Public

amnesty international

UNITED STATES OF AMERICA
The experiment that failed
A reflection on 30 years of executions[1]

16 January 2007 **AI Index: AMR 51/011/2007**

I have been a judge on this Court for more than twenty-five years… I have no delusions of grandeur and I know my place in the judiciary. My oath requires me to apply the law as interpreted by the Supreme Court of the United States. I will continue to do so until the Supreme Court concludes that the death penalty cannot be administered in a constitutional manner or our legislatures abolish the death penalty. But lest there be any doubt, the idea that the death penalty is fairly and rationally imposed in this country is a farce.

US federal appeals court judge, 2005[2]

Historian Arthur Schlesinger wrote in 1983: "No paradox is more persistent than the historic tension in the American soul between an addiction to experiment and a susceptibility to ideology". On the one hand, Schlesinger suggested, "Americans are famous for being a practical people, preferring fact to theory, finding the meaning of propositions in results, regarding trial and error, not deductive logic, as the path to truth". On the other hand, "they also show a recurrent vulnerability to spacious generalities".[3]

The USA's attachment to the death penalty carries echoes of Schlesinger's paradox. The facts on the ground say abolish, but an idealised notion of capital punishment says continue. Today, 30 years after Gary Gilmore was shot by firing squad in Utah on the morning of 17 January 1977, restarting executions after almost a decade without them, the USA's reluctance to let go of judicial killing sets it apart from a clear majority of countries. Surely, however, with arbitrariness, discrimination, error and cruelty among its hallmarks, the USA's death penalty experiment has failed, to use US Supreme Court Justice Harry Blackmun's words. In his now famous 1994 dissent, Justice Blackmun vowed that after two decades of struggling to fashion a capital justice system that would be consistent, fair and error-free, he would no longer "tinker with the machinery of death". No combination of rules or regulations, he wrote, could ever save capital punishment from its inherent flaws.

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[1] This is a substantially revised and updated version of a document issued for the 30th anniversary of *Gregg v. Georgia*, the US Supreme Court ruling that allowed executions to resume. *USA: Blind faith*, AI Index: AMR 51/100/2006, 1 July 2006.

[2] *Moore v. Parker*, US Court of Appeals for the Sixth Circuit, Judge Martin dissenting.

[3] Arthur Schlesinger, Jr. *Foreign policy and the American character*. Foreign Affairs, Vol 62(1), 1983.

A dozen years later, however, even those current Justices who seem the most troubled by the death penalty have suggested that, despite "decades of back-and-forth between legislative experiment and judicial review" and the growing "evidence of the hazards of capital prosecution", it is "far too soon for any generalization about the soundness of capital sentencing across the country".[4] Thus the USA continues with its dead-end experiment, refusing to give up what Justice Blackmun suggested was the delusional idea that the death penalty can be made to work.[5]

Delusional is an appropriate word, for 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 in a country founded in revolution against a tyrannical monarchy, the state is still somehow assumed to be imbued with incorruptibility and infallibility when it turns its hand to executions.

If these assumptions are *not* made, and the imperfection of the justice system and the fallibility of the government are thereby accepted, then those advocating the death penalty must also accept the inevitability of executing the wrongfully convicted or the unfairly sentenced. One cannot have it both ways.

A learning curve – downturn in support for the death penalty

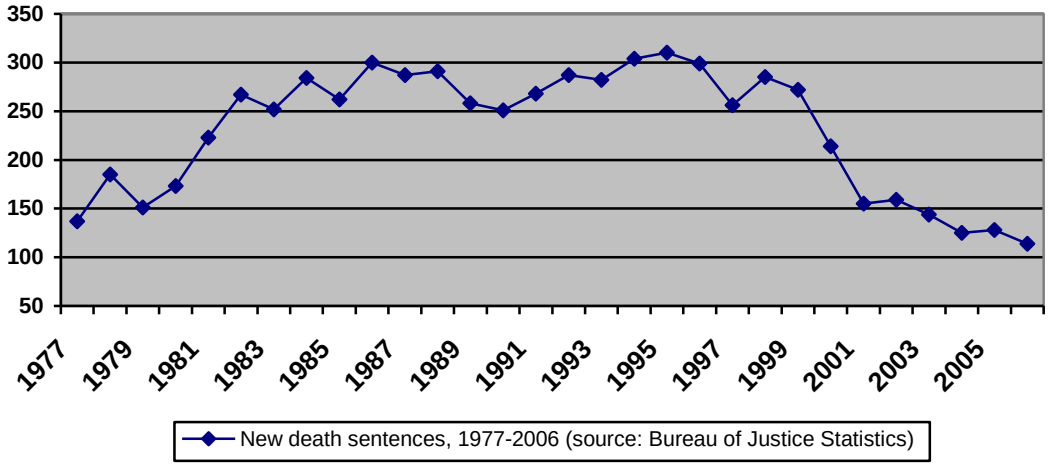
The introduction to Thomas Paine's hugely influential 1776 pamphlet, *Common Sense*, an appeal for independence addressed to the "inhabitants of America", opens with the following:

> "Perhaps the sentiments contained in the following pages, are not yet sufficiently fashionable to procure them general favour; a long habit of not thinking a thing *wrong*, gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defence of custom. But the tumult soon subsides. Time makes more converts than reason".

Two hundred and thirty years later, time *and* reason are conspiring against the death penalty. Today, with 128 countries abolitionist in law or practice, there are signs that the USA is also slowly turning against judicial killing. The 53 executions carried out in 2006 represented the lowest annual total for a decade, and death sentencing continues to drop from its peak in the mid-1990s. The number of people sentenced to death in 2006 was under half of what it was in 1996 and the lowest since 1977.[6] Capital jurors in the USA are more pro-prosecution than those who under US law are excluded from capital jury service due to their

[4] *Kansas v. Marsh*, 26 June 2006, Justice Souter dissenting (with Justices Stevens, Ginsburg & Breyer).
[5] "Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed". *Callins v. Collins*, Justice Blackmun dissenting.
[6] The Death Penalty Information Center is projecting that the 2006 total will be 114 new death sentences. See Year End Report, December 2006, http://www.deathpenaltyinfo.org/2006YearEnd.pdf.

opposition to the death penalty (and therefore not representative of the community as a whole).[7] Yet the growing reluctance of even these "death-qualified" jurors to hand down death sentences seems to reflect a broader downturn in public support for the death penalty. An erosion of the public's belief in the deterrence value of the death penalty, an increased awareness of the frequency of wrongful convictions in capital cases, and a greater confidence that public safety can be guaranteed by life prison terms rather than death sentences have all contributed to the waning of enthusiasm for capital punishment.[8]



A recent indicator of this shift against the death penalty came on 2 January 2007, when the New Jersey Death Penalty Study Commission – set up by the state legislature in 2006 to study all aspects of capital punishment in New Jersey – released its final report.[9] The Commission noted evidence of a trend against the death penalty in the USA, including the moratorium on executions in force in Illinois since 2000; the striking down of New York's death penalty statute by its Court of Appeals in 2004 and the state legislature's failure to reinstate it; abolition bills introduced in the legislatures of 10 states over the past two years;[10] and the recent decline in death sentencing both in New Jersey and nationally. After a process in which it held five public hearings and took evidence from a wide range of witnesses, the

[7] In 1986, the US Supreme Court acknowledged research that the "death qualification" of juries "produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries". *Lockhart v. McCree*, 476 U.S. 162 (1986).
[8] In a Gallup opinion poll taken in the USA in May 2006, more respondents favoured life imprisonment without parole (48 per cent) than the death penalty (47 per cent), when asked to choose between the two. 64 per cent of those polled disagreed with the notion that the death penalty deters murder, a substantial shift upwards from the 1980s and early 1990s. 63 per cent said they believed that an innocent person had been executed in the past five years, up from previous years.
[9] New Jersey Death Penalty Study Commission Report, January 2007. The report is available at http://www.njleg.state.nj.us/committees/njdeath_penalty.asp.
[10] Illinois, Kansas, Kentucky, Maryland, Missouri, Montana, New Jersey, New Mexico, Tennessee and Washington.

Commission recommended abolition of the death penalty in New Jersey, having failed to find any compelling evidence that it served a legitimate penological purpose and concluding that only abolition could eliminate the risk of irreversible arbitrariness and error. State Governor Jon Corzine welcomed the Commission's findings, adding that he was looking forward to working with the New Jersey legislature to implement the Commission's recommendations.[11]

Positive comments have also come from Maryland, where the state Court of Appeals halted executions on 19 December 2006 after finding that the state's lethal injection protocols had been adopted improperly. Governor-elect Martin O'Malley, due to take office on 17 January 2007, called on the outgoing Governor to leave the issue for the new administration. The Governor-elect said: "I'm sure all of this will spark a renewed debate as to whether all of the money we spend prosecuting death penalty cases might be better spent fighting violent crime and saving lives." A similar sentiment has been expressed by the new Attorney General of Ohio, Marc Dann, who said recently: "There is a pretty wide disparity with how the death penalty is administered in the state and I think we need to take a look at whether we're doing it the best possible way or whether there are better ways; or whether we should do it at all".[12]

A shortage of human rights leadership

Other elected officials are failing to offer human rights leadership on this issue, including at federal level and in the three states – California, Florida and Texas – which together account for more than 40 per cent of the country's total death row population.[13] About 30 per cent of murders in the USA take place in these three states, a figure which has changed little over the past 30 years despite their resort to the death penalty.[14]

In California, Governor Arnold Schwarzenegger responded to the December 2006 finding of a federal judge that California's lethal injection process was "broken" and marked by a "pervasive lack of professionalism" under which at least six of 13 executions may have been botched, with the announcement that he was "committed to doing whatever it takes to ensure that the lethal injection process is constitutional so that the will of the people is followed and the death penalty in maintained in California."[15] The opportunity was there for

[11] "As someone who has long opposed the death penalty, I look forward to working with the Legislature to implement the recommendations outlined in the report". *Governor Corzine's Statement on the New Jersey Death Penalty Study Commission Report*, 2 January 2007, http://www.state.nj.us/governor/news/news/approved/20070102.html.

[12] *Death penalty questions begin anew with Strickland's administration*. Dayton Daily News, 15 January 2007.

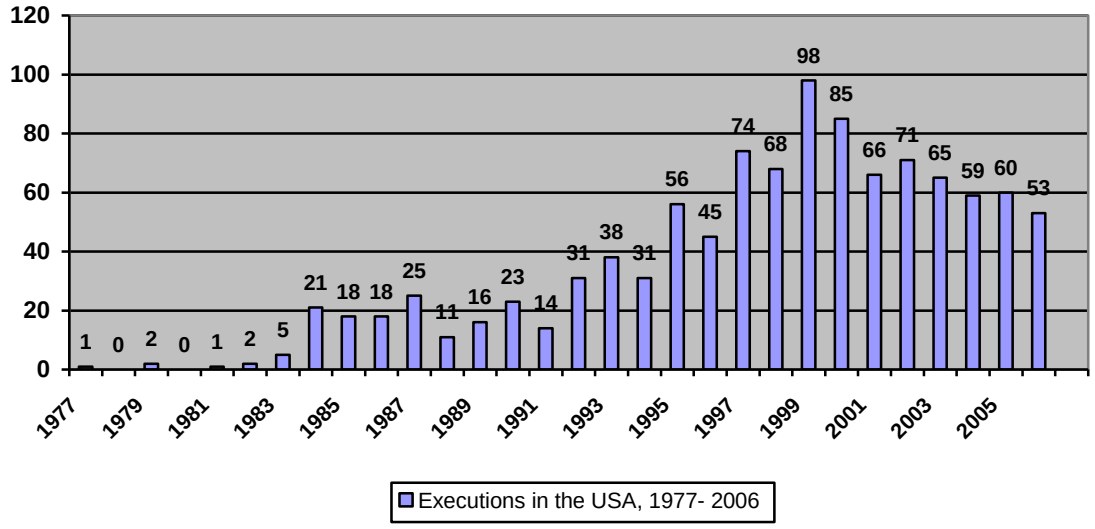
[13] See also, for example, on legislation to expand the death penalty for non-homicidal sex crimes against children in South Carolina and Oklahoma, *USA: More about politics than child protection - The death penalty for sex crimes against children*, AI Index: AMR 51/094/2006, 21 June 2006, http://web.amnesty.org/library/Index/ENGAMR510942006. There are similar proposals to introduce such legislation in Texas.

[14] 1977 – 27 per cent; 1990 – 31 per cent; 2005 – 29 per cent. These and other murder statistics in this report from FBI Uniform Crime Reports, as compiled by The Disaster Center, www.disastercenter.com.

[15] See *USA: New Year's resolution: End a cruel and outdated punishment*, AI Index: AMR 51/205/2006, 21 December 2006, http://web.amnesty.org/library/Index/ENGAMR512052006.

the Governor to speak out against judicial killing. Instead he turned to perceived popular opinion to justify yet more tinkering with the machinery of death.

The pursuit of the mythical humane execution is also still on in Florida, despite the botched execution in December 2006 of Angel Nieves Diaz. The lethal injection team needed 34 minutes and two doses to kill the prisoner, having apparently injected the first into his flesh rather than a vein. Seven years earlier, the state Supreme Court had urged the Florida legislature to adopt lethal injection as the alternative to the electric chair, following, as one of the Justices put it, the "fiery deaths of Jesse Tafero and Pedro Medina and the recent bloody execution of Allen Lee Davis" by electrocution.[16] Another of the Justices published, on the internet, post-execution photographs of Allen Lee Davis to make the point more graphically.[17] The legislature subsequently adopted lethal injection. Now Florida seems set to respond to the Diaz lethal injection with yet another effort to fix the unfixable.[18]



In Texas, by 10 January 2007, Rick Perry's governorship had seen 141 executions since he took office in 2001, following the 152 executions that marked the five-year term of his predecessor, George W. Bush. Texas has routinely violated international law and standards in its pursuit of the death penalty over the years, executing child offenders, the mentally disabled, foreign nationals denied their consular rights, prisoners whose guilt was in doubt, and those denied adequate legal assistance at trial or on appeal.[19]

[16] *Provenzano v. Moore*, 30 September 1999 (corrected version), Justice Anstead concurring. Jesse Tafero was executed on 4 May 1999, Pedro Medina on 25 March 1997, and Allen Davis on 8 July 1999.
[17] *Ibid*. Justice Shaw, dissenting.
[18] See *USA: New Year's resolution: End a cruel and outdated punishment*, *ibid*.
[19] *USA: Texas - In a world of its own as 300th execution looms*, AI Index: AMR 51/010/2003, 23 January 2003, http://web.amnesty.org/library/index/engamr510102003.

In 2002, the Texas Defender Service (TDS) published a study having reviewed 251 *habeas corpus* applications filed on death penalty cases in Texas between September 1995 and the end of 2001. It found that "an alarmingly large proportion" of them were "perfunctory".[20] Matters outside the trial record – such as the withholding of evidence by the prosecutor or the failure of the defence lawyer to present particular evidence – are supposed to be presented via the state *habeas corpus* appeal. The *habeas* appeal lawyer must therefore conduct a thorough investigation of the inmate's case. While a *habeas* appeal filed by a properly funded, experienced, competent lawyer might be expected to run to 150 pages, the TDS report found that:

> "Of the 251 *habeas* applications reviewed, 76 (30%) were 30 pages or less. Of those, 37 applications (15%) were 15 pages or less. Twenty-two applications (9%) were 10 pages or less - quite a feat, because the procedural requirements for *habeas* petitions usually consume five pages alone. It is no surprise that many of the shortest petitions contained only record-based, direct-appeal-type claims presenting nothing for review, thereby forfeiting future review by the federal courts."

Carlos Granados was put to death in Texas on 10 January 2007. For his state-level *habeas* appeal in 2001, his lawyer had filed a two-page petition raising a single issue. He never met with the prisoner. On the day of the execution six years later, the Texas Court of Criminal Appeals refused to grant a stay, acknowledging that the 2001 *habeas* petition had been "unusually brief" but writing that "in some circumstances, brevity is the wisest course. A single valid claim is all that is necessary to achieve the desired result…A single, well-crafted sentence may speak volumes while a 150 page application may be full of sound and fury signifying nothing".[21] In a concurring statement, three of the judges said that Granados "was found guilty of a brutal crime and may well deserve his sentence of death."[22] They noted the trial testimony of a clinical psychologist who had included race and ethnicity in his list of 22 factors predictive of "future dangerousness" (a finding by the jury of the defendant's future dangerousness is a prerequisite for a death sentence in Texas).[23] Agreeing with the decision not to stop the execution, the judges stated that this testimony "may or may not have improperly influenced the punishment assessed by the jury". But surely there should be no room for doubt when employing this irrevocable punishment? Governor Perry was asked to stay the execution, but refused to intervene. At the time of writing, another nine men and one woman were scheduled to be put to death in Texas before the end of May 2007.

Texas, where less than eight per cent of the USA's population resides, accounts for about nine per cent of the nation's murders and 36 per cent of its executions over the past 30 years. For all but one of the past 10 years, more than half of the country's annual total of executions has occurred in three states, Oklahoma, Virginia and Texas, which, combined,

[20] *Lethal indifference.* Texas Defender Service, 2002. www.texasdefender.org.
[21] *Ex parte Carlos Granados*, 10 January 2007.
[22] *Ibid*., Judge Johnson, concurring, joined by Judges Meyers and Price.
[23] The psychologist said at the trial that "race or ethnicity is not politically correct, but we know that minorities are over-represented in the prison system. The prison system is about 40 per cent black and 40 per cent Hispanic, and 20 per cent white and others…" Carlos Granados was Hispanic.

account for 11.5 per cent of the population of the USA, and between 12 and 13 per cent of its murders. This is geographical bias in judicial killing on a grand scale.

Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR) prohibits the arbitrary deprivation of life. The UN Human Rights Committee, the expert body established by the Covenant to oversee its implementation, has stated regarding the right to liberty that 'arbitrariness' should not be equated to 'against the law', but that it should be interpreted more broadly, to include notions of inappropriateness, injustice and lack of predictability.

Study after study has found that racial and geographic bias mark the US death penalty. Recent research, for example, concluded that the willingness of prosecutors in South Carolina to seek the death penalty "varies profoundly" across judicial districts.[24] The study's findings included:

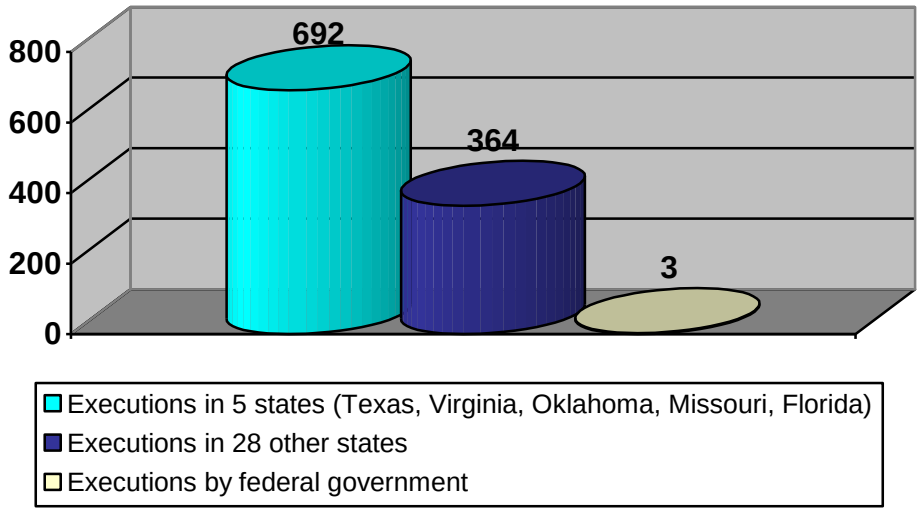
- Prosecutors are three times more likely to seek the death penalty if the murder victim is white than if the murder victim is black;
- Defendants in South Carolina's most "death-prone" district are nearly eight times more likely to have the death penalty sought against them than defendants in the district with the lowest rate of death penalty pursuit by prosecutors;[25]
- Prosecutors in rural districts are five times more likely to seek the death penalty than their urban counterparts;
- Defendants accused of killing strangers are six times as likely to face capital prosecutions as offenders who kill friends of family members in an identical manner.

In a country where the difference between a death sentence and a life term can hinge not only on which county or state the crime was committed in, but also on the quality of the defence lawyer, the resources of the prosecuting county, the conduct of the prosecutor, the race or status of the victim or defendant, the racial make-up of the jury, or even whether the jury understood its sentencing options, the question arises as to whether US executions generally violate Article 6's ban on the arbitrary deprivation of life.

All but three of the 1,059 executions carried out in the USA since 1977 were conducted at state level, rather than by the federal government, and all but about 50 of the more than 3,300 men and women currently on death row in the USA are held in state rather

[24] Songer, Michael and Unah, Isaac. *The effect of race, gender, and location on prosecutorial decision to seek the death penalty in South Carolina*. South Carolina Law Review, Vol. 58, November 2006.
[25] By way of illustration, the researchers point to the case of Raymond Patterson who was sentenced to death in South Carolina for shooting a man in the car park of a motel in 1984. The line dividing judicial districts 11 and 5 runs through the car park. It was determined that Patterson had been just inside District 11 when he fired the fatal shot. The prosecution from District 11 sought and obtained a death sentence against Patterson. If Patterson had been found to have been standing in District 5 when the crime was committed, according to this study, he would have been at least three times less likely to have received the death penalty, given the much lower rate among District 5 prosecutors of seeking death sentences.

than federal or military death row. The federal authorities have tended to hide behind federalism or the concept of "states' rights" when the USA is accused of failing to live up to its international obligations in relation to the death penalty. In international law, however, the USA is a single state. The federal government, as the authority which signs and ratifies treaties, must ensure that the whole country complies with its international legal obligations, including under Article 6 of the ICCPR. The federal structure of government does not absolve it of this obligation.[26]



President George W. Bush, whose term in office has seen the federal death row population double in size and the only three federal executions in the USA since 1963, missed a recent opportunity to speak out against the death penalty on the world stage. At a press conference, he was pushed for his response to the execution in Iraq of Saddam Hussein, whose hanging – secretly filmed and published on the internet – laid bare the fine line between vengeance and retribution and managed to turn a dictator into a martyr for many.[27] Two and half centuries ago Italian philosopher Cesare Beccaria wrote: "The death penalty cannot be useful because of the example of barbarity it gives men".[28] Of Saddam Hussein's execution, President Bush said: "I wish, obviously, that the proceedings had been done in a more dignified way. But, nevertheless, he was given justice".[29] The promotion of the idea of the death penalty as justice, like the idea of the death penalty as compatible with human dignity, is a habit that dies hard.

[26] Article 27 of the Vienna Convention on the Law of Treaties ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").
[27] See *Images of hanging make Hussein a martyr to many*, New York Times, 6 January 2007.
[28] Cesare Beccaria. *On crimes and punishments*. 1764.
[29] *President Bush Welcomes Chancellor Merkel of Germany to the White House*, 4 January 2007, http://www.whitehouse.gov/news/releases/2007/01/20070104-2.html.

In his 1983 article cited above, historian Arthur Schlesinger wrote that "ideology is the curse of public affairs because it converts politics into a branch of theology and sacrifices human beings on the altar of abstractions."[30] President Bush, for one, continues to display a strong faith in judicial killing. Asked in 2001 whether he was having any "second thoughts" about the death penalty, he responded "Not as far as I'm concerned – so long as the system provides fairness."[31] Fairness is not a characteristic of the capital justice system, however.

President Bush has said that his support for the death penalty is conditional upon making sure that those who are subject to it are "truly guilty".[32] The cases of Ricky McGinn and Henry Lee Lucas were the only Texas or federal cases of impending execution in which Governor – and then President – George W. Bush has intervened (with a reprieve for McGinn and clemency for Lucas), despite many others that cried out for executive intervention. This record suggests that the phrase "truly guilty" represents the narrowest of funnels through which his quality of mercy is strained.[33] 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.[34] The execution since 1977 of at least 50 people who had mental retardation or were children at the time of their crimes, indicates that this principle has not been matched.[35] The inconsistencies that riddle the death penalty system add further evidence still.

No check on arbitrariness or systemic bias

There have been about 500,000 murders in the USA since 1977. In the same period about 7,000 people have been sentenced to death, about 3,300 of whom remain on death row. By 10 January 2007, there had been 1,059 executions since Gary Gilmore was put to death on 17 January 1977.

Only five years before Gilmore was shot, a majority of US Supreme Court Justices, in *Furman v. Georgia*, found that the death penalty was unconstitutional as then applied.[36] With the death penalty inflicted in a relatively tiny number of cases in which it was legally

[30] *Ibid*.
[31] Press conference of the President, White House, 11 May 2001, available at: http://www.whitehouse.gov/news/releases/2001/05/20010511-3.html.
[32] "No, I still support the death penalty, and I think it's a deterrent to crime. But I want to make sure, obviously, that those subject to the death penalty are truly guilty." President's press conference, 16 March 2005, available at http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html.
[33] On the case of Henry Lee Lucas and others see page 42 of *USA: Failing the future – Death penalty developments, March 1998 - March 2000*, http://web.amnesty.org/library/index/engamr510032000. On Ricky McGinn's case, see for example, *Bush's death penalty dodge*, by Alan Berlow, 12 June 2000 available at http://archive.salon.com/politics/feature/2000/06/12/death/ and *The hanging governor*, by Alan Berlow, 11 May 2000, http://archive.salon.com/politics2000/feature/2000/05/11/bush/index.html.
[34] "Within the category of capital crimes, the death penalty must be reserved for 'the worst of the worst'." *Kansas v. Marsh*, *op. cit*. Justice Souter dissenting.
[35] See Tables 3 and 4 of *USA: Indecent and internationally illegal – the death penalty against child offenders*, September 2002 available at, http://web.amnesty.org/library/Index/ENGAMR511432002.
[36] *Furman v. Georgia*, 408 U.S. 238 (1972).

available, there was no meaningful basis for explaining why the few were executed when the many were not. The words used by the Justices to describe the use of the death penalty included "arbitrary", "capricious", "discriminatory" and "freakish". Yet the experiment authorized by the Supreme Court four years later in *Gregg v. Georgia* (after it had approved state capital laws revised following *Furman*) has failed, perhaps inevitably, to produce a system that passes the test of fairness and consistency. [37]

In *Gregg v. Georgia*, the Supreme Court endorsed the Georgia statute's requirement of proportionality review, under which the Georgia Supreme Court would review each death sentence to determine "if the sentence imposed is excessive compared with the sentence imposed in similar cases". The Georgia process initially became a model for various other states and from 1976 state high courts increasingly conducted proportionality review. However, after the US Supreme Court ruled in *Pulley v. Harris* in 1984 that such review was not required under the Constitution, "the majority of state high courts reduced proportionality review to a perfunctory exercise". [38] Some states repealed their statutory provisions for proportionality review, and in some, including the large death row states of California (which was the subject of the *Pulley* ruling) and Texas, there was never any mandated proportionality review.[39]

Then in 1987, in *McCleskey v. Kemp*, the Court held that even if there is evidence of systemic racism in the criminal justice system, there is no constitutional violation unless the death row inmate shows intentional discrimination in his or her specific case. Taken together, it has been said that the *McCleskey* and *Pulley* rulings,

> "sent a message to the states which was crystal clear: the Supreme Court was no longer willing to reverse death sentences or declare capital punishment statutes unconstitutional in response to evidence of arbitrariness or caprice, bias or systematic racial discrimination within a particular capital case processing system…The combined effect of *Pulley* and *McCleskey* is that state high courts no longer need to demonstrate to the United States Supreme Court that their capital punishment systems are free from systemic racial or jurisdictional bias… With little risk of reversal by the Supreme Court, high courts in states with large death row populations tend to conduct minimal proportionality review, and some of these courts have become factories for affirmances". [40]

The Supreme Court of New Jersey was an exception. Despite political pressure to curtail or abandon proportionality review, it took the position that such review and the systematic analysis of capital case processing was required under the state constitution. The conclusion of the New Jersey Death Penalty Study Commission in its January 2007 report is

[37] *Gregg v. Georgia*, 428 U.S. 153 (1976)
[38] Leigh B. Bienen, *The proportionality review of capital cases by state high courts after Gregg: Only 'the appearance of justice'*? Journal of Criminal Law and Criminology, Volume 87, No 1, 1996, pages 130 to 314.
[39] *Ibid*., page 174.
[40] *Ibid*. pages 150-151.

therefore all the more noteworthy. It reflected upon the fact that the effectiveness of even the New Jersey Supreme Court's careful system of proportionality review had been questioned in recent years, including from within its own ranks, and the Commission heard evidence from a number of experts, including a witness who had reviewed the nearly 600 "narrative summaries" of murder cases prepared for the Court's proportionality reviews. She testified that "despite a numbing similarity" in the cases, there was "no uniformity in the way the cases are charged and prosecuted". She continued:

> "The resulting unfairness leaves one defendant on death row while others, having committed very similar offenses, were sentenced to life in prison or were not even prosecuted capitally…. It is not just that there is no significant difference between the crimes to be punished by death and the crimes to be punished by life in prison; sometimes the crime for which defendants spend life in prison, are worse."[41]

In its final report, the New Jersey Commission concluded that "despite the best efforts of the State, the risk remains that similar murder cases are being treated differently in the death penalty context thereby elevating the probability that the death penalty is being administered 'freakishly' and arbitrarily. Given the finality of the punishment of death, this risk is unacceptable". This risk should not only be unacceptable in New Jersey, but everywhere.

In the *Gregg v. Georgia* decision in 1976 giving the green light for executions to resume under new state laws, the majority said that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." There are many cases to illustrate how misplaced was the Supreme Court's confidence expressed in *Gregg*.[42] The absence or limited nature of proportionality review in the individual states or any system of national review has exacerbated the problem.

Oklahoma currently has the highest rate of executions per capita in the USA. It repealed its statutory provision for proportionality review in 1985. It has carried out 84 executions since then. It has frequently violated international standards in obtaining death sentences, including standards on the conduct of prosecutors.[43]

James Malicoat, who like many on death row was severely abused as a child, was executed in Oklahoma on 31 August 2006 for the murder of his 13-month-old daughter. At his trial in a courtroom with a large carving of two statues holding a sword with the inscription "AN EYE FOR AN EYE AND A TOOTH FOR A TOOTH"[44], the prosecutor had

[41] New Jersey Death Penalty Study Commission Report, January 2007.
[42] For example, see *USA: Arbitrary, discriminatory, and cruel: an aide-mémoire to 25 years of judicial killing*, http://web.amnesty.org/library/pdf/AMR510032002ENGLISH/$File/AMR5100302.pdf.
[43] See *USA: Old habits die hard: The death penalty in Oklahoma*, AI Index: AMR 51/055/2001, April 2001, http://web.amnesty.org/library/index/engamr510552001.
[44] In the Bible, this phrase appears in Exodus, Deuteronomy, and Leviticus, and includes in those books the notion of "life for life"; "life shall go for life", and "he that killeth a man, he shall be put to death".

repeatedly described the defendant as a "monster" and "evil". He read out to the jury a first-hand account of the baby's final hours (as if from the child's perspective), and introduced a photograph of the baby taken two months before her death. In 2000, the Oklahoma Court of Criminal Appeals, which described as "improper and reprehensible" several of the prosecutor's arguments for execution, said that the photo was "irrelevant and should not have been admitted, and that the State's use of it in closing argument compounded the error".[45] Arguing for a death sentence, the prosecutor had held up this photo of the live child and compared it with four post-mortem pictures. Nevertheless, James Malicoat's death sentence was allowed to stand. The errors, on their own and cumulatively, were deemed harmless. In contrast, in the same year, the Texas Court of Criminal Appeals overturned the death sentence of Raymond Reese because the jury at his trial had been shown a photograph of the victim lying in a coffin next to her unborn fetus. The Court ruled that this may have inflamed jurors into voting for death, saying that it is "society's natural inclination... to protect the innocent and the vulnerable". One man whose jury may have been so inflamed was put to death; the other had his death sentence overturned.[46] Such inconsistencies have been repeated many times in the past 30 years.

About 75 per cent of those executed in the USA since 1977 (817 out of 1,059) were, like James Malicoat, sentenced to death for killing a single victim. James Elledge was one of them, executed in Washington State on 28 August 2001 for the murder of a woman in 1998. He had turned himself in after the crime, after allegedly twice attempting suicide. At the trial, he pleaded guilty. He refused to allow any mitigating evidence to be presented, telling the jury that "the wicked part of me needs to die". The jury was therefore left unaware of evidence that there was a history of mental illness in his family, and that he himself suffered from mental illness. On death row, Elledge refused to appeal against his death sentence. In early August 2001, the state Clemency and Pardons Board voted 3-2 against clemency. One of the dissenting members said that the case was "very troubling", in that the outcome of the trial might have been different "depending on whether [the jury] got the full story or not". Two years later, also in Washington State, Gary Leon Ridgway was sentenced to life imprisonment for the murder of 48 women – mainly prostitutes and runaways – over a 20-year period. He avoided a death sentence in return for his cooperation with the authorities and a guilty plea. The question immediately arises: If Gary Ridgway was not subject to the death penalty, why was James Elledge executed for killing 47 fewer victims?

In March 2006, the Supreme Court of the State of Washington came within one vote of effectively abolishing the state's death penalty law. Lawyers for Davya Cross, a death row inmate with a long history of mental illness (and who is paraplegic as a result of post-crime suicide attempts in which he injured his spine and brain), raised the Ridgway case as part of

The largest religious denomination in Oklahoma is Southern Baptism (accounting for about a third of the state's population), the leadership of which has contended that the Bible supports capital punishment. A judge on the Oklahoma Court of Criminal Appeals described the inscription as "inappropriate for any criminal trial… [I]n the context of a capital trial I believe that the sign is outrageous and unconstitutional".

[45] *Malicoat v. State*, 7 January 2000.

[46] Raymond Reese died of cancer in 2002.

their challenge to Cross's death sentence. They argued that the fact that Gary Ridgway would not face the death penalty rendered the punishment disproportional when applied to other defendants, including Davya Cross, who was convicted of killing his wife and two of her daughters in 1999. Five of the nine Justices sidestepped the issue, suggesting that it was a moral rather than a legal issue. "We do not minimize the importance of this moral question", they wrote. "But it is a question best left to the people and to their elected representatives in the legislature." Conducting proportionality review, the Court noted that the Davya Cross appeal had raised at least 22 cases similar to the crime for which he was convicted but in which the defendant had been sentenced to life in prison, "including cases that were arguably objectively worse" than his. The five Justices sought to explain the difference in sentencing outcomes by suggesting that "our society is losing its tolerance for domestic violence. We can not say the prosecutor's decision to prosecute, and the jury's decision to sentence, were disproportionate based on the nature of the crime and its resemblance to other death eligible cases" in which life sentences were the outcome.[47]

The other four Justices dissented: "The majority abandons any rational attempt to fulfil our statutory responsibility to conduct a proportionality review, effectively rendering the statutory duty meaningless… When Gary Ridgway, the worst mass murderer in this state's history, escapes the death penalty, serious flaws become apparent". The four went on to point out that other serial killers had escaped the death penalty in Washington. They continued:

> "These cases exemplify the arbitrariness with which the penalty of death is exacted… The death penalty is like lightening, randomly striking some defendants and not others. Where the death penalty is not imposed on…the worst mass murderers in Washington's history, on what basis do we determine on whom it is imposed? No rational explanation exists to explain why some individuals escape the penalty of death and others do not."[48]

Executive clemency is not a failsafe for this problem either. Darrell Mease was scheduled to be put to death on 27 January 1999 in Missouri at the same time as a planned visit to the state by Pope John Paul II, who actively opposed the death penalty. After this embarrassing coincidence of events had become known, the state Supreme Court rescheduled the execution for 10 February. However, at a meeting with state Governor Carnahan on 27 January, the Pope made a personal plea for Mease to be granted clemency. The next day, Governor Carnahan commuted the death sentence.

A day after the Governor's decision, the Missouri Supreme Court set the execution date for James Rodden. On 24 February he was put to death, one of nine prisoners executed in Missouri in 1999. Why were they killed and Darrell Mease allowed to live? The answer is in the luck of the draw: Mease was spared simply because his scheduled execution date happened to coincide with the Pope's visit. One of the nine Missouri prisoners executed was Roy Roberts. He was put to death on 10 March 1999, despite a plea for clemency from the Pope, this time in a written appeal.

[47] *State of Washington v. Davya Cross*, 30 March 2006.
[48] *Ibid*., Justices Madsen, Johnson, Sanders and Owens, dissenting.

Roy Roberts had been sentenced to death for a murder committed in prison, involving two other inmates, one of whom is serving a life sentence, the other of whom had his death sentence overturned on appeal. Roberts, whose last words were "you're killing an innocent man", had been convicted despite conflicting eyewitness testimony and other questionable evidence. Like Roberts, Wendell Flowers in North Carolina had been sentenced to death for a prison murder involving other inmates. Also like Roberts, Flowers had been sentenced to death despite questions as to whether he was principally responsible for the murder. He was the only one of the four prisoners involved in the killing to be sentenced to death. However, unlike in Roberts' case, on 15 December 1999, Governor Hunt of North Carolina recognized the arbitrariness in the sentencing and commuted Wendell Flowers' death sentence two days before his execution.

Charles Walker has been on death row in North Carolina for more than 10 years. He was convicted of a 1992 murder on the basis of testimony of accomplices, none of whom was subjected to a capital trial. The jury which sentenced him to death did so despite finding that he had not actually killed the victim, whose body was never found. The state presented no physical evidence of any kind that linked Charles Walker to the crime: no fingerprints, no blood evidence, no autopsy, no DNA evidence, and no ballistics evidence. Indeed, there was no physical evidence of a murder, and no confession from the defendant. All the evidence against Walker came from the inconsistent testimony of witnesses who were themselves implicated in some way in the crime. The jury, which was not presented with evidence of Charles Walker's mental illness or his childhood abuse, deliberated for four days before recommending a death sentence. On their sentencing form, the jurors answered "no" to the question of whether Charles Walker had fired the fatal shot. Instead they found that he had intended to kill the victim while acting with others.[49]

Will the courts, the legislature or the executive prevent Charles Walker from being executed? Shortly before he was due to be put to death in December 2004, a court agreed to hear further arguments in the case. A committee in the state legislature is examining the "accuracy and fairness" of the capital justice system. Three death sentences have been commuted by the governor since Wendell Roberts received clemency. There is clearly concern about the death penalty in North Carolina, and there is much public support for a moratorium on executions there. The state's leaders should pluck up the courage to end the death penalty. They should do so urgently; there are three men scheduled to be executed in the state's death chamber before 10 February 2007.[50]

'Profound uncertainty' no basis for an irrevocable punishment

In the 24 years since the death penalty was reinstated in New Jersey, there have been about 10,000 murders in the state. In the same time period, the New Jersey Commission noted, 455 defendants were eligible for the death penalty under state law. Of these 228 were subjected to capital trials and 60 were sentenced to death. There have been no executions in the state, and

[49] Amnesty International Urgent Action, http://web.amnesty.org/library/Index/ENGAMR511652004.
[50] Marcus Robinson (26 January); James Thomas (2 February); James Campbell (9 February).

the majority of death sentences have been overturned on appeal, leaving nine people currently on death row.

The small number of death sentences and even smaller number of executions relative to the total number of crimes that could be punished with the death penalty make the deterrence argument difficult if not impossible to sustain. The New Jersey Commission noted that "the measurement of any deterrent effect based on such miniscule percentages is fraught with difficulty".

The same can be said nationally, where more than 99 per cent of murders committed since 1977 have not resulted in executions or death sentences still upheld. A recent review of the statistical evidence on the deterrent effect of the death penalty concluded that "the existing evidence for deterrence is surprisingly fragile". The principal insight of the study published in the Stanford Law Review in 2005 was that "the death penalty – at least as it has been implemented in the United States since *Gregg* ended the moratorium on executions – is applied so rarely that the number of homicides it can plausibly have caused or deterred cannot be reliably disentangled from the large year-to-year changes in the homicide rate caused by other factors. Our estimates suggest not just 'reasonable doubt' about whether there is any deterrent effect of the death penalty, but profound uncertainty".[51]

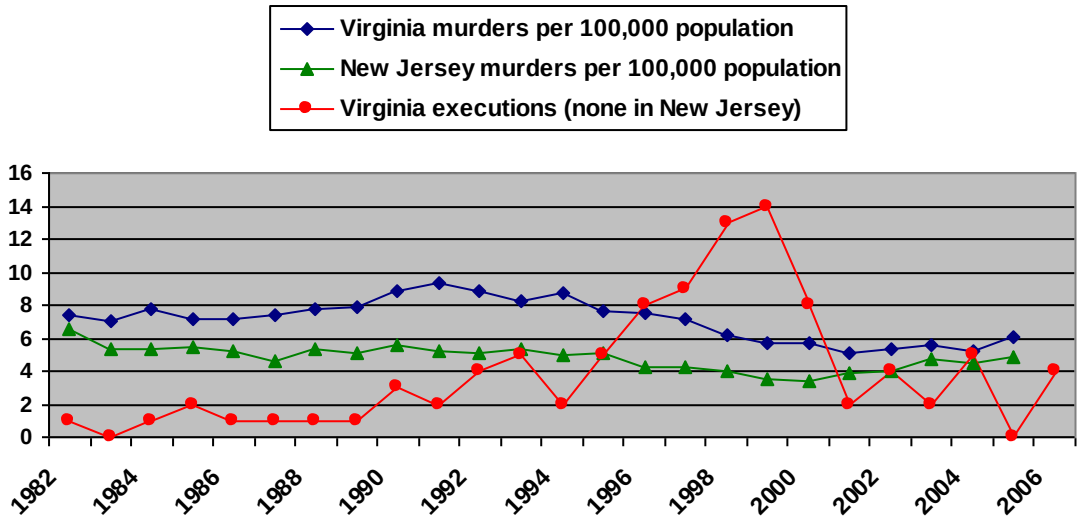
Profound uncertainty is surely no basis on which to justify this irrevocable punishment. Yet elected officials continue to respond with a degree of certainty about the death penalty that is not warranted by the evidence. At a press conference in March 2005, President Bush was again asked about whether his support for executions had changed at all since leaving the Texas governorship. The President replied: "No. I still support the death penalty, and I think it's a deterrent to crime."[52] He did not say what evidence he was drawing on for this assertion, leaving the impression that he was relying on an idea rather than empirical data. A 1996 survey of the views of some of the USA's top criminologists found a wide consensus within this expert community about the empirical research on deterrence. The consensus was that "the death penalty does, and can do, little to reduce rates of criminal violence". Thus, as the study put it, "these leading criminologists do not concur with one of the most important public justifications for the death penalty in modern society".[53]

Virginia is a state of comparable size to New Jersey. It resumed executions in 1982, the same year that New Jersey reinstated its death penalty. There have been about 11,500 murders in Virginia since then, and about 150 death sentences, with 19 people remaining on death row. Ninety-eight people have been executed. Virginia's capital justice system, as elsewhere in the country, has been marked by arbitrariness, discrimination and error, and violations of international standards. Eighty per cent of those executed were convicted of killing white victims. Thirty per cent were African Americans convicted of killing white

[51] John D. Donohue and Justin Wolfers, *Uses and abuses of empirical evidence in the death penalty debate*, 58 Stanford Law Review 791 (2005).
[52] President's press conference, 16 March 2005, available at http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html.
[53] *Deterrence and the death penalty: The view of the experts. Op.cit.*

victims. Among those put to death were juvenile offenders, people with mental disabilities, and foreign nationals denied their consular rights. One of them, Pakistan national Mir Aimal Kasi, was a pre-"war on terror" victim of "rendition".[54] Wanted for the murder in 1993 of two CIA employees shot outside CIA headquarters, he was seized in 1997 by FBI agents from a hotel in Karachi, hooded, gagged, shackled, and removed from Pakistan without judicial oversight, flown to Virginia and handed over to the state authorities, tried in front of an all-white Virginia jury, sentenced to death, and executed in 2002.[55]

On 9 November 2006, John Schmitt became the 98th person to be put to death in Virginia since resumption. He was killed for a shooting murder he maintained to the end was accidental. Among those who called for clemency for him was William Page True, former warden of the prison housing Virginia's death row. He asserted that "there's a lot worse inmates that I've dealt with in my 36 years in prison systems than Mr. Schmitt." On seeking clemency, he said: "I've never done anything like this before in my life. It's tough for me because I'm as hard-core as they come. I just don't think he should be put to death. I don't want to diminish his conduct. It was terrible. Somebody died and families are suffering… But this guy is no worse than most of those other guys in these prisons [with] life sentences."



Thus, whereas New Jersey has carried out no executions, Virginia has carried out 98. The New Jersey Commission concluded that the death penalty served no legitimate purpose. What measurable benefit has Virginia's capital justice system achieved?

[54] See *USA: Below the radar: Secret flights to torture and 'disappearance'*, AI Index: AMR 51/051/2006, April 2006, http://web.amnesty.org/library/Index/ENGAMR510512006.
[55] *No return to execution - The US death penalty as a barrier to extradition,* AI Index: AMR 51/171/2001, 29 November 2001, http://web.amnesty.org/library/Index/ENGAMR511712001.

Thomas Akers was executed in Virginia in 2001. When he was 17, he was arrested for stealing, tried and sentenced to adult prison. After a few months, he wrote to the judge who had sentenced him, and asked to be put to death in Virginia's electric chair. After being paroled in August 1998, he began wearing a necklace with an electric chair pendant. He told his family that he was going to be executed. In December 1998, he was arrested for the murder of Wesley Smith. Thomas Akers told his court-appointed lawyers not to bother with a defence, wrote to the judge demanding to be sentenced to death. Having got his wish, he refused to appeal and was executed 15 months later.

'Volunteers' – more arbitrariness

The New Jersey Commission report pointed to evidence of a "brutalization effect" associated with executions, causing the murder rate to increase.[56] While such evidence is disputed, there have been individual cases in the USA in which the death penalty appears to have served as a counter-deterrent – that is, to have caused the crime rather than prevented it. Daniel Colwell, for example, shot two people at random in 1996 in Georgia in order, he said, to be sentenced to death after he found that he was unable to kill himself.[57] Daniel Colwell, who suffered from schizophrenia, is among the hundreds of people with histories of serious mental illness who have been sentenced to death in the USA since 1977. Colwell hanged himself in his cell in January 2003. At least 100 of the other condemned individuals have been executed.[58]

More than 120 of the people put to death since 1977 – 60 since 1999 alone – have been so-called "volunteers", prisoners who had dropped their appeals and "consented" to their execution. Some, like Daniel Colwell, had refused to challenge the prosecution's pursuit of the death penalty at trial. Others gave up some time after arriving on death row. Any number of factors may lead a prisoner not to pursue appeals against his or her death sentence, including mental disorder, physical illness, remorse, bravado, religious belief, the severity of conditions of confinement, including prolonged isolation and lack of physical contact visits, the bleak alternative of life imprisonment without the possibility of parole, pessimism about appeal prospects, a quest for notoriety, or simply a desire to gain a semblance of control over a situation in which the prisoner is otherwise powerless. While "volunteer" executions are sometimes referred to as a form of state-assisted suicide, "prisoner-assisted homicide" would be a more accurate label. After all, if a death row inmate seeks to commit actual suicide, the state will make every effort to prevent it.[59]

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[56] For examples of studies referring to the "brutalizing" effect, see footnote 34, *Deterrence and the death penalty: The view of the experts*. Michael L. Radelet and Ronald L. Akers, in the Journal of Criminal Law & Criminology, Volume 87, No. 1.

[57] See page 114 of *USA: The execution of mentally ill offenders*, AI Index: AMR 51/003/2006, January 2006, http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/$File/AMR5100306.pdf. Also see cases of James French and Robert Smith, page 8 to 9 of *USA: The illusion of control*, April 2001, http://web.amnesty.org/library/index/engamr510532001.

[58] *USA: The execution of mentally ill offenders*, AI Index: AMR 51/003/2006, January 2006, op.cit.

[59] For example, David Long attempted suicide by drug overdose two days before he was due to be executed in Texas on 8 December 1999. He was still in intensive care in hospital in Galveston, about 200 kilometres from the Texas death chamber, as his scheduled execution approached. As in other

The phenomenon of prisoners "volunteering" for execution contributes to the lottery of the death penalty. To put it another way, given the rate of reversible error found in capital cases, if the more than 120 "volunteers" executed since 1977 had pursued their appeals, there is a significant possibility that a number of them would have had their death sentences overturned to prison terms by the appeal courts.[60] Given that some 86 per cent – or more than 100 – of the executed "volunteers" were white, another aspect to this phenomenon is that without it US capital justice might show even more racial imbalance than it already does. As it is, 29 per cent of all executions have been of black inmates, although African Americans make up only about 12 per cent of the US population. Fifty-seven per cent of executed inmates were white, compared to 80 per cent in the population as a whole.

Bobby Wilcher's case introduced a new twist to the tragic stories of so-called "volunteers", and added yet more inconsistency to the US death penalty. Wilcher, who suffered from bipolar disorder, a serious mental illness, was executed in Mississippi on 18 October 2006 after 22 years on death row. Over recent years, conditions on Mississippi's death row have been severely criticized, including in relation to the psychological impact of these conditions and the poor mental health care provided. In May 2003, a federal judge ruled that the conditions in the State Penitentiary offended "contemporary concepts of decency, human dignity and precepts of civilization which we profess to possess". Among other things, he found that the filthy conditions impacted on the mental health of inmates; the probability of heat-related illness was high for death row inmates, particularly those suffering from mental illness who either did not take appropriate steps to deal with the heat or whose medications interfere with the human body's temperature regulation; the exposure to the severely psychotic individuals was intolerable; the mental health care provided to inmates was "grossly inadequate"; and the isolation of death row, combined with the conditions on it and the fact that its population are awaiting execution, would weaken even the strongest individual.

On 24 May 2006, Bobby Wilcher, who had shown suicidal tendencies even before being subjected to such conditions of confinement, filed a motion in court seeking to drop all his remaining appeals and to allow the state to execute him. Six weeks later, however, he

cases, David Long's suicide bid was not interpreted as a mental health issue, but rather a prisoner's effort to cheat the executioner. The state authorities saw no reason to delay, and in contrast to the lack of resources provided for his defence at the time of the trial, the state spared no expense in having him killed. He was flown by aeroplane to Huntsville, accompanied by a full medical team to ensure his safe arrival. As he was given the lethal injection, David Long "snorted and began gurgling. A blackish-brown liquid spouted from his nose and mouth and dribbled to the floor". This was the charcoal solution that had been used to detoxify his body, only hours before it would be injected with lethal chemicals.

[60] A landmark study published in 2000 concluded that US death sentences are "persistently and systematically fraught with error". The study revealed that appeal courts had found serious errors – those requiring a judicial remedy – in 68 per cent of cases. The study expressed "grave doubt" as to whether the courts catch all such errors. *A Broken System: Error Rates in Capital Cases, 1973-1995*, conducted at New York's Columbia Law School by James S. Liebman, Jeffrey Fagan and Valerie West, published 12 June 2000.

contacted his lawyer and told him that he had changed his mind and wished to pursue his appeals. On 10 July, the Fifth Circuit Court of Appeals dismissed Wilcher's request to reinstate his appeals and refused to stay the execution. In a shocking opinion, the court stated that "this sudden about-face strikes us as nothing more than an eleventh-hour death row plea for mercy finally elicited from Wilcher by Counsel; the accompanying affidavit states only a conclusional flip-flop by Wilcher…" Other Circuit Courts of Appeal have reinstated appeals in such cases, including of inmates who have changed their minds on numerous occasions on whether or not to drop their appeals. In a case in 2000, the Seventh Circuit Court of Appeals stated that "not only the defendant but society as a whole has a particularly strong interest in the regularity of proceedings that are followed; there is no un-doing a sentence of death once it is carried out". The courts refused to provide a remedy, and Bobby Wilcher was executed.

Rational or irrational, a decision taken by someone who is under threat of death at the hands of others cannot be consensual. Whether or not prisoners who "ask" to be executed are deluding themselves about the level of control they have gained over their fate – after all, they are merely assisting their government in what it has set out to do anyway – the state is guilty of a far greater deception. It is peddling its own illusion of control: that, by killing a selection of those it convicts of murder, it can offer a constructive contribution to efforts to defeat violent crime. In reality, the state is taking to refined, calculated heights what it seeks to condemn – the deliberate taking of human life.

The risk of irrevocable error

In April 2002 in Illinois, the 14-member Commission appointed by the governor to examine the state's capital justice system in the light of the number of wrongful convictions being uncovered, reported that it was "unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death".

Referring to the Illinois experience, but ignoring the case of Anthony Porter, who only survived execution in Illinois in 1998 after 17 years on death row because students happened to investigate his case and prove his innocence, Justice Scalia recently perpetuated the myth that exonerations of condemned inmates demonstrate "not the failure of the system but its success". Justice Scalia also said:

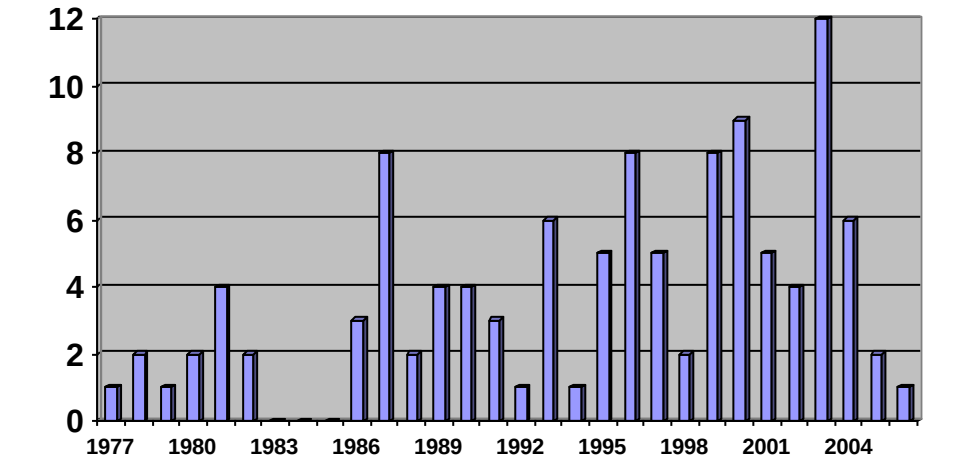
> "Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to…"[61]

It is shocking that anyone, let alone a Justice of the United States Supreme Court, should consider as "insignificant" the risk of wrongful convictions in capital cases, given the

[61] *Kansas v. Marsh*, 26 June 2006, Justice Scalia concurring.

number of such cases – more than 100 – that have been uncovered since Gary Gilmore was executed.[62] Amnesty International, which makes no apologies for being ideologically opposed to the death penalty, has little doubt that sooner or later it will be shown that since 1977, the USA has executed at least one person for a crime he or she did not commit. Such cases are, of course, hard to prove, especially before abolition. The state will resist attempts to uncover the execution of an innocent person, and in any event, once a person has been executed, the scarce resources of the legal and abolitionist communities will generally be directed toward trying to stop future executions. In the United Kingdom, for example, it took nearly half a century to clear Mahmood Mattan's name. This 28-year-old Somali sailor had been hanged in the UK in 1952. After a long campaign by relatives and others to prove his innocence, his wrongful murder conviction was overturned by an appeal court in 1998.

Nevertheless, a number of investigations have unearthed evidence pointing to the execution of wrongfully convicted individuals in the USA since 1977. Journalists at the *Chicago Tribune*, for example, have raised compelling evidence that Carlos DeLuna, executed in Texas in 1989 for a murder committed six years earlier, was innocent of the crime for which he was put to death.[63] Three other investigations in the past two years have pointed to the execution of possibly innocent men – Cameron Todd Willingham and Ruben Cantu, executed in Texas in 1993 and 2004 respectively, and Larry Griffin executed in Missouri in 1995.[64] There are numerous other cases of individuals who went to their deaths despite doubts about their guilt.



[62] See http://www.deathpenaltyinfo.org/article.php?did=412&scid=6.
[63] See 3-part series by Steve Mills and Maurice Possley, Chicago Tribune: *'I didn't do it. But I know who did'* (25 June 2006). *A phantom, or the killer?* (26 June). *The secret that wasn't* (27 June). http://www.chicagotribune.com/news/specials/broadband/chi-tx-htmlstory,0,7935000.htmlstory.
[64] See http://www.deathpenaltyinfo.org/article.php?scid=6&did=111#executed.

The different state responses to the same problem – wrongful convictions in capital cases – represent another aspect of arbitrariness in the USA's death penalty. In Illinois, not long after the number of innocent people discovered on death row went into double figures, the Governor of the state declared a moratorium on executions, and subsequently granted clemency to all on death row. In Florida, there have been 22 such exonerations and yet there has been no moratorium or clemency move on these grounds. Across the USA as a whole, clemency authorities have stopped some executions and commuted sentences on the grounds of lingering doubt. In other cases, equally compelling cases have not led to clemency.

The governor of Oklahoma, for example, commuted the death sentence of Phillip Dewitt Smith in 2001 shortly before he was due to be put to death because of doubts about his guilt. Phillip Smith, black, had been sentenced to death for the murder of a white man in 1983. There was no physical evidence against him and the witness testimony against him was either inconsistent or later recanted.[65] A year before Phillip Smith was spared, Gary Graham was put to death in Texas. Graham, black, was sentenced to death for the murder of a white man in 1981. There was no physical evidence against him and the witness testimony against him was highly suspect and witnesses not heard at trial said that he was not the killer. The governor of Texas refused to intervene.[66]

A long and lingering cruelty

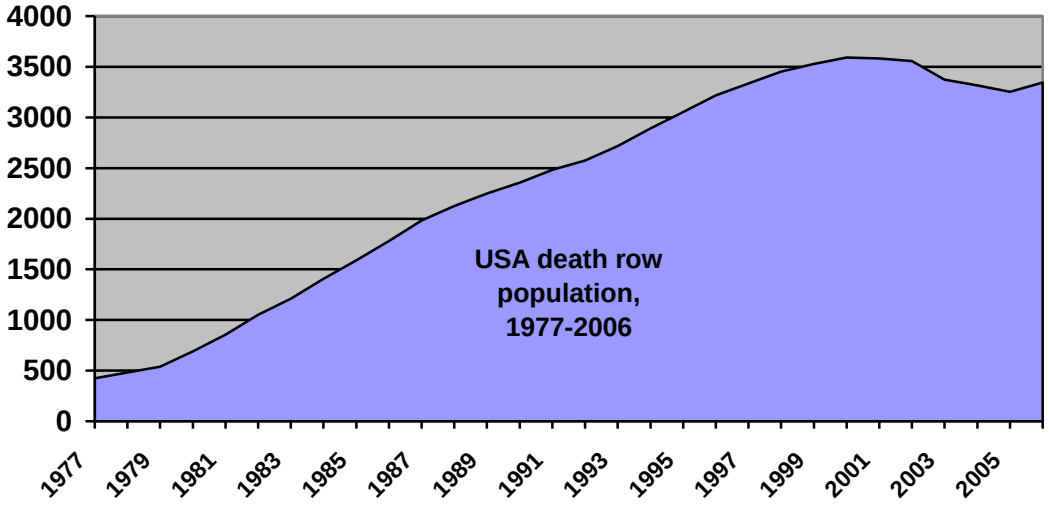
The risk of irrevocable error is, of course, only one of the fundamental flaws of capital punishment. Its inherent cruelty is another. As Justice Byron White wrote in *Furman v. Georgia*, "the imposition and execution of the death penalty are obviously cruel in the dictionary sense". In the same ruling, Justice Brennan added:

> "We know 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."

More than a century ago, the Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it."[67] This is an anguish Ronald Chambers has lived with for the past three decades – he has been in custody in Texas for the past 31 years, almost all of it

[65] Amnesty International Urgent Action, http://web.amnesty.org/library/Index/ENGAMR510212001.
[66] *USA: An appeal to President Clinton, Vice-President Gore and Governor Bush of Texas to condemn one illegal execution and to stop another*, AI Index: AMR 51/096/2000, 15 June 2000, http://web.amnesty.org/library/Index/ENGAMR510962000. See also, Mandy Welch and Richard Burr, *The politics of finality and the execution of the innocent: The case of Gary Graham*. In: Machinery of Death: The reality of America's death penalty regime. Edited by David Dow and Mark Dow, Routledge Books, 2002.
[67] *In re Medley*, 134 U.S. 160 (1890).

on death row.[68] First sentenced to death in 1976, he was 20 years old at the time of the crime. He turned 52 on 11 January 2007, two weeks before he was due to be executed on 25 January 2007.



Amnesty International believes that to put a human being under a sentence of death for even one day is one day too many – if a death threat in an interrogation cell is considered torture, why not one in a death row cell? In the USA, the question arises as to how long a prisoner can be held under a sentence of death before his or her treatment amounts to "cruel and unusual" punishment prohibited by the Eighth Amendment of the Constitution. The US Supreme Court has not directly confronted this issue, but individual Justices have raised their concerns. For example, in 1995, Justice Stevens wrote that executing a prisoner who had been on death row for 17 years – more than a decade less than Ronald Chambers – arguably negated any deterrent or retributive justification for the punishment. If these goals no longer existed, he suggested, the outcome would be "patently excessive and cruel."[69] In 2002, in the case of a Florida inmate on death row for about 27 years, Justice Breyer wrote of this "extraordinarily long confinement under sentence of death, a confinement that extends from late youth to later middle age." If the prisoner was executed, Justice Breyer stated, he would

[68] His death sentence was overturned in 1984 because he had been interviewed by the state's psychologist without being informed that his statements could be used to obtain a death sentence. He was retried and again sentenced to death in 1985. This was reversed in 1986 because of discriminatory jury selection. Dallas County prosecutors were notorious for their racist jury selection tactics (see *USA: Death by discrimination – the continuing role of race in capital cases*, AI Index: AMR 51/046/2003, April 2003, http://web.amnesty.org/library/index/engamr510462003). Chambers was tried for the third time in 1992 and again sentenced to death.

[69] *Lackey v. Texas*, 27 March 1995, Justice Stevens, respecting the denial of *certiorari*.

have been "punished both by death and also by more than a generation spent in death row's twilight. It is fairly asked whether such punishment is both unusual and cruel."[70]

At least 60 per cent of those now on death row were arrested when they were under 30 years old, yet the average age of those on death row on 31 December 2005 was 42. More than 50 death row inmates were older than 65, with the oldest being 90 years old.[71] In six states alone – California, Florida, Ohio, Texas, Pennsylvania and Alabama – there are some 300 inmates – about 10 per cent of the national total – who have been on death row for two decades or more.[72]

In its 2 January 2007 report, the New Jersey Commission stated that "as a practical matter, the length of time that convicted murderers in New Jersey serve on death row argues against the usefulness of the death penalty as a deterrent". Under this reasoning, the death penalty has become even less of a deterrent as the years have passed.

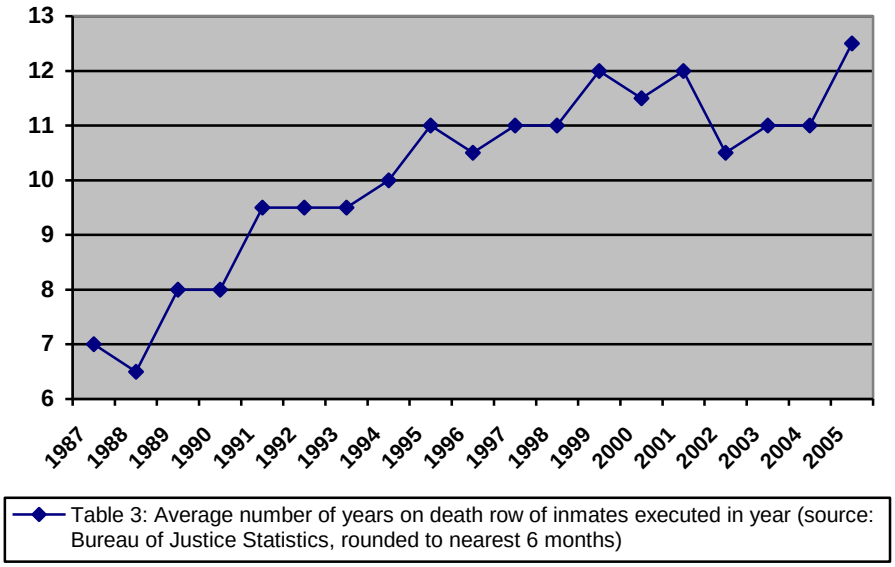


Table 3: Average number of years on death row of inmates executed in year (source: Bureau of Justice Statistics, rounded to nearest 6 months)

At the same time, as the US death row population has grown over the years, conditions on many death rows have become even harsher, with isolation and lack of human contact or group activities becoming routine, the result of an increasingly punitive rather than rehabilitative approach to incarceration adopted during the 1980s and 1990s. Maximum security prisoners are warehoused until they die, are executed or released. In some states, for example Texas, death row conditions can be as severe as those in the USA's

[70] *Foster v. Florida*, 21 October 2002, Justice Breyer, dissenting from denial of *certiorari*.
[71] Bureau of Justice Statistics, Capital Punishment 2005.
[72] California - 122; Florida – 75; Ohio – 30; Texas – 29; Pennsylvania – 27; Alabama – 17. Compiled from state correction department figures.

"supermaximum" security prisons, a concept "now embedded in American corrections".[73] Certain aspects of the supermaximum security prisons have been described by the UN Committee against Torture as "excessively harsh", and the UN Human Rights Committee as "incompatible" with international standards. Those on death row have to contend with the additional torment of the death penalty.

The death penalty draws the family members of the condemned into the inevitable cycle of hope and despair that accompanies this punishment. Death row in the USA has a disproportionate impact on the African American community. About 42 per cent of the death row population is black, more than three times the proportion of African Americans in the population as a whole.

Killing with prejudice – race in capital cases

It has been the consistent finding in numerous studies over the years that race, particularly the race of the murder victim, is a factor in who is sentenced to death.[74] Eighty per cent of those executed in the USA since 1977 had been convicted of crimes involving white victims. Yet blacks and whites are the victims of murder in approximately equal numbers in the USA. At least one in six of the 350 African Americans executed in the USA since 1977 was tried in front of all-white juries. Given the racist history of the USA (and elsewhere) any racial influence in capital cases alone should shame US politicians into ending the death penalty, not defending it. Three Supreme Court Justices concurring in the *Gregg* decision in 1976 acknowledged that in the death penalty experiment they were initiating, "mistakes will be made and discriminations will occur". Nevertheless, they refused to rule against a resumption of executions "on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner".[75] Their predictions about errors and prejudice were right. Their refusal to provide the only possible remedy – abolition – was wrong.

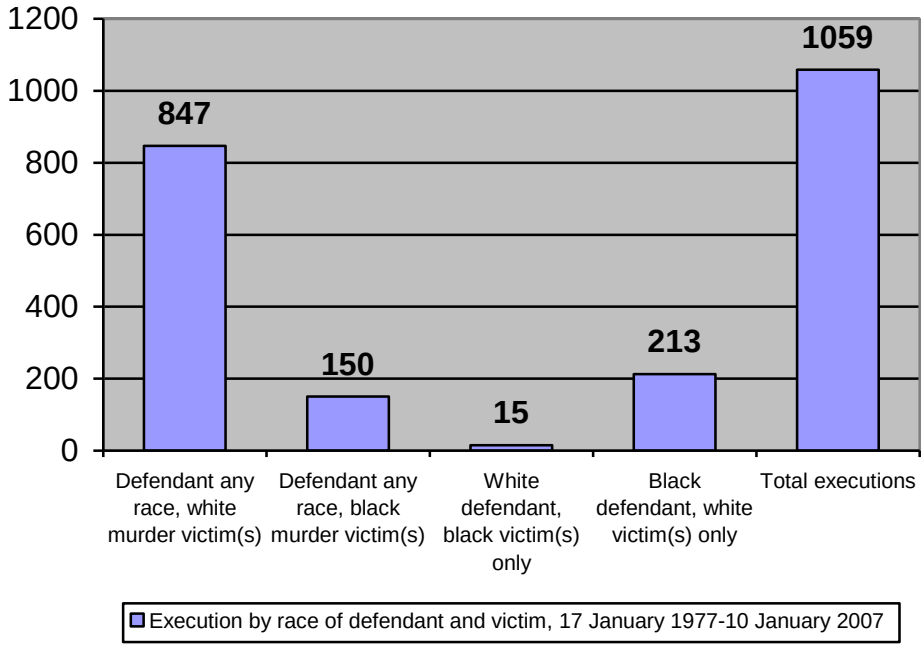
John Luttig and Ivan Holland were both 63 years old when they met untimely deaths in the east Texas town of Tyler. Each was gunned down in a senseless act of violence. John Luttig, a wealthy white businessman, was shot at his Tyler home on 19 April 1994. Two years later, on 7 May 1996, Ivan Holland, a homeless African American man who lived on the streets of Tyler, was shot and left for dead outside a convenience store.

Ivan Holland's assailants were three young white men, described as having a "Hitler fetish" and a habit of verbally abusing blacks, Jews and Hispanics. At a 1997 hearing, 23-year-old Todd Rasco said that when he told his two friends that he was contemplating suicide, they had urged him to "just kill a nigger" instead. The three had driven around Tyler, armed

[73] *Supermax prisons and the Constitution: Liability concerns in the Extended Control Unit*. By William C. Collins. Funded and published by the National Institute of Corrections, US Department of Justice, November 2004.
[74] *USA*: *Death by discrimination - the continuing role of race in capital cases,* April 2003, available at: http://web.amnesty.org/library/Index/ENGAMR510462003.
[75] *Gregg v. Georgia*, Justice White, joined by the Chief Justice and Justice Rehnquist, concurring in the judgment.

with Rasco's new shotgun, looking for a black person to kill. Todd Rasco said that he had put socks on his hands so as not to leave fingerprints on the weapon, and that he and his two friends later laughed when news reports indicated that police were looking for three Hispanic men. In a plea arrangement, Todd Rasco was sentenced to 45 years in prison. Twenty-one-year-old Chad Crow, was sentenced to 37 and a half years for encouraging Rasco to shoot Holland. Both inmates will be eligible for parole after serving half of their sentences.

John Luttig's attackers were three black teenagers. Their aim was to steal the Mercedes Benz in which John Luttig had just returned home. Napoleon Beazley was sentenced to death as the 17-year-old gunman. His two co-defendants, Cedric and Donald Coleman, who say that Beazley was so remorseful after the shooting that they had to stop him committing suicide, were sentenced to life imprisonment for their role in the crime. They will be eligible for parole after 80 years, or about six decades after Todd Rasco and Chad Crow.



At Napoleon Beazley's trial in front of 12 white jurors, the two white prosecutors had referred to the black defendant as an "animal" whose "prey happened to be human beings". The prosecution had removed several African Americans from the jury pool, ensuring an all-white jury. One of them was a man who, a dozen years earlier, had been prosecuted and acquitted for drunk driving. This made him an unsuitable juror in the eyes of the prosecution. Not so for a white juror, who was selected despite having been convicted of driving while intoxicated. After the trial, it emerged that this same juror harboured profound racial prejudice, including by frequently refusing, in his job as a repairman, to fix items brought in by black customers. He later said of Napoleon Beazley, "the nigger got what he deserved", and the

juror's wife confirmed that her husband "on more occasions than not" used the term "nigger" to describe African Americans.[76]

Napoleon Beazley was executed on 28 May 2002. A few hours earlier, in Missouri, the State Supreme Court granted an indefinite stay of execution to Christopher Simmons pending the outcome of a case before the US Supreme Court to decide whether "standards of decency" in the USA had evolved to the extent that executing people with mental retardation constitutes cruel and unusual punishment. While Simmons was not raising a claim of such a mental disability, his appeal argued that a favourable US Supreme Court decision on that issue could lead to a ruling that a national consensus also existed against allowing the execution of those aged under 18 at the time of their crimes (Simmons, like Beazley, was 17 years old at the time of his crime). The Texas Court of Criminal Appeals had denied a stay of execution for Napoleon Beazley on the same argument accepted by the Missouri Supreme Court in Christopher Simmons' case. In 2002, in *Atkins v. Virginia*, the US Supreme Court outlawed the execution of people with mental retardation and built on this ruling three years later by prohibiting the execution of child offenders, in *Roper v. Simmons*.[77] The case the Court took to decide the juvenile offender question was that of Christopher Simmons. Yet it had allowed Napoleon Beazley to go to his death.

Evolving standards of decency

In 1958, the US Supreme Court clarified that the words of the Eighth Amendment to the Constitution, banning "cruel and unusual" punishments, "are not precise" and "their scope is not static." Rather, "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[78] It was this criterion which the Court applied to the question of the execution of child offenders and people with mental retardation when it concluded – later than most of the rest of the world – that both categories of offender should be exempted from the death penalty. While Amnesty International welcomed these decisions, it considers that their regrettable belatedness in relation to other countries and international law illustrated how the "evolving standards of decency" yardstick can conspire against progressive change in the USA.

The *Atkins* and *Roper* decisions left a question mark over another category of offender, namely those with serious mental illness. The Court had reiterated that "capital punishment must be 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". The fact that seriously mentally ill offenders remain subject to the death penalty in the USA stands in ever starker relief. Death sentences in such cases are surely excessive and incompatible with human dignity, whether the dignity in question is that of the offender or of society as a whole.

[76] For details of Napoleon Beazley's case, see *USA: Too young to vote, old enough to be executed*, AI Index: AMR 51/105/2001, July 2001, http://web.amnesty.org/library/index/engamr511052001.
[77] *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005), *op.cit.*
[78] *Trop v. Dulles*, 356 U.S. 86 (1958).

Thirty years ago, the "evolving standards of decency" yardstick allowed the Supreme Court to duck abolition as well as the antagonism that the *Furman* ruling had caused among state legislators. In *Gregg v. Georgia*, a majority of Justices found that legislative developments in the four years since *Furman* had "undercut substantially" the notion that standards of decency had evolved to the point where the death penalty was unconstitutional. In other words, because some 35 US states had responded to *Furman* by enacting new death penalty statutes, it was "now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction". With that conclusion, the Court opened the doors to the country's death chambers.

In 1995, in contrast, the Constitutional Court of South Africa found that the death penalty violated that country's new constitution. One of the Judges, building on the USA's "evolving standards of decency" notion, recalled US Supreme Court Justice Antonin Scalia's opinion that "the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views".[79] Judge Ackermann continued:

> "This is a pertinent warning which I have, I hope, kept in mind. I believe, nonetheless, that there is ample objective evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies. Most democratic countries have abandoned the death penalty for murder…. [I]n general in civilised democratic societies the imposition of the death penalty has been found to be unacceptably cruel, inhuman and degrading, not only to those subjected to it but also to the society which inflicts it."[80]

Speaking against the death penalty on 11 January 2007, United Nations Secretary General Ban Ki-moon stressed his belief that "life is precious and must be protected and respected, and that all human beings have the right to live in dignity". He emphasized "the growing trend in international law and in national practice towards a phasing out of the death penalty", adding that he encouraged continuation of this trend.[81] In contrast, Justice Scalia has written that the death penalty is morally acceptable and that the "modern aversion to the death penalty" is the predictable but erroneous response to "modern, democratic self-government" in which, he says, private morality is equated with governmental morality. Few people, he wrote, "doubted the morality of the death penalty in the age that believed in the divine right of kings."[82] The USA revolted against monarchy, but has yet to do so against capital punishment. Indeed, US officials tend to defend their country's resort to judicial killing by characterizing it as democracy in action rather than the use or abuse of state power. Thus the USA's recent report to the UN Committee Against Torture justified the death penalty on the grounds that "a majority of the people in a majority of the states, and of the country as a whole, have chosen through their democratically elected representatives to provide the

[79] *Thompson v. Oklahoma* (1988), Justice Scalia dissenting (against the Court's decision which stopped the execution of anyone who was 15 years old or younger at the time of the crime).
[80] *The State v. T.Makwanyane and M Mchunu*, Constitutional Court of South Africa, 6 June 1995, Ackermann J., concurring.
[81] Secretary-General's press conference, http://www.un.org/apps/sg/sgstats.asp.
[82] Antonin Scalia. *God's justice and ours*. First Things, Volume 123, pages 17-21 (May 2002).

possibility of capital punishment for the most serious of crimes".[83] In one of his most recent opinions, Justice Scalia expressed the flipside of this US position, namely that leaders who abolish the death penalty – despite apparent public support for it – are undemocratic:

> "There exists in some parts of the world sanctimonious criticism of America's death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently – and indeed, many of them would still have it if the democratic will prevailed)."[84]

Sixty years ago, the US Supreme Court wrote that the purpose of the Bill of Rights, the first 10 Amendments to the US Constitution adopted in 1791, was "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials... [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections".[85] Amnesty International agrees: respect for fundamental human rights should not be dependent on opinion polls or other indicators of public sentiment, including the vote. Just because a democratically elected legislature passes a law allowing a human rights abuse does not make it right.[86] Justice Scalia himself has acknowledged that there are limits to democratically approved abuse:

> "What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offences? … I doubt whether any federal judge… would sustain them against an eighth amendment challenge… I am confident that public flogging and hand-branding would not be sustained by our courts."[87]

Nevertheless, when it comes to the state killing people convicted of certain criminal offences, Justice Scalia displays a double standard. He maintains that if "the American people have determined that the good to be derived from capital punishment… outweighs the risk of error", then it is "no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution."[88]

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[83] Second Periodic Report of the United States of America to the Committee Against Torture, 6 May 2005, available at http://www.state.gov/g/drl/rls/45738.htm#article16.
[84] *Kansas v. Marsh*, 26 June 2006, Justice Scalia concurring.
[85] *West Virginia State Board of Education v Barnette*, 319 U.S. 624 (1943).
[86] A recent example being the Military Commissions Act of 2006 which among other things strips the US courts of jurisdiction to consider *habeas corpus* appeals from any foreign national held as an "enemy combatant" anywhere in the world" (and allows the President to establish military commissions with the power to hand down death sentences against such detainees after unfair trials). See *USA: Military Commissions Act of 2006 – Turning bad policy into bad law*, AI Index: AMR 51/154/2006, 29 September 2006, http://web.amnesty.org/library/Index/ENGAMR511542006.
[87] *Originalism: the lesser evil*. Antonin Scalia, University of Cincinnati Law Review, Volume 57, pages 849 to 865. 1989.
[88] *Kansas v. Marsh*, 26 June 2006, Justice Scalia concurring.

In the 1995 South African Constitutional Court ruling heralding the end of the death penalty in that country, Judge Ackermann wrote:

> "It is not necessarily only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilization, must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place".

The same sentiment was recently expressed by a father whose daughter was abducted and murdered in Ohio. Gregory McKnight was sentenced to death for the killing. The victim's father and mother, Thomas and Cynthia Murray, intend to seek clemency for McKnight. Their daughter, Emily Murray, was opposed to the death penalty. Of his wish not to see McKnight executed, Thomas Murray said: "It's about Emily. It's about the people of Ohio. When we execute someone, in some subtle ways, we may harm ourselves."[89] Ohio's new governor, Ted Strickland, has admitted that he too has concerns about the effect of the death penalty on those who have to carry it out, as well as its effect "on society as a whole". [90]

Democratic but damaging? The appearance of ideologically driven judicial decisions

The executive, legislative and judicial branches of government all have roles to play in promoting and respecting human rights standards. The history of the progress towards worldwide abolition reveals, as Justice Scalia's comment about the countries of "finger-waggers" suggests, that governments have not waited for perceived public opinion to turn against the death penalty. In some cases, it has been the political branches of government that have led the way. On 7 June 2006, for example, Congress in the Philippines passed legislation abolishing the death penalty there. Two months earlier, President Arroyo had ordered the commutation of all death sentences – more than 1,000 – in what is believed to be the largest such act of executive clemency in modern times. In other cases, it has been the judiciary that has taken action, such as in South Africa in 1995.

This has occurred on occasion in the USA, albeit with only temporary effect. The *Furman* decision was one from which the Supreme Court backed away four years later in *Gregg*. Also in 1972, the Chief Justice of the California Supreme Court wrote in an opinion finding the state's death penalty unconstitutional: "Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants".[91] At some point, judges bring their own judgment to an issue.

Not that this will necessarily lead to progress against the death penalty in the absence of principled human rights leadership from the other branches of government. Federal judges

[89] *Victim's parents: Spare her killer*. Columbus Dispatch, 11 January 2007.
[90] *Death penalty questions begin anew with Strickland's administration*. Dayton Daily News, 15 January 2007.
[91] *People v Anderson*, California Supreme Court, 6 Cal. 3d 628 (1972).

in the USA are appointed by the President with the advice and consent of the Senate. The political support for the death penalty in the White House and Congress over recent decades has unsurprisingly meant the appointment of few federal judges who were ideologically opposed to judicial killing. The main distinction between judges in relation to the death penalty has thus tended to be one of their greater or lesser support for regulation of the capital process, rather than opposition to executions *per se*.

As the late Chief Justice of the US Supreme Court, William H. Rehnquist, wrote: "There is obviously wide room for honest difference of opinion over the meaning of general phrases in the Constitution: any particular Justice's decision when a question arises under one of these general phrases will depend to some extent on his own philosophy of constitutional law."[92] A seminal article in 1992 examining the various notions of 'political' used to describe the US Supreme Court noted that:

> "It is not necessarily the case that a justice's vote flows from his policy preferences and precedes a process of legal rationalization. That does, of course, happen on occasions. But different philosophical principles will inevitably dictate different results, so that different policy consequences will follow ineluctably from justices' different jurisprudences. For example, those who see the fundamental role of the Court as the protector of the individual, particularly the unpopular individual, against the power of the state, will necessarily incline towards activism (defined here as a willingness to find unconstitutional the laws and actions of duly elected officials); those who defer to elected officials except where the most egregious breakings of the Constitution have taken place will naturally seem self-restrained".[93]

On death penalty cases, the end result of the "conservative/liberal" divide can be what appears to be ideological decision-making by federal judges, and heightens the need for action to protect fundamental human rights by the other two branches of government, the executive and the legislature. A recent illustration of this occurred in the case of Levar Walton, a seriously mentally ill prisoner convicted of three murders committed in 1996 and sent to Virginia's death row where he remains.

There is compelling evidence that Levar Walton was already suffering from mental illness at the time of the murders and that he was incompetent to stand trial. Once on death row his mental illness worsened – prison records have described an inmate who is "floridly psychotic" with little apparent concern about his impending execution. The principal question in his case thus became one of whether he was legally insane and therefore "incompetent" for execution. The execution of an insane prisoner violates the US Constitution under the 1986 Supreme Court ruling, *Ford v. Wainwright*. However, *Ford* protections have proved minimal. At a bare minimum, it requires that a prisoner be found to make a connection between his crime and punishment. However, what if the connection is highly tenuous or takes place in an

[92] *The notion of a living Constitution*. William H. Rehnquist, Texas Law Review, Volume 54, No. 4, May 1976. This article was written when the author was an Associate Justice on the Supreme Court.
[93] *Six definitions of 'political' and the United States Supreme Court.* Richard Hodder-Williams, British Journal of Political Science, Volume 22, No. 1 (1992).

inner world that is delusional and the product of severe mental illness? Precisely what the *Ford* decision means continues to cause disagreements in the lower courts.[94]

In May 2003, a District Court issued a stay of execution in order to assess whether Levar Walton was competent for execution under *Ford*. After holding hearings, at which he heard conflicting professional opinions on Walton's competence for execution, the judge ruled him competent under a narrow interpretation of the *Ford* ruling. Walton's lawyers appealed to a three-judge panel of the US Court of Appeals for the Fourth Circuit, arguing that the *Ford* decision requires not only that the condemned inmate understands that he is to be executed and why, but also that this understanding is such that the prisoner is able to prepare for his death.[95] Two of the judges agreed. Noting that the *Ford* decision "presents challenges" because it had neither defined insanity nor mandated the procedures for making competency determinations, the panel's 2005 opinion stated that, as in Walton's case, "a person who can only acknowledge, amidst a barrage of incoherent responses, the bare facts that he will be executed and that his crime is the reason why does not meet the standard for competence" under *Ford*.

The state successfully appealed for a rehearing in front of the full Fourth Circuit court of 13 judges. In March 2006 a majority of seven judges concluded that the District Court had applied the correct legal standard. All seven judges had been appointed by Republican Presidents, including two appointed by President George W. Bush and three by President George H.W. Bush.[96] The other six dissented, noting the "substantial evidence that Percy Levar Walton does not understand that his execution will mean his death, defined as the end of his physical life". They noted that "there is no dispute that since his sentencing, Walton has fallen deeper and deeper into mental illness". Five of these six judges had been appointed by President Bill Clinton, a Democratic president.[97] Clearly these six judges took a more "liberal" view than their seven colleagues.[98]

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[94] On 5 January 2007, the US Supreme Court agreed to hear the case of Scott Panetti, a mentally ill man on death row in Texas. The question to be considered is "Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the state is executing him, and thus does not appreciate that his execution is intended to seek retribution for his capital crime". For details of Scott Panetti's case, 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.

[95] The only dispute for the Fourth Circuit court was how to establish whether Levar Walton was competent for execution under the *Ford* decision. As the earlier Fourth Circuit panel opinion had noted, "undoubtedly, determining whether a person is competent to be executed is not an exact science." In other words there will inevitably be errors and inconsistencies – reaffirming that abolition is the only solution.

[96] The other two were appointed by President Reagan and President Nixon.

[97] The sixth was the exception. Judge Wilkins was appointed by President Reagan.

[98] On 4 December 2006, Governor Timothy Kaine of Virginia stayed Levar Walton's execution for 18 months because of the prisoner's severe mental illness. However, he declined to commute the sentence,

This phenomenon is apparent in other areas of the death penalty. For example, in September 2000, the US Court of Appeals for the Sixth Circuit split seven votes to seven on whether to grant Tennessee death row inmate Philip Workman a hearing on new evidence supporting his claim of innocence (the 7-7 tie meant that he lost). The seven judges voting for a new hearing had all been appointed by Democratic presidents.[99] The seven voting against had all been appointed by Republican presidents.[100] In a more recent Sixth Circuit decision involving the case of Abu-Ali Abdur'Rahman, another Tennessee death row case with many troubling aspects of race, mental health, inadequate legal representation and prosecutorial misconduct, nine of the 10 judges who voted for the state's position were appointed by Republican presidents, including six appointed by President George W. Bush.[101] The five judges who dissented had been appointed by Democratic presidents.

Amnesty International is not suggesting either that federal judges lack independence or that the system of appointing them is undemocratic. Voters, for example, would or could have known that President George W. Bush would likely appoint conservative judges if elected as President.[102] The point is simply that, not only should democratic principles not be used to justify human rights violations, democracy alone will not rid a society of such abuses. It requires informed public debate and principled human rights leadership at all levels of government.

But close votes on courts also add to the arbitrariness of the death penalty. If a case is so lacking in clarity that one vote either way means the difference between life or death, is this acceptable in an irrevocable punishment? Walter Mickens, black, was executed in Virginia on 12 June 2002. He was sentenced to death in 1993 for the murder of a white teenager, Timothy Hall. At the time Hall died, he was facing weapons and assault charges. The judge dismissed the charges because of Hall's death. On the next working day, the same judge appointed the lawyer who had been representing Hall to represent Walter Mickens. Neither the judge nor the lawyer disclosed to Mickens that he was being defended by the lawyer of the murder victim. The matter remained undisclosed until it was discovered years

stating that Walton could yet regain his competency to be put to death. See Amnesty International Urgent Action update, http://web.amnesty.org/library/Index/ENGAMR511922006.

[99] Five were appointed by President Clinton, two by President Carter. The decision is *Workman v. Bell*, (5 September 2000)

[100] Four had been appointed by President Reagan, three by President George H.W. Bush.

[101] Of the three others, two were appointed by President George H.W. Bush and one by President Reagan (the 10th judge was a Clinton appointee). Of the five dissenters, four had been appointed by President Clinton, and one by President Carter. *Abdur'Rahman v. Bell* (7 October 2005). For more on this case, see *USA: Not in the jury's name: the imminent execution of Abu-Ali Abdur'Rahman*, June 2003, http://web.amnesty.org/library/Index/ENGAMR510752003.

[102] See, for example, comments of Senator John Kerry, second 2004 presidential debate: "A few years ago, when he came to office, the President said – these are his words – 'What we need are some good conservative judges on the courts.' And he said also that his two favourite justices are Justice Scalia and Justice Thomas. So you get a pretty good sense of where he's heading if he were to appoint somebody". Available at http://www.whitehouse.gov/news/releases/2004/10/20041009-2.html.

later by Walter Mickens's appeal lawyer. However, the conviction and death sentence were allowed to stand.

In effect, Walter Mickens was discriminated against on the grounds of his economic status. Because he could not afford his own attorney, the state appointed one. It did so without ensuring that the lawyer it appointed was not labouring under a conflict of interest, or ensuring that Mickens knew of any such potential conflict, thereby giving the defendant the opportunity to insist upon different representation if he so chose.

Four Supreme Court Justices (the 'liberal' Justices) dissented, arguing that Mickens should get a new trial. Justice Stevens wrote: "Mickens had a constitutional right to the services of an attorney devoted solely to his interests… Setting aside Mickens's conviction is the only remedy that can maintain public confidence in the fairness of the procedures employed in capital cases... A rule that allows the State to foist a murder victim's lawyer onto his accused is not only capricious; it poisons the integrity of our adversary system of justice".[103] Justices Breyer and Ginsburg added that "to carry out a death sentence so obtained would invariably diminish faith in the fairness and integrity of our criminal justice system. That is to say, it would diminish that public confidence in the criminal justice system upon which the successful functioning of that system continues to depend."

As long as the death penalty remains in force, such divisions among judges in life-or-death cases will continue, giving the impression of ideologically motivated decision-making and undermining confidence in the even-handedness of the judiciary.

Jeffrey Leonard, aka James Earl Slaughter, is an African American man who remains on death row in Kentucky. In 2001, a federal district judge (appointed by President Clinton) granted the prisoner a new sentencing on the grounds that his legal representation at his original sentencing had been inadequate.

The State of Kentucky appealed, and in June 2006, a three-judge panel of the US Court of Appeals for the Sixth Circuit reversed the district judge's ruling. All three judges found that the trial lawyer's representation had been constitutionally deficient, but two of the judges (appointed by Presidents Reagan and Bush I) decided that it had not prejudiced the defendant. The third (appointed by President Clinton) dissented, accusing his two colleagues of "turning a blind eye" to the wealth of mitigation evidence that could and should have been presented to the jury at the trial.[104] Judge Cole subsequently wrote of the case:

> "Twenty-year-old Jeffrey Leonard was sentenced to death for the robbery and stabbing death of store owner Esther Stewart. Trial counsel's failure to investigate Leonard's background prevented him from learning even that "James Earl Slaughter" was not Leonard's real name…[T]he jury never knew that Slaughter has possible brain damage from an untreated childhood skull fracture near his right frontal lobe; his cognitive disorder is likely the result of this brain injury; his mother and stepfather (Slaughter's father abandoned Slaughter's fifteen-year-old mother) beat him so badly

[103] *Mickens v Taylor* (2002), Justice Stevens dissenting.
[104] *Slaughter v. Parker*, US Court of Appeals for the Sixth Circuit, 13 June 2006, Judge Cole dissenting.

> as a child that scars remain all over his body; his stepfather once fired a gun at him as he ran out of the home carrying his younger brother; his parents locked him and his siblings in rooms without food, and he would sneak food to his younger siblings; his mother, brothers, and grandparents (who did not know about the trial) would have testified on his behalf; and a clinical psychologist specializing in neuropsychology and forensic psychology concluded that Slaughter was not a sociopath, but could overcome most of his problems if put in the right environment. The majority reversed, holding that it was not reasonably probable that this information would have influenced a single juror to spare Slaughter's life. One juror, however, has since provided an affidavit stating that had she known of this information, she would have sentenced him to life in prison."[105]

The defence appealed for a rehearing in front of the whole Sixth Circuit court. By a tied vote of seven-seven, this was denied. Five of the judges (all appointed by President Clinton) wrote a dissent against this denial:

> "We are uneasy about executing anyone sentenced to die by a jury who knows nearly nothing about that person. But we have allowed it. We are also uneasy about executing those who commit their crime at a young age. But we have allowed that as well. We are particularly troubled about executing someone who likely suffers brain damage. We rarely, if ever, allow that – especially when the jury is not afforded the opportunity to even consider that evidence. Jeffrey Leonard, known to the jury only as "James Slaughter," approaches the execution chamber with all of these characteristics. Reaching this new chapter in our death-penalty history, the majority decision cannot be reconciled with established precedent. It certainly fails the Constitution."[106]

Experiments doomed to failure should be abandoned

James Madison, one of the principal Framers of the US Constitution and the country's fourth President, warned against setting the Constitution in stone.

> "Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?"[107]

In similar vein, Madison's immediate predecessor as President, Thomas Jefferson, wrote in 1816:

> "[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made,

[105] *Slaughter v. Parker*, US Court of Appeals for the Sixth Circuit, 1 November 2006, Judge Cole, dissenting from the denial of rehearing *en banc*, joined by Judges Martin, Daughtrey, Moore and Clay.
[106] *Ibid*.
[107] James Madison, Alexander Hamilton and John Jay. The Federalist Papers, Number 14.

> new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors…"[108]

Nearly two centuries later, the US government told the United Nations Committee Against Torture in Geneva 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."[109] So when will the USA abandon its failed death penalty experiment? Once one accepts the fallibility of governments and human beings more generally, one must reject the death penalty, realizing that no amount of tinkering with the machinery of death can free this outdated punishment from its inescapable flaws.

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. It should be abolished.

Appendix: A selection of AI documents against the US death penalty since 1998

For Urgent Action case sheets issued on individual death penalty cases in the USA, see http://web.amnesty.org/library/eng-usa/urgent_actions.

USA: New Jersey Death Penalty Study Commission recommends abolition, 3 January 2007, http://web.amnesty.org/library/Index/ENGAMR510032007.

USA: New Year's resolution: End a cruel and outdated punishment, 21 December 2006, http://web.amnesty.org/library/Index/ENGAMR512052006.

USA: More about politics than child protection. The death penalty for sex crimes against children, 21 June 2006, http://web.amnesty.org/library/Index/ENGAMR510942006.

USA: The execution of mentally ill offenders, January 2006, http://web.amnesty.org/library/Index/ENGAMR510032006.

[108] Letter to Samuel Kercheval, 12 July 1816, 15. The Writings of Thomas Jefferson 40-42 (Memorial ed. 1904). Quoted in *Furman v. Georgia*.
[109] Statement available at http://www.state.gov/g/drl/rls/rm/2006/66065.htm.

USA: Killing possibility: The imminent execution of Stanley Williams in California, November 2005, http://web.amnesty.org/library/Index/ENGAMR511872005.

USA: Death by default, 21 January 2005. http://web.amnesty.org/library/Index/ENGAMR510152005.

USA: Osvaldo Torres, Mexican national denied consular rights, scheduled to die, April 2004, http://web.amnesty.org/library/Index/ENGAMR510572004.

USA: Another Texas injustice: The case of Kelsey Patterson, mentally ill man facing execution, March 2004, http://web.amnesty.org/library/Index/ENGAMR510472004

USA: 900th execution looms. A call to the President as Vietnamese refugee and Vietnam veteran set to be killed, http://web.amnesty.org/library/Index/ENGAMR510342004.

USA: Supreme Court to revisit constitutionality of executing child offenders, 27 January 2004, http://web.amnesty.org/library/Index/ENGAMR510202004.

USA: Dead Wrong. The case of Nanon Williams, child offender facing execution on flawed evidence, January 2004, http://web.amnesty.org/library/Index/ENGAMR510022004.

USA: 'Where is the compassion?' The imminent execution of Scott Panetti, mentally ill offender, January 2004, http://web.amnesty.org/library/Index/ENGAMR510112004.

USA: Evolving standards of decency, 6 January 2004, http://web.amnesty.org/library/Index/ENGAMR510032004.

USA: Death and the President, 22 December 2003, http://web.amnesty.org/library/Index/ENGAMR511582003.

USA: A lethal ideology, 9 December 2003, http://web.amnesty.org/library/Index/ENGAMR511492003

USA: Not in the jury's name: the imminent execution of Abu-Ali Abdur'Rahman, June 2003, http://web.amnesty.org/library/Index/ENGAMR510752003.

USA: One more reason to end the death penalty, 30 April 2003, http://web.amnesty.org/library/Index/ENGAMR510602003.

USA: Death by discrimination - the continuing role of race in capital cases, April 2003, http://web.amnesty.org/library/Index/ENGAMR510462003.

USA: A killing that no respectable government can condone, 4 March 2003, http://web.amnesty.org/library/Index/ENGAMR510332003.

USA: Another planned killing by the US Government - The imminent federal execution of Louis Jones, February 2003, http://web.amnesty.org/library/Index/ENGAMR510202003.

USA: Texas - In a world of its own as 300th execution looms, January 2003, http://web.amnesty.org/library/Index/ENGAMR510102003.

USA: James Colburn: mentally ill man scheduled for execution in Texas, October 2002, http://web.amnesty.org/library/Index/ENGAMR511582002.

USA: Indecent and internationally illegal. The death penalty against child offenders, September 2002, http://web.amnesty.org/library/Index/ENGAMR511432002.

USA: Wrong 800 times, 20 September 2002, http://web.amnesty.org/library/Index/ENGAMR511522002.

USA: To err is human; to abolish is demanded, 4 July 2002, http://web.amnesty.org/library/Index/ENGAMR511102002.

USA: Wrong turn, 27 June 2002, http://web.amnesty.org/library/Index/ENGAMR511022002.

USA: 'A skunk in the jury box', 7 June 2002, http://web.amnesty.org/library/Index/ENGAMR510902002.

USA: Joseph Amrine - Facing execution on tainted testimony, June 2002, http://web.amnesty.org/library/Index/ENGAMR510852002.

USA: The human dignity that Texas refuses to recognize, 31 May 2002, http://web.amnesty.org/library/Index/ENGAMR510872002.

USA: In whose best interests? 24 April 2002, http://web.amnesty.org/library/Index/ENGAMR510632002.

USA: Too flawed to fix: Time for courage on the death penalty, 17 April 2002, http://web.amnesty.org/library/Index/ENGAMR510612002.

USA: Killing costs, 13 February 2002, http://web.amnesty.org/library/Index/ENGAMR510292002.

USA: Arbitrary, discriminatory, and cruel: an *aide-mémoire* to 25 years of judicial killing, January 2002, http://web.amnesty.org/library/Index/ENGAMR510032002.

USA: No return to execution -The US death penalty as a barrier to extradition, November 2001, http://web.amnesty.org/library/Index/ENGAMR511712001.

USA: Time to reject the culture of death, 20 November 2001, http://web.amnesty.org/library/Index/ENGAMR511682001.

USA: 'The day of my scheduled execution is fast approaching...', 12 October 2001, http://web.amnesty.org/library/Index/ENGAMR511492001.

USA: State cruelty against families, 4 September 2001, http://web.amnesty.org/library/Index/ENGAMR511322001.

USA: A time for action - Protecting the consular rights of foreign nationals facing the death penalty, August 2001, http://web.amnesty.org/library/Index/ENGAMR511062001.

USA: Too young to vote, old enough to be executed, 31 July 2001, http://web.amnesty.org/library/Index/ENGAMR511052001.

USA: Still a lethal lottery, 25 June 2001, http://web.amnesty.org/library/Index/ENGAMR510962001.

USA: Open letter to the US Attorney General concerning the imminent execution of Juan Raul Garza, 15 June 2001, http://web.amnesty.org/library/Index/ENGAMR510882001.

USA: An open letter to President George W. Bush calling for a moratorium on federal executions, 10 May 2001, http://web.amnesty.org/library/Index/ENGAMR510692001.

USA: Old habits die hard: The death penalty in Oklahoma, April 2001, http://web.amnesty.org/library/Index/ENGAMR510552001.

USA: The illusion of control. 'Consensual' executions, the impending death of Timothy McVeigh, and the brutalizing futility of capital punishment, April 2001, http://web.amnesty.org/library/Index/ENGAMR510532001.

USA: Nevada's planned killing of Thomas Nevius, March 2001, http://web.amnesty.org/library/Index/ENGAMR510012001.

USA: Memorandum to President Clinton. An appeal for human rights leadership as the first federal execution looms, November 2000, http://web.amnesty.org/library/Index/ENGAMR511582000.

USA: Crying out for clemency: The case of Alexander Williams, mentally ill child offender facing execution, September 2000, http://web.amnesty.org/library/Index/ENGAMR511392000.

USA: Worlds Apart -- Violations of the Rights of Foreign Nationals on Death Row - Cases of Europeans, July 2000, http://web.amnesty.org/library/Index/ENGAMR511012000.

USA: Failing the future. Death Penalty Developments (March 1998 - March 2000), April 2000, http://web.amnesty.org/library/Index/ENGAMR510032000.

USA: A Life in the Balance: The Case of Mumia Abu-Jamal, February 2000, http://web.amnesty.org/library/Index/ENGAMR510012000.

USA: Beyond Reason - The imminent execution of John Paul Penry, December 1999, http://web.amnesty.org/library/Index/ENGAMR511951999.

USA: Shame in the 21st Century – Three child offenders scheduled for execution in January 2000, December 1999, http://web.amnesty.org/library/Index/ENGAMR511891999.

USA: Time for humanitarian intervention: the imminent execution of Larry Robison, July 1999, http://web.amnesty.org/library/Index/ENGAMR511071999.

USA: Killing without mercy – Clemency procedures in Texas, June 1999, http://web.amnesty.org/library/Index/ENGAMR510851999.

USA: Killing with Prejudice: Race and the Death Penalty, May 1999, http://web.amnesty.org/library/Index/ENGAMR510521999.

USA: Killing Hope - The Imminent Execution of Sean Sellers, December 1998, http://web.amnesty.org/library/Index/ENGAMR511081998.

USA: Fatal flaws: Innocence and the death penalty, November 1998, http://web.amnesty.org/library/Index/ENGAMR510691998.

USA: On the wrong side of history: Children and the death penalty, October 1998, http://web.amnesty.org/library/Index/ENGAMR510581998.

USA: 'A macabre assembly line of death'. Death penalty developments in 1997, April 1998, http://web.amnesty.org/library/Index/ENGAMR510201998.

USA: The Death Penalty in Texas: Lethal Injustice, March 1998, http://web.amnesty.org/library/Index/ENGAMR510101998.

USA: Violation of the rights of foreign nationals under sentence of death, January 1998, http://web.amnesty.org/library/Index/ENGAMR510011998.