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USA: Death penalty, still a part of the 'American experiment', still wrong

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State executioners have killed 38 people in the USA so far this year, one thousand since 1994, and more human beings are being lined up to be strapped down in execution chambers around the country in the coming days and weeks. At the same time, the USA professes a "deep commitment" to human rights.

Last month, the US administration sent a report to the United Nations High Commissioner for Human Rights in relation to upcoming scrutiny of the USA's human rights record under the Universal Periodic Review (UPR) process. The introduction to the report contains the following paragraph:

> "The ideas that informed and inform the American experiment can be found all over the world, and the people who have built it over centuries have come from every continent. The American experiment is a human experiment; the values on which it is based, including a commitment to human rights, are clearly engrained in our own national conscience, but they are universal".

A sub-experiment of the broader "American experiment" is the USA's continuing resort to the death penalty. This is a punishment incompatible with human dignity and which, far from representing universal values, has been abandoned by a majority of governments all over the world. The USA is behind the times – clinging to a sanction that most countries have consigned to their history books.

It is more than 16 years since US Supreme Court Justice Harry Blackmun famously revealed his view that the USA should abandon the death penalty. In his now famous February 1994 dissent, he wrote:

> "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…The basic question – does the system accurately and consistently determine which defendants 'deserve' to die? – cannot be answered in the affirmative… The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution."

Case after case shows why Justice Blackmun's words ring as true now as they did a decade and a half ago.

- **Holly Wood**. At his sentencing hearing, Holly Wood was represented by a lawyer who had been admitted to the bar five months earlier, had no trial or criminal law experience, and had never worked on a capital case before. By a vote of 10-2, the jury voted to recommend the death penalty. The vote was split along racial lines, with the two black jurors voting for life imprisonment and the 10 whites voting for execution. Blacks had been disproportionately removed by the prosecution during jury selection for the murder trial of this African American man. The judge accepted the jury's recommendation, finding that there were no mitigating circumstances. The defence had failed to present any evidence about Holly Wood's mental ability despite being in possession of an expert report indicating that Wood operated, "at most, in the borderline range of intellectual functioning". The US Supreme Court has recognized that "impaired intellectual functioning is inherently mitigating" and has said that evidence that a

capital defendant is "borderline mentally retarded, might well… influence the jury's appraisal of his moral culpability". Yet Holly Wood was executed in Alabama on 9 September 2010, over the dissent of a number of federal judges, including two Supreme Court Justices, who had variously cited the "egregious failures", "sheer neglect" and "inattention" of his trial counsel.

- **Gregory Wilson**. After Gregory Wilson's original lawyers withdrew from the case, the trial judge posted a notice outside his courtroom appealing for volunteer counsel. Two attorneys volunteered, but serious concerns were raised about their qualifications to represent someone who was facing the death penalty (one of the lawyers had never even worked on a criminal case before). Gregory Wilson sought to have them dismissed and others appointed. The judge refused to hear any evidence regarding the background of the volunteer lawyer who was to serve as lead counsel, including allegations of malpractice and unethical conduct. At the trial, Wilson again asserted that he did not have confidence in the lawyers, to which the judge responded that he had the right to represent himself. Gregory Wilson said that he did not know how to, but also said that the lawyers "don't represent me". The judge ruled that he had therefore chosen to represent himself. The trial went ahead, with only one defence witness called. Key prosecution witnesses were not cross-examined. A few days before Gregory Wilson was due to be put to death in Kentucky on 16 September 2010 after more than two decades on death row, a judge issued a stay, including on the question of whether Gregory Wilson might have "mental retardation" which would render his execution unconstitutional.

- **Teresa Lewis**. Matthew Shallenberger and Rodney Fuller shot and killed Julian Lewis and his son Charles Lewis in their home in October 2002. On 15 May 2003, Teresa Lewis pleaded guilty to capital murder for her role in the killings of the victims, her husband and stepson. Prosecutors claimed that she had lured the gunmen – with sex, gifts, and a promise to share life insurance proceeds – to commit the murders. The judge found that Teresa Lewis was "the mastermind" behind the murders and sentenced her to death. Prosecutors agreed that Rodney Fuller should receive a life sentence in return for a guilty plea, and the judge said he could not sentence Matthew Shallenberger to a harsher sentence than Fuller received. A psychologist found that Teresa Lewis had an IQ of 72, indicating that her intellectual function was in the "borderline mental retardation" range. Post-conviction investigations raised additional evidence of her mental disabilities. A second psychologist, selected by the state, assessed her IQ at 70. Medical experts have diagnosed her with Dependent Personality Disorder and an addiction to painkillers before the crimes, calling into further question the "mastermind" label attached to her. Evidence has since emerged that her role in the crime was manipulated by one of the actual gunmen. While the gunmen serve out their life sentences, Teresa Lewis is due to be killed in Virginia's execution chamber at 9pm on 23 September 2010.

- **Brandon Rhode**. Brandon Rhode was 18 years old at the time of the murders in 1998 for which he was sentenced to death. If the crime had been committed nine months earlier, he would not be facing execution. In 2005, the Supreme Court finally ruled that offenders who were under 18 at the time of the crime should not be subjected to the death penalty. The decision noted, however, that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18." As well as his young age at the time of the crime, Brandon Rhode was also emerging from a childhood of deprivation, developmental problems, and substance abuse. He has been diagnosed as suffering from organic brain damage, and in 2010, using modern methods of testing, experts concluded that he "definitely suffers from a Fetal Alcohol Spectrum Disorder" (FASD), and that his development was significantly delayed as a result of his exposure to alcohol as a foetus. An expert has said that "what we now know for certain in 2010… is that the brain of a healthy child continues to grow and develop and mature into the early 20s…This is why adolescents – even 18 year old teenagers like Brandon Rhode was in 1998 – are definitely impaired in these areas of functioning as compared to adults. Furthermore, the

> characteristic deficits associated with FASD only exacerbate the impairments associated with adolescent brain immaturity… In effect, Brandon was functioning… at a considerably younger level than his chronological age at the time of the subject crimes". Brandon Rhode began drinking alcohol at the age of 11, and by the age of 13 was abusing alcohol and drugs regularly. He was hospitalized at the age of 13 after a suicide attempt. At 15, he dropped out of school and was sent by his mother to live with his biological father who was a drug addict and alcoholic. The teenager's own substance abuse escalated and he began to burgle houses in the pursuit of money to buy alcohol and drugs. The murders for which he was sentenced to death occurred during a burglary. Shortly before he was due to be executed in Georgia on 21 September 2010, Brandon Rhode attempted to commit suicide. The state has rescheduled his execution for the evening of 24 September.

In its report to the UN for the UPR process, the USA touches briefly on the death penalty. The USA, it says, "may impose the death penalty for the most serious crimes and subject to exacting procedural safeguards". This echoes what the US Supreme Court has said, namely 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".

Of course, the crime of murder is always serious, and has terrible consequences for those affected by it. But selecting which of the thousands of murders that occur each year in the USA will be punished by execution has amounted to little more than a lottery, with outcomes affected by issues such as prosecutorial resources, electoral politics, race, defence representation, jury composition, and so on.

On 10 September 2010, the State of Washington carried out its first execution for nine years when it killed Cal Brown for the abduction, rape and murder of a 21-year-old woman in 1991. The crime was undoubtedly serious. But then so too were the crimes of Gary Ridgway, who in 2003 avoided the death penalty in Washington State in return for his confession to murdering 48 women. The fact that he would serve a life sentence, while others would be executed for crimes with far fewer victims has, as the state Supreme Court put it in 2006, "caused many in our community to seriously question whether the death penalty can, in fairness, be proportional when applied to any other defendant." However, the court upheld the state's death penalty. The five judges in the majority said that while they did not "minimize the importance of this moral question…it is a question best left to the people and to their elected representatives in the legislature." Four dissenting judges argued that "When Gary Ridgway, the worst mass murderer in this state's history, escapes the death penalty, serious flaws become apparent… If the Ridgway case was the only case at the far end of the spectrum, perhaps his penalty of life in prison rather than death could be explained or dismissed. Ridgway, however, is not the only case in which a mass murderer escaped death." The dissenters went on to list other such cases which they said "exemplify the arbitrariness with which the penalty of death is exacted….The death penalty is like lightning, randomly striking some defendants and not others... No rational explanation exists to explain why some individuals escape the penalty of death and others do not."

In its UPR report, the US administration says that it views the USA's participation in the UPR process as an opportunity to discuss "our accomplishments, challenges, and vision for the future of human rights… Delivering on human rights has never been easy, but it is work we will continue to undertake with determination". Political determination to turn the USA away from judicial killing has been sadly lacking over the years. The delusion that the USA has a fair and humane death penalty system is alive and well 16 years after Justice Blackmun announced that he would no longer participate in his country's death penalty experiment.

The USA's vision should be one of a future without the death penalty. Today, with 139 countries abolitionist in law or practice, it is long overdue for the USA to call a halt to executions. It should do so in the name of its "deep commitment" to human rights.

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