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UNITED STATES OF AMERICA

A lethal ideology

More state killing on Human Rights Day as 900th execution looms

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An Amnesty International poster from the early 1990s depicted a number of former or current leaders, each with a hand in the air. Adolf Hitler, Joseph Stalin, Mao Zedong, Idi Amin, and Saddam Hussein were among those pictured. So too was the then US President, George Bush. The caption read: "All those in favour of the death penalty, raise your hand".

A decade later, the presidential hand is still raised as the USA approaches its 900th execution since resuming judicial killing in 1977. On 900 occasions, a human being will have been led from his or her cell and hanged, shot, gassed, electrocuted or poisoned to death. Kept under the threat of execution for years, these prisoners, together with their families, had to endure the cycle of fear, hope and despair inherent to capital punishment. More than three and a half thousand men and women are being kept under such a death threat today in the United States. Now, by presidential order, there is also the prospect of executions of selected foreign nationals following trials by military commissions – executive

bodies, not independent and impartial courts – with no right of appeal to any court.

On 9 December last year, President George W. Bush issued a proclamation, declaring 10 December 2002 to be Human Rights Day and that week as Human Rights Week. "As a Nation", the President proclaimed, "we steadfastly oppose the forces of cruelty, injustice, and tyranny".¹ In the five days from 9 to 13 December 2002, the USA killed seven people in its execution chambers.² They had been selected for death under a system marked by arbitrariness, discrimination and error.

The presidential proclamation failed to mention that 10 December each year is international Human Rights Day. It marks the adoption in 1948 of the Universal Declaration of Human Rights, with its vision of a world free from state killing and cruelty. It is one of the success stories of the human rights movement that the years since 1948 have seen steady progress towards worldwide eradication of the death penalty. Today, 112 countries

are abolitionist in law or practice. The vast majority of the world's executions each year now take place in a handful of countries, the USA among them.

This year, on the Universal Declaration's 55th anniversary, the USA is set to execute two more people. This is in addition to the two men scheduled to be put to death either side of Human Rights Day, on 9 and 11 December.³

On 14 January 2003, President Bush, whose five-year governorship of Texas saw 152 executions in that state and whose presidency has seen the first federal executions in the USA since 1963, issued another proclamation, promising that the United States will "continue to build a culture that respects life".⁴ On the same day, the USA carried out its first execution of the year, and has carried out over 60 more since then, including the federal execution of a former soldier with a claim of Gulf War Syndrome who was denied clemency by President Bush.⁵

Premeditated

There is no killing more premeditated than the death penalty. Just how calculated this killing is, is illustrated by the execution protocols for the death penalty states. On "Execution Day" in Colorado, for example, "the inmate will be offered the opportunity to shower and dress in clean clothes one and one-half hours prior to the scheduled execution time. Following the shower, the inmate will be dressed in green uniform pants, a green button-up front shirt, socks, and shoes. Thirty minutes prior to the scheduled execution time, the strap down team will remove the inmate from the holding cell and strap the inmate to the execution bed. Twenty minutes prior to the scheduled execution time or when

instructed by the Warden, the IV team will insert two intravenous catheters into appropriate veins in the inmate's arms, one to deliver the lethal agents and the other to serve as a back-up in the event of injection failure into the primary catheter."⁶ And so on.

After a night of heavy drinking in 1993, 20-year-old Johnny Martinez robbed a Texas grocery shop, stabbing the shop assistant in the process. Within half an hour of the murder Martinez had telephoned the police from a nearby motel, and told them of the crime. When the police arrived, Martinez surrendered without resistance. The arresting officer described him as "very cooperative" and "concerned about what happened". At the police station, Johnny Martinez confessed to the stabbing. He assisted the police in their search for the murder weapon. The interrogating officer described Martinez as "very upset" and "remorseful". At the sentencing phase of his subsequent trial, Johnny Martinez expressed his remorse and an inability to explain why he had committed this act of violence. He had no history of violence and no criminal convictions. He was sentenced to death and in May 2002 was put to death by lethal injection.

Some of those on death row were intoxicated at the time of the crimes. Some were mentally ill. Many came from backgrounds of exposure to abuse and violence from an early age. Eddie Crawford is scheduled for execution in Georgia on 10 December 2003, Human Rights Day, for the murder of his niece. He is a Vietnam veteran, who, according to his appeal lawyers, returned from that war as an alcoholic suffering from post-traumatic stress disorder.

Meanwhile, the state practices its killing procedures, further highlighting just how premeditated this legalized murder is. New Mexico's "tie-down team practice session", for example, includes the following steps: "1. The condemned inmate shall be escorted from the holding cell into the execution chamber. 2. The condemned inmate shall be ordered to lay down on his/her back on the table. 3. The condemned inmate shall be strapped to the table as follows: (a) The condemned inmate's ankles and wrists shall be buckled down simultaneously. (b) The strap across the chest and below the knees shall be placed on the inmate. The strap across the stomach and above the knees shall be placed on the inmate."⁷

As it wields the ultimate power over individuals, the state may need to cater for the possibility of a stay of execution. In New Jersey, the procedures state that: "in the event that such a stay is granted during the execution process and the condemned has not expired, the Superintendent shall immediately order the team physicians to intercede. Witnesses shall be removed from the area. The team physicians shall immediately initiate life saving medical techniques to revive the condemned. When indications of life are present, the condemned shall, as soon as practical, be transported to the St. Francis Medical Center Emergency Room for further treatment as necessary".⁸ On paper, such a scenario borders on the surreal. The reality, of course, involves actual human beings.

David Long, a Texas inmate with a long history of mental illness, attempted suicide by drug overdose two days before his scheduled execution in 1999. He was still in intensive care in hospital in

Galveston, about 200 kilometres from the death chamber in Huntsville, as his scheduled execution time approached. The Texas authorities, including then Governor George Bush, saw no reason to wait, and in contrast to his 1987 murder trial, when the state had denied his lawyers the funds to conduct a full assessment of Long's mental impairment, it spared no expense to have 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.⁹

In Florida on 20 June 2000, after Governor Jeb Bush denied clemency, seriously mentally ill prisoner Thomas Provenzano was strapped to a gurney and had the lethal injection needles inserted in his arms. Eleven minutes before he was due to be killed, a federal court issued a stay of execution. The needles were withdrawn and he was taken back to his cell. A few hours later, the court lifted the stay, without comment, and Thomas Provenzano was put through the same procedure again. This time he was killed.

Mentally ill prisoner Jay Scott was an hour from execution in Ohio on 17 April 2001, with clemency already denied by Governor Bob Taft, when the state Supreme Court issued a stay. The stay was lifted and the execution was reset for 15 May. This time, minutes before the killing was due to be carried out a federal court intervened. Catheters had already been put in Jay Scott's arms in preparation

for the lethal injection. Again, the stay was lifted. Jay Scott was executed on 14 June.

Delma Banks, African American, was sentenced to death by an all-white jury who heard evidence from witnesses who have since recanted their testimony. A federal judge has referred to Banks' trial lawyer's performance as "dismal".¹⁰ Banks has had 15 execution dates in the nearly 24 years that he has been on death row in Texas. The most recent of these execution dates was 12 March 2003, when the US Supreme Court stepped in and issued a stay of execution about 10 minutes before it was due to be carried out. Earlier the Texas Board of Pardons and Paroles had refused to consider clemency, saying that the lawyer had missed the deadline for filing the clemency petition. A Texas newspaper suggested: "That kind of mind-set – that deadlines and technicalities matter more than legitimate claims of innocence or wrongful convictions – undermines public confidence in the entire Texas justice system."¹¹

Politically motivated

In the USA the death penalty has been highly politicized, with support for executions generally seen as a prerequisite for political office, whether at prosecutorial, gubernatorial or presidential level. The 1992 execution of Ricky Ray Rector, a severely brain damaged prisoner, has often been cited as a case in point. Breaking off from presidential campaigning, Arkansas governor Bill Clinton flew back from New Hampshire to oversee Rector's killing. In its 1996 report *Killing for Votes*, the Death Penalty Information Center wrote: "Although the use of death sentences to gain political leverage is certainly not new, the

demagoguery aimed at escalating executions has become more pervasive... Many of those seizing the anti-crime mantle not only advocate capital punishment, but also seek to out-do each other in expanding the death penalty to new crimes, cutting appeals, and withdrawing the resources critical to defending those on death row."¹²

Although the demagoguery has been tempered in recent times as public concern about the reliability of capital convictions and the fairness of sentencing has increased, the "tough on crime" politics of the death penalty can still rear its ugly head. A recent Republican Party leaflet in Virginia denounced a Democratic candidate's opposition to the execution of offenders who were under 18 years old at the time of the crime, an almost exclusively US practice that violates an unequivocal principle of international law.¹³ In the case which sparked this, domestic considerations were seen to trump the USA's international obligations when Attorney General John Ashcroft, at a press conference, announced his order to transfer the suspect, John Lee Malvo, from federal custody to the Virginia authorities because it was "imperative" that the death penalty be an option.¹⁴ Under federal and international law the teenaged defendant could not have faced execution. He is now on trial for his life in Virginia.

In abolitionist Minnesota on 2 December 2002, Governor Tim Pawlenty, reacting angrily to an unresolved violent crime, called for reinstatement of the death penalty in his state. His move led some to accuse him of playing politics with the death penalty. One columnist suggested that "this must be how lynch mobs worked.

A strong leader, reacting to anger, would work up the crowd, then, en masse, there would be a rush to the nearest tree... [The governor] was trying to create public policy with a jerk of the knee".¹⁵ The state's Attorney General suggested that "we should not be engaged in sideshows, and we should not be engaged in politics... We're going to focus on [the victim] today. I don't think it's appropriate to be grandstanding."¹⁶

A form of state violence

The Oxford Dictionary defines "violent death" as death "resulting from external force or from poison". Nevertheless, in the USA lethal injection has been promoted as a "humane" way to kill condemned prisoners. In fact, the driving force behind the advent of injection in some states as their favoured method of killing has been to protect the death penalty from constitutional challenges to the more visually grotesque forms of execution, such as electricity or lethal gas. Governor Mike Johanns of Nebraska, for example, has been urging his state legislature to adopt lethal injection to pre-empt legal challenges to the electric chair. He recently wrote: "If the citizens of Nebraska want to continue to have an enforceable death penalty statute, then state lawmakers must act in the 2004 session. It might be the last opportunity to do so before one or more persons found guilty of first-degree murder avoid capital punishment because of our reliance on the electric chair."¹⁷ Under international standards, a politician should be promoting abolition of the death penalty, not finding ways to entrench it.

What Governor Johanns and others sidestep in their enthusiastic support

for lethal injection is that this method, like any other, cannot rid the death penalty of its cruelty. The death penalty is not just the act of execution, but the death sentence itself. If holding a gun against someone's head in an interrogation room is torture, why is holding a person for years under the threat of the lethal injection needle considered acceptable? What about the condemned inmate's family? Is their suffering to be considered the "collateral damage" of this state killing?

Moreover, lethal injections do not guarantee quick, efficient executions. On numerous occasions, an execution team has had to engage in a prolonged search for a suitable vein in which to insert the needle. Jose Martinez High was kept on death row in Georgia for almost a quarter of a century before being executed in November 2001. The execution team spent 39 minutes trying to find a vein, before abandoning their efforts. Eventually one catheter was inserted in his neck and another in his hand. In other cases, a surgical procedure known as "cutdown" has had to be performed before the execution can proceed. Bennie Demps, executed in Florida 2000, complained that he had been "butchered" and in a lot of pain while the execution team tried to find a vein. Alabama death row inmate David Nelson is challenging the state's plan to kill him on the grounds that his collapsed veins would require the state to carry out painful surgery before lethally injecting him.

In many states, lethal injections are carried out using a combination of three chemicals: sodium thiopental (Pentothal), pancuronium bromide (Pavulon), and potassium chloride. There is evidence that the pancuronium bromide,

a derivative of curare which paralyses the muscles but does not affect the brain or nerves, may mask the condemned prisoner's suffering during the execution. A person injected with this chemical cannot move or speak. When lawyers in Tennessee challenged the state's use of this drug, they presented as a witness a woman who had undergone surgery during which the anaesthetic was not effective. She testified that she was able to hear, perceive and feel everything that was going on in her surgery, but was unable to move or speak because of an injection of pancuronium bromide. She has described the experience as "worse than death".¹⁸

The judge hearing the challenge to execution by lethal injection noted that "the focus of the dispute is whether there is a reasonable likelihood that the Pentothal will not take effect such that the prisoner feels the full affects of the Pavulon and the sodium chloride and, because of the Pavulon, it is unknown to those witnessing the execution that the prisoner is being subjected to such torture. Sodium chloride is extremely painful. Pavulon... is psychologically horrific".¹⁹ The judge decided that the chance of such a torturous outcome during an execution by lethal injection was remote enough to be constitutionally permissible. However, the claim that a "chemical veil" is masking the reality of the lethal injection process, making executions more palatable to society, will continue to be raised in the courts.

The use of pancuronium bromide for pet euthanasia is not acceptable under American Veterinary Medical Association guidelines, and its use has been banned in several states. On 1 September 2003, a new law came into force in Texas

prohibiting the use of pancuronium bromide in the euthanasia of cats and dogs.²⁰ The state has executed more than 310 human beings using this chemical.

The American Medical Association's Code of Ethics prohibits doctors from participating in executions. There are reportedly no standards for the training of these non-medical personnel who carry out Texas executions, increasing the potential for botched executions. A recent appeal raised in the Texas courts points to a law which will come into force on 1 January 2005, and which "would make the lethal injection process, if performed on animals, illegal, because of the lack of training for the personnel involved, and the lack of safeguards."²¹

Defending Tennessee's position against the appeal brought against its lethal injection process, the state argued that its ban on pancuronium bromide in pet euthanasia does not apply to the condemned prisoner because he is not a "non-livestock animal". Under state law the latter means "a pet normally maintained in or near the household or households of its owner or owners, other domesticated animal, previously captured wildlife, an exotic animal, or any other pet, including but not limited to, pet rabbits, a pet chick, duck, or pot bellied pig". Abu-Ali Abdur'Rahman, the death row prisoner at the centre of the case has responded: "They're saying I'm less than an animal".²² The state continues to pursue his execution despite the fact that eight of the original trial jurors have signed affidavits making it clear that they no longer have confidence in their sentencing verdict because exculpatory and mitigating evidence was kept from them at the trial.²³

Meanwhile, those who consider execution by lethal injection to be a non-violent activity should be asked whether they would characterize as non-violent the action of a private citizen who captured a fellow human being, promised to murder that captive at some time in the future, and after a few years, strapped him or her down and killed them by injecting poison into their veins. What if the offender became a serial killer, killing a captive once a week, resulting in hundreds and hundreds of captives murdered over the course of a decade? In the USA, such a crime would be punishable by the death penalty.

Inescapable risk of error

On 9 December 2003, Human Rights Day eve, anti-death penalty activists were due to hold a vigil outside Delaware County courthouse in Pennsylvania in anticipation of the formal exoneration of Nicholas Yarris. He has spent more than 20 years on the state's death row. His conviction and death sentence were overturned in September on the basis of DNA tests supporting his innocence claim. The activists were expecting the local District Attorney to announce the dropping of charges against Nicholas Yarris.

If released, Nicholas Yarris would become the 112th death row inmate to be freed from death row on the grounds of innocence since 1973, and the 10th this year.²⁴ Each spent years on death row with the state pursuing their execution. Others have gone to their deaths despite serious doubts about their guilt.

The death penalty carries the potential for irrevocable error, and its proponents must accept this ever-present risk or reject the punishment. In 2002, a

federal judge noted that because "innocent people are sentenced to death with materially greater frequency than was previously supposed" and because "convincing proof of their innocence often does not emerge until long after their convictions, it is "fully foreseeable that in enforcing the death penalty, a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence." The judge described the state's pursuit of the death penalty as "tantamount to foreseeable, state-sponsored murder of innocent human beings".²⁵ When history reveals that people have been executed during this period for crimes they did not commit, today's politicians will not be able to claim that they were not warned.

Some proponents of the death penalty believe that its flaws can be fixed. Governor Mitt Romney of Massachusetts, for example, wants to reintroduce capital punishment to this abolitionist state. He believes that advances in forensic science can make failsafe judicial killing possible, that "just as science can be used to free the innocent, it can be used to identify the guilty".²⁶ It is important not to be blinded by science, which has its limits. Post-conviction DNA testing, for example, has played a substantial part in only around one in 10 of the cases of prisoners released from death row in the USA. Science is also subject to human error. In March 2003, for example, an independent audit of the Houston Police Department (HPD) Crime Laboratory revealed serious defects in the lab's DNA analysis section, including poorly trained staff relying on outdated scientific techniques. The report found that the lab was "not designed to minimize contamination", and that "on

one occasion the roof leaked such that items of evidence came in contact with the water".²⁷ The DNA section was shut down, and hundreds of criminal cases opened for review. In a number of cases, discrepancies between new tests and the original HPD analysis emerged. One man, Josiah Sutton, was released from prison after the DNA test used to convict him was shown to have been wrong, and a retest exonerated him.²⁸

It was a tireless legal team, not science, which obtained Joseph Amrine's freedom in 2003 in the face of a Missouri state apparatus which continued to try to take him to the execution chamber even after the evidence used to convict him 17 years earlier had fallen apart.²⁹ It was luck, not science, which prevented Anthony Porter from being executed in 1998 in Illinois for a crime he did not commit. He was released after 17 years on death row after university students happened to take his case as part of a project and then uncovered his innocence. The Commission on Capital Punishment subsequently set up by the Illinois governor to look into the failures of the system concluded, after two years of study, 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".³⁰

Unfairness rife

In November 2003 in Washington State, Gary Ridgway confessed to killing 48 women. By pleading guilty, he avoided the death penalty. In the same month, Patrick Murphy became the sixth person to be sentenced to death for a single murder, the killing of Texas police officer Aubrey Hawkins in December 2000. In October

2003, Patrick Kennedy was sentenced to death in Louisiana for the rape of his eight year old stepdaughter. He became the first prisoner in a quarter of a century in the USA to be sent to a state's death row for a crime not involving a murder.

Just as science cannot guarantee that an innocent person will not be sentenced to death, neither can it cure arbitrariness. In the USA, only a tiny percentage of murders result in execution. A token number of prisoners are put to death – in effect sacrificed – to satisfy popular demand. The selection process to determine who will die is tainted not only by error, but also by arbitrariness and discrimination. Is the USA reserving the death penalty for the "worst of the worst" crimes and offenders as it claims? If so, why are children and the mentally impaired still sentenced to death? Perhaps it is because they, the poor and the inadequately represented are easy targets for the state's power.

Kevin Zimmerman was sentenced to death in 1990. He stabbed Gilbert Hooks to death during a drunken argument after Hooks had stabbed him first. Zimmerman was initially charged with murder, not capital murder. He was appointed a succession of lawyers who all withdrew from the case for various reasons, having done little or no work on the case.

After a year, Zimmerman wrote letters to the prosecutor and court, in effect daring them to charge him with capital murder. In his letters he falsely claimed involvement in other crimes, and claimed that he had robbed Hooks. Murder during the course of a robbery is a capital offence, unlike plain murder. The state took him at his word, and he was recharged, this time

with capital murder. A doctor who recently reviewed the case has stated in an affidavit that the claims in Zimmerman's letters were "patently absurd" and that the records indicate that at the time he wrote them he was "psychotic", "potentially suicidal and required suicide prevention measures".

The court presented Kevin Zimmerman with a list of lawyers from which to select the one who would represent him at trial. The list contained only names, no other information about the attorneys. Kevin Zimmerman objected, but complied with the order of the court. The lawyer he chose was appointed to the case. She had no experience in capital cases and had never represented anyone charged with murder. She chose co-counsel who had no capital case experience.

Kevin Zimmerman suffers brain damage stemming from a serious bicycle accident when he was 11 years old, which required his having a plate put in his head. The accident led to a marked change in his personality and behaviour. His defence lawyers failed to investigate his background however, and did not present the numerous relatives and neighbours who could have testified to this at the trial. The lawyers failed to have Zimmerman evaluated for his mental competency to stand trial even though there was evidence that he might not be able to assist in his own defence. They failed to present expert psychiatric evidence to support the claim of self-defence or to present as mitigation evidence against the death penalty.

The defence also did not investigate Gilbert Hooks' record of violence, including wife-beating and

drunken brawls with strangers. Since the trial, his fifth wife has testified about his violence and drinking, and another wife has confirmed his violent nature. On one occasion he allegedly beat his pregnant wife so severely that she miscarried. Such evidence presented to the jury could have supported the self-defence claim and countered the prosecution's depiction of the victim as non-violent.

Kevin Zimmerman is scheduled to be executed on 10 December 2003, Human Rights Day.

A system gone mad

In a death penalty appeal in 1997, Judge Gerald Heaney of the US Court of Appeals for the Eighth Circuit wrote: "At every stage, I believe the decision on who shall live and who shall die for his crime turns less on the nature of the offence and the incorrigibility of the offender and more on inappropriate and indefensible considerations: the political and personal inclinations of prosecutors; the defendant's wealth, race, and intellect; the race and economic status of the victim; the quality of the defendant's counsel; and the resources allocated to defence lawyers. Put simply, this country's unprincipled death penalty selection process is inconsistent with fundamental principles of due process."³¹

Six years later, the prisoner on whose appeal Judge Heaney was ruling was still facing execution. The condemned prisoner, Charles Singleton, suffers from serious mental illness which, without treatment may rise to the level of insanity. The execution of the insane is unconstitutional in the USA, but in 2003, the US Court of Appeals for the Eighth Circuit ruled that he could be forcibly

medicated even if that made him competent for execution. In a breathtaking understatement, the majority opinion held that “eligibility for execution is the only unwanted consequence of the medication”.

Judge Heaney, joined by three other dissenters wrote that “to execute a man who is severely deranged without treatment, and arguably incompetent when treated, is the pinnacle of what [US Supreme Court] Justice [Thurgood] Marshall called ‘the barbarity of exacting mindless vengeance’.”³²

At the sentencing phase of Charles Singleton’s trial, no witnesses were called on his behalf, despite their availability to testify about his difficult childhood and intoxication at the time of the crime. His lawyer’s entire closing argument was: “Ladies and gentlemen, it’s been a long trial. You’ve sat and listened to the evidence and you’ve made your decision. I don’t believe any one of you would like to take a man’s life and I think you will do what’s proper. I know you are people of conviction, and if it is required then that’s what you’ll do. If you don’t think it’s required, you will not. I know that none of you will make this decision lightly. I have absolutely nothing to say to you in regard to it. I do not envy you having to make the decision. And I trust that you would deliberate now and reach what you feel is proper in this case.” The jury voted for death.

Charles Singleton, an African American man, was tried in front of an all-white jury for the murder of a white woman. At least one in five of the 300 African Americans executed in the USA since 1977 were tried in front of all-white juries. Eighty per cent of the more than 880 people put to death since 1977 were

convicted of crimes involving whites, even though whites and blacks are the victims of murder in almost equal numbers. Race of murder victim has consistently been shown to be a factor in capital sentencing in the USA.³³

Charles Singleton is one of four men facing execution on 6 January 2004.³⁴

Undermining the rule of law

A landmark study released in June 2000 concluded that the most common flaws in the USA’s error-prone capital justice system are “1) egregiously incompetent defense lawyers who didn’t even look for - *and demonstrably missed* - important evidence that the defendant was innocent or did not deserve to die; and 2) police or prosecutors who *did* discover that kind of evidence but *suppressed* it, again keeping it from the jury.”³⁵

Taking issue with Illinois prosecutors, state Supreme Court Justice Philip Rarick wrote in a recent opinion: “Misconduct on the part of prosecutors cannot be allowed to continue unchecked. To call it “error” is to mischaracterize it, as it represents nothing less than an attempt to subvert a defendant’s fundamental right to a fair trial.”³⁶ A North Carolina newspaper recently published a series of articles on prosecutorial misconduct in the state’s capital cases. In addition to the case of Alan Gell who had his conviction and death sentence overturned in December 2002 because prosecutors had withheld exculpatory evidence, “prosecutorial misconduct has undone at least four other North Carolina death row sentences in recent years, and several similar cases are grinding their way through the appeals process. In these cases where judges

ordered new trials, prosecutors broke the law by withholding evidence helpful to defendants, such as witness statements or deals cut with jailhouse informants. The prosecutors have received no significant punishment.”³⁷

A compelling claim of prosecutorial misconduct may not be enough to prevent an execution, undermining confidence that the state is serious about upholding the rule of law. James Willie Brown was executed in Georgia on 4 November 2003. He had a long history of mental illness, including repeated diagnoses of schizophrenia. Indeed, his trial for murder was delayed for six years on the grounds of mental incompetence. Despite the substantial evidence of his illness – over the years more than 25 mental health experts employed by the state had found James Brown to be mentally ill – the prosecution contended at his 1990 trial that he was faking his condition.

To bolster the state’s theory that the defendant was malingering, the prosecution presented a former inmate, Anita Tucker, who said that James Brown had confided in her that he was faking his illness. Anita Tucker later recanted that testimony, and testified that her earlier testimony was part of a deal with the prosecution in exchange for her early release on her own criminal charges. At Brown’s clemency hearing on 31 October 2003, a renowned expert on schizophrenia testified that James Willie Brown had this mental illness. Anita Tucker told the board that she had lied at the trial. Clemency was denied and the execution went ahead.

Eddie Hartman was executed in North Carolina on 3 October 2003 despite

evidence that the prosecutor had used the defendant’s homosexuality against him at his trial as part of its successful bid to obtain a death sentence.³⁸ At Jay Wesley Neill’s Oklahoma trial the prosecutor did much the same thing. Arguing for execution, the prosecutor told the jury: “I want you to think briefly about the man you’re sitting in judgment on and determining what the appropriate punishment should be... I’d like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. The person you’re sitting in judgment on - disregard Jay Neill. You’re deciding life or death on a person that’s a vowed [sic] homosexual... But these are areas you consider whenever you determine the type of person you’re sitting in judgment on...The individual’s homosexual.” The jury returned a death verdict. The death sentence survived the appeal process, although one federal judge argued that “the prosecutor’s blatant homophobic hatemongering at sentencing has no place in the courtrooms of a civilized society”. Jay Neill was executed two days after Human Rights Day last year.

This year, Bobby Hines is scheduled for execution in Texas on 11 December, the day after Human Rights Day. His lawyers are challenging his execution on the grounds of evidence that he has mental retardation. In June 2002, the US Supreme Court prohibited the execution of people with mental retardation. The decision, *Atkins v Virginia*, left it up to individual states as to how to comply with the decision. In its most recent legislative session earlier this year, the Texas legislature failed to amend Texas law to reflect the *Atkins* decision.

The state judiciary has not clarified the issue either.

Since the *Atkins* decision in June 2002, Texas prosecutors have shown little inclination to take a progressive attitude towards the ruling. For example, in the current case of Walter Bell, a long-time death row inmate who has a strong claim of mental retardation, the local prosecution is challenging his claim despite having not disputed it at the original trial (at a time when the execution of people with mental retardation was constitutional). In a recent editorial, the *Austin-American Statesman* said of the case: "In short, the Jefferson County prosecutors are hell-bent on executing Bell; the truth about his mental state is irrelevant and the requirements of the law are something to be evaded... Bell's case also is indicative of the failure of the Legislature this year to rewrite state law to reflect the Supreme Court's ruling, and the failure of the executive branch, including the governor, to review the inmates on death row to see which ones should not be there because of mental retardation."³⁹

The regularity with which prosecutors have used questionable tactics to pursue death sentences flatly contradicts President Bush's oft-made assertion that "America will always stand firm for the non-negotiable demands of human dignity and the rule of law."⁴⁰ He repeated this in a statement to mark World Refugee Day on 20 June 2002, which he said was "also a time to be reminded of the terrible circumstances that drive people from their homelands in search of freedom and safety."⁴¹

The jurors who sentenced former Vietnamese refugee Hung Thanh Le to death in Oklahoma in 1995 knew little

about his traumatic life. He was tried for the murder of Hai Hong Nguyen. Hai Nguyen and Hung Le fled their native Vietnam and later met in 1985 in a refugee camp in Thailand before immigrating to the USA. Hung Le's lawyers had done almost no investigation into his background or preparation of the mitigation witnesses. As a result, the mitigation testimony was brief, and did not include any expert evidence about the possible impact of Hung Le's past on his conduct. A juror from the trial later stated that a Vietnamese woman who was on the jury had not wanted to impose a death sentence, and had unsuccessfully tried to persuade the other jurors that Hung Le's actions may have been affected by his cultural and personal background. Since the trial, a Vietnamese psychologist has concluded that, as a result of his life experiences, Hung Le was suffering from post-traumatic stress disorder at the time of the crime. Hung Le was 16 years old when he fled Vietnam. He witnessed, and was subjected to, violence and deprivation in the refugee camps.

Meanwhile, Hung Le's prosecutor made inflammatory remarks at the trial. For example, arguing for execution he asked the jury "do you really think that justice would be done if this man goes to prison, gets three meals a day and a clean bed every night and regular visits from his family while Hai Nguyen lays cold in his grave?" He also misstated the law as it related to mitigating evidence: in response to the mitigating factors presented, including regarding the defendant's good character and the absence of any criminal record, the prosecutor wrongly suggested that the jurors need not consider any evidence "about whether [Hung Le had]

been a good guy in the past or anything like that". The prosecutor referred to facts that were not in evidence. For example, with no evidence to back him up, he suggested that Hung Le may have murdered before: "All we know about his past is what he has told us...It's kind of hard to believe that the man who has done what he has done never has done it before in his life". The prosecutor repeatedly dehumanized Hung Le. He stated that "this man may be a small man in stature but he's cold as an icicle. The state submits he's without compassion or feelings". The prosecutor told the jury that allowing the defendant to live in prison "doesn't even come close to being justice... and you can only do justice in this case by bringing in a verdict of death".

Oklahoma County prosecutors have repeatedly been criticized by state and federal appeal courts.⁴² In Hung Le's case, a federal judge wrote in November 2002 that "...at some point the repeated violation of ethical responsibility threatens the violation of our justice system". Impunity reigns, however. Despite finding that the prosecution's arguments were "improper" and "irrelevant", the appeal courts allowed Hung Le's death sentence to stand. He is scheduled to be executed in Oklahoma on 6 January 2004.

Hung Le has a hearing before the state clemency board on 9 December 2003, the day before Human Rights Day. The last time Oklahoma executed a former Vietnamese refugee was on Human Rights Day in 1998. There was evidence that Huan Anh Nguyen was insane at the time of his execution and that his execution was therefore unconstitutional.⁴³

A question of human dignity

Supporting abolition of the death penalty is not to excuse or condone violent crime. The suffering caused to murder victims and their families is immeasurable and the state should find ways both to fight crime and to support the victims of crime. Perpetuating the cycle of violence and undermining respect for life is not the way to do it, in Amnesty International's opinion.

Some argue that certain crimes demand the ultimate penalty, and allow society to show its absolute condemnation of those crimes – although as most executions pass largely unnoticed in the US mainstream, society's mood would appear to be one of desensitized apathy about the killing done in its name.

Perhaps retribution was in the minds of Arizona prosecutors when they obtained a death sentence against Frank Roque on 9 October 2003 after he was convicted of killing an Indian immigrant on 15 September 2001 in revenge for the attacks against the World Trade Center and the Pentagon four days earlier. Frank Roque's defence at the trial was that he had been mentally impaired at the time of the crime. After the trial, one of the jurors said: "We were deciding if his life experiences outweighed his disrespect for human life that day. I think he had problems, he had issues. I don't think they were serious enough [to warrant a life sentence]." ⁴⁴ If the death sentence is upheld on appeal, Frank Roque will be killed in the state's own act of retaliation. Will this not undermine, rather than affirm, the value of human life? The killing of Frank Roque will undoubtedly be a calculated killing.

Twelve of the 50 states in the USA are abolitionist. One of them is Minnesota which abolished the death penalty in 1911, five years after its last execution, a botched hanging which took the prisoner nearly 15 minutes to die. The recent call by Governor Tim Pawlenty for the resumption of executions has caused something of a stir in the state. Republican Senator Tom Neuville was one of those who took issue with the governor. He said that reintroduction of the death penalty in Minnesota would “affect us as a culture. It would make us more coarse and less respectful of life. Philosophically, it damages us.”⁴⁵

Amnesty International would add that the death penalty is also costly – to the public purse, as well as in social and psychological terms, and to the international reputation of the USA; it has no special deterrent effect; it carries the risk of irrevocable error; it tends to be applied discriminatorily on grounds of race and class; it prolongs the suffering of the murder victim’s family; and it extends that suffering to the loved ones of the condemned prisoner. It is a symptom of a culture of violence, not a solution to it.

On 30 November, the Fourth Global Summit of the Nobel Peace Prize Laureates culminated with a common statement by the laureates which among other things stated that “the death penalty is a particularly cruel and unusual punishment that should be abolished.” In resolution after resolution, the United

Nations Commission on Human Rights has expressed its conviction that “abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights”.

“The United States will champion aspirations for human dignity” according to its National Security Strategy published in September 2002, a month when seven people died in US execution chambers. In his State of the Union Address delivered on 29 January 2002, President Bush asserted that “America will always stand firm for the non-negotiable demands of human dignity”. Two more men were put to death on that day. For his State of the Union Address on 28 January 2003, the President said: “Our founders dedicated this country to the cause of human dignity, the rights of every person, and the possibilities of every life.” Alva Curry was executed a few hours later, the first of three men to be executed in three days in the President’s home state of Texas.

The death penalty is gradually being consigned to what President Bush has referred to as “history’s unmarked grave of discarded lies”.⁴⁶ The lie perpetuated by the death penalty is that it offers a constructive solution to crime. It does not. It is a lethal ideology and an affront to human dignity.

All those in favour of the death penalty, raise your hand... It is time for the presidential hand to be lowered.

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- ¹ Human Rights Day, Bill of Rights Day, and Human Rights Week, 2002. By the President of the United States of America. A Proclamation, 9 December 2002.
- ² Linroy Bottoson (Florida), Desmond Carter (North Carolina), Jerry McCracken (Oklahoma), James Collier (Texas), Jessie Williams (Mississippi), Jay Neill (Oklahoma), Anthony Johnson (Alabama).
- ³ Billy Vickers (9 December, Texas); Eddie Crawford (10 December, Georgia); Kevin Zimmerman (10 December, Texas), Bobby Hines (11 December, Texas).
- ⁴ National Sanctity of Life Day, 2003. A proclamation, 14 January 2003.
- ⁵ USA: *Another planned killing by the US Government - The imminent federal execution of Louis Jones*, AMR 51/020/2003, 18 February 2003, <http://web.amnesty.org/library/Index/ENGAMR510202003>
- ⁶ Colorado Department of Corrections. <http://www.doc.state.co.us/DeathRow/DeathRow.htm>
- ⁷ *When legislatures delegate death: The troubling paradox behind state uses of electrocution and lethal injection and what it says about us*. Deborah W. Denno, Ohio State Law Journal, Vol 63. No. 1. 2002.
- ⁸ Id.
- ⁹ USA: *Failing the future – Death penalty developments, March 1998 – March 2000*. AI Index: AMR 51/03/2000, April 2000, page 13. <http://web.amnesty.org/library/Index/ENGAMR510032000>
- ¹⁰ See <http://web.amnesty.org/library/Index/ENGAMR510302003>
- ¹¹ *Hope for a fair trial lies in hands of high court*. Austin-American Statesman, 12 March 2003.
- ¹² *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*. Death Penalty Information Center, Washington DC, October 1996.
- ¹³ *Virginia GOP uses sniper trial against candidate*. Washington Times, 20 October 2003.
- ¹⁴ Remarks of Attorney General John Ashcroft, Press Conference, 7 November 2002.
- ¹⁵ *Pawlenty's rush to judgment*. Doug Grow, Minneapolis Star Tribune, 3 December 2003.
- ¹⁶ *Sjodin case spurs Pawlenty to push for death penalty*. Star Tribune, 3 December 2003.
- ¹⁷ *Urgency increases to change death penalty*. By Governor Mike Johanns. Grand Island Independent, 19 October 2003.
- ¹⁸ *Critics say execution drug may hide suffering*. New York Times, 7 October 2003.
- ¹⁹ *Abdur'Rahman v Sundquist*. Memorandum and Order. In the Chancery Court for the State of Tennessee Twentieth Judicial District, Davidson County, Part III. 2 June 2003.
- ²⁰ Texas Health and Safety Code, Sec. 821.052(a).
- ²¹ *Ex Parte Kevin Lee Zimmerman*. Successive application for a post-conviction writ of habeas corpus. December 2003. According to this appeal brief, Texas Health and Safety Code Sec. 821.055(a) specifies that “[a] person may not euthanize an animal in the custody of an animal shelter unless the person has successfully completed, not more than three years before the date the person euthanizes the animal, a training course in the proper methods and techniques for euthanizing animals. The law specifies the specific components of the training, including pharmacology, proper administration and storage of the euthanasia solutions, the federal and state law regulating the storage and accountability of euthanasia solutions, euthanasia technician stress management, proper restraint and handling of an animal during euthanasia, and the procedures for administering authorized chemicals.”
- ²² Id.
- ²³ 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>
- ²⁴ see Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110>
- ²⁵ USA v *Quinones*, US District Court, Southern District of New York, S3 00 Cr. 761. 1 July 2002.
- ²⁶ *Romney takes scientific approach to death penalty*. Governor's news release, 23 September 2003.
- ²⁷ *Auditors find problems with HPD's crime lab*. Houston Chronicle, 15 March 2003.

- ²⁸ *Crime lab scandal leaves prosecutor feeling betrayed*. Houston Chronicle, 16 March 2003.
- ²⁹ See *Joseph Amrine: Facing execution on tainted testimony* (AMR 51/085/2002, June 2002) and *One more reason to end the death penalty* (AMR 51/060/2003, 30 April 2003).
- ³⁰ Report of the Governor's Commission on Capital Punishment, April 2002.
- ³¹ *Singleton v Norris*, US Court of Appeals for the Eighth Circuit, 1997, Judge Heaney concurring.
- ³² *Singleton v Norris*, US Court of Appeals for the Eighth Circuit, 2003, Judge Heaney dissenting, quoting Justice Marshall in *Ford v Wainwright* (1986).
- ³³ See *USA: Death by discrimination: The continuing role of race in capital cases*, April 2003 <http://web.amnesty.org/library/Index/ENGAMR510462003>
- ³⁴ Charles Singleton (Arkansas); Hung Thanh Le (Oklahoma); Ynobe Matthews (Texas); Karl Roberts (Arkansas).
- ³⁵ *A Broken System: Error Rates in Capital Cases, 1973-1995*, James S. Liebman, Jeffrey Fagan and Valerie West, Columbia Law School.
- ³⁶ *People v Johnson*, 17 October 2003.
- ³⁷ *Cheating prosecutors ruin lives, go unpunished*. News Observer, 2 November 2003.
- ³⁸ See Amnesty International EXTRA 42/03, AMR 51/123/2003, 18 September 2003. <http://web.amnesty.org/library/Index/ENGAMR511232003>
- ³⁹ *Texas must fix uneven application of death penalty*. Austin-American Statesman, 25 November 2003.
- ⁴⁰ See for example, State of the Union Address, 29 January 2002; National Security Strategy of the USA, September 2002; The Rights and Aspirations of the Peoples of the Middle East, White House, 5 June 2003.
- ⁴¹ Statement by the President, White House News Release, 20 June 2002.
- ⁴² *USA: Old habits die hard: The death penalty in Oklahoma*, AMR 51/055/2001, April 2001, <http://web.amnesty.org/library/Index/ENGAMR510552001>
- ⁴³ *Failing the future*, op. cit. page 58. <http://web.amnesty.org/library/Index/ENGAMR510032000>
- ⁴⁴ *Killer of Sikh sentenced to death – Jurors dismiss Roque's claim of mental illness in post-9/11 shooting spree*. Arizona Republic, 10 October 2003.
- ⁴⁵ *Sjodin case spurs Pawlenty to push for death penalty*. Star Tribune, 3 December 2003.
- ⁴⁶ "We have seen their kind before. They are the heirs of all the murderous ideologies of the 20th century. By sacrificing human life to serve their radical visions – by abandoning every value except the will to power – they follow in the path of fascism, and Nazism, and totalitarianism. And they will follow that path all the way, to where it ends: in history's unmarked grave of discarded lies". President George W. Bush, Address to a joint session of Congress and the American people, 20 September 2001, quoted in the National Strategy for Combating Terrorism, February 2003.