



CCR/FIDH REPORT ON THE DEATH PENALTY IN THE UNITED STATES SUMMARY OF FINDINGS

INTRODUCTION

In May 2013, the Center for Constitutional Rights (CCR)¹ and the International Federation for Human Rights (FIDH)² met with stakeholders in California and Louisiana to evaluate the death penalty as practiced and experienced in the jurisdictions through a legal framework grounded in human rights law and practice. Through interviews with death-row prisoners, exonerees, their family members, advocates, legal counsel, and non-governmental organizations, and documentary review, the Mission conducted a human rights assessment of current issues arising from or related to the use of the death penalty in the United States. In particular, the Mission sought to evaluate the role of race in the implementation of the death penalty, and conditions of confinement on death row, as well as other issues identified by local stakeholders. By placing these observations in the context of international human rights, this Executive Summary highlights how the United States' use of the death penalty fails to meet a significant number of international obligations, and conflicts with the general trend towards abolition both internationally,³ and within the U.S.⁴

Although general recommendations are suggested to ensure that the death penalty is carried out in a non-discriminatory manner and that conditions on death row minimize human suffering, CCR and FIDH consider that if the United States were to take seriously its human rights obligations, beginning with the non-derogable obligation to protect the right to life, it must abolish the death penalty altogether.

CURRENT FRAMEWORK

The United States' criminal justice system operates in a federalist context, in which there are separate federal courts and state courts. Although the U.S. Supreme Court intervened on the basis of violations to the U.S. Constitution in 1972 in *Furman v. Georgia*, instituting a de facto moratorium until states revised statutes to seek to prevent arbitrary or race based sentences, today the individual states have significant discretion over use of the death penalty, with limited federal review. As such, the Mission studied the capital process in two states particularly relevant in this regard.

This report relies on understandings of the terms “discrimination” and “torture” established by leading international conventions on the issues, to which the U.S. is a party. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) defines discrimination as “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental

freedoms”⁵ Note that the “purpose or effect” clause is distinct from the U.S. practice, which requires a particularized showing of discriminatory *intent* for those alleging that discrimination played a role in a capital case. Discrimination is particularly important in the context of the death penalty, because although numerous international instruments do not prohibit the death penalty *per se*, implementation of the sanction without a fair trial and/or in a discriminatory manner constitutes an unlawful deprivation of life.⁶

Torture is defined by the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), as:

. . . [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him . . . or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁷

Of particular relevance is that torture is not limited to physical acts; severe mental pain or suffering can constitute torture, and is assessed based on the particular case in light of the “nature, purpose and consistency of the acts committed” and personal circumstances relating to the vulnerability of the victim.⁸ The U.S. federal criminal definition of torture includes “severe pain or suffering . . . whether physical or mental” with mental pain or suffering requiring the harm be “prolonged” harm arising out of a number of defined circumstances.⁹

CALIFORNIA

With 727 individuals currently on death row, including 19 women, and an average of 20 new judgments of death per year, California is the leading death penalty state in the United States. Its death row is by far the most populous in the country and contains nearly twice as many condemned men and women as the nation’s second largest death row in Florida, which houses 404 condemned prisoners.

California adopted its current death penalty law by popular initiative in 1978, two years after the Supreme Court reaffirmed the country’s acceptance of the death penalty in *Gregg v. Georgia*. Since then, the state’s death row population has increased steadily. But unlike other states with large death row populations, California has carried out relatively few executions. Thirteen individuals have been executed since 1978, and none have been executed since a court-ordered stay was entered in 2006. More inmates on death row have died from suicides than from execution, and three times as many inmates have died from natural causes than from execution.

Although the lack of executions would appear to indicate that the state has little appetite for the death penalty, recent election results suggest that its citizens remain reluctant to give up the symbolism – and the fiction – of meting out the ultimate punishment to the “worst of the worst.” Last fall, abolitionist organizations around the state mounted a \$7 million campaign in support of Proposition 34, a state-wide ballot measure to abolish the death penalty in California and convert the sentences of over 700 death row inmates to life without parole.¹⁰ The measure

failed by a slim majority. As a result, California's death row population continues to grow, even as the state struggles to meet minimum international standards for conditions of confinement for the current condemned population. Nevertheless, the campaign highlighted the many problems that plague California's death penalty. In addition to increasing public awareness and debate around capital punishment, Proposition 34, which would have stripped access to court-appointed habeas counsel because such counsel are not given to prisoners serving life sentences, also illuminated the painful tradeoff that many death row prisoners face after a state abolishes capital punishment: the loss of any meaningful opportunities to pursue claims of innocence.

It is clear that retaining the death penalty essentially for its symbolism comes at an unacceptable price for those on death row, their families, and even the state of California itself. In May, CCR and FIDH interviewed inmates on California's death row, family members, attorneys who represent individuals in capital cases and post-conviction appeals, legal scholars, and advocates who have worked for decades to abolish the death penalty in California. Interviewees emphasized fundamental problems with how the death penalty is implemented in the state and described shockingly poor conditions on death row. These systemic problems, which will likely not be fixed in the foreseeable future given, *inter alia*, the state's long-term financial crisis, strongly suggest that continued administration of capital punishment will simply never be compatible with the United States' obligations under international human rights law.

Discrimination

California's death penalty statute is one of the broadest in the country. Under state law, a sentence of death may be imposed if a defendant is found guilty of first-degree murder and if one of 21 enumerated "special circumstances" is present.¹¹ The death penalty may be sought for any murder that occurs in the course of a felony, and a defendant need not have had an intent to kill in order to be eligible for death. As a consequence, at least 87% of California's first-degree murders are "death eligible," and prosecutors have nearly unfettered discretion to decide whether a homicide should be prosecuted as a death penalty case.¹² This broad discretion in deciding when to seek the death penalty creates a stunning disparity in sentencing rates between counties. Since 2000, 10 counties in California with vastly different homicide rates have been responsible for 83% of all death sentences in the state.¹³ In addition to raising concerns of arbitrariness, such discretion invariably increases the risk of discrimination in the imposition of the death penalty.

There is no question that racial disparities are evident at sentencing. Death penalty sentencing rates tends to be highest in counties that are overwhelmingly white. And numerous studies show that defendants found guilty of killing whites are more than three times more likely to be sentenced to death than those found guilty of killing blacks.¹⁴ Moreover, blacks have been sentenced to death at rates that far exceed their numbers in the population. While they make up only 6.7% of the overall population in California, they represent 36% of inmates on death row.¹⁵ These disparities appear to violate the International Convention on Civil and Political Rights (ICCPR) and the CERD, which prohibit arbitrary deprivations of life and effects-based discrimination.

Conditions of Confinement

San Quentin State Prison's death row holds California's entire population of 708 condemned men. The remaining 19 women are housed at Central California Women's Facility, in Chowchilla, California. Although San Quentin has been operating under a consent decree for over 30 years to improve living conditions, its death row remains filthy and in disrepair. Mental health care for severely ill prisoners on death row is grossly inadequate, even though the rate of suicides on death row is roughly twice the average suicide rate among the general prison population. In addition, the relationship between prisoners and guards appears to be poor. Prisoners interviewed by the Mission stated that they were subject to verbal abuse and mistreatment by prison guards on a regular basis. Because the death row population is increasing year by year, overcrowding is also an urgent problem. Communal indoor areas no longer exist, and recreation time is severely restricted due to lack of space.

Solitary confinement, called "administrative segregation" at San Quentin, is also frequently used. Long-term administrative segregation is regularly given to inmates deemed to have gang affiliations, and used to punish individuals who have either suffered infractions or committed particular crimes. Conditions in administrative segregation are much more restrictive than in the general death row population: among other things, prisoners in segregation are banned from all contact visits and are permitted to receive only one package per year. Moreover, there is no upper limit to the length of time an inmate may spend in this type of isolation; some prisoners have spent *over two decades in administrative segregation* before being moved to the general death row population. Conditions on death row, and the frequent use of long-term administrative segregation, are not in conformity with requirements under the ICCPR and CAT, and fall below the UN's Standard Minimum Rules for the Treatment of Prisoners.

Delays in the Adjudication of Post-Conviction Claims for Relief

Indigent death row prisoners in California – a population which includes all but one person on death row – are also denied prompt disposition of their claims because of inordinate delays in appointment of counsel and adjudication of post-conviction claims for relief. Because of a shortage of attorneys willing to take on capital cases, death row prisoners wait an average of 3-5 years before counsel is appointed to handle their direct appeal, and an additional 8-10 years following the conclusion of their appeal for an attorney to be assigned to their state habeas petition. As a consequence, over half of the population on death row is currently unrepresented. But delays in appointment of counsel are only half the story. The California Supreme Court takes an average of 8 years to decide an appeal, and approximately 2 years to decide a state habeas petition; resolution of federal habeas petitions takes an additional 8 years. These delays unquestionably compound the mental pain and suffering of a death row prisoner, who is forced to live for decades under the psychological torment of a death sentence and in punitive conditions of confinement while he waits for his post-conviction remedies to be exhausted. Such intolerable conditions amount to torture or at minimum, cruel, inhuman or degrading treatment in violation of the United States' obligations under the ICCPR and CAT.

LOUISIANA

The flawed process by which defendants are sentenced to death in Louisiana and the cruelty of the conditions they experience on death row prior to execution raise serious questions about the state's adherence to international human rights law. Located in the southern U.S., Louisiana is a largely rural state with a population of 4.6 million.¹⁶ Prosecutors seeking the death penalty for a homicide in Louisiana must charge a defendant with first degree murder, which includes one of 11 aggravating factors.¹⁷ Until 2008, rape of a child was also a crime which could warrant the death penalty.¹⁸ There are currently 88 people on Louisiana's death row, including two women. Since reinstatement of the death penalty in 1976, the state has executed 28 persons. Since 2003, one person has been executed by Louisiana: a man who volunteered to die without undertaking appeals. Significantly, nine men have been exonerated from Louisiana's death row.¹⁹

Discrimination

The Mission has found that the implementation of the death penalty in Louisiana is racially discriminatory. Although U.S. standards require proof of discriminatory *purpose* to find a case unlawful due to discrimination, CERD considers both discriminatory purpose and *effect*, which is readily seen in Louisiana. Of the persons on death row, 58 are black, 26 white, three Latino and one Asian.²⁰ African Americans are overrepresented on death row; making up 65% of those sentenced to death, in a state where the black population is roughly 32%.²¹ The inequality is most frequently attributed to the exercise of prosecutorial discretion, which the evidence suggests is consciously or subconsciously influenced by racial factors. Louisiana prosecutors, who are elected, have tremendous discretion to charge first degree murder, restrained solely by the aforementioned capital statute and their judgment of political risk. Moreover, prosecutors' discretion over jury selection often results in the removal of blacks from the jury. This discriminatory practice has made jury selection a current priority of anti-death penalty advocates and defense attorneys. In one jurisdiction, for example, a statistical review of felony cases found blacks were struck at three times the rate of whites (55.5% for blacks, and 16.3% for whites).²² Combined with the disfranchisement of black voters (Louisiana assembles its jury pools from lists of registered voters), the practice of removing black members of the jury pool means that encountering an all-white capital jury is common in many locations within the state, and the presence of two or more African Americans on a capital jury is considered rare.

As a result of these practices, there is significant arbitrariness and discrimination in the imposition of the death sentence when looking at the state as a whole. For instance, there are conspicuous variations in the rates of capital sentencing among Louisiana's judicial districts, with the districts of Caddo and East Baton Rouge considered the most likely to sentence to death, irrespective of their relative murder rates. Anecdotal evidence of prosecutorial bias and racism in these locales are supplemented by data which shows gaping racial disparities in those two districts. For example, statistical analysis in East Baton Rouge showed that a person who kills a white victim is 2.6 times more likely to be sentenced to death than one who kills a black person.²³ Other research has shown that there is only a 1 in 10,000 chance that the cases prosecuted as first degree murder in Caddo are racially neutral, and that blacks who are alleged to have killed whites face a capital prosecution at higher rates than any other group.²⁴

Conditions of Confinement

The Mission has concluded that the conditions on death row in Louisiana can constitute torture, violating CAT and the international law on the treatment of prisoners. All those sentenced to death, with the exception of the two women on death row in an all-female facility, live in Louisiana State Penitentiary, a former plantation turned hard-labor prison most commonly referred to as “Angola,” after the home country of the slaves that worked on the original plantation. Angola is infamous for its history of brutality and racism.

The impact of each of the conditions noted below is magnified by the lengthy period of time inmates spend in them due to court delays and the state’s inability to provide defense counsel in a timely fashion. The majority of prisoners have spent at least a decade on death row, and the longest period a current prisoner has been on death row is 28 years. Inmates are housed in single cells where they are alone with limited communication with others for twenty-three hours of every day. During this time, the inmates are not allowed to attend classes or participate in rehabilitative or creative outlets. They are housed in a building which does not use air conditioning, even though the infrastructure for air conditioning exists. As a result, the temperature in the summer regularly reaches 37.7 °C (100 °F), and due to the humidity, the heat index is much higher. This oppressive heat is exacerbated by the lack of ventilation and cool water to drink and bathe in. Inmates have been reported to empty their toilet bowl water and lay in it on the floor to seek respite from the heat. These conditions are unhygienic and are irreconcilable with human dignity.

The one hour each day inmates are allowed to exit their cell rotates, so that an inmate’s recreation time may occur even in the pre-dawn hours. During the free time allotted, the inmate may walk around the death row building, or may spend time outside alone in small fenced-in area, although this practice is often discouraged by the guards because of the heat. Once outside, the inmate will have no access to recreational activities or equipment. During their free time, inmates are also allowed to place phone calls, although the exorbitant pricing of placing such calls is a major barrier to doing so. For those who have an attorney, legal visits are non-contact and take place behind glass; some attorneys complained that this setup limits relationship building, and inhibits attorneys’ ability to observe the client’s mannerisms in search of signs of mental illness. Families are allowed contact visits, albeit with the inmate in shackles; however these visits are dependent on the discretion of the prison staff.

This isolation, coupled with the difficult prison conditions and the mental torment of a pending execution, causes severe mental suffering and the deterioration of most prisoners’ mental state. Attorneys working with inmates on death row indicated that a large portion of their work consists of supporting their client’s mental stability, and that several clients have considered volunteering for early execution. Those who have not yet been appointed an attorney face even more daunting mental health issues as a result of their isolation. The range of debilitating psychological responses to living on death row, often referred to as “death row phenomenon,” is pervasive in Angola.²⁵ Despite the needs of the prisoners, the clinic at Angola has no mental health wing or hospital and no therapeutic services (only pharmacological treatment) available for prisoners. Even those with the most severe illnesses are unable to

receive treatment in a mental hospital, and it is reported that prison officials have placed at least one inmate with mental illness in an even more restrictive setting. Further, an inmate found incompetent to execute due to mental illness remains on death row without receiving specialized care nearly twenty years after the Louisiana Supreme Court found he could not be forcibly medicated. It is unclear how many others are in a similar situation. Inmates who are perceived to have misbehaved are often placed in cells on a tier with the mentally ill as a punishment. Social workers and nurses regularly visit with the men, however their contact is typically through the bars of the prisoner's cell, with no privacy. Interviewees report that neither quality care for major illnesses nor medications are consistently available for all prisoners.

Attorneys for two inmates on Louisiana's death row are currently challenging Louisiana's refusal to disclose its execution protocol in federal court. The non-disclosure is of particular concern, due to widespread reports that Louisiana's supply of the controversial drug pentobarbital may have expired. The imminent execution of one of the inmates, Christopher Sepulvado, has been stayed pending resolution of the case.

PRELIMINARY CONCLUSIONS

The use of the death penalty constitutes an inherent violation of the most fundamental of all rights, the right to life. No legal or correctional reforms could bring legitimacy to the necessarily inhumane and premeditated taking of a life by the state. As such, CCR and FIDH unambiguously and fundamentally oppose any use of the death penalty in the U.S. Nevertheless, we recognize that complete abolition of the death penalty in all 50 states will not occur immediately, despite the multitude of efforts to bring about the end of the death penalty in the United States. In the interim, a moratorium on executions must be imposed to protect condemned inmates' right to life.

In addition, based on our observations, CCR and FIDH find that the death penalty as currently practiced in California and Louisiana is arbitrary and discriminatory, and that conditions on death row constitute torture and cruel, inhuman, and degrading treatment. Immediate steps must be taken to bring these two states into compliance with the U.S.'s international treaty obligations. Among other things, both states must institute procedural review and accountability mechanisms to limit the breadth and impact of prosecutorial discretion and narrow the range of crimes for which the death penalty may be sought. In addition, both states must adhere to the CERD definition of discrimination and remove onerous intent requirements for discrimination claims. States must also ensure that all persons charged with a death-eligible offense have timely-appointed, competent, and experienced representation at all stages of a capital case, and that appointed counsel have adequate funding to carry out the tasks necessary to provide effective representation.

Finally, with respect to conditions on death row, California and Louisiana must, at minimum, end the use of solitary confinement and provide regular contact visits with family members. To meet international law standards, both states must also provide inmates with regular access to all necessary health services, including mental health services, of a quality comparable to that available in the outside community. The physical conditions of prison should be well-maintained and hygienic.

¹ The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change. CCR is a member of the World Coalition against the Death Penalty (WCADP). For more information visit www.ccrjustice.org.

² The International Federation for Human Rights is a federation comprised of 178 human rights organizations in more than 100 countries. Founded in 1922, FIDH aims at obtaining effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators. With activities ranging from judicial enquiry, trial observation, research, advocacy and litigation, FIDH has developed strict and impartial procedures which are often relied upon by independent human rights experts. FIDH is a member of the Steering Committee of the WCADP. For more information, visit www.fidh.org.

³ For example, the UN General Assembly Resolution calling for a moratorium in the few states that continue to use the death penalty. G.A. Res. 62/149, U.N. GAOR, 62nd Sess., U.N. Doc. A/RES/62/149 (Feb. 26, 2008).

⁴ Executions and new death sentences have decreased in the U.S. and a number of retentionist states are considering abolition. See, DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2012: YEAR END REPORT (December 2012), <http://deathpenaltyinfo.org/documents/2012YearEnd.pdf>; (data on decreasing executions and sentences); David A. Love, *Abolition in Maryland*, The Nation (May 15, 2013), <http://www.thenation.com/article/174309/abolition-maryland> (discussing Maryland's recent abolition, which makes it the 18th state to formally reject the death penalty).

⁵ International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, March 7, 1966, 660 U.N.T.S. 195.

⁶ "The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life" Human Rights Committee, General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial, para. No. 59, UN Doc. CCPR/C/GC/32 2007 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 1, December 10, 1984, 1465 U.N.T.S. 85.

⁸ *Prosecutor v. Bradjanin*, Case No. IT-99-36-T, Judgement, paras. 484-85 (Sept. 1, 2004). See also *Soering v. United Kingdom*, 11 Eur. Hum. Rts. Rep. 439 (1989), para. 104 (finding that the facts used to determine whether the death penalty violates the prohibition on torture or inhuman or degrading treatment or punishment including "[t]he manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution" are present due to *inter alia* "death row phenomenon" existing in Virginia.

⁹ 18 U.S.C. § 2340 (2) (A) – (D). See also Torture Victim Protection Act, 28 U.S.C. § 1350, note, Sec. 3(b)(2).

¹⁰ California's state constitution allows California voters to pass state laws by popular initiative. When a petition for the proposed measure receives a sufficient number of signatures, the proposed law is placed on the ballot and submitted for a direct vote by the people. Initiatives pass by simple majority.

¹¹ Cal. Penal Code § 187-99

¹² Steven F. Shatz and Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1331 (December 1997); see also California Commission on the Fair Administration of Justice, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 16-18 (June 30, 2008).

¹³ ACLU of Northern California, *Death by Geography: A County to County Analysis of the Road to Execution in California* 3-5 (2008).

¹⁴ Glenn L. Pierce and Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 13 (2005).

¹⁵ *Id.* at 6.

¹⁶ US CENSUS BUREAU, *State & County QuickFacts, Louisiana* (2013), available at <http://quickfacts.census.gov/qfd/states/22000.html>

¹⁷ La. R.S. 14:30 First Degree Murder, available at <http://www.legis.state.la.us/lss/lss.asp?doc=78397>. Treason can also give rise to the death penalty, see La. R.S. 14:113.

¹⁸ The U.S. Supreme Court rejected the Supreme Court of Louisiana's position that rape of a child could warrant the death penalty. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

¹⁹ Death Penalty Information Center, *Innocence: List of Those Freed from Death Row* (December 2012), available at <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>

²⁰ CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEFENSE AND EDUCATION FUND, INC. DEATH ROW U.S.A. WINTER 2013 (January 1, 2013) available at http://www.naacpldf.org/files/publications/DRUSA_Winter_2013.pdf

²¹ US CENSUS BUREAU, State & County QuickFacts, Louisiana (2013), available at <http://quickfacts.census.gov/qfd/states/22000.html>

²² LOUISIANA CRISIS ASSISTANCE CENTER , BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY’S OFFICE (2003), available at http://www.blackstrikes.com/resources/report/black_strikes_report_september_2003.doc

²³ GLENN L. PIERCE AND MICHAEL L. RADELET, DEATH SENTENCING IN EAST BATON ROUGE PARISH, 1990-2008 (2011), available at <http://www.deathpenaltyinfo.org/documents/PierceRadeletStudy.pdf>

²⁴ LYMAN, TIM, CADDO (LA) PARISH REPORT ON RACE, HOMICIDES AND PROSECUTIONS, 1998-2008 (2011), available at <http://ssrn.com/abstract=1743712>

²⁵ For more on death row phenomenon, see CCR policy paper, “The United States Tortures Before it Kills: An Examination of the Death Row Experience from a Human Rights Perspective,” Oct. 2011, available at: http://ccrjustice.org/files/deathrow_torture_postition_paper.pdf.