Facts & Issues

CRIMINAL JUSTICE: Capital Punishment

A STUDY BY THE LEAGUE OF WOMEN VOTERS OF TEXAS EDUCATION FUND

INTRODUCTION

In Texas, where one-third of the country's executions take place, the issue of capital punishment is again being debated. As part of that debate, delegates to the LWV-TX 2000 State Convention adopted a study of Criminal Justice: Capital Punishment.

The scope of the study was to consider the death penalty as it is applied in Texas:

- A comparison of outcomes for defendants with court appointed lawyers to those who hire their own lawyers, and whether outcomes relate to racial, ethnic, and income status of the defendants.
- A comparison of the costs of executions to the cost of life imprisonment, including any appeals, and specifically mandated appeals.
- The potential for wrongful executions in Texas and the impact of new technology, such as DNA testing.
- Possible sentencing alternatives to the death penalty, including life imprisonment, life without parole, and the rehabilitative potential of those serving life sentences.

DEFINITION OF A CAPITAL CRIME

According to the Texas law, the following crimes constitute capital murder: the murder of a public safety officer or firefighter; murder during the commission of kidnapping, burglary, robbery, aggravated sexual assault, arson, or for obstruction or retaliation; murder for remuneration or employment of another to commit the murder; murder during a prison escape; murder of a correctional employee; murder by a state prison inmate who is serving a life sentence for any of five offenses (murder, capital murder, aggravated kidnapping, aggravated sexual assault, or aggravated robbery); multiple murders; and murder of an individual under six years of age. (Texas Penal Code, art. 19.03)

An offense under this section of the Code is a capital felony with a penalty of death or life imprisonment. If a jury or, when authorized by law, the judge does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section; he/she may be convicted of murder or any other lesser-included offense.

BACKGROUND

Prior to 1923, convicted capital offenders in Texas were executed in local counties under the supervision of the sheriff. The trial and execution, generally by hanging in a public place, took place within days of each other. Capital crimes in the pre-1923 era at one time or another included treason, piracy, murder, kidnapping slaves, selling free persons as slaves, rape, robbery, counterfeiting, and arson. In this era of frontier justice lynching occurred with some frequency.

The Texas Legislature, following a national trend and touting electricity as a "clean, efficient and humane" means of execution, enacted a law in 1923 to centralize capital punishment in the state prison at Huntsville. The use of the electric chair continued until 1964, although it was not as humane as originally thought.

In 1964 a *de facto* moratorium on executions occurred in Texas as well as the rest of the country as a result of the convergence of several factors. During the 1950's, Britain and other European countries abolished the death penalty based on evidence that innocent people had been executed and that the threat of death was not a demonstrable deterrent to crime. The civil rights movement in the United States also played a role in changing attitudes and in forcing the Caucasian community to examine and question some core beliefs. In Texas, data indicated that between 1923 and 1964, 34.1% of those on death row were white, while African Americans made up 56.3% of that population. Other states had similar statistics. Hugo Bedau's account of the best-known possible miscarriages of justice related to homicide since 1893, also contributed to unease about the death penalty. Bedau concluded that eight of these high-profile cases had resulted in wrongful executions. Gallup polls at the time indicated that only 40% of the population supported the death penalty. This *de facto* moratorium lasted until the landmark decision in 1972 by the United States Supreme Court in *Furman v. Georgia*. The court ruled that state laws for sentencing capital defendants were being administered in an arbitrary and capricious fashion, particularly with respect to the race and social class of the defendant. The court further stated that the decision to impose the death penalty should not be left to a jury without providing it with rational standards for decision-making. State and federal prosecutors were temporarily banned from seeking death sentences for any defendants awaiting trial at the time. In Texas, these death row inmates had their sentences commuted to life imprisonment. (Hugo Bedau, The Death Penalty In America, 1964)

In 1973, Texas was the first state to enact a new statutory sentencing system, mandating that juries unanimously agree to three "special issues" before imposing the death penalty:

1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;
2. whether there is a possibility that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable to the provocation, if any, by the deceased.

In addition, the statute established standards for juries to use to recommend the death penalty versus life imprisonment. (Texas Penal Code, art. 37)

In 1976, the U.S. Supreme Court upheld the constitutionality of Texas' new sentencing statute in *Jurek v Texas,* finding that the law provided "guided discretion" by limiting and defining the class of murders that could be punished with a death sentence.

ARGUMENTS FOR AND AGAINST THE DEATH PENALTY

Both proponents and opponents of the death penalty cite the value of human life to bolster their positions. Opponents argue that because all human life is valuable, no one should be put to death. Proponents contend that those who take a human life must pay their debt to society.

Ernest van den Haag says that even if society could be fully and permanently protected from murder, the survival of murderers is morally unjust and the death penalty for murder is deserved. ("The Ultimate Penalty," The National Review, June 11, 2001)

Michael D. Bradbury, Ventura County, California, DA argues, "In our understandable desire to be fair and to protect the rights of offenders in our criminal justice system, let us never ignore or minimize the rights of the victims. The death penalty is a necessary tool that reaffirms the sanctity of human life while assuring that convicted killers will never again prey upon others." (Los Angeles Times, September 24, 2000)

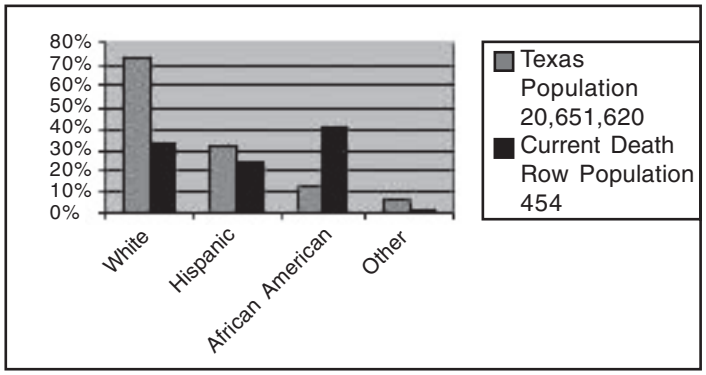
Opponents to the death penalty maintain that innocent people may be executed due to poor representation or discrimination in the way the death penalty is applied, while others state religious and moral grounds for their opposition to the death penalty. Rev. Pat Robertson said, " The death penalty has been administered in a way that discriminates against minorities and poor people who can't afford high priced attorneys." (Texas Civil Rights Project. The Death Penalty in Texas: Due Process and Equal Justice, 2000, p. 54)

A U.S. House report states, " Americans are justifiably concerned about the possibility that an innocent person may be executed….Errors can and have been made repeatedly in the trial of death penalty cases because of poor representation, racial prejudice, prosecutorial misconduct, or simply presentation of erroneous evidence." (U.S. Congress House. Subcommittee on Civil and Constitutional Rights. Report, October 21, 1993, p.3)

DEMOGRAPHICS

According to the 2000 U.S. Census, the population of Texas is almost 21 million, of whom 73% are white, 32% Hispanic, 12% African American, and 6% other. Of the prisoners on death row, 33% are white, 25% Hispanic, 41% African American, and 1% other. In fall, 2000, Texas had 448 death row inmates, the largest number in the United States, followed by Florida which had 385. (Texas Department of Criminal Justice, *www.tdcj.state.tx.us*)

Comparison between Current Texas and Death Row Populations



(Source: 2000 U.S. Census and Texas Department of Criminal Justice website *www.tdcj.state.tx.us*)

COSTS

The Death Penalty Information Center estimates that the cost of a death penalty case in Texas averages approximately $ 2.3 million. This is about three times the cost of housing an inmate in a high security single cell for forty years. Factored into this estimate are the cost of housing an inmate and the legal costs of appeals, some of which are mandated by law. Imprisonment cost per year increases as inmates grow older and develop health problems associated with old age. (Dallas Morning News, March 8, 1992)

RIGHT TO ADEQUATE COUNSEL

According to the Department of Justice, minority inmates nationwide were more likely than whites to have appointed counsel, findings indicating that 77% of African American, 73% of Hispanic, and 63% of white defendants had appointed counsel. White-collar defendants were most likely to have private attorneys, while only about 2 in 10 defendants charged with violent crimes used private attorneys. This report also indicates that in large counties nationwide, publicly funded (75%) and private attorneys (77%) had the same conviction rates. (U.S .Department of Justice, Bureau of Justice Statistics Special Report, "Defense Counsel in Criminal Cases," November, 2000)

Texas-specific reports seem to indicate that the conviction rates for appointed versus privately hired counsel do not follow this pattern. The State Bar of Texas in September, 2000, surveying participants in the criminal justice process, reported "…there is reason to believe that judicial outcomes vary by the type of counsel (retained or appointed) and that those assigned to represent indigent criminal defendants may not be providing "effective" representation." (Muting

Gideon's Trumpet: the Crisis in Indigent Criminal Defense in Texas, Committee on Legal Services to the Poor in Criminal Matters, State Bar of Texas, Michael Moore and Allen Butcher, September, 2000)

Respondents also felt that "…indigent defendants receive a different standard of justice than those who can afford to retain counsel" and that "Retained clients fare better than indigent clients and indigent clients are more likely to take pleas." Survey participants indicated their belief that defendants with retained counsel receive better plea offers than clients who have appointed counsel as well as more favorable sentencing decisions. The report also concluded that politics play a role in court appointments, and appointed attorneys are underpaid, lack adequate support, and are less experienced than retained attorneys.

A recent Dallas Morning News article reported that trial lawyers who had represented Texas death row inmates had been disciplined at approximately eight times the rate of lawyers as a whole, and that nearly one in four condemned prisoners had been represented at trial or on appeal by court-appointed counsel who had been disciplined for professional misconduct at some point in their careers. ("Defense Called Lacking for Death Row Indigents," Dallas Morning News, September 10, 2000)

Prior to 2001, Texas had no statewide system for indigent defense and no statewide standards for defense attorneys. Indigent defense practices varied widely from county to county. Appointed defense attorneys declared their pay to be hopelessly inadequate and that funds were denied for investigative assistance. Though the counties provide funds for police, investigators, and others to assist in the prosecutor's case, Texas defense attorneys reported, on average, that 31.78% of their requests for support services were denied.

It has been estimated that, in 1999, Texas counties spent about $93 million on indigent defense, including costs of counsel, investigators, experts, transcripts, and related costs. At a cost of $4.65 per capita, Texas spent less than any of ten comparison southern states which had the death penalty. The $4.65 per capita applied to all cases with appointed counsel . Costs per capita ranged from $11.70 for Florida and $10.18 for Louisiana to $4.83 in Arkansas. (Texas Appleseed Project, December, 2000, Appendix A, pp.i-ii)

The Texas Fair Defense Act, enacted by the 77th Legislature in 2001, was designed to correct some of the inadequacies of defense counsel for indigent defendants. In counties with populations of 250,000 or more, counsel must be appointed no later than the end of the first working day after the request is received. Counties with smaller populations must appoint counsel no later than the end of the third working day.

In capital cases in which the death penalty is sought, two attorneys must be appointed, at least one of whom must be qualified under stringent requirements relating to previous experience in criminal litigation.

A 13-member task force, including the chief justice of the Texas Supreme Court, the presiding judge of the Court of Criminal Appeals, four legislators, and seven members to be appointed by the governor, will implement the act. The task force is charged with reviewing and approving plans submitted by each county. Up to $19.7 million in grants were provided to help counties pay for indigent defense.

By March, 2002, all 254 Texas counties had submitted their plans to the task force. About one third of the plans fell substantially short of meeting the requirements of the new law.

RELIABILITY OF EVIDENCE

Since 1973, seven Texas death row inmates have been released from prison due to wrongful conviction. In addition to inadequate representation, studies have identified several other causes of wrongful convictions in death penalty cases, including faulty expert testimony, questionable forensic testimony, and reliance on eyewitnesses, uncorroborated co-defendants, and testimony from fellow criminals and others who can benefit from assisting the prosecution.

Prosecutors and defense lawyers often rely on physical evidence such as hair and blood samples, ballistics, bite marks, shoeprints, fingerprints, and DNA testing. Out-dated technology, untrained technicians, and under-funded laboratories can lead to faulty test results. The qualifications and effectiveness of the persons presenting the evidence in court can vary greatly.

Eyewitnesses to crimes may have faulty vision or memory (or both). Yet, reliance on a single eyewitness may be the only ground for conviction even in capital trials. The testimony of co-defendants and others who can benefit from assisting the prosecution is suspect because of possible conflicts of interest. (Constitution Project, Mandatory Justice)

The use of DNA science as evidence can mitigate many of the above problems. The fundamental building block of an individual's genetic makeup is DNA (deoxyribonucleic acid), a component of nearly every cell in the human body. With the exception of identical twins, each person's DNA is unique, making DNA testing one of law enforcement's most powerful crime solving tools. As with fingerprints, DNA collected at the scene of a crime can either identify or eliminate a suspect. Usable forensic DNA can be obtained from evidence that is decades old. Because of this, crimes once thought to be unsolvable can now be solved.

The new technology has been used in post conviction testing to vindicate death row inmates who have maintained their innocence. In Texas, four death row inmates were granted DNA testing, but all were ultimately executed when the DNA evidence did not indicate that their innocence.

State Senator Rodney Ellis sponsored a bill (SB3) to establish procedures for both the preservation of DNA evidence and its use in post conviction testing. Governor Perry signed the bill on April 5, 2002.

During the sentencing phase of a capital trial, the jury is asked to assess "future dangerousness" or the probability that the defendant will kill again. Both sides may present expert psychiatric testimony to predict future dangerousness, although the cost may

be prohibitive, especially for the defendant. This expert testimony has been described as subjective and notoriously unreliable, and, according to the American Psychiatric Association, "distorts the fact-finding process in capital cases." (*Barefoot v Estelle,* 463 U.S. 880, March 4, 1983, *Amicus Curiae Brief,* American Psychiatric Association)

APPLICATION OF THE DEATH PENALTY IN CERTAIN SITUATIONS

Mental Retardation and the Death Penalty

On June 20, 2002, the United States Supreme Court declared in *Atkins v Virginia* execution of persons with mental retardation to be unconstitutional. The court did not set a standard for determining whether an individual is mentally retarded, although a common definition is an I.Q. (Intelligent Quotient) of 70 or below. According to the June 21 Austin American Statesman, because Texas does not currently have a statutory definition of mental retardation for these purposes, processes and procedures must be established for screening current prisoners on death row as well as future murderers. As of June, 2002, the United States Supreme Court, pending its decision on this subject, had stayed the execution of three inmates on Texas' death row.

Mental Illness and the Death Penalty

Mental illness may occur at any time during a lifetime and is unpredictable in its onset and in its severity. Increasingly, prescription medications are used to treat people suffering from mental diseases. Mental illness may result in severely disordered behavior, thoughts, or feelings, and may cause a person to perceive and react to the world in a way not validated by objective data. Persons with mental illness may hear voices, may perceive others to be threatening to them, and may become violent.

The Texas Penal Code lists insanity as an affirmative defense to prosecution if, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong. The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. Texas uses a simplified version of the McNaughton Rule to determine whether someone was mentally ill at the time of the commission of the crime, as do half of the other states. The McNaughton Rule, first established in Britain in1843, has been used as a standard in the United States. Because of the very narrow definition of grounds for the defense in Texas, critics contend that serious mental illness may cause individuals to commit criminal acts such as murder even though they "know" that what they are doing is wrong. Defenders of the current standard believe that people who knew what they were doing is wrong at the time the crime was committed should be punished, regardless of the existence of mental illness. (Texas Penal Code, art. 8.01)

Foreign Nationals and the Death Penalty

According to the Texas Department of Criminal Justice, as of September 18, 2001, 26 individuals on Texas death row were foreign nationals (not United States citizens). Of these, 18 were from Mexico, 3 from Central or South America, 4 from Asia, and 1 from Cuba.

Few industrialized countries use the death penalty to punish murderers, and many refuse to provide evidence to United States officials against accused citizens of their countries. In some cases, these countries refuse to extradite fugitives to the United States if they are subject to the death penalty. Anecdotally, some prosecutors may take the death penalty off the table in order to procure evidence or to obtain custody of the accused through extradition.

Foreign nationals detained in the United States may not understand the language, the charges against them, or many aspects of the legal system. To lessen these problems and to protect the rights of Americans abroad, the United States has subscribed to Article 36 of the Vienna Convention on Consular Relations. (21 U.S.T. 77, December 24, 1969)

Specifically, this Article obligates detaining officials to inform a detained national of the right to consular notification. Upon consent or request for consular notification, detaining officials must notify those consular officials of the detention without delay. Further, the Article grants to consular officials the right to visit a national of the sending state who is in prison, custody, or detention, to converse and correspond with him, and to arrange for legal representation if the foreign national so consents. A bill by Senator Rodney Ellis, designed to enforce the requirements of the Vienna Convention on Consular Relations regarding foreign nationals, was introduced in the 2001 session of the Texas Legislature, but failed to pass.

Juveniles and the Death Penalty

In July 2001, 84 death inmates in the United States, all male, had been sentenced as juveniles. Of these, 35% were in Texas.

The Texas Family Code permits a prosecutor in juvenile court to seek a sentence of up to 40 years. Fifteen states plus the federal government have a minimum age of at least 18 for imposition of capital punishment. Five states, including Texas, place the minimum age for the death penalty at 17. In 1992, the United States ratified the International Covenant on Civil and Political Rights, but excluded Article 6, maintaining the right "to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing and future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age." (Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights. Senate Executive Report, 102-23, September 8, 1992)

Prosecuting attorneys have argued that if the accused juvenile fully understood what he was doing at the time of commission of the crime, he should be tried as an adult and, if found guilty, should be given the maximum sentence. Victor L. Streib argues that violent juvenile crimes are on the rise, apparently are worse in the U.S. than in other countries, and that juvenile-committed homicides are increasing while adult-committed homicides are decreasing. He also states that "juvenile murderers seem to be particularly brutal and non-responsive to civilized entreaties to stop the killing." (The Juvenile and the Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2001, *http://www.law.onu.edu/faculty/streib/juvdeath.pdf*)

During the 77th Texas Legislative Session, a bill prohibiting the execution of those under age 18 at the time of the crime passed the House but did not reach a vote on the Senate floor. Proponents argued that people under the age of 18 do not have the maturity to fully know what they are doing.

ALTERNATIVES TO THE DEATH PENALTY

Life Imprisonment

In 1995 the legislature amended the Texas Penal Code and mandated that an individual convicted of a capital offense and sentenced to life in prison must serve a minimum of 40 years before becoming eligible for parole.

As a further safeguard against the "early" release of a prisoner, the Texas Legislature curtailed the governor's traditional power to commute death penalty sentences. On his own authority, the governor can only commute the death penalty for 30 days. To commute a sentence to life in prison, the governor must first have a recommendation from the Board of Pardons and Parole. Factors such as time served and time earned for good behavior used by the board to grant parole for lesser offenses do not apply to the sentence of life imprisonment in capital murder cases.

Proponents of life imprisonment suggest that most murderers will not survive for 40 years in prison and that those who do survive will be so old that they will be unlikely to commit further crimes. Opponents point out the high cost of incarcerating aging prisoners and argue that with little hope of parole these prisoners will have no incentive to behave properly while in prison.

Life without Parole (LWOP)

Although not currently an option in Texas, a life sentence without parole removes the possibility that a murderer could go free. Polls have found that support for the death penalty drops by 20-30 percentage points if LWOP is offered as an alternative. Jim Mattox, former Texas Attorney General, who has supported the death penalty in the past, favors a sentence of life without parole as an alternative to the death penalty. He pointed out in 1993 that life without parole would save the state millions of dollars because it costs so much more to carry out the death sentence than to incarcerate an individual for life. ("Texas' Death Penalty Dilemma," Dallas Morning News, August 25, 1993)

Opponents to life without parole agree with Susan Fisher of the Doris Tate Crime Victims Bureau in Sacramento, Calif. that, "As long as there are people governing the state that can change sentences and alter what the jury or the judge chose, there can't be any guarantees that violent offenders won't eventually get out of prison." "Clergy Unite, Urging Followers to Oppose the Death Penalty," Paul Van Slambrouck, Christian Science Monitor, October 8, 1998)

According to the California based organization, *Death Penalty Focus*, LWOP has the following advantages:

- Murderers are removed from society without the risk of killing those who are eventually found innocent of the crime for which they were condemned.
- Severe retribution is provided which some people consider harsher than the death penalty
- A sentence of life without parole affirms the value of every human life, even the most hateful.

POST CONVICTION APPEALS

An individual arrested and prosecuted for a capital crime goes through a series of hearings, arraignment, a jury trial, and, if found guilty, a sentencing phase to the trial. An automatic appeal process is granted in death penalty cases.

The three stages of post-conviction review in death penalty cases are direct appeal, state *habeas corpus* proceedings, and federal *habeas corpus* proceedings. On direct appeal, challenges can be made to rulings by the judge, improper questioning of one or more witnesses and improper instructions to the jury. Only the record of the trial can be reviewed at this stage. *Habeas corpus* proceedings examine the fairness of the trial and often involve constitutional questions of fairness of the trial. New facts that were not considered in the direct appeal review may be presented, as well. The issues raised in *habeas* review at the federal level are limited to issues raised at the state *habeas* proceedings. Texas Defender Service, A State of Denial, Texas Justice and the Death Penalty. pp 3-4

In 1995 the Texas Legislature revised and limited *habeas corpus* protection for death penalty cases. The purpose of the change was to streamline the review of capital convictions and significantly reduce the time between conviction and imposition of a death sentence, while assuring that capital convictions and death penalty sentences are fully and fairly reviewed. The legislation also included procedures for appointment and compensation of counsel for individuals charged with capital felonies. (Texas Code of Criminal Procedure, art. 11.071)

Prior to these changes, the average time between a capital conviction and the imposition of a death sentence was 8.3 years, but it was not unusual for an inmate to be on death row for as long as 16 years. The lack of limits on the number of *habeas* applications that could be filed and lack of legal representation for death row inmates were contributing factors to these delays.

The law adopted a "unitary" appeals process that requires the direct appeal and state *habeas corpus* proceedings to take place concurrently and shortens the time period for seeking *habeas relief*. A convicted person is generally limited to only one application of *habeas corpus*. At the conclusion of the simultaneous processes, the death-row inmate has access to only limited federal relief.
James C. Harrington and Anne Moore Burnham argue, "Although the *habeas corpus* process prior to the enactment of Article 11.071 was long and tedious, it allowed persons who were wrongly convicted and sentenced to death sufficient time to acquire the evidence needed to prove their innocence." The new concurrent process shortens that time frame, and, as a result, may promote the execution of some innocent persons. In addition, the new procedure effectively precludes the convicted person from raising standard points of reversal of appeal during the *habeas* process, including ineffectiveness of counsel, a violation of a constitutional right, or other error, rising during the direct appeal. (27 St. Mary's Law Review 69, 73-74, 1995)

When court appeals are exhausted, a death penalty case moves from the judicial system to the executive branch of government. The convicted individual may request counsel or the governor to ask the Board of Pardons and Paroles to consider the case. The convicted individual may petition for a full pardon, commutation to a life sentence, or for a temporary reprieve from execution. The Texas Civil Rights Project, The Death Penalty in Texas, Seventh Annual Report of the Sate of Human Rights in Texas, Sept. 2000, p. 45

In Texas, the governor's role is limited, with no power to pardon, sentence to death, or grant reprieves, powers that rest with the Board of Pardons and Paroles, the body responsible for making clemency recommendations to the governor. The governor may issue a one-time, 30-day reprieve without the board's approval.

The 18 member, appointed Board of Pardon and Paroles does not meet as a group. Rather, they review the evidence individually and then telephone or fax their decisions to the central office, which tallies the votes. The board is not subject to the Open Meetings Act, is not required to provide reasons for denial of clemency, nor are its decisions subject to appeal or court review. Board members are required by rule to consider the input of the sentencing judge, district attorney, and sheriff. Clemency recommendations passed by majority vote go to the governor. The governor may reject the board's recommendations of clemency and, in that case, the death sentence is carried out.

MORATORIUM ON EXECUTIONS

Because the prospects for abolition of the death penalty in Texas and in other states are unfavorable at this time, momentum for declaring a moratorium on carrying out the death penalty appears to be growing. The governor of Illinois declared a moratorium on executions in January, 2000, when, of 25 cases on death row since reinstatement of death penalty in 1977, 13 death row inmates had been found innocent. He named a panel to make recommendations that would keep innocent people off death row. Abolishing the death penalty was not one of the options. The panel made 70 recommendations for judges, prosecutors, defense attorneys, and police, including standards of experience for lawyers who represent defendants in capital cases, videotaping of police interrogations, and limiting testimony from jail house informants and single witnesses. The governor of Maryland recently established a moratorium in his state because of similar concerns.

A moratorium on executions has gained some support in Texas. Although three bills calling for a moratorium were filed in the 77th Legislature, none passed. HB 720 provided for a two year moratorium and commission to study the guilt of persons convicted in capital cases; HJR 56 proposed a constitutional amendment requiring a two year moratorium on executions; and HJR 21 proposed a constitutional amendment granting the governor the authority to declare a moratorium on executions.

During the debate on the moratorium bill, one state senator challenged the contention that executions were moving too quickly to eliminate possible errors. He and other opponents argue that the nearly 13 year time period elapsing between sentencing and execution of a capital murderer allows ample time to bring forth new evidence of innocence; thus a moratorium is not needed.

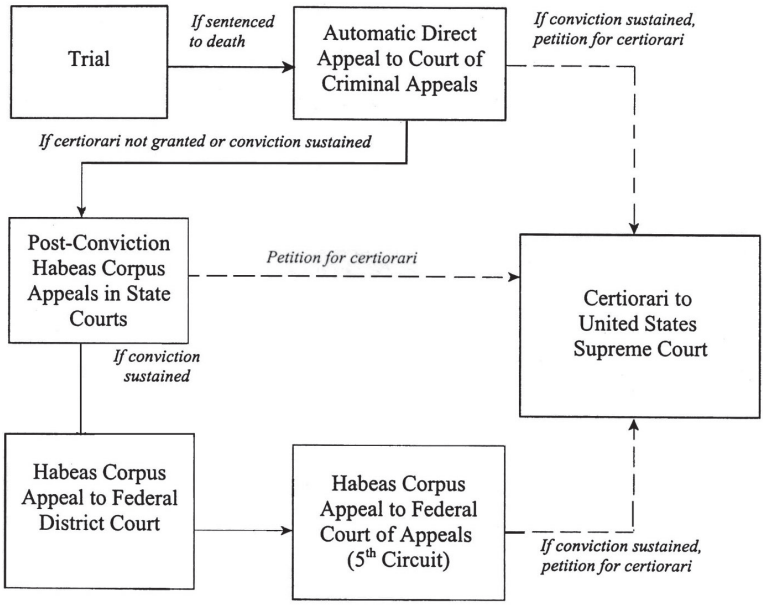
POSSIBLE REFORMS TO THE DEATH PENALTY

The Constitutional Project, which seeks to develop bi-partisan solutions to contemporary issues, convened a panel of thirty members to study the issue of the death penalty. Members included both proponents and opponents of the death penalty. The resulting publication, Mandatory Justice: Eighteen Reforms to the Death Penalty, (*http://www.constitutionproject.org/dpi/*) includes the following recommendations:

1. Create an independent authority to supervise appointed counsel
2. Adequately compensate appointed counsel and provide adequate funds for the defense
3. Defendants in questionable categories, including mentally retarded, juveniles, and felony murders, should not be subject to the death penalty.
4. Life without parole should be an option in all death penalty cases and judges should inform juries of the true length of a sentence of life imprisonment.
5. Mechanisms should be in place to ensure racial fairness
6. Procedures should be in place to ensure that the death penalty is given in a rational, non-arbitrary, and even-handed manner
7. As protection against wrongful convictions and sentences, DNA should be preserved, tested, and used to prevent unjust executions. Mechanisms should be established to ensure that all newly discovered evidence that would establish innocence be brought to light.
8. Judges should not be able to override sentences imposed by juries. Judges should warn juries that any doubt by a juror is "mitigating" evidence against the death penalty. Judges should ensure that each juror understands his/her individual obligation to consider mitigating factor when deciding on a death sentence.
9. Prosecutors should provide "open file discovery" to the defense; establish internal guidelines for seeking the death penalty; and should engage in a period of reflection and consultation before any decision to seek the death penalty.

BEFORE CHANGES TO TEXAS AND FEDERAL HABEAS CORPUS LAW
(PRE-1995)

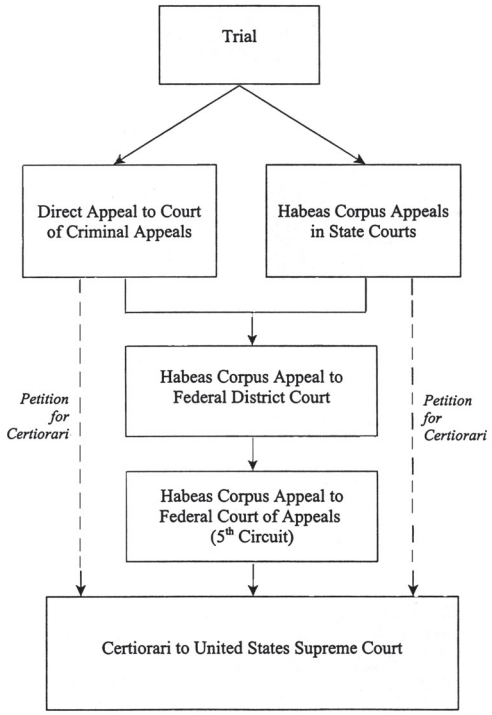
APPEALS OF DEATH SENTENCES



Hugo Bedau, The Death Penalty In Texas, pg. 39

AFTER CHANGES TO STATE AND FEDERAL HABEAS CORPUS LAW
(1995)

APPEALS OF DEATH SENTENCES



Hugo Bedau, The Death Penalty In Texas, pg. 40

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