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USA: Breaking a lethal habit

A look back at the death penalty in 2007

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On 11 December, Saverio DiGiovanni was strapped into New Jersey's electric chair and became the first prisoner to be put to death by electrocution in the state.

That was in 1907. One hundred years later, on 17 December 2007, Governor Jon Corzine signed into law a bill abolishing the death penalty in New Jersey. In so doing, he quoted the words of Martin Luther King from his 1964 Nobel Peace Prize acceptance speech: "man must evolve for all human conflict a method which rejects revenge, aggression and retaliation". By abolishing the death penalty, Governor Corzine said, "New Jersey is truly evolving". The state was, he said, rejecting a punishment which carries the inescapable risk of irrevocable error, has little or no deterrence value, compounds the suffering of the families of murder victims by necessarily long appeals, costs the state more than imprisonment, and is cruel, regardless of the execution method chosen to kill the condemned prisoner.

The year 2007 began with the New Jersey Death Penalty Study Commission – set up by the state legislature in 2006 to study all aspects of capital punishment in the state – releasing its final report recommending abolition.[1] The New Jersey legislature took up the issue and on 10 December 2007, Human Rights Day, the Senate voted by 21-16 to approve the abolitionist bill brought before it; three days later the lower General Assembly did the same by 44 votes to 36. As well as signing the bill into law, Governor Corzine commuted the death sentences of all eight men on New Jersey's death row.

Thus New Jersey becomes the first US state since 1965 to legislate to abolish the death penalty. And while no-one is expecting an immediate domino effect through the other death penalty states, the move is nonetheless part of a wider questioning underway in the USA about the reliability, necessity, fairness and humanity of capital punishment.

With New Jersey's decision, the total number of abolitionist states in the USA rises to 14. New York had effectively become the 13th abolitionist state in October 2007 when its highest court refused to make an exception to its 2004 ruling finding the state's death penalty statute unconstitutional. The challenge to that ruling had been brought by the state in the case of the last person left on New York's death row.

[1] See *USA: New Jersey Death Penalty Study Commission recommends abolition*, AI Index: AMR 51/003/2007, 3 January 2007, http://www.amnesty.org/en/report/info/AMR51/003/2007.

On the downside, in 2007 South Dakota carried out its first execution since April 1947. Elijah Page was executed on 11 July for a murder committed in 2000 when he was 18 years old and emerging from a childhood of deprivation and abuse. He had given up his appeals and became one of five "volunteers" put to death during the year.[2] His execution meant that 34 states and the federal government had conducted at least one execution since judicial killing resumed in the USA in 1977. South Dakota was one of 10 states that carried out executions during 2007.

The total of 42 executions in the USA during 2007 was nevertheless 11 down on 2006, less than half of the number put to death in 1999, and represents the lowest annual judicial death toll since 1994. This is at least in part due to the apparent moratorium on lethal injections that has been in place since late September when the US Supreme Court agreed to take the case of *Baze v. Kentucky*, and thereby consider a challenge, under the US Constitution's Eighth Amendment ban on "cruel and unusual" punishment, to the three-chemical lethal injection process used in Kentucky, and in most other states that use this method.[3] The Court will hear oral arguments on the case on 7 January 2008; its ruling is expected before the end of June.

Kentucky was also the location for a recent commutation in a capital case. Hours before leaving office on 11 December 2007, Governor Ernie Fletcher commuted the death sentence of Jeffrey Leonard to life imprisonment on the grounds that Leonard's legal representation at trial had been wholly inadequate. Indeed, the defence lawyer had not even known his client's name, and failed to present compelling mitigating evidence about him to the trial jury.[4] In neighbouring Tennessee, Governor Phil Bredesen gave similar reasons for commuting the death sentence of Michael Boyd on 14 September 2007 to life imprisonment five weeks before Boyd was due to be executed, although this time the "grossly inadequate legal representation" in the case had occurred at the post-conviction stage.

In a now familiar indicator of the geographical bias in the US death penalty, Texas accounted for 26 of the 42 executions in the USA in 2007, and this state now accounts for 405 of the 1,099 executions carried out since 1977. Among those executed in Texas during the year was Joseph Nichols, put to death for the murder of Claude Shaffer in 1980. His co-defendant, Willie Williams, who had been tried first, had pleaded guilty at his January 1981 trial and was executed in 1995. At his trial, the prosecutor had told the jury: "Willie Williams is the individual who shot and killed Claude Shaffer. That is all there is to it. It is scientific. It is consistent. It is complete. It is final, and it is in evidence… there is only one bullet that could possibly have done it and that was Willie Williams'." At the trial of Joseph Nichols in July 1981, the state argued that regardless of the fact that Williams fired the fatal shot, Nichols was guilty under the 1974 Texas "law of parties", under which the distinction between principal actor and accomplice in a crime is abolished and each may be held equally culpable. The jury was unable to reach a sentencing verdict. After the trial, the prosecution interviewed some of

[2] See *USA: Prisoner-assisted homicide – more 'volunteer' executions loom*, AI Index: AMR 51/087/2007, May 2007, http://www.amnesty.org/en/report/info/AMR51/087/2007.
[3] See *USA: Pause for thought: Another lethal injection halted by US Supreme Court*, AI Index: AMR 51/161/2007, 18 October 2007, http://www.amnesty.org/en/report/info/AMR51/161/2007.
[4] See pages 33-34 of *USA: The experiment that failed – A reflection on 30 years of executions*, AI Index: AMR 51/011/2007, January 2007, http://www.amnesty.org/en/report/info/AMR51/011/2007..

the jurors and learned that their doubts about whether Nichols had been the person who had fired the fatal shot had left them unable to agree on the death penalty. Joseph Nichols was retried by the same prosecutor in early 1982. This time the prosecution argued that Nichols had fired the fatal shot. The prosecutor argued that "Willie could not have shot [Shaffer]… [Nichols] fired the fatal bullet and killed the man in cold blood and he should answer for that". The jury voted for a death sentence. Although a federal judge ruled in 1992 that the prosecution had presented false evidence by changing its argument – adding that "Williams and Nichols cannot both be guilty of firing the same bullet because physics will not permit it", his decision was overturned and Joseph Nichols went to his execution on 7 March 2007.

Even Texas saw an executive commutation in 2007, however. Kenneth Foster had his death sentence commuted to life imprisonment by Governor Rick Perry on 30 August, a few hours before he was due to be put to death. He had been sentenced to death for the murder of Michael LaHood. Mauriceo Brown, the man who had actually shot LaHood, was executed in 2006. Kenneth Foster, in a car some 30 metres from the crime when it was committed, was convicted under the law of parties. Kenneth Foster maintains that he did not know that Brown would either rob or kill Michael LaHood. On 30 August 2007, the Texas Board of Pardons and Paroles announced that it had voted 6-1 to recommend to the Governor that he commute Kenneth Foster's death sentence. Shortly afterwards, Governor Perry announced that he had accepted the recommendation. Governor Perry's term in office since 2001 has seen 166 executions. Although he has commuted the death sentences of a number of Texas prisoners protected by the US Supreme Court rulings prohibiting the execution of child offenders and people with mental retardation, this was the first time he had commuted the death sentence of a prisoner facing imminent execution. Indeed, in 2004 he had rejected a recommendation from the Board of Pardons and Paroles to commute the death sentence of Kelsey Patterson, who suffered from serious mental illness, and Patterson was executed a few hours later.

Texas was nevertheless stopped in 2007 from executing another death row prisoner suffering from severe mental illness. In a 5-4 decision issued on 28 June, the US Supreme Court blocked the execution of Scott Panetti.[5] This important ruling found that Texas had not provided Scott Panetti with an adequate hearing, and that the federal Court of Appeals for the Fifth Circuit had employed a "flawed" and "too restrictive" interpretation of the Supreme Court's 1986 *Ford v. Wainwright* ruling. The latter decision had affirmed that the execution of an insane prisoner is unconstitutional. The *Panetti* ruling has the potential to provide additional protection for condemned prisoners suffering from serious mental illness, protection which under the 1986 *Ford* ruling has proved minimal.[6]

The five Justices in the *Panetti* majority noted that there is "much in the record to support the conclusion that [Panetti] suffers from severe delusions". However, it also acknowledged that "a concept like rational understanding is difficult to define". In the *Ford* ruling two decades

[5] See *USA: 'Where is the compassion?' The imminent execution of Scott Panetti, mentally ill offender*, January 2004, http://www.amnesty.org/en/report/info/AMR51/011/2004. Also, *USA: The execution of mentally ill offenders*, January 2006, http://www.amnesty.org/en/report/info/AMR51/003/2006.
[6] See *USA: Supreme Court tightens standard on 'competence' for execution*, AI Index: AMR 51/114/2007, 29 June 2007, http://www.amnesty.org/en/report/info/AMR51/114/2007.

earlier, four of the Justices had similarly noted that although "the stakes are high", the evidence of whether a prisoner is incompetent for execution "will always be imprecise". In other words, there will always be errors and inconsistencies, at least on the margins. Any arbitrariness in the application of the death penalty should be abhorrent even to those who do not oppose this punishment on principle. In the end, as New Jersey has now found, there is only one solution – abolition.

As New Jersey Governor Jon Corzine said when signing the abolitionist law, "government cannot provide a foolproof death penalty that precludes the possibility of executing the innocent". Wrongful convictions in capital cases have drawn much public attention in recent years, and may be one reason why public support for the death penalty has softened in the USA. Over the years a number of prisoners have gone to their deaths despite serious doubts about their guilt. Another such case that occurred in 2007 was that of Philip Workman who was executed in Tennessee on 9 May despite compelling evidence that a key state witness lied at the trial and that the police officer he was convicted of killing may have been accidentally shot by a fellow officer.

On 16 July, less than 24 hours before he was due to be put to death, Georgia death row inmate Troy Davis received a stay of execution from the state Board of Pardons and Paroles. He had been on death row for more than 15 years for the murder of a police officer he has always maintained he did not commit. There was no physical evidence against him and the weapon used in the crime was never found. The case against him consisted entirely of witness testimony, most of which had subsequently been recanted. On 3 August, the Georgia Supreme Court granted an extraordinary appeal and agreed to hear his case for a new trial. It heard oral arguments in November, and its ruling is awaited.[7]

More than 120 people have been released from death rows in the USA since 1975 on the grounds of innocence. More cases were added in 2007. Curtis Edward McCarty, who had spent 21 years on Oklahoma's death row, was released in May 2007 after a federal judge ordered that the charges against him be dismissed. DNA evidence helped to exonerate him, and the judge ruled that the case against him had been tainted by the questionable testimony of a discredited former police chemist. In December 2007, Michael McCormick was acquitted at his retrial for a murder for which he had spent 16 years on death row in Tennessee. Also in December, prosecutors dismissed all charges against Jonathon Hoffman in the crime for which he had served nearly a decade on death row in North Carolina. He had been granted a new trial in 2004 following allegations of prosecutorial misconduct and of crucial evidence being withheld from the defence.

Jonathon Hoffman is black. The murder victim in the case was white, and Hoffman was sentenced to death by an all-white jury. Studies have consistently shown that race place a role in the US death penalty.[8] Additional evidence of this emerged in 2007. An investigation of

[7] See: *USA: 'Where is the justice for me?' The case of Troy Davis, facing execution in Georgia*, AI Index: AMR 51/023/2007, February 2007, http://www.amnesty.org/en/report/info/AMR51/023/2007.
[8] *USA: Death by discrimination – the continuing role of race in capital cases*, April 2003, AI Index: AMR 51/046/2003, http://www.amnesty.org/en/report/info/AMR51/046/2003.

Georgia's death penalty conducted for the *Atlanta Journal-Constitution*, for example, concluded that prosecutors across Georgia were twice as likely to seek the death penalty in cases where the victim was white. The study also found that between 1995 and 2004, prosecutors were about six times more likely to seek death when an armed robber killed a white person.[9] An academic study also published in 2007 found that "blacks convicted of killing whites are more likely to be executed than other death row offenders." It concluded that "despite efforts to transcend an unfortunate racial past, residues of this fierce discrimination evidently still linger, at least when the most morally critical decision about punishment is decided… [T]he post-sentencing capital punishment process continues to place greater value on white lives".[10]

A quarter of the prisoners put to death in 2007 were blacks convicted of killing whites. To date, more than 220 blacks have been executed for killing whites, more than 10 times as many as whites convicted of killing blacks. Although blacks and whites are the victims of murder in almost equal numbers in the USA, 80 per cent of the people executed since 1977 had been convicted of killing white people. The figure in 2007 was in line with this – 71 per cent of those put to death during the year had been convicted of killing at least one white person.

In June 2007, the US Supreme Court agreed to hear the case of an African American death row inmate, Allen Snyder, who was sentenced to death in Louisiana by an all-white jury selected after all five African Americans in the jury pool had been peremptorily dismissed by the prosecutor. The trial occurred in 1996, a year after the racially divisive trial in California of O.J. Simpson for the murder of his ex-wife. The prosecutor in Snyder's case argued to the all-white jury that the case was "very, very, very similar" to the O.J. Simpson trial, in which Simpson had "got away with it". The Simpson acquittal – the prosecutor's reference to which was described by a Louisiana Supreme Court judge as "totally irrelevant" and "highly prejudicial" to Snyder's case – had been overwhelmingly unpopular with white citizens, according to opinion polls. However the Louisiana court upheld the death sentence. On 4 December 2007, the US Supreme Court heard oral arguments relating to the alleged racial discrimination in jury selection at Allen Snyder's trial and the racially inflammatory references to the O.J. Simpson case. It is expected to rule in the first half of 2008.

Research shows that capital jurors in the USA are more pro-prosecution than those who under US law are excluded from capital jury service due to their opposition to the death penalty.[11] Yet even these "death-qualified" jurors have apparently become more reluctant to hand down death sentences. The annual number of death sentences continues to drop from its peak in the mid-1990s.[12] The Death Penalty Information Center in Washington, DC, estimates that approximately 110 death sentences were passed in 2007, just down from 115 in 2006.[13] In

[9] *A matter of life or death*, Atlanta Journal-Constitution, September 2007.
[10] Jacobs, D., Carmichael, J.T., Qian, Z., Kent, S.L., *Who survives on death row? An individual and contextual analysis*. American Sociological Review, August 2007, Volume 72, pages 610-632.
[11] In 1986, the Supreme Court noted research that "death qualification… produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries". *Lockhart v. McCree*, 476 U.S. 162 (1986).
[12] See pages 2-3 of *USA: The experiment that failed, op. cit*, January 2007.
[13] Year-end report, December 2007, http://www.deathpenaltyinfo.org/2007YearEnd.pdf.

contrast to this, in the five years from 1995 to 1999, more than 300 people, on average, were annually sentenced to death in the USA.

In a state capital trial, 12 citizens from the county in which the trial is held are selected to sit as a "death qualified" jury. At jury selection, the defence and prosecution will question the prospective jurors and have the right to exclude certain people, either for a stated reason (for cause) or without giving a reason (a peremptory challenge). Those citizens who would be "irrevocably committed" to vote against the death penalty can be excluded for cause by the prosecution, under the 1968 US Supreme Court ruling in *Witherspoon v. Illinois*.[14] In 1985, in *Wainwright v. Witt*, the Supreme Court relaxed the *Witherspoon* standard, thereby expanding the class of potential jurors who could be dismissed for cause during jury selection.[15] Under the *Witt* standard, a juror can be dismissed for cause if his or her feelings about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath".

A US Supreme Court ruling issued on 4 June 2007 in the case of Washington State death row inmate Calvin Brown would appear to allow yet broader exclusion of jurors from capital cases. The ruling, *Uttecht v. Brown*, overturned a 2006 decision by the US Court of Appeals for the Ninth Circuit that Brown should get a new sentencing on the grounds that a juror had been improperly excluded under the *Wainwright/Witt* standard. Reversing this ruling, the Supreme Court upheld the trial court's exclusion of a juror who had said that he could vote for the death penalty despite having general reservations about this punishment. Four of the nine Justices dissented, accusing the majority of "abdicat[ing] our judicial role" and "blindly" accepting the state court's conclusion that the juror's views would have "substantially impaired" his performance as a capital juror. The dissent continued:

> "Today, the Court has fundamentally redefined – or maybe just misunderstood – the meaning of 'substantially impaired', and, in so doing, has gotten it horribly backwards. It appears to be under the impression that trial courts should be encouraging the inclusion of jurors who will impose the death penalty rather than only ensuring the exclusion of those who say that, in all circumstances, they cannot".[16]

Nearly a decade ago, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions expressed concern that "while the jury system was intended to represent the community as a whole, the community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded from sitting

[14] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).
[15] *Wainwright v. Witt*, 469 U.S. 412 (1985). In 1992, in *Morgan v. Illinois*, the Court explicitly extended the *Witt* standard to include proponents of the death penalty. In other words, anyone whose support for the death penalty would "prevent or substantially impair" them from performing his or her duties as a juror can be dismissed for cause.
[16] The dissent further notes that the majority opinion opens with a "graphic description" of the facts of the crime for which Calvin Brown was convicted. The dissent suggests that this may have been "an attempt to startle the reader or muster moral support for its decision". The inclusion of such a description, however, "is both irrelevant and unnecessary".

as jurors".[17] The *Uttecht* ruling threatens to exacerbate this problem, possibly leading to capital juries that are more conviction prone and more racially imbalanced (to the extent that whites tend to support the death penalty more than blacks).

Despite the increasing recognition of the flaws of the death penalty, and in contravention of international standards, some states have expanded the death penalty to include non-homicidal sex crimes against children. On the same day as the New Jersey General Assembly approved abolition, Governor Matt Blunt of Missouri announced that he was calling on the legislature to pass a law authorizing the death penalty for the rape of a child under the age of 12 years old. If this occurs, Missouri would become the latest in a number of states to have expanded the death penalty to this type of non-homicidal crime, including South Carolina and Oklahoma in 2006.[18] In July 2007, Governor Perry of Texas signed a similar bill into law, making repeated sex crimes against under 14-year-old children punishable by the death penalty.

Louisiana law provides for the death penalty for the aggravated rape of children under the age of 13. In May 2007, the Louisiana Supreme Court upheld the death sentence of Patrick Kennedy for the rape of an eight-year-old girl in March 1998. He was then the only prisoner on death row in the USA for a crime not involving murder. The Chief Justice dissented from the affirmation of his death sentence, arguing that "despite recent legislative enactments in other states, nothing approaching a consensus exists in capital jurisdictions on the appropriateness of the death penalty for non-homicidal crimes… Capital punishment is unique in its severity and irrevocability and it is reserved by the Eighth Amendment for the worst of fully culpable offenders committing the worst crimes different in kind and degree from all others because they result in the taking of human life".

On 4 January 2008, the US Supreme Court is scheduled to consider whether to take the Kennedy case and rule on the constitutionality of such use of the death penalty, more than four decades after the last execution for rape in the USA, and 31 years after the Supreme Court ruled that the death penalty for rape was unconstitutional (*Coker v. Georgia*, 1977).[19] In its brief urging the Supreme Court not to take the case, the State of Louisiana argues that support for its position lies in the fact that since 1997 five states have enacted (although not used) legislation prescribing the death penalty for child rape and that a number of states also allow (but have not used) the death penalty for other non-homicidal offences, such as treason

[17] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Addendum: Mission to the United States of America, UN Doc. E/CN.4/198/68/Add.3, para. 147. 22 January 1998.
[18] South Carolina added as a capital offence, second and subsequent offences of first-degree criminal sexual conduct with a child under the age of 11. Oklahoma added as a capital offence, sex crimes against a child under the age of 14 when the offender has a previous conviction for a similar offence. See *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://www.amnesty.org/en/report/info/AMR51/094/2006.
[19] The *Coker* ruling involved a man sentenced to death for the rape of a 16-year-old girl. Georgia law and the US Supreme Court characterized the victim as an adult, thereby leaving the door open to those states which have passed laws making sex crimes against children capital crimes. The last execution for rape in the USA was in Missouri in 1964. There were six other executions that year for non-homicidal offences – five for rape (Arkansas, Missouri and Texas) and one for robbery (Alabama).

and espionage. The brief also asserts that the "execution of child rapists will serve the goals of deterrence and retribution". It provides no evidence to back up its deterrence claim. A retributive stance by local prosecutors was on display in a Louisiana courtroom later in the year. On 12 December 2007, the second such death sentence in the country was passed when a Louisiana jury sentenced Richard Davis to death for the rape of a five-year-old child. At the sentencing, the prosecutor had urged the jury: "Execute this man. Justice has a sword and this sword needs to swing today." After the verdict, the other prosecutor said: "We are satisfied… [I]f you are going to have crimes like this, you have to have the appropriate penalty."

Thirty years ago, in a speech accepting the Nobel Peace Prize for Amnesty International in 1977, Mümtaz Soysal said: "human rights will not be protected if left solely to the governments. Individuals of goodwill must everywhere concern themselves with and act to curb repression, and to defend human rights. The ordinary individual can make a difference. This is the experience of Amnesty International. An aroused public opinion is a powerful weapon. Important as bills of rights and legal mechanisms are, still more important is the concern of one individual for another, one group for another, one nation for another".

Signing New Jersey's abolitionist bill into law, Governor Corzine specifically thanked human rights and advocacy groups which had "created a fundamental grassroots groundswell that put pressure on those of us in public service to stand up and do the right thing". At the same time, he recognized that "good people will describe today's actions in quite different terms – in terms of injustice", including some of those who had lost relatives to murder. Nevertheless, the Governor stated that he and a "bipartisan majority of our legislature" believed that "state-endorsed killing" offended "our State's highest values" and the "search for true justice".

The New Jersey legislature and governor have shown that the "tough on crime" posturing that has so often accompanied political and legislative support for the death penalty need not hold sway. They acted upon the only appropriate conclusion that a serious examination of the death penalty can reach, namely that to end judicial killing is to abandon a destructive, diversionary and divisive public policy that is not consistent with widely held values. Today 133 countries are abolitionist in law or practice, and on 18 December 2007, the UN General Assembly passed a landmark resolution calling for a global moratorium on executions.

The death penalty 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 proven 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.

The death penalty is an old habit that dies hard. As New Jersey has shown, even old habits can be broken.

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