

# A TEXAS TRADITION: ANALYZING TEXAS' COMMITMENT TO CAPITAL PUNISHMENT

*By: Grace E Brandt*

*Editor: Raleigh Dewan*

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## INTRODUCTION

Everything is bigger in Texas and capital punishment is no exception. The death penalty is a long-standing Texas tradition first overseen by the quintessential Texan Stephen F. Austin in 1835.<sup>1</sup> Just as other traditions, executions in Austin's era were a public and celebratory affair. In 1923, State Senator J.W. Thomas implemented a shift from hanging to electrocution, outlawed public executions, and placed the role of capital punishment in the hands of the state rather than the county.<sup>2</sup> The crowd was lost, but support for capital punishment remained and thrives to this day.

The ongoing legislative commitment to capital punishment in Texas stands in stark contrast to the majority of the nation. The death penalty has been abolished or is under a moratorium in half of the U.S. states. Meanwhile, Texas has carried out 569 executions over the past four decades, approximately five times as many as the next leading state.<sup>3</sup> The ongoing implementation of the sentence, despite rejection in many other areas of the country, begs consideration of what contributes to the Texan perspective.

This paper examines three distinct aspects of capital punishment in Texas: The process, the people, and the reform.

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1 White, Jennifer, "Texas History 101: The Death Penalty," Texas Monthly, December 1, 2002, <https://www.texasmonthly.com/articles/texas-history-101-45/>.

2 White, "Texas History 101."

3 Death Penalty Information Center, "Fact About the Death Penalty," as of March 23, 2020.

Methods and regulations have shifted dramatically since Austin first oversaw a public hanging. The modern process continues to act as a deterrent and form of justice, but the rising cost and the treatment of jurors draw concern. In pure democratic fashion, the people are at the heart of the issue. The disproportionate representation of minorities on death row has sparked criticism, yet capital punishment continues to reflect public opinion and the political culture of the state. Reform has sought to address some of these issues and denunciations. For example, Texas recently implemented life without possibility of parole and shortened the appeals process.

I contend that Texas will maintain devotion to capital punishment. Barring the Supreme Court outlawing the practice for a second time, executions are likely to proceed without interruption. The traditionalist political culture of the state and need for officials to appease their constituents will outweigh nationwide condemnation and declined usage. Reform will, however, continue to address the disadvantages and concerns due to federal intervention and increasing opposition. If one is considering a capital offense in Texas, they must do so with the knowledge that tradition has not been thrown away.

## THE PROCESS

The current proceedings of a capital punishment sentencing came forth after the Supreme Court remanded a death sentence in *Penry v. Lynaugh* (1989) due to the special issue questions potentially leading to the disregard of mitigating factors. Texas' death penalty statute had only recently been reaffirmed in *Jurek v. Texas* (1976) after the Supreme Court suspended capital punishment nationwide in 1972. Knowing the Court was no stranger to ruling the sentence unconstitutional, the Texas legislature took the precaution of devising new special issue questions that centered upon both future dangerousness and mitigating factors.<sup>4</sup> Despite this 1991 amendment, direction pertaining to mitigating circumstances remains insufficient.

The mitigating circumstances special issue question posed to jurors fails to enumerate potential factors or provide counsel from the law. A study of data from the Capital Jury Project comparing *Penry* and

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<sup>4</sup> Vartkessian, Elizabeth S., Jon R. Sorensen, and Christopher E. Kelly, "Tinkering with the Machinery of Death: An Analysis of Juror Decision-Making in Texas Death Penalty Trials During Two Statutory Eras," *Justice Quarterly* 34, no. 1 (January 2, 2017): 2-4.

*Jurek* era jurors found a larger portion of *Penry* jurors were unable to identify the legal standard for mitigating evidence in a death sentence.<sup>5</sup> This evidence reveals that the 1991 modification actually hinders the impact of mitigation on juror decision-making. Meanwhile, the question presents a “death default” in asking the jury if the mitigating factors merit the imposition of a life sentence “rather than a death sentence.”<sup>6</sup> The downplay of mitigating evidence combined with general confusion as to what constitutes mitigation shift jury consideration far more heavily to future dangerousness.

Future dangerousness was a component of special issue questioning from the beginning. The preeminence does not imbue the factor with greater significance, but data shows juries grant it such weight. Two-thirds of Texas capital jurors incorrectly believed affirmed future dangerousness legally requires the death penalty, remaining virtually the same from *Jurek* to *Penry*.<sup>7</sup> This emphasis is cause for greater worry due to the virtual impossibility of accurately prescribing future dangerousness. A study of 155 cases found expert witnesses were incorrect in predicting future danger 95% of the time. Furthermore, the statute fails to define what constitutes dangerousness.<sup>8</sup> A task performed with little-to-no accuracy by experts is thereby placed upon a handful of ill-instructed and unqualified individuals in order to determine life or death.

The projection of future dangerousness is difficult to ascertain, but the impact on broader levels of societal danger is more evident in consideration of capital punishment. The sentence spreads beyond the punishment of an individual in order to deter further crime. Each execution in Texas from 1994 to 2005 correlated to a decrease of up to 2.5 murders.<sup>9</sup> On a national level, declines in executions were matched with an increase in murders over a 26 year period, whereas each execution was associated with 74 fewer murders the subsequent year.<sup>10</sup>

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5 Vartkessian, Sorensen, and Kelly, “Tinkering with the Machinery of Death,” 13.

6 Fowler, Brittany, “A Shortcut to Death: How the Texas Death-Penalty Statute Engages the Jury’s Cognitive Heuristic in Favor of Death,” *Texas Law Review* 96, no. 2 (December 1, 2017): 385 (emphasis added).

7 Vartkessian, Sorensen, and Kelly, “Tinkering with the Machinery of Death,” 11.

8 Fowler, “A Shortcut to Death,” 381.

9 Mulhausen, David B., “How the Death Penalty Saves Lives,” *US News and World Report*, September 29, 2014, <https://www.usnews.com/opinion/articles/2014/09/29/the-death-penalty-saves-lives-by-deterring-crime>.

10 Adler, Roy D. and Michael Summers, “Capital Punishment Works,” *The Wall Street Journal*, November 2, 2007, <https://www.wsj.com/articles/SB119397079767680173>.

The apparent deterrence could be related to an alternative variable, but one has yet to be conclusively identified.

The promotion of general welfare through crime deterrence is coupled with the establishment and assurance of justice. As a largely philosophical concept, justice is difficult to measure. George H. Brauchler, a district attorney in Colorado, contends, “The repeal of the death penalty treats all murders as the same. Once a person commits a single act of murder, each additional murder is a freebie.”<sup>11</sup> Brauchler quantifies justice in appropriate severity of punishment for increasingly immoral actions. If so, the gravity of the death penalty enables a just sentence for the most appalling of crimes.

The cost for the individual is the utmost they can pay, yet critics point to a significant public cost. *Gregg v. Georgia* (1976) reaffirmed the usage of capital punishment with the requirement of bifurcated, or separate guilt and sentencing, trials. This lengthier sentencing process combined with more expensive pretrial and security results in capital punishment cases exceeding the cost of an average non-death penalty aggravated murder case by over \$1 million.<sup>12</sup> The burden is largely borne at the county level. 130 of the 245 counties have never sent anyone to death row likely in part due to inability to fund the process of capital punishment.<sup>13</sup> The worth of capital punishment must, therefore, continue to match the rising cost.

## THE PEOPLE

No matter one’s perspective on the humanity of capital punishment, it is entirely human and involves real people. The people facing the death penalty, however, consist primarily of one type of person. Blacks were executed at three times the rate suggested by their population presence between 1982 and 2016,

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11 Brauchler, George, “Coloradoans should have the final say on the death penalty (and I’d hope they keep it),” *The Denver Post*, March 1, 2019, <https://www.denverpost.com/2019/03/01/brauchler-coloradans-should-have-the-final-say-on-the-death-penalty-and-id-hope-they-keep-it/>.

12 Collins, Peter A. and Aliza Kaplan, “The death penalty is getting more and more expensive. Is it worth it?” *The Conversation*, March 30, 2017, <https://theconversation.com/the-death-penalty-is-getting-more-and-more-expensive-is-it-worth-it-74294>.

13 Halperin, Rick and Roger C. Barnes, “How the death penalty fails Texas,” *The Dallas Morning News*, December 1, 2019, <https://www.dallasnews.com/opinion/commentary/2019/12/01/how-the-death-penalty-fails-texas/>

whereas whites and Hispanics faced rates lower than their population proportion. Perception of blacks as “a violent, criminal underclass” that are “disproportionately linked to the U.S. penal system” is the predominant racial stereotype and research shows those with this view are more likely to support longer prison sentences and the death penalty.<sup>14</sup> The future dangerousness question forces jurors to rely upon their stereotypical conceptualizations to make assumptions.<sup>15</sup>

The racial disproportion is not new, as blacks faced high rates of execution following Reconstruction as a form of racial control.<sup>16</sup> The usage of crime and punishment realigned the political electorate in uniting conservative Republicans of all economic classes against a racial underclass following the civil rights movement. Evidence affirms that differentiation in predominant political forces generates varied incarceration rates between states. Conservative states continue their legacy with higher rates of incarceration overall and minorities being more likely to be imprisoned.<sup>17</sup>

The bias that permeates the jury bench is not limited to racial prejudice. To participate in a capital punishment trial, a juror must go through death qualification in which they are asked about their ability to sentence a defendant to death. Research confirms that death-qualified jurors are conditioned to be more inclined to conviction and more prone to believe prosecution witnesses.<sup>18</sup> Jurors already suffer from misleading special issue questions, but this confusion extends further. Capital jurors are frequently found to be incapable of understanding even the fundamental aspects of sentencing and then error in favor of the prosecution.<sup>19</sup>

These perceptions do, however, reflect the overarching political culture of Texas. The amalgamation of Southern traditionalism and Western/Midwestern individualism has consistently defined the state. Ideals such as elite governance, maintenance of social order,

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14 Percival, Garrick L., “Ideology, Diversity, and Imprisonment: Considering the Influence of Local Politics on Racial and Ethnic Minority Incarceration Rates,” *Social Science Quarterly* 91, no. 4 (December 2010): 1066.

15 Fowler, “A Shortcut to Death,” 383.

16 Jillson, Cal, *Lone Star Tarnished: A Critical Look at Texas Politics and Public Policy*, 3rd ed, (New York: Routledge, 2018), 194.

17 Percival, “Ideology, Diversity, and Imprisonment,” 1065-67.

18 Vartkessian, Elizabeth S., Jon R. Sorensen, and Christopher E. Kelly, “Tinkering with the Machinery of Death,” 4.

19 Vartkessian, Elizabeth S., Jon R. Sorensen, and Christopher E. Kelly, “Tinkering with the Machinery of Death,” 5.

and competition are ingrained in society, but also in the commitment to capital punishment.<sup>20</sup> With minorities facing the brunt of capital punishment, elites are permitted to extend their hand in furthering subjugation of the traditionally disenfranchised. High rates of parental incarceration contribute to instability in children of poor families and heightened chances of incarceration themselves.<sup>21</sup> The traditional social order advocated by traditionalist political culture is thus preserved.

Support of capital punishment is not relegated to those with conservative perspectives. Seventy-three percent of Texans strongly or somewhat favored the death penalty as of 2012.<sup>22</sup> Texas' system of electing appellate judges encourages these officials to heed public opinion and, therefore, re-election necessitates a record of toughness on criminals. Updegrave and Longmire argue that "many of the public assumes the death penalty is a good policy because authorities continue to use it" while public officials "continue using the death penalty precisely because the public supports it."<sup>23</sup> The result is a catch-22 of approval. Nevertheless, the profuse and persevering support that permits capital punishment's reign in Texas is an identifying factor of the working of democracy. The people's voice is heard and heeded.

## THE REFORM

Capital punishment looks far different at all stages than it did in Austin's era. The population qualified to receive the sentence has decreased in recent years. *Atkins v. Virginia* (2002) outlawed the execution of intellectually disabled inmates but permitted states to individually define *intellectual disability*.<sup>24</sup> The definition crafted by the Texas Court of Criminal Appeals was ruled unconstitutional in *Moore v. Texas* (2017) due to outdated medical standards and non-

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20 Jillson, Cal, Texas Politics: Governing the Lone Star State, 6th ed, (New York: Routledge), 2018, 8-9.

21 Western, Bruce and Becky Pettit, "Incarceration and Social Inequality," Daedalus 139, no. 3 (January 1, 2010): 14-15.

22 Jillson, Texas Politics, 231.

23 Updegrave, Alexander H., and Dennis R. Longmire, "Systems Thinking, System Justification, and the Death Penalty: Thirty-Eight Years of Capital Punishment Legislation in Texas," Corrections 3, no. 4 (October 2, 2018): 251.

24 Updegrave and Longmire, "Systems Thinking, System Justification, and the Death Penalty," 253.

clinical factors. The man being sentenced, Bobby Moore, was to be re-evaluated with different methods which were once again overturned by the Supreme Court. House Bill 1839 of the 2019 Texas Legislature aimed to address the legal troubles but died after the House and Senate failed to agree.<sup>25</sup>

Had the initial version of the bill passed, defendants determined to be intellectually disabled pre-trial would be ineligible for the death penalty and automatically sentenced to life in prison without possibility of parole.<sup>26</sup> The option of LWOP is a recent reform in Texas. If capital punishment was rejected prior to 2005, the alternative was life in prison with the possibility of parole after 40 years.<sup>27</sup> Unease regarding a defendant's potential return to society and future dangerousness encouraged juror predisposition to the death penalty. The implementation of LWOP provides juries a valid and reassuring alternative to execution. Since the addition of LWOP, "the number of new death sentences has fallen by about half."<sup>28</sup>

Even so, the reform has proven less influential in juror decision making than expected. Keeping a defendant from killing again was an important factor in sentencing for approximately 90% of *Penry* jurors.<sup>29</sup> The perseverance of this emphasis on future dangerousness is striking considering their inability to return to the general public. Evidently, the focus is on danger within the prison environment. The apprehension is not unwarranted. While on death row in 1985, Jermarr Arnold killed another inmate and had a record of numerous other assaults while in prison.<sup>30</sup> It is impossible to completely isolate prisoners throughout their entire sentence from others serving time, guards, and anyone else within the prison. The odds of additional harm transpiring are ultimately unknown, but execution remains the only foolproof preventative option.

Common criticism of capital punishment is the excessive

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25 Byrne, Elizabeth and Jolie McCullough, "Despite bipartisan support, Texas bill tackling intellectual disability in death penalty cases fails," *The Texas Tribune*, May 26, 2019, <https://www.texastribune.org/2019/05/26/Texas-death-penalty-intellectual-disability-fails/>.

26 Byrne and McCullough, "Despite bipartisan support, Texas bill tackling intellectual disability in death penalty cases fails."

27 Updegrave and Longmire, "Systems Thinking, System Justification, and the Death Penalty," 254.

28 Jillson, *Texas Politics*, 232.

29 Vartkessian, Sorensen, and Kelly, "Tinkering with the Machinery of Death," 15.

30 Goldberg, Guy and Gena Bunn, "Balancing Fairness & Finality: A Comprehensive Review of the Texas Death Penalty," *Texas Review of Law & Politics* 5 (October 1, 2000): 130.

length of time prisoners spend on death row. An overburdened court system is argued to prolong the process of appeals. Recognizing this concern, then-Governor George Bush championed legislative reforms that enabled shortened lengths of appeals. The number of years inmates spend on death row dropped from nine to approximately seven. Long appeals are not inherently bad as they exemplify death row inmates' greater access to justice compared to other prisoners.<sup>31</sup> *Gregg v. Georgia* (1976) mandated an automatic appeal by the state supreme court of all cases that resulted in a death sentence, on top of additional appeals in lower courts.<sup>32</sup>

Texas still remains behind in reform movements, even amongst states who permit capital punishment. *Wainwright v. Witt* (1985) permits individuals who oppose the death penalty to serve in capital punishment cases as long as they make their ruling according to law rather than personal conviction. Regardless, Texas jurors are excluded from capital trials if they oppose the death penalty. The Texas Legislature has failed to propose any legislation acknowledging or amending this violation.<sup>33</sup> Texas' history of reform pertaining to the death penalty reflects a cognizance of issues, but initiative to rectify only those which suit them.

## CONCLUSION

I have shown that Texas remains staunchly committed to capital punishment. The process now involves the consideration of mitigating evidence but remains predominantly impacted by the future dangerousness special issue question. Future danger is only indisputably absolved by executions and they produce an additional deterrent effect. The public benefits from this increase in safety and overall sense of justice. The true justice, however, is questionable as death sentences remain troublingly concentrated in minority populations. Juries are also disproportionately filled, but in that they consist of those with a bias towards death. This view remains in line with that of Texas as a whole. The state's overwhelming support for

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31 Goldberg and Bunn, "Balancing Fairness & Finality," 94-95.

32 Collins and Kaplan, "The death penalty is getting more and more expensive."

33 Updegrave and Longmire, "Systems Thinking, System Justification, and the Death Penalty," 253-261.



capital punishment stands at odds with the nation's predominant move away from the sentence. Shifts in Texas have unfolded through reforms in appeal lengths, LWOP, and intellectual disability criteria. The sufficiency, effectiveness, and pace of reform remains a contentious issue.

I expect Texas to persevere in handing out one-way tickets to the execution chamber. National criticism and rejection of capital punishment will continue to creep up on the process. As a result, Texas will begrudgingly amend statutes to keep the option on the table. The reforms will be limited and crafted in such a way as to preserve control over the process. Previous attempts have failed due to inability to progress in both house of the Texas Legislature. Imposition of new and dissenting perspectives on capital punishment in the houses would allow greater chances at reform, but the true power over the death penalty resides in the citizens. House and Senate members as well as judges are elected. They will follow the wave of public opinion in order to secure election and then re-election.

However, public opinion is not static. The diversification of the population will slowly erode the strict adherence to the traditionalist and individualistic political culture that defines the state. Elite rule and maintenance of social order will thus decline as underlying reasoning, but support will not so readily disappear as both sides of the political aisle continue to back the death penalty. Standing at odds with national opinion is no matter for death penalty advocates in Texas who pride themselves in their commitment to their values. A state infatuated with its history of independence, democracy, and frontier justice will relish in bucking the status quo of the nation by grabbing this gruesome tradition by the horns and holding on for dear life.