A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973-1994*

*by Brent E. Newton***

Whatever your views about the death penalty, we simply cannot accept this state of affairs. . . .
— Thurgood Marshall[1]

I. INTRODUCTION

"The generality of a law inflicting capital punishment is one thing," Justice Douglas wrote in his concurring opinion in *Furman v. Georgia*,[2] the landmark 1972 case that invalidated the existing system of capital punishment.[3] "What may be said of the validity of the law on the books and what may be done with the law in its application . . . lead to quite different conclusions."[4] A second concurring Justice in *Furman*, Thurgood Marshall, commented that "whether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether people who are *fully informed* as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."[5] These two premises — that one need not quarrel with capital punishment in theory to oppose it in practice, and that most reasonable persons will oppose the death penalty if they are adequately informed about its application — are central to this article.

The optimal means to test these two related premises is to focus extensively on a single state that has fully implemented the death penalty in the post-*Furman* era. An informed opinion against capital punishment in practice follows from a coherent, holistic understanding of its application, an understanding that may best be obtained by studying a single state's death penalty. A case study of a single death penalty jurisdiction permits one to view capital punishment organically, as a distinct "system" within our law involving a single polity and populace supporting capital punishment, one capital defense bar, one statutory scheme governing the death penalty, one state judiciary that implements the law, and one federal judicial circuit responsible for federal habeas corpus review. Furthermore, in this era of increasing Supreme Court "deregulation" of the states' prerogative to implement the death penalty,[6] a case study of a single state's system of capital punishment also serves to inform judgment about

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[1] Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit, 86 COLUM. L. REV. 1, 4 (1986).

[2] 408 U.S. 238 (1972).

[3] Id. at 242 (Douglas, J., concurring).

[4] Id.

[5] Id. at 361 (Marshall, J., concurring) (emphasis added). This statement has been referred to as the "Marshall Hypothesis." *See, e.g.*, Austin Sarat & Neal Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (1976). Because of the complicated nature of many legal issues surrounding the death penalty, I limit my adherence to the "Marshall Hypothesis" to fully informed lawyers rather than fully informed lay persons.

[6] Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (1983).

the Court's current body of capital jurisprudence in view of the unconscionable unfairness it tolerates.

There is no better candidate for a case study than the State of Texas, the bellwether of the modern death penalty.[7] Texas has been a breeding ground for unfairness in the administration of capital punishment, which has evoked national and international condemnation.[8] Among the myriad factors accounting for Texas' shameful experience in implementing the death penalty are two primary ones: the clash of a legacy of social and racial prejudices with increasing ethnic diversity and socio-economic disparities, and the confluence of southern notions of Old Testament justice and western notions of frontier justice.[9] Nor is Texas' death penalty legacy an anachronism in 1994. Enthusiasm for capital punishment within Texas is unprecedented in the modern era, with a recent poll showing ninety-two percent popular support.[10] Today, Texas' death row, which boasts almost 400 residents, is, literally, a billion-dollar industry.[11]

This article attempts to demonstrate the pervasive unfairness in the modern Texas death penalty. First, it will offer a short history of the Texas death penalty. Because many chapters of that history have been written by the Supreme Court, the Court's many decisions involving Texas will be noted. Next, it will focus on the recurring unfairness in the administration of the Texas death penalty: inherent and overt racism, prosecutorial misconduct,

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[7] *See generally* Michael Graczyk, *Texas Death Penalty Still Raises Questions*, L.A. TIMES, December 20, 1992, at A5; Jack Broom, *Executions Down to a Smooth Legal Routine in Texas*, SEATTLE TIMES, December 13, 1992, at A18; Michael Graczyk, *Death Row Swells in Ten Years of Lethal Injections*, HOUS. CHRON., December 6, 1992, at D3; Kathy Fair, *Lethal Justice: Evolutions of Executions in Texas*, HOUS. CHRON., May 24, 1992, at A19; Julie Morris, *Executions a Matter of Routine in Texas*, GANNETT NEWS SERVICE, August 1, 1990 (available on NEXIS); *Texas Justice*, N.Y. TIMES, December 17, 1989, at D20.

[8] For instance, during the last decade or so, the editorial page editor of the *New York Times* has written at least nine editorials condemning the Texas death penalty on various grounds. *See Injustice in Texas*, N.Y. TIMES, June 2, 1993, at A18 (discussing case of Gary Graham); *Give Mercy a Day in Court*, N.Y. TIMES, May 4, 1993, at A24 (discussing case of Gary Graham); *Deadly Injustice*, N.Y. TIMES, February 1, 1993, at A18 (discussing cases of Gary Graham and Leonel Herrera); *Almost Executed, By Mistake*, N.Y. TIMES, March 6, 1989, at A16 (discussing case of Randall Dale Adams); *Texas Justice*, N.Y. TIMES, December 17, 1989, at A20 (discussing case of Clarence Brandley); *Merciless Texas Justice*, N.Y. TIMES, January 17, 1989, at A24 (discussing case of Johnny Paul Penry); *When a Tie Vote Means Death*, N.Y. TIMES, January 18, 1988, at A18 (discussing case of Robert Streetman); *Killing Young Killers*, N.Y. TIMES, January 9, 1986, at A22 (discussing case of Charles Rumbaugh); *Death Purified*, N.Y. TIMES, December 8, 1982, at A30 (discussing case of Charlie Brooks).

[9] As another commentator has observed of Texas' historical influences, "Texas' unique blend of Southern shame-based ritual and 'wild West' vigilantism resulted not only from her geographic location and demographic mix of her inhabitants, but [also] from insecurities concerning the stability of her borders. Feeling themselves besieged by Mexicans from the south, Yankees from the North, and most unsettling, insurrectionary slaves in their midst, Texans developed a national identity forged in fear." Danalynn Recer, *Neutralizing Race: The Fallacy of Multi-Culturalism and the Criminalization of the Black Male*, unpublished manuscript (1993) (on file with author).

[10] James Pinkerton, *Crime Poll Finds Many Fear Even Daytime Walk*, HOUS. CHRON., August 7, 1992, at A28.

[11] Christy Hoppe, *Executions Cost Texans Millions*, DALLAS MORNING NEWS, March 8, 1992, at 1 (extensive three-month study by *Dallas Morning News* conservatively estimated that each successful execution costs $2.3 million in terms of costs of trial, appeals, defense attorneys, etc.); Dick Lehr, *Death Penalty Foes Seek a New Debate*, BOSTON GLOBE, January 11, 1993, at 1 (study by Death Penalty Information Center in Washington, D.C. estimated that each Texas execution costs $2.8 million). As a basis of comparison, it should be noted that the Texas Department of Criminal Justice, Institutional Division, reports that a typical 2,250-convict prison costs $23 million annually to operate. *See* Mary Lenz, *Criminal Justice Problems Facing Lawmakers*, HOUS. POST, January 19, 1993, at A1.

hanging judges and hanging juries, the crisis in providing indigent capital defense, the injustice of subjecting the young and persons with serious mental disorders to capital punishment, and Texas' record of sending innocent persons to death row.[12]

II. HISTORY OF THE TEXAS DEATH PENALTY

A. Social History

Capital punishment has a prominent place in this State's history, which simply reflects the generally violent climate historically associated with Texas justice. Until 1924, when Texas began executing people in the newly-acquired electric chair located in the state prison in Huntsville, the death penalty was largely a local concern, administered by hanging at the county level. Between 1924 and 1964, when the last electrocution occurred before the decade-long national moratorium, Texas placed 506 persons on death row and executed 361 of them.[13] In those years before *Furman v. Georgia*,[14] the Texas death penalty was used almost exclusively against the young, the ignorant and impoverished, racial minorities, and the mentally disturbed; at the same time, practically every victim was white.[15] Demographically, Texas' death row population since 1973 is not strikingly different from its pre-*Furman* counterpart: condemned persons are overwhelmingly minorities, the young, or the mentally disabled, who come from the undereducated, impoverished ranks of society. Similarly, the vast majority of their victims have been white.[16] Strikingly, a disproportionate contingent of death row inmates has been sent to Huntsville from Harris County (Houston), appropriately dubbed "the death penalty capital of the world."[17] Furthermore, in Houston and elsewhere in Texas, the number of capital cases has been increasing exponentially in recent years.[18]

Since 1973, when Texas enacted its post-*Furman* death penalty statute, the state's death row has grown steadily, by approximately 25 inmates annually. By 1990, the size of

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[12] This article, which cites only selective instances of unfairness, merely begins to aid in such an understanding. Numerous other sources are obviously available. My forthcoming book contains a considerably larger body of empirical and anecdotal data. Another excellent source is James Marquart et al., THE ROPE, THE CHAIR, AND THE NEEDLE (1994), written by three social scientists.

[13] *See* "Execution Information" packet, distributed by the Texas Department of Criminal Justice, Institutional Division (on file with author) [hereinafter "TDCJ-ID Packet"]; *see also* Peggy M. Tobolowsky, *What Hath* Penry *Wrought: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 348-51 (1992). In the mid-1970s, Texas adopted lethal injection as its mode of execution. *See* John H. Jordon, Note, *Lethal Injection in Texas*, 9 ST. MARY'S L.J. 359 (1977).

[14] 408 U.S. 238 (1972).

[15] *See generally* Don Reid, EYEWITNESS (1973); Rubert C. Koeninger, *Capital Punishment in Texas, 1924-68*, 15 CRIME & DELINQ. 132 (1969).

[16] The author has compiled extensive data on the gender, race, and age of Texas death row inmates and their victims since 1973.

[17] *See* Steve McVicker & D.J. Wilson, *Capital Punishment Capital*, HOUS. PRESS, July 8, 1993, at 17-23; J. Michael Kennedy, *Why Houston Leads in Death Row Cases*, L.A. TIMES, July 2, 1992, at A5; Kim Cobb, *County Sets Pace for Death Penalty Verdicts in U.S.*, HOUS. CHRON., April 12, 1992, at 1A; Peter Applebaum, *Texas Town Leading in Executions in New U.S. Era of the Death Penalty*, N.Y. TIMES, September 6, 1986, at A8.

[18] *See* John Makeig, *Rise in Capital Case Filings May Put County In Jam*, HOUS. CHRON., April 9, 1992, at 25A (Harris County capital case filings up from 50 in 1990 to 200 in 1992; estimated that capital case filings in Harris County will be 400 by the turn of the century); John Makeig, *County's Deadly Trend; Capital Murder Charges up 125% from 1991*, HOUS. CHRON., December 14, 1991, at 1A; Barbara Linkin, *Murder Cases Clog County's Court System*, HOUS. POST, April 8, 1992, at A19 ("As of [April 1992], 93 capital murder cases were pending in Harris County.").

Texas' death row population had surpassed 300.[19] That figure — as well as the total number of actual executions — would have been considerably higher but for a series of Supreme Court capital cases from Texas in the 1980s that invalidated well over 100 death sentences and otherwise created judicial bottlenecks. Until mid-1993, Texas led the nation in the size of its death row; California subsequently has achieved that dubious distinction.[20] California's narrow lead is explained by another Texas death penalty record, which likely will never be broken; by the time this goes to press, Texas has executed seventy-six inmates in the post-*Furman* era, fully one-third of the total executions in the entire county.[21] By the mid-1980s, the first generation of post-*Furman* death row inmates were exhausting their appeals, which were being rebuffed by an increasingly conservative state and federal judiciary. In 1986, three executions occurred within a single week. Frequently, by the late 1980s and early 1990s, multiple executions were being scheduled for the same night, although to date last-minute stays of execution have prevented such joint killings.[22]

The first post-*Furman* execution did not occur until December 1982, when, amidst the revelry of hundreds of cheering spectators, Charlie Brooks, an African-American convicted of kidnapping and murdering a white male, became the first person executed in Texas since 1964.[23] The carnival atmosphere surrounding many Texas executions is symptomatic of the strength of popular support for capital punishment in Texas. One reporter's account of this phenomenon at executions he attended is particularly disturbing:

> As revelers chanted death slogans and bought up souvenir electric chair pins, death-penalty enthusiasts in Texas gathered by the hundreds outside the death chamber in downtown Huntsville and cheered until they became hoarse . . . . I will never forget the first time I encountered that scene. It was October 4, 1983, less than a year after the death penalty had been reinstituted in Texas, when convicted killer J.D. Autry was scheduled to die for gunning down a convenience store clerk and then taking a six-pack of beer.
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> Autry was not scheduled to die until after midnight, but by late afternoon scores of death-penalty advocates already had begun showing up on the street outside the Texas Department of Corrections' red-brick death chamber. The great majority of the advocates were young students from nearby Sam Houston State University, many of them future police officers and prosecutors enrolled in the school's criminal justice program.
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> As the evening wore on, other journalists and I were amazed — and horrified — as a crowd that swelled into the hundreds chanted slogans, drank beer and waved placards celebrating the condemned man's imminent demise. One placard, depicting a beer-filled needle being inserted into Autry, read: "Hey J.D., this Bud's for you!" . . . [A] tiny knot of death-penalty opponents stood by in a candlelight vigil, all shocked and sickened . . . at the grotesque

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[19] *See* NAACP Legal Defense Fund, *Death Row U.S.A. Reporter, 1976-93.*

[20] *See California Has Largest Death Row; Last Month the State Surpassed Texas*, L.A. TIMES, August 24, 1993, A18. Almost 600 persons have been sent to Texas' death row since 1973; presently, almost 400 persons are on Texas' death row. The author has compiled what he believes to be a definitive list of those persons. That data is on file with the author and will be made available upon request.

[21] On May 3, 1994, Texas executed its seventy-sixth inmate since 1982, when executions were resumed in the post-*Furman* era. The remainder of the nation has executed 159 inmates. *See Executed in Texas*, WASH. TIMES, April 5, 1994, at A7.

[22] *See* TDCJ-ID "Death Penalty Information" packet; *see also* UPI WIRE December 12, 1988 [untitled] (available on NEXIS).

[23] Dick J. Reavis, *Charlie Brooks Last Words*, TEXAS MONTHLY, 101 et seq. (February 1983).

> display. Inside the death house, where witnesses said the cheering could be heard, an ashen-faced Autry was strapped to a gurney a half hour before midnight, and prison officials inserted a needle to begin a saline solution that would later carry a lethal chemical. But as fate would have it, Autry got a last-minute court reprieve, and prison officials were ordered to pull out the needle and unstrap him from the gurney. Moments later, as Texas Atty. Gen. Jim Mattox was announcing from an outdoor podium that the execution would not take place, the festive, inebriated crowd turned ugly. These college students and aspiring police officers began shouting down the state's top law enforcement officer, demanding the blood they had come to celebrate. Finally, after much concern that the scene would deteriorate into a riot, the revelers sulkily stalked home.[24]

In the two decades following *Furman*, Texans have increasingly favored the death penalty. Not surprisingly, public opinion polls have shown consistently that between 8 and 9 out of every 10 Texans, as a general matter, favor capital punishment.[25] But among racial minorities and the poor in Texas, support wanes considerably.[26] A less scientific gauge of Texans' sentiments on the issue is the frequency and tenor of letters-to-the-editor concerning the death penalty in Texas newspapers. Reactionary letters appear almost daily.[27]

The death penalty is also an integral part of the Texas political culture. The 1990 gubernatorial race received national attention for the candidates' fixation with capital

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[24] Jim Carlton, *The Dancing Over A Man's Execution Recalls Other Days*, L.A. TIMES, January 29, 1989, at B8; *see also Placard-Waiving Crowds Cheer Twin Executions*, UPI WIRE, October 30, 1984 (noting that spectators carried four-foot mock syringes and placards and proudly shouted, "we're Republicans").

[25] *See, e.g.*, James Pinkerton, *supra* note 10; Kathy Fair, *Texans Give Thumbs Up to Executions*, HOUS. CHRON., February 22, 1992.

[26] *See* Terry Williams, *Blacks, Hispanics Still Feel Brunt of Racial Bias*, HOUS. POST, March 17, 1993, at A1 (90% of white Texans favor the death penalty, as compared to 66% of African-American Texans); Marilyn D. McShane et al., *Eligibility for Jury Service in [Texas] Capital Trials: A Question of Potential Exclusion and Bias*, TEX. B.J. at 365 (April 1987).

[27] *See, e.g.*, HOUS. POST, April 12, 1994, at A24 ("I feel death is too good for Peter Cantu and his friends [sentenced to death in Houston in 1994]. They should each be tortured before they are allowed to die . . . .") HOUS. CHRON., March 23, 1993, at 13A ("Isn't it nice that our State senate approved a bill calling for the death penalty for those who kill children under age 6? The next step is to approve the death penalty for all killers. Think of the lives it would save, not to mention the millions saved by not keeping these vermin alive year after year."); HOUS. POST, January 10, 1993, at C2 (proposing that Texas should change its method of execution to burning at the stake); HOUS. POST, December 27, 1992, at C2 ("How about a mandatory death sentence for any felon convicted three times?"); HOUS. POST, September 13, 1992, at C2 ("Why not have the death penalty for anyone having a handgun, knife, or other deadly weapon in his possession while committing any crime?"); HOUS. POST, April 11, 1992, at A26 (proposing summary executions for all drug dealers); HOUS. CHRON., February 23, 1992, Outlook section, at 3 ("Let's pass a . . . law that makes drug possession punishable by an automatic death sentence."); HOUS. CHRON., October 25, 1991, at 33A ("I vote for . . . the death penalty to criminals wielding firearms."); HOUS. CHRON., September 23, 1991, at A11 ("We want the death penalty implemented within a month of conviction."); HOUS. POST, July 6, 1989, at A2 ("I'm excited and proud of the recent decisions by the [Supreme Court] permitting [Texas] to execute minors and the mentally retarded."); HOUS. POST, May 12, 1989, at A32 (proposing public hanging for all drug dealers).

Disturbingly, such reactionary opinions about capital punishment are not limited to the fringes of Texas society. For example, the 1993 chairman of the Harris County (Houston), Texas Republican Party, Dr. Steve Holtz, has publicly advocated the death penalty for all homosexuals based on his reading of the Bible. *See* Robert Sullivan, *An Army of the Faithful*, N.Y. TIMES, April 25, 1993, at F33; *"Religious Right" Seizes Control of Harris County GOP*, DALLAS MORNING NEWS, December 9, 1992, at 16A.

punishment. In one campaign ad, a leading candidate, former Governor and Attorney General Mark White, was filmed walking down a trophied hallway adorned with large visages of all the men executed by Texas during his tenure in office.[28] The public's obsession with the death penalty is perhaps best illustrated by a more recent candidate's campaign. Rene Haas, a serious contender for the Texas Supreme Court in the 1994 Democratic primary, stated her "strong support for the death penalty" in her campaign ads. Such a campaign strategy might appear to be par for the course until one recognizes that the Texas Supreme Court does not handle *any* criminal appeals, which are the exclusive province of the Texas Court of Criminal Appeals.[29]

B. Legal History

Vehement scholarly criticism of post-*Furman* Texas capital sentencing procedures has been voiced repeatedly on a wide variety of grounds. Indeed, with the possible exception of one early article written by a former capital prosecutor,[30] scholarly treatment of Texas sentencing procedures has been unequivocal in its condemnation.[31] Yet, as discussed below, such criticism

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[28] *See* Molly Ivins, *The Big Fry-Off*, MOTHER JONES, at 9 (June 1990); David Broder & Maralee Schwartz, *Readiness to Use Death Penalty Is A Theme of Texas Campaign*, WASH. POST, February 20, 1990, at A11.

[29] *See* Bruce Nichols, *Court Candidates Trade Charges During Debate*, DALLAS MORNING NEWS, April 6, 1994, at 28A.

[30] *See generally*, David Crump, *Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531 (1977). Even Crump's approval of the statute was somewhat conditional. *See id.*, at 581.

[31] *See* Note, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49 (1993); Peggy M. Tobolowsky, *supra* note 13; Scott W. Howe, *Resolving The Conflict In The Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 368, 375-76 (1992); Sean Fitzgerald, Note, *Walking a Constitutional Tightrope: Discretion, Guidance, and the Texas Capital Sentencing Scheme*, 28 HOUS. L. REV. 663 (1991); Shelley Clarke, Note, *A Reasoned Moral Response: Rethinking Texas' Capital Sentencing Statute After* Penry v. Lynaugh, 69 TEX. L. REV. 407 (1990); Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 423-25 (1990); Brock Mehler, *The Supreme Court and State Psychiatric Examinations of Capital Defendants: Stuck Inside of* Jurek *with the* Barefoot *Blues Again*, 59 UMKC L. REV. 107 (1990); Kenneth Andrew Zimmern, Satterwhite v. Texas: *A Return to Arbitrary Sentencing?*, 42 BAYLOR L. REV. 623 (1990); James M. Marquart et al., *Gazing Into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC. REV. 449 (1989); Mary K. Sicola & Richard R. Shreves, *Jury Consideration of Mitigating Evidence: A Renewed Challenge to the Constitutionality of the Texas Death Penalty Statute*, 15 AM. J. CRIM. L. 1 (1988); Stephen W. MacNoll, Note, *A Constitutional Analysis of the Texas Death Penalty Statute*, 15 AM. J. CRIM. L. 69 (1988); Robert Clary, *Voting for Death: Some Lingering Doubts About the Constitutionality of Texas' Capital Sentencing Procedure*, 19 ST. MARY'S L.J. 353 (1987); Daniel Benson, *Texas Capital Sentencing Procedure After* Eddings: *Some Questions Regarding Constitutional Validity*, 23 S. TEX. L.J. (1982); Charles L. Black, Jr., *The Death Penalty* 66-72 (1981); Giles R. Scofield, *Due Process in the United States Supreme Court and the Death of the Texas Capital Murder Statute*, 8 AM. J. CRIM. L. 1 (1980); Hertz & Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 339-41 (1981); George E. Dix, *Constitutional Validity of the Texas Capital Murder Scheme: A Continuing Question*, TEX. B.J. 627 (July 1980); George E. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 142-61 (1979); Peggy Davis, *Texas Capital-Sentencing: The Role of the Jury and Restraining the Hand of the Expert*, 69 J. CRIM. L. & CRIMINOLOGY, 300, 300-06 (1978); George E. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343 (1977); George E. Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 AM. J. CRIM. L. 151 (1977); Charles L. Black, Jr., *Due Process for Death:* Jurek v. Texas *and Companion Cases*, 26 CATH. L. REV. 1, 4, 6 (1976); William Taylor, Note, Jurek v. State, 7 TEX. TECH. L. REV. 170 (1975); William R.

has largely been ignored by the courts. This failure, at least on the part of the Supreme Court, is particularly unfortunate in that the Court's Texas precedents have broader implications outside the state in shaping the Court's overall death penalty jurisprudence. As commentators have noted, in the Supreme Court's eyes, the Texas post-*Furman* sentencing scheme "sets the constitutional outpost."[32] Although the governing statute has, fortunately, recently been amended so as to remedy some of its infirmities,[33] the amended statute has offered no succor to the many hundreds of inmates sentenced to death under the prior statute.[34]

In the wake of *Furman*, the Texas Legislature sought to enact a new death penalty statute that would pass muster with the Supreme Court.[35] In keeping with its tradition of nonconformity, the Texas Legislature in 1973 enacted a unique capital sentencing scheme. Unlike other jurisdictions, which required sentencing juries in capital cases to weigh aggravating and mitigating circumstances in deciding whether life or death is appropriate, juries in Texas simply were asked to answer three narrow statutory "special issues":

> (i) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (ii) whether there is a reasonable probability that the defendant w[ill] commit criminal acts of violence that w[ill] constitute a continuing threat to society; and
> (iii) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[36]

Upon unanimous affirmative answers to the special issues, a death sentence was automatic; a negative answer to any one special issue by ten or more jurors would result in a life sentence.[37] The Texas House approved the proposal 114-30; the Senate vote was 24-7. The legislative history of the conference committee proposal reveals that its sponsor, Representative Cobb, intended that jurors, in answering the "special issues," would have little or no discretion to dispense mercy in view of traditional mitigating circumstances.[38]

Taylor, Case Note, 7 TEX. TECH. L. REV. 170 (1975); Kay C. Martinez, Case Note, 7 ST. MARY'S L.J. 454 (1975). Roy L. Stacy, Note, *Is the Death Penalty Dead?*, 26 BAYLOR L. REV. 114 (1974); Charles Bubany, *The Texas Penal Code of 1974*, 28 S.W.L.J. 292 (1974).

[32] Charles L. Black, Jr., *supra* note 31, at 2 (1976); *see also* Shelley Clarke, *supra* note 31, at 436-37 (1990) (". . . Texas' capital sentencing scheme is universally regarded, even by the Supreme Court, as the absolute minimum below which invalidation is required by the Constitution.").

[33] *See* TEX. CODE CRIM. PROC. ANN. arts. 37.071 & 37.0711 (West 1994).

[34] *See* Acts, 1991, 72nd Leg., ch. 838, secs. 1, 5.

[35] For a thorough discussion of the legislative history of the Texas post-*Branch* death penalty statutory scheme, see Michael Kuhn, Note, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410 (1974).

[36] TEX. CODE CRIM. PRO. ANN. art. 37.071 (West 1974).

[37] *Id.* Article 37.071 was significantly amended in 1991, effective with respect to all capital murders committed after September 1, 1991. *See* TEX. CODE CRIM. PRO. ANN. art. 37.071 (West 1994).

[38] *See* Stephen W. MacNoll, *supra* note 31, at 79 & nn.81-85. In the first decade and a half after its enactment, Texas capital juries instructed pursuant to Article 37.071(b) returned death sentences in four-fifths of all cases, which indicates its near mandatory quality. *See* Jonathan Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-*Furman *Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CH. 743, 771 (1990-91). Although the data in most states is incomplete, it appears that in other leading death penalty jurisdictions the ratio between life and death sentences for capital cases actually reaching the capital sentencing phase is considerably less than Texas'. For instance, in California the ratio has

The first death penalty case under this new statutory scheme to reach the Texas Court of Criminal Appeals — Texas' highest state criminal court and the only state appellate court in death penalty cases — was *Jurek v. State*.[39] By a vote of 3-2,[40] the court upheld the constitutionality of the statute. Two dissenters, including Judge Truman Roberts, a former leading prosecutor and staunch proponent of capital punishment,[41] argued that the statute employed overly vague terminology and did not permit jurors to dispense mercy in view of mitigating evidence.[42] The U. S. Supreme Court granted certiorari in Jurek's case and consolidated it with capital cases from Georgia, Florida, Louisiana, and North Carolina. In *Jurek v. Texas*,[43] over the dissents of Justices Marshall and Brennan, the Court held that the Texas statutory scheme was constitutional.

In a three-judge opinion announcing the judgment of the Court, Justices Stewart, Powell and Stevens addressed the primary issue in the case — whether a Texas capital sentencing jury could adequately consider mitigating evidence under Article 37.071; if not, the death penalty would be essentially mandatory in certain cases.[44] "The Texas statute does not explicitly speak of mitigating circumstances," the joint opinion observed. "[I]t directs only that the jury answer three questions." The opinion then framed the issue that would recur in Texas capital cases for the next two decades:

> *Thus, the constitutionality of the Texas procedure turns on whether the enumerated questions allow consideration of particularized mitigating factors.* The [future dangerousness] question asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death . . . . The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" and "continuing threat to society." In the present case, however, *it indicated that it will interpret this [special issue] so as to allow a defendant to bring the jury's attention whatever mitigating circumstances he may be able to show* . . . . It thus appears that . . . the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a death sentence.[45]

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been 1:1. Author's telephonic interview with Wendy Peoples, Esq., California Appellate Project, San Francisco, California, April 15, 1993.

[39] 522 S.W.2d 934 (Tex. Crim. App. 1975).

[40] The court's membership has since been expanded to nine judges.

[41] Author's interview with Judge Sam Houston Clinton, Texas Court of Criminal Appeals, February 28, 1993, Austin, Texas; *see also* Reid, *supra* note 15, at 137-38.

[42] Jurek, 522 S.W.2d at 946-50 (Roberts, J., dissenting in part); *id.* at 943-46 (Odom, J., dissenting in part).

[43] 428 U.S. 262 (1976).

[44] The Court had declared a mandatory death penalty unconstitutional in two other cases handed down on the same day as *Jurek*. *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (opinion of Stevens, Stewart & Powell, JJ.); Roberts v. Louisiana, 428 U.S. 325 (1976) (opinion of Stevens, Stewart & Powell, JJ.).

[45] Jurek, 428 U.S. at 273-75 (emphasis added). The joint opinion reserved judgment about whether the other two special issues, if construed broadly, could be significant vehicles for mitigating evidence because the Texas Court of Criminal Appeals had not indicated that it would construe the issues in such a fashion. *Id.* As discussed in a subsequent case, those two special issues were never construed by the Texas courts, thus making the "future dangerousness" issue the only meaningful vehicle for mitigating evidence in the post-*Furman* Texas capital sentencing scheme. *See* Penry v. Lynaugh, 492 U.S. 302 (1989).

Thus, in *Jurek*, the Court's approval was only tentative: the Court upheld the "facial" constitutionality of the statute on the condition that the Texas Court of Criminal Appeals would broadly construe the language of the special issues — or at least the "future dangerousness" issue — so as to permit defendants to "bring to the jury's attention" and have jurors "consider" all relevant mitigating evidence.

In the late 1980s and early 1990s, the Supreme Court granted certiorari in a series of Texas death penalty cases to decide whether the Court of Criminal Appeals had interpreted the Texas death penalty statute in a manner that would permit juries to consider and give effect to all types of mitigating factors.[46] The grant of certiorari in *Franklin v. Lynaugh* seemed to offer the possibility that *Jurek's* conditional imprimatur might be revoked. Franklin argued that certain mitigating evidence offered at his trial — his record as a model prisoner — could not be given full mitigating effect by jurors in answering the narrow special issues. Because the bare-bones language of the statutory special issues had not been expanded in extra-statutory jury instructions, Franklin contended, the statute violated the bedrock Eighth Amendment principle that capital jurors must be permitted to consider all relevant mitigating evidence.

A plurality of the Court in *Franklin* rejected any challenge, facial or as-applied, to the constitutionality of the Texas statute, and thus reaffirmed *Jurek*.[47] However, the five remaining Justices, including Justice Stevens (who co-authored the joint opinion in *Jurek*), hinted that in a potentially large number of cases involving different types of mitigating evidence than that at issue in *Franklin*, Texas jurors would be unconstitutionally circumscribed from giving proper mitigating effect to such evidence.[48] Predictably, the very next year, in *Penry v. Lynaugh*,[49] those same five Justices held that the Texas statute was unconstitutional as applied to mitigating evidence of a capital defendant's mental retardation, brain damage, and child abuse. Because Penry's mitigating evidence had significant mitigating relevance "beyond the scope" of the special issues, the Court held jurors were unable to give a "reasoned moral response" to such evidence as required by the Eighth Amendment. Furthermore, as the Court recognized, under the Texas "special issues," Penry's mitigating evidence, rather than militating in favor of a life sentence, perversely militated in favor of death, since it showed that Penry would more likely pose a "future danger" to society, although his condition was no fault of his own.[50] Although *Penry's* holding was unmistakably broad, the lower state and federal courts gave it an extremely niggardly reading during the next four years.[51] The Fifth Circuit has ultimately granted *Penry* relief in only one case,[52] and even that case was subsequently overruled.[53]

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[46] *See* Franklin v. Lynaugh, 487 U.S. 164 (1988); Penry v. Lynaugh, 492 U.S. 302 (1989); Graham v. Collins, 113 S. Ct. 892 (1993); Johnson v. Texas, 113 S. Ct. 2658 (1993).

[47] Franklin, 487 U.S. at 182.

[48] *Id.* at 183 (O'Connor, J., joined by Blackmun, J., concurring); *id.* at 189 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting).

[49] 492 U.S. 302.

[50] *Id.* at 319-28.

[51] *See, e.g.*, Mines v. State, 852 S.W.2d 941, 959 (Tex. Crim. App. 1992) (Baird, J., dissenting, joined by Clinton & Maloney, JJ.) ("A majority of this Court has elected to limit the application of *Penry* to virtually identical scenarios."); *id.* at 941 n.5 ("Our research reveals that a defendant has sustained a *'Penry'* claim before this Court in only six published cases."); *see also*, Peggy M. Tobolowsky, *What Hath Penry Wrought?: Mitigating Circumstances and the Texas*, 19 AM. J. CRIM. L. 345 (1992).

[52] Mayo v. Lynaugh, 893 F.2d 683 (5th Cir. 1990).

[53] *See* Motley v. Collins, _ F.3d _, 1994 U.S. App. LEXIS 6059 (5th Cir. April 1, 1994). There have been estimates that *Penry* claims have been rejected by the lower state and federal courts in Texas in approximately 100-150 cases.

By 1993, the tension created by the numerous lower court decisions in the wake of *Penry* demanded the Supreme Court's attention. After an *en banc* Fifth Circuit divided on a *Penry*-type claim 7-6 in *Graham v. Collins*,[54] the Court granted certiorari in order to decide the constitutionality of the Texas sentencing statute as applied to types of mitigating evidence not present in *Penry* — including a defendant's youth (seventeen), deprived childhood, and positive character traits. Rather than reaching the merits, however, five members of the Court held that Graham's claim proposed a "new rule of constitutional law" under *Teague v. Lane*,[55] and thus could not be remedied on federal habeas corpus review. Justice Souter's dissent, joined by three other Justices, argued not only that Graham's claim did not propose a "new rule,"[56] but also that Graham's jury was unconstitutionally prohibited from giving proper mitigating effect to his youth and evidence of his troubled childhood.[57]

Because the *Graham* majority left open the question of whether other types of mitigating evidence could be given proper mitigating effect under the Texas statute, the Court again was required to address the issue. In 1993, in *Johnson v. Texas*,[58] a case on direct appeal and thus unaffected by *Teague*, the Court held that mitigating evidence such as a capital defendant's youth at the time of the crime was within the "effective reach" of sentencing juries under the Texas special issues. The same four Justices who dissented in *Graham* again rejected the majority's reasoning, arguing that such mitigating evidence actually militated in favor of a death sentence.[59]

The Court's 5-4 rejection of the claims of Graham and Johnson in early 1993 was a highly significant event in the history of the Texas death penalty. Had the dissenters' views prevailed, an estimated three-fourths of Texas' death row population would have had their death sentences invalidated. One can only conclude that the majority engaged in unprincipled judicial expediency in order to avoid that result — at the expense of constitutional integrity.[60] In the wake of *Graham* and *Johnson*, state and federal courts in Texas have invariably rejected any constitutional challenge to the Texas "special issues," even in cases involving evidence virtually identical to that in *Penry*.[61]

The Texas statute's treatment of mitigating evidence is not the only aspect of the Texas death penalty scheme that has occupied the attention of the Supreme Court during the last two decades. *Adams v. Texas*[62] concerned Texas Penal Code § 12.31(b), which required capital jurors to take an oath that the possibility of a death sentence would not "affect" their deliberations. Any prospective juror who could not swear to that effect — that is, any venireperson who

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[54] 950 F.2d 1009 (5th Cir. 1992) (en banc).

[55] 489 U.S. 288, 301 (1989).

[56] The four dissenters accused the majority of manipulating the *Teague* rule in Graham's case, as *Teague*'s retroactivity bar had not been applied in *Penry*, which raised an essentially identical type of claim. 113 S. Ct. at 920 n.2, 926 (Souter, J., dissenting, joined by Blackmun, Stevens & O'Connor).

[57] 113 S. Ct. at 917-26 (dissenting opinion).

[58] 113 S. Ct. 2658 (1993).

[59] *See id.* at 2672-2680 (O'Connor, J., dissenting, joined by Blackmun, Stevens & Souter, JJ.).

[60] Such a conclusion should not be attributed to this writer's ideological opposition to capital punishment. (Indeed, the four members of the Court who dissented in *Graham* and *Johnson* — all appointed by Republican presidents — have consistently voted for capital punishment while on the Court.) Rather, the majority in *Graham* and *Johnson* were transparent in their own pro-death penalty ideology, which caused them to flout two decade's worth of Supreme Court precedent. As Justice O'Connor so correctly argued in her *Johnson* dissent, the majority "reach[ed] th[eir] result only by invoking a highly selective version of *stare decisis*." Johnson, 113 S. Ct. at 2672.

[61] *See, e.g.*, Earhart v. State, _ S.W.2d _, 1994 Tex. LEXIS 41 (Tex. Crim. App. April 6, 1994) (mitigating evidence of mental illness); Motley, *supra* note 53 (mitigating evidence of child abuse).

[62] 448 U.S. 38 (1980).

expressed any scruples against capital punishment — was disqualified as a matter of Texas law. Since 1974, the Texas Court of Criminal Appeals consistently had rejected claims that § 12.31(b) was a straight-forward violation of *Witherspoon v. Illinois*.[63] But in *Adams*, by a 8-1 vote, the Court held that disqualification based on a prospective juror's refusal to take § 12.31(b)'s oath did indeed violate *Witherspoon*. In so doing, the Supreme Court in a single swipe invalidated numerous Texas death sentences.[64]

The following year, in 1981, the Supreme Court granted certiorari in *Estelle v. Smith*[65] to review the constitutionality of the widespread practice of subjecting defendants to obligatory *ex parte* interviews by prosecution psychiatrists, who later would testify on the "future dangerousness" special issue at capital sentencing hearings. The Court held this practice a violation of a capital defendant's Fifth and Sixth Amendment rights. Again, numerous Texas death sentences were invalidated.[66]

The next major Texas capital case decided by the Supreme Court arose from the ashes of *Smith*.[67] In *Barefoot v. Estelle*,[68] the Court was asked to bar psychiatrists from testifying on the "future dangerousness" question based only on a hypothetical posed by the prosecution. Such hypotheticals, used to circumvent the restraints imposed by *Smith*, were based on the circumstances of the murder and would usually include the defendant's criminal history, yet neglected to include any mitigating circumstances. Thus, without even interviewing a defendant, prosecution psychiatrists in Texas were speculating about his tendency toward violence in the future. In the alternative, Barefoot asked the Court to outlaw categorically the use of prosecution psychiatrists during Texas capital sentencing hearings.

In *Barefoot*, the American Psychiatric Association, as *amicus curiae*, argued that such "expert" predictions of long-term future dangerousness were highly unreliable and bordered on medical quackery, which lay jurors would unduly credit as authoritative. The APA particularly condemned the use of factually-based hypotheticals. Conceding the unreliability of such predictions, the Court nevertheless refused to limit the use of prosecution psychiatrists so long as they complied with the procedures set forth in *Smith*. Justice Blackmun, previously a consistent vote for the death penalty since *Furman*, dissented vigorously, announcing that the Court's approval of such highly prejudicial and unreliable evidence "is too much for me."[69]

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[63] 391 U.S. 511 (1968). In *Witherspoon*, the Court held that a state could not constitutionally exclude prospective capital jurors "for cause" simply because they expressed conscientious scruples against the death penalty.

[64] *See* Welsh S. White, THE DEATH PENALTY IN THE NINETIES 19 (1991).

[65] 451 U.S. 44 (1981).

[66] Linda Greenhouse, *Court Widens Right of Suspect to Bar Self-Incrimination*, N.Y. TIMES, May 19, 1981, at A1.

[67] In Satterwhite v. Texas, 486 U.S. 250 (1988), and Powell v. Texas, 492 U.S. 680 (1989), the Court elaborated on its prior holding in *Estelle v. Smith*. The more important of those two cases was *Satterwhite*, in which the Court held that harmless error analysis should be applied to *Smith* violations reviewed on appeal. Thus, the Court permitted the lower courts in Texas to affirm a death sentence if it could be concluded that such testimony was introduced in violation of *Smith* was "harmless beyond a reasonable doubt." Satterwhite, 486 U.S. at 256-60.

[68] 463 U.S. 880 (1983).

[69] *Id.* at 916 (Blackmun, J., dissenting, joined by Marshall and Brennan, JJ.). A second, wholly unrelated issue was before the Court in *Barefoot*. The United States Court of Appeals for the Fifth Circuit had employed expedited, summary appellate procedures in reviewing the federal district court's denial of Barefoot's petition for habeas corpus. The rationale for the fast-track procedures was to permit an execution to be carried out without the usual delay occasioned by a federal appeal that, in any other type of case, could take many months. By a vote of five to four, the Court held that such procedures were constitutional. *Id.* at 887-96.

In a 1993 case from Texas which received international condemnation, the Court granted certiorari to decide whether a claim of "actual innocence," based on evidence discovered after trial, is cognizable on federal habeas corpus review when unrelated to any other federal constitutional claim. In *Herrera v. Collins*,[70] Chief Justice Rehnquist's majority opinion held that a federal habeas petitioner may not raise such an innocence claim, because states may constitutionally execute an inmate who may in fact be innocent so long as his trial was "fair" and he was permitted to seek executive clemency beforehand.[71] Justice Blackmun again wrote a harsh dissent, stating his belief that "it is contrary to any standard of decency to execute someone who is actually innocent."[72]

III. ASPECTS OF SYSTEMIC UNFAIRNESS

> *When we talk about the [death penalty] system being corrupt . . . we are talking about not only the [defense] lawyers, or the elected state-court hanging judges, or members of the federal bench. We are talking about the entire system, from top to bottom.*[73]

A. The Issue of Race

In describing the pre-*Furman* Texas death penalty, the leading authority on the topic, Don Reid, wrote that racism was "as much a part of Texas as oil and cattle."[74] Little has changed since 1973. Numerous studies on the existence of systemic racial discrimination in the post-*Furman* Texas death penalty scheme have been undertaken.[75] These studies, based on aggregate data regarding the race of murderers and their victims, overwhelmingly point to the existence of racial discrimination. For instance, Professor Eckland-Olson's study using data from 1974-83 revealed that only 51% of all Texas capital murders during those years involved white victims, yet 85% of all death sentences were for the capital murder of whites. Conversely, 23.4% of all Texas capital murders involved black victims, but such murders resulted in only 3.6% of all death sentences.[76] Similarly, Professors Sorensen and Marquart

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[70] 113 S. Ct. 853 (1993).

[71] *Id.* at 856-70.

[72] *Id.* at 876-884 (Blackmun, J., joined by Stevens and Souter, JJ.) (expressing doubts about whether death penalty, as regulated by the Supreme Court, remains constitutional).

[73] David Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 60 (1991).

[74] Reid, *supra* note 15, at 109.

[75] *See, e.g.*, William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563, 596 (1980) (study based on Texas homicide data from 1973-78); Jim Henderson, & Jack Taylor, *Killers of Dallas Blacks Escape the Death Penalty*, DALLAS TIMES HERALD, November 17, 1985, at A1, A16; Ronnie Dugger, *The Numbers on Death Row Prove that Blacks Who Kill Whites Receive the Harshest Judgment*, TIME, Spring 1988, Special Issue, at 88 (discussing University of Texas Law Professor Ed Sherman's analysis of Harris and Dallas County, Texas, death penalty data from 1978-80); Sheldon Eckland-Olson, *Structured Discretion, Racial Bias, and the Texas Death Penalty*, 69 POL. SCI. Q. 853 (1988) (study based on Texas capital murder statistics from 1974-88); Jonathan R. Sorensen, The Effects of Legal and Extra-legal Factors on Prosecutorial and Jury Decision Making in Post-*Furman* Texas Capital Cases (1990) (unpublished Ph.D. dissertation, Sam Houston State University, Huntsville, Texas), (study based on Texas capital murder statistics from 1974-88); Sorensen & Marquart, *supra* note 38 (study based on Texas capital murder statistics from 1980-86); Alan Widmayer & James Marquart, *Capital Punishment and Structured Discretion: Arbitrariness and Discrimination After Furman, in* CORRECTION THEORY AND PRACTICE 178-96 (1992) (capital murder statistics from Harris County, Texas, from 1980-88).

[76] *See* Eckland-Olson, *supra* note 75, at 858-60.

have concluded that — all other things being equal — a capital murderer who kills a white person in Texas is over five times more likely to be sentenced to death than one who commits a capital murder of an African-American.[77] Particularly alarming among such statistics is the extremely large number of African-Americans on Texas' death row who murdered white women in the course of a rape, as contrasted to the paucity of black-on-black murders in the course of a rape.[78] Similarly, although scores of African-Americans in Texas have been sentenced to death for murdering whites in the course of a simple robbery, there are virtually no African-Americans on Texas' death row who murdered other African-Americans under such circumstances. Yet the statewide percentages of black-on-black robbery-murders and rape-murders are roughly equivalent to the statewide percentages of black-on-white robbery-murders and rape-murders.[79] Thus, there is a clear pattern of minority-victim devaluation in Texas death penalty cases. Finally, it is notable that, with the rarest of exceptions, whites in Texas do not receive death sentences for the capital murders of blacks.[80] The obvious explanation for each of these trends is that prosecutors, overwhelmingly white, do not believe such crimes warrant the ultimate punishment.

Two of the largest counties in Texas, together responsible for a significant part of the death row population, deserve particular mention regarding systemic racism. In Harris County, which alone accounts for 40% of African-Americans on death row, blacks constitute only one-fifth of the population, yet have comprised two-thirds of the county's death row contingent

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[77] *See* Sorensen & Marquart, *supra* note 38, at 765-72.

[78] I have identified only one Texas capital case involving a white-on-black rape; however, in that case, the prosecution did not charge the defendant with murder in the course of a rape, but instead charged him with murder in the course of a robbery. *See* Vigneault v. State, 600 S.W.2d 318 (Tex. Crim. App. 1979).

[79] *See* Eckland-Olson, *supra* note 75, at 861-63 (Texas capital murder data from 1973-83). Professor Eckland-Olson's data reveal remarkable disparities in this regard. Statewide between 1974-83, 12.8% of all capital murders were black-on-white robbery-murders, while 8.9% were black-on-black robbery-murders. Yet 18.2% of persons on Texas' death row were blacks who murdered whites during a robbery, while only 1.2% of Texas' death row population were blacks who killed blacks during a robbery. That is, proportionally speaking, black-on-white robbery-murders were *overrepresented* by almost 50%, while black-on-black robbery-murders were *underrepresented* by almost 800%. Gross disparities were also evident with respect to the statistics regarding murders in the course of a rape. Statewide between 1974-83, 1.1% of all capital murders were black-on-white rape-murders, while 1.0% were black-on-black rape-murders. Yet 5.3% of Texas' death row population were blacks who murdered whites during the course of a rape, while only 0.4% were blacks who killed blacks during the course of a rape. That is, proportionally speaking, black-on-white rape-murders were *overrepresented* by 500%, while black-on-black rape-murders were *underrepresented* by over 200%.

[80] For instance, Sorensen and Marquart's data covering Texas capital murders from 1980-86 show that a white who committed the capital murder of an African-American during those years had, statistically speaking, *no* chance of receiving the death penalty, while an African-American who committed a capital murder of a white stood a 25% chance of receiving the death penalty. *See* Sorensen & Marquart, *supra* note 38, at 765. To my knowledge, there is only one white person currently on Texas' death row who received a death sentence for killing an African-American. *See generally* Vigneault, 600 S.W.2d 318. Notably, that case involved especially horrific facts. *See id.* (murder committed during course of robbery, rape, and kidnapping; defendant shot female victim point-blank in head while he forced her to perform oral sodomy). In another post-*Furman* white-on-black capital case, which also involved egregious facts the Texas Court of Criminal Appeals amazingly held that the defendant's death sentence should be reformed to a life sentence because there was insufficient evidence that he posed a "future threat to society." *See* Brasfield v. State, 600 S.W.2d 288, 293-94 (Tex. Crim. App. 1980) (murder in course of kidnapping and anal rape of male child).

since 1973.[81] In the post-*Furman* era in Dallas County, where countless capital murders of black victims have occurred, *none* of the dozens of persons sent to death row killed an African-American.[82]

For years, the Dallas County District Attorney's Office, under the direction of the legendary Henry Wade, issued a manual to new prosecutors instructing them to strike minority jurors. "You are not looking for a fair juror," the manual exhorted,

> but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree . . . . You are not looking for any member of a minority group which may subject him to suppression — they almost always empathize with the accused . . . . Minority races almost always empathize with the Defendant . . . . Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused.[83]

Even after *Batson v. Kentucky*,[84] Texas prosecutors continue to use peremptory strikes in a racist manner, consequent to the Court of Criminal Appeals' evisceration of *Batson*.[85] Following the Supreme Court's lead in *Hernandez v. New York*,[86] Texas' highest criminal court not only has shown blind deference to trial judges' rejection of *Batson* claims, but also has extended that deference to prosecutors' purported "race-neutral" explanations of those strikes. The extent of this deference is evident in *Tompkins v. State*.[87] In this capital case, a Harris County prosecutor offered the following "race-neutral" explanation for striking an African-American from the jury pool: the potential juror was an employee of the Postal Service and "I have not had very good luck with postal employees." Both the trial court and Court of Criminal Appeals accepted this far-fetched explanation as legitimate under *Batson*.[88] Other prosecutors have demonstrated similar creativity in proffering purportedly "race-neutral" reasons for systematic strikes of minorities from venires. One Dallas County prosecutor, an active Republican, regularly justifies striking African-American veniremembers by pointing to their affiliation with the Democratic Party; not coincidentally, that is overwhelmingly the party affiliation of African-Americans in Dallas, while whites are mostly Republican.[89] The Court

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[81] *See* Kathy Fair, *County Leads in Sending Blacks to Death Row*, HOUS. CHRON., May 24, 1992, at A1; J. Michael Kennedy, *Why Houston Leads in Death Row Cases*, L.A. TIMES, July 22, 1992, at A5.

[82] *See* Henderson & Taylor, *supra* note 75, at A1, A16; *Dallas Rate of Conviction in Black Victim Crimes*, DALLAS TIMES-HERALD, November 17, 1985, at A17. The Dallas County criminal justice system is widely known as being one of the most racist in the entire country. *See, e.g.*, Ray F. Herndon, *Race Tilts the Scales of Justice*, DALLAS TIMES-HERALD, August 19, 1990, at A1, A22.

[83] Application for Habeas Corpus Petition, *Ex parte* Lewis, 292nd District, Dallas County, No. F86-73713-ULH (filed January 5, 1993) (quoting from Dallas County prosecution manual, *Jury Selection in Criminal Cases*, attached as an exhibit).

[84] 476 U.S. 79 (1986) (prosecutors cannot use peremptory challenges to strike prospective jurors solely based on race).

[85] *See generally* Clara Tuma, *Appeals Court Keeps Wide Latitude on* Batson *Claims*, TEX. LAW., September 24, 1990, at 10.

[86] 111 S. Ct. 1859 (1991) (limiting appellate review of a trial judge's findings regarding alleged *Batson* violation to the highly deferential "clearly erroneous" standard).

[87] 774 S.W.2d 195 (Tex. Crim. App. 1987), *aff'd by equally divided court*, 490 U.S. 754 (1989).

[88] *Id.* at 205.

[89] *See* UPI Wire, December 18, 1992. Other far-fetched "race-neutral" explanations offered include the fact that a minority member of the venire was overweight (even though overweight white jurors were not struck) and that a minority member of the venire chewed gum during voir dire. *See* TEX. LAW., August 14, 1992, at 11; *id.*, September 14, 1991, at 14.

of Criminal Appeals has also held that *Batson* is not violated when a prosecutor exercises a peremptory only *in part* based on an openly articulated racist motivation.[90] Thus, it is hardly surprising that to date, there has been but a single Texas death penalty case reversed on *Batson* grounds.[91]

Overt racism among capital prosecutors is not limited to jury selection. The leading example is the case of Clarence Lee Brandley. Texas authorities selected Brandley among numerous other suspects in a circumstantial evidence case involving the rape and murder of a white female, because, in their own words, "you're the nigger, so you're elected [for prosecution]." Brandley was convicted, but ultimately exonerated and released from death row in 1989.[92] In the Fort Bend County case of James Russell, also sentenced to death for the capital murder of a white victim, the prosecutor struck every African-American after having marked "B's" and "W's" by the names of prospective jurors on the venire list. The prosecutor then made repeated racist remarks on the record throughout Russell's trial, including referring to an adult black male as a "boy" and African-Americans as "you people." In imploring jurors to return a death sentence, the prosecutor asked them to imagine how the white victim must have felt being abducted "by three blacks." He further stated that since the 1950s society had concerned itself with the "civil rights of the defendant," and that it was now time to show concern for the white victim's rights. The defendant's white attorney lodged no objection to these remarks.[93] There are myriad other examples of prosecutorial race-baiting, less blatant, perhaps, but no less invidiously racist.[94]

In a recent case, Texas' racially discriminatory application of capital punishment was patently evident. In that case, four Harris County men committed a spree of robberies resulting in a capital murder. Three of the co-defendants were African-American; the fourth was white. One of the African-Americans, a teenager, was sentenced to death; the two other African-Americans received substantial prison sentences. The white co-defendant, who was integrally involved in the crime spree and who legally was eligible to be prosecuted for capital murder, inexplicably was never charged with any crime by the Harris County District Attorney's Office.[95]

B. Hanging Juries

Texas prosecutors and trial judges not only assure that juries are predisposed against minority defendants; they also pack juries with persons who overwhelmingly favor the death penalty. Theoretically, as the Supreme Court held in *Witherspoon v. Illinois*,[96] any person who can abide by the traditional oath to be an impartial fact-finder, notwithstanding scruples

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[90] Hill v. State, No. 347-90 (Tex. Crim. App. Jan. 20, 1992); *see also* Wilkerson v. Texas, 493 U.S. 924, 925 (1989) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari) (dissenting because prosecutor admitted that part of motivation for striking black juror was her racial "identification" with black defendant).

[91] *See* Chambers v. State, 784 S.W.2d 29 (Tex. Crim. App. 1989) (affirming trial court's finding of a *Batson* violation). The Texas Court of Criminal Appeals' *Batson* record stands in sharp contrast to other southern death penalty jurisdictions, even such racist bastions as Alabama, where numerous *Batson* violations have been found by courts. *See, e.g., Ex parte* Floyd, 571 So.2d 1234 (Ala. 1990); Powell v. State, 548 So. 2d 590 (Ala. Crim. App. 1988); Acres v. State, 548 So. 2d 459 (Ala. Crim. App. 1988).

[92] *See Ex parte* Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989).

[93] For an account of Russell's trial, *see* Elizabeth Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 121-14, 1240-41 (1992).

[94] Russell was executed in 1991.

[95] *See* Dominique Green v. State of Texas, Cause No. 647436, Trial Record, vol. XX, at 280, 312-13 (262nd Dist. Ct. Harris County) (pending on direct appeal to Texas Court of Criminal Appeals).

[96] 391 U.S. 510 (1968).

against capital punishment, may not be constitutionally disqualified as a matter of state law. In two subsequent cases, *Adams v. Texas*[97] and *Wainwright v. Witt*,[98] the Court held that the prosecution may disqualify automatically any prospective capital juror whose convictions against capital punishment would "substantially impair" their ability to serve impartially. Furthermore, in *Witt*, the Court required appellate courts to afford extraordinary deference to a trial court's findings regarding a potential juror's views on capital punishment and her ability to abide by her oath. In Texas, such deference is problematic considering that trial judges, almost exclusively former prosecutors, have displayed a remarkable pro-prosecution bent in death penalty cases. As a result, "death-qualified" capital juries do not simply deny defendants a fair cross section of their peers concerning the community's beliefs about the propriety of capital punishment; as numerous empirical studies have concluded, capital defendants also face pro-prosecution juries more likely to convict in the first place.[99]

Even more so than its record on excluding minorities from capital juries, Texas has led the way in "death-qualifying" juries. The Texas Legislature and Court of Criminal Appeals simply opted to defy openly the Court's mandate in *Witherspoon*. Section 12.31(b) of the Texas Penal Code, as interpreted by the Court of Criminal Appeals, permitted the prosecution to exclude automatically prospective capital jurors who refused to swear under oath that the possibility of the death penalty would not even "affect" their deliberations on guilt or punishment.[100] As dissenting judges and commentators argued, this strict requirement unquestionably violated *Witherspoon*, which held that a venireperson could be excluded only if her scruples against capital punishment actually prevented compliance with her oath to be an impartial juror.[101] In 1980, in *Adams v. Texas*, the United States Supreme Court agreed.[102]

Nevertheless, *Wainwright v. Witt*'s requirement that appellate courts abdicate their enforcement of *Witherspoon* has effectively resurrected § 12.31(b) in Texas.[103] Moreover, Texas trial courts' virtually automatic exclusion of scrupled members of the venire exacerbates the effect of excluding minorities with peremptories, as minority Texans, particularly African-Americans, oppose capital punishment in considerably greater numbers than white Texans.[104]

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[97] 448 U.S. 38 (1980).

[98] 469 U.S. 412 (1985).

[99] *See* Judge Hugh D. Hayes, *Capital Jury Selection in Florida and Texas — A Qualitative Distinction Without a Legally Qualitative Difference?*, 12 NOVA L. REV. 743 (1988); Welsh S. White, *The Death Penalty in the Nineties* 186-218 (1991); *see also* Lockhart v. McCree, 476 U.S. 162 (1986) (dissent) (discussing large body of social science research concluding that death-qualified juries are more likely the average persons to convict of capital murder in the first place).

[100] *See* Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 923 (1982).

[101] *See* Linda Brooks, Comment, *Texas Penal Code, Section 12.31(b), and* Witherspoon*: An Irreconcilable Pair?*, 5 AM. J. CRIM. L. 313 (1977); Mary Elizabeth Carmody, Comment, *Death Prone Jurors: The Disintegration of* Witherspoon *in Texas*, 9 ST. MARY'S L.J. 288 (1977); Dana Timaeus, Note, Adams v. Texas, 9 AM. J. CRIM. L. 51 (1981).

[102] 448 U.S. 38 (1980).

[103] *See* Tom Moran & Stanley Schneider, *Playing For Keeps*, TEXAS BAR JOURNAL at p.398 (April 1992) ("Jury selection, once the bread and butter of reversals in [Texas] death penalty cases, often caused a case to be reversed because a venireperson was improperly excused for opposition to the death penalty. Today, it is almost impossible to get a new trial based on jury selection . . . .").

[104] *See* Marilyn D. McShane et al., *Eligibility for Jury Service in [Texas] Capital Trials: A Question of Potential Exclusion and Bias*, TEX. B.J., April 1987, at 365. McShane and her colleagues randomly selected 2000 Texans and questioned them extensively on their views on capital punishment, in order to simulate questions typically asked during voir dire in a Texas capital case. Lower-income persons, particularly minorities, showed the weakest support for the death penalty, while upper-class white male Texans showed the strongest support for capital punishment.

Although *Witherspoon* supposedly is a two-way street — that is, in requiring the disqualification of prospective jurors whose bias in favor of the death penalty is so extreme that it interferes with their ability to serve as impartial jurors[105] — the Court of Criminal Appeals has ignored this requirement entirely. As the late Judge Marvin Teague of the Court of Criminal Appeals sardonically stated in one of his many dissents, only "the likes of Adolph Eichmann and Joseph Mengele are qualified to serve on capital murder [juries]."[106] For instance, in *Cordova v. State*,[107] the Court of Criminal Appeals held that a prospective juror was not subject to disqualification because he stated, before the trial even began, that "he really wanted to fry the guy." The court, obviously wanting to avoid a new trial, disingenuously stated that:

> [w]e find that [the prospective juror's] statement "he really wanted to fry the guy" could be interpreted *not* to mean that he had prejudged appellant's guilt or[,] in the event that appellant w[ere] found guilty of capital murder[,] that he had not already decided the special issues should be answered in the affirmative.[108]

Judge Teague was hardly exaggerating.

C. *Prosecutorial Misconduct*

> *Willie Williams is the individual who shot and killed Claude Shaffer.*
>
> *Willie [Williams] could not have shot [Claude Shaffer]. . . . And I submit to you from this evidence, [Joseph Nichols] fired the fatal bullet and killed the man in cold blood . . . .*[109]

The significance of prosecutorial misconduct in a death penalty case cannot be understated, for any lack of integrity is felt by persons in addition to those prosecuted and sentenced to death. Rather, it goes to the very heart of our system: the exercise of prosecutorial discretion is indisputably the single most important factor in determining whether any capital murderer lives or dies, as Texas prosecutors seek the death penalty for only a small fraction of all capital murders committed.[110] Even when prosecutors act in good faith there will inevitably be sentencing disparities, which are intolerable in the context of the death penalty.[111]

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[105] *See, e.g.*, Morgan v. Illinois, 112 S.Ct. 2222 (1992).

[106] Knox v. State, 744 S.W.2d 53, 64 (Tex. Crim. App. 1987) (Teague, J., dissenting); *see also* Drinkard v. State, 776 S.W.2d 181 (Tex. Crim. App. 1989) (criticizing the Court of Criminal Appeals for its "lip service" paid to *Witherspoon*).

[107] 733 S.W.2d 175 (Tex. Crim. App. 1987).

[108] *Id.* at 183-84.

[109] From a Harris County prosecutor's closing arguments made at the respective capital murder trials of Willie Williams and Joseph Nichols, co-defendants separately tried for the murder of Claude Shaffer, who was killed by a single bullet. *See* Nichols v. Collins, 802 F. Supp. 66, 73 (S.D. Tex. 1992).

[110] *See* Sorensen & Marquart, *supra* note 38, at 750, 764-67 (death penalty sought in approximately 1/5 of all Texas capital murder cases from 1980-86); Widmayer & Marquart, *supra* note 75, at 186-87 (death penalty sought in approximately 1/8 of all Harris County capital murder cases between 1980-88).

[111] *See, e.g.*, DeGarmo v. Texas, 474 U.S. 973, 973-75 (1985) (Brennan & Marshall, JJ., dissenting from denial of certiorari) ("This case demonstrates just one way in which capital sentencing schemes have failed to eliminate arbitrariness in the choice of who is put to death . . . . This gross disparity in treatment [of capital murder co-defendants] is solely the product of the prosecutor's unfettered

However, when corrupt prosecutors are overzealous because of illegitimate factors — such as bigotry, gender-based discrimination, local political considerations, personal animus, or pecuniary gain — totally indefensible exercises of prosecutorial discretion have occurred.[112]

Two of the more notable Texas prosecutors, who together have sent an estimated 200 inmates to death row, merit brief mention. Henry Wade, who served as District Attorney of Dallas County for three decades before his retirement in 1986, promoted his assistant prosecutors, including incumbent Dallas County District Attorney, John Vance, based primarily on their conviction rates. It is hardly surprising, then, that the Dallas County District Attorney's Office has lost only one death penalty case in the post-*Furman* era. In addition, Wade also strictly forbade his prosecutors to confess error on appeal.[113] Among Wade's trophies was Randall Dale Adams, whose 1981 capital murder conviction and death sentence were secured through extreme prosecutorial misconduct, including the intentional suppression of material exculpatory evidence and the subornation of perjury. Fighting Adams' appeals long after it became obvious he was innocent, Wade's successor Vance finally dropped the charges only after two assistant Dallas County prosecutors took up Adams' cause. The two were subsequently forced out.[114] Wade's record on racism was noted previously.

Johnny Holmes, who has generated controversy unrelated to the death penalty,[115] has been District Attorney of Harris County since 1979.[116] As such, he has been the leading capital prosecutor in Texas in the post-*Furman* era. Symbolic of his attitude is a sign adorning the wall of the death penalty unit of the D.A.'s Office entitled the "Silver Needle Society," which lists all persons from Harris County executed by lethal injection.[117] Fearing any decrease in the number of death sentences returned by Texas juries, Holmes has consistently opposed any effort to enact a life-without-parole option for sentencing juries.[118] He also opposes any

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discretion to choose who will be put in jeopardy of life and who will not."). There are countless Texas cases since 1973 where especially heinous capital murders have been committed but where prosecutors have inexplicably refused to seek the death penalty. *See, e.g., Stabbing Nets Man 40 Years,* Houston Post, July 13, 1990, at A27 ("A man accused of stabbing a woman 48 times while her 12-year old son begged him to take $4 and stop pleaded no contest to a reduced charge of murder and was sentenced to 40 years in prison.").

[112] For instance, in numerous Texas death penalty cases, the murder victims' families utilized a Texas law that permitted them to retain private trial prosecutors. In each case, the local elected district attorneys opted not to try the case, so affluent family members of the victims hired private prosecutors, paying them handsome fees of as much as $275/hour (in 1981 dollars). *See, e.g.,* Petition for Writ of Habeas Corpus, *Faulder v. Collins,* No. 6:92-CV-755 (N.D. Tex., pending).

[113] *See* Bobette Riner, *Dallas Legend Henry Wade: He's a Tough Act to Follow,* NATIONAL LAW JOURNAL, January 29, 1990, at 28; Richard L. Fricker, *Crime and Punishment in Dallas,* 75 CRIMINAL JUSTICE (ABA) 52 (July 1989).

[114] Adams was not alone among the innocent persons who were railroaded by Wade's office. *See Critics Fault Dallas For Record of Bad Convictions; In Just Over A Year, County Has Had To Free Five Unjustly Found Guilty,* HOUS. POST, July 19, 1990, at A24; Michelle Mittelstadt, *When It Comes to Freeing Inmates Unjustly Convicted, Dallas Stands Out,* L.A. TIMES, July 22, 1990.

[115] For instance, Holmes has been a leading supporter of castration as a sentencing option for felons. *See* Bruce Griffiths, *Should Criminals Be Castrated?,* HOUSTON POST, October 6, 1991, at C1.

[116] *See* Audrey Duff, *The Deadly DA,* TEXAS MONTHLY, February 1994, at 38-40.

[117] Interview with Sandra Babcock, Esq., February 26, 1993, Houston, Texas. Similarly, University of Houston Law Professor David Dow has noted the "reliable rumor" that Holmes' office throws champagne parties on the nights of executions. *See* David Dow, *supra* note 73, at 57 n. 187.

[118] *See* Steve Friedman, *No-Parole Plan Irks Prosecutors; Holmes Fears Loss of Death Penalty,* HOUS. POST, May 6, 1991, at A1 (Holmes stated that "I think [a life-without-parole option] would repeal the death penalty. I don't think you could get a verdict of death if the jury knows it can give life without parole."). Polls have consistently showed that Texans' overwhelming support for the death penalty drops

improvements in the sorry state of indigent defense in Texas capital cases.[119] In addition, Holmes favors abolishing habeas corpus appeals in death penalty cases, limiting all capital defendants to a single appeal.[120] And Holmes has not limited his pro-death penalty zeal to capital defendants. Following one highly-publicized Houston capital case, Holmes openly engaged in an internecine partisan feud with fellow Harris County Republican and District Court Judge Norman Lanford, because Lanford had ruled that a confession given by a capital defendant was unconstitutionally obtained.[121] Like Wade, Holmes' record on race has been noted previously.[122]

Prosecutorial (including police) misconduct is pervasive in the administration of the Texas death penalty, principally a function of the widespread credo that any means are appropriate to secure the ultimate penalty when the ultimate crime has been committed.[123] A few recurring examples will suffice to demonstrate this point.

A particularly shocking practice by Texas prosecutors involves their duplicity at the respective capital trials of co-defendants. In a number of circumstantial evidence cases in which a victim was killed by only one shooter, Texas prosecutors have argued at respective trials that the co-defendant on trial in each instance was the primary actor and triggerman and

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precipitously when life-without-parole is a sentencing option. *See, e.g.*, Kathy Fair, *supra* note 7 (citing 1992 poll showing that Texans' support for death penalty drops below 50% if life-without-parole is a sentencing option). Holmes is not alone. *See* Christy Hoppe, *$2.3 Million to Burn: Is This Justice?*, CHI. TRIB., March 24, 1992, at 8 (Leading death penalty prosecutor in Texas Attorney General's Office, Bob Walt, also opposes life-without-parole option).

[119] Holmes has stated that the quality of Texas capital defense is "excellent." *See* UPI WIRE, September 28, 1986 (quoting Holmes). A 1993 NATIONAL LAW JOURNAL editorial about the crisis in indigent capital defense in Texas quoted Holmes as saying that such criticisms of Texas' system showed "a disrespect for the law" and that persons attempting to improve the quality of capital representation were merely trying to abolish capital punishment through the "back door." *See A Back Door?*, NAT'L L.J., April 26, 1993, at 12.

[120] *See Many Lawyers, But Few for Death Row Appeals*, UPI WIRE, September 28, 1986; 1982 piece.

[121] Mark Ballard, *Gunning For a Judge: Houston's Lanford Blames DA's Office for his Downfall*, TEX. LAW., April 13, 1992 at 1. Former Harris County District Court Judge Lanford, "one of the few criminal judges in [Harris] county who is not a former [Harris County] prosecutor," *id.*, alleged that Holmes and his underlings manipulated the size of the criminal docket in Lanford's court — by refusing to plea bargain — in order to make Lanford appear inefficient to voters. Lanford also claimed that Holmes orchestrated public denunciations of Lanford by the relatives of the victim of the capital defendant whom Lanford freed because his confession had been unconstitutionally obtained. *Id.*

[122] Holmes claims to select capital cases in which he seeks the death penalty in a "color-blind" fashion. However, a leading researcher on racism in the Texas death penalty, University of Texas Professor Sheldon Eckland-Olson, has responded that Holmes' claim "strains credibility." Kathy Fair, *supra* note 81, at A1. Even a cursory survey of Harris County death penalty cases strongly belies Holmes' claim. Holmes' office seeks the death penalty in only a small fraction of all capital murders in Harris County. *See* Widmayer & Marquart, *supra* note 75, at 187. One would logically expect those cases to involve the most culpable capital murders. Yet countless Harris County black-on-white capital cases since 1979 have involved some of the least aggravated capital murders in Texas — not atypically an African-American teenager who kills a white victim. In one especially notable case, an African-American was prosecuted and sentenced to death in Harris County for killing a white woman in the course of robbing her. The killing was caused by the victim's choking on a gag that the defendant had placed in her mouth while he used her bank card to withdraw cash. *See* State v. Tompkins, 774 S.W.2d 195 (Tex. Crim. App. 1987).

[123] *See, e.g.*, Jim Phillips, *Police Errors Force Reviews of 90 Cases*, AUSTIN AMERICAN-STATESMAN, November 10, 1992, at 1; Lee Hancock, *Man Says He Was Told to Testify Falsely; Lubbock DA Has Denied Making Deals in '88 Case*, DALLAS MORNING NEWS, January 8, 1993, at 1A); *Information Suppressed [By Prosecution] in Tyler Mutilation Case*, HOUS. POST, August 17, 1992, at A18.

that the other co-defendant was simply present at the scene.[124] A prosecutor's closing argument at each co-defendant's trial reads like a veritable script; only the triggerman's name is changed.[125] In one such case, the prosecution did this and more; it also intentionally suppressed exculpatory evidence at one co-defendant's trial that had been produced at the second co-defendant's trial, which strongly indicated that the second co-defendant was in fact the triggerman.[126]

Inflammatory forensics are also standard prosecutorial fare in Texas death penalty cases. For instance, in the case of Kerry Max Cook, the female victim was sexually mutilated. The prosecutor reminded jurors that "[t]he woman's vagina was cut off and it was never found." Without any basis in the evidence, the prosecutor then concluded that, "the defendant probably ate it."[127] In the case of Calvin Burdine, the prosecutor reminded jurors that Burdine was a homosexual. "Don't just send him to prison for life," he implored. "The defendant is a homosexual, and we all know what goes on inside of prisons, so sending him there would be like sending him to a party."[128]

Texas prosecutors and police have also repeatedly obtained confessions by unconstitutional means. According to Don Reid, incumbent Harris County Sheriff Johnny Klevenhagen, during his prior career as a Texas Ranger, obtained numerous capital defendant confessions through brutal coercion. Indeed, Klevenhagen also once used violence against Percy Foreman, the famous Houston capital defense attorney, after Foreman secured an acquittal in a capital case on the ground that the defendant's confession had been coerced by Klevenhagen.[129] In the 1988 Harris County death penalty case of John Zimmermann, the Texas Court of Criminal Appeals' decision recounts evidence, including police testimony, of horrific brutality in obtaining his confession, including the use of an electric cattle prod and slap jack.[130]

Other conduct by Texas prosecutors is so juvenile it would actually be humorous, if human life were not at stake. For instance, two leading female capital prosecutors in the Texas Attorney General's Office in the mid-1980s, Leslie Benitez and Paula Offenhauser, were affectionately known to their prosecutorial colleagues by the respective monikers of "the Princess of Death" and "Lady MacDeath."[131] To quote David Dow, who has also noted the frequent occurrence of such outrageous conduct by Texas capital prosecutors: "Inflicting death, irrespective of the debate over whether the state should even do it at all, is a solemn act. The

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[124] *See, e.g.*, Nichols v. Collins, 802 F. Supp. 66, 72-74 (S.D. Tex. 1992).

[125] For example, at Joseph Nichols' capital trial, the Harris County prosecutor argued Nichols' co-defendant "Willie [Williams] could not have shot him. . . I submit to you that he [Nichols] fired the fatal bullet and killed the man in cold blood and he should answer for that." Conversely, at Williams trial, the Harris County prosecutor argued "Willie Williams is the individual who shot and killed Claude Shaffer . . . . [T]here is only one bullet that could possibly have done it and that was Willie Williams['].'' At the punishment phase of Nichols' trial, in asking for the death penalty, the Harris County prosecutor asked jurors "[i]s it fair and equal for Willie Williams to sit up there on death row when this man [i.e., Nichols] planned the whole thing and fired the shot." *Nichols*, 802 F. Supat 73. *Compare* Williams v. State, 674 S.W.2d 315, 317 (Tex. Crim. App. 1984), *with* Nichols v. State, 754 S.W.2d 188, 199-201 (Tex. Crim. App. 1988).

[126] *See* Steve McVicker, *Crime and Punishment*, March 24-30, 1994, HOUS. PRESS, at 8-13 (discussing Harris County cases of Anthony Westley and John Henry).

[127] David Dow, *supra* note 73, at 60 (citation omitted).

[128] *Id.* (citation omitted).

[129] *See* Don Reid, *supra* note 15, at 106-08, 169.

[130] *See* Zimmermann v. State, 750 S.W.2d 194, 205-08 (Tex. Crim. App. 1988).

[131] Author's interview with Paula Offenhauser, former Texas Assistant Attorney General, December 8, 1992, Houston, Texas. Ms. Offenhauser also told me that a running joke among her male colleagues in the Texas AG's death penalty unit was that "the only date that you can get is an execution date."

families of the victims know this, and so do the guards and wardens; too often . . . [Texas] prosecutors do not."[132]

D. Doctors of Death

Special attention should be given to two "expert" witnesses regularly used by Texas capital prosecutors in the post-*Furman* era, Drs. Ralph Erdmann and James P. Grigson. For a decade, Dr. Erdmann was a pathologist employed by forty counties in the Texas Panhandle. He not only conducted thousands of autopsies, but also served as a medical expert who testified for the prosecution in countless felony cases, including perhaps two dozen capital cases. Many of these cases were based on circumstantial evidence, including Erdmann's pivotal testimony about such things as the medical cause of death, the precise time at which the victim died, whether the victim was sexually assaulted, and the like.[133] In 1992, Erdmann was exposed as a fraud: a tremendous amount of evidence came to light that showed he fabricated hundreds of autopsies, moonlighted as a broker in body parts, and provided bogus medical testimony in an unknown number of felony and capital cases. Many of this country's leading pathologists contend that Erdmann, who received his medical degree in Mexico, simply fabricated "expert" testimony in numerous instances, at the behest of police and prosecutors. As a result, Erdmann surrendered his medical license.[134]

In addition, Texas defense lawyers have claimed that a coterie of Panhandle prosecutors engaged in a conspiracy to cover up Erdmann's misconduct in capital cases. Among other things, defense attorneys point to the fact that Lubbock County District Attorney Travis Ware, who regularly employed Erdmann's services, entered into a plea bargain with Erdmann, whereby the doctor received ten years' probation and the State of Texas agreed not to prosecute him further for any illegalities arising from his medical misconduct.[135] Erdmann subsequently moved out of the state. Furthermore, Ware and a district attorney from a neighboring Panhandle county, Randall Sherrod, subsequently turned their sights on noted Georgia capital defense attorney Millard Farmer, who had come to Lubbock to assist in the defense of a circumstantial evidence capital case based on Erdmann's testimony, which Ware was prosecuting. As a result, Sherrod brought witness-tampering charges against Farmer and Ware brought similar charges against two Lubbock police officers who acted as whistleblowers against Erdmann. But a federal district judge in Lubbock, in a highly unusual move, issued an injunction against the

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[132] Dow, *supra* note 73, at 57.

[133] *See, e.g., Exhumation Hearing in Canyon*, HOUSTON POST, March 23, 1993, at A11 (in death penalty case of Johnny Lee Ray, Dr. Erdmann testified that victim died of brain hemorrhage as result of alleged assault; after trial, defense pathologist challenged Erdmann's claim and instead argued that the victim died of heart attack).

[134] *See, e.g.*, Chris Wood, *Justice — Texas Style*, MCCLEANS, January 18, 1993, at 21; Roberto Suro, *Impact of Pathologist's Misconduct Ripples Through West Texas Courts*, N.Y. TIMES, November 20, 1992; Richard Frady, *Pathologist's Plea Adds Turmoil*, A.B.A. J., March 1993, at 24; Lee Hancock, *Uproar Over Pathologist Continues*, DALLAS MORNING NEWS, November 22, 1992, at 1A. Erdmann is not the only controversial pathologist used by Texas capital prosecutors. Pathologist Fred Zain, who has worked for the prosecution in numerous San Antonio capital cases, has recently been accused of various acts of egregious misconduct. *See* David McLemore, *Accusations of Fraud Case Doubt on Forensic Scientist*, DALLAS MORNING NEWS, February 14, 1994, at 1, 10.

[135] *See* Jerry Laws, *Defense Bar Attacks Erdmann Plea*, TEX. LAW., September 28, 1992, at 4. Longtime District Attorney Ware has repeatedly been accused of prosecutorial misconduct in other capital cases. *See, e.g.*, Lee Hancock, *Man Says He Was Told to Testify Falsely*, DALLAS MORNING NEWS, January 8, 1993, at 1A; Lee Hancock, *Lawyers Say Lubbock DA Had Intimate Link to Juror*, DALLAS MORNING NEWS, December 5, 1992, at 1A; Lee Hancock, *Lubbock DA's Deal to Cut Terms for Felon Questioned*, DALLAS MORNING NEWS, November 29, 1992, at 1A.

state criminal prosecutions by Ware and Sherrod, which were held to be in bad faith.[136]

Perhaps even more notorious than Dr. Erdmann is another Texas medical doctor, psychiatrist James Grigson, *a.k.a.* "Dr. Death,"[137] whose "talents" have been extensively utilized by prosecutors. Dr. Grigson earned that moniker over the last two decades by testifying in one-third of all Texas capital cases resulting in a death sentence. Such testimony, used to support the argument that a defendant will pose a "future danger" to society, typically describes a capital defendant as an incorrigible "sociopath" who will kill again if not executed.[138] Grigson's testimony has proven remarkably effective: in over 90% of cases in which he testified, a jury sentenced the defendant to death.[139] The explanation for his success rate, according to numerous observers, is the combination of his unequivocal, confident diagnoses that capital defendants are incorrigible "sociopaths" who "absolutely" pose a future danger, and his manner of testimony — coming across as a "kindly, gregarious, country-doctor" who is "perpetually grinning."[140] But Dr. Grigson is not the only Texas psychiatrist specializing in the death penalty. His pioneering methods have been emulated by numerous other members of the mental health profession.[141] Although there is no definitive data, it is reliably estimated that prosecution psychiatrists have testified in at least one-half of all Texas capital cases since 1973. Such "expert" testimony has been resoundingly criticized by nationally-recognized authorities, particularly the American Psychiatric Association.[142]

Dr. Grigson's methods warrant particular mention. No matter how brutal or not the murder, no matter how extensive or minor the defendant's previous history of criminal conduct, and no matter what other mitigating factors exist, Dr. Grigson has testified in nearly identical

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[136] *See Judge Blocks Lawyer's Prosecution*, TEX. LAW., March 8, 1993, at 46; Lee Hancock, *Rare Federal Ruling Halts State Cases Against Erdmann Critics*, DALLAS MORNING NEWS, February 5, 1993, at 30A.

[137] *See* Bennett v. State, 766 S.W.2d 227, 231 (Tex. Crim. App. 1989) (Teague, J., dissenting) ("This is another case in which Dr. James Grigson, who earned his nickname, 'Dr. Death,'. . . testified."); Ron Rosenbaum, *Travels with Dr. Death*, VANITY FAIR 141 (May 1990).

[138] *See* James Marquart et al., *supra*, note 31, at 457. To quote a judge formerly on the Texas Court of Criminal Appeals: "The number of these cases is so great that I will simply refer the reader to either WESTLAW or LEXIS and not cite them." Bennett v. State, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting).

[139] *See* Ron Rosenbaum, *supra* note 137, at 142 (as of 1989, 115 of the 124 Texas capital defendants against whom Grigson had testified were sentenced to death).

[140] Ron Rosenbaum, *supra* note 137, at 144; *see also* Fuller v. State, 829 S.W.2d 191, 211 (Tex. Crim. App. 1992) (Baird, J., dissenting); Bennett v. State, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting); Satterwhite v. Texas, 726 S.W.2d 81, 95-96 (Tex. Crim. App. 1986) (Clinton, J., dissenting).

[141] Sorensen & Marquart, *supra* note 38, at 749 (noting "growing entourage of Grigson-like psychiatrists acting as hired guns for the state").

[142] *See* Brief of American Psychiatric Association as *Amicus Curiae*, Barefoot v. Estelle, No. 82-6080 (U.S. 1983) (available on NEXIS); Brief of American Psychiatric Association as *Amicus Curiae, Estelle v. Smith*, No. 79-1127 (U.S. 1981) (available on NEXIS); APA Task Force Report, *Clinical Aspects of the Violent Individual*, 28 (1974); *Report of the [American Psychological Association] Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOLOGIST 1099, 1110 (1978). The American Psychiatric Association, recognizing the conclusions of numerous respected medical researchers, has concluded that such long-term predictions are incorrect two out of three times. *See* APA Amicus Brief, *Barefoot, supra*, at 9, 13; *see also* Charles Ewing, *"Dr. Death" and The Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings*, 8 AM. J.L. & MED. 407, 409 (1983) (discussing literature criticizing long-term predictions of "future dangerousness"). Dr. Grigson explains his difference with such nationally-recognized authorities by claiming that they are simply "liberal psychiatrists" with an "emotional animus . . . against the death penalty" and that he is better qualified than the APA leadership. *See* Ron Rosenbaum, *supra* note 137, at 168.

fashion in virtually every trial regarding a defendant's proclivity to be violent in the future. As stated by Professors Marquart and Sorensen, who have undertaken the most extensive study of Grigson: "His testimony reads like a script from case to case . . . ."[143] According to Dr. Grigson's usual testimony at capital sentencing hearings, "as a matter of medical certainty," every capital defendant is a "sociopath," that is, a person who is not mentally ill in the traditional sense and is beyond the reach of modern psychiatric medicine.[144] Grigson typically adds that such defendants are not merely sociopaths, but "the most severe" type, like "on a range from 1 to 10 he's ten plus."[145] Dr. Grigson reinforces his opinions by invariably stating that he is "absolutely, 100% certain" of his conclusions, that a defendant's sociopathic condition "will only get worse," and that the defendant "most certainly" will kill again if not executed.[146]

As courts and commentators — and Grigson himself[147] — have repeatedly observed, his psychiatric testimony is given tremendous weight by lay jurors.[148] Even when defense lawyers have sought to impeach Dr. Grigson with the APA's condemnation of his "expert" testimony, Dr. Grigson has effectively countered such attacks on his credibility by unflappably informing conservative Texas jurors that he is the preeminent mental health expert on the criminal mind and that the APA's position simply reflects a visceral reaction of East Coast liberals who oppose the death penalty.[149]

In his autobiography, Randall Dale Adams, a former Texas death row inmate exonerated and released from prison in 1989, describes the level of sophistication employed by Dr. Grigson in determining whether Adams was a "sociopath."[150] During such interviews, Grigson

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[143] Sorensen & Marquart, *supra* note 38, at 749.

[144] *See* Marquart,et al., *supra* note 31, at 458.

[145] *See, e.g.*, Satterwhite v. Texas, 486 U.S. 249, 260 (1988); Barefoot v. Estelle, 463 U.S. 880, 919 (1983) (Blackmun, J., dissenting); Estelle v. Smith, 451 U.S. 454, 459 (1981);

[146] *See, e.g.*, Barefoot, 463 U.S. at 919 (Blackmun, J., dissenting); Ron Rosenbaum, *supra* note 137, at 166, 168, 170.

[147] As Grigson stated in an interview broadcast on CBS News, *West 57th Street*, "Deadly Diagnosis: Trying Testimony," October 15, 1988: "I have developed a way to testify that I end up having a tremendous amount of influence . . . ." *As quoted in* Fuller v. State, 829 S.W.2d at 212 n.3 (Baird, J., dissenting).

[148] *See* Bennett v. State, 766 S.W.2d at 232 (Teague, J., dissenting) ("Believe me dear reader, for jury purposes, Dr. Grigson is extremely good at persuading jurors to vote to answer the second special issue in the affirmative."); *see also* Ake v. Oklahoma, 470 U.S. 68, 79 (1985) (noting "pivotal role" played by psychiatry in criminal proceedings).

[149] *See* Ron Rosenbaum, *supra* note 137, at 168. Dr. Grigson also reportedly refers to the APA as "a bunch of liberals who think queers are normal." *Id.* at 147.

[150] Adams' entire "mental status exam" consisted of the following:

> [Dr. Grigson] met me in a small visiting room . . . . He placed a pencil and a few sheets of paper in front of me, asked me to look at some drawings, and to copy them onto the paper. They were simple line drawings of basic shapes: a square, a circle, and a few more intricate designs. "You want me to draw them exactly as they are?" I asked. "You just copy them any way that you like," Dr. Grigson said. "I'm going to get a cup of coffee. I'll be back in a few minutes." Left alone, I dutifully copied the drawings, wondering what in the world this activity could disclose about my mental condition. I was finished by the time Dr. Grigson returned. He glanced at the drawings, gathered them up and said, "Okay, I've got a couple of questions for you. Just answer them the best you can. What does 'a rolling stone gathers no moss' mean to you?" "Are you kidding?" I asked, still wondering what these parlor games had to do with my mental stability. "No, I'd really like to know." I told him that it meant that it was difficult for people to get close to or cling to a person who doesn't stay in one place for any length of time. He made some notes, then asked, "Okay, how about 'a bird in the hand is worth two in the bush'?" I replied that it would be silly to let go of something you have for only

does not inquire into a defendant's social history — such as whether he was abused or neglected as a child, his level of education, and the like — nor does Grigson interview the defendant's family, believing such information useless in diagnosing a defendant's mental condition. Finally, Grigson's diagnoses based on such pre-trial interviews simply assume a defendant is guilty of every criminal act alleged by the prosecution.[151] During certain mental status exams, Dr. Grigson has not even maintained the pretense of objective professionalism and has instead attempted to beguile a defendant into confessing, which Grigson claims has happened on numerous occasions.[152]

A 1989 empirical study conducted by three social scientists entirely discredits Dr. Grigson and other psychiatrists in Texas who have adopted his methods during the last two decades. The study also calls into serious question the validity of Texas' post-*Furman* capital sentencing scheme, central to which has been a jury's prediction of future dangerousness. Moreover, the study examined the post-commutation behavior of 92 former Texas death row inmates whose post-*Furman* death sentences were reversed and commuted in the early 1980s. In all cases, of course, juries predicted "beyond a reasonable doubt" that there was a "probability" the defendant would pose a future danger. Dr. Grigson himself had predicted that many of those inmates, whom he invariably classified as sociopathic, would "absolutely" pose a future danger. The study also examined the behavior of a control group, a comparable number of Texas capital murderers (107) who received life sentences from 1973-88.[153]

The results of the study are remarkable: a vast majority of these inmates engaged in no significant violent behavior while serving out their prison sentences or while on parole. Two-thirds of the 92 never committed a serious disciplinary infraction. 90% were ultimately promoted to "trusty" status. While two of the 92 killed again, at least two others have received college bachelor's degrees.[154] More important, the 92 commuted inmates, on the average, committed *less* acts of violence and prison disciplinary violations than the control group of 107 capital murder defendants sentenced to life.[155]

E. Hanging Judges

Misconduct in capital cases is not limited to prosecutors and their agents. Numerous locally-elected state district court judges — the vast majority former prosecutors — have likewise engaged in unethical and conscience-shocking behavior. Furthermore, appellate courts, at both the state and federal level, have displayed open hostility toward the rights of capital defendants.

> a chance of getting something else. "If you can get something else, fine," I said, "but don't give up what you have in order to get it." Dr. Grigson made a few additional notes and left.

Randall Dale Adams et al., ADAMS V. TEXAS 64-65 (1991). At Adams' trial, Dr. Grigson testified that he had given Adams "a complete psychiatric examination .... I diagnosed him as being a sociopathic personality disorder .... I would place Mr. Adams at the very extreme, worse or severe end of the scale. You can't go beyond that." *Id.* at 121-22; *see also* Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979) (discussing Dr. Grigson's testimony).

151 *See* Smith v. Estelle, 445 F. Supp. 647, 654 n.8 (N.D. Tex. 1977), *aff'd*, 451 U.S. 454 (1981).

152 *See* Ron Rosenbaum, *supra* note 137, at 172 (describing some of Grigson's "mental status exams" as "less like a medical procedure than a third degree in the precinct detective tank").

153 *See* Marquart et al., *supra* note 31.

154 *See id.* at 461-62.

155 *See id.* at 464; *see also* James W. Marquart & Jonathan Sorensen, *Institutional and Postrelease Behavior of Furman-Commuted Inmates in Texas*, 26 CRIMINOLOGY 677, 690 (1988) (study of pre-*Furman* Texas capital murderers who were commuted to life sentences after *Furman* yielding similar results).

Horror stories of outrageous misconduct by Texas judges in capital cases abound. In addition to garden-variety misconduct, such as *ex parte* communication with prosecutors and conflicts of interest,[156] Texas trial judges have engaged in a variety of misconduct that would surely lead to removal from the bench in most other states. Some trial judges have intentionally scheduled execution dates for particular days, such as holidays or a victim's birthday.[157] Another signs execution warrants — the legal document setting an execution date — with a "smiley face."[158] Trial judges have also been known to fall asleep during capital trials.[159] One judge in a recent death penalty case stated on the record that he would decide whether to excuse a juror for bias against the defendant by flipping a coin.[160] As Professor David Dow has correctly observed, such "[u]nbecoming conduct on the part of judges [in death penalty cases] is not terribly uncommon in Texas."[161]

Of all the cases in Texas involving judicial misconduct, none surpasses that of Harris County District Judge William Harmon, a former prosecutor, during the 1991 capital trial of Carl Wayne Buntion. Among the many acts of misconduct: During voir dire Harmon stated to the defendant that "[h]e was doing God's work to see that [Buntion] was executed." Harmon taped a photograph of the "hanging saloon" of the infamous Texas "hanging judge," Roy Bean, on the front of his judicial bench, in full view of prospective jurors. Harmon superimposed his own name over the name "Judge Roy Bean" that appeared on the saloon, undoubtedly conveying the obvious. Harmon also was involved in an escalating feud with the court-appointed defense attorneys, and engaged in repeated *ad hominem* attacks. Without justification, the judge twice removed defense attorneys from the case during the course of the proceedings.[162] Harmon surreptitiously followed one defense attorney to his hotel room at 1:00 a.m., where Harmon threatened retaliation if the defense attorneys filed any further motions seeking to recuse the judge. In making rulings at trial, Harmon repeatedly berated the Court of Criminal Appeals as "liberal bastards" and "idiots" because of its decision requiring Harmon to permit Buntion's jury to consider certain types of mitigating evidence. Harmon also admitted on the record that he had repeatedly engaged in *ex parte* communication with the Harris County District Attorney's Office about the merits of the case during the trial. During the sentencing phase, in the presence of jurors, Harmon visibly laughed at a defense witness, a minister who testified that Buntion was deeply religious.[163]

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[156] *See, e.g., Tearful Judge Sets Execution Date in Police Killer's Death*, DALLAS TIMES HERALD, March 22, 1986, at 23A (reporting that District Judge Tom Ryan, when setting execution date for capital defendant Stephen Nethery, broke down into tears and set execution date on dead officer's birthday; officer reported to be personal friend of judge).

[157] *See, e.g.*, Nick Davies, WHITE LIES: RAPE, MURDER, AND INJUSTICE, TEXAS STYLE 363 (1991) (Montgomery County District Judge John Martin, at request of his court clerk, set Clarence Brandley's execution date on clerk's birthday as a "present"); Dow, *supra* note 73, at 56-57 (noting a particular Harris County judge who delights in setting execution dates on holidays); HOUS. CHRONICLE, April 1, 1993 (judge set Mexican-American defendant's execution date on Cinco de Mayo).

[158] *See Justices Refuse Case of "Smiling" Death Warrant*, HOUS. CHRON., May 1, 1994, at A16.

[159] Author's interview with Harris County District Judge Carolyn Clause Garcia, December 3, 1992, Houston, Texas.

[160] *See* Brief for State of Texas in Opposition to Certiorari Petition, Jose de la Cruz v. Texas, No. 91-8593, at 11-12.

[161] Dow, *supra* note 73, at 57 (recounting instances of judicial misconduct by Texas district court judges).

[162] The attorneys were reinstated by the Texas Court of Criminal Appeals by writ of mandamus. *See* Buntion v. Harmon, 827 S.W.2d 945 (1992).

[163] *See* Brief for Appellant, 1-119, Carl Wayne Buntion v. State of Texas, No. 71238 (pending on direct appeal with the Texas Court of Criminal Appeals). Not surprisingly, Harmon's misconduct generated a tremendous amount of negative publicity. *See, e.g.*, Brenda Sapino, *Freewheeling Judge Again*

The Texas Commission on Judicial Conduct formally reprimanded Harmon for his outrageous conduct at the *Buntion* trial.[164] But the *Buntion* trial was not an aberration for Harmon, who has presided over numerous Texas death penalty cases. For instance, in another Harris County case, the defense requested that Harmon order that numerous Harris County death row inmates be transported to Houston to testify at a hearing. Harmon stated on the record: "Could we arrange for a van to blow up the bus on the way down here?"[165] During the 1994 trial of a teenaged capital defendant, Harmon, ignoring a specific statutory provision, permitted the victim's father to yell obscenities at the defendant in the presence of jurors and the press.[166]

Unfortunately, state judges such as Harmon are not alone. Many federal judges in Texas, who handle habeas corpus appeals, also have demonstrated extreme bias in capital cases. Nationally, during the last decade, the rate of federal habeas grants in death penalty cases has been approximately 40%.[167] Since the mid-1980s, when Republican appointees began to dominate the Court of Appeals for the Fifth Circuit,[168] the rate for granting the writ of habeas corpus in Texas capital cases has been less than 5%.[169]

An understanding of the Fifth Circuit's habeas jurisprudence in Texas capital cases may best be gained by contrasting two judges, Judge Alvin Rubin, who symbolizes the previous era of the court, and Judge Edith Jones, who represents the court's current membership. The late Judge Rubin was appointed to the federal bench by President Johnson in 1966 and served as both a district and appellate court judge until his death in 1991. Upon his passing, Judge Rubin received the type of encomiums that few lower court judges other than Henry Friendly or Learned Hand have ever received.[170] In the words of Minor Wisdom, another great Fifth Circuit judge from a previous generation, Judge Rubin "[a]bove all . . . was compassionate, with a feeling for fairness and a sensitivity for justice."[171] That praise extended to Judge Rubin's "restrained and non-result-oriented" opinions in numerous death penalty cases.[172] A former law clerk summarized Judge Rubin's record:

> Judge Rubin wrote opinions addressing sixteen different habeas corpus petitions in death penalty cases [the majority of which were Texas cases]. In three of them, he wrote a majority opinion granting relief to the condemned, one of which was reversed *en banc* by the court of appeals. In each of his other

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in Hot Water, TEX. LAW., March 25, 1990, at 1; Barbara Linkin, *One Court Without Much Harmon-y; Judge Cherishes Privacy, Attracts Negative Publicity*, HOUS. POST, April 13, 1991, at A21.

[164] *See* Clay Robison, *State Panel Reprimands District Judge Harmon*, HOUS. CHRON., April 1, 1993, at A29.

[165] *Nichols v. Collins* 802 F. Supp. 66, 78-79 (S.D. Tex. 1992) (granting writ of habeas corpus).

[166] *See* Steve McVicker, *The Last Word: Judge Bill "Roy Bean" Harmon Grandstands at a Murder Trial—Again*, HOUS. PRESS, February 17-23, 1994, at 4; *Unjudicial: Judge Harmon Wrong in Sanctioning Confrontation*, HOUS. CHRON., February 13, 1994, "Outlook" Section, at 2 (editorial condemning Harmon).

[167] *See* Benjamin Civiletti, *An Open Courthouse Door*, WASH. POST, October 24, 1993, at C7.

[168] For a excellent study of the "old" Fifth Circuit, not limited to the death penalty, *see* Jack Bass, UNLIKELY HEROES (1981); *see also* Richard Connelly, *New Voices Divide Court that Desegregated the South*, LEGAL TIMES, May 30, 1988, at 30.

[169] The author has compiled data in published and unpublished cases.

[170] *See, e.g., In Memoriam: Judge Alvin Rubin*, 52 LA. L. REV. (1992) (colloquium dedicated to jurisprudence of late Judge Rubin); "Memorial Proceeding Honoring Judge Alvin Rubin," reported in 940 F.2d CXXI-CXXVII (5th Cir. 1991) (en banc).

[171] 940 F.2d at CXXI.

[172] David J. Bradford, *Judge Rubin and the Death Penalty: Legacy Unaccomplished*, 52 LA. L. REV. 1441, 1441 (1992).

> thirteen cases, the court denied the condemned's petition. In three of those cases, Judge Rubin concurred in the court's judgment because he was compelled to do so by precedent with which he disagreed; in four others, he dissented.[173]

Judge Rubin's recurring concerns, as reflected in his many opinions, were over the poor quality of defense counsel, the impediments to a sentencing jury's ability to make a fair, reasoned decision, and the deficiencies in federal habeas corpus review,[174] three of the central elements of unfairness that have plagued the Texas death penalty scheme during the last two decades. Judge Rubin's former clerk concluded, however, that the judge's legacy in capital cases remains unfulfilled.

This in large part is a function of the present ideological complexion of the Fifth Circuit, the last effective appellate court for the overwhelming majority of Texas death row inmates. The judge who best represents the court's present membership is Edith Jones. Judge Jones, a former general counsel of the Texas Republican Party who was appointed by President Reagan in 1985, has frequently been mentioned as a leading candidate for the next Republican appointment to the Supreme Court.[175] She has taken a particular interest in the death penalty, not simply as a member of the Fifth Circuit. She has not only led the charge from the bench to curtail federal habeas corpus review in capital cases; she has also, in articles and speeches, offered a detailed proposal for expediting *state* court appellate review in Texas capital cases.[176] Judge Jones' capital habeas jurisprudence, unlike Judge Rubin's, is anything but "restrained and non-result oriented." As a member of over 30 three-judge or *en banc* panels in capital habeas cases, she has voted to grant habeas relief in only one case, where a Supreme Court decision precisely on point compelled her vote.[177] Furthermore, she repeatedly has dissented from decisions granting even temporary relief to death row inmates, such as a remand for a habeas corpus evidentiary hearing.[178]

Two of Jones' cases merit particular mention. In *Bell v. Lynaugh*,[179] the judge became agitated when a habeas petitioner's attorney breached a promise to the Texas Attorney General that he would file the petition by a certain deadline. Judge Jones demanded that sanctions be imposed, but a majority of the court declined. She opened her special concurrence by stating:

> The veil of civility that must protect us in society has been twice torn here. It was rent wantonly when Walter Bell robbed, raped, and murdered Fred and Irene Chisum. It has again been torn by Bell's counsel's conduct, inexcusable

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[173] *Id.* at 1441-42, 1455-56 (citations omitted).

[174] *Id.* at 1455-56.

[175] *See* Bobette Rivera, *Is She Too Hot for the Court?*, NAT'L L.J., July 15, 1991, at 1.

[176] *See, e.g.*, Edith H. Jones, *Death Penalty Procedures: A Proposal for Reform*, TEX. B.J., September 1990, at 850-53. Professor David Dow correctly observed that this is an odd action for a leading "states' rights" federalist to take. *See* Dow, *supra* note 73, at 77. In Harris v. Collins, 990 F.2d 185, 186 (5th Cir. 1993), Judge Jones openly criticized the Texas Court of Criminal Appeals for moving too slowly in affirming a death sentence.

[177] The author has compiled the capital habeas cases in which Judge Jones has participated since she joined the Fifth Circuit.

[178] *See, e.g.*, Streetman v. Lynaugh, 812 F.2d 950, 961 (5th Cir. 1987) (Jones, J., dissenting on remand for evidentiary hearing).

[179] 858 F.2d 978 (5th Cir. 1988).

> according to ordinary standards of law practice. . . . I would advocate considering the imposition of sanctions in cases such as this.[180]

In announcing her standards of "civilization," Judge Jones failed to mention that the man awaiting execution, Walter Bell, had never scored above 70 on an I.Q. test.[181] Judge Jones also neglected to mention that the allegedly unethical attorney who represented Bell on habeas did so on a *pro bono* basis and invested $10,000 of his own funds in the case.[182]

In another Texas capital habeas case, Judge Jones publicly complained that she missed her child's birthday party because she was forced to stay at the courthouse late into the evening for an eleventh-hour death penalty appeal. In a letter to the editor of *The New York Times*, Judge Jones did not deny that she complained in such a manner, instead stating that she was justified because the habeas petition was filed at the last minute.[183] Although more outspoken, Judge Jones fairly represents at least a majority of the current judges on the Fifth Circuit.[184]

F. Executing the Mentally Ill, the Mentally Retarded, and Juveniles

Even in the view of many who support capital punishment, Texas is the undisputed leader in applying the death penalty to those who should be exempt — namely, those suffering from acute mental disabilities and those who committed the crime as juveniles. Although a majority of the current Supreme Court generally has held that there is nothing constitutionally troubling about the execution of most such persons,[185] it is widely recognized that these executions are anathema to fundamental human rights, as recognized by international law.[186]

The only Supreme Court case to date regarding execution of the mentally retarded arose in Texas. Johnny Paul Penry, sentenced to death in 1981 for rape and murder, repeatedly had been diagnosed as having an IQ between 50 and 64. At the time of the offense, Penry, 22, had a mental age of a six-year old child. Penry also suffered from brain damage, possibly the result of repeated acts of severe child abuse. He never made it past the first grade and spent a good portion of his life before death row in mental institutions.[187] Nevertheless, the Court of Criminal

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[180] *Id.* at 985 (Jones, J., specially concurring). The *pro bono* attorney, a New York City civil attorney, claimed to have missed the filing deadline because of a severe case of the flu. *See* Monroe Freedman, *Destroying the Great Writ*, TEX. LAW., April 6, 1992, at 16.

[181] *See Bell*, 858 F.2d at 984 (Bell's various I.Q. tests revealed an I.Q. between 57 and 70).

[182] *See* Freedman, *supra* note 180, at 16.

[183] *See* David Margolick, *Death Row Appeals Are Drawing Sharp Rebukes From Frustrated Federal Judges in the South*, N.Y. TIMES, December 2, 1988, at 9; Jones' letter to the editor may be found in N.Y. TIMES, February 3, 1989, A10.

[184] For two en banc death penalty cases in which Judge Jones' views carried the day, *see* Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc) (court split 7-6); *King v. Lynaugh*, 850 F.2d 1055 (5th Cir. 1988) (en banc) (court split 11-3).

[185] *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361 (1989) (Eighth Amendment does not proscribe execution of sixteen and seventeen year-olds); Penry v. Lynaugh, 492 U.S. 302 (1989) (Eighth Amendment does not proscribe execution of moderately to mildly mentally retarded persons).

[186] *See, e.g., Jay Pinkerton v. State of Texas, U.S.A., reprinted in* HUM. RTS L.J. 345-55 (1987) (Inter-American Commission on Human Rights) (Commission found that Texas inmate Jay Kelly Pinkerton's death sentence for crime committed at age 17 violated American Convention on Human Rights, which U.S. signed, but Senate has never ratified).

[187] Penry v. Lynaugh, 109 S.Ct. 2943, 2941 (1989); *see also Life of John Paul Penry Leads to a Sentence of Death*, HOUS. POST, September 11, 1988, at 1B (recounting in detail Penry's long history of institutionalization for his mental disabilities); Jeffery S. Trachman, *Why Execute the Mentally Retarded?*, WASH. POST, November 8, 1988, at A25 (noting extent of Penry's mental disabilities).

Appeals, the Fifth Circuit, and the Supreme Court held that, despite Penry's mental limitations, the State of Texas could constitutionally put him to death.[188]

Penry's case is not an exceptional one in Texas. Dozens of persons suffering from varying degrees of mental retardation — from borderline to moderate levels, with IQs ranging from 50 to the lows 70s — have been sentenced to death in the last two decades.[189] For varying reasons, the precise number of such persons who have been condemned since 1973 is unknown, but informed estimates for death rows nationally suggest at least 50-60 in Texas alone. And though there have been legislative attempts to outlaw the execution of retarded persons, no statute has yet been passed.[190]

As with mental retardation, there is simply no way to know the number of persons sent to death row in the last two decades who suffered from acute mental illness at the time of the offense. Undoubtedly, this number is considerably larger than the number of retarded persons. If the effects of significant brain damage are included under the rubric of mental illness, that number could very well encompass the vast majority of the 500-plus persons sentenced to death since 1973.[191]

A representative case is that of Johnny Garrett, one of the juveniles included in the NYU study mentioned above.[192] Garrett was a severe paranoid schizophrenic with a history of grand mal seizures and convulsions, auditory and visual hallucinations, and paranoid ideation dating back to the age of nine; as a child, he regularly conversed with "ghosts" of deceased relatives. As he grew older, Garrett developed four distinct personalities. Dr. Windell Dickerson, former chief psychologist in the Texas criminal justice system, testified that Garrett was "one of the most profoundly and pervasively disabled people I've encountered" in three decades of practice. As a child, Garrett suffered numerous serious head injuries. A Halstead-Reitan Battery revealed extraordinary brain dysfunction. His IQ was tested at 82. Not

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[188] *See* 109 S. Ct. at 2943.

[189] *See, e.g.*, Duhamel v. Collins, 955 F.2d 962, 966 (5th Cir. 1992) (evidence of "moderate" mental retardation); Bell v. Lynaugh, 858 F.2d 978, 984 (5th Cir. 1988) (IQ of 57); *Ex parte* Williams, 833 S.W.2d 150 (Tex. Crim. App. 1992) (IQ of 53); Bell v. Lynaugh, *Ex parte* McGee, 817 S.W.2d 77 (Tex. Crim. App. 1991) (IQ of 66 and brain damage); Ramirez v. State, 815 S.W.2d 636 (Tex. Crim. App. 1991) (IQ of 57); *Ex parte* Goodman, 816 S.W.2d 383 (Tex. Crim. App. 1991) (IQ of 56); Smith v. State, 779 S.W.2d 417 (Tex. Crim. App. 1989) ("severe" retardation).

[190] Numerous other death penalty jurisdictions have passed such a statute. *See, e.g.*, GA. CODE § 17-7-131 (1992); KY. CRIM. CODE § 532.135 (1992); N.M. CRIM. CODE, chpt. 30, § 31-20A-2.1 (1992).

[191] In a study of fifteen death row inmates selected in a random fashion by psychiatrists at New York University, "[a]ll had histories of severe head injury, five had major neurological impairment, and seven others had less serious neurological problems. . . . Six subjects had schizophrenia psychosis antedating incarceration and two others were manic-depressive." *See* Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychioeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCH. 838 (1986). A similar study of fourteen juveniles on death row conducted by the same group of psychiatrists found even more widespread and severe neurological and psychiatric disorders. *See* Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCH. 584 (1988).

My conversations with experienced capital defense attorneys have revealed conservative estimates that at least a half of inmates on Texas' death row have significant histories of mental illness or brain damage. Published cases and press reports of mentally ill persons being sentenced to death or executed abound in Texas. *See, e.g., Ex parte* Garrett, 831 S.W.2d 304, 304 (Tex.Crim.App. 1992) (Clinton, J., dissenting) (Johnny Garrett, executed in 1992); John Makeig, *Teen Killer Gets Death*, HOUS. CHRON., July 1, 1992, at 26A (Randolph Greer); *Sentence for Goynes is Death*, HOUS. CHRON., December 12, 1992, at 33A (Theodore Goynes).

[192] *See* Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, supra* note 191.

surprising since he was subjected to extreme physical abuse dating back to the womb, when his mother, married five times, was beaten during pregnancy. In addition to regular harsh beatings by a succession of step-fathers, Garrett was, as a small child, intentionally seated on a hot stove and burned with cigarettes because he would not stop crying. He was sodomized by numerous adults, including a step-father, and was forced to perform pornographic acts on film, including sex with a dog. Garrett also abused alcohol and hard drugs, including LSD and heroin. His youth was spent in special education classes and institutions.[193]

At the time of his execution, Garrett suffered from the ideation that his dead aunt would prevent the toxic agents used in lethal injection from harming him. The Texas and federal courts held that, because Garrett's various personalities were at least aware that he was being punished for his crime, notwithstanding his belief that his dead aunt would intervene, he was sufficiently mentally competent to be executed.[194] Despite a plea from the Pope — Garrett was convicted of raping and murdering a Catholic nun — the Texas Board of Pardons and Paroles, by a vote of 17-0 with a single abstention, refused to stop the execution.[195]

Other horror stories deserve at least brief mention. In 1991, Texas executed Jerry Joe Bird, a man who suffered a stroke a week before his execution and had to be wheeled into the execution chamber on a gurney.[196] In 1992, Texas executed Robert Black, a highly-decorated Vietnam veteran who flew over 100 combat missions. Black, who led an exemplary life before and during the war, and perhaps the only Eagle Scout ever executed, was diagnosed by the nation's leading medical authority on Post-Traumatic Stress Disorder as suffering from a severe case of PTSD.[197] In another case, David Martin Long, who had a long history of mental illness, pled guilty and took the stand during the punishment phase of his trial to ask for the death penalty. He told jurors that he "did not want to die," but knew of no other alternative since he did not believe doctors would cure his mental illness and he wished to end his suffering.[198] Similarly, Robert Streetman was executed in 1988 despite the fact that shortly before his execution he was diagnosed by prison psychiatrists as being in "an atypical paranoid state and having openly delusional ideation."[199] And Harold Amos Barnard was executed in 1994, although seven out of eight doctors who examined him, including numerous prison doctors not employed by Barnard's attorneys, declared that he was mentally incompetent to be executed. The one doctor declared Barnard competent was paid by the prosecution.[200] Sadly, these cases are hardly atypical.

Although the available data is incomplete, an estimated 30 persons who were juveniles at the time of the crime, which, in Texas, means seventeen-years old, have been condemned to death since 1973. In total, Texas has condemned at least 100 teenagers to death in the last

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193 *Id.* at 586-88; *Experts: Garrett Has At Least Four Personalities*, UPI WIRE, February 4, 1992; Bishop Leroy Matthiesen, *Texas is Making a Deadly Mistake About Crime*, HOUS. CHRON., January 29, 1992, at B11; *see also Ex parte* Garrett, 831 S.W.2d 304, 304-310 (Clinton, Maloney, & Baird, JJ., dissenting); Garrett v. Collins, 951 F.2d 57, 58-59 (5th Cir. 1992).

194 *See* Garrett v. Collins, 951 F.2d at 59.

195 *See Parole Board Rejects Garrett Clemency*, TEX. LAW., February 10, 1992, at 38. Governor Ann Richards had earlier granted Garrett a thirty-day reprieve — all she was enabled to do under Texas law — but was highly criticized for doing so by Texas prosecutors. *See* Kathy Fair, *Richards Takes Heat On Reprieve*, HOUS. CHRON., January 8, 1992, at A1.

196 *See Texas Executes Stroke Victim*, UPI WIRE, June 17, 1991 (also noting Bird's history of mental illness).

197 *See* Peter Erlinder, *The Wrongful Death of Bob Black*, CHI. TRIB., June 9, 1992, at p.19.

198 Long v. State, 823 S.W.2d 259, 274-75, 283 & n.39 (Tex. Crim. App. 1991).

199 Streetman v. Lynaugh, 835 F.2d 1521, 1526-27 (5th Cir. 1988).

200 *See* Barnard v. Collins, 13 F.3d 871, 877 (5th Cir. 1994).

two decades.[201] This number explains why the median age of Texas death row inmates since 1973 is only twenty-five (at the time of the crime).[202] Since 1982, Texas has actually executed five juvenile murderers and numerous other teenage murderers.[203]

G. The Crisis in Indigent Defense

Texas has already reached a crisis stage and . . . the problem is substantially worse than that faced by any other state with the death penalty.[204]

One of the defense lawyers interviewed for this article referred to Texas' standard for effective assistance of counsel in capital cases as the "pulse test": that is, counsel passes constitutional muster if he has a pulse. There is little hyperbole in this remark. In countless death penalty cases since 1973, capital defense attorneys — almost all court-appointed[205] — have done nothing but "show up" at trial. There are many of stories of defense attorneys who: either fell asleep[206] or were drunk[207] during trial; referred to their minority clients by a racial epithet in front of jurors;[208] engaged in scant (or no) preparation for trial;[209] failed to lodge a

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[201] Because the available data is partially incomplete, I can only estimate these figures.

[202] That figure is not only based on my own data, but also on Professor's Eckland-Olson's data covering Texas' death row population from 1974-83. *See* Eckland-Olson, *supra* note 75, at 860.

[203] Charles Rumbaugh, Jay Kelly Pinkerton, Johnny Garrett, Curtis Paul Harris, and Rubin Cantu, all of whom have been executed, were 17 at the time of the crime.

[204] *A Study of Representation in Capital Cases in Texas*, issued March 18, 1993, by The Spangenberg Group, a nationally-renowned research group commissioned by the Texas Bar Association and Texas Bar Foundation to study indigent criminal defense in Texas. The Spangenberg Report concluded that the crisis in Texas is "desperate," and the current system of indigent capital defense is "overwhelmed," in large part because court-appointed attorneys are paid "absurdly low" rates. The summary of the report's findings are reprinted in TEX. B.J., April 1993, at 333 *et seq.*

[205] In my numerous interviews, Texas capital defense attorneys and judges have estimated that anywhere from 75-95% of Texas capital defendants are indigent and thus require court-appointed counsel during trial and on direct appeal. The percentage varies from county to county. That number increases to virtually 100% for habeas corpus appeals.

[206] *See, e.g.*, John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, HOUS. CHRON., August 14, 1992, at 35A; Dow, *supra* note 73, at 56 (citing *Ex parte* Johnson, No. 286-440B (Tex. Dist. Ct. Feb. 1979)). A Texas trial judge presiding over one such case stated that, "The Constitution does not say the lawyer has to be awake." Makeig, *supra*, at 35A.

[207] *See, e.g.*, Russell v. Collins, 892 F.2d 1205, 1213 (5th Cir. 1989).

[208] *See, e.g., Ex parte* Guzmon, 730 S.W.2d 724 (Tex. Crim. App. 1987) (white capital defense lawyer repeatedly referred to Mexican client as a "wet back" in front of all-white jury); *see also A Different Approach*, NAT'L L. J., June 11, 1990, at 34.

[209] *See, e.g., Ex parte* Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980). In *Duffy*, according to the court's opinion, the ambulance-chasing trial lawyer, who had no experience in capital defense, convinced the defendant's family that he was an "expert" at criminal law. He proved to be entirely incompetent. He engaged in no preparation for trial and failed to raise an insanity defense when the defendant was obviously severely mentally ill. Instead, he raised a "provocation" defense — arguing that the 80-year old fragile female victim "provoked" the defendant's actions by hitting him with a cane! The only defense witness at the sentencing phase was a priest who testified that he believed that the defendant *would* pose a future threat to society. *See id.* at 510-27.

single objection during the voir dire or trial;[210] selected a capital jury in a single day;[211] presented absolutely no evidence or meaningful arguments at the punishment phase;[212] possessed conflicts of interest that worked to their clients' detriment;[213] filed wholly inadequate pleadings on appeal;[214] or engaged in similar acts of incompetence.[215] Such incompetence is in no small part explained by the fact that Texas, unlike the vast majority of death penalty jurisdictions, lacks any minimum competency standards for capital counsel.[216]

Another explanation for such inadequate representation is Texas' reliance on a system of court-appointments in capital cases. Texas is the only death penalty state in the nation that depends almost entirely on court-appointed lawyers to defend indigents at trial and on direct appeal in capital cases.[217] Of all possible variations of indigent defense, a system of court-appointments is widely recognized as the least efficacious, particularly in capital cases where expertise in an arcane area of the law is required.[218] Professor Dow's comparison of various systems of indigent capital defense, including that in Texas, is particularly illustrative in this regard. As just one example, he contrasts the court-appointed system used by both Dallas and Harris Counties with the public defender system used by Dade County (Miami), Florida between 1985-1990. There were roughly 100 capital murder trials both in Dade County and in Harris and Dallas counties combined during this time. Over eight out of ten capital murder

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[210] *See, e.g., Ex parte* Earvin, 816 S.W.2d 379, 381-82 (Tex. Crim. App. 1991) (Baird, J., dissenting) (defense counsel did not lodge a single objection throughout the entire voir dire, guilt-innocence phase, and punishment phase).

[211] *See, e.g.,* Duffy, 607 S.W.2d at 507 (picked jury in a single day). There is perhaps no more important task for a capital defense attorney than selecting the jury who will decide her client's fate. A competent counsel will spend at least a month picking a jury. See Hugh D. Hayes, *supra* note 99, at 769 (average capital voir dire in Harris County death penalty cases takes four weeks; average capital voir dire in Oakland, California takes two to three months).

[212] Romero v. Collins, 884 F.2d 871, 875 (5th Cir. 1989) (the entire closing argument of court-appointed defense lawyer, Jon R. Wood, in Texas death penalty case of teenager Jesus Romero, who was executed in 1992, was less than 30 words). Woods' entire closing argument was as follows: "You are an extremely intelligent jury. You've got this man's life in your hands. You can take it or not. That's all I've got to say." Marcia Coyle, *The Twenty-Three Word Summation,* NAT'L L.J., June 11, 1990, at 34.

[213] *See, e.g.,* Mark Ballard, *Beets Reversal May Rewrite Conflict Laws,* TEX. LAW., May 20, 1991, at 1; *When Second Chair Is A Bit Too Close,* TEX. LAW., November 23, 1992, at 1 (court-appointed lawyer physically attacked by Texas death row inmate Cedric Ransom; trial judge refused to permit counsel to withdraw even though he "admitted on the stand that he believed that Ransom is guilty and deserves the death penalty"); *Ex-Jury Foreman Defends Murder Suspect in Third Trial,* N.Y. TIMES, November 3, 1988, at A20 (Texas death row inmate John Zimmermann's defense attorney at his second re-trial was jury foreman at a prior trial at which Zimmermann was found guilty and sentenced to death). Such conflicts-of-interest should come as no surprise, as the rate for attorney ethical violations by Texas capital defense lawyers is ten times the rate for Texas attorneys generally and fourteen times the rate of attorneys nationally. *See* Marcia Coyle, *Trial and Error in the Nation's Death Belt,* NAT'L L.J., June 11, 1990, at 30.

[214] For instance, in Banda v. State, 768 S.W.2d 294, 297 (Tex. Crim. App. 1989), Judge Teague noted in his dissent that the court-appointed appellate attorney raised a single point of error in his brief; the substantive portion of the brief was a mere 150 words long.

[215] *See, e.g.,* Derrick v. State, 773 S.W.2d 271, 275, 276, 283 (Tex. Crim. App. 1986) (Clinton, Teague, Duncan, JJ., dissenting) (referring to court-appointed trial counsel, *inter alia,* as "appallingly ineffective").

[216] *See* Vincent W. Perini, *A Bridge or a Ferryboat?,* TEX. B.J., April 1992, at 390, 391.

[217] *See* Paul Calvin Drecksel, *The Crisis in Indigent Defense,* 44 ARK. L. REV. 363, 402-03 (1991) (248 of Texas' 254 counties, including Harris and Dallas, rely exclusively on court appointments).

[218] *See* Dow, *supra* note 73, at 61-72.

trials in the two Texas counties combined resulted in death sentences; on the other hand, less than one out of ten of the Dade County capital trials resulted in a death sentence.[219]

The chairperson of the Texas Bar Association committee on death row representation has written of indigent capital defense in Texas: "[f]or most of the State it remains a rudimentary system of appointment by trial judge and remuneration at rates that fail even to cover counsel's office overhead for the time invested in representation."[220] In many smaller Texas counties, court-appointed attorneys have been paid as little as $800 for trial work in death penalty cases.[221] Even in the few larger, urban Texas counties, where more than the minimum wage is paid, there is no assurance of quality representation. Rather, it is the system of county-wide court appointments itself that is inherently flawed; it encourages cronyism among the individual judges, who control the purse-strings, and financially dependant defense counsel, and with rare exceptions, it generally attracts attorneys whose primary concern is making a profit rather than protecting their clients' rights.[222] Furthermore, basic attorneys' fees are only one element of the financing of an adequate capital defense. Equally important are funds for pre-trial investigation and the appointment of defense experts such as psychiatrists. By Texas statute, this amount is capped at $500 in capital cases, and a defense attorney must spend the money *before* requesting reimbursement. Even then, it is within the discretion of the trial judge to award funds.[223]

Another aspect of the crisis in Texas death penalty defense — the lack of attorneys for habeas corpus appeals — is even more critical. Unlike representation at trial and on direct appeal, however, the problem is not just quality, but also quantity. In contrast to California and Florida, the other two states with comparably-sized death rows, there is no right in Texas to court-appointed counsel for death row inmates during habeas appeals, and the Supreme Court has held that there is no federal constitutional right to counsel after a capital defendant's death sentence is affirmed on direct appeal in state court. Simply put, very few attorneys volunteer to take capital habeas cases in state courts.[224] A 1993 study commissioned by the Texas Bar Association, which makes a compelling case for reform of Texas' system of indigent defense, was particularly critical of the State's unwillingness to fund habeas corpus representation for indigent death row inmates: "Texas has already reached a crisis stage and . . . the problem is substantially worse than that faced by any other state with the death penalty." As a result, at any given time, as many as 70 inmates on death row in Texas lack counsel.[225]

In a recent Texas capital case, the U.S. Supreme Court decided to hear the appeal of a *pro se* death row inmate who wanted to file a habeas corpus appeal but could not afford a

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[219] *See* Dow, *supra* note 73, at 66, 70. 100% of Dallas County capital cases resulted in death sentences; approximately 70% of Harris County capital cases resulted in death sentences. *Id.* at 70.

[220] *See* Perini, *supra* note 216, at 390-91.

[221] Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, NAT'L L.J., June 11, 1990, at 31; *see also Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992) (court-appointed attorney paid $11.40 an hour in capital case). Moreover, as basis of comparison, experienced privately retained capital defense attorneys will often charge $100,000 or more for a single trial. *See, e.g.*, Melinda Smith, *Surviving the System*, TEX. B.J., 400, 401-02 (April 1992).

[222] *See* Steve McVicker, *Defending the Defenseless: Do Court-Appointed Attorneys Serve Their Clients or the Courts?*, HOUS. PRESS, February 10-16, 1994, at 11 *et seq.*

[223] Lackey v. State, 638 S.W.2d 439, 441 (Tex. Crim. App. 1982).

[224] *See* David Margolick, *Texas Death Row Is Growing, But Fewer Lawyers Will Help*, N.Y. TIMES, December 31, 1993, at A1 *et seq.*

[225] *A Study of Representation in Capital Cases in Texas*, issued March 18, 1993, by The Spangenberg Group, in TEX. B. J., April 1993, at 333.

lawyer.[226] Although the Court previously decided that the Constitution does not require the appointment of habeas counsel for indigent death row inmates, the issue in *McFarland* is whether a federal statute which requires the appointment of counsel in all capital "habeas corpus proceedings"[227] permits a federal court to appoint counsel and stay the inmate's scheduled execution before a habeas corpus petition is filed. The lower federal courts in Texas, in paradoxical fashion, held that a *pro se* inmate must first file a legally sufficient petition before he is entitled to a court-appointed lawyer.[228] Because the filing of a legally insufficient *pro se* petition may subject the inmate to dismissal with prejudice before a lawyer is appointed, thus precluding further habeas corpus appeals under the "abuse of the writ" doctrine,[229] the Fifth Circuit's approach puts the inmate in a "Catch-22" situation.[230]

H. Executing the Innocent

Justice Kennedy: Suppose a prisoner sentenced to die [subsequently discovers] a videotape proving someone else committed the murder. Does it violate the Eighth Amendment to execute him?

Assistant Texas Attorney General Margaret Griffey: No.[231]

By a vote of 6-3, the Supreme Court, in *Herrera v. Collins*,[232] held that federal habeas courts had no constitutional authority to inquire whether Texas had sentenced an innocent person to death, unless a claim of innocence could be linked to some separate constitutional violation. Put another way, it is not *per se* cruel and unusual punishment for Texas to execute an innocent person, so long as his trial meets minimum constitutional standards. *Herrera* ranks as one of those infamous Supreme Court opinions, like *Lochner* and *Plessy*,[233] that is utterly repugnant to any basic sense of fairness. Indeed, it prompted one of the harshest dissents in the history of the Court.[234] While *Herrera* is most objectionable as a matter of principle, only time will tell whether it is similarly damaging in its practical effect. The opinion signals that a majority of the Court is willing to give states extremely wide latitude in administering the death penalty in a manner that may well take innocent lives. In *Herrera*, the Court carried this reactionary "states' rights" philosophy to its farthest extreme in the post-*Furman* era.

It is not coincidental that *Herrera* was a Texas case. In the post-*Furman* era, Texas has in all likelihood sentenced a number of innocent persons to death. Innocence claims have arisen

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[226] *See* McFarland v. Collins, 114 S. Ct. 544 (1993), granting certiorari to review *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993).

[227] *See* 21 U.S.C. § 848(q)(4)(B).

[228] *See* McFarland v. Collins, 7 F.3d 47 (5th Cir. 1993).

[229] *See* McCleskey v. Zant, 111 S. Ct. 1454 (1991).

[230] *See* Marcia Coyle, *Inmate Trapped in "Fatal Paradox,"* NAT'L L. J., March 7, 1994, at 1.

[231] Transcript of oral argument before the United States Supreme Court in *Herrera v. Collins*, 113 S. Ct. 853 (1993). *See* 61 U.S.L.W. 3312 (October 27, 1992).

[232] 113 S. Ct. 853 (1993).

[233] Lochner v. New York, 198 U.S. 45 (1905); Plessy v. Ferguson, 163 U.S. 537 (1896).

[234] Justice Blackmun implied that the majority was willing to countenance what is in effect murder by the state. *See* Herrera, 113 S. Ct. at 884 ("The execution of a person who can show he is innocent comes perilously close to simple murder.").

in dozens of Texas death penalty cases since 1973,[235] just as they arose in the pre-*Furman* era.[236] No doubt, many of these claims were groundless. But others unquestionably were legitimate, colorable enough to merit the federal evidentiary hearing denied in *Herrera*.

Two Texas death penalty cases involving wrongful convictions have received considerable national and international attention, those of Clarence Lee Brandley and Randall Dale Adams. In 1989, the Court of Criminal Appeals ordered the State to release both men.[237] Clarence Brandley and Randall Dale Adams are not isolated examples of innocent persons being sent to death row in Texas. Since the release of these two men in 1989, courts have granted the writ of habeas corpus in two other cases, noting in each case strong evidence that the death row inmate was in fact innocent.[238] In a third case, a death row inmate whose original conviction was reversed on appeal for trial error was acquitted at retrial because of strong doubts about his guilt,[239] and four other cases in which substantial claims of innocence have been raised are still pending in the courts.[240] Finally, in many other Texas death penalty cases since 1973, including Leonel Herrera's, there have been less compelling, but still plausible, claims of actual innocence. Five of those death row inmates have been executed.[241] These death penalty

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[235] As of the time *Herrera* was decided, there were at least twenty inmates on Texas death row who, in post-conviction proceedings, had raised innocence claims. *See* Mark Ballard, *Innocence Claims Hinge on* Herrera, TEXAS LAWYER, January 18, 1993, at 1, 25.

[236] *See* Michael Radelet et al., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 360 (1992) (listing pre-*Furman* capital defendants ultimately exonerated).

[237] *See Ex parte* Brandley, 781 S.W.2d 886 (1989); *Ex parte* Adams, 768 S.W.2d 281 (1989).

[238] *Ex parte* Mitchell, 853 S.W.2d 1 (Tex. Crim. App. 1993); Macias v. Collins, 979 F.2d 1067 (5th Cir. 1092), *aff'd*, 810 F. Supp. 782 (W.D. Tex. 1991).

[239] *See* Stephanie Asin, *Freedom Comes at High Price; Inmate Cleared of 3 Teens' Deaths in '82*, HOUSTON CHRONICLE, January 16, 1993, at 1A (discussing case of Munier Deeb).

[240] *See, e.g., Through the Looking Glass: The Gary Graham Case*, HOUS. PRESS, September 9-15, 1993, at 17-25; Jo Ann Zuniga, *A Policeman's Killer or Just an Unwitting Companion? Hearing to Study Evidence in Internationally Renown Death Row Case*, HOUS. CHRON., November 14, 1993, at A1 (discussing case of Ricardo Aldape Guerra); David Barron, *After a 14 1/2 Year Quest: Retrial; Condemned Man Wins Chance To Prove His Innocence*, HOUS. CHRON., November 8, 1992, at A1 (discussing case of Kerry Max Cook); *Victim of Own Hoax, Willing Confessor Awaits Death*, WASH. POST, December 2, 1990, at A3; *"Mass Killer" a Fraud, Texas Official Says*, L. A. TIMES, May 8, 1986, at A9 (discussing case of Henry Lee Lucas).

[241] *See, e.g.*, Drew v. Collins, 964 F.2d 411 (5th Cir. 1992) (*see also* William Kunstler, *The Innocent Die With the Guilty*, NATIONAL LAW JOURNAL, June 22, 1992, at 15) (both key prosecution witnesses recanted after trial, claimed that Drew was innocent); May (Justin) v. Collins, 955 F.2d 299 (5th Cir. 1992) (both key prosecution witnesses recanted after trial, claimed May was innocent); Ellis v. Collins, 956 F.2d 76 (5th Cir. 1992) (in support of innocence claim, defendant offered numerous witnesses and handwritten letter from another person confessing to murder) (*see also* Kathy Fair, *Ellis Execution Called Injustice; Action to Have Impact on Other Inmates, Group Says*, HOUSTON CHRONICLE, March 4, 1992); Beathard v. State, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989) (key prosecution witness, defendant's co-defendant, recanted after trial); *Ex parte* May *(Robert)*, 717 S.W.2d 84, 86 n.2 (Tex. Crim. App. 1986) (*see also Appeals Court Reverses Death Penalty Case Second Time*, UPI WIRE, September 24, 1986) (accomplice witness, whose testimony was essential to original conviction, recanted after trial; state unable to reprosecute); Skillern v. Estelle, 720 F.2d 839, 844 (5th Cir. 1983) (undisputed that Skillern in separate car from one in which victim as shot by co-defendant; tenuous evidence that Skillern intended for co-defendant to kill victim); *Ex parte* Green, 820 S.W.2d 796, 797 (Tex.Crim.App. 1991) (Clinton, J., dissenting) (arguing that evidence established that defendant, who indisputedly was not the triggerman, never intended to kill anyone and merely was present at a robbery during which a man was shot); Whitmore v. State, 570 S.W.2d 889, 894-98 (Tex. Crim. App. 1978) (following original death sentence, new trial ordered when newly discovered evidence of innocence surfaced; defendant not re-sentenced to death).

cases present the disturbing possibility that the State is sentencing to death and executing persons who lack the requisite culpability.

In some cases, trial judges or prosecutors have attempted to prevent executions at the eleventh-hour, but their efforts have been to no avail.[242] In a similar vein, former Texas Attorney General Jim Mattox, without specifying to whom he was referring, cryptically stated in 1986 that he believed one of the 19 men executed in Texas since 1982 possibly had been "wrongly executed"; Mattox further noted that at least two other men on Texas' death row "should not have received the death penalty."[243]

IV. CONCLUSION

This article has only scratched the surface regarding the pervasive unfairness in the Texas death penalty. For every anecdote and statistic cited, there are many others not mentioned. Every facet of the administration of the Texas death penalty — including whom the State chooses to kill, what processes the State has adopted to select the condemned, and actual executions — has been corrupted by myriad factors, including racial and socio-economic discrimination, dehumanization, and unabashed vengeance. It is the author's hope that a reader favoring capital punishment, after reflecting on this pervasive unfairness, will understand that the-death-penalty-in-theory and the-death-penalty-in-practice are not the same.

In this regard, this article concludes by noting that its thesis is perhaps most strongly supported by an erstwhile supporter of the death penalty, Supreme Court Associate Justice Harry Blackmun, appointed to the Court by President Nixon in 1970.[244] Justice Blackmun, perhaps more than any other living jurist in this country, has thoroughly studied the implementation of the death penalty in the modern era, in Texas and elsewhere.[245] On February 22, 1994, in a Texas capital case, Justice Blackmun announced that:

In numerous other cases, it has been highly questionable whether a "capital" murder — as opposed to a lesser degree of homicide — was committed. *See, e.g.*, Williams v. State, 682 S.W.2d 538, 544-46 (1984) (highly questionable whether capital defendant knew victim was an undercover police officer); Farris v. State, 819 S.W.2d 490, 493-98, 504-07 (Tex. Crim. App. 1990) (substantial evidence that policeman killed by capital defendant was not acting in lawful course of duty and instead was engaged in illegal drug sale); Tompkins v. State, 774 S.W.2d 195 (Tex. Crim. App. 1987) (defendant sentenced to death after victim choked on gag that defendant placed in her mouth while he went to use bankcard; substantial evidence that defendant did not intend to kill victim).

[242] *See, e.g., Slayer of Store Manager Executed Despite Plea of Father of Victim*, N. Y. TIMES, June 20, 1986, at A13 (father of victim and trial prosecutor attempted to stop execution of Texas death row inmate Kenneth Brock; trial prosecutor expressed serious doubts about whether Brock intended to kill victim or whether it was an accident); Paula Detrick, *Judge Questions Thompson Execution*, UPI WIRE, July 8, 1987 (Texas death row inmate John Thompson's trial judge questioned whether Thompson actually intended to kill or whether killing was accidental); Robert Reinhold, *Groups Race to Prevent Texas Execution*, NEW YORK TIMES, December 6, 1982, at A16 (trial prosecutor attempted to stop execution of Charlie Brooks, admitting that evidence could support finding that Brooks' accomplice was the actual murderer).

[243] *See* Mary Schlangenstein, *Prosecutor Says Man Possibly Wrongly Executed*, UPI WIRE, December 4, 1986.

[244] Justice Blackmun was a dissenter in *Furman* and a concurring vote in the Court's resurrection of capital punishment in 1976. *See* Furman, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting); Gregg v. Georgia, 428 U.S. 153 (1976) (Blackmun, J., concurring).

[245] In addition to participating in every Supreme Court death penalty decision since *Furman*, Justice Blackmun also regularly voted to affirm death sentences as a member of the United States Court of Appeals for the Eighth Circuit in the pre-*Furman* era. *See, e.g.*, Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).

> [f]rom this day forward, I shall no longer tinker with the machinery of death. For more than twenty years I have endeavored . . . along with a majority of this Court, to develop procedural and substantive rules that would lend more than a mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle this Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.[246]

It is no coincidence that Justice Blackmun chose a death penalty case from Texas in which to express such views.

[246] Callins v. Collins, 127 L. Ed. 2d 435, 445 (Feb. 22, 1994) (No. 93-7054) (Blackmun, J., dissenting) *denying cert. to review* Callins V. Collins, 998 F.2d 269 (5th Cir. 1993).