The Advocates for Human Rights,
a non-governmental organization in special consultative status with ECOSOC

and

Reprieve,
a human rights charity

Shadow Report on the Death Penalty in the United States[1]

for consideration during

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The Advocates for Human Rights (The Advocates) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publications. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a Death Penalty Project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition Against the Death Penalty.

Reprieve, a human rights charity, delivers justice and saves lives. Reprieve investigates, litigates and educates, prioritising those cases where human rights are most likely to be jettisoned or eroded. Reprieve promotes the rule of law around the world, targeting the death penalty and abuses committed in the name of the "war on terror." Reprieve holds a seat on the Steering Committee of the World Coalition Against the Death Penalty.

Endorsed by:

World Coalition against the Death Penalty
Center for International Human Rights, U.S.A.
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French Collective of Support to Mumia Abu-Jamal, France
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EXECUTIVE SUMMARY

1. Thirty-two states, the U.S. federal government, and U.S. military retain the death penalty in the United States. Since the United States' last review before the Committee in 2006, the number of states retaining the death penalty has decreased. Six states—Maryland (2013), Connecticut (2012), Illinois (2011), New Mexico (2009), New York (2007), and New Jersey (2007)—have since abolished the death penalty.

2. This report addresses four main issues with regard to the United States' use of the death penalty:

    a. **Innocence.** The death penalty system in the United States has wrongfully convicted and sentenced innocent persons to death. Since 1973, 142 individuals have been exonerated from death row. Also of great concern are the at least 10 individuals who have been executed despite strong evidence of their innocence. When exonerees are released, they face numerous challenges in reintegrating into society. They may face social, economic, and legal hurdles. In addition, the right to compensation for wrongful imprisonment varies widely from state-to-state. Sixteen retentionist U.S. states do not have compensation laws for the wrongfully convicted to seek reparation. In states that do have compensation laws, exonerees must often overcome onerous procedural and eligibility barriers. If they succeed, the compensation they may receive can be meager and very often falls short of the corollary federal standards for such compensation. See Recommendations and Questions on pages 9-10.

    b. **Racial Bias**. Racial bias is pervasive in the application of the death penalty in the United States. The race of the victim is the most indicative factor in determining who is charged and sentenced with death. If the victim is white, a defendant is more likely to be sentenced to death than if the victim is black. The race of the defendant also increases the likelihood of a death sentence, and black persons are disproportionately overrepresented on death row in comparison to the general population. See Recommendations and Questions on page 13.

    c. **Lethal Injection.** The majority of the 32 retentionist U.S. states and the U.S. federal government use lethal injection as the primary means of executing prisoners. The traditional three-drug lethal injection procedure has come under constitutional challenge in a number of states for causing cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution. The U.S. Supreme Court has held that the lethal injection method used by the state of Kentucky does not qualify as cruel and unusual punishment. Since then, however, a number of regulations by foreign governments and the European Union have restricted the supply of drugs used in the three-drug procedure. As these drugs have become increasingly harder to obtain, U.S. states have turned to other drugs that can be used singly to administer a lethal dose. In turn, pharmaceutical companies have refused to supply these drugs for execution purposes in the United States. As these drugs become increasingly difficult to obtain, states have turned to questionable sources—including compounding pharmacies selling drugs that are not

FDA-approved—to obtain the drugs required to administer executions. In addition, several U.S. states have passed secrecy laws to conceal the identities of these drug suppliers, thus allowing states to withhold critical information to detainees seeking assurances about the drugs' quality and effectiveness. Obtaining execution drugs that are outside of federal regulation increases the risk of tampering and reduced drug efficacy, which in turn may heighten the risk of cruel or inhuman treatment or punishment during an execution. See Recommendations and Questions on pages 18-20.

d. **Consular Notification.** The United States is a party to the Vienna Convention on Consular Relations (VCCR), and Article 36 requires States Parties arresting or detaining foreign nationals to notify them of their right to communicate with consular officials. The United States has failed many times to comply with its consular notification duties in capital cases, and the International Court of Justice (ICJ) ordered the United States to provide review and reconsideration of the cases of 51 Mexican nationals' who had been sentenced to death. To date, the United States has failed to pass implementing legislation to give effect to the ICJ's decision, and in the meantime, Texas has since executed two Mexican nationals who were covered by that ICJ decision. In addition, only a handful of U.S. courts have recognized the availability of judicial remedies for consular notification violations, but even in these jurisdictions, procedural default rules can still bar remedies for foreign nationals who failed to raise the VCCR claim at the right time or in the right way. See Recommendations and Questions on pages 25-26.

e. **Non-triggermen.** Most retentionist states continue to sentence to death and execute non-triggermen; that is, offenders who did not kill, attempt to kill and/or have any intention to kill. In a 1982 judgment (*Enmund v. Florida* 458 U.S. 782 (1982)), the United States Supreme Court ruled that non-triggermen, as a category, should not be sentenced to death. However, in subsequent cases, this rule was abandoned and most retentionist states have laws permitting the execution of non-triggermen. The United Nations General Assembly has explicitly supported the interpretation of Article 6(2) of the ICCPR to mean that the death penalty should be reserved only for intentional crimes. Consistent with this, the United States should now exclude this category of offender from death-eligibility. See Recommendations and Questions on page 28.

BACKGROUND

The International Covenant on Civil and Political Rights

3. The International Covenant on Civil and Political Rights (ICCPR) was adopted on December 16, 1966 by the United Nations General Assembly. Its goal is to protect the civil and political rights of individuals and to guarantee the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights, and the right to due process and a fair trial. The United States is one of 74 signatories and 167 parties to the ICCPR. Implementation of the ICCPR is monitored by the United Nations Human Rights Committee, which reviews regular reports of State parties on a periodic basis.

4. Article 2(3) provides the right to an effective remedy to any person whose civil and political rights or freedoms have been violated, "notwithstanding that the violation has been committed by persons acting in an official capacity." States Parties are to "ensure that any

person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy" (Art. 2(3)(b)) and to enforce such remedies when granted (Art. 2(3)(c)).

5. Article 6 of the ICCPR establishes that every human being has an inherent right to life, of which they cannot be arbitrarily deprived. The sentence of death must be reserved for only the most serious crimes, and subject to a final judgment by a competent court. Additionally, the Covenant prohibits the execution of minors or pregnant women. Article 7 protects individuals from being subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 9 preserves the right to liberty and security of self, to not be subjected to arbitrary arrest or detention, or to not be deprived of liberty without an adherence to procedure.

6. Article 14 provides individuals with equal rights to appear before a competent and impartial tribunal and to have a fair public hearing. Article 26 aims to equalize all persons before the law and entitles them to equal protection. Discrimination on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is prohibited.

Human Rights Committee Review (2006)

7. The Human Rights Committee ("Committee") last reviewed the United States' compliance with the ICCPR in 2006 and observed that the United States had progressed in the right direction regarding the death penalty, but that such progress was insufficient. It determined that the Supreme Court decisions that protected certain groups from execution did not address the real issues behind the death penalty, which were the disproportionate number of racial minorities that receive the death penalty and the high number of indigent persons on death row. The Committee recommended an immediate moratorium on the practice and the eventual abolition of the death penalty in order to achieve full compliance with the ICCPR.

List of Issues

8. In preparation for the Committee's upcoming review of the United States' compliance with the ICCPR, the Committee has requested information on the following issues:

    a. Death sentences imposed, the number of executions carried out, the grounds for each conviction and sentence, the age of the offenders at the time of committing the crime, and their ethnic origin;[2]

    b. Whether the death penalty has been imposed on people with mental or intellectual disabilities since the 2002 Supreme Court ruling in *Atkins v. Virginia* exempting people with "mental retardation" from the death penalty;[3]

[2] List of issues in relation to the fourth periodic report of the United States of America (CCPR/C/USA/4 and Corr. 1), adopted by the Committee at its 107th session (11–28 March 2013), U.N. Human Rights Committee, U.N. Doc. CCPR/C/USA/Q/4, Apr. 29, 2013, para. 8(a).

c. Steps taken to guarantee access to federal review of state court death penalty convictions, in the light of the drastic limits imposed by the Antiterrorism and Effective Death Penalty Act of 1996 and the USA Patriot Improvement and Reauthorization Act of 2005 on the availability of federal habeas corpus relief for defendants sentenced to death[4];

d. Steps taken to ensure that the death penalty is not imposed on the innocent;[5] and

e. Steps taken to improve criminal defense programs and legal representation for indigent persons in capital cases, including in Alabama and Texas, as well as civil proceedings, in particular for defendants belonging to racial, ethnic and national minorities.[6]

The United States' Response

9. In response to the Committee's list of issues, the United States has committed to addressing racial disparities within the criminal justice system and has taken action to change the sentencing of certain crimes associated with particular racial groups.[7]

10. The United States noted that all death row inmates were convicted of murder under statutorily-defined circumstances that made those crimes death-eligible and that any individuals sentenced to death were at least 18 years of age at the time of the crime's commission.[8] It noted that all capital defendants are entitled to the same constitutional protections as criminal defendants and have the right to federal review once they have exhausted their state court appeals providing they file within one year of the completion of state appellate proceedings.[9]

Other UN Human Rights Mechanisms

11. In 2010, the Human Rights Council reviewed the United States under the Universal Periodic Review and many States expressed concern about the United States' reservations on Articles 5 and 6 of the ICCPR prohibiting the death penalty for those who commit crimes while under the age of 18 years.[10] They urged the United States to take action to address the racial disparities evident in the application of the death penalty and further investigate potentially discriminatory practices.[11] Countries recommended a moratorium on the death penalty with

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[3] *Id*., at para. 8(b).
[4] *Id*., at para. 8(c).
[5] *Id*., at para. 8(d).
[6] *Id*., at para. 8(e).
[7] United States Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report of the United States on the International Covenant on Civil and Political Rights (ICCPR), Human Rights Committee, 109th Sess. (14 October – 1 November 2013), U.N. Doc. CCPR/C/USA/Q/4/Add.1, Para. 7.
[8] United States Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report of the United States on the International Covenant on Civil and Political Rights (ICCPR), Human Rights Committee, 109th Sess. (14 October – 1 November 2013), U.N. Doc. CCPR/C/USA/Q/4/Add.1, Para. 25.
[9] *Id*., at para. 27, 28.
[10] Report of the Working Group on the Universal Periodic Review, Human Rights Council, U.N. Doc. A/HRC/16/11, Jan. 4, 2011.
[11] *Id*., at para. 92.95, 92.96.

the intention of total abolition in the future.[12] In the meantime, they recommended that the United States withdraw its reservation to Article 6(5) of the ICCPR regarding the application of the death penalty to juvenile offenders and restrict the number of offenses that carry the death penalty.[13] Countries recommended that all persons with mental illness also be excluded from the application of the death penalty.[14]

12. The United States, while recognizing the racial, economic, and geographic disparities within the death penalty, accepted only six of the thirty-two UPR recommendations pertaining to the death penalty.

REPORT

13. This shadow report examines four aspects of death penalty law, policy, and practice in the United States. Section I discusses the problem of wrongful convictions in the United States, which affects Articles 6, 9, 14, and 26, and discusses U.S. compliance with exonerees' right to an effective remedy under Article 2(3). Section II assesses the influence of racial bias on decisions to charge capital crimes and to seek the death penalty, which affects Articles 6, 14, and 26. Section III analyzes whether standard lethal injection procedures constitute cruel and unusual punishment, and identifies developing legal and corporate resistance to those procedures, which affects Article 7. Section IV addresses U.S. compliance with the *Avena* decision by the International Court of Justice to provide remedies for violations of the Vienna Convention on Consular Relations and the United States' overall compliance with consular notification obligations arising under the convention, which affect Articles 6, 14, and 26 of the ICCPR. Section V analyses death-eligibility for the category of non-triggermen lacking intent to kill, which affects Article 6.

I. Wrongful Convictions and the Right to an Effective Remedy

14. Wrongful convictions are a grave concern in the United States. There are several reasons for wrongful convictions, including eyewitness misidentification, poor forensics ("junk science"), false confessions, snitch testimony, government misconduct, and ineffective assistance of counsel.[15]

15. Since 1973, 142 individuals have been exonerated from death row.[16] These exonerations show that U.S. states have imposed the death penalty on innocent individuals and wrongly

[12] *Id*., at para. 92.118-126, 92.129-131.
[13] *Id*., at para. 92.48-50, 92.131-132.
[14] *Id*., at para. 92.134-135.
[15] *Causes of Wrongful Convictions,* DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/causes-wrongful-convictions (last visited Aug. 13, 2013); *The Causes of Wrongful Conviction,* THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/ (last visited Aug. 13, 2013).
[16] *See Innocence: The National Registry of Exonerations,* A JOINT PROJECT OF MICHIGAN LAW AND NORTHWESTERN LAW, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited July 22, 2013).

imprisoned them for years under a sentence of death; in fact, these individuals have spent a total of 1,425 years as wrongfully accused.[17]

16. Of even graver concern are the individuals who were likely innocent but executed.[18] For example, Troy Davis was convicted for the 1989 murder of a police officer, a conviction based solely on witness testimony and no physical evidence. Since his trial, seven of the nine eyewitnesses have recanted or contradicted their testimony, and one of the remaining witnesses was implicated by nine others as the actual murderer. Despite widespread calls for clemency, the state of Georgia executed Troy Davis on September 21, 2011.[19]

17. Individuals who are exonerated and released from prison face numerous challenges in rebuilding their lives. Almost all exonerees possess no assets at the time of their release, one-third have lost child custody due to their wrongful imprisonment, and many face severe challenges in obtaining employment or housing.[20] A study by the Life After Exoneration Program found that one-half of exonerees reside with their family, and that two-thirds are not economically independent.[21] Securing employment and appropriate housing is difficult for exonerees because expungement of the wrongful conviction from their criminal record does not happen automatically.[22] In addition, many exonerees have spent years in prison while others in their age group have been completing their education, acquiring job skills, or progressing on career paths.[23] In-prison educational programs are not available to many death row inmates during their prison terms, and they are often are denied job training programs and literacy and GED classes given their sentence of death.[24]

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[17] 1,425 is the number of years between their sentence to death and exoneration. *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFORMATION CENTER, http://deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Aug. 7, 2013).

[18] According to the Death Penalty Information Center, at least ten men with strong evidence of their innocence have been executed. *See Executed But Possibly Innocent*, DEATH PENALTY INFORMATION CENTER, http://deathpenaltyinfo.org/executed-possibly-innocent (last visited Aug. 6, 2013). These persons include Troy Davis, Cameron Todd Willingham, Claude Jones, Gary Graham, Leo Jones, David Spence, Joseph O'Dell, Larry Griffin, Ruben Cantu, and Carlos DeLuna.

[19] *See I Am Troy Davis: The Fight for Abolition Continues*, AMNESTY INTERNATIONAL, http://www.amnestyusa.org/our-work/cases/usa-troy-davis (last visited Aug. 6, 2013).

[20] *Remedies,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited Aug. 14, 2013).

[21] *Remedies,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited Aug. 14, 2013) (citing Life After Exoneration Program).

[22] *Remedies,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited Aug. 14, 2013).

[23] *Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation,* The Innocence Project, 2009, at 8 [hereinafter, "*Making up for Lost Time*"].

[24] *Facts on Exoneration,* RESURRECTION AFTER EXONERATION, http://www.r-a-e.org/about/facts-exoneration (last visited Aug. 14, 2013).

18. Exonerees not only have economic and legal needs, but also health care needs as many are affected by institutionalization;[25] Post-Traumatic Stress Disorder affects one-fourth of exonerees.[26] Only 10 of the 50 U.S. states' compensation laws provide for social services, and a recent report by The Innocence Project found that just 15 exonerees had accessed these services.[27] Many lack adequate access to health care, and the problem is exacerbated as exonerees are not automatically eligible for Medicaid.[28] Because exonerees often work in short-term or low-paying jobs, they are often not provided health benefits through their employment, either.[29]

19. Compensation is not guaranteed to exonerees for wrongful convictions and imprisonment, and it is a process fraught with barriers. Some states have adopted compensation statutes, which variously provide an award based on actual damages, amount of time spent wrongfully accused, targeted aid (such as an education grant or health services), or a capped sum.[30] Yet, these compensation statutes often have restrictions and fall short of an adequate reparation. Several of these statutes compensate wrongful convictions at outdated and scant amounts and cap maximum compensation. For example, New Hampshire's compensation law grants a maximum award of just $20,000 regardless of the number of years spent wrongfully imprisoned.[31] Texas' legislation grants $80,000 per year wrongfully imprisoned with no cap, but it bars an exoneree from filing a civil lawsuit.[32] Even when an exoneree successfully obtains compensation, the money may need to be redirected toward basic needs and legal fees. Kirk Bloodsworth, who was wrongfully imprisoned by the state of Maryland for nine years (two years of which on death row), applied for and received $300,000 from the Maryland Board of Public Works.[33] But most of the money awarded went toward paying back the legal fees Kirk Bloodsworth incurred by his wrongful conviction.[34]

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[25] *Making up for Lost Time,* at 7. "Institutionalization" refers to how prisoners adjust to surviving the hostile living environment conditions of a prison. *Id*.
[26] *Remedies,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited Aug. 14, 2013).
[27] *Making up for Lost Time*, at 16. The 15 exonerees may include both death sentenced and non-death sentenced individuals.
[28] *Making up for Lost Time*, at 8.
[29] *Making up for Lost Time,* at 8.
[30] *Compensation Laws*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Aug. 14, 2013); *Making up for Lost Time*, 2009.
[31] N.H. Rev. Stat. Ann. § 541-B: 14; *see also Compensation Laws,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Aug. 14, 2013); *Making up for Lost Time*, at 30.
[32] Tex. Civ. Pract. & Rem. Code § 103.001; Tex. H.B. § 1736; *see also Compensation Laws,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Aug. 14, 2013); *Making up for Lost Time*, at 30.
[33] K. Bloodsworth, Personal Communication, Aug. 15, 2013.
[34] K. Bloodsworth, Personal Communication, Aug. 15, 2013.

20. In contrast, the U.S. federal government passed The Innocence Protection Act, which grants a maximum of $100,000 per year of wrongful imprisonment on federal death row.[35] The majority of states' compensation laws, however, do not meet the U.S. federal standard of compensation.[36] This compensation does not apply to exonerees wrongfully imprisoned by states, yet these individuals are the vast majority of exonerees.

21. Compensation laws also restrict eligibility and may impose filing deadlines.[37] For example, in Tennessee and Utah, the deadline to bring a claim is one year.[38] Some states impose limitations that bar individuals from bringing claims for compensation: Alabama and Texas' compensation statutes disqualify anyone with a post-exoneration felony conviction;[39] Missouri and Montana grant awards only to persons exonerated by DNA;[40] and several states render any exoneree who entered a guilty plea as ineligible.[41] In some states, the exoneree must not have "contributed" to his or her arrest or conviction to be eligible for an award.[42] These restrictions do not reflect the factors contributing to wrongful convictions in the first place; for example, disqualification for pleading guilty fails to take into account cases where false confessions led to wrongful convictions; in one study, false confessions constituted nearly 10% of the causes behind wrongful convictions.[43]

22. Even when exonerees overcome these hurdles and successfully claim compensation, it can take years to receive the money. The average amount of time to obtain state compensation is three years.[44] But securing employment, housing, health care, and other basic needs poses an immediate challenge to these exonerees upon their release, and the support (if any) they receive upon release can be woefully inadequate. Resurrection after Exoneration reports that exonerees from Louisiana's prison system receive their possessions and $10 from the Department of Public Safety and Corrections upon release.[45] Albert Burrell was released from Louisiana's death row after serving 14 years for a crime he did not commit. Upon his

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[35] U.S. Senate, The Innocence Protection Act of 2002, 107th Cong., 2d sess., S.486, March 7, 2001.
[36] *Making up for Lost Time,* at 15.
[37] *Compensation Laws,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Aug. 14, 2013).
[38] Tenn. Code Ann. § 9-8-108; Utah Code §§ 78B-9-405, 78B-9-405; *see also Compensation Laws,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Aug. 14, 2013).
[39] Tex. Civ. Pract. & Rem. Code § 103.154; Ala. Code § 29-2-159.
[40] Mo. Rev. Stat. § 650.058; Mont. Code Ann. § 53-1-214. Montana's compensates a DNA exoneree through educational aid only. Mont. Code Ann. § 53-1-214.
[41] *Compensation Laws,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Aug. 14, 2013); *Making up for Lost Time,* 27, 29.
[42] *Compensation Laws,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Aug. 14, 2013); *Making up for Lost Time*, at 27-31.
[43] *Causes of Wrongful Convictions,* DEATH PENALTY INFORMATION CENTER, http://deathpenaltyinfo.org/causes-wrongful-convictions (last visited Aug. 20, 2013).
[44] *Making up for Lost Time*, at 17.
[45] *Facts on Exoneration*, RESURRECTION AFTER EXONERATION, http://www.r-a-e.org/about/facts-exoneration (last visited Aug. 15, 2013).

release, the state gave Albert Burrell $10 and a denim jacket that was several sizes too large for him. Albert Burrell has filed for compensation under Louisiana's compensation law, but is still waiting to receive any award 12.5 years after his release.[46]

23. Sixteen U.S. states that retain the death penalty have no compensation laws whatsoever for wrongful convictions. Arizona does not have a compensation statute, yet eight individuals have been exonerated from its death row.[47] Civil litigation is another possibility to obtain compensation where compensation laws do not exist, but this option is unavailable when prosecutors and judges are at fault because they are typically immune from these lawsuits.[48] For an exoneree to prevail against another government actor, he or she must show intentional government misconduct caused the wrongful conviction, but this is not always the case nor can it always be proven.[49] Even if the exoneree prevails in his or her civil claim, it can take years and costly litigation fees.[50]

Recommendations

24. The following recommendations are compiled from The Innocence Project's report Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation:

    a. Require U.S. states to adopt compensation legislation that provides at least $100,000 per year on death row. This compensation should be untaxed.

    b. Require U.S. states to adopt legislation that provides for appropriate legal assistance or lawyers' fees associated with filing for compensation.

    c. Require U.S. states to adopt legislation that provides exonerees with adequate and appropriate services, including housing, transportation, education, physical and mental care, employment assistance, and other services to assist with reintegration.

    d. Require U.S. states to issue an official apology for the wrongful conviction.

    Questions

    e. What measures is the United States taking to ensure adequate compensation, services, and support to death row exonerees of state-based wrongful convictions?

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[46] C. Lloyd, Personal Communication, Aug. 15, 2013.
[47] *Compensation Laws,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=166&Itemid=88 (last visited Aug. 14, 2013); *Exonerations by State,* DEATH PENALTY INFORMATION CENTER, http://deathpenaltyinfo.org/innocence-and-death-penalty#inn-st (last visited Aug. 14, 2013).
[48] *Remedies,* LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/index.php?option=com_content&view=article&id=95&Itemid=88 (last visited Aug. 14, 2013); *Making up for Lost Time,* at 12.
[49] *Making up for Lost Time*, at 12.
[50] *Making up for Lost Time*, at 13.

f. What measures is the United States taking to provide accountability for prosecutors, judges, and law enforcement who engage in misconduct that leads to wrongful convictions?

II. Racial Bias in the Imposition of the Death Penalty in the United States[51]

25. The U.S. State Report notes that, in regard to concerns about racial disparities in capital sentences, the Department of Justice implemented a new capital case review protocol in July 2011 on ways to improve the department's decision-making process for death penalty cases.[52] The U.S. State Report acknowledges, however, the overrepresentation of minorities on death row and that racial bias continues to be a serious problem in deciding whether federal prosecutors seek the death penalty.[53] Also, this problem is grounded in the fact that each of the retentionist U.S. states has considerable legal authority to decide whether capital punishment is available in any case and, if it is, the circumstances and procedures for using it.[54]

26. In those states where the death penalty is used most often, defendants in racial minority groups fare worse than white defendants. The U.S. State Department recently acknowledged in its 2013 report to the Committee on the Elimination of Racial Discrimination that it "faces challenges . . . in its provision of legal representation to indigent criminal defendants and . . . these challenges are felt acutely by members of racial and ethnic minorities."[55] Racial and ethnic disparities "continue to exist" in the criminal justice system and the use of the death penalty is still left to the individual governments of each of the 50 states.[56] This Report addresses the two most recurring indicators of racial bias in the implementation of the death penalty: (1) race of the victim and (2) race of the defendant.[57]

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[51] Although this report pertains to racial bias as a factor in U.S. death penalty cases, it is consistent with respected studies that have suggested racial bias in the American criminal justice system generally. See, for example, *World Report 2013*, published by Human Rights Watch on January 31, 2013. That report concludes that "[r]acial and ethnic minorities have long been disproportionately represented in the [U.S.] criminal justice system." HUMAN RIGHTS WATCH, WORLD REPORT 2013: EVENTS OF 2012 644 (2013).

[52] *Consideration of reports submitted by States parties under article 40 of the Covenant: Fourth Periodic Report, United States of America,* U.N. Human Rights Committee*,* Mary 22, 2012, U.N. Doc. CCPR/C/USA/4, para. 155 [hereinafter "Fourth U.S. Report"].

[53] *Id*.

[54] The Fourth U.S. Report should also be considered in the context of a report by the U.S. General Accounting Office (GAO) in 1990 following a careful study of the relationship between a defendant's race and the imposition of the death penalty among the states that permitted the death penalty. One conclusion of the GAO report at that time was: "Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty" and "race of victim influence was found at all stages of the criminal justice system . . . ." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990), *available at* http://www.gao.gov/products/GGD-90-57.

[55] *Committee on the Elimination of Racial Discrimination Report by the U.S. Department of State*, June 12, 2013, para. 62.

[56] *Committee on the Elimination of Racial Discrimination Report by the U.S. Department of State*, June 12, 2013, paras. 65 and 70.

[57] Reputable studies have also shown that racial bias continues to exist in the selection of juries in states that authorize the death penalty. G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*,

27. During the past 37 years, 80% of all persons sentenced to death have been executed for murders involving white victims, even though the numbers of white and black persons murdered are virtually equal.[58] This is a longstanding and pervasive problem: even as long ago as 1987, the U.S. Supreme Court ruled that reliable statistical evidence suggesting racial bias in the trial of any defendant could not be used to vacate a death sentence.[59]

28. In a 2013 report, the Death Penalty Information Center investigated interracial murder cases throughout the United States and found glaring racial bias. According to that report, 20 white defendants have been executed for murdering African-American victims since 1976; during the same time period, 259 black defendants have been executed for murdering white victims.[60] These data areconsistent with other recent studies. For example, a comprehensive review of the connection between the races of defendants and victims during a 10-year period in the state of California[61] concluded that 27.6% of the murder victims in California were white, but more than 80% of defendants executed had been convicted of killing white victims.[62]

29. The state of Louisiana's use of the death penalty is perhaps the starkest of all American states, although its ranking is a matter of degree. Louisiana has the highest percentage of death-row prisoners who are African American of any U.S. state.[63] One of the most decisive factors affecting who is charged with a death-eligible offense is the race of the victim. That is, the prosecution is more likely to charge and seek the death penalty when the defendant is

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85 WASH. L. REV. 425 (2010). A state court judge in North Carolina recently vacated death sentences for three African-American defendants because of clear evidence of racial bias in the selection of juries. *Report on Race and the Death Penalty*, AM. CIVIL LIBERTIES UNION, Dec. 13, 2012, http://www.aclu.org/capital-punishment/judge-finds-racial-bias-three-more-death-penalty-cases-north-carolina-under-state (last visited July 29, 2013); *see also* ALEX MIKULICH & SOPHIE CULL, LOYOLA UNIVERSITY NEW ORLEANS, DIMINISHING ALL OF US: THE DEATH PENALTY IN LOUISIANA 28 n.82 (2012). African-Americans comprise about one-third of the population of the entire State of Louisiana and almost half the population in some parishes. *Id.* at 28. Nevertheless, it is rare that more than one or two African-Americans are selected to be on juries in capital punishment trials in that state. *Id*; *Sourcebook of Criminal Justice Statistics*, HINDELANG CRIMINAL JUSTICE RESEARCH CENTER, UNIVERSITY AT ALBANY, http://www.albany.edu/sourcebook/; Tim Lyman, *Caddo (LA) Parish Report on Race, Homicides, and Prosecutions, 1988-2008* 5-9 (2011), *available at* http://ssrn.com/abstract=1743712; Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (2005); Charles Ogletree, *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 17 (2002); Glenn L. Pierce & Michael L. Radlet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LA. L. REV. 647, 670 (2011).

[58] *U.S. Supreme Court Declines to Hear Case Involving Improper Race-Base Testimony*, American Bar Association Death Penalty Representation Project, 2012, Vol. V issue #1.

[59] *McClesky v. Kemp*, 481 U.S. 279 (1987).

[60] *Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited June 2, 2013).

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

[62] *Id.* at 8; *see also* Jennifer L. Eberhardt et. al, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2005).

[63] ALEX MIKULICH & SOPHIE CULL, LOYOLA UNIVERSITY NEW ORLEANS, DIMINISHING ALL OF US: THE DEATH PENALTY IN LOUISIANA (2012), at 4.

African American and the victim is white than when the defendant is white and the victim is African American.[64]

30. People of color constitute more than half of the 3,170 people sentenced to death in the United States.[65] Black people make up only 13.1% of the U.S. population, yet constitute 42% of the total death row population.[66] Use of the death penalty in the state of Texas illustrates how defendants of color are disproportionately represented on death row:

> Over the last five years, nearly 75% of all death sentences in Texas have been imposed on people of color . . . While African-Americans comprised only 12% of the entire Texas general population, they comprise 39.8% of death row inmates.[67]

31. Black defendants in the United States face two significant disadvantages when compared to white defendants in similar cases, regardless of the analytical methods or underlying criteria. The first risk arises when the prosecuting attorney initially decides whether to charge a defendant with a capital offense. Data continue to show a pattern of prosecutors, at the time of the charging determination, being influenced, either consciously or subconsciously, by the races of the defendants and the victims. The second risk arises when, after a conviction, the death penalty actually may be imposed.

32. Discriminatory practice is not the only contributing factor to racial bias in capital punishment. Laws or lack thereof also allow racial biases to influence outcomes. Recent legal amendments in the state of North Carolina curtailed protections against racial bias in that state's death penalty system. North Carolina's 2009 Racial Justice Act had mandated that courts vacate death sentences for any defendant if evidence showed that race was a factor in the imposition of the death penalty. On June 5, 2013, however, the North Carolina Legislature repealed that Act, thus eliminating an important safeguard against North Carolina prosecutorial, judicial, and jury practices that use the race of a defendant or victim as a factor at trial and sentencing.[68]

33. On a per-capita basis, Alabama imposes the death penalty more than any other American state.[69] One contributing factor for this statistic is that Alabama law allows elected state judges to impose the death penalty by overriding a jury's sentence of life in prison; judges overturn the life sentences of approximately one-fifth of Alabama's death row inmates and resentence them to death.[70] The racial discrimination that this judicial discretion fosters is

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[64] Scott Phillips, *Status Disparities in the Capital of Punishment*, 43 L. & SOC'Y REV. 807 (2009); *see also* Thomas P. Sullivan, *The Death Penalty: 35 Years of a Failed Experiment*, THE HILL CONGRESS BLOG (June 29, 2011, 9:06 AM), http://thehill.com/blogs/congress-blog/judicial/168943-the-death-penalty-35-years-of-a-failed-experiment.
[65] *Racial Bias*, EQUAL JUSTICE INITIATIVE, http://www.eji.org/deathpenalty/racialbias (last visited Aug. 13, 2013).
[66] *Racial Bias*, EQUAL JUSTICE INITIATIVE, http://www.eji.org/deathpenalty/racialbias (last visited Aug. 13, 2013); State & County QuickFacts, United States Census Bureau, http://quickfacts.census.gov/qfd/states/00000.html (last visited Aug. 13, 2013).
[67] Texas Death Penalty Developments in 2012: The Year in Review, Texas Coalition to Abolish the Death Penalty.
[68] *Id.*; *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. TIMES, June 6, 2013.
[69] *Death Penalty Report*, EQUAL JUSTICE INITIATIVE, July 15, 2013, http://www.eji.org/deathpenalty (last visited Aug. 13, 2013).
[70] *Id.*

apparent in Alabama's death row statistics: Alabama currently has 191 prisoners on death row, and 94 of those prisoners are black.[71]

34. In addition, racial discrimination throughout charging, jury selection, and sentencing decisions contribute to a pattern of racial bias in the death penalty.[72] The result is that persons of color who murder white victims are more likely to be charged with capital offenses and sentenced to death in the United States.

Recommendations

35. The United States should undertake studies to identify the root causes and factors of racial disparities pertaining to the death penalty, with the objective of developing means to eliminate racial bias in the criminal justice system.

36. The United States should adopt all necessary measures, including a moratorium, to ensure that death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries, or lawyers.

Questions

37. What steps is the United States taking to identify patterns and causes of racial discrimination in its death penalty system?

38. What measures, if any, is the United States taking to address racial bias in the death penalty?

III. Lethal Injection Policies and Cruel, Inhuman or Degrading Treatment or Punishment

39. The ICCPR provides that "[n]o one shall be subject to torture or cruel, inhuman or degrading treatment or punishment."[73] When the death penalty is imposed, it must be carried out in a manner to cause "the least possible physical and mental suffering."[74]

40. The United States ratified the ICCPR subject to reservations, declarations and understandings, among them "[t]hat the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."[75] Accordingly, the United States interprets the ICCPR to require the same protection—no more and no less—against cruel and unusual punishment as is required by the U.S. Constitution.

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[71] Alabama Inmates Currently on Death Row, Alabama Dep't of Corrections, http://www.doc.alabama.gov/DeathRow.aspx (last visited Aug. 13, 2013).
[72] *Racial Bias,* NATIONAL COALITION AGAINST THE DEATH PENALTY, http://www.ncadp.org/pages/racial-bias (last visited Aug. 13, 2013); *Racial Bias*, EQUAL JUSTICE INITIATIVE, http://www.eji.org/deathpenalty/racialbias (last visited Aug. 13, 2013); *The Case against the Death Penalty,* ACLU, Dec. 11, 2012.
[73] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art. 7.
[74] Human Rights Committee, General Comment 20, U.N. Doc. CCPR/C/21/Add.3, para. 6.
[75] 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992).

41. In its Fourth Periodic Report, the United States reiterates recent caselaw addressing lethal injection, including *Hill v. McDonough* and *Baze v. Rees.*[76] The United States states that lower courts have rejected challenges to lethal injection protocols, which includes challenges to newer protocols that utilize new drug combinations.[77]

42. All of the 32 U.S. states that still retain the death penalty have adopted lethal injection as the exclusive or primary means of implementing capital punishment.[78]

43. Lethal injection has traditionally been administered by injecting a prisoner with three consecutive drugs: (1) sodium thiopental, a "barbiturate sedative that induces a deep, coma-like unconsciousness;" (2) pancuronium bromide, "a paralytic agent that inhibits muscular-skeletal movements and . . . stops respiration;" and (3) potassium chloride, which "interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest."[79] Proper administration of the first drug (sodium thiopental) should prevent the prisoner from experiencing pain from the paralysis and cardiac arrest caused by the second and third drugs.[80]

44. The three-drug injection procedure is intended to be a more humane alternative to older execution methods such as the electric chair or gas chamber. A number of recent executions, however, have cast the "humanity" of the procedure into doubt. The administration of the three-drug injection procedure by the state of Ohio alone demonstrates the problems that can arise. In 2006, Ohio's execution of Joseph L. Clark lasted nearly 90 minutes because prison officials had difficulties locating a suitable vein for the lethal injection.[81] In 2007, Ohio's execution of Christopher Newton lasted nearly two hours, long enough that Newton was permitted to take a bathroom break.[82] And in 2009, the execution of Romell Broom failed altogether, as Ohio technicians unsuccessfully searched for a suitable vein to inject for over two hours before finally abandoning the execution and sending Mr. Brown back to death row (where he still sits).[83]

45. Ohio is not the only state where prolonged and problematic executions have arisen. Similar problems with lethal injection procedures occur in other U.S. states. For example, Angel Diaz's 2006 execution by Florida officials lasted 34 minutes, required two rounds of

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[76] *Hill v. McDonough*, 547 U.S. 573 (2006); *Baze v. Rees*, 553 U.S. 35 (2008).
[77] Fourth U.S. Report, para. 652.
[78] *Methods of Execution*, DEATH PENALTY INFORMATION CENTER, http://deathpenaltyinfo.org/methods-execution (last visited Aug. 20, 2013).
[79] *Baze v. Rees*, 553 U.S. 35, 44 (2008).
[80] *Id.*
[81] Jim Provance & Christina Hall, *Clark Execution Raises Lethal-Injection Issues*, TOLEDO BLADE, May 4, 2006, http://www.toledoblade.com/local/2006/05/04/Clark-execution-raises-lethal-injection-issues.html (last visited July 22, 2013)
[82] Julie Carr Smyth, *Newton Execution Took Two Hours; Vein Couldn't Be Located*, THE PLAIN-DEALER, May 25, 2007, http://blog.cleveland.com/pdextra/2008/11/newton_execution_took_two_hour.html (last visited July 22, 2013)
[83] Bob Driehaus, *Ohio Plans to Try Again as Execution Goes Wrong*, N.Y. TIMES, Sept. 16, 2009, www.nytimes.com/2009/09/17/us/17ohio.html (last visited July 22, 2013).

injections to complete. It resulted in chemical burns on Diaz's arms where administrators had pushed needles through his veins into soft tissue.[84]

46. Despite the widely reported details of such horrific executions, the U.S. Supreme Court held in 2008 that the three-drug method of lethal injection does not constitute "cruel and unusual punishment" in violation of the Eighth Amendment of the U.S. Constitution.[85] In *Baze v. Rees*, two inmates on Kentucky's death row challenged the use of the three-drug injection procedure, claiming that there is a "significant risk" that the procedure would not be properly followed, which would result in severe pain in violation of the Eighth Amendment.[86] The Supreme Court ruled otherwise, holding that "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual [punishment]" under the Eighth Amendment.[87]

47. Although the *Baze* decision did not require a change to the traditional three-drug protocol, the U.S. lethal injection process has nonetheless faced upheaval over the last several years. Challenges to other U.S. states' lethal injection procedures have since been brought in other state courts and, in some cases, have halted executions pending litigation.[88] Moreover, recent upheavals with regard to drug sourcing have cast into serious doubt whether states are able to ensure that their lethal injection policies do not constitute cruel and unusual punishment.

48. New policies adopted by foreign governments and regional authorities have hindered U.S. states' ability to procure the drugs necessary to administer lethal injections. In 2010, the UK government issued export restrictions on sodium thiopental after learning that the drug was used for executions in the United States.[89] In early 2011, the Italian government requested that American pharmaceutical company Hospira Inc., the world's largest manufacturer of sodium thiopental, guarantee that any drugs it produced in Italy would not be used for executions.[90] Hospira responded it was unable to guarantee compliance and halted production of sodium thiopental altogether.[91]

49. In December 2011, the European Commission ("EC") of the EU tightened restrictions on exporting products that can be used for capital punishment.[92] The EC's so-called "Torture

[84] Victoria Gill, *The Search For a Humane Way to Kill*, BBC NEWS MAGAZINE, Aug. 7, 2012, www.bbc.co.uk/news/magazine-19060961 (last visited July 22, 2013).
[85] *Baze v. Rees*, 553 U.S. 35 (2008).
[86] *Id.* at 49.
[87] *Id.* at 50.
[88] *See State-by-State Lethal Injection,* DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Aug. 6, 2013).
[89] Dominic Casciana, *US Lethal Injection Drug Faces UK Export Restrictions*, BBC NEWS, Nov. 29, 2010, http://www.bbc.co.uk/news/uk-11865881?print=true (last visited July 22, 2013).
[90] Makkiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs From U.S. Prisons*, BLOOMBERG BUSINESSWEEK, Feb. 7, 2013, http://www.businessweek.com/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons (July 22, 2013).
[91] *Id*.
[92] Ed Pilkington, *Europe Moves to Block Trade in Medical Drugs Used in US Executions*, THE GUARDIAN, Dec. 20, 2011, http://www.guardian.co.uk/world/2011/dec/20/death-penalty-drugs-european-commission (last visited July 22, 2013).

Goods Regulation" imposes export controls on eight barbiturates, including sodium thiopental and pentobarbital.[93] "The decision [to restrict such products] … contributes to the wider EU efforts to abolish the death penalty worldwide," said EC Vice-President Catherine Ashton.[94] This policy reiterates the moral opposition of European governments to capital punishment and their resistance to further the practice in any way in the United States.

50. In addition to the policies adopted by foreign governments and the EU, the international business community has also begun taking steps to curtail its role in lethal injections. In February 2011, on the heels of Hospira's announcement that it would stop producing sodium thiopental, multinational pharmaceutical company Novartis and its subsidiary Sandoz announced they also had instructed distributors to stop selling sodium thiopental to other customers who had been importing it into the United States.[95]

51. Facing the inability to procure sodium thiopental, states began establishing alternative protocols to administer lethal injection. Instead of the traditional three-drug injection procedure, Ohio announced plans to begin administering lethal injections via a one-drug injection of the barbiturate pentobarbital.[96] Other states soon followed suit.[97] As it became known that pentobarbital was being used for lethal injection purposes, Danish manufacturer Lundbeck, the only licensed supplier of the drug in the United States at the time, announced that it would control the distribution of the drug to prevent sales to U.S. correctional facilities.[98]

52. In 2012, the state of Missouri announced that it would use propofol for a one-drug lethal injection.[99] Thereafter, German healthcare company Fresenius SE & Co. KGaA,[100] Israeli generic drug manufacturer Teva Pharmaceutical Industries Ltd,[101] and American

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[93] Makkiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs from U.S. Prisons*, BLOOMBERG BUSINESSWEEK, Feb. 7, 2013, http://www.businessweek.com/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons.
[94] Ed Pilkington, *Europe Moves to Block Trade in Medical Drugs Used in US Executions*, THE GUARDIAN, Dec. 20, 2011, http://www.guardian.co.uk/world/2011/dec/20/death-penalty-drugs-european-commission (last visited July 22, 2013).
[95] *Id.*
[96] *Ohio To Use Pentobarbital In Executions,* UPI, Jan. 31, 2011, http://www.upi.com/Top_News/US/2011/01/31/Ohio-to-use-pentobarbital-for-executions/UPI-52111296492921/ (last visited July 22, 2013).
[97] *See State by State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state-lethal-injection (last visited July 23, 2013).
[98] Jeanne Whalen & Nathan Koppel, *Lundbeck Seeks to Curb Use of Drug in Executions*, WALL ST. J., July 1, 2011, http://online.wsj.com/article/SB10001424052702304584004576419092675627536.html.
[99] Makkiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs From U.S. Prisons*, BLOOMBERG BUSINESSWEEK, Feb. 7, 2013, http://www.businessweek.com/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons.
[100] *Id.*
[101] Makkiko Kitamura, *Teva to Block Drug for U.S. Execution Use as Hospira Pressured*, BLOOMBERG, March 20, 2012, http://www.bloomberg.com/news/print/2013-03-20/teva-to-bloc-drug-for-u-s-execution-use-as-hospira-pressured.html.

manufacturer Hospira[102] announced they would take measures to prevent U.S. prisons from using the drug for lethal injections.[103] Likewise, after the state of Arkansas announced that it would use phenobarbital in its one-drug lethal injection protocol, London-based Hikma announced it would stop selling the drug to the state.[104]

53. Lethal injection in the United States has now turned into a cat-and-mouse game, with U.S. states attempting to procure execution drugs from an international business community determined to keep the drugs out of the states' possession. The end result has been a widescale reduction in the drugs available to states to perform lethal injections.[105]

54. The measures that U.S. states have taken to procure lethal injection drugs escalate concerns about the United States' already questionable ability to comply with Article 7 as states turn to unregulated and non-transparent sourcing for lethal injection drugs. Some states are obtaining drugs from compounding pharmacies, which produce drugs that are not verified by the FDA for their "quality, safety and effectiveness."[106] Other states are reportedly obtaining drugs from dubious sources. When supplies of sodium thiopental were scarce in 2010, Arizona executed Jeffrey Landrigan with drugs purchased from a pharmaceutical company operated in the back of a London driving school.[107] Nebraska and South Dakota, instead, have turned to questionable Indian drug manufacturers to source their lethal injection ingredients.[108]

55. As U.S. states increasingly turn to questionable sources, several states have adopted secrecy laws to conceal the identity of the drug supplier.[109] The Georgia State Assembly recently passed a law that classifies the identity of any person or company providing drugs for use in

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[102] Dan Stanton, *Propofol Lethal Injections Blocked as Teva and Hospira Re-Enter Market*, in-Pharma Technologist, March 26, 2013, http://www.in-pharmatechnologist.com/Processing/Propofol-Lethal-Injections-Blocked-as-Teva-and-Hospira-Re-Enter-Market (last visited Aug. 21, 2013).
[103] Makkiko Kitamura, *Teva to Block Drug for U.S. Execution Use as Hospira Pressured*, BLOOMBERG, March 20, 2012, http://www.bloomberg.com/news/print/2013-03-20/teva-to-bloc-drug-for-u-s-execution-use-as-hospira-pressured.html.
[104] UK-Based Firm Stops Selling Phenobarbital Drug to Arkansas, BBC NEWS, May 15, 2013, http://www.bbc.co.uk/news/uk-22541905 (last visited July 23, 2013).
[105] Raymond Bonner, *Death Rows Grow For Want of Lethal Drugs*, THE PHILADELPHIA DAILY NEWS, May 23, 2013, http://www.philly.com/philly/news/nation_world/Death_rows_grow_for_want_of_lethal_drugs.html (last visited July 23, 2013).
[106] The Special Risks of Pharmacy Compounding, U.S. Food and Drug Administration, http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm107836.htm (last visited Aug. 12, 2013).
[107] Andrew Hosken, *Lethal Injection Drug Sold from UK Driving School*, BBC NEWS, Jan. 6, 2011, http://news.bbc.co.uk/today/hi/today/newsid_9342000/9342976.stm (last visited July 23, 2013).
[108] Kayem Pharma under fire over supply of lethal injection drug; Lundbeck Company of Denmark also caught up in legal tussle, June 2, 2011, http://deathpenaltynews.blogspot.co.uk/2011/06/kayem-pharma-under-fire-over-supply-of.html (last visited Aug. 21, 2013).
[109] Kathy Lohr, *Where Do Drugs For Lethal Injections Come From? Few Know,* NPR, July 30, 2013, http://www.npr.org/2013/07/30/207026540/where-do-drugs-for-lethal-injections-come-from-nobody-knows (last visited Aug. 12, 2013); Abby Ohlheiser, *Texas Is Running out of Execution Drugs*, THE ATLANTIC WIRE, Aug. 1, 2013, http://www.theatlanticwire.com/national/2013/08/texas-running-out-execution-drugs/67902/ (last visited Aug. 12, 2013).

lethal injections as a "state secret."[110] Other states, including South Dakota, Arkansas, and Tennessee have also adopted secrecy laws protecting the identity of their drug sources.[111] Suppressing these suppliers' identities allows the state to withhold critical information about the drugs' effectiveness in executing a person.

56. Such sourcing lacks the transparency, regulation, and oversight needed to evaluate whether lethal injection protocols violate the right to be free from cruel or inhuman treatment or punishment. When drugs originate from sources outside of federal oversight and regulation, there is a greater likelihood of tampering, improper labeling, and diminished potency, quality, and efficacy of those drugs—factors which elevate the risk of a botched execution.

57. While the traditional three-drug protocol was ruled constitutional by the U.S. Supreme Court in *Baze*, the faulty administration of this drug protocol has unquestionably resulted in cruel and unusual punishment of various individual prisoners. In light of the recent shortages of traditional lethal injection drugs, states now seek to execute prisoners via unregulated lethal injection methods and sources, increasing the risk of cruel and unusual punishment.

58. Some U.S. states may even seek to stop executing by lethal injection altogether, and revert to execution methods that have been found to constitute cruel and inhuman treatment or punishment. Missouri's attorney general, for example, suggested that resurrecting the use of the gas chamber may be an option following the state supreme court's refusal to set execution dates while a legal challenge to the state's lethal injection protocol is pending.[112] Yet, the Human Rights Committee found in its decision in *Ng v. Canada* that execution by gas asphyxiation "constitutes cruel and inhuman treatment."[113]

Recommendations

59. The United States and U.S. states should impose a moratorium on the death penalty in light of the risk of causing cruel and inhuman treatment or punishment by lethal injection.

60. Federal legislation should be adopted to ensure that lethal injections are carried out: (1) via well-tested procedures that do not subject the executed to unnecessary pain; (2) with full oversight and transparency of the sourcing and administration of the drugs; and (3) using drugs approved by the US FDA.

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[110] Ed Pilkington, *Georgia Scrambles For Fresh Supply of Drugs to Execute Death Row Inmate*, THE GUARDIAN, July 12, 2013 http://www.guardian.co.uk/world/2013/jul/12/georgia-drugs-execute-death-row-inmate (last visited July 23, 2013).
[111] Abby Ohlheiser, *Texas Is Running out of Execution Drugs*, THE ATLANTIC WIRE, Aug. 1, 2013, http://www.theatlanticwire.com/national/2013/08/texas-running-out-execution-drugs/67902/ (last visited Aug. 12, 2013).
[112] Tony Rizzo, *Missouri's Attorney General Hints at Gas Chamber's Return*, KANSAS CITY STAR, July 3, 2013, www.kansascity.com/2013/07/03/4327272/missouri-attorney-general-koster.html (last visited July 17, 2013).
[113] *Ng. v. Canada*, Human Rights Comm. Commc'n No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), para. 16.4.

61. In full compliance with the decision of the U.S. Court of Appeals for the D.C. Circuit's decision in Cook et al. v FDA et al.,[114] the FDA should refuse admission to any drug which is found to be in violation of § 21 U.S.C. 381(a).[115]

Questions

62. What steps is the United States taking to provide appropriate transparency and information about states' lethal injection drug sources with a view to ensuring these drugs do not result in cruel or inhuman treatment or punishment?

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[114] See Cook et al., v. Food and Drug Administration et al., case number 12-5176, U.S. Court of Appeals for the D.C. Circuit.

[115] 21 U.S.C. § 381(a)(1)-(4) states:

> (1) such article has been manufactured, processed, or packed under insanitary conditions or, in the case of a device, the methods used in, or the facilities or controls used for, the manufacture, packing, storage, or installation of the device do not conform to the requirements of section 360j (f) of this title, or
> (2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or
> (3) such article is adulterated, misbranded, or in violation of section 355 of this title or the importer (as defined in section 384a of this title) is in violation of such section 384a of this title, or prohibited from introduction or delivery for introduction into interstate commerce under section 331 (ll) of this title, or
> (4) the recordkeeping requirements under section 2223 of this title (other than the requirements under subsection (f) of such section) have not been complied with regarding such article, then such article shall be refused admission, except as provided in subsection (b) of this section. With respect to an article of food, if importation of such food is subject to, but not compliant with, the requirement under subsection (q) that such food be accompanied by a certification or other assurance that the food meets applicable requirements of this chapter, then such article shall be refused admission. If such article is subject to a requirement under section 379aa or 379aa–1 of this title and if the Secretary has credible evidence or information indicating that the responsible person (as defined in such section 379aa or 379aa–1 of this title) has not complied with a requirement of such section 379aa or 379aa–1 of this title with respect to any such article, or has not allowed access to records described in such section 379aa or 379aa–1 of this title, then such article shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such article refused admission unless such article is exported, under regulations prescribed by the Secretary of the Treasury, within ninety days of the date of notice of such refusal or within such additional time as may be permitted pursuant to such regulations, except that the Secretary of Health and Human Services may destroy, without the opportunity for export, any drug refused admission under this section, if such drug is valued at an amount that is $2,500 or less (or such higher amount as the Secretary of the Treasury may set by regulation pursuant to section 1498 (a)(1) of title 19) and was not brought into compliance as described under subsection (b).. [1] The Secretary of Health and Human Services shall issue regulations providing for notice and an opportunity to appear before the Secretary of Health and Human Services and introduce testimony, as described in the first sentence of this subsection, on destruction of a drug under the sixth sentence of this subsection. The regulations shall provide that prior to destruction, appropriate due process is available to the owner or consignee seeking to challenge the decision to destroy the drug. Where the Secretary of Health and Human Services provides notice and an opportunity to appear and introduce testimony on the destruction of a drug, the Secretary of Health and Human Services shall store and, as applicable, dispose of the drug after the issuance of the notice, except that the owner and consignee shall remain liable for costs pursuant to subsection (c). Such process may be combined with the notice and opportunity to appear before the Secretary and introduce testimony, as described in the first sentence of this subsection, as long as appropriate notice is provided to the owner or consignee. Clause (2) of the third sentence of this paragraph [2] shall not be construed to prohibit the admission of narcotic drugs the importation of which is permitted under the Controlled Substances Import and Export Act [21 U.S.C. 951 et seq.].

63. What measures is the United States taking to ensure that state prison authorities do not unlawfully import or transfer drugs for use in lethal injection procedures?

64. What assurances can the United States provide that new lethal injection protocols will not result in cruel or inhuman treatment or punishment?

65. Will the federal government assist and cooperate with people sentenced to death in their efforts to determine the origins of the drugs that will be used for their lethal injections?

IV. Capital Punishment and Consular Notification

66. The United States is a party to the Vienna Convention on Consular Relations ("VCCR"), Article 36(1) of which requires parties arresting or detaining foreign nationals to inform such persons without delay of their right to have their consulate notified and, upon the foreign national's request, to so notify the consulate of the arrest or detention without delay.[116] The consulate has the right to communicate with and have access to the arrested or detained national and to arrange for his legal representation.[117]

67. It is widely accepted that foreign nationals often face significant disadvantages when interacting with the U.S. criminal justice system—disadvantages that commonly stem from language barriers, cultural barriers, and, at times, geographical barriers to evidence located in their native country that may assist their defense.[118] Consular officials help these individuals by visiting them, communicating with family members, arranging for legal representation, and assisting with investigations and evidence collection within the individual's native country. In no case is such assistance more invaluable than when a foreign national faces the death penalty.

68. The United States has repeatedly failed, and continues to fail, to comply with its VCCR consular notification responsibilities regarding foreign nationals in capital cases.[119] Paraguay, Germany, and Mexico have each brought consular notification cases against the United States in the International Court of Justice ("ICJ").[120] In the case involving 51 Mexican

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[116] Vienna Convention on Consular Relations, signed Apr. 24, 1963, effective Mar. 19, 1967, 21 U.S.T. 77, 596 U.N.T.S. 262 [hereinafter VCCR].

[117] *Id*.; *see also Honored in the Breach: The United States' Failure to Observe Its Legal Obligations Under the Vienna Convention on Consular Relations (VCCR) in Capital Cases*, REPRIEVE 2 (2012), *available at* http://www.reprieve.org.uk/static/downloads/2013_02_26_PUB_VCCR_Report_Web.pdf [hereinafter Reprieve Report].

[118] *See id*. at 2, 2 n.4.

[119] *See, e.g.*, MARK WARREN, DEATH PENALTY INFO. CENTER, FOREIGN NATIONALS AND THE DEATH PENALTY IN THE U.S., *available at* http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us (last visited May 2, 2013); Reprieve Report, *supra* note 87, *passim*; Bruce Swartz, Deputy Assistant Att'y Gen., Crim. Div., Address Before the S. Judiciary Comm. (July 27, 2011), *available at* http://www.justice.gov/criminal/pr/testimony/2011/crm-testimony-110727.html ("Despite the fact that these [consular notification] obligations already exist, instances in which notification is not provided continue to occur").

[120] *See Case Concerning the Vienna Convention on Consular Relations* (*Paraguay v. United States*), 1998 I.C.J. 5 (Nov. 10) (alleging the United States failed to fulfill its VCCR obligations in the case of Paraguayan national, Angel Breard, who had received a death sentence in the State of Virginia, but dismissed at Paraguay's request following execution of Breard); *LaGrand Case* (*Germany v. United States*), 1999 I.C.J. 1 (Mar. 3) (alleging the United States

foreign nationals ("*Avena*"), the ICJ ordered the United States to provide review and reconsideration of the convictions and sentences of the foreign nationals covered by such judgments.[121]

69. Following the *Avena* decision, the United States withdrew from the optional protocol establishing ICJ jurisdiction over VCCR disputes involving the United States, thereby foreclosing the ability of other countries to pressure the United States to comply with its obligations by bringing cases in the ICJ.[122]

70. In response to *Avena*, President George W. Bush issued a Memorandum directing state courts to give effect to the ICJ decision.[123] The State of Texas refused to review the case of death row inmate Jose Medellin, and Medellin petitioned the United States Supreme Court for relief.[124] The Court held that, without implementing legislation, the *Avena* decision was not automatically binding domestic law, and that the President did not have the authority to order states to bypass their procedural rules and comply with the ruling of the ICJ.[125] Thereafter, on August 5, 2008, Texas executed Medellin without first reviewing his case as directed under *Avena*.[126] Subsequently, Texas also executed Humberto Leal Garcia, another *Avena* foreign national, on July 7, 2011.[127]

71. Currently, foreign nationals sit on the death rows of 15 states,[128] with California, Florida, and Texas collectively holding 74% of the reported total.[129] To date, only state courts in Oklahoma and Nevada have fully applied the ICJ's requirement of 'review and reconsideration.'[130] Most of the remaining jurisdictions strictly apply procedural rules that

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failed to fulfill its VCCR obligations with respect to German foreign nationals Karl and Walter LaGrand, who were subsequently executed before the ICJ's judgment was issued); *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. United States*), 2004 I.C.J. 128 (Mar. 31) [hereinafter *Avena*].

[121] *Avena*, *supra* note 90, at 64. In *Avena*, the Mexican government alleged that the United States had failed to comply with Article 36 of the VCCR in 52 separate cases involving Mexican nationals who had been convicted and sentenced to death. The ICJ held that the United States had violated the Vienna Convention in 51 of the 52 cases.

[122] Letter from Condoleezza Rice, U.S. Sec'y of State, to Kofi Annan, Sec'y-Gen. of the U.N. (Mar. 7, 2005).

[123] Memorandum from President George W. Bush to the Att'y Gen., Compliance with the Decision of the I.C.J. in *Avena* (Feb. 28, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html.

[124] *See Medellin v. Texas*, 552 U.S. 491, 498 (2008).

[125] *See id*. at 506, 530-32.

[126] *See The Issue of Foreign Nationals in the Courts*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/medellin-v-texas (last visited May 4, 2013).

[127] *See id*.

128 *See Reported Foreign Nationals Under Sentence of Death in the U.S.*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW (last visited May 4, 2013) [hereinafter DPIC STATISTICS].

[129] *See* DPIC STATISTICS, *supra* note 98.

130 *See Torres v. State,* 120 P.3d 1184, 1190 (Okla. Crim. App. 2005) (finding that Torres was actually prejudiced by the failure to inform him of his rights under the VCCR but that no relief was required because the Governor of Oklahoma had already granted him clemency and limited his sentence to life without the possibility of parole); *Gutierrez v. State*, No. 53506, 2012 Nev. Unpub. LEXIS 1317, at *4-6 (Nev. Sept. 19, 2012) (finding Gutierrez "arguably suffered actual prejudice due to the lack of consular assistance" and remanding the case for an evidentiary hearing to determine the matter); *see also* Sandra Babcock, *Nevada's Supreme Court Upholds ICJ Ruling on Consular Rights of Mexicans*, DEATH PENALTY WORLDWIDE (Sept. 25, 2012, 5:04 AM),

prevent death-sentenced foreigners from receiving meaningful and unfettered review of VCCR violations.[131] Moreover, Texas in the *Medellin* case affirmatively disclaimed any responsibility to ensure that the United States' international legal obligations are fulfilled with respect to the foreign nationals on its death row.[132]

72. Since the U.S. Supreme Court has already held that the *Avena* decision is not binding on states without federal legislation,[133] unless the courts of each state that has the death penalty independently recognize the rights of foreign nationals to meaningful judicial review and remedies for VCCR consular notification violations[134] (an unlikely possibility in light of Texas' actions in *Medellin)*, federal legislation remains as the only potential mechanism to ensure that the United States complies with its international obligations by providing access to effective remedies for Article 36 violations.[135]

73. In 2011, Senator Patrick Leahy introduced Senate Bill 1194, the Consular Notification Compliance Act of 2011, in the U.S. Senate. The Act would have required all U.S. jurisdictions to comply with Article 36 of the VCCR and would have provided for federal court review of any claim of an Article 36 violation by anyone sentenced to death in a state or federal court.[136] Despite support from President Obama's administration,[137] the bill died in committee. Since then, no similar federal legislation has been introduced in either house of the U.S. Congress. The U.S. Department of State did include proposed legislative language in the budget it sent to Congress for consideration for fiscal year 2014. This legislation would implement *Avena*'s review and reconsideration mandates and provide redress for violations of VCCR consular notification rights of individuals charged with capital offenses.[138] On July 23, 2013 the Senate Appropriations Committee included the implementing language in the fiscal year 2014 Senate Foreign Operations bill (for the second year in a row). In its current form, the proposed legislation is remedial rather than preventative, as it focuses on remedies for existing violations rather than improving future compliance with Article 36. The prospects of Congress enacting the legislation are questionable.[139]

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http://blog.law.northwestern.edu/cihr/2012/09/nevadas-supreme-court-upholds-icj-ruling-on-consular-rights-of-mexicans.html (last visited May 4, 2013).

[131] In 2006, the U.S. Supreme Court upheld the application of state procedural barriers to foreclose merits review of Article 36 claims that were not raised in a sufficiently timely manner. See *Sanchez -Llamas v. Oregon*, 548 U.S. 331, 360 (2006) (holding that U.S. states may subject Article 36 claims "to the same procedural default rules that apply generally to other federal-law claims). See also Mark Warren, *Understanding the Sanchez-Llamas Decision*, Foreign Nationals, Consular Rights, and the Death Penalty, http://users.xplornet.com/~mwarren/sanchezllamas.html (last visited Aug. 14, 2013).

[132] *See Medellin v. Texas*, 552 U.S. 491, 498 (2008).

[133] *See* Medellin v. Texas, 552 U.S. 491, 498 (2008).

[134] *See Medellin*, 552 U.S. at 536-37 (Stevens, J., concurring) (indicating that the states could voluntarily adhere to the mandates set forth in *Avena*).

[135] *See* Medellin v. Texas, 552 U.S. 491, 498 (2008).

[136] S. 1194, 112th Cong. §§ 2, 4 (2011).

[137] *See, e.g.*, Swartz, *supra* note 89; Harold Hongju Koh, Legal Advisor U.S. Dept. of State, Remarks at Georgetown University Law Center (Oct. 17, 2012).

[138] U.S. DEPT. OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION, VOLUME 1: DEPT. OF STATE OPERATIONS (2013).

[139] The United States Judicial Conference's Committee on Rules of Practice and Procedure has proposed amendments to the Federal Rules of Criminal Procedure that would require federal courts to inform foreign

74. In the United States' Fourth Periodic Report, the United States asserts that it is actively exploring "options for giving domestic legal effect to the Avena judgment, including pursuing legislation to implement that judgment. The United States asserts that it "fully supports" the adoption of the Consular Notification Compliance Act of 2011, S. 1191, and is committed to its timely enactment.[140] The United States emphasizes its outreach efforts to inform street-level officials of the country's VCCR consular notification obligations via a Consular Notification and Access Manual, training seminars, and other training materials.[141] While advancing awareness of consular notification and access is important, such efforts have not resulted, and are not likely to result, in 100% compliance with the United States' obligations. In fact, as discussed further in paragraph 77 below, available statistics show that current compliance with VCCR consular notification obligations is woefully inadequate. Moreover, considering that compliance can mean the difference between life and death for foreign nationals facing the death penalty,[142] anything short of 100% compliance is unacceptable. Reliance on voluntary compliance schemes is inadequate.

75. Going forward, there is a need—independent of the remedial aspects of Article 36 violations—to ensure future compliance with Article 36. Three U.S. states have laws that address consular notification rights. California amended its penal code to require notification of consular right for detained foreigners within three hours of arrest.[143] Oregon mandates police who detain a foreigner for mental illness must inform the foreigner of the right to communicate with his or her consulate, but it has no such guarantee subsequent to criminal arrests, aside from a law enforcement duty to understand the VCCR requirements and the situations in which they would apply.[144] In 2000, Texas issued a magistrate's guide to Article 36 requirements, recommending that when "foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified" and that courts offer at arraignment "without delay, to notify the foreign national's consular officials of the arrest/detention."[145]

76. These measures do not always guarantee foreigners effective access to their consulate and therefore they do not comply with Article 36. Texas has insisted that procedurally defaulted VCCR claims (where defendants are assumed to have waived their right to object to VCCR violations because of a failure to raise that issue at the appropriate time, at the appropriate stage of proceedings, or using the appropriate procedure) cannot be reviewed, thus

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nationals of their consular rights at the detainee's first appearance in court. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 202-12 (2012). Amendments to this effect have been pending since 2010. If approved, this rule change would apply to foreign nationals appearing in federal court, but it would not apply in state courts.

[140] Fourth U.S. Report, para. 158.

[141] Fourth U.S. Report, para. 159.

[142] *See* DPIC STATISTICS, *supra* note 72 ("[T]he available data indicates that timely consular assistance significantly reduces the likelihood that death sentences will be sought or imposed on foreign nationals facing capital charges.").

[143] The Penal Code of California, Arts. 834(c), 851.5.

[144] OR.REV.STAT. ch. 426.228 (9)(a), ch. 181.642(2) (2007).

[145] Office of the Attorney General of Texas, Magistrate's Guide to Consular Notification under the Vienna Convention (2000), pp. 7-9.

foreclosing relief for most death-sentenced foreigners in that state. Also, Florida courts have generally not recognized Article 36 violations as cognizable claims. Florida amended its law in 2001 so that the government's failure to provide consular notification "shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national's discharge from custody."[146]

77. The statistics for compliance with VCCR consular notification and access requirements reflect the ineffectiveness of the actions the United States has taken thus far to meet its obligations. According to the Death Penalty Information Center ("DPIC"), as of July 2, 2013, 143 foreign nationals remain under sentence of death in the United States.[147] In only three of those cases does the DPIC have evidence that consular rights were provided by authorities without delay, while in at least 81 cases, a consular rights violation was raised in court proceedings or otherwise reported. In fact, the DPIC reports only seven cases of complete compliance with Article 36 requirements out of more than 160 reported death sentences (including those executed, reversed on appeal, or exonerated and released). Statistics cited in a report by Reprieve are consistent with the DPIC's findings.[148] Of the 102 foreign nationals on death row in various U.S. states about whom Reprieve was able to collect undisputed data, it found VCCR consular notification compliance in just five cases (or non-compliance in 95.1% of cases). Moreover, Reprieve reported that of the six foreign nationals on federal death row, it had data in four cases, and in only one of those four had the federal government complied with VCCR consular notification obligations, despite the existence of federal regulations requiring compliance.[149] Reprieve reports only seven death row prisoners received VCCR notice, and in one case a federal judge ruled such notice to be legally inadequate. No individual state was found to have adequately complied with VCCR consular notification requirements.

78. Since the ICJ's 2004 ruling in *Avena*, the United States has executed seven foreign nationals, only one of whom was informed by authorities upon arrest of his consular rights.[150] Further, according to the DPIC, three foreign nationals on Texas' death-row are facing possible execution in the near future. The state of Texas is threatening to execute Mexican national Edgar Tamayo, who has not received the ICJ-mandated review and reconsideration, as early as January 2014. Without federal legislation requiring Texas and other states holding foreign nationals on death row to comply with the ICJ's review and reconsideration mandate, additional individuals will die without knowing whether consular notification could have saved their lives or set them free. Further, without federal legislation implementing the VCCR consular notification and access rights of Article 36, it is likely that additional

[146] FLA.STAT. ch. 901.26 (2008), Arrest and detention of foreign nationals.
[147] *Id*.
[148] *See* Reprieve Report, at 1.
[149] *See* 28 C.F.R. § 50.5 (2012).
[150] *See* DPIC STATISTICS, *supra* note 98. Of the seven foreign nationals executed since the *Avena* decision, three were from Mexico, two were from Cuba, one was from Honduras and one was from Jamaica. In five of the seven cases, Texas was the executing state. The other two cases were in Virginia and Florida, respectively. Only Angel Maturino Resendiz, a Mexican foreign national executed by the State of Texas, reportedly received information regarding consular rights without delay after arrest as required under the VCCR.

individuals will be placed on death row without having the opportunity to exercise their VCCR consular notification rights.

Recommendations

79. Foreign nationals on death row must receive the review and reconsideration of their convictions and sentences mandated by the ICJ's decision in *Avena*. Other foreign nationals should be notified of their consular notification rights in a timely manner as required under Article 36 of the VCCR. The Committee should consider the following recommendations, adapted from the American Bar Association, when responding to the Fourth Periodic Report of the United States:[151]

    a. The Obama Administration and U.S. Congress should undertake all necessary measures to fully comply with the ICJ *Avena* decision, including by passing implementing legislation. The Obama Administration should also ensure that all individuals on federal death row receive the review and reconsideration mandated under *Avena* in cases where VCCR consular notification and access was not previously accorded under Article 36.

    b. The Obama Administration and U.S. Congress should acknowledge the authority of the ICJ to adjudicate disputes over VCCR interpretation and related legal questions. They should take steps to confer binding force on ICJ judgments to which the United States is party.

    c. The Obama Administration, U.S. Congress, and U.S. states and territories should take measures to ensure compliance with Article 36 requirements, i.e. to provide timely consular information, notification, and access to arrested or detained foreign nationals. Such measures include adopting legislation to transpose Article 36 into law that: ensures a detained or arrested foreign national is advised without delay of his or her right to communicate with his consulate; that the U.S. or U.S. state officer then informs the appropriate official in that agency if the foreign national desires consular communication; and adopt legislation that allows a defendant's claim of an Article 36 violation to override procedural default rules that would exclude such claims.

    d. The Obama Administration, U.S. Congress, and U.S. states and territories should adopt policies and protocols to promote compliance with Article 36, including: making advisement of the rights under Article 36 a part of booking protocols for foreign nationals; ensuring that judicial officers notify foreign national defendants at a first appearance about a the rights under Article 36; undertaking measures to disseminate policies and protocols to law enforcement on federal, state, and local levels; training for law enforcement, prosecutors, defense attorneys, and judges on their responsibilities under Article 36; ensuring that officials conduct mandatory notification for foreign nationals of countries on the mandatory notification list.

[151] The American Bar Association's Sections of Litigation, Criminal Justice, Individual Rights and Responsibilities, and International Law, Death Penalty Representation Project, and Commission on Immigration have adopted these recommendations in a Report to the House of Delegates, available at http://www.americanbar.org/content/dam/aba/migrated/Vienna_Convention_on_Consular_Relations_Article_36__2.authcheckdam.pdf.

e. Congress and the Obama Administration should impress upon state authorities the critical importance of the reciprocal rights United States citizens enjoy while in foreign countries that are signatories to the VCCR.[152] For example, the VCCR consular notification and access rights of U.S. citizens in foreign countries may be jeopardized if other signatories respond to the United States' noncompliance by declining to comply themselves.

Questions

80. What guarantees can the United States provide to ensure that it will pass legislation to implement the *Avena* decision?

81. What steps is the United States taking to ensure that it and U.S. states adopt policies and protocols to promote compliance with Article 36 of the VCCR?

82. How has the United States responded to the American Bar Association's recommendations on implementation of the *Avena* decision?

V. Death-eligibility for non-triggermen lacking intent to kill

83. The United States continues to permit capital punishment for non-triggermen, being defendants who did not kill, attempt to kill or have any intention to kill.

84. The ICCPR provides that "[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes."[153]

85. The United States ratified the ICCPR. There are no reservations, declarations and understandings which relate directly to Article 6(2). It is therefore understood that the United States accepts that the death penalty should only be applied to 'the most serious crimes'.

86. The phrase 'the most serious crimes' has been interpreted to mean intentional crimes which involve lethal or extremely grave consequences. This was stipulated by the 'Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty' published by the Economic and Social Council ('ECOSOC') in 1984.[154] Although the Safeguards are not binding, they have been endorsed by the UN General Assembly, indicating strong international support.

87. Similarly, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in his 2012 report to the UN General Assembly[155] reminded States of the stringent constraints under which the right to life may be infringed under the ICCPR and how the

[152] *Id*.
[153] International Covenant on Civil and Political Rights, Art. 6(2).
[154] *Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty*, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984), para. 1.
[155] Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Addendum, Follow-up to country recommendations – United States of America, A/HRC/20/22/Add.3

statute envisaged the progressive restriction of the death penalty. In particular, the Special Rapporteur found that only intentional killing fits the definition of 'most serious crimes'[156], supporting the ECOSOC interpretation and further raising the interpretive threshold.

88. The current threshold adopted by United States' jurisprudence does not follow the international recommendation. In 1982, the United States Supreme Court appeared to implement a categorical bar for non-triggermen, finding death to be a disproportionate sentence for the class of defendants who 'did not kill, attempt to kill, and did not intend to kill.'[157] The Court followed earlier precedent in reaching the decision that unintentional harm constituted a lower level of culpability than intentional harm.[158] In addition the Court found no support for the so-called deterrent and retributive effects of the death penalty where intention is lacking.

89. The decision was confused by a later ruling in 1987 which permitted a jury the discretion to sentence to death a felony murder accomplice acting without intent to kill.[159] Not only does this contradict the categorical bar already established by earlier precedent, but it goes against a rising national consensus and strong international opinion opposing death-eligibility for non-triggermen.

90. National consensus supporting a categorical bar exists within the United States. Thirty three jurisdictions have made legislative or judicial decisions against the use of the death penalty for non-triggermen lacking intent to kill.[160] Only ten jurisdictions follow the 1987 decision with a further nine authorising the death penalty for non-triggermen where they were complicit or had knowledge that lethal force would be used. Despite this apparent incline towards the earlier Court decision, the lack of clarity in the law creates confusion, particularly in lower courts, and permits the possibility of decisions which violate international rules by permitting the execution of non-triggermen. With this in mind, the United States should abolish the death penalty for non-triggermen to conform with international practice and, indeed, its own jurisprudence. The slide towards a more expansive scope for the death penalty should be arrested and this, clearly violative, category should be removed.

91. The individualised approach adopted by the later Court ruling carries a strong risk of disproportionate sentencing and leads to results which breach article 6(2) of the ICCPR. Similar individualised approaches have subsequently been overruled in favour of categorical bars in the context of juveniles[161] and the mentally retarded[162].

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[156] *Id.* at Paragraph 23.
[157] *Enmund v Florida,* 458 U.S. 782, 794-96 (1982)
[158] *Id.* at 798.
[159] *Tison v. Arizona,* 481 U.S. 137 (1987)
[160] Joseph Trigilio & Tracy Casadio, *Executing those who do not kill: A categorical approach to proportional sentencing*, 48 AM. CRIM. LAW REV. 1371 (2011). Statistics updated and amended against the figures listed on the Death Penalty Information Center at https://deathpenaltyinfo.org.
[161] *Roper v. Simmons,* 543 U.S. 551 (2005).
[162] *Atkins v. Virginia,* 536 U.S. 304 (2002).

92. The ICCPR is premised on the concept that, inherent in protecting all human beings' right to life, is to work toward abolition of the death penalty and capital punishment worldwide. Despite ratification, some jurisdictions within the United States are clearly acting in breach of the provisions of the ICCPR.

Recommendations

93. Require the United States to overturn the ruling in *Tison v Arizona* and make clear that juries should not be granted the discretion to sentence non-triggermen to death.

94. Require the United States to implement a categorical bar on death-eligibility for 'non-triggermen' defendants who do not kill, nor intend to kill, nor attempt to kill.

95. Require the United States to review cases of non-triggermen currently on death row.

Questions

96. What steps are the United States taking to ensure non-triggermen lacking intent to kill are not subject to disproportionate sentencing?

97. What steps are the United States taking to ensure that all domestic courts are aware of the interpretation of article 6(2) of the ICCPR to mean that intent is required in the context of sentencing an offender to death?