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An 'uncomfortable truth'

Two Texas governors – more than 300 executions

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As Texas prepares to carry out its 13th execution of the year, having conducted all but one of the judicial killings carried out in the USA so far in 2007, the editorial board of the major Texan daily newspaper, the *Dallas Morning News*, has taken the historic step of calling for an end to the death penalty in the state. Its recognition that Texas may have executed at least one innocent person lies behind its new thinking:

*“That uncomfortable truth has led this editorial board to re-examine its century-old stance on the death penalty. This board has lost confidence that the state of Texas can guarantee that every inmate it executes is truly guilty of murder. We do not believe that any system devised by inherently flawed human beings can determine with moral certainty the guilt of every defendant convicted of murder”.*¹

The *Dallas Morning News* points to the case of Carlos de la Luna, executed in Texas in 1989 for a crime he may not have committed: “We don’t know for sure”, the editorial states, “but we do know that if the state made a mistake, nothing can rectify it”. This is not the only time Texas has sent a prisoner to his death despite doubts about his guilt.

If Texas has indeed executed wrongfully convicted prisoners since resuming judicial killing on 7 December 1982, there is a high chance that one or more were put to death under the two most recent governors. Nearly 80 per cent of the 391 executions in Texas since 1982 have taken place under the governorships of George W. Bush (1995-2000) and Rick Perry (2001 – today). Indeed, more than a quarter of the USA’s 1,070 executions carried out since 1977 have taken place in this single state during the terms of office of these two men.² This is geographical bias on a grand scale. Governor Bush’s term saw 152 executions. So too has Governor Perry’s. On 26 April 2007, Ryan Dickson is set to become the 153rd prisoner to be put to death in Texas under Governor Perry.

¹ *Death no more*. Dallas Morning News, 16 April 2007.

² Apart from the ability to issue a single 30-day reprieve, the governor’s independent clemency authority is limited to formally requesting that the Texas Board of Pardons and Paroles investigate and consider the commutation of a death sentence. The governor may not commute a death sentence without a positive recommendation from the Board. The governor appoints the Board members.

President Bush, whose term in the White House has seen the only three federal executions in the USA since 1963 and the federal death row population double, was asked in 2005 about whether his support for executions had changed at all since leaving the Texas governorship. He replied that it had not, adding that his support for the death penalty is conditional upon making sure that those who are subject to it are “truly guilty”.³ “Truly guilty” is the phrase adopted by the *Dallas Morning News* in its editorial against the death penalty. While that paper has decided that “it is far better to err on the side of life”, President Bush’s record of non-intervention in capital cases suggests that his use of the words “truly guilty” represents the narrowest of funnels through which his quality of mercy is strained.

In the context of US death penalty law, the concept of “truly guilty” must mean that not only is the defendant guilty of the capital crime as charged, but that he or she also falls into the category of the “worst of the worst” for sentencing purposes.⁴ Only a tiny percentage of murders in the USA lead to a death sentence, and not all death sentences end in an execution. Indeed, more people are murdered in Texas every year than have been sentenced to death in the state in over 30 years. Since Texas reinstated the death penalty in 1974, following the 1972 US Supreme Court ruling which overturned the country’s existing capital laws, there have been a little over 60,000 murders in Texas. In the same period, 1,010 people have been sentenced to death in the state. Of these individuals, 391 have been executed and 384 remain on death row.

The question, then, is: are those people who are being selected for execution the “worst of the worst”? The *Dallas Morning News* rightly thinks not, pointing out that “wealth, race and random luck play a role in determining whether a case ends in death. Politics and

I am innocent, innocent, innocent... I am an innocent man, and something very wrong is taking place tonight.

Final statement, Leonel Herrera, Texas execution chamber, 12 May 1993

I want you to understand I speak the truth when I say I didn't kill your kids. Honestly I have not killed anyone.

Final statement, David Spence, Texas execution chamber, 3 April 1997

I would like to say that I did not kill Bobby Lambert. That I'm an innocent black man that is being murdered... What is happening here is an outrage for any civilized country.

Final statement, Gary Graham, Texas execution chamber, 22 June 2000

The only statement I want to make is that I am an innocent man - convicted of a crime I did not commit. I have been persecuted for 12 years for something I did not do.

Final statement, Cameron Willingham, Texas execution chamber, 17 February 2004

³ President’s press conference, 16 March 2005, available at <http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html>

⁴ “Within the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst’.” *Kansas v. Marsh*, US Supreme Court, 26 June 2006, Justice Souter dissenting.

geography can mean the difference between life in prison or lethal injection”.⁵ Texas, the paper suggests, “must begin a rigorous self-examination of its liberal use of the death penalty”.⁶ It continues:

*“Advances in DNA technology have ripped back the curtain and exposed ugly truths about the system we hoped and prayed stood for justice. We now see that system has stunk of reliance on bad eyewitnesses, faulty police techniques, junk forensic science, shortcuts by prosecutors, stingy defence funding and outrageously bad lawyering on behalf of people whose lives or freedom were at stake”.*⁷

Joseph Nichols was subjected to a prosecutorial “shortcut” when tried for the murder of Claude Shaffer, who was shot during the robbery of a grocery store in Houston. Claude Shaffer died from a single bullet wound. Willie Williams was brought to trial first. He pleaded guilty to killing Claude Shaffer. He said that Nichols had fired first but had not hit Shaffer. The prosecutor told the jury: “Willie Williams is the individual who shot and killed Claude Shaffer. That is all there is to it. It is scientific. It is consistent. It is complete. It is final, and it is in evidence... there is only one bullet that could possibly have done it and that was Willie Williams’.” Willie Williams was executed on 20 January 1995 after Governor George W. Bush failed to intervene.

Joseph Nichols was brought to trial after Willie Williams had been convicted. The state argued that regardless of who fired the fatal shot, Nichols was guilty under the law of parties, the Texas law under which no distinction is made between principal actor and accomplice in a crime and each defendant may be held equally culpable. The jury found Joseph Nichols guilty of capital murder, but was unable to reach a sentencing verdict. After a mistrial was declared, the prosecution interviewed some of the jurors and learned that their doubts about whether Nichols had been the person who had fired the fatal shot had left them unable to agree on the death penalty.

Joseph Nichols was retried by the same prosecutor. This time the prosecution primarily argued that Nichols had fired the fatal shot. It did not base this about-turn on any additional investigation. The prosecutor argued that “Willie [Williams] could not have shot [Shaffer]... [Nichols] fired the fatal bullet and killed the man in cold blood and he should answer for that”. This time the jury voted for a death sentence. In 1992, a federal judge noted that “Williams and Nichols cannot both be guilty of firing the same bullet because physics will not permit it”. He ruled that the prosecution had presented false evidence by changing its argument against Nichols and ordered that he be released or retried. However, the state appealed and the ruling was overturned. Joseph Nichols was executed on 7 March 2007 after Governor Rick Perry refused to intervene.

A prosecutorial shortcut was also indicated in the case of Ryan Dickson, whose sentence is due to be carried out on 26 April. In order to convict Dickson of capital murder at his 1997 trial, the prosecution had to prove that he intentionally killed Carmelo Surace while

⁵ *Death no more: Life without parole should be new standard.* Dallas Morning News, 16 April 2007.

⁶ *Texas' next step.* Dallas Morning News, 16 April 2007.

⁷ *Ibid.*

robbing his grocery store in Amarillo. While Dickson acknowledged responsibility for the killing, he denied having done so intentionally, arguing that Carmelo Surace was shot during a struggle. The testimony of Jeremy Brown, who participated in the robbery, was an important part of the state's evidence of intent. Brown testified that before entering the store, Dickson had said that he was going to shoot the owners. The jury found Ryan Dickson guilty of capital murder and he was sentenced to death.

It subsequently emerged that the prosecution had failed to give the defence audiotapes of pre-trial interviews the state had conducted with Jeremy Brown. In contrast to his trial testimony, in this interview, indeed during the first 40 to 50 pages of the transcript, Brown had said he did not know whether Dickson had expressed intent to shoot the store owners. Toward the end of the interview, the prosecutor had assured Brown that he need not worry about being charged with murder.

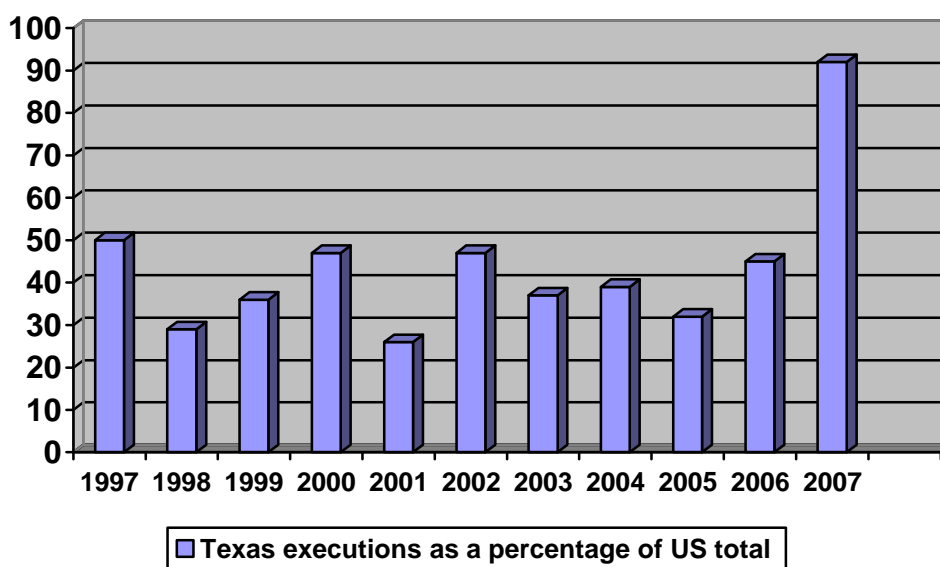
After a post-conviction hearing, the trial court concluded that the defence could have used the contents of the tapes to impeach the credibility of Jeremy Brown, and could have shown that it was only after Brown had been informed that he would not be prosecuted that he agreed during the pre-trial interview that Ryan Dickson had expressed the intent to kill. The trial court concluded that with such evidence, the jury might have reached a different conclusion. It recommended that Ryan Dickson receive a new trial "because of the importance of preserving and maintaining the integrity of the adversarial trial process". However, the Texas Court of Criminal Appeals allowed the conviction and death sentence to stand. Although the US Court of Appeals for the Fifth Circuit was critical of the withholding of evidence, noting that "the preservation of our civil liberties depends upon the faithful and ethical exercise of power by those who bear the mantle of public trust", having reviewed the state court decision "through the deferential lens" demanded by federal law, it upheld Ryan Dickson's sentence.

Ryan Dickson had just turned 18 years old at the time of the crime for which he was sentenced to death. If the crime had been committed 17 days earlier, he would now be serving a life sentence. On 24 June 2005, the death sentences of 29 Texas death row inmates who were 17 years old at the time of their crimes were commuted to life imprisonment following the US Supreme Court's ruling, *Roper v. Simmons*, three months earlier. The *Roper* ruling finally brought the USA into line with international law prohibiting, at a minimum, the use of the death penalty against people who were under 18 at the time of the crime. This prohibition stems from recognition of the immaturity, impulsiveness, poor judgment and underdeveloped sense of responsibility often associated with youth. But, as the *Roper* decision noted, "drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Indeed, scientific research shows that development of the brain and psychological and emotional maturation continues at least into a person's early 20s.

Amnesty International is urging the Board of Pardons and Paroles and Governor Perry to stop Ryan Dickson's execution.⁸ While Texas was following the law when it

⁸ Amnesty International Urgent Action, <http://web.amnesty.org/library/Index/ENGAMR510732007>.

commuted the 29 death sentences in June 2005, it would also be serving the interest of justice to commute the death sentence of Ryan Dickson, including on the grounds of his age at the time of the crime. Recent history is no cause for optimism, however. Vincent Gutierrez and Randy Arroyo were sentenced to death for the same crime in 1998, having been found equally culpable by the jury. Arroyo was 17 at the time of the crime and in 2005 became one of the 29 whose death sentences were commuted. His co-defendant Vincent Gutierrez was 18, and was executed on 28 March 2007, in the face of appeals for clemency.



Before the *Roper* ruling, in violation of international law, Governor Rick Perry and his predecessor each allowed the executions to go ahead of four offenders who were 17 at the time of the crime (all but one of these eight were African American). In 2001, the Texas House of Representatives passed a bill that would have raised the death penalty eligibility age in the state to 18. It failed in the Senate after high-level political intervention, reportedly from the governor's office. In August 2001, Governor Perry said that he supported the imposition of the death penalty on 17-year-old offenders.⁹ This became clear when he failed to stop the executions of Gerald Mitchell, Napoleon Beazley, T.J. Jones, and Toronto Patterson in 2001 and 2002 for crimes committed when they were 17 years old. Governor Perry was out of step with what the US Supreme Court calls "evolving standards of decency", the criterion it used in the *Roper* ruling when prohibiting such executions.

Governor Perry was also out of step with commonly held standards of decency in the USA, not to mention outside it, on the question of the execution of offenders with mental retardation. In 2001, he vetoed a bill which had passed both houses of the Texas legislature, aimed at exempting defendants with mental retardation from the death penalty. The veto

⁹ Perry says he's comfortable with execution age law. Dallas Morning News, 15 August 2001.

occurred at a time when it can be presumed, given the US Supreme Court's ruling a year later (*Atkins v. Virginia*) prohibiting the execution of people with mental retardation, there was already a "national consensus" against such use of the death penalty.

In its *Atkins* ruling in 2002, the US Supreme Court had left it up to individual states to develop "appropriate ways" to comply with the ruling, thereby opening the door to further inconsistency in the application of the death penalty in the USA. Five years later, the Texas legislature has still not enacted a law to comply with the *Atkins* ruling, and the courts there are operating under temporary guidelines developed by the Texas Court of Criminal Appeals. Governor Perry allowed the execution of James Clark to proceed on 11 April 2007 despite evidence that he had mental retardation.

In an assessment in April 2003, clinical psychologist Dr George Denkowski, hired by the state, concluded that James Clark had retardation – he assessed Clark's IQ at 65 and concluded that he had adaptive skill deficits in three areas (health and safety, social, and work). This was the fifth post-*Atkins* case that Dr Denkowski had worked on – in one other case he found that the defendant had mental retardation, in the other three he concluded that they did not have this level of impairment. Dr Denkowski found that Robert Smith had mental retardation, and an IQ of 63. The Harris County prosecutor accepted this, citing Denkowski's expertise, and Smith's death sentence was commuted. In 2006 and 2007 Dr Denowski found that death row inmates Darrell Carr, Demetrius Simms, and Exzavier Stevenson had mental retardation. In each case, the Harris County prosecutor accepted Dr Denkowski's finding and the death sentences were commuted. In two other Harris County cases, those of Coy Westbrook in 2006 and Brian Davis in 2004, Dr Denkowski concluded that the inmate did not have retardation. They remain on death row.

In James Clark's case, the Denton County prosecution did not accept Dr Denkowski's finding of retardation. Instead it hired another psychologist, Dr Thomas Allen. He concluded that Clark was faking retardation to avoid execution. The defence had an assessment done by Dr Denis Keyes, an expert whose studies were among those cited in the *Atkins* ruling. Dr Keyes concluded that James Clark had retardation (and an IQ of 68). He noted that Dr Denkowski's findings in Clark's case were "credible and correct". In contrast to this, Dr Keyes noted that Dr Allen "did no standardized testing (which is required for diagnosis and for ruling out a diagnosis)." Neither Dr Keyes nor Dr Denkowski found that James Clark had faked his mental retardation during their assessments, something that these experts specifically tested for.

An evidentiary hearing was held in the trial court in 2003. The judge deferred to Dr Allen's conclusions, rejecting those of Drs Keyes and Denkowski. She held that an IQ score of 74 that Clark achieved in 1983 in youth custody was "the most reliable indicator" of his IQ because he then had no reason to fake retardation, whereas a finding now would determine whether he was executed or not. The judge's opinion survived the appeals process and James Clark was put to death.

Like Governor Bush before him, Governor Perry has failed to intervene to stop the execution of condemned inmates with serious mental illness. In the case of Kelsey Patterson in 2004, Governor Perry rejected a rare recommendation for clemency from the Board of

Pardons and Paroles. Kelsey Patterson had long suffered from paranoid schizophrenia. There was overwhelming evidence that Kelsey Patterson's crime was a result of his mental illness, that he had not been competent to stand trial, and that he was legally insane at the time of his execution.¹⁰ Patterson had apparently long thought that he had received a permanent stay of execution on the grounds of innocence, and used to refer to his "amnesty". There was no doubt that he had committed the crime for which he was sentenced to death.

The "uncomfortable truth" is that just like the execution of the wrongfully convicted, the execution of those whose sentences were just plain wrong, cannot be rectified. Kelsey Patterson's execution flouted international standards, if not the US Constitution. It surely offended widely held "standards of decency".

Statement to what? State what? I am not guilty of the charge of capital murder. Steal me and my family's money. My truth will always be my truth. There is no kin and no friend; no fear what you do to me. No kin to you undertaker. Murderer. Get my money. Give me my rights. Give me my rights. Give me my rights. Give me my life back.

Final statement, Kelsey Patterson, Texas execution chamber, 18 May 2004

In the 1986 *Ford v. Wainwright* decision confirming the unconstitutionality of executing insane prisoners, but leaving it to individual states as to how to comply with the ruling, four US Supreme Court Justices acknowledged that although "the stakes are high", the evidence of whether a prisoner is incompetent for execution "will always be imprecise". A fifth Justice added that "unlike issues of historical fact, the question of [a] petitioner's sanity calls for a basically subjective judgment." In other words, there will always be errors and inconsistencies on the margins. There will also be inconsistency between states in the absence of clear US Supreme Court guidance. The *Ford* decision did not provide such clarity.¹¹ This is why the Court is now considering the case of Texas death row inmate Scott Panetti, who has serious mental illness. The question before the Court, 21 years after the *Ford* ruling, is whether the US Constitution permits the execution of an inmate who has a factual awareness of the reason for his execution, but who, because of his severe mental illness, has a delusional belief as to why the state is executing him.¹² Texas contends that while there is no dispute that Scott Panetti has mental illness, he has exaggerated the extent of that illness and Texas should be allowed to execute him.¹³

The Texas authorities considered the same in the case of Monty Delk, who it put to death on 28 February 2002. If Monty Delk was indeed faking his mental illness, he fooled

¹⁰ See USA: Another Texas injustice: The case of Kelsey Patterson, mentally ill man facing execution, AI Index: AMR 51/047/2004, March 2004, <http://web.amnesty.org/library/index/engamr510472004>.

¹¹ See pages 120 to 132 of USA: The execution of mentally ill offenders, AI Index: AMR 51/003/2006, January 2006, <http://web.amnesty.org/library/index/engamr510032006>.

¹² See USA: 'Where is the compassion?' The imminent execution of Scott Panetti, mentally ill offender, AI Index: AMR 51/011/2004, January 2004, <http://web.amnesty.org/library/index/engamr510112004>.

¹³ US Supreme Court to consider mental illness in case of Texas inmate. Austin American-Statesman, 18 April 2007. Oral arguments in the Panetti case were held on 18 April 2007.

many mental health professionals. He also maintained the “act” for years and right up to the point of his death. Monty Delk’s final words were: “I’ve got one thing to say, get your Warden off this gurney and shut up. I am from the island of Barbados. I am the Warden of this unit. People are seeing you do this”.¹⁴

Thus, the uncertainty that surrounds the guilt of some condemned prisoners swirls more generally around the capital justice system as a whole. Is one defendant who was two weeks past his 18th birthday so much more culpable than another whose capital crime was committed just before he turned 18 that it should make the difference between life and death? Is this prisoner so mentally ill that he is “incompetent” for execution, while this other inmate has enough understanding to allow their execution to proceed? Does this individual fall into the category of an offender with mental retardation, while this person does not? If this trial lawyer had raised more available mitigation evidence, would the jury have voted for life rather than death? If that prosecutor had not suppressed evidence, would the outcome of the trial have been different? Did race play a role in the case? To cite a specific example, if the murder victim had been a homeless African American man rather than a rich white businessman, would the prosecutor have sought a death sentence in the first place?¹⁵

Such questions demand definitive answers in these life or death cases, but at least at the margins this may be impossible. Yet the death penalty assumes a degree of certainty that does not occur in the real world. Indeed, the death penalty makes assumptions about a world that does not exist. It assumes the absolute perfection of the criminal justice system, and the absolute imperfection of the people it condemns to death. It assumes that human beings can decide – free from error or inequity – which of their fellow human beings convicted of crimes should live and which should die. It assumes that even if discrimination has not yet been eradicated in society, it can be overcome in the course of capital justice. And, even if government is the focus of public distrust on other issues, the state is still somehow assumed to be imbued with incorruptibility and infallibility when it turns its hand to executions.

The act I committed to put me here was not just heinous, it was senseless. But the person that committed that act is no longer here - I am. I'm not going to struggle physically against any restraints. I'm not going to shout, use profanity or make idle threats. Understand though that I'm not only upset, but I'm saddened by what is happening here tonight. I'm not only saddened, but disappointed that a system that is supposed to protect and uphold what is just and right can be so much like me when I made the same shameful mistake. Tonight, we tell our children that in some instances, in some cases, killing is right.
Final statement, Napoleon Beazley, Texas execution chamber, 28 May 2002

By all accounts, President Bush remains confident in the death penalty. Yet at the same time, his administration told the United Nations Committee Against Torture in Geneva

¹⁴ See page 65 of USA: *The execution of mentally ill offenders*, op.cit.

¹⁵ See case of Napoleon Beazley, pages 24 to 26 of USA: *The experiment that failed. A reflection on 30 years of executions*, AI Index: AMR 51/011/2007, January 2007, [http://web.amnesty.org/library/pdf/AMR510112007ENGLISH/\\$File/AMR5101107.pdf](http://web.amnesty.org/library/pdf/AMR510112007ENGLISH/$File/AMR5101107.pdf).

on 8 May 2006: "All governments are imperfect because they are made up of human beings who are, by nature, imperfect. One of the great strengths of our nation is its ability to recognize its failures, deal with them, and act to make things better."¹⁶ In its recent editorial, the *Dallas Morning News* revealed that it had reached the conclusion that human imperfection renders the death penalty an untenable punishment:

"The state holds in its hands the power of life and death. It is an awesome power, one that citizens of a democracy must approach in fear and trembling, and in full knowledge that the state's justice system, like everything humanity touches, is fated to fall short of perfection. If we are doomed to err in matters of life and death, it is far better to err on the side of caution. It is far better to err on the side of life. The state cannot impose death – an irrevocable sentence – with absolute certainty in all cases. Therefore the state should not impose it at all."

To end the death penalty is to abandon a destructive, diversionary and divisive public policy that is not consistent with widely held values. It not only runs the risk of irrevocable error, it is also costly – to the public purse, as well as in social and psychological terms. It has not been shown to have a special deterrent effect. It tends to be applied discriminatorily on grounds of race and class. It denies the possibility of reconciliation and rehabilitation. It promotes simplistic responses to complex human problems, rather than pursuing explanations that could inform positive strategies. It prolongs the suffering of the murder victim's family, and extends that suffering to the loved ones of the condemned prisoner. It diverts resources that could be better used to work against violent crime and assist those affected by it. It is a symptom of a culture of violence, not a solution to it. It is an affront to human dignity.

In his inaugural address on 20 January 2001, President George W. Bush promised to be a leader who would "speak for greater justice and compassion". He should speak out publicly against the death penalty, including in Texas, and call a halt to any more federal executions during his term in office.

In Governor Rick Perry's most recent State of the State address, in February 2007, he exhorted his fellow Texans to "fight for the Texas we aspire to, the Texas that can be, the Texas that can lead the world." In a world where 128 countries are now abolitionist in law or practice, should Texas not aspire to ending its attachment to the death penalty rather than leading the USA's increasing isolation on this issue?

Amnesty International urges these two leaders to reflect upon the reasons why the *Dallas Morning News* has lost confidence in capital punishment, and to consult any of the many other editorials, articles, commentaries and studies providing compelling evidence that the death penalty is an inescapably flawed punishment that should be consigned to the history books.

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¹⁶ Statement available at <http://www.state.gov/g/drl/rls/rm/2006/66065.htm>.