychological terms. The death penalty has not been proved to have a special deterrent effect. It tends to be applied in a discriminatory way, on grounds of race and class. It denies the possibility of reconciliation and rehabilitation. It prolongs the suffering of the murder victim’s family, and extends that suffering to friends and relatives of the condemned prisoner. It diverts resources that could be better used to work against violent crime and assist those affected by it.

Today, 139 countries are abolitionist in law or practice. More than half of these countries have legislated to abolish the death penalty since David Powell was first sent to death row in 1978. As Justice Stevens said in *Baze v. Rees*, the death penalty is “becoming more and more anachronistic”.

The USA’s increasing isolation on the death penalty is being led, it could be said, by the State of Texas. Texas accounts for more than one in three of the executions carried out by the USA since 1977. David Powell is scheduled to become the 460th person to be killed in the Texas execution chamber since 1977, the 13th this year, and the 221st since 2001 when the current Texas governor took office.¹⁸ In the view of Justice Stevens, in his *Baze* opinion, the USA’s retention of the death penalty is “the product of habit

and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits". In Texas, this habit is proving particularly hard to kick, although there is evidence that, like the USA as a whole, it is beginning to have second thoughts about the death penalty, with death sentencing rates declining. People can change.

Six years before David Powell was sent to death row, US Supreme Court Justice Potter Stewart wrote: "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."¹⁹ One might here be again reminded of Justice Blackmun's 1994 final and absolute rejection of the death penalty when he spoke of what would happen now that the Supreme Court had refused the appeal of the Texas death row prisoner then before it, Bruce Callins: "Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction."²⁰

Texas is due to carry out this deadly ritual for the 460th time since 1977 with the killing of David Powell. As the Texas judge who set his execution date stated on 1 March 2010:

"It is therefore the order of this Court that the defendant David Lee Powell, who has been adjudged to be guilty of capital murder, and whose punishment has been assessed at death, shall, after the hour of 6pm on the 15th day of June, 2010 at the Texas Department of Criminal Justice at Huntsville, Texas, be caused to die by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death into the body of the said David Lee Powell until he is dead".²¹

Eight decades ago, the British writer George Orwell wrote of an execution in Burma. Orwell had watched as the condemned man was led from his cell to the gallows. At one point, "in spite of the men who gripped him by each shoulder, he stepped slightly aside to avoid a puddle on the path". Orwell continued:

"It is curious, but till that moment I had never realized what it means to destroy a healthy, conscious man. When I saw the prisoner step aside to avoid the puddle I saw the mystery, the unspeakable wrongness, of cutting a life short when it is in full tide. This man was not dying, he was alive just as we are alive... He and we were a party of men walking together, seeing, hearing, feeling, understanding the same world; and in two minutes, with a sudden snap, one of us would be gone – one mind less, one world less".²²

David Powell is alive today. Whether he remains so beyond 15 June 2010 or is taken from his cell on that day, strapped down and killed, is in the hands of the Texas authorities. Without the state's errors made in the earlier trials, David Powell might well have already been executed. Those mistakes have provided an opportunity for Texas to turn away from the mistake of killing him, and to recognise the "pointless and needless deprivation of life" that his execution would represent.

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¹ *Gregg v. Georgia*, 428 U.S. 153, 2 July 1976.

² *Baze v. Rees*, 16 April 2008, Justice Stevens concurring (internal quote marks omitted).

³ *Callins v. Collins*, 22 February 1994, Justice Blackmun dissenting.

⁴ On 10 May 2010, President Obama nominated US Solicitor General Elena Kagan to succeed Justice Stevens. Her confirmation hearing before the Senate Judiciary Committee is scheduled to begin on 28 June 2010.

⁵ This sentencing scheme has encouraged dubious prosecutorial practices. See for example, Deadly Speculation: Misleading capital jurors with false predictions of future dangerousness. Texas Defender Service, 2004, <http://02f2fd4.netsolhost.com/tds/images/publications/DEADLYSP.pdf>

⁶ *Powell v. Texas*, 492 U.S. 680, 3 July 1989.

⁷ For details of the crime see Amnesty International Urgent Action, 18 May 2010, <http://www.amnesty.org/en/library/info/AMR51/043/2010/en>

⁸ *In re David Lee Powell*. Before the Texas Board of Pardons and Paroles, Application for commutation of death sentence (Clemency petition), page 10.

⁹ See also, USA: Second thoughts – Former jurors rethink death decision as execution approaches 26 March 2010, <http://www.amnesty.org/en/library/info/AMR51/025/2010/en>. On 19 May, the Oklahoma governor commuted Richard Smith's death sentence to life imprisonment without the possibility of parole, see <http://www.amnesty.org/en/library/info/AMR51/044/2010/en>

¹⁰ Ohio Supreme Court Justice Paul Pfeifer has suggested that Ohio should review all the cases of those on its death row to assess the whether the death penalty was warranted under current law and societal standards. In 1981, Paul Pfeifer was among those state Senators responsible for resurrecting Ohio's capital statute after the old one was declared unconstitutional. 'Death row cases should be reviewed, justice says'. The Columbus Dispatch, 15 May 2010.

¹¹ <http://www.austinpolic.com/#abla>

¹² A recent national survey of police chiefs in the USA found that such officials "rank the death penalty last in their priorities for effective crime reduction. The officers do not believe the death penalty acts as a deterrent to murder, and they rate it as one of most inefficient uses of taxpayer dollars in fighting crime. Criminologists concur that the death penalty does not effectively reduce the number of murders." See Smart on crime: Reconsidering the death penalty in a time of economic crisis. Death Penalty Information Center, Washington DC, October 2009 <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>

¹³ In his concurring opinion in *Baze*, Justice Stevens said: "The legitimacy of deterrence as an acceptable justification for the death penalty is also questionable. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment".

¹⁴ Clemency petition, page 33.

¹⁵ *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan concurring.

¹⁶ *Thompson v. McNeil*, 9 March 2009, Justice Breyer, dissenting from the denial of *certiorari*.

¹⁷ *Thompson v. McNeil*, 9 March 2009, Statement of Justice Stevens respecting denial of *certiorari*.

¹⁸ Too much cruelty, too little clemency – Texas nears 200th execution under current governor, <http://www.amnesty.org/en/library/info/AMR51/057/2009/en>

¹⁹ *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Stewart concurring.

²⁰ *Callins v. Collins*, 22 February 1994, Justice Blackmun dissenting.

²¹ *Texas v. Powell*, Sentence after mandate, 167th District Court of Travis County, Texas, 1 March 2010.

²² George Orwell, *A Hanging* (1931). In 'Decline of the English Murder and other essays'. Penguin Books, 1965.