USA

A DEADLY DISTINCTION

500TH EXECUTION IN TEXAS LOOMS

AMNESTY INTERNATIONAL

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Anthony Haynes, on Texas death row for a crime committed when he was 19, was less than three hours from execution in October 2012 when the US Supreme Court granted a stay. He remains on death row, one of about 280 inmates awaiting execution in Texas (© Melinda Martin, 2012)

INTRODUCTION

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 [Texas death row prisoner Bruce] Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction. Within days, or perhaps hours, the memory of Callins will begin to fade. The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die

Callins v. Colllins (1994), US Supreme Court, Justice Blackmun dissenting[1]

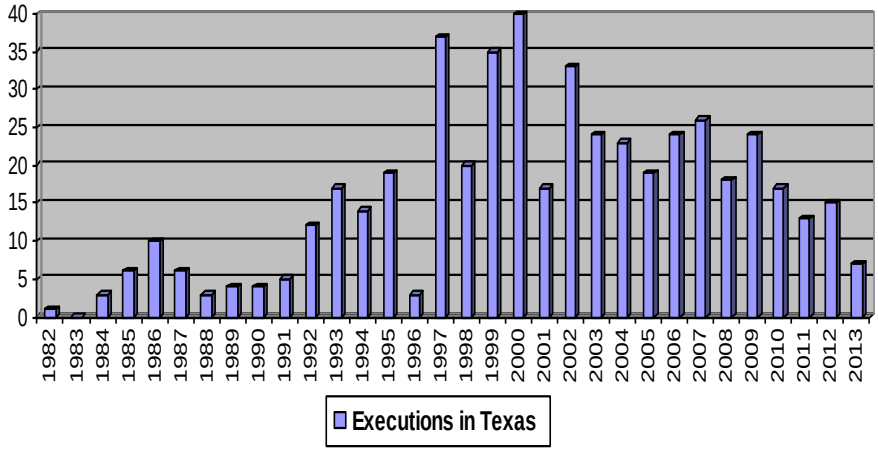
The State of Texas is set to kill another incarcerated human being, in the same macabre ritual it has repeated 499 times since 1982. On 499 occasions since the US Supreme Court approved new capital laws in 1976, a Texas execution squad has tied a prisoner down in the state's death chamber and he or she has then been killed by lethal injection.

Between1997 and 2000, Texas averaged an execution every 10 or 11 days. For the past five years, it has been killing condemned prisoners at a rate of about one every three weeks.

For 259 days from 26 September 2007, no one was killed in the Texas execution chamber.[2] This was the result of a nationwide moratorium which occurred while the US Supreme Court considered the constitutionality of the three-drug lethal injection process then used in most executing states, including Texas. When the Court upheld the method in April 2008, its most senior Justice, John Paul Stevens, revealed that his three decades on the Court had led him to conclude that "the imposition of the death penalty represents the pointless and needless extinction of life". Thirty-two years earlier, he had voted with the Court's majority to allow the "modern" era of judicial killing in the USA to begin.

In the 2008 ruling, Justice Stevens suggested that retention of the death penalty in the USA was "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".[3] Four US states have since broken the habit and legislated to abolish the death penalty – New Mexico (2009), Illinois (2011), Connecticut (2012) and Maryland (2013).[4]

Texas, in contrast, has killed another 94 prisoners, 40 per cent of the national total for that five-year period.



As individual US states abandon the death penalty, one of the hallmarks of US capital justice, geographic disparity, can only become greater. Thirty-seven per cent of the more than 1,330 executions in the USA since 1976 have occurred in Texas. Texas accounts for five times as many executions as 17 other US death penalty states combined.[5] Thirty-two US states and the federal government currently retain the death penalty.

Some 168 prisoners sentenced to death in just two Texas jurisdictions – Harris County and Dallas County – have been executed since 1976. More Harris County defendants alone have been executed than have been put to death in any other entire state in the USA. Today there are another 131 prisoners on death row who were prosecuted in these two counties. Only six states (apart from Texas) currently have more prisoners on death row.[6]

The 500th Texas execution is due to take place on 26 June 2013. Kimberly McCarthy, a 52-year-old woman, is scheduled to be killed at or soon after 6pm, Texas time. She was sentenced to death in Dallas County for the murder of her 71-year-old neighbour Dorothy Booth, who was stabbed to death in her home in 1997.[7] Kimberly McCarthy would be the 13th woman to be executed in the USA since 1976, and the fourth in Texas.

As with any murder, the crime for which Kimberly McCarthy was sentenced to death was undoubtedly serious. However, the vast majority of murders in the USA do not result in a death sentence, even in those states that are most active in pursuing capital punishment. The murder of Dorothy Booth was one of more than 1,300 murders that occurred in Texas in 1997. Kimberly McCarthy was one of 39 people to be sentenced to death in Texas in 1998.[8] There have been more than 60,000 murders in Texas since 1973 (about 10 per cent of the national total), about 1,080 death sentences (about 12 per cent of the national total), and 499 executions (37 per cent of the national total).

Each state killing is long planned (with a level of calculation not displayed in the average capital murder), and numerous people are urged or paid by the state to devote expertise or effort to see that any opposition to that outcome based in law, compassion or human rights is defeated and the condemned prisoner's life eventually extinguished. While Texas has not always been successful in this goal – including in the dozen cases where it spent years trying to move the condemned prisoner towards the death chamber before it was revealed that the person was innocent of the crime in question – it has succeeded in numerous cases in executing the prisoner even when to do so violated specific principles of international law or contravened international safeguards. This has included the cases of individuals who were under 18 at the time of the crime, where the prisoner had a serious mental disability, where the condemned prisoner was a foreign national denied his consular rights, where there was compelling evidence of inadequate legal representation provided to the capital defendant, or where there were serious doubts about the condemned person's guilt.

The process for deciding who gets the death penalty – a punishment in the USA supposedly since 1976 "limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution"[9] – is marked by discrimination, arbitrariness and error.

Since 1976, dozens of countries have abolished the death penalty and today 140 are abolitionist in law or practice. The USA – with Texas as by far its most prolific executing state – continues to buck this global trend. The USA's claims to be a progressive force for human rights cannot survive its continuing resort to the death penalty.

DEATH BY DISCRIMINATION

The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded
Gregg v. Georgia (1976), US Supreme Court, Justice Brennan dissenting

In 2009, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions singled out Texas (and Alabama) where he said he had found "a shocking lack of urgency with regard to the need to reform glaring criminal justice system flaws" in relation to the death penalty. He drew attention among other things to the "lack of adequate counsel for indigent defendants" and "racial disparities in sentencing." In a follow-up report in 2012, he pointed to the continuing failure of the authorities to address such issues.

Issues of race are never far away in US capital justice. Race, particularly race of the murder victim, continues to be a factor in the death penalty, as study after study has shown. Seventy per cent of the 499 people executed in Texas were convicted of crimes involving white victims. While this is about seven or eight per cent lower than the national figure, individual case and county information show how the racial component of capital justice in Texas is no less a cause for concern.

Fifteen people convicted in Montgomery County, Texas, for example, have been executed since 1977. All 15 were convicted of killing whites. Another person against whom Montgomery County prosecutors obtained a death sentence was Clarence Brandley, a black man twice tried in front of all-white juries for the murder of a white girl (the first trial was declared a mistrial, the second resulted in a death sentence). He was released from death row, one of the dozen wrongful convictions in Texas capital cases uncovered since 1987. Meanwhile the 15 men who were executed included two other black defendants, Glen McGinnis, executed in 2000, and Jonathan Marcus Green, tried in 2002 and executed in 2012. Both of them had also been sentenced by all-white juries. Glen McGinnis's execution went ahead in violation of international law – he was 17 at the time of his crime. Jonathan Green was killed despite the fact that he suffered from serious mental illness (see below).

A study published in 2008 concluded that race of defendant and race of victim were both "pivotal" in capital justice in Harris County, the Texas jurisdiction that is the main supplier for the state's death row. According to this study, "death is more likely to be imposed against black defendants than white defendants, and death is more likely to be imposed on behalf of white victims than black victims".[10] Of the 21 prisoners sentenced to death in Harris County since 2004 who remain on death row, 15 (71 per cent) are black, four are Hispanic and two are white.

Richard Wilkerson was a Harris County defendant who was executed in 1993 for a crime committed at the age of 19. He was black, the victim white. Richard Wilkerson was tried by an all-white jury after the prosecution used four of its "peremptory challenges" to get rid of all four prospective black jurors during jury selection. Under the 1986 US Supreme Court decision *Batson v Kentucky*, prospective jurors can only be removed for "race neutral" reasons. If the defence makes a *prima facie* case of discrimination by the prosecution, the burden shifts to the state to provide race neutral explanations. The Wilkerson case prompted a US Supreme Court Justice to write:

> "*Batson*'s greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors… This flaw has rendered *Batson* ineffective against all but the most obvious examples of racial prejudice – the cases in which a proffered 'neutral explanation' plainly betrays an underlying impermissible purpose. To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd. *Batson* would thereby become irrelevant, and racial discrimination in jury selection, perhaps the

> greatest embarrassment in the administration of our criminal justice system, would go undeterred. If such 'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination."[11]

In the country's second most prolific death penalty jurisdiction, Dallas County, the geographic disparity is again mixed with concerns over race. As the US Supreme Court put it in 2003, "the culture of the [Dallas County] District Attorney's Office in the past was suffused with bias against African-Americans in jury selection".[12]

In 2005, the Court again noted that "for decades leading up to the [mid-1980s] prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries".[13] In addition to finding that prosecutors at the 1986 Dallas County trial of Thomas Miller-El had resorted to racially motivated peremptory strikes against would-be black jurors, the Supreme Court pointed out that "if anything more is needed for an undeniable explanation of what was going on, history supplies it". The Court pointed to "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black [would-be jurors] at the time Miller-El's jury was selected", and to a training manual for prosecutors that gave tips on excluding minorities from juries. In August 2005, a study by the Dallas Morning News reported that the county's prosecutors were still excluding blacks at more than twice the rate that they were excluding eligible white would-be jurors at capital trials.[14]

Dallas County is where Kimberly McCarthy was sentenced to death at a retrial. She is black. The murder victim was white. The 2002 trial jury consisted of 11 whites and one black, inconsistent with the population of Dallas County which is about 23 per cent black and 69 per cent white. At the trial there were 64 prospective jurors in the pool for individual questioning, of whom only four (six per cent) were black. Three of them were peremptorily dismissed by the prosecution. Kimberly McCarthy's trial lawyer did not object to the prosecutor's dismissals and did not request a *Batson* hearing.

Kimberly McCarthy's current lawyer has pointed out that the "inexplicable" failure of defence counsel to object to the state's dismissals means that the record is devoid of a *Batson* hearing, including any race neutral reasons asserted by the prosecution or evidence from the defence that such reasons were the pretext for racism. However she has argued that there is nevertheless evidence of race-based intent – firstly, the history of racist jury selection tactics by prosecutors in Dallas County; secondly, the bare statistic that the prosecutors peremptorily dismissed 75 per cent of the blacks in the jury pool; and thirdly, evidence that they had asked different questions of white and non-white prospective jurors.

Not only had the trial lawyer not objected, but neither had the state-appointed appeal lawyer (who reportedly visited his client only once on death row in the 10 years he represented her) raised the failure on appeal, causing it to be procedurally lost to judicial review.

On 24 June 2013, the Texas Court of Criminal Appeals refused to issue a stay of execution in Kimberly McCarthy's case. At the same time, there were already three men scheduled to be killed in the Texas death chamber in July 2013.

KILLING YOUNG OFFENDERS

The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty

Gregg v. Georgia (1976), US Supreme Court, Justice Brennan dissenting

In 1972, in the US Supreme Court's *Furman v. Georgia* ruling overturning existing death penalty statutes, one of the Justices pointed to a study of the death penalty in Texas covering the years 1924 to 1968 which concluded that "Application of the death penalty is unequal: most of those executed were poor, young, and ignorant".[15]

Of the 499 people executed in Texas since 1982, at least 75 were teenagers (17, 18 or 19) at the time of the crime. In other words, Texas has carried out more executions of teenaged offenders than the *total* number of executions carried out in any other state, bar three.[16]

After the Court's *Gregg v. Georgia* ruling in 1976 approved new capital laws, Texas led the USA's flouting of the international prohibition on the execution of individuals who were under 18 at the time of the crime. Until the US Supreme Court belatedly stepped in and banned this practice in 2005, Texas accounted for 13 of the 22 such executions carried out in the USA in the modern era. In its 2005 ruling, the Supreme Court recognized the immaturity, impulsiveness, poor judgment and underdeveloped sense of responsibility associated with youth, as well as the susceptibility of young people to "outside pressures, including peer pressure". It also noted that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18". Indeed, scientific research shows that brain development continues into a person's 20s.

Since the 2005 ruling, Texas has executed 26 individuals who were 18 or 19 at the time of the crime. While not a violation of any explicit provision of international law as was the case in its use of the death penalty against 17-year-old offenders, the Texas capital justice system is nevertheless still displaying an unwillingness to recognize the mitigating effects of youth.

The use of this punishment against teenaged offenders in Texas also displays marked racial disparities. Twenty-seven of the 75 people executed for crimes committed when they were teenagers were African Americans convicted of killing whites.

The leading role that Texas played in the use of the death penalty against children before the practice was banned is replicated in the case of people with intellectual disabilities.

FAILING 'STANDARDS OF DECENCY'

We have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual
US Supreme Court, *Roper v. Simmons* (2005)

In 2002, in *Atkins v. Virginia*, the US Supreme Court banned the execution of people with "mental retardation" as categorically exempted due to their diminished culpability. The Court found that a national consensus had emerged against such executions under its "evolving standards of decency" analysis.

The Court did not define retardation, although it pointed to definitions used by professional bodies. Under such definitions, mental retardation is a disability, manifested before the age of 18, characterized by significantly sub-average intellectual functioning (generally indicated by an IQ of less than 70) accompanied by limitations in two or more adaptive skill areas such as communication, self-care, work, and functioning in the community. In a statement responding to the *Atkins* decision, Governor Perry said that "Texas does not execute mentally retarded individuals who meet the three-pronged test cited in the High Court's decision". Clearly the state had been sentencing defendants with mental retardation to death, however, given that at least 10 Texas prisoners have had their death sentences commuted to life imprisonment on the grounds of mental retardation as a result of the *Atkins* ruling. And before the *Atkins* decision, Texas accounted for nine of 44 of the USA's executions since 1977 of people assessed as having mental retardation, again more than any other state.[17]

The Court left it to the states to decide how to comply with the *Atkins* ruling, which in the case of Texas, was akin to leaving the fox in charge of the henhouse. Over 10 years later, the Texas legislature has still not enacted a law to do so. In the absence of such legislation, in 2004 the Texas Court of Criminal Appeals (TCCA) issued guidelines, a "temporary" solution which has caused growing concern that people who should be exempted from execution under the *Atkins* ruling are being put to death.[18]

In addition to this, a number of prisoners with histories of serious mental illness remain on death row in Texas.[19] Even for such prisoners, executive clemency seems to remain only a remote possibility in Texas. In Texas, the Office of the Governor has limited formal authority over capital cases – he or she can impose stays of execution and can commute a death sentence on the recommendation of the Board of Pardons and Paroles (BPP). There is little doubt however, that the Governor could also use his or her influence (including with their BPP appointees) to offer the sort of leadership required for the state to progress on this fundamental human rights issue. No such leadership has been forthcoming in the Texas, even as it has begun to emerge in other such offices in other states.

In the case of Jonathan Green (see also above), a federal judge granted a stay of execution after his lawyer had submitted compelling evidence that Green suffered from schizophrenia and believed that he was going to be killed "as a result of demons conducting spiritual warfare over him". A mental health expert retained by the defence, who had "performed numerous psychological tests on Green, interviewed him extensively and reviewed extensive records", concluded that Jonathan Green was suffering from "severe delusions, hallucinations, and formal thought disorders". The federal judge also noted that prison records dating back to 2003 showed "progressing mental illness, including visual, auditory, and somatic hallucinations. For instance, Green has stuffed toilet paper in his ears to try to stop the voices in his head. On several occasions, he required medical attention to remove the impacted toilet paper from his ears".

The judge noted that the state's expert had met with Jonathan Green only twice, "apparently for less than an hour on each occasion", and "performed no tests". This expert acknowledged

that Jonathan Green suffered from mental illness, including hallucinations, but disagreed that he had schizophrenia. The federal judge concluded that Green had "made a substantial threshold showing of insanity", including through the submission of evidence from lay observers about his "bizarre behavior and his delusional statements" corroborated by the expert evidence that "he is likely psychotic". She issued a stay of execution. The US Court of Appeals for the Fifth Circuit granted the state's motion to lift the stay, however. Neither the Supreme Court nor the governor intervened, and the execution went ahead.

Eight years earlier, rejecting a recommendation from the state Board of Pardons and Parole that he commute the death sentence of Kelsey Patterson, a prisoner with serious mental illness, Governor Rick Perry said that he was allowing the execution to go forward "in the interests of justice and public safety", as if it was somehow necessary.

None of the 499 Texas state killings was necessary, but were instead "pointless and needless" exterminations. Each could have been stopped, right up until the last minute. While upheld as legal by the courts, each such killing is ultimately a policy choice, not a legal requirement.

NOT JUST A TEXAS AFFAIR

Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example

Olmstead v US (1928), US Supreme Court, Justice Brandeis, dissenting

In his first State of the State address in January 2001, current Texas Governor Rick Perry suggested that executing people was a good way to affirm the value of life.[20] More generally, the Texas authorities assert that whether or not to retain the death penalty is solely the state's business. In 2007, for example, responding to a call by the European Union for Texas to stop executing, the Texas Governor's spokesperson said: "Texas long ago decided that the death penalty is a just and appropriate punishment for the most horrible crimes committed against our citizens. While we respect our friends in Europe, welcome their investment in our state and appreciate their interest in our laws, Texans are doing just fine governing Texas."[21]

But this is not just a Texas affair. Every execution in Texas is an execution carried out by the USA, even if the federal government might sometimes, particularly when promoting the USA's human rights record on the international stage, seek to accentuate the federal/state divide. During scrutiny of the USA's human rights record under the Universal Periodic Review (UPR) process in 2010, for example, the Obama administration emphasised to the UN Human Rights Council that "state governments retain primary responsibility for establishing procedures and policies that govern state capital prosecutions".[22]

The UN Human Rights Committee, the expert body established under the International Covenant on Civil and Political Rights (ICCPR) to oversee implementation of that treaty, has reminded governments that national laws and systems of government may not be invoked in seeking to justify a country's failure to meet its treaty obligations.[23]

> "All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility… [T]he Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'."

The federal government, despite its public distancing from the state-level death penalty, has frequently facilitated state executions, including in litigation and legislation. In 1996, for example, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA). Signing the AEDPA into law on 24 April 2006, President Bill Clinton said: "For too long, and in too many cases, endless death row appeals have stood in the way of justice being served. From now on, criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences." Since then the AEDPA has remained an obstacle to federal judicial review and facilitated executions, including of individuals with compelling constitutional claims.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions noted in 1998 that "the guarantee of due process in capital cases ha[d] been seriously jeopardized" by the AEDPA, which placed unprecedented restrictions on prisoners raising claims of constitutional violations. It imposed severe time limits on the raising of constitutional claims, restricted the federal courts' ability to review state court decisions, placed limits on federal courts granting and conducting evidentiary hearings, and prohibited "successive" appeals except in very narrow circumstances. In 2012, the Special Rapporteur reiterated concern about the AEDPA: "No steps have been taken concerning the implementation of the recommendation that Congress enact legislation permitting federal courts to review the merits on all issues in post-conviction death penalty cases. Thus, the Special Rapporteur is still concerned about the AEDPA as it prevents federal habeas review of many issues…"[24]

One of the many examples of how the federal government has supported death penalty states in litigation came in 1999. Invited by the US Supreme Court to express its views on whether executing individuals for crimes committed when they were under 18 years old violated international law, the Clinton administration urged the Court not to review the question. The Court agreed and dismissed the issue. Nine more offenders were executed in the USA for crimes committed when they were children – in clear violation of international law – before the Court finally agreed to review the matter and ruled in 2005 that such executions were unconstitutional. Six of the nine were executed in Texas.

The federal government is currently litigating an aspect of lethal injection. In a letter dated 21 May 2012, the Attorneys General of the 15 states urged the US Attorney General to ensure that the Food and Drug Administration (FDA) appealed against a US District Court ruling, which held that the FDA had acted "arbitrarily and capriciously" and "in a manner contrary to the public health" in allowing imports of a "misbranded" and "unapproved" drug used in lethal injections. The lawsuit, brought by a number of state death row inmates, had accused the FDA of violating federal law by having improperly allowed imports of sodium thiopental, the short-acting barbiturate used in lethal injections. Among other things, the plaintiffs argued that thiopental might fail to anesthetize them properly, with the result that they might be conscious or partially conscious when the next drugs were administered, which would cause them severe pain. Amnesty International wrote to the US Attorney General urging him to respond to the states that the federal government would not appeal the District Court ruling.[25] While the organization did not receive a reply from the Attorney General, the administration's response was clear when the US Department of Justice filed notice of appeal to the US Court of Appeals for the DC Circuit and has since filed its petition arguing for the District Court ruling to be reversed.[26] The Court of Appeals has not yet ruled.

The manner in which the federal government ratified the ICCPR in 1992 (having signed it in 1977) was illustrative of the USA's reluctance to apply international law to its own conduct, whether at state or federal level. When the USA ratified the ICCPR it filed a number of "reservations, declarations and understandings". Two of these conditions stemmed at least in part from the USA's intent to avoid any constraints on the country's use of capital punishment beyond those imposed by the US Supreme Court as final arbiter of constitutional standards. With article 6 of the ICCPR on the right to life, then, the USA lodged the following

reservation:

> "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."

The stated main purpose of the USA's reservation to article 6 (the right to life) was to allow states in the USA (predictably led by Texas) to continue to use the death penalty against individuals for crimes committed when they were under 18 years old, despite the unequivocal ban on such executions. However, the 2005 *Roper v. Simmons* ruling banning the death penalty against under 18-year-olds has not led to withdrawal of the reservation. In 2006, reporting to the UN Human Rights Committee on US compliance with the ICCPR, the administration of President George W. Bush emphasised the USA's reservation and its breadth, rather than the previous emphasis on the narrow issue of the death penalty against children:

> "…the United States took a reservation to the Covenant, permitting it to impose capital punishment within its own constitutional limits. Accordingly, the scope of the conduct subject to the death penalty in the United States is not a matter relevant to the obligations of the United States under the Covenant."

The Bush administration told the Human Rights Committee that the reservation "remains in effect, and the United States has no current intention of withdrawing it." That remains the case seven years later under a new administration. At the UPR session on the USA at the UN Human Rights Council in 2010, a number of governments called on the USA to withdraw this reservation and other conditions attached to the ICCPR and other treaties. In its formal response in March 2011, the USA rejected such calls. Even if the original immediate motivation for the reservation had been to facilitate the execution of offenders for crimes committed when they were children, the USA apparently intends to continue to seek to avoid any international law curtailment of its judicial killing, including indeed mainly at state level.

The ICCPR contains an abolitionist vision, even as it recognizes the existence of the death penalty. This recognition should not be invoked "to delay or to prevent the abolition of capital punishment", in the words of article 6.6. In the same year that Texas resumed executions, 1982, the Human Rights Committee made clear that Article 6 of the treaty (on the right to life) "refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life".[27]

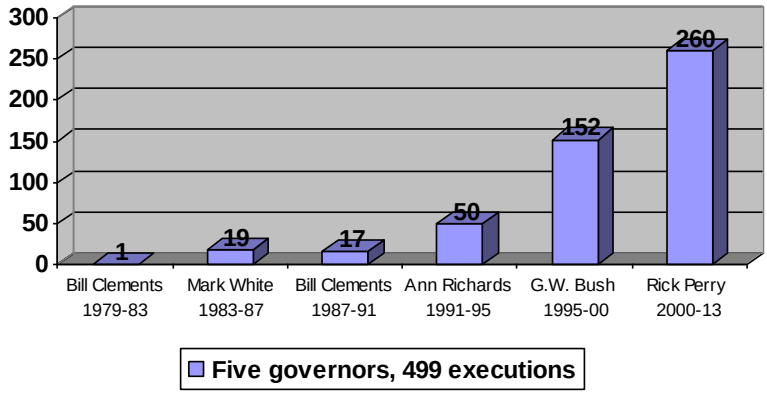
After scrutinizing the USA's Initial Report in 1995, the Committee called on the USA to work towards abolition. It repeated this call in 2006 after reviewing the USA's combined Second and Third Periodic reports.[28] Both the federal authorities and the Texas authorities are failing to provide such leadership.

While Texas continues to carry out an execution every two or three weeks, the USA's growing isolation in an increasingly abolitionist world has been expressly recognized in those few US states that have abolished the death penalty in the past few years. "From an international human rights perspective", said New Mexico's Governor Bill Richardson in 2009 when signing the bill to abolish the death penalty in his state, "there is no reason the United States should be behind the rest of the world on this issue". Two years earlier, his counterpart in New Jersey, Jon Corzine, had signed an abolitionist bill, and described this legislative achievement as "a day of progress – for the State of New Jersey and for the millions of people across our nation and around the globe who reject the death penalty". In 2011, Governor Pat Quinn of Illinois asserted that "we are taking an important step forward in our history as Illinois joins the 15 other states and many nations of the world that have abolished the death penalty". In 2012 Connecticut Governor Dannel P. Malloy promised to

sign his state's abolitionist bill into law, saying that his state would be thereby joining the "16 other states and almost every other industrialized nation in moving toward what I believe is better public policy".

When he announced in January 2013 that he was sending his state's legislature an abolitionist bill, Maryland's Governor Martin O'Malley also pointed to the global picture, emphasising that abolitionist countries were "a much more expansive community than the number who still use the death penalty". He asked: "So who do we choose to be? In whose company to do we choose to walk forward?" adding that "the way forward is always found through greater respect for the human dignity of all." The Maryland legislature voted for abolition and in May 2013, Maryland became the 18th abolitionist state in the USA.

Maryland executed five prisoners during its modern era of judicial killing. Texas has executed 100 times as many over the same period.



In Texas, Governor Perry's predecessor, George W. Bush, went from the governorship to the White House, where his term in office saw the first federal executions in the USA in nearly four decades. In the former President's memoirs published in 2010, there is a single reference to the death penalty, when he recalls a meal in the UK with then Prime Minister Tony Blair and his family. The death penalty came up in conversation, the former President recalls, and he defended his position on judicial killing: "I told her [Cherie Blair] I believed the death penalty, when properly administered, could save lives by deterring crime".[29]

Before taking the presidential election in 2000, his almost six years as Governor of Texas had seen more than 150 executions – of prisoners strapped down and injected with lethal drugs. This cutting of the future President's teeth as chief executive of the country's leading death penalty state included the execution of a number of prisoners in violation of clear provisions of international law after the governor's power of reprieve was not exercised. And as Amnesty International has pointed out, the conditions the USA attached to its ratification of the ICCPR and the UN Convention against Torture, at least in part to protect the US death penalty from international restrictions, subsequently formed part of the USA's flawed legal justifications for resorting to torture and other human rights violations in the counter-terrorism context.[30]

For the USA, the death penalty does not just constitute the "pointless and needless extinction of life", as Justice Stevens concluded in 2008. It seriously damages the USA's human rights credibility in an increasingly abolitionist world, and has a corrosive influence on the USA's relationship to international human rights law and standards.

The death penalty is incompatible with human dignity, as Governor O'Malley suggested when encouraging his state legislature to abolish capital punishment. Texas has yet to recognize this incompatibility with human rights principles.

FURTHER INFORMATION

An illustrative selection of Amnesty International reports on the death penalty in Texas:

Texas – Still doing its worst, October 2012,
http://www.amnesty.org/en/library/info/AMR51/092/2012/en

The less than one percent doctrine, October 2012,
http://www.amnesty.org/en/library/info/AMR51/084/2012/en

Senseless killing after senseless killing, June 2012,
http://www.amnesty.org/en/library/info/AMR51/042/2012/en

'The State would urge the Court to find that the defendant is competent', July 2010,
http://www.amnesty.org/en/library/info/AMR51/061/2010/en

People can change. Will Texas? June 2010,
http://www.amnesty.org/en/library/info/AMR51/048/2010/en

Too much cruelty, too little clemency, April 2009,
http://www.amnesty.org/en/library/info/AMR51/057/2009/en

One county, 100 executions, July 2007,
http://www.amnesty.org/en/library/info/AMR51/125/2007/en

Another Texas injustice: The case of Kelsey Patterson, mentally ill man facing execution, March 2004, http://www.amnesty.org/en/library/info/AMR51/047/2004/en

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'Where is the compassion?' The imminent execution of Scott Panetti, mentally ill offender, January 2004, http://www.amnesty.org/en/library/info/AMR51/011/2004/en

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http://www.amnesty.org/en/library/info/AMR51/158/2002/en

'A skunk in the jury box, June 2002,
http://www.amnesty.org/en/library/info/AMR51/090/2002/en

Death in black and white, August 2001,
http://www.amnesty.org/en/library/info/AMR51/117/2001/en

Too young to vote, old enough to be executed, July 2001,
http://www.amnesty.org/en/library/info/AMR51/105/2001/en

Beyond Reason: The imminent execution of John Paul Penry, December 1999,
http://www.amnesty.org/en/library/info/AMR51/195/1999/en

Killing without mercy: Clemency procedures in Texas, May 1999,
http://www.amnesty.org/en/library/info/AMR51/085/1999/en

The death penalty in Texas: lethal injustice, March 1998,
http://www.amnesty.org/en/library/info/AMR51/010/1998/en

ENDNOTES

[1] Bruce Callins was eventually executed on 21 May 1997, becoming the 121st person to be put to death

in Texas in the modern era.

[2] Between February 1996 and September 1996 there was a 203-day period with no executions in Texas while the Texas Court of Criminal Appeals considered a state law enacted in 1995 aimed at accelerating the state appeals process. The Court upheld the law in late 1996. There were only three executions in Texas in 1996, two of them of prisoners who had waived their appeals.

[3] *Baze v. Rees*, 16 April 2008, Justice Stevens concurring in judgment

[4] In addition, New Jersey legislated to abolish the death penalty in 2007 and in that same year the last death sentence in New York State was commuted, following a 2004 court ruling that its capital law violated the state's constitution.

[5] California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kentucky, Maryland, Montana, Nebraska, New Mexico, Oregon, Pennsylvania, South Dakota, Utah, Washington State, Wyoming. Between them these states accounted for 98 executions between 1976 and June 2013 (Connecticut, Illinois, Maryland and New Mexico have now legislated to abolish the death penalty).

[6] Alabama, California, Florida, North Carolina, Ohio, Pennsylvania.

[7] See Amnesty International Urgent Action at http://www.amnesty.org/en/library/info/AMR51/039/2013/en

[8] Her conviction and death sentence were overturned by the Texas Court of Criminal Appeals in 2001. She was re-convicted and sentenced to death in 2002, one of 37 sent to Texas death row that year.

[9] *Roper v. Simmons*, US Supreme Court (2005)

[10] Scott Phillips, Racial disparities in the capital of capital punishment. 45 Houston Law Review, 807, 809 (Summer 2008).

[11] *Wilkerson v. Texas*, Justice Marshall dissenting from denial of certiorari.

[12] *Miller-El v. Cockrell* (2003)

[13] *Miller-El v. Dretke* (2005).

[14] A process of juror elimination, Dallas Morning News, 21 August 2005.

[15] *Furman v. Georgia* (1972), Justice Douglas concurring, citing Koeninger, Capital Punishment in Texas, 1924-1968, 15 Crime & Delin. 132, 141 (1969).

[16] Florida, Oklahoma, Virginia.

[17] See http://www.deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states.

[18] See, for example, case of Marvin Wilson, http://www.amnesty.org/en/library/info/AMR51/071/2012/en; Bobby Woods, http://www.amnesty.org/en/library/info/AMR51/121/2009/en; and James Clark, http://www.amnesty.org/en/library/info/AMR51/064/2007/en

[19] For example, see USA: 'Where is the compassion?' The imminent execution of Scott Panetti, mentally ill offender, January 2004, http://www.amnesty.org/en/library/info/AMR51/011/2004/en (Scott Panetti remains on Texas death row).

[20] "Texans know that the air that we breathe, the water that we drink, the land that we inhabit, they are all a reflection of the majesty and the beauty of our wonderful Creator. We must preserve His image. Like most Texans, I am a proponent of capital punishment because it affirms the high value we place on innocent life." Available at http://governor.state.tx.us/news/speech/67/

[21] Statement by Robert Black, spokesman for Texas Governor Rick Perry, concerning the European Union's appeal that Texas enact a moratorium on the death penalty, 21 August 2007,

http://governor.state.tx.us/news/press-release/129/

[22] UN Doc.: A/HRC/WG.6/9/USA/1, August 2012, National report to the UN Human Rights Council, for Universal Periodic Review, para. 63.

[23] Article 27, Vienna Convention on the Law of Treaties.

[24] UN Doc.: A/HRC/20/22/Add. 3. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, addendum: Follow-up to country recommendations – United States of America.

[25] Letter to US Attorney General Eric Holder from Amnesty International, 24 May 2012.

[26] For more on the shortage of lethal injection drugs, see USA: An embarrassment of hitches: Reflections on the death penalty, 35 years after Gregg v. Georgia, as states scramble for lethal injection drugs, July 2011, http://www.amnesty.org/en/library/info/AMR51/058/2011/en

[27] CCPR General Comment No. 6, The right to life (Article 6), 1982.

[28] Its Fourth Periodic report is due for scrutiny by the Committee in October 2013.

[29] George W. Bush, Decision points, Virgin Books, 2010, page 231. In the USA in 2012, the Committee on Deterrence and the Death Penalty at the National Research Council concluded that research on the effect of capital punishment on homicide is "not informative on whether the death penalty decreases, increases or has no effect on homicide rates." It said that "claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment". Deterrence and the death penalty. National Research Counsel. The National Academies Press, Washington, D.C., 2012. In an executive order issued on 22 May 2013, the Governor of Colorado said: "I once believed the death penalty had value as a deterrent. Unfortunately, people continue to commit these crimes in the face of the death penalty. The death penalty is not making our world a safer or better place".

[30] USA: Deadly formula: An international perspective on the 40th anniversary of *Furman v. Georgia*, 28 June 2012, http://www.amnesty.org/en/library/info/AMR51/050/2012/en