

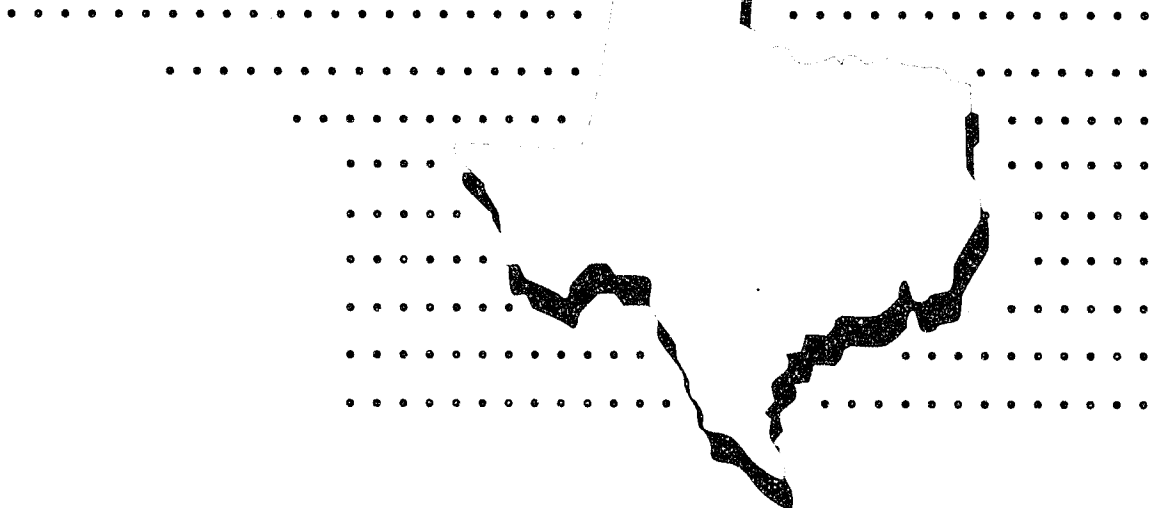
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# The Future of the **DEATH PENALTY** in the U.S.

DEATH PENALTY INFORMATION CENTER

APR 1991

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**A Report by the Death Penalty  
Information Center**

# The Future of the Death Penalty in the United States: *A Texas-Sized Crisis*

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*"[T]he scandalous state of  
our present system of  
capital punishment will  
cast a pall of shame over  
our society for years to  
come. We cannot let it  
continue."*

**-Justice Thurgood Marshall**

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## **Executive Summary**

Texas is the nation's foremost executioner. It has been responsible for a third of the executions in the country and has carried out two and a half times as many death sentences as the next leading state. Death warrants are being signed at an unmanageable pace, yet the Texas death row is bulging with unprecedented numbers of inmates. But this accelerated form of justice comes at a price. The rest of the country should heed the warning of the Texas experience before it embarks on a wholesale expansion of the death penalty.

The death penalty in Texas is in a state of crisis. Numerous death penalty convictions have been tainted by overzealous prosecutions and the use of perjured testimony. State paid medical "experts" make unreliable predictions about defendants' future dangerousness while other doctors simply lie about tests they never performed. Six innocent people have been sentenced to death and later released since 1987. The race of the defendant and victim play a major part in which cases are selected for the death penalty. Legal representation of indigent defendants at trial is frequently incompetent, and representation for appeals is often non-existent. And the costs of the death penalty in Texas are in the hundreds of millions of dollars with no end in sight.

And yet, Texas has little to show for all this expense and the sacrifice of judicial due process. During the period when Texas

rose to become the nation's leading death penalty state, its crime rate grew by 24% and its *violent* crime increased by 46%, much faster than the national average. Texas leads the country in numbers of its police officers killed and more Texans die from gunshot wounds than from car accidents.

But Texas's death penalty problems are certainly not unique. Many states with large death rows have also been plagued by prosecutorial misconduct, innocent defendants sentenced to death, racism in the application of justice, inadequate representation, and the high costs of the death penalty. Forty-eight defendants have been released from death row since capital punishment was reinstated after evidence of their innocence was discovered. Half of the nation's death row is made up of minorities and almost all capital cases involve white victims.

Many in America are pushing for a faster pace and a wider use of the death penalty on both the state and federal levels. Texas is a paradigm of what can happen under such an expansion.

Some politicians and law enforcement officers in Texas are beginning to have second thoughts about their state's practice of the death penalty. While people want to address the problem of crime, they also want solutions that really work. Nationally, there should be a careful examination of death penalty justice in Texas before we embrace an expansion of executions as an answer to crime.

*When in Gregg v. Georgia the Supreme Court gave its seal of approval to capital punishment, this endorsement was premised on the promise that capital punishment would be administered with fairness and justice. Instead, the promise has become a cruel and empty mockery. If not remedied, the scandalous state of our present system of capital punishment will cast a pall of shame over our society for years to come. We cannot let it continue.*

-Justice Thurgood Marshall, 1990<sup>1</sup>

*From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated to concede that the death penalty experiment has failed.*

-Justice Harry Blackmun, 1994<sup>2</sup>

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### Introduction

Between 1967 and 1977, executions in the United States were halted as evidence of racial injustice and arbitrariness in the use of the death penalty mounted. When most states revised their capital punishment laws, the Supreme Court allowed the death penalty to resume in 1976. But this approval inaugurated a new period of experimentation regarding the application of the death penalty. In the eyes of many, including Justice Blackmun who oversaw this entire critical period of death penalty history, that experiment has failed to meet even the minimal standards of fairness and justice. And nowhere are these failings more evident than in the state of Texas.

No other state comes close to the number of executions being carried out in Texas. It has put to death more than twice as many inmates as any other state since the death penalty was reinstated. In 1993 alone, Texas accounted for

more than three times as many executions as any other state and carried out almost half of the death sentences in the entire country.

The accelerated pace of executions and the disturbing number of inmates facing death without legal representation in Texas has drained both the state's resources and the ability of the defense bar to adequately respond. At the same time, the political pressure to achieve even more death sentences and more executions has frequently given due process a back seat.

But the size and problems of capital punishment in Texas are not unique to that state. The United States is perched on the precipice of a wholesale expansion of the death penalty. Before it takes the plunge, the country should look at Texas' experience. The warehousing of hundreds of people awaiting execution, half of whom are minorities, the constant signing of death warrants, the grisly spectacle of

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*The United States is perched on the precipice of a wholesale expansion of the death penalty. Before it takes the plunge, the country should look at Texas' experience.*

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weekly executions, and the erosion of due process by the relentless press to execute will be much more common in the years ahead if the United States chooses to follow the Texas model. The problems which Texas has been experiencing in its rise to the position as the nation's foremost executioner are already emerging in other states throughout the country.

This report will look at various dimensions of the death penalty crisis in Texas:

- The examples of official misconduct and resulting mistaken convictions;
- The evidence of racism infecting the application of the death penalty;
- The crisis in death penalty representation which serves to

perpetuate Texas' death penalty problems.

- The absence of clemency as a realistic remedy to prevent wrongful executions; and
- The way in which Texas' emphasis on the death penalty interferes with addressing the larger problem of crime.

At each step of the way, the report will look at the **national implications** of what is happening in Texas. It will identify the extent to which the Texas death penalty is likely to be mirrored in the rest of the United States in the near future. Finally, the report will point to the signs of official disillusionment with the death penalty in Texas. The death penalty crisis in Texas should be a warning to our entire country as we struggle to respond to the national problem of crime.

## **The Death Penalty in Texas: A State of Crisis**

To get an idea of the size of the death penalty in Texas, it is instructive to look at what the death penalty in the entire country would be like today if every state had proportionately followed Texas' lead.

In 1993 alone, there would have been 250 executions, one for every business day of the year and the largest number of executions in the country's history. In the last ten years, the U.S. would have executed over 1,000 people. The nation's death row would house more than 5,300 condemned individuals. The national cost for the death penalty would be at least two billion dollars, with much more expense to come. The courts of appeals and the Supreme Court would be deluged with petitions from condemned inmates, while at the same time hundreds of inmates would have no attorney as their execution dates approached. Meanwhile, all of these executions would have done nothing to lower the nation's murder rate.<sup>3</sup>

In achieving this proficiency in executions, Texas has sacrificed the pursuit of justice. It was probably no coincidence that Justice Blackmun chose a Texas case to condemn the death penalty. Justice Thurgood Marshall had earlier warned that the entire country was in similar

danger because of the death penalty: "[T]he scandalous state of our present system of capital punishment will cast a pall of shame over our society for years to come."<sup>4</sup> As the nation moves toward an even greater expansion of this practice, it should consider whether capital punishment is worth the mantle of such a pall of shame.

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### **1. Official Misconduct: The Death Penalty With A Vengeance**

Texas has pursued the death penalty with a vengeance. Prosecutors and politicians have staked their careers on getting people executed. Unfortunately, such political grandstanding results in more than rhetoric -- individual rights have been sacrificed and innocent people have been sent to death row.

This phenomenon is certainly not unique to Texas, but Texas politicians have campaigned shamelessly on the strength of their commitment to ever more executions. In the 1990 gubernatorial race, former Governor Mark White portrayed

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*"[T]he scandalous state of our present system of capital punishment will cast a pall of shame over our society for years to come."*

**-Justice  
Thurgood Marshall**

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his "toughness" by walking through a display of large photos of people executed during his term, while Attorney General Jim Mattox insisted that he was the one who should be given credit for the many executions under his watch. And the Republican candidate, Clayton Williams, claimed that his proposed laws to expand the death penalty were "the way to make Texas great again."<sup>5</sup>

The end result of all this political posturing was a spoof of Texas on "Saturday Night Live" and the election of Ann Richards as governor. Governor Richards was the least vociferous of the candidates on the death penalty but has nevertheless presided over a dramatic increase in the pace of executions in Texas.

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### **Convicting the Innocent**

Among elected state prosecutors, death penalty rhetoric has sometimes spilled over into serious abuses in order to secure a death sentence. Two of the most famous Texas examples of this misconduct involved Randall Dale Adams and Clarence Brandley, both of whom were released from Texas' death row after years of struggle to prove their innocence. Adams' story was eloquently told in the award winning movie, *The Thin Blue Line*, and Brandley's struggle with Texas racism is related in Nick Davies' book, *White Lies*.

The original convictions of Adams and Brandley were not

simply the product of honest prosecutorial mistakes. When Randall Dale Adams had his murder conviction unanimously overturned by the Texas Court of Criminal Appeals, Judge M. P. Duncan sharply castigated the prosecution: "[T]he State was guilty of suppressing evidence favorable to the accused, deceiving the trial court during the applicant's trial, and knowingly using perjured testimony."<sup>6</sup>

Similarly, when Texas Special District Judge Perry Pickett reviewed Clarence Brandley's conviction in 1987, he concluded that the state's investigative procedure was "so impermissibly suggestive that false testimony was created, thereby denying . . . due process of law and a fundamentally fair trial."<sup>7</sup> Furthermore, the state had "wholly ignored any evidence or leads to evidence that might prove inconsistent with their premature conclusions that Brandley had committed the murder. The conclusion is inescapable that the investigation was conducted **not to solve the crime, but to convict Brandley.**"<sup>8</sup>

In their zeal to obtain capital convictions, Texas prosecutors have made wide use of medical "experts" selected because of their willingness, in case after case, to parrot the exact words the prosecutor needs to get a conviction. One such "expert" is Dr. James Grigson -- or "Dr. Death," as he came to be known.

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*"The State was guilty of suppressing evidence favorable to the accused, deceiving the trial court during the applicant's trial, and knowingly using perjured testimony."*

**-decision overturning Randall Dale Adams' conviction**

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## Dr. Death, I

In Texas, jurors are required to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."<sup>9</sup> Not only is it difficult for a lay person to make such a judgment, it is also impossible for professionals. Naturally, a jury would give considerable weight to a state psychiatrist who unhesitatingly predicts with scientific certainty that the person sitting in front of them will invariably kill again if he<sup>10</sup> is allowed to live.

Dr. James Grigson offered just such predictions in at least 124 death penalty cases, 115 of which resulted in death sentences.<sup>11</sup> Dr. Grigson traveled the plains of Texas offering his testimony in exchange for sizable fees. At first, Grigson would personally examine the defendant, perhaps for 90 minutes. Based on this cursory interview, Dr. Grigson would then be asked by the prosecutor in court:

*Can you tell us whether or not, in your opinion, having killed in the past, he is likely to kill in the future, given the opportunity?*

Grigson would reply:

*He absolutely will, regardless of whether he's inside an institutional-type setting or whether he's outside. No matter where he is, he will kill again.<sup>12</sup>*

Grigson made these same predictions about Randall Dale Adams, despite Adams' having no history of violence. The fact that Adams was exonerated of all charges and was freed from prison a number of years ago has done nothing to sway Grigson's certainty about his predictions.<sup>13</sup>

In later cases, Grigson would offer his absolutely certain view of the future without even interviewing the defendant. He would simply listen to the prosecutor's description of the defendant's crime and background and then offer the conclusion that such a person would certainly kill again, no matter what the setting.

The American Psychiatric Association has unequivocally condemned the process that Dr. Grigson has used so liberally. "[P]sychiatric testimony of future dangerousness impermissibly distorts the fact-finding process in capital cases,"<sup>14</sup> they said in a brief to the Supreme Court.

Moreover, empirical studies have shown the inaccuracies of predicting future dangerousness. One study in Texas examined 92 former death row prisoners whom juries had sentenced to death because of their future dangerousness. For various reasons, these inmates had their sentences changed from death to life imprisonment. The study concluded:

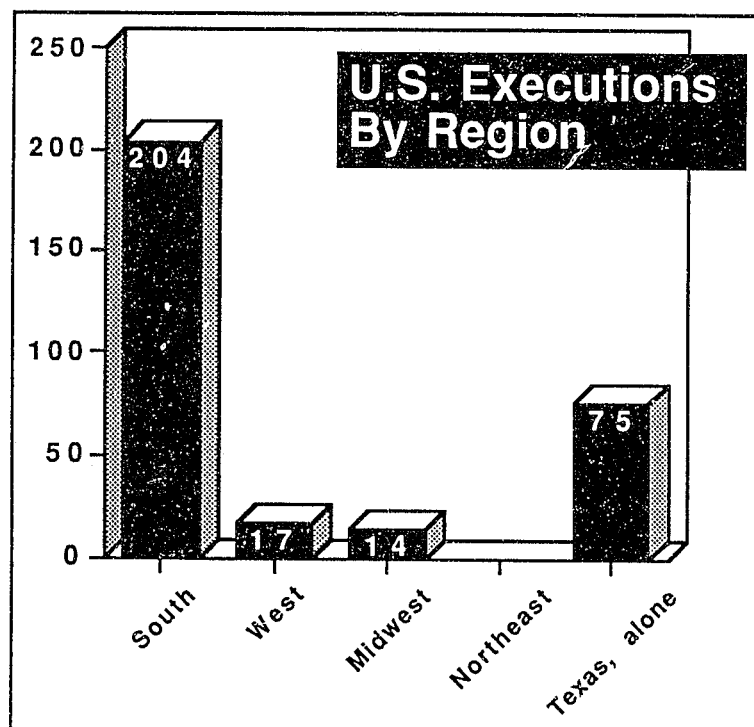
Overall these former death row prisoners were not a disproportionate threat to the institutional order, other inmates, or the custodial staff. Indeed, their total rate of assaultive institutional misconduct was lower than those of both the capital murder offenders who were given a life sentence [to begin with] and the general prison population.<sup>15</sup>

that the defendant must serve 40 years before even being considered for parole. But jurors are told only that their alternatives are the death penalty or a life sentence. They are left with their erroneous assumptions that a life sentence will allow a dangerous murderer to be released in 10 years or less.<sup>17</sup>

## Dr. Death, II

Another critical element of the prosecution's case in a capital trial is proof that the victim's death resulted from the defendant's violent actions. To tie that knot, many prosecutors in Texas have utilized a pathologist by the name of Ralph Erdmann, who has also earned the name "Dr. Death." Erdmann received his medical degree in Mexico in the 1950s and traveled to 40 Texas counties supposedly performing 400 autopsies a year in capital and non-capital cases. Lubbock County alone paid Dr. Erdmann \$140,000 a year for his work. Now the verdicts in at least 20 capital murder cases and dozens of other prosecutions are being appealed because Erdmann lied, falsified reports and even neglected to perform some of the autopsies he testified about.<sup>18</sup>

Erdmann's word began to be doubted when one family read his autopsy report indicating that the deceased's spleen had been examined and weighed as part of the examination. However, the family knew that the dead man's



Despite the unreliability of such predictions, Dr. Grigson's testimony has been used by the prosecution in one-third of Texas' death sentences.<sup>16</sup> The problem of manipulating juries with fear is compounded by Texas law which forbids telling the juries what the alternative to a death sentence really means. A life sentence in a capital case in Texas now means

spleen had been removed years earlier. As a result of the family's intervention, the body was exhumed and no incision marks from an autopsy were found.<sup>19</sup> At that point, attorney Tommy Turner of Lubbock was appointed special prosecutor to look into Erdmann's deceptions. Turner concluded that Erdmann was a liar and a con man: "If the prosecution theory was that death was caused by a Martian death ray, then that was what Dr. Erdmann reported."<sup>20</sup>

### **Killing the Messenger**

When Erdmann's methods and testimony came under increasing criticism in death penalty cases, some prosecutors retaliated by prosecuting Erdmann's critics. Two police officers, Patrick Kelly and William Hubbard from Lubbock County, who had testified about Erdmann's misdeeds, were indicted for alleged perjury. And nationally famous death penalty defense attorney, Millard Farmer of Atlanta, was indicted for supposedly tampering with a witness. However, this effort to cover-up the growing scandal around Dr. Erdmann fell apart.

A federal District Court judge ordered a halt to the prosecutions and stated that those being attacked "have offered substantial evidence that the prosecutions were brought in bad faith and for purposes of retaliation."<sup>21</sup>

A suit brought by the police officers and Mr. Farmer against

the prosecutors who indicted them was settled in favor of the plaintiffs with the agreement that the prosecutions be permanently stopped, that the policemen be restored to their jobs with full back pay, and that they be awarded \$300,000 in damages.<sup>22</sup>

Dr. Erdmann had earlier pleaded no contest to seven felony charges. He was sentenced to 10 years probation, and fined \$17,000 for botched autopsies and exhumation expenses. He also surrendered his medical license and moved to another state.<sup>23</sup>

As disgraceful as the behavior of these medical "experts" has been, the real scandal is that prosecutors were willing to repeatedly utilize such witnesses in order to get convictions and death sentences. In other instances, prosecutors failed to investigate cases thoroughly and allowed defendants, later found innocent, to be sentenced to death. Besides Randall Dale Adams and Clarence Brandley, at least four other Texas death row inmates have been found innocent in recent years (Muneer Deeb, 1993; Federico Macias, 1993; John Skelton, 1990; and Vernon McManus, 1987) and that number could increase as further abuse is examined. Unfortunately, this pattern of prosecutorial misconduct in capital cases is not unique to Texas.

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*"If the prosecution theory was that death was caused by a Martian death ray, then that was what Dr. Erdmann reported."*

**-Special prosecutor Tommy Turner**

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## **NATIONAL IMPLICATIONS: Official Misconduct**

The pressure on prosecutors and police to succeed in death penalty cases has resulted in miscarriages of justice all over the country. Representative Don Edwards, Chair of the House Judiciary Subcommittee on Civil and Constitutional Rights, released a staff report in October, 1993, recounting 48 cases since 1970 in which the defendants were sentenced to death but later exonerated and released.<sup>24</sup> In many of these cases, the prosecutors or police illegally withheld vital information from the defense, encouraged witnesses to lie, and deceived the court in a variety of ways. In other cases, prosecutors pushed for the death penalty in headline cases in which they lacked sufficient evidence even to sustain a conviction.

For example, when Attorney General Janet Reno was a prosecutor in Dade County, Florida, she helped uncover a pattern of official abuse in the death penalty conviction of James Richardson. Richardson had been sentenced to death for poisoning his own children in 1968. He was spared the electric chair when the Supreme Court overturned all existing death sentences in 1972, but he remained in prison. Reno's 1989 investigation affirmed what had long been claimed by the defense: the state had "knowingly used perjured testimony and suppressed

evidence helpful to the defense."<sup>25</sup> Richardson was released in 1989.

Just last year, five people were released after years on death row for crimes they did not commit.<sup>26</sup> In the case of Walter McMillian in Alabama, prosecutors admitted that the case had been mishandled. Evidence was improperly withheld from the defense, the state's three main witnesses all admitted that they had lied, and the "eyewitness" said that he had been pressured to pin the blame for the murder of the young white woman on McMillian, who is black.<sup>27</sup>

In the case of Kirk Bloodsworth in Maryland, prosecutors improperly withheld evidence of a different suspect who bore a striking resemblance to the police sketch in the rape and murder of a young girl. The other suspect had been found in the woods near the murder scene, had a blood-like spot on his shirt, and was very dirty except for his hands, which were meticulously clean. Moreover, the police found a young girl's underwear in this suspect's car. The suspect had a prior conviction for indecent exposure and had failed a polygraph test.<sup>28</sup> Nevertheless, prosecutors sought and obtained a death sentence against Bloodsworth. Fortunately, he was completely cleared in June, 1993, when a new DNA test confirmed that someone else had committed the crime.<sup>29</sup>

Federal prosecutors are also not immune from such practices.

If Congress passes a greatly expanded federal death penalty in 1994, U.S. Attorneys will be responsible for a much larger number of death penalty cases. However, recent investigations into abuses in the El Rukin gang prosecution in Illinois and a major racketeering case in Los Angeles in which an appellate court described the government's conduct as "intolerable,"<sup>30</sup> have shown that some federal prosecutors also engage in misconduct to obtain convictions.

Attorney General Janet Reno has promised much swifter investigations into allegations of abuse by federal prosecutors. But experience has shown that evidence of prosecutorial abuse, if discovered at all, may come only long after the defendant's conviction. In capital cases that may be too late. This problem raises the almost certain specter that innocent people will be executed, especially if capital punishment is expanded.<sup>31</sup>

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## 2. Racism In Deciding Who Should Die

Judge (Roy) Bean opened the session by spending two hours reading the Texas statutes aloud to the courtroom spectators. He then closed the law book, and, dropping it on the bench, declared: "That's . . . the complete statutes of this here state from the Alamo on ahead, and there ain't a damned

line in it nowheres that makes it illegal to kill a Chinaman. The defendant is discharged."

-Judge Roy Bean, presiding at the trial of his son for murdering a Chinese laundryman who overcharged him<sup>32</sup>

*The cop paused and stared at the two of them, the black man in his white T-shirt and shabby jeans, the little white man with the thick glasses and the ballooning belly. "One of you two is gonna hang for this," said the cop. Then he turned to Brandley. "Since you're the nigger, you're elected."*

-Nick Davies in *White Lies*, quoting testimony in the appeal of Clarence Brandley<sup>33</sup>

In 1993, national attention was drawn to two murder cases in Texas. In one case, the defendant was given the death sentence; in the other, he was placed on probation. Although, the cases differ in some respects, the most glaring inequity is that a young white man was given leniency for the murder of a black man, while a young black man was condemned to death for the murder of a white man. This disparity is symptomatic of broader inequities in Texas depending on the race of the defendant and the race of the victim.

Both of those convicted of the crimes were 17 years old at the time of the murders. In the first case, a white supremacist skinhead, Christopher Brosky, was given 10 years probation for the murder of Donald Thomas, a

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*"One of you two is gonna hang for this," said the cop. Then he turned to Brandley. "Since you're the nigger, you're elected."*

-testimony  
leading to Clarence  
Brandley's release

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black man. One of the jurors responsible for the sentence commented: "We just felt like this might be a man who might be able to turn his life around . . . . If we had sent him to Huntsville, he might have come back in worse shape."<sup>34</sup>

In the second case, a young black man, Gary Graham, was given the death penalty for the murder of Bobby Lambert in Houston back in 1981. Graham has been on death row in Huntsville ever since. Both cases have split the community and resulted in demonstrations raising issues of race and the administration of justice. Graham's case gained particular attention in 1993 because of new evidence pointing to his innocence.<sup>35</sup> His execution has been stayed three times, but he remains on death row.

### **Racism in Texas' Earlier Use of the Death Penalty**

Outcomes based on race in death penalty cases have a long history in Texas. From the time of the first state executions, the race of the defendant played a large role in who was given the death penalty. For example, between 1924, when centralized state executions were begun, and 1972, 361 people were put to death in Texas. About 70% of them were either African- or Mexican-American, with blacks constituting 63% of those executed.<sup>36</sup> Of the whites sentenced to death during this

period, 34% had their sentences commuted. Only 20% of the blacks received clemency.<sup>37</sup>

The race of the victim was an even more certain predictor of which cases would receive the death penalty. Prior to 1972, 80% of the victims in Texas death penalty cases were white.<sup>38</sup> In rape cases where the death penalty was applied, 95% of the victims were white. When a black man was convicted of raping a white woman, the sentence was virtually always death. No white man, however, was executed for raping a black woman.<sup>39</sup>

Before 1924, central state records on executions were not compiled, since the death penalty was carried out locally. However, Texas' part in the history of lynchings in the U.S. reveals an even more severe practice of racial bias. In post-Civil War Texas, lynchings were often used as a form of punishment and intimidation. Not surprisingly, almost all of those who suffered this illegal form of vigilante justice were black. From 1889 to 1899, over 95% of the recorded lynchings in Texas were of blacks.<sup>40</sup> The geographical pattern of lynchings in Texas closely followed those areas where slavery had been most prevalent.<sup>41</sup>

As part of a response to the embarrassment of racial lynchings, state legislators voted to move executions to a central state location in Huntsville and to change the method of execution

from hanging to the electric chair.<sup>42</sup> Interestingly, the warden of the Huntsville prison, Captain R.F. Coleman, resigned over this unwanted duty, saying: "A warden can't be a warden and a killer too. The penitentiary is a place to reform a man, not to kill him."<sup>43</sup> Coleman was replaced by a more accommodating warden, and four days later on Feb. 8, 1924, the State of Texas electrocuted its first five prisoners, all black.<sup>44</sup>

### **Racism in the Current Use of the Death Penalty**

Racial discrimination in the application of capital punishment was one of the factors that led the U. S. Supreme Court in 1972 to throw out virtually all existing death penalty statutes and sentences. Their ruling required states to more carefully craft new statutes that narrow the class of defendants who can receive the death penalty. Texas was one of the first legislatures to approve new death penalty laws, less than one year after the High Court's decision. In 1976, when the Court allowed the death penalty to resume, the Texas statute was one of three such laws that the Court approved.

The racial composition of Texas' death row has improved only slightly since the death penalty resumed. The percentage of minorities on Texas' death row has decreased from 70% to 55%,

still a large disproportion. However, the racial disparities with respect to victims has changed little. In capital cases, if you murder a white person in Texas, you are over five times more likely to receive the death penalty than if you murder a black person.<sup>45</sup> In none of the 74 Texas executions was the victim black and the defendant white. In fact, a recent Texas study of homicide cases between 1980 and 1988 found that no white offender who killed a black victim has even been charged and convicted with capital murder.<sup>46</sup>

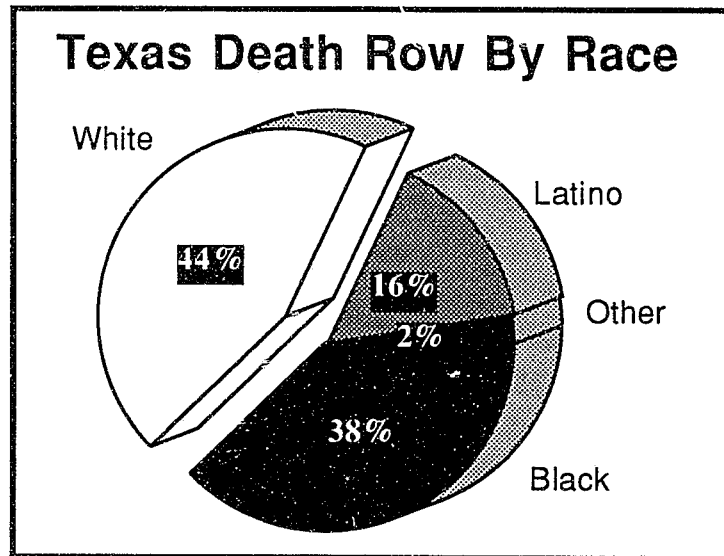
Racism in the death penalty does not fully explain the pace of executions or the size of death row in Texas. However, it is a recurrent and largely untreated sore which skews the use of the death penalty in Texas and eats away at the hope for better relations among the races. A Texas governmental report showed that racial disparities are evident in other areas of criminal justice, as well. For example, the incarceration rate for blacks in Texas is over eight times the rate for whites.<sup>47</sup> Almost half of black offenders are sentenced to prison, but less than one-third of white offenders are so sentenced.<sup>48</sup>

But in many respects, the racial problems in other states are as severe as they are in Texas.

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*"Coleman was replaced by a more accommodating warden, and four days later on Feb. 8, 1924, the State of Texas electrocuted its first five prisoners, all black."*

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Source: NAACP Legal Defense & Educ. Fund, Death Row USA (1/94)

## **NATIONAL IMPLICATIONS: Race and the Death Penalty**

Racism is also apparent in national death penalty statistics. Half of those on death row are from minority populations that make up only 20% of the country's population. Blacks are represented on death row at three and a half times their proportion in the population as a whole. As

is the case in Texas, however, the form of racial discrimination which is most directly attributable to capital punishment concerns the race of victims.

Blacks constitute about 50% of the victims of homicide in this country.<sup>49</sup> One might expect, therefore, that the percentage of death penalty cases involving black victims would approximate 50%. That has never been the case, and all the reforms instituted at the insistence of the Supreme Court in 1976 have done **nothing** to alleviate the problem.



Since 1976, 84% of the victims in the cases resulting in an execution were white. In 1993, the numbers were even worse: 89% of the cases resulting in an execution involved white victims. Only one out of the 226 executions between 1976 and 1993 involved a white defendant who had killed a black victim. This represents a consistent pattern since the founding of this country.

In all, only 31 of the over 18,000 executions in this country's history involved a white person being punished for killing a black person.<sup>50</sup> In 1990, the U.S. General Accounting Office reviewed the existing studies on racism and the death penalty in the United States and concluded:

*Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision.*

*In 82% of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks.<sup>51</sup>*

The federal government's use of the death penalty has been even more racially disproportionate than the states. Under a new 1988 statute aimed at murders by drug "king-pins," almost 90% of those

approved by the Attorney General for capital prosecutions have been either black or Hispanic defendants.<sup>52</sup>

The continuation of racial disparities in the use of capital punishment is an embarrassment for the entire country. The riots following the verdict in the first Rodney King beating case in California indicate the serious repercussions possible when a jury appears to ignore the facts and decide a case based on the status of who committed the crime and who was the victim. There have been some Congressional attempts to rectify the problem in capital cases, but these were defeated when prosecutors argued that any law that prohibited racially disproportionate death sentencing would mark the end of the death penalty in the entire country.

This ongoing problem of racial disparities was addressed by Supreme Court Justice Harry Blackmun in his dramatic dissent to a death penalty ruling: "Even under the most sophisticated death penalty statutes," said Blackmun, "race continues to play a major role in determining who shall live and who shall die." He announced that he would no longer "tinker with the machinery of death" because he had concluded that "the death penalty experiment had failed."<sup>53</sup>

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*"[T]hose who murdered whites were found more likely to be sentenced to death than those who murdered blacks."*

**-U.S. General Accounting Office**

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*"Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die."*

-Justice Harry A. Blackmun

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As the number of people on death row and the number of people executed in this country continue to grow, the patterns of racial disparity will become clearer and more disgraceful. What has been a perennial problem in Texas' administration of the death penalty will become apparent as a national problem as well.

particular defendant will ultimately receive the death penalty, probably the most important is the quality of representation he or she receives. In Texas, death penalty defendants are frequently given inexperienced and underpaid attorneys at trial. For some critical stages of their appeal, the defendants are given no attorney at all.

As in other states, almost everyone who is charged with a capital crime in Texas cannot afford his own attorney. The state is therefore required to provide him with one. Texas delegates that responsibility to the local county which is trying the case. The State of Texas itself provides no funds for the representation of those charged with a capital crime. The selection and qualifications of the attorney, the fee he or she will be paid, and the amount of resources which will be made available for investigation and expert witnesses are totally in the hands of the 375 local judges, who have widely varying economic resources.

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### 3. The Crisis of Representation in Texas

*You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say.*

-entire defense offered by a Texas attorney for his client, Jesus Romero, at a capital sentencing<sup>54</sup>

*The state [of Texas] paid defense counsel \$11.84 per hour. Unfortunately, the justice system got only what it paid for."*

-U.S. Court of Appeals overturning Federico Macias' death penalty conviction<sup>55</sup>

The enormity of the death penalty in Texas has overtaken the state's willingness to mete this punishment out with even a modicum of fairness and due process. Of all the factors which determine whether or not a

In the larger counties, such as those encompassing Houston or Dallas, the judge might select from more experienced defense counsel and pay them a higher rate. In poorer counties, a general practitioner might be chosen and paid as little as \$800 for an entire case.<sup>56</sup> In Randall County, for example, defense counsel Mallory Holloway was told that he had better not ask for investigation funds since he had already

drained the county's budget by insisting on co-counsel.<sup>57</sup>

Recently, the State Bar of Texas commissioned a study of the system of representation in death penalty cases. A comprehensive report prepared by the Spangenberg Group of Massachusetts was released in March, 1993. The report found that capital representation in Texas was plagued with tremendous problems at both the trial and appellate level. It described the lack of counsel and the inadequacy of funding as "desperate" and "urgent" and concluded:

*We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty.*<sup>58</sup>

## Representation At Trial

The problem of representation in capital cases in Texas is multi-layered, beginning at the trial stage. Texas is the only death penalty state which makes practically no use of a public defender system to provide attorneys. Instead, Texas allows each county to secure counsel through the private bar, often on a contract basis. The county judges can individually determine what they believe to be a "reasonable attorney fee" and compensation for "reasonable expenses."

Until 1987, the statute regarding payment of attorneys for such work made no mention of compensation for the investigation, research and consultation with experts before trial. The statute did provide minimum payments for in-court appearances and these often became the de facto maximum paid to attorneys for the entire case. Although the statute was changed in 1987, the rates paid in many counties did not change, and Texas' compensation for court-appointed attorneys remains near the lowest in the country.<sup>59</sup> The prosecutors, on the other hand, represent a team of salaried state employees with ample resources and ready access to other law enforcement agencies for investigating and pursuing their cases.<sup>60</sup>

The rate of compensation often determines the quality of representation. The Spangenberg Report concluded that defending death penalty cases in Texas is frequently a losing financial venture for attorneys: "The rate of compensation provided to court-appointed attorneys is absurdly low and does not cover the cost of providing representation."<sup>61</sup> Without adequate compensation, it would be unrealistic to expect the consistent provision of a thorough defense.

The consequences of poor representation can be disastrous. Federico Macias, for example, came within two days of execution in Texas because his trial attorney

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*"We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation . . . the problem is substantially worse than that faced by any other state with the death penalty."*  
-Spangenberg Report

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did almost nothing to prepare for trial. Today he is a free man, thanks to volunteer counsel from a large Washington law office that intervened just before Macias' execution. With qualified counsel and ample resources, Macias was not only granted a stay of execution but was eventually cleared of all charges in 1993. The federal court's order overturning the conviction noted that the first attorney had missed evidence of Macias' innocence:

*We are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense counsel \$11.84 per hour. Unfortunately, the justice system got only what it paid for.<sup>62</sup>*

Another man who was freed from death row this past year in Texas was Muneer Deeb. Deeb said he was poorly represented at his first trial. At his re-trial, however, he was represented by one of Texas' best known criminal attorneys, Dick DeGuerin, and was acquitted of all charges.<sup>63</sup> Other death row inmates who may also be innocent are not so fortunate.

### **Post-Trial Representation: A Desperate Situation**

Access to the appeals process is critical to sparing the lives of those who are mistakenly sentenced to death. Former Texas death row inmates like Randall

Dale Adams, Clarence Brandley, Federico Macias, and Muneer Deeb were extremely fortunate that others became interested in their cases and helped them attain freedom. But Texas has severely limited that access by not providing attorneys during critical appeal stages. And most recently, the state has even pushed for executions prior to the completion of a defendant's appeals.

Death row inmates are entitled to representation for only one direct state appeal of their conviction or sentence. After that appeal, Texas generally provides no attorney for subsequent appeals. Unless some court grants a stay, execution warrants can be signed and carried out despite the fact that an inmate might have significant issues requiring state and federal review.

With respect to this period of post-conviction representation, the Spangenberg Report found that:

*[T]he situation in Texas can only be described as desperate. The volume of cases is overwhelming. Presently no funds are allocated for payment of counsel or litigation expenses at the state habeas level.<sup>64</sup>*

Whereas most other states have a system for appointing and compensating attorneys after the direct appeal is over,<sup>65</sup> Texas leaves this important step to the discretion of the local judge. In almost every case, no attorney is appointed for state post-

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*"The state [of Texas] paid defense counsel \$11.84 per hour.*

*Unfortunately, the justice system got only what it paid for."*

**-U.S. Court of Appeals**

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conviction relief, and those who do the legal work do it without pay. Similarly, funds for expert witnesses and expenses are almost never approved.<sup>66</sup>

With the defendant unrepresented, local prosecutors have recently begun to push for executions, and some local judges are no longer granting stays until an attorney can be found. The dangerous consequences of this procedure were seen in the recent case of Lesley Lee Gosch, who was scheduled to die just after midnight on September 16, 1993 and who had no attorney. Despite the fact that the Texas Attorney General's office acknowledged that Gosch still had legitimate appeals to pursue, the prosecution persuaded federal District Judge Hippo Garcia to refuse a stay of execution, which was just hours away.

As time was running out, the Texas Resource Center told Judge Garcia that an attorney had been found to represent Gosch. The Judge still refused to stay the execution and instead appointed the Resource Center to represent Gosch. Finally, just 25 minutes before the execution, with the inmate already being prepared for the lethal injection, Judge Garcia relented and granted a stay because, he said, new unresolved legal questions deserved review.<sup>67</sup> Jay Jacobson, Executive Director of the ACLU of Texas, sharply criticized this unnecessarily close call: "Texas justice is in mortal danger of reverting back to the speedy vigilantism of Roy Bean; a

rush to judgment in place of justice."<sup>68</sup>

In response to this crisis, the Texas Resource Center recently brought a case before the U.S. Supreme Court to clarify the federal courts' authority to stay executions while attorneys are being found to properly prepare death row appeals.<sup>69</sup> In an amicus curiae brief filed supporting the Resource Center's position, the American Bar Association called Texas' attempted denial of an opportunity to appeal a "perverse process" which "effectively nullifies the Great Writ" of habeas corpus.<sup>70</sup>

Thus, the death penalty in Texas is caught in a spiraling crisis:

- The volume of cases in Texas which has reached the post-conviction stage surpasses that of any other state and is exhausting the supply of volunteer attorneys from Texas and around the country.
- No state funds are available for carrying on the appeals necessary to prevent an inmate's execution, thus discouraging attorneys who might represent death row inmates.<sup>71</sup>
- With the defendant unrepresented, the state pushes ahead for executions. Death warrants are signed, putting prospective volunteer attorneys under more pressure

and creating even more reluctance to take these cases.

### **The Texas Resource Center**

In response to the inadequate system of representation for death row inmates in Texas, representatives from the University of Texas School of Law and a committee of attorneys concerned about the crisis proposed a resource center to recruit and train volunteer attorneys to handle death penalty cases after the direct appeal. The Texas Resource Center was created in 1988 and receives the bulk of its funding from the federal government's Administrative Office of the U.S. Courts.

With over 360 people on death row and with new cases being constantly added to the list, there is no way that the 16 attorneys of the Resource Center can represent even a significant proportion of the appeals. The Resource Center recently estimated that more than 75 death row inmates in Texas had no representation, many of whom were scheduled for execution within 5 weeks.<sup>72</sup> Much of the Center's efforts go into recruiting and assisting counsel from other states who agree to represent Texas' death row inmates.

Despite Texas' relatively high rate of executions, the situation would be much graver without the Resource Center. The Spangenberg Report concluded that the Resource Center's staff provides "an invaluable array of services under truly unique pressures and circumstances."<sup>73</sup> They are not staffed, however, to fill all the gaps created by Texas' failure to appoint and pay counsel in capital cases.

Not surprisingly, the Resource Center's pursuit of legal representation and their success in stopping many executions has drawn reactions from prosecutors and politicians intent on an expeditiously functioning death penalty. There have been attempts to discredit the Resource Center in the media and to have Congress withdraw its funding.<sup>74</sup> These challenges have, in turn, been met by prominent members of the Texas Bar, some of whom serve on the Board of Directors of the Resource Center.<sup>75</sup> The dispute illustrates the highly political nature of the death penalty in Texas.

## **The Pressure to Execute: A Chronology**

Eleventh hour scrambles are inevitable in Texas death penalty cases. Death warrants are often signed at a pace which exceeds the defense community's ability to respond in a thorough and timely fashion. The following is an approximate chronology of what was almost Leonel Herrera's final day of life. Even though the U.S. Supreme Court had agreed to hear his case, the state pressed for his execution:

**February 17** Federal District Court judge grants a stay to hear constitutional claims regarding the execution of an innocent person.

**February 18** Texas Attorney General's office obtains a Circuit Court order vacating the stay on the grounds that a claim of innocence is irrelevant in federal court.

**9:30 PM** Defense attempts to obtain another stay of execution from the state or federal courts.

**10:00 PM** Request for stay filed with U.S. Supreme Court.

**12:05 AM** Defense checks with local weather station regarding the exact time of sunrise: Texas law requires that the execution take place **before** sunrise on the appointed day.

**1:00 AM** Supreme Court rejects stay by vote of 5-4.

**4:30 AM** Supreme Court again refuses to stay execution but indicates it will entertain a request to review the issue of executing the innocent.

**4:35 AM** State of Texas informs attorneys that it will begin the lethal injection of Herrera in 30 minutes if a stay is not in place.

**4:35-6:20 AM** Frantic efforts to obtain a stay from state and federal courts; two members of the Texas Court of Criminal Appeals and a federal District Court judge agree to stay execution so the Supreme Court can hear the case; Texas Attorney General attempts to have stays vacated; State court stay upheld.

**6:20-6:55 AM** Silence regarding Herrera's status.

**7:00 AM** Clerk of Supreme Court announces that state court stay is valid.

**7:08 AM** Texas sunrise: no execution.<sup>76</sup>

Leonel Herrera's case was eventually argued before the Supreme Court eight months later, in October 1992. He argued that he should be given a hearing to review new evidence of his innocence and that it would be unconstitutional to execute someone who was innocent. Witnesses, including a former Texas judge, revealed that Herrera's brother had actually confessed to the crime. A decision was reached on January 25, 1993, with Herrera losing on a vote of 6-3. Herrera was executed on May 12, 1993.

## NATIONAL IMPLICATIONS: The Crisis in Representation

The crisis in death penalty representation is starting to spread to other death penalty states as well. Because of the number of people on Texas' death row and the rate at which those people are now being processed for execution, the problem in Texas is more acute than in other places. But the size of the national death row is also increasing rapidly: at least 250 people are sentenced to death each year and other states are experiencing both a shortage of attorneys and a shortage of funds to pay for the death penalty.

A six month study by *The National Law Journal* of death penalty representation in the south concluded:

*"Southern justice in capital murder trials is more like a random flip of the coin than a delicate balancing of the scales."*

-National Law Journal

*Southern justice in capital murder trials is more like a random flip of the coin than a delicate balancing of the scales. Who will live and who will die is decided not just by the nature of the crime committed but equally by the skills of the defense lawyer appointed by the court. And in the nation's Death Belt, that lawyer too often is ill-trained, unprepared and grossly underpaid.<sup>77</sup>*

The study found high disbarment rates for attorneys who represented death row inmates, widespread inexperience among those appointed to capital

cases, and wholly unrealistic caps on the funds available for defense. With limits on attorneys' fees of \$1,000 in states like Alabama, Louisiana, and Mississippi, lawyers offering even minimal representation were working for \$5 an hour.<sup>78</sup> Such meager pay obviously can affect performance.

In Tennessee, a state not included in the *Law Journal* study, it is not uncommon for trial attorneys to spend less than 100 hours preparing a capital case, while it typically takes over 1,000 hours in other states. In two death row cases, the attorneys spent 10 and 16 hours respectively preparing for trial.<sup>79</sup> In 17 Tennessee cases, no mitigation evidence whatsoever was offered during the penalty phase of the trial. Under Tennessee law, if no mitigation evidence is presented, the court is compelled to direct a sentence of death, assuming the prosecutor has presented aggravating circumstances.<sup>80</sup> Tennessee has one of the lowest compensation rates for indigent defense in the country: \$20/hr. for out-of-court time and \$30/hr in-court.<sup>81</sup>

In contrast, the state of Ohio allowed \$40,000 for two attorneys in capital cases.<sup>82</sup> In California, attorneys are paid about \$75 an hour and total fees often exceed \$100,000 just for the appellate work.<sup>83</sup> But even in California, which recently surpassed Texas as the state with the largest death row, nearly a third of those on death row lack lawyers for their appeals.<sup>84</sup>



In Georgia 60 of the 80 people on death row who have gone beyond their direct appeals are being represented by lawyers from outside the state. "Many [Georgia] firms view defending a person on death row as politically unpopular, bad public relations and bad business," said Robert Remar, who heads a state bar committee to correct the problem.<sup>85</sup>

Ronald Tabak, chair of the ABA's Individual Rights and Responsibilities death penalty committee, said that the situation is "getting materially worse because demand for lawyers is growing substantially as the number of inmates moving into state post-conviction and federal habeas proceedings is increasing."<sup>86</sup> States like California, Ohio, Pennsylvania and Illinois, with bulging death rows but few executions so far, are a warning that the crisis in death penalty representation will soon be spreading.

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#### 4. Clemency in Texas

The U.S. Supreme Court recently ruled in the *Herrera* case that a defendant with a claim of innocence still has the opportunity to apply for executive clemency.<sup>87</sup> Even though Texas has by far the most death row inmates who have reached the end of their appeals and whose

last chance for relief lies with the governor, there have been no commutations granted at a defendant's request since the death penalty was reinstated.<sup>88</sup> Texas has refused clemency in one case where it was requested by the prosecutor and by the father of the victim,<sup>89</sup> and in another case where it was even requested by the Pope.<sup>90</sup> Clemencies have been rare in other states as well, but most of those states have had few inmates who had exhausted all their appeals and sought clemency.

The case of Gary Graham, discussed above, is testing the seriousness of Texas' clemency procedure. Graham was convicted and sentenced to death on the basis of one eyewitness who viewed him only from a distance at night. New evidence indicating that Graham may be innocent has emerged, but it has been barred by Texas procedural rules which forbid introducing new evidence more than 30 days after a conviction.<sup>91</sup>

Graham was denied clemency and the Pardon Board did not even meet to hear his evidence. He has filed a suit claiming that his due process rights have been violated because he was not given a hearing by the Pardon Board. The *Graham* case tests whether there is any substance to Texas' clemency process. Texas courts are still considering whether the Board will be required to hold the hearing and possibly spare Graham's life. But regardless of

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*"Despite the Supreme Court's assurances that clemency exists as a protection against executing an innocent person, it has never been used in Texas, or most other death penalty states, since 1972."*

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the outcome in Graham's case, clemency in Texas has not been the safety-valve recommended by the High Court.

## NATIONAL IMPLICATIONS: Clemency

With respect to clemency, the extreme hesitancy of governors to utilize this process in death penalty cases is also a national problem. Clemency used to be granted more liberally by governors in capital cases. Prior to the *Furman* decision in 1972, commutations were granted in approximately one in five death sentenced cases. The current rate is roughly one out of forty.<sup>92</sup> The increased politicization of the death penalty has meant that a governor could suffer a sharp decline in popularity for granting a commutation.<sup>93</sup> Indeed, of the 31 clemencies granted since 1972, more than half were by governors as they were leaving office.<sup>94</sup>

Thus, despite the Supreme Court's assurances that clemency exists as a protection against executing an innocent person, it has never been used in Texas, or most other death penalty states, since 1972. As long as the issue of capital punishment is thought of as a litmus test for politicians to attain and retain office, the prospect of clemency for any death row inmate will remain dim.

## 5. Texas Crime And the State's Response

*The word 'crisis' is used far too often in politics and government -- but a crisis is precisely what Texas faces today.*

*The Texas criminal justice system is failing.*

*-Report from the Texas Office of the Comptroller<sup>95</sup>*

Closely intertwined with the death penalty is the broader response which a state makes to the problem of crime. Not surprisingly, the turmoil exhibited in Texas' administration of the death penalty is reflected in an even larger crisis with crime. In the same period in which Texas moved from its first execution in 1982 to become the undisputed leader in the use of the death penalty, the state also experienced a tremendous growth in its violent crime rate. From 1982 to 1991, the national crime rate rose by 5%. In the same period, the Texas crime rate rose by 24%, and the violent crime rate in Texas rose by nearly 46%. In 1990, Texas earned the dubious distinction of being the first state in which more people died from gunshot wounds than from traffic accidents.<sup>96</sup> In 1991, Texas' overall crime rate was third in the nation, and its murder rate was the second highest.

But the problems in Texas go far beyond mere crime statistics. A recent report from the Texas

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*"Despite the need for real solutions, public debate over crime in Texas revolves around hollow calls for the state to become 'tougher.'"*

*-Texas Office of the Comptroller*

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Office of the Comptroller pointed to a larger crisis in the state's response to crime:

*[D]espite the need for real solutions, public debate over crime in Texas revolves around hollow calls for the state to become "tougher." In fact, this is a call for the status quo -- for more of the same, only more so. It is a call for a continuing cycle of cynical quick fixes and stop-gap measures, for costly prison construction that cannot keep pace with the demand for new prison space -- for a constant drain on state and local treasuries that make Texas taxpayers poorer, not safer.<sup>97</sup>*

The death penalty is precisely one of those "quick fixes" that drain the taxpayers' money. A 1992 study by the *Dallas Morning News* reported that each death penalty case, followed through to the federal appeal, is costing taxpayers \$2.3 million. That is in line with the costs that other states have projected. New York estimated that each capital case would cost \$1.8 million, without including costs past the direct appeal. Florida calculated the cost of each execution to be about \$3.2 million.<sup>98</sup>

With over 70 executions since 1976 and close to 400 other people waiting on death row, Texas has likely spent several hundred million dollars on the death penalty, far more than it would have if there were no death penalty and people were sentenced to life imprisonment.

As a response to crime, then, the death penalty is exceedingly expensive and focuses on only a tiny fraction of the problem. Nevertheless, politicians throughout Texas have consistently seized on the death penalty as an answer to violence. They have pushed the death penalty at every possible turn and have lashed out at anyone opposing them. But when the causes of crime are rooted in guns, gangs, drugs, and the deterioration of the social fabric, capital punishment offers nothing in the way of a solution.

### **The Winds of Change**

Crime was recognized as a paramount problem in Texas well before national media attention began to focus on crime. In the 1990 gubernatorial race, the candidates tripped over each other in an effort to look tougher in their responses to violence. The death penalty became the leading symbol of toughness. In fact, populist Democrat Jim Hightower described the campaign as "a race to see who could kill the most Texans."<sup>99</sup> The rapid rise in the pace of executions in Texas also began in 1990, but now dissatisfaction with both the process and the results is starting to emerge.

Jim Mattox, the former Attorney General of Texas who oversaw 36 executions in the state, was one of the candidates for governor who campaigned on his support for the death penalty. But cases like Gary Graham's and

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*"Life without parole could save millions of dollars. It currently costs three times as much -- more than \$2 million per inmate -- to carry out the death sentence than to keep an inmate in prison for 40 years."*  
-former Texas Attorney General, Jim Mattox

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*"On a death penalty case, I can't ever tell [the family] they won't have to come back and live it all over again. This can go on ad nauseam." But under the new life sentence law, "there's a finality to all this."*

**-Norman Kinne,  
Assistant District  
Attorney, Dallas  
County**

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Clarence Brandley's, which raised the prospect of innocent people being executed, have given him second thoughts.

For one thing, Mattox doesn't believe the death penalty is a deterrent to crime: "It is my own experience that those executed in Texas were not deterred by the existence of the death penalty law," he said.<sup>100</sup> "I think in most cases you'll find that the murder was committed under severe drug and alcohol abuse."<sup>101</sup>

As an alternative to the death penalty, he suggests a sentence of life without parole, which other Texas prosecutors have resisted so far: "Life without parole could save millions of dollars," said Mattox. "It currently costs three times as much -- more than \$2 million per inmate -- to carry out the death sentence than to keep an inmate in prison for 40 years."

"In other words," he wrote, "it's cheaper to lock 'em up and throw away the key . . . . As violent crime continues to escalate, it's something to consider."<sup>102</sup>

Others in law enforcement agree. Norman Kinne, First Assistant District Attorney of Dallas County, praised a new Texas law which allowed sentences for life with no possibility of parole for 35 years (now 40)<sup>103</sup>: "I think we can take more violent offenders out of society for longer periods of time with less expense to the taxpayers."<sup>104</sup>

He pointed out that the new law can also bring a sense of finality to the victim's family: "On a death penalty case, I can't ever tell them they won't have to come back and live it all over again. This can go on ad nauseam." But under the new life sentence law, "there's a finality to all this."<sup>105</sup>

On another occasion he said: "Even though I'm a firm believer in the death penalty, I also understand what the cost is. If you can be satisfied with putting a person in the penitentiary for the rest of his life . . . I think maybe we have to be satisfied with that as opposed to spending \$1 million to try and get them executed."<sup>106</sup>

Dr. George Beto, who headed the Texas prison system for ten years, also favors the death penalty in theory but opposes it in practice. He has clearly recognized some of the problems with the application of capital punishment: "[I]n a democratic society like ours, the death penalty is capriciously and inequitably administered. Whether a person is convicted depends on the quality of his defense, the hysteria of the moment in the community and the culture."<sup>107</sup>

And in Washington, some of Texas' Congressional delegation have been leading the way towards alternatives to the death penalty. Rep. Craig Washington (D-TX) has spearheaded the effort to present an alternative federal crime bill which excludes the

death penalty and emphasizes a range of positive responses to crime, and Rep. Henry Gonzalez (D-TX) is the perennial sponsor of a constitutional amendment to end the death penalty altogether.

Meanwhile, juries in Texas are also beginning to see things differently, especially with the availability of longer guaranteed sentences. Formerly, criminals in Texas were serving only 20% of their sentence and some of those with life sentences were released after only five years.<sup>108</sup> Now that life can mean no parole for 35-40 years, juries have real alternatives to a death sentence. Dallas County District Attorneys, for example, used to have a perfect record when seeking the death penalty. But three of the past six capital cases have ended in life sentences. "Sometimes it makes you think the public isn't 100 percent with you," said Assistant District Attorney Hugh Lucas, who recently "lost" a capital case when it ended in a life sentence for Anthony Hampton.<sup>109</sup>

## **NATIONAL IMPLICATIONS: The Crime Problem**

The issue of violent crime has now reached national prominence as well. Politicians all over the country have been using the headlines of crime to promote the death penalty as a quick fix

solution. If the people buy this promotion as they did in Texas, then it is likely that other states will match Texas' high rate of executions. The federal government, for example, has increased death penalty prosecutions and is seeking ways to greatly expand their role as a response to the national problem of violence. States like New York, Kansas, and Alaska have all been considering reinstating capital punishment.

On the other hand, states that have used capital punishment extensively, like Texas, have been beset with its problems. The death penalty has failed to reduce the number of murders, it has proved enormously expensive, and there continues to be the uncomfortably present danger of executing an innocent individual. As a result of these problems, some states are relying more on the alternative of life sentences with severe restrictions on parole.<sup>110</sup> The political tug of war between more and faster executions on the one hand, and more efficient and effective ways of reducing crime on the other, is a battle raging in the entire nation, as well as in Texas.

## CONCLUSION: Foreshadowing A National Crisis

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*Texas has been the nation's crucible for this experiment with the death penalty, and the results of this experiment should speak volumes to those who choose to listen.*

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The death penalty in Texas is in a state of crisis. Even more alarming, however, is the prospect that what is happening in Texas will be happening across the country if the U.S. expands its use of the death penalty. The size of the national death row, the willingness of the courts to accept the practices utilized in Texas, the increasing pace of executions, the public's concern about crime -- all indicate that the use of the death penalty could become as common nationwide as it is in Texas.

On the other hand, the problems in implementing the death penalty in Texas are a warning to the rest of the country that it is wading into a swamp that it should avoid. The death penalty skews the process of prosecution and leads to official abuse. The death penalty has also been a symbol of racial division. As the numbers of executions begins to rise, the impact of these injustices will force itself more clearly into our consciousness.

Similarly, the costs of the death penalty are not a problem only in Texas. As thousands of cases move into the later stages of appeal and as more and more people are added to death row every year, the costs will become greater and the strain on other crime fighting programs will

become more severe. It is clear even to proponents of capital punishment that this expansion of the death penalty will mean that hard choices must be made between preventive methods of law enforcement and more costly and ineffectual executions.

Furthermore, the crisis in death penalty representation, which is closely related to the problem of costs, augurs poorly for the country as a whole. What is a crisis in Texas because of the numbers involved and the scarcity of qualified counsel willing to take these cases, will become a national problem as the number of inmates approaching execution continues to grow.

Such a death penalty may not be acceptable to the American public. Moreover, such a death penalty may not meet the standards of the High Court, which set this experiment in motion 18 years ago. That experiment, as Justices Marshall and Blackmun have pointed out, has so far established that the death penalty remains arbitrary and capricious. Texas has been the nation's crucible for this experiment with the death penalty, and the results of this experiment should speak volumes to those who choose to listen.

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2. *Callins v. Collins*, No. 93-7054, slip opin., at 4 (Feb. 22, 1994) (Blackmun, J., dissenting).
3. Projections based on Texas population of 17.66 million and United States population of 259 million. The cost projection was based on a cost of \$2 million per execution and a national projection of 1,027 executions. See, e.g., P. Cook & D. Slawson, *The Costs of Processing Murder Cases in North Carolina* (Duke University, May, 1993), at 1 ("the extra cost . . . per execution exceeds \$2 million.")
4. See note 1.
5. See *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, The Death Penalty Information Center, October 1992, at 13.
6. M. Radelet, H. Bedau, & C. Putnam, *In Spite of Innocence* 71-72 (1992).
7. *Id.* at 133.
8. *Id.* at 134 (emphasis added).
9. Texas Penal Code Art. 37.071(b)(2) (Vernon's 1985).
10. Since executions were centralized at one state facility in 1924, Texas has not executed any women. There are, however, four women currently on Texas' death row. Since defendants in capital cases are almost exclusively male, the male pronouns will sometimes be used in a generic sense.
11. See R. Rosenbaum, *Travels With Dr. Death*, *Vanity Fair*, May, 1990, at 142.
12. *Rodriguez v. Texas*, trial transcript, p. 2136 (1978), quoted in J. Marquart, et al., *Gazing Into The Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 *Law & Society Review* 449, 458 (1989).
13. See R. Rosenbaum, note 11, at 142.
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16. See *id.* at 457.
17. Although the defense can offer their own experts to refute such claims that the defendant will be a danger to society, they are at a distinct disadvantage for two reasons. First, the defense is severely limited in the funds available for such

experts. Secondly, even if a psychiatrist could be found who would predict with absolute certainty that someone would not be a danger in the future, the jury is less likely to believe that claim since it has already convicted the defendant in the underlying crime.

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23. R. Suro, note 18, at 22.

24. *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*, Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary (1993) (reprint available from the Death Penalty Information Center).

25. M. Curriden, *No Honor Among Thieves*, American Bar Association Journal, June, 1989, at 54 (quoting Janet Reno).

26. Walter McMillian (Ala.), Federico Macias (Tex.), Muneer Deeb (Tex.), Kirk Bloodworth (Md.), and Gregory Wilhoit (Ok.).

27. See P. Applebome, *Black Man Freed After Years on Death Row*, The New York Times, Mar. 3, 1993, at A1.

28. Bloodworth v. State, 307 Md. 164, 173 (1986).

29. See P. Valentine, *Jailed for Murder, Freed by DNA*, The Washington Post, June 29, 1993, at A1.

30. *A Reno Reform*, The Washington Post, Dec. 20, 1993 (editorial).

31. See, e.g., Justice Blackmun's comments on ABC-TV's *Nightline*, in which he said that he believed innocent people have been executed during his term. Transcript, ABC-TV News, *Nightline*, Nov. 18, 1993.

32. M. Radelet, *Executions of Whites for Crimes Against Blacks: Exceptions to the Rule?*, 30 The Sociological Quarterly 529, 530 (1989) (citing B. Botkin, *A Treasury of American Folklore* (1944)).



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33. N. Davies, *White Lies: Rape, Murder, and Justice Texas Style* 23 (1991) (the story of Clarence Brandley's conviction and eventual exoneration for a murder in Texas).
34. J. Floyd & S. Crawford, *Skinhead Gets Probation in Murder of Black Man*, The Dallas Morning News, Mar. 24, 1993, at 1A.
35. See, e.g., N. Hentoff, *Death and Reasonable Doubt in Texas*, The Washington Post, May 29, 1993.
36. J. Marquart, S. Ekland-Olson, & J. Sorensen, *The Rope, The Chair, and The Needle: Capital Punishment in Texas, 1923-1990* 21-22 (1994).
37. *Id.* at 24.
38. *Id.*
39. *Id.* at 65.
40. *Id.* at 6.
41. See *id.* at 4 & 6, maps 1.1 & 1.2.
42. *Id.* at 14-15.
43. *Id.* at 15.
44. *Id.*
45. See J. Sorenson & J. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. Review of Law & Social Change 743, 765-72 (1990-91).
46. Marquart, et al., note 36, at 169.
47. See *Criminal Justice Trends in Texas: Overview by Race*, Criminal Justice Policy Council of Texas, at 2 (April, 1992) (1991 rates).
48. *Id.* at 8.
49. See, e.g., S. LaFraniere, *FBI Finds Major Increase in Juvenile Violence in Past Decade*, The Washington Post, Aug. 30, 1992, at A13 (half of U.S. murder victims are black).
50. See D. Margolick, *White Dies for Killing Black, For the First Time in Decades*, The New York Times, Sept. 7, 1991.
51. U.S. General Accounting Office, *Death Penalty Sentencing*, February, 1990, at 5 (emphasis added).

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52. See *Racial Disparities in Federal Death Penalty Prosecutions, 1988-1994*, Staff Report by the House Judiciary Subcommittee on Civil and Constitutional Rights (March, 1994) (reprint available from Death Penalty Information Center).
53. *Callins v. Collins*, No. 93-7054, slip opin. at 4 (Feb. 22, 1994) (Blackmun, J., dissenting).
54. See *Romero v. Lynaugh*, 884 F.2d 871 (5th Cir. 1989) (Romero was executed in 1992), cited in *National Law Journal*, see note 56, at 34.
55. *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992) (Macias was freed in 1993).
56. *Fatal Defense*, *National Law Journal*, June 11, 1990, at 34.
57. See *Hafdahl v. Texas*, 69,646 (Texas Crim. App., 1988), cited in *Fatal Defense*, note 56, at 34.
58. The Spangenberg Group, *A Study of Representation of Capital Cases in Texas*, at 4 & 152 (March, 1993) (emphasis added) [hereinafter *Spangenberg*].
59. *Id.* at 14-15.
60. "State funding pays the salaries of the primary district or county felony prosecutor . . . and provides cash supplements for partial funding of assistants' salaries and other expenses." *Texas Crime, Texas Justice* 49, Office of the Comptroller (Sept., 1992). There is also an Office of the State Prosecuting Attorney to represent the State's interests in the Court of Criminal Appeals. *Id.* at 47.
61. *Spangenberg*, note 58, at vi (Major Findings).
62. *Martinez-Macias*, note 55, 979 F.2d at 1067.
63. B. Kessler, *Fighting the System*, *The Dallas Morning News*, Nov. 4, 1993, at 1A.
64. *Spangenberg*, note 58, at ii (emphasis added).
65. *Id.* at 127.
66. *Id.* at vii.
67. M. Graczyk, *Death Row Inmate's Lawyers Had Close Call*, *The Dallas Morning News*, Sept. 18, 1993, at 26A.
68. ACLU press release, Sept. 16, 1993 (on file with Death Penalty Information Center).

69. See *McFarland v. Collins*, No. 93-1954, on Writ of Certiorari to the U.S. Court of Appeals for the 5th Cir. (argument Mar. 29, 1994).

70. *Id.*, Brief of the American Bar Association, at 7.

71. Federal funds are available for indigent defendants in federal habeas corpus proceedings. See Anti-Drug Abuse Act, 21 U.S.C. § 848 (1988). However, federal procedure requires that an inmate first exhaust all possible state remedies. Thus, lack of funds and attorneys at the state level directly affects what, if anything, can be accomplished at the federal level.

72. C. Hoppe, *Center Sees Crisis in Shortage of Public Defenders for Death Row*, *The Dallas Morning News*, Oct. 27, 1993.

73. *Spangenberg*, note 58, at 9.

74. See, e.g., R. Walt, *Ending the Death Penalty Chaos*, *Texas Lawyer*, Dec. 6, 1993, at 20 (quoting former Assistant Texas Attorney General: "Unlike any governmental entity, as best as can be determined the [Texas Resource] center is answerable to nobody."); S. Warren, *Taking Offense at Death Row Defense*, *Houston Chronicle*, Nov. 7, 1993, at 20A ("Prosecutors, though, were in a lousy mood, complaining of more trouble, more stress and more frustration in their jobs than ever before. Accusing fingers pointed in one direction: the Texas Resource Center.").

75. See, e.g., C. Hoppe, note 72 (Resource Center has been responsible for proving the innocence of a number of people on death row but current surge of cases endangers adequate representation); see also letter and accompanying report to Meryl Silverman of the Administrative Office of the U.S. Courts from Edward Sherman, Chair of the Board of Directors of the Texas Resource Center, Oct. 29, 1993, on file with the Death Penalty Information Center; see also, *Crisis in Representation of Texas Death Row Inmates*, released by the Board of Directors of the Texas Resource Center, Oct. 25, 1993.

76. Unpublished chronology from Leonel Herrera's defense attorneys on file with the Death Penalty Information Center (Feb. 20, 1992).

77. *Fatal Defense*, *The National Law Journal*, June 11, 1990, at 1.

78. *Id.* at 33.

79. W. Redick, *The Crisis in Representation of Tennessee Capital Cases*, *Tennessee Bar Journal*, Mar./April, 1993, at 23.

80. *Id.* at 24.

81. *Id.* at 25.

82. *Id.* at 32.

83. M. Coyle, *Death Counsel Shortage Grows*, The National Law Journal, Sept. 27, 1993, at 3, 46.

84. R. Smothers, *A Shortage of Lawyers to Help the Condemned*, The New York Times, June 4, 1993.

85. M. Curriden, *Ga. Bar Calls on Local Lawyers*, The National Law Journal, Dec. 6, 1993, at 3.

86. See M. Coyle, note 83, at 3.

87. See *Herrera v. Collins*, 113 S.Ct. 853 (1993).

88. There have been 36 commutations granted in Texas for the sake of judicial expediency when the death sentence has been overturned by the courts. In Texas, the trial jury determines the sentence of the defendant in capital cases. If a mistake was made in the *sentencing* process, the whole case, including the guilt/innocence phase, would have to be tried again before a new jury. To avoid this re-trial, when courts have discovered errors in the sentencing process, the state has frequently asked the governor for a commutation of the death sentence to a life sentence, thus avoiding the necessity for a new trial and possible exoneration of the defendant. These should be distinguished from the cases in which the *defendant* requests clemency. None have been granted in this latter category. See, e.g., M. Radelet & B. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 Univ. of Richmond Law Review 289, 293-94 (1993).

89. See *Slayer of Store Manager Executed Despite Plea By Father of Victim*, The New York Times, June 20, 1986, at A13, col. 1.

90. See *Pope's Plea Stops Execution*, The New York Times, Jan. 8, 1992 (Johnny Frank Garrett was granted a 30 day stay by the governor, but was then executed on Feb. 11, 1992).

91. A recent ruling by the Texas Court of Criminal Appeals will allow Graham to petition for a new trial based on new evidence. He will have to show that the new evidence "shows that no rational trier of fact could find proof of guilt beyond a reasonable doubt." See S. Verhovek, *Texas Opens Door for Death-Row Appeals*, The New York Times, April 21, 1994.

92. M. Vandiver, *The Quality of Mercy: Race and Clemency in Florida Death Penalty Cases, 1924-1966*, 27 Univ. of Richmond Law Review 315, 315 n.2 (1993).

93. See, e.g., former California Governor Pat Brown's book, *Public Justice, Private Mercy: A Governor's Education on Death Row* (1989) (with Dick Adler) for a discussion of the political pressures surrounding clemency.

94. Governor Tony Anaya commuted all five death row inmates in New Mexico as he left office. Governor Celeste of Ohio commuted eight death sentences at the end of his term. Governor Wilder of Virginia commuted the sentence of Earl Washington in 1994 on his last full day in office.

95. See *Texas Crime, Texas Justice*, note 60, at 119.

96. *Id.* at 4. Also, "[f]or the sixth straight year, Texas was the most deadly state in which to be a law enforcement officer." C. Flournoy, *Texas Tops Lethal List for Officers*, *The Dallas Morning News*, Jan. 2, 1994, at 25A.

97. *Id.* at p.119 (emphasis in original).

98. For a discussion of the costs of the death penalty, citing the cost studies mentioned, see *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, The Death Penalty Information Center, October 1992.

99. See *id.* at 13.

100. R. Dugger, *In the Dead of the Night*, *The Texas Observer*, April 22, 1988, at 7.

101. *Id.*

102. J. Mattox, *Texas' Death Penalty Dilemma*, *The Dallas Morning News*, Aug. 25, 1993.

103. For crimes after Sept. 1, 1993, the sentence is no parole for 40 years. See S. Scott, *Prosecutors Find Juries Balking at Death Penalty*, *The Dallas Morning News*, Dec 26, 1993, at 42A.

104. D. Barber, *Law Could Curb Texas Executions*, *The Dallas Morning News*, April 18, 1993, at 35A, 37A.

105. *Id.* at 37A.

106. C. Hoppe, *Executions Cost Texas Millions*, *The Dallas Morning News*, Mar. 8, 1992, at 12A.

107. *Texas Town Leading in Executions In a New U.S. Era of Death Penalty*, *The New York Times*, Sept. 6, 1986, at 8, col. 4.

108. See, e.g., B. Denson, *The Pros, Cons of Throwing Away Key*, *The Houston Post*, July 14, 1991, at A-1.

109. S. Scott, *Prosecutors Find Juries Balking at Death Penalty*, *The Dallas Morning News*, Dec. 26, 1993, at 41-42A.

110. See, e.g., *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, Death Penalty Information Center, April, 1993, at 19 (decrease in death sentences in states giving jurors the option of life without parole).

The Death Penalty Information Center is a non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment. The Center prepares in-depth reports, issues press releases, conducts briefings for journalists, and serves as a resource to those working on this issue.

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