

• Of interest

- According to the latest Gallup Poll in October 2003, support for the death penalty in the US has dropped to 64%, its lowest level since 1978.
- The 32% of Americans opposed to the death penalty represented the strongest opposition since 1972.
- This finding is particularly noteworthy given the extensive media coverage leading to the trials of subsequently convicted Washington snipers John Muhammad and Lee Boyd Malvo in Virginia.
- Two other polls taken in the US this year, an ABC News poll and Pew Research Center Poll, also recorded a drop in death penalty support to 64%.

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President's Column

The International Debate

The recent endorsement of the death penalty for Saddam Hussein by the incumbent Prime Minister, Mr Howard, and the leader of the opposition, Mr Latham, is nothing short of shameful. Neither man was compelled to comment, on the public record, on the appropriateness of the death penalty but each scrambled to do so. In a country where the citizens/voters have clearly repudiated this barbaric practice, why do our political leaders feel the need to reassure us that the death penalty is appropriate in certain cases?

When interviewed on the Fox network in the US earlier this year, Mr Howard made it clear that he had no opposition to the execution of Osama bin Laden, should he be caught. This was followed by Mr Howard commenting to the Australian media that no person in Australia would raise issue with the death penalty being handed down to the Bali Bombers. When Amrozi was sentenced, Mr Howard explicitly adverted to the death sentence and stated that the Australian Government would make no representation to the Indonesian Government. This statement was unsolicited. Soon after, we hear the death penalty in this country is a matter for the Australian states to consider. I don't recall a state premier ramping up the debate.

And now Saddam Hussein has been caught and not even tried, Mr Howard is reassuring us again that the ultimate penalty may be wheeled out and the Australian public shall acquiesce. After all, if the monster is caught it only follows that the monster must be slain for his monstrous deeds. It is in the way of things that, apparently, the punishment must fit the crime. But what of the cycle of violence?

So why does Mr Howard clearly feel the need to 'reassure' us that the death penalty is acceptable in certain circumstances. Perhaps it is the former one million One Nation voters who are preparing to lick the lead to mark the ballot sheet in 2004. As Barry Jones commented recently, it is this rump of swinging voters who may well decide the federal election in 2004.

Lest I be considered partisan, the apparently heroic and outspoken leader of the opposition has, consistent with recent leaders of the opposition, given us very little by way of alternative on this topic. He also agrees that Saddam Hussein should be executed should he be found guilty in any impending trial. But hang on, this is the parliamentary leader of the Australian Labor Party. The ALP is formally opposed to the death penalty. Why is he reassuring us that it is permissible for a state to sanction killing in certain circumstances? Is this Mr Latham's personal view or the formal position of the party? How many swinging voters did you say there were?

A civilised state should never condone the death penalty, whatever the crime. It demeans us all and perpetuates a cycle of violence.

Our political leaders have failed us terribly on this most significant of issues. Their respective positions are indefensible and out of step with contemporary Australian values. The dog whistling must stop. Notwithstanding the double standards of our political leaders, Australians do know better. And they can spot hypocrisy and cynical politicking a mile off.

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Update on Reprive Interns

In November, a new group of *RepriveAustralia* interns headed to America's deathbelt to begin their volunteer service in four capital defence offices in Texas and Louisiana.



Sophie Williams

Sophie Williams is working with the Gulf Region Advocacy Center in Houston, where she has been working on a number of capital cases and is currently helping prepare the office for a trial set in January 2004.



Lara Guarino

To give some sense of scale to the death penalty problem in Texas, ponder this: in the first month that the Australians have been in Texas, three men have been executed. The executions of three others were stayed in that period after it emerged that one of the drugs used in the lethal injection process has been banned by the American Veterinary Medical Association as being too cruel to be used in putting down animals.



Carly Marcs

Carly Marcs and **Lucy Adams** have been placed at the Louisiana Crisis Assistance Center. Carly has been helping prepare for the January trial of a man accused of a triple murder in Lake Charles, Louisiana. Not to be outdone, Lucy has been helping to prepare for the trial of an alleged serial killer suspected in the deaths of over a dozen women. In a few short weeks each has been able to see up close the way that fear and hatred are used by the pro-death lobby to distract from the inhumanity of their own cause.



Emma Williams

Also in Texas are **Emma Williams** and **Lara Guarino**, who have been placed at the Texas Defender Service. Each is helping TDS with post-conviction appeals for prisoners awaiting execution on Texas' death row.



Tamara Hamilton-Noy

In Louisiana, **Tamara Hamilton-Noy** is working at the Capital Post-Conviction Project of Louisiana and has assisted in the completion of a major application for that office. The CPCPL is bracing itself for the setting of an execution date in January for one of Louisiana's ninety-two condemned prisoners.



Lucy Adams

Once again, the capital defense offices in which our interns have been placed have expressed their gratitude for the contribution that Australian volunteers are making in the fight against the death penalty in the south.

Richard Bourke

A Co-founder of Reprive, Richard has been working with the Louisiana Crisis Assistance Center since January 2002, and co-ordinating the placement of Reprive interns in appropriate defence offices.

Why Does the US Keep Killing Its Children?

This paper was delivered by RepriveAustralia co-founder Richard Bourke at the XIII World Congress of Criminology on 13 August 2003 in Rio de Janeiro, Brazil.

The Statistics

The death penalty continues to operate in 38 states in the US and the two federal jurisdictions (civilian and military). Of these forty jurisdictions, twenty-two still maintain the death penalty for juvenile offenders. Sixteen states and both federal jurisdictions have excluded juveniles from the death penalty.

In the modern history of the death penalty in the US (that is, since 1976) 22 juvenile offenders have been executed. 21 of these were seventeen at the time of the offence and one, Sean Sellers, executed in Oklahoma in 1999, was sixteen at the time. Juvenile offenders make up 2.6% of all executions in the modern period. Thirteen of the twenty-two killed were executed by Texas, the state which accounted for the only three recorded juvenile executions in the world in 2002. At the time of writing, only one juvenile offender had been executed in 2003; Scott Hain in Oklahoma.

It is difficult to get reliable statistics on the use of the juvenile death penalty world-wide; the best information comes from Amnesty International (AI). AI report that since 1990 only seven nations are believed to have executed juvenile offenders. Excluding the US, the other six nations accounted for only fourteen deaths in this period and many have since renounced the

practice.

Taking each in turn:

- **Pakistan** abolished the juvenile death penalty in 2000 in all but tribal areas in the north;
- **Yemen** has abolished the juvenile death penalty;
- **Iran** denies that it has executed any juveniles since 1980;
- **Nigeria** similarly denies executing any juveniles in the last decade, stating that juvenile death penalties are commuted to terms of imprisonment;
- **the Democratic Republic of Congo** acknowledges some death penalties have been announced by military tribunals but claims they are now subject to commutation; and **Saudi Arabia** uses the age of majority under Islamic law but is not reported to have carried out a juvenile execution since 1992.

The effect of these developments over the last decade are that the United States is now the only country on earth that proclaims for itself the right and intention to carry out the juvenile death penalty and the only country that is recorded as having continued such executions. At the time of delivering this paper there were seventy-eight juvenile offenders on Death Row in the United States.

The Legal Position in the US

In the 1988 case of *Thompson v Oklahoma*, the US Supreme Court ruled that it was unconstitutional to execute anyone for an offence committed while

they were fifteen or younger. In 1989 in *Stanford v Kentucky*, the Court ruled that it was lawful to execute those who were sixteen or older at the time of the crime.

Seventeen states provide for the death penalty for those sixteen and over, another five for those seventeen and above. Of the seventy-eight juvenile offenders on death row, sixty-one were seventeen at the time of the offence and seventeen were only sixteen.

The death penalty is available in the US in cases of murder and, in Louisiana only, for aggravated rape. Capital murder requires more than a simple murder; there must be an additional element such as the killing of more than one person, killing a police officer or a child. The most common type of capital murder is where the killing is in the course of a violent felony such as an armed robbery or a rape. Fifty-one of the seventy-eight juvenile offenders on death row are there for the felony murder variety of capital murder.

When a juvenile is charged with capital murder they are tried as an adult, under identical conditions. It is simply open to a jury at penalty phase to consider the defendant's youth as a mitigating factor if they so choose.

Of the seventy-eight juvenile offenders on death row, twenty-eight are in Texas. Since a peak in 1999, there has been a decrease in the number of juveniles sentenced to death each year. The figures are fifteen in 1999, seven in 2000 and 2001, four in 2002 and one so far in 2003.

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Scott Hain (the most recently executed juvenile in the US)

Scott Hain was born on 2 June 1970. He was convicted of a double murder/robbery committed when he was 17 years old and was executed on 3 April 2003. His co-offender, who was 21 years old at the time of the crime, was sentenced to death but has not yet been executed.

A poll in Oklahoma around the time of the execution found that around 63% of Oklahomans would support legislation to ban the juvenile death penalty.

Scott had no last words.

Why Does the US Keep Killing Its Children? (contd)

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International Law

International law is principally composed of treaties entered into by nation states and by laws so basic and fundamental to the nations of the world that they have become accepted as binding even on countries who have not signed a relevant treaty (*jus cogens*). For these purposes, there are 194 recognised states in the world, not including Taiwan, which does not enter treaties.

Article 37(a) of the *Convention on the Rights of the Child (CROC)* bars children from facing the death penalty. 192 nation states are parties to this treaty. The only ones that have not ratified the treaty are Somalia and the USA. (The US State Department reports that Somalia has not had a functioning central government for over a decade).

Article 6(5) of the *International Covenant on Civil and Political Rights (ICCPR)* excludes child offenders from the death penalty. 149 states are parties to this covenant, including the US. However, the US has entered a specific reservation to Article 6(5), maintaining its right to execute children.

Article 4(5) of the *American Convention on Human Rights* excludes children from the death penalty. The convention has 24 parties from the nations making up the Americas. The USA has not signed the convention.

On 22 October 2002 the Inter-American Commission on Human Rights found that the prohibition on the execution of juvenile offenders had become an accepted norm of international law such as to reach the level of *jus cogens*. In *Michael Domingues v United States*, the Commission rejected the US argument that other nations may have abandoned the practice out of "courtesy, fairness or morality" rather than out of a sense of legal obligation.

The Political Environment

The existence of and continued use of the juvenile death penalty must also be considered in the political context of the United States at present.

Current US President, George W Bush, is the former Governor of Texas and in his six years as Governor presided over 157 executions, including 4 juvenile executions.

Current US Attorney-General, John Ashcroft, has overseen an explosion in

federal death cases, overruling prosecutors who have recommended life on numerous occasions. More recently, he has removed the discretion of prosecutors to enter plea bargains, required prosecutors to report on all judges sentencing below federal matrix guidelines and forced a federal death case forward in Puerto Rico, where there is massive opposition to the death penalty and a constitutional ban on executions in local law.

In October 2002 Lee Malvo, 17, was arrested as one of the pair accused of being the Washington Snipers. The juvenile death penalty is available in three of the five states in which charges have been laid. Federal Attorney-General Ashcroft asserted federal jurisdiction to seize control of the case but given the absence of a federal juvenile death penalty never had any intention of exercising it. He engaged in an auction with available death jurisdictions, asserting that the victims deserved the case to be tried where there was the best justice. He settled on Fairfax County, Virginia, which has the juvenile death penalty, and the national debate is poised, awaiting the outcome of the Malvo case.

In 2002, in an apparent effort to reverse the national consensus

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Toronto Patterson was born on 17 October 1977 and executed in Texas on 28 August 2002

Toronto was sentenced to death for the triple murder of a woman and two children in a botched burglary involving the theft of three car wheel rims. He maintained his innocence until the end.

There is more info on Toronto, including photos, artwork he created, and poetry he wrote at <http://www.ccadp.org/torontopatterson.htm>

Toronto Patterson's Last Words:

"I am sorry for the pain: sorry for what I caused my friends, family and loved ones. I feel a great deal of responsibility and guilt for all this crime. I should be punished for the crime, but I do not think I should die for a crime I did not commit. I am sorry, but nothing can bring Kim, Ollie, and Gigi back. But I pray my death brings peace for my family that may unite the family. I ask for your forgiveness and that you will all forgive me. I have no animosity; I am at peace and invite you all to my funeral. We are still family. I love you all, Momma, Aunt Deidra, family and everybody. I love you. I am ready, Warden."

Why Does the US Keep Killing Its Children? (contd)

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developing against juvenile executions, a group of Florida legislators sponsored a bill to reduce the state's death eligibility age to 16.

In Texas, the epicentre of the juvenile death penalty, George W Bush's replacement, Rick Perry, has executed 71 people in three years as Governor including 4 juveniles; as many as President Bush killed in twice that period.

Judicial Response to the Juvenile Death Penalty

The US Supreme Court held in 1988 in *Thompson* that no person under 16 could be sentenced to death, reasoning in part that the rejection of such sentences by state legislatures and death penalty juries indicated a national consensus. The Court likened the chance of being executed as a 15 year old to the risk of being struck by lightning and felt comfortable in declaring it illegal.

In 1989 the Court rejected the appeal of Kevin Stanford, holding that there was no national consensus against killing 16 year olds. The court's judgment was not by clear majority but by a plurality. Four judges on one side, four on the other and a fifth judge agreeing with juvenile executions on a different basis.

In mid-2002 the US Supreme Court recognized the development of a national consensus against the execution of the mentally retarded, citing amongst other things the direction of change by state legislatures and international condemnation of the practice. A similar analysis applied to the juvenile death penalty shows that on each of these indicia the argument for abolition is even stronger than it was in the case of the mentally retarded.

In August 2002 in the case of Toronto Patterson, three Supreme Court Justices (Stevens, Ginsburg & Breyer) ruled that the time was ripe for the

court to hear new argument on the question of the juvenile death penalty. But four votes were needed to call for a full hearing and the state of Texas executed Toronto on 28 August 2002.

In October 2002, once again the case of Kevin Stanford came before the Supreme Court. This time four justices voted for the Supreme Court to hear new argument on the question of the juvenile death penalty (Souter J. having joined the group). Unfortunately, in Stanford's unusual procedural posture, five justices were needed to call for a full hearing. The four Justice's noted that five more states had abolished the juvenile death penalty since the original Stanford decision. A sixth has now done so since this October 2002 decision.

In June 2003, Kentucky's Governor Patton announced that he would commute Kevin Stanford's death sentence, saying that the justice system had "perpetuated an injustice" in Stanford's case.

Other Voices for Reform

While there are certainly voices of complaint, there is no serious voice for reform in the US in respect of its failure to ratify international human rights instruments such as *CROC* and the *ICCPR*.

Similarly, while many Northern states may be embarrassed at the excesses of the South in this area and particularly of Texas, there is no serious pressure applied by the wealthy Northern states to require reform from Texas and the South.

Amnesty International (AI) has been one of the principal voices in the fight against the juvenile death penalty and has been well supported by the American Bar Association. AI chose Napoleon Beazley as a poster child in the fight but Napoleon's case also illustrates the forces rallied against ending the killing. The victim of the fatal robbery in Napoleon's case was the father of federal appellate judge,

John Luttig. Luttig moved his offices over to Texas so that he could consult with the District Attorney's office throughout the prosecution. The fiercely conservative Luttig is an appellate judge on the 4th Circuit and President Bush is expected to nominate him for a position on the US Supreme Court. Beazley was convicted, sentenced to death and, on 28 May 2002, was killed.

In 2003 the Vatican, formally opposed to the death penalty since 1996, moved to increase pressure for the abolition of the juvenile death penalty. The Vatican flew the families of a number of executed or condemned juveniles to Italy for a personal audience with the Pope and the Vatican's senior policy advisers. However, the rule in *Witherspoon's* case provides that the prosecution is entitled to a jury of persons each of whom could vote for the death penalty. The Pope's 1996 encyclical has had the effect of excluding devout Catholics from serving on death penalty juries, leaving the field open to those more willing to vote for death.

There has been movement in individual states, with Nevada abolishing the juvenile death penalty in 2003 and drafts being argued before the legislatures of many states, including Kentucky.

Vox Pop

The fact is that American juries continue to vote for the execution of juveniles, even though recent polling consistently puts opposition to child executions at 60-69% across the country. Of course, the *Witherspoon* rule means that only those who believe in the juvenile death penalty tend to end up on juries in juvenile death cases.

As a mark of this phenomenon it is notable that five of the seventy-eight juveniles on death row had been sentenced to death, received new penalty phase hearings on appeal and

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Why Does the US Keep Killing Its Children? (contd)

been sentenced to death again by another jury.

It is important to understand that many of the reasons for the continuation of the death penalty in the US apply with even greater force in the case of juveniles. The leadership in pro-death states and the media in the US perpetuate a fear of crime and a rejection of rehabilitation. As with many communities, the populace is afraid of its children. In the present environment one must also note the present rejection in much of the US of international norms and opinions in policy formulation.

Despite the negative outlook on a number of fronts, it is likely that the juvenile death penalty system in the US will change in the next few years. It is likely that the Supreme Court will grant certiorari and, using the logic applied to

the execution of the mentally retarded in *Atkins*, the Court will declare juvenile executions to be a cruel and unusual punishment. It is possible that this shift will be incremental, first abolishing executions for 16 year olds and then for 17 year olds.

The question, of course, is how many of the seventy-eight juveniles on death row USA will die before the Supreme Court finally changes the rules. If one could ask Toronto Patterson, it is certain that he would say that the process of change is taking too long.

On a final note, it is important to remember that even upon the abolition of the juvenile death penalty in the US, the alternative sentence for those defendants will be sentences of life imprisonment without the possibility of parole, or perhaps the theoretical possibility of release on parole after the

service of twenty-five or forty years of imprisonment with hard labour. The abolition of the juvenile death penalty will likely only be a forced concession rather than a watershed in US attitudes to sentencing, penology and juveniles.

Post Script

Since this paper was delivered the Missouri Supreme Court has ruled the juvenile death penalty unconstitutional in the US, citing evolving standards of moral decency to bar the killings as cruel and unusual punishment under the Eighth Amendment. This ruling must withstand the scrutiny of the US Supreme Court before it can genuinely be applied across the country. There are now eighty-two juveniles on death row USA.

Richard Bourke

Another Juvenile on Death Row - Ryan Matthews



Ryan Matthews with his mother

Ryan Matthews' story is a timely illustration of the arbitrariness of the death penalty, particularly in its application to juveniles. He is on death row despite being young, mentally retarded, and innocent.

Newly-acquired DNA evidence not only demonstrates Ryan's innocence, but points the finger toward the true killer. Several witnesses have signed statements to confessions made by the other man.

Ryan is a black youth and because his family is poor, he was represented at trial by a court-appointed lawyer. He faced a jury which included only one black person, despite the fact that 30% of the population of Ryan's parish are minorities.

Following his conviction, the Louisiana Crisis Assistance Center has become involved in his case and through the work of Reprieve (US) President, Billy Sothern, has uncovered the critical DNA evidence.

Ryan's case is of special importance to ReprieveAustralia as he has won the hearts of several of our interns who have helped work for his release from death row.

We have high hopes that Ryan will join Johnny Ross and Shareef Cousin as juveniles exonerated from Louisiana's death row.



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PLEASE VISIT OUR
WEBSITE AT
WWW.REPRIEVE.ORG.AU

RepriveAustralia was founded in Melbourne in April 2001 by a group of Melbourne lawyers with the intention of assisting in the provision of effective legal representation and humanitarian assistance to impoverished people facing the death penalty at the hands of the state.

It is a sister organisation of *Reprive (UK)*, a UK based international human rights charity which was launched in December 1999 by Clive Stafford Smith OBE. *Reprive (US)* was also established in 2001 to assist in the placement of volunteer interns supplied by *RepriveAustralia* and *Reprive (UK)*.

RepriveAustralia's primary objective is to provide effective legal representation to impoverished people facing the death penalty at the hands of the state, by assisting a body of volunteers from Australia to travel overseas to work on death penalty cases and issues.

President's Column (contd)

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Terrorism, the Death Penalty and International Law: From Guantanamo Bay to Bali

In late October, Reprive, together with PILCH (the Public Interest Law Clearing House) hosted a panel discussion on terrorism, the death penalty and international law which was attended by over 130 people – and in that packed room, you could have heard the proverbial pin dropping for the entire 2 hours. Professor David Kinley of the Castran Centre for Human Rights deftly moderated a passionate discussion between our visiting advocate, Clive Stafford Smith OBE, local luminaries Dr Barry Jones, Magistrate Brian Deegan, and barrister Richard Bourke, and many from the floor. It was an inspiring evening of ideas that galvanized opinions and commitments to the pursuit of fundamental human rights in this age where it is so easy to become distracted by the day to day. Thanks to all who came along. We hope you were inspired!

Ash Halphen

RepriveAustralia Vice-President Ashley Halphen is winging his way back from Texas where he has just completed his third stint as a volunteer in the US. Ash has been working as an investigator on a special Reprive project, the case of Linda Carty. Linda is a British national who was sentenced to death for the kidnap/murder of a woman in her

apartment complex. Linda's court appointed trial lawyer has more prisoners on Texas' death row than any other and Linda was denied her rights under the Vienna Convention on Consular Relations. Reprive (UK) has raised funds to help cover the costs of Ash's volunteer work to ensure that an intensive investigation can be completed at the critical state post-conviction stage of Linda's appellate process.

Justice Michael Kirby and the AGM

Our thanks yet again to our Founding Patron, Justice Michael Kirby, for his stirring address at the AGM in October. Looking back on the High Court's historical connection with the death penalty, his Honour gave us much to ponder about the way forward, and of our responsibilities to uphold fundamental human rights. His address made the front page of *The Australian* and the editorial page of the *Sydney Morning Herald*. We need more leaders like Justice Kirby in this country.

The new Executive for 2003/2004 comprises:

President: Nick Harrington
Vice-President: Ash Halphen
Secretary: Rachel Walsh
Treasurer: Pia Di Mattina
Ordinary Committee Members:
Natasha Stojanovich & Lucy Rees.

Many thanks to outgoing co-founder Susan Brennan, for her stalwart support and canny ideas, and to Marissa Dreher, whose energetic co-ordination of the volunteer researchers has made an

enormous difference to those working on the ground in the US. Thanks also to others who continue to carry other particular responsibilities, like Lucy McCullagh (fund-raising) and Gen Browne (membership). And welcome to Adrian Finanzio, who has agreed to work closely with the Executive on various strategic projects in the coming year.

And thanks to all members who have attended recent events, volunteered your time and skills, and renewed your membership. Reprive can only continue to make its significant contribution to the fight against the death penalty and related human rights issues with your support and involvement.

A safe and happy festive season to you all.

Nick Harrington