

A CULTURE OF CAPITAL PUNISHMENT: A LOOK AT TEXAS AND THE DEATH
PENALTY FROM PRE-REPUBLIC TO THE PRESENT

by

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Abstract

The purpose of this paper is to explore previously untouched areas of analysis in Texas death penalty law in an attempt to broaden current understanding of how the people and politicians of Texas view the justifications for capital punishment. While the topic of modern capital punishment in Texas has been the subject of dozens if not hundreds of scholarly reviews, there is a noticeable gap in historical analysis of the Republic Era (approx. 1836 through 1845) criminal law through the early 20th century. The perception of this period is one of extreme lawlessness, of bandits and cowboys and Texas Rangers prowling the expanses of newly settled lands in search of prosperity. It is the intention of this paper to explore if this perception of lawlessness held true to what was actually occurring in the early stages of the criminal justice system, in terms of law, law enforcement, and specifically the death penalty. This paper will examine the cultural influences of the “six flags over Texas,” and how influences from different legal systems had an impact on how death penalty law developed, specifically in the years leading up to the 1923 change in Texas law. It will conclude with a short case study in a current Texas county, to further highlight the tension between pro-and anti-death penalty advocates in the state today and to illustrate how in a century of debates, Texas still holds fast to the necessity of the death penalty in its criminal justice system

Introduction

Dr. Ralph Gray paid a visit to Charles “Charlie” Brooks Jr. in the morning of December 7th, 1982 for the sole purpose of examining his veins. Would they be large enough to allow for the catheter needle that would eventually deliver the lethal cocktail? The patient was known to have used intravenous drugs in the past, ones that may shrink the veins to a point of collapse. Dr. Gray flipped over the patient’s arm and examined his vessels. The veins were indeed large enough to support the injection.¹ However, the science was not yet absolute; the United States had never employed the intravenous injection of sodium pentothal in a high dose as a method of execution. This would be the country’s first ever use of lethal injection on a human. Would this new method of legal execution be as effective as the electric chair? And, perhaps a more pressing concern, would this method of exterminating prisoners be considered humane?²

In 1976, Charles Brooks Jr. and a friend, Woody Lourdes, kidnapped and murdered used-car mechanic and Fort Worth resident David Gregory.³ Although evidence never surfaced to conclude which of the two suspects fired the fatal shot, in separate trials the jury sentenced both accomplices to death. Lourdes would be spared by an appeals court who overturned his conviction in favor of a forty-year sentence. Mr. Brooks was not successful in his appellate claims.⁴

In the dead of the December night Mr. Brooks, a forty-year old black Muslim man who now went by the name Shareef Ahman Abdul-Rahim, offered little resistance as he shuffled

¹ Dick Reavis, “Charlie Brooks’ Last Words,” *Texas Monthly*, February 1983. Accessed November 1, 2018. <https://www.texasmonthly.com/articles/charlie-brooks-last-words/>

² Robert Reinhold, “Technician Executes Murderer in Texas by Lethal Injection,” *The New York Times*, December 7 1982. Accessed November 25 2018. <https://www.nytimes.com/1982/12/07/us/technician-executes-murderer-in-texas-by-lethal-injection.html>

³ “Texas Catholic Conference Tried to Stop Execution,” *South Texas Catholic (Corpus Christi, Texas)*, Vol. 18. No. 29 Ed. 1 December 17, 1982. <https://texashistory.unt.edu/ark:/67531/metaph840582/m1/3/?q=%22charles+brooks+jr.%22>

⁴ Reavis.

through the hallways of the red-brick Walls Unit toward a gray steel door. Described as “bright-eyed” and “handsome,” the former high school football star from a Methodist, middle-class, eastern Tarrant County family now marched to meet his fate.⁵ About twenty witnesses awaited his entry, including four reporters, Mr. Brooks’ minister from Fort Worth, and Mr. Brooks’ recent girlfriend, Vanessa Sapps. Like the 361 men who had been electrocuted in this Huntsville prison chamber before him, this would be Brooks’ last stop.⁶ Mr. Brooks had been sentenced to die.⁷

Looking to historic turning points on the use of capital punishment, such as this 1982 execution, provides context as to what were considered ethical boundaries of specific sentences over time. These boundaries have changed significantly as American culture evolves in its interpretation of the law, of religion, and of the power and privileges of the government. By analyzing these moral developments and ethical debates over two centuries of Texas law, it becomes clear the boundary repeatedly falls short of abolishing the punishment entirely. This pattern remains true from the beginning developments of Texas criminal law, to the reforms passed in 1923, and through to present day. The necessity of capital punishment has become intertwined with the modern identity of Texans from varying political backgrounds, and has persevered even in the face of compelling arguments against its use.

A modern interpretation of the 8th Amendment to the U.S. Constitution states that in order to determine whether or not a punishment can be considered cruel or unusual, a court must consider “evolving standards of decency that mark the progress of a maturing society.”⁸ Though

⁵ Ibid.

⁶ “Death Row Facts,” Texas Department of Criminal Justice, n.d. Accessed November 25 2018. https://www.tdcj.state.tx.us/death_row/dr_facts.html

⁷ Reavis.

⁸ *Trop v. Dulles*, 356 U.S. 86, 101, 1958.

this standard appeared first in the “liberal” *Trop v. Dulles* 1958 majority opinion, the idea that society should move past using certain types of punishments on criminals has been around for far longer. As society develops, so does the idea of what a just society can do to its citizens. Just as torture as a form of punishment evolved into the more humane penitentiary system, so has the death penalty changed to fit modern interpretations of decency, progressing from spectacles that drew crowds of thousands to a quiet, hidden, and theoretically painless experience. Today, the standard in Texas is that capital punishment is reserved only for murder coupled with aggravating circumstances, and must be completed using lethal injection in the death chambers of Huntsville, Texas. These standards have not always been in place, and took two centuries of revisions by legislators and progressive movements from citizens to become as stringent as they are today.

As Mr. Brooks made his way to the death chamber of Huntsville, Texas, he had no way of foretelling that his own execution would begin the nation-wide trend of lethal injection. He did not know that he was only the beginning step in propelling Texas to notoriety for its extensive use of the practice. In a world that has today essentially condemned the usage of capital punishment, with 142 countries, the United Nations, and now the Catholic Church through Pope Francis denouncing the practice, the United States is eighth in the world as of 2017 in executions per year behind countries such as China, Iran, Saudi Arabia, Iraq, and Pakistan. This is only the second year since 2006 that the USA has fallen out of the top five.⁹ Texas differentiates itself further within the United States by having the highest number executions of

⁹ “The Death Penalty in 2017: Facts and Figures,” Amnesty International, last modified April 12 2018, <https://www.amnesty.org/en/latest/news/2018/04/death-penalty-facts-and-figures-2017/>.

any state, and when controlling for the high population in Texas is only second per capita behind Oklahoma.¹⁰

As the rest of the world finds that modern standards of decency cannot permit the death penalty, Texas holds firm to the continued use of the practice. Though there has been some evolution within the state that has marked progress in the interpretation of what type of punishments are moral, Texas stills falls short of where the majority of the world sets its standards. Many scholars attribute this trend to what has been dubbed as “Texas exceptionalism.”¹¹ Texans today have developed a unique sense of pride in their home that often manifests into an ideology that Texas is superior to other states in rules, governance, and culture. In terms of capital punishment, this has made many state residents complacent with the tradition of executing offenders, even as the rest of the world seems to be progressing away from state sponsored killings. Texans drag their boot heels in the dirt in the face of change. But this phenomenon is not new, and can be attributed to Texas’ unique and individualistic history even compared to other Southern states. To fully understand how present day arguments for and against capital punishment were founded, it is essential to consider the evolution of Texas criminal law, and how people in different time periods determined their own standards of decency.

To better understand and interpret Texas death penalty law, it is important to understand the three distinct eras in this history. The first era encompasses the years 1819 to 1923, from Spanish controlled Mexico to the passage of Senate Bill 63. The second era begins with the

¹⁰ “Facts about the Death Penalty,” *Death Penalty Information Center*, last modified November 15 2018. Accessed November 20 2018. <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

¹¹ Tony G. Poveda, “American Exceptionalism And the Death Penalty,” *Social Justice/Global Options* 27, no. 2, accessed September 9, 2018, <https://www.jstor.org/stable/29767217>.

important legal changes prompted by the Texas Senate in 1923, and ends with the 1972 decision *Furman v. Georgia*.¹² The Furman decision handed down by the Supreme Court of the United States ruled that the death penalty as applied was capricious and discriminatory, and therefore was a violation of the Eighth Amendment's cruel and unusual punishment clause. This created a nation-wide moratorium on executing death row inmates. Four years later, the Supreme Court essentially overturned this decision in *Gregg v. Georgia*, stating that the death penalty could indeed serve "the social purposes of retribution and deterrence."¹³ Gregg was settled alongside four other "death penalty case," including *Jurek v. Texas*.¹⁴ The post-Gregg era encompasses the years 1976 to the present, and is where the highest concentration of scholarly works regarding Texas death penalty law lies.

It is this earliest period, the first of the two pre-Furman eras from the early 19th century to 1923, and specifically the debate surrounding the adoption of Senate Bill 63 in 1923, that is neglected in historical analyses. Uncovering what led to this fundamental shift from public execution, vigilante justice, and county rule to strict, state-sponsored execution is vital to understanding how the law evolved to match perceived cultural standards of justice.

Pre-Republic

Texas has a long history of executing criminals, but state-sponsored death sentences have not always been as frequent as they are today. The most visibly significant difference in the death penalty in the 19th century and the death penalty today was the community involvement in

¹² *Furman v. Georgia*, 408 US 238 (1972).

¹³ *Gregg v. Georgia*, 428 US 153 (1976).

¹⁴ *Jurek v. Texas*, 428 US 262 (1976).

public hangings.¹⁵ The public spectacle of state-sponsored executions was one brought to Texas from centuries of European tradition. Many European monarchs justified their rule through divine appointment, and needed to instill legitimacy to both their rule and their religious preference. Torturing offenders, and ultimately publically killing them, even for petty crimes, achieved both of these goals. For example, in England, death was the punishment for all felonies (of which there were at least 160).¹⁶ There was no consideration of proportionality of the crime to the sentence imposed, and public execution was supposed to act as a deterrent to those considering similar actions. France operated in a similar fashion as England. Michel Foucault's *Discipline and Punish* remarks on the shift of monarchical use of execution, mostly in France, as a means of force for preserving the stability of authoritarian rule to the birth of prisons and criminal justice reform that introduced an Enlightenment-inspired notion of humanity toward the condemned.¹⁷

“It was as if the punishment was thought to equal, if not to exceed, in savagery the crime itself, to accustom the spectators to a ferocity from which one wished to divert them, to show them the frequency of crime, to make the executioner resemble a criminal, judges murderers, to reverse roles at the last moment, to make the tortured criminal an object of pity or admiration.”¹⁸

But as Europe moved toward constitutional monarchies or republic government styles, there was less need for the government to scare its citizens into submission through threat of death or divine punishment. Intertwining religious confession through torture also began to decrease, though religion would still play an important part in criminal justice reform.¹⁹

¹⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Edited and translated by Alan Sheridan in 1977, (New York: Vintage Books 1975), 9.

¹⁶ A. H. Love, “Inequality of Sentences and The Remedy,” *Journal of Prison Discipline and Philanthropy* 33 and 34 (January 1895), 13. Retrieved from http://library.tcu.edu.ezproxy.tcu.edu/PURL/EZproxy_link.asp?http://search.proquest.com.ezproxy.tcu.edu/docview/136062372?accountid=7090

¹⁷ Michel Foucault, “Discipline and Punish,” 9.

¹⁸ Ibid.

¹⁹ Ibid, 7.

As European settlers flocked to the Americas, they took with them their own distinct cultural views of ethics and morality. Some of these perspectives were influenced by religious interpretation. Others were driven by a sense of justice and a desire for reason to dictate the law. As the American colonies transitioned into the United States of America, these ideas began to be reflected in writing, and a criminal justice system that prioritized individual inherent rights was created. Looking at executions during this time, many lost the more overtly religious overtones prevalent in Europe, but America still saw religion driving people's perceptions on whether or not the death penalty was just. This phenomena is highlighted in Louis P. Masur's book *Rites of Execution*, as it observes how America's distinct definitions of individual rights and liberties specifically influenced this debate around capital punishment.²⁰

Movements inspired by Enlightenment thinkers helped to eliminate torture or pain in criminal justice, and to begin building penitentiaries intended for quiet reflection. This is where the idea of proportionality began to develop, though a multitude of crimes would still be punishable by death. Although incarceration became wide-spread as an alternative for death in less egregious cases, the wild spectacle of public executions did become a staple of early American culture. Executions that drew thousands of spectators using the practice almost as sport were common. The community rallied behind putting offenders to death, even at the expense of due process and truth. These traditions would become solidified in American culture, as were transmitted to Texas by American settlers.

Mexico gained its independence from Spain in 1821, creating the predecessor of Texas, Coahuila y Tejas. Mexican laws had their root in Castilian (Spanish) law, and specifically a set

²⁰ Louis P Masur, "Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865," (Oxford: Oxford University Press, 1991).

of codes known as *Recopilación de las Leyes de los Reinos de las Indias* (Law of the Indies).²¹

Although there had been contention between Spanish and French control of the region, it is generally accepted that France left no law and that the Spanish roots were all that remained.²²

The Law of the Indies defined and regulated Spanish control of the Americas, and how the colonies would interact to the benefit of Spain, and later influenced how the laws (including criminal codes) in Mexico developed. Mexico gained its independence from Spain in 1821, however it was not until 1824 that the new country adopted its first constitution. This constitution implemented the Roman Catholic faith, and Catholic philosophy, as the official and only religion of the land.²³ It made little mention of a judicial system, creating a Supreme Court of Justice but otherwise allowing for more localized control of the court and criminal justice systems.²⁴

Rather than forming one united country after its independence, Mexico developed what has been described as “virtually autonomous provinces.”²⁵ This gave each separate state greater leniency in deciding how to run its judicial system. The new state of Coahuila y Tejas was therefore allowed to develop its own court system through its individualized state constitution. Naturally, this allowed for influence from American settlers who began to emigrate to the region. The federal uniformity for law and the courts in the new country came from the Constitution of 1824 Title V. Though no mention is made of punishment by death in Section Seven “General Rules for Administration of Justice in the States,” the law abolished certain types of criminal

²¹Joseph W. McKnight, "LAW," *Handbook of Texas Online*, last modified June 15 2010, accessed October 16, 2018, <http://www.tshaonline.org/handbook/online/articles/jzlp>

²²H. P. N. Gammel *The Laws of Texas, 1822-1897* Volume 1, (Austin, Texas: The Gammel Book Company, 1898) Page: F, referenced from The Portal to Texas History, UNT Online.

²³ *Ibid* 61.

²⁴*Ibid* 64.

²⁵ Nettie Lee Benson, “The Plan of Casa Mata,” *The Hispanic American Historical Review*, volume 25 (1945), 45-55.

punishment such as torture, confiscation of goods, and confinement without established guilt, moving away from unrestricted punishing practices.²⁶ This separated Mexico from the traditional European capital punishing practices, and those used by Spanish settlers while colonizing North America, which introduced torture to obtain religious confession from criminals facing death. The devices and techniques of executions themselves had been designed to create as much pain and suffering for their victim, such as the preferred Spanish method of “strappado,” where the victim’s hands tied behind their back would be used to suspend their entire body, dislocating their shoulders.²⁷ This movement in Mexican law toward a full acceptance of humane criminal justice practices was one small step towards developing a greater appreciation for the lives of the accused, and was a consideration that would ultimately lead to great debate over the morality of continuing the practice of execution.

As American settlers entered Coahuila y Tejas, they brought their own culture and values which soon intertwined with the European-Spanish traditions that had taken root in both Central America and present-day Mexico. While Mexico still utilized the death penalty, it was not in an official capacity as commonly utilized within the Texas state. According to state records, Coahuila y Tejas held its first, and only, legal execution in 1834.²⁸ Joseph Clayton, convicted “after due trial” for the murder of Abner Kuykendall (the man credited with bringing the first hogs into Texas) was hanged in front of crowds of eager onlookers on July 25th, 1834.²⁹ Clayton

²⁶ Mexico Constitution of 1824, title V, sec. 7, referenced from <https://tarlton.law.utexas.edu/constitutions/mexican1824>

²⁷ Anton Daughters, “Torture in Colonial Spain’s Northwestern Frontier: The Case of Joseph Romero ‘Canito,’ 1686,” *Journal of the Southwest*, Vol. 56, No. 2, O’odham and the Pimería Alta (Summer 2014), 240, Accessed November 3 2018, <https://www.jstor.org/stable/24394915>.

²⁸ Jennifer White, “The Death Penalty,” Texas History 101, *Texas Monthly*, December 2002, Accessed October 15, 2018. <https://www.texasmonthly.com/articles/texas-history-101-45/>.

²⁹ “First Texas Cattle and Hogs,” *The Canyon News* (Canyon, Texas), June 4, 1931, Accessed October 15, 2018. <https://newscomwc.newspapers.com/image/89300890>

drunkenly stabbed Kuykendall in the back of the neck, breaking off the blade of the knife, causing tetanus. Though lockjaw was the official cause of Kuykendall's death, Clayton was charged with his murder.³⁰ "Records show this to be the only legal execution in Austin's colony," though official records from this time of other legal executions may have been lost to time.³¹

The Texas territory slowly gained a reputation for lawlessness between 1821 and 1836, and began to consider how to better run its criminal justice system. The appearance of law enforcement agencies in Texas dates back to this era, but it still took many decades to form coherent and uniform organizations with the power to curb crime. This lack of state-sponsored oversight could be another factor that explains the lack of officially recorded capital sentences during this period. For many decades, community members had to uphold the laws of the land without greater oversight from the government, leading to inconsistency in applying statutes and punishment. It is possible that local governments were executing offenders without sending notice to either the state or federal government.

In 1823, Stephen F. Austin authorized the formation of a militia that would eventually become known as the infamous Texas Rangers.³² The Rangers served as soldiers during the eventual conflict with Mexico, and in the emergence of the new country, organized themselves into "frontier battalions" to establish some sense of law and order in the chaos of the widely unsettled frontier lands. Widely regarded as the first state policing agency in North America, the

³⁰ Ammon Underwood, "Journal of Ammon Underwood 1834-1838," *The Southwestern Historical Quarterly*, Volume 32, (July 1928 - April, 1929), 124. Referenced from the Portal to Texas History, UNT Online. And Evelyn Karm, "Uncle Hamp, the Texan," *The Junior Historian* (Austin, Texas) Vol. 4 No. 6, (May 1944). Accessed November 29 2018. Referenced from the Portal to Texas History, UNT Online.

³¹ Ibid.

³² Ben H. Procter, *Just One Riot: Episodes of Texas Rangers in the 20th Century* (Austin: Eakin Press, 1991).

Rangers were not officially recognized as a law enforcement agency, however, until after the Civil War.³³ This larger presence of policing bodies was essential to begin to account for total executions held. With greater governmental oversight, it was more difficult for counties to fly under the radar in their criminal sentencing. But even with the state policing body, there were not enough officers to maintain control of all localities.

Department police chiefs were established prior to Texas independence through the 1827 Constitution of Coahuila y Tejas for the purpose of filling the gaps in policing local communities.³⁴ These departments were the precursors to county sheriff offices, which emerged formally after Texas gained its independence from Mexico, and were in charge of overseeing local executions. Although these enforcement agencies existed, there were still not enough officers to offset the numbers of emigrants coming into Texas and to regulate their clashes with Native Americans. As the *History of Texas* recounts, "...there was scarcely a month that passed, but some murder or robbery was perpetrated by them."³⁵ The policing bodies could also barely control the ever-growing tensions between American settlers and the Mexican government which would soon erupt into war.

The Republic Era

Prior to joining the United States in 1845, Texas reigned as its own nation. Having won its independence from Mexico in 1836, the Republic of Texas had many decisions ahead regarding how to run the newfound country, and how Texans would truly distinguish themselves

³³ Julian Samora, Joe Bernal, and Albert Peña "Gunpowder Justice: A Reassessment of the Texas Rangers," *Crime and Social Justice*, No. 13 (Summer 1980), 61-64, Accessed November 2 2018, <https://www.jstor.org/stable/29766090>.

³⁴ Constitution of Coahuila y Tejas 1827, Section VI.

³⁵ Henderson K. Yoakum, *History of Texas*, (New York: Redfield, 1856), pp. 310.

from Mexican rule. During the struggle for independence, the Texian rebels drafted a Declaration of Independence modeled on the American Declaration of Independence. Similarly, when creating the first state constitution, the Texas citizens who had mainly emigrated from America with empresario such as Stephen Austin utilized American law as a framework for designing the new laws of the Republic of Texas.³⁶

The Republic Era saw an expansion in settlers numbering roughly 7,000 per year coming to domesticate Texas lands, and with it, the further “association [of Texas] with blood and violence.”³⁷ As William Ransom Hogan remarked in his journal article titled “Rampant Individualism in the Republic of Texas,” district court records of the day indicated high numbers of indictments for charges against other persons, including assault and battery, assault with intent to kill, and murder.³⁸ As people from different cultural backgrounds came to settle previously uncharted land, the laws of morality that governed more established settlements were often forgotten. Resources for law enforcement were scarce, leading to less of a threat of actualized punishment. There was no deterrence for committing a crime in the more rural areas, which may have had only minimal sheriff presence for the majority of the year. While rates of reported murder saw no obvious decline, the resources to support state-sponsored executions were limited, leading to lower numbers of reported and legal state executions. When capital crimes were to be punished, they were done as a spectacle in front of the eyes of sometimes thousands of eager onlookers desperate to catch a glimpse of the condemned.

³⁶“Giants of Texas History: Stephen F. Austin,” Texas State Library and Archives Commission, last modified December 5 2017. Accessed November 25 2018. <https://www.tsl.texas.gov/treasures/giants/austin/austin-01.html>

³⁷William Ransom Hogan, "Rampant Individualism in the Republic of Texas." *The Southwestern Historical Quarterly* 44, no. 4 (1941), 458, <http://www.jstor.org/stable/30235932>.

³⁸ *Ibid.*

Taking into consideration Spanish, indigenous, and American influences, the criminal justice system of the new country was developed as a way of ‘bettering’ laws that had ruled the territory before. The first Congress of the Republic in 1836 created a court system that included a Supreme Court, four judicial districts, and a county-court system to preside over the twenty-three newly formed counties.³⁹

“All trials shall be by jury, and in criminal cases the proceedings shall be regulated and conducted upon the principles of the common law of England; and the penalties prescribed by said law, in case of conviction, shall be inflicted, unless the offender shall be pardoned or fine remitted.”

From the Declaration of the People of Texas, Art. 7, Plan and Powers of the Provisional Government of Texas, March 2nd 1836⁴⁰

These courts operated under common law, a system that utilizes precedent and custom instead of agreed upon statutes to govern judicial decisions.⁴¹ Decisions, therefore, varied greatly depending on which precedent cases the judges had access to and what outcomes for specific offenses they were aware of being used in practice. This led to greater inconsistency in how both the law, and sentences for crimes, were applied. This also allowed individual judges greater discretion and control over the outcomes of the districts they presided over.

English common law was officially adopted by the Texas legislature in 1840, but separate criminal statutes defined certain offenses and their punishment.⁴² In these circumstances, the law as defined by statutes would take precedent over common law practice. The law that detailed

³⁹ Joseph Milton Nance, “Republic of Texas,” *Texas State Historical Association*, n.d., accessed October 21, 2018. <https://tshaonline.org/handbook/online/articles/mzr02>.

⁴⁰ N. Doran Maillard, “The History of the Republic of Texas,” (London: Smith, Elder, and Co. Cornhill, 1842), 436, American West Online Digital Repository.

⁴¹ Sam A. Willson, *Revised Penal Code and Code of Criminal Procedure*, Volumes 1 and 2, (St. Louis: The Gilbert Book Co. 1891), https://books.google.com/books?id=q2ZOAQAIAAJ&pg=PA4&lpg=PA4&dq=republic+of+texas+criminal+code+1840&source=bl&ots=m2aZcK3Nq_&sig=muFGRFmE4U0_xVp1_f7pw_VNOs0&hl=en&sa=X&ved=2ahUKEwiO79qHgpjeAhUJ0FMKHd-ADqoQ6AEwD3oECAIQAQ#v=onepage&q=republic%20of%20texas%20criminal%20code%201840&f=false

⁴² Maillard, 394.

capital offenses was presented by the President of the Texas Senate, Richard Ellis, and approved by President Sam Houston on the 21st of December, 1836. The law stated that offenders indicted for a capital offense were allowed counsel for their trial, and were provided at least two days after the indictment to prepare a defense for trial.⁴³ Crimes designated as capital offenses⁴⁴ included: treason; willful or malicious homicide; arson; stealing a slave; rape; robbery; burglary; accessory to either : murder, robbery, burglary, arson, or rape; the counterfeit of gold or silver coin; forgery; lying under oath in a capital trial; selling a free person as a slave; freeing someone convicted of a capital offense; and killing another in a duel. According to the Laws of the Republic of Texas Sec. 52, the manner of inflicting the punishment of death “shall be hanging the person convicted by the neck until dead.”⁴⁵ While these were all considered capital offenses, the punishment of death was not a mandatory sentence. Other punishments in the Republic Era included “cutting off ears, branding, whipping, imprisonment...loss of citizenship, banishment from the state, and confiscation of property.”⁴⁶ The criminal code did not differ from societal standards for that time in that it held African Americans and “aborigines” to be of a different, lesser class. While the killing of a white man was considered murder and could be punished by death, the killing of a minority by a white man could be considered justifiable manslaughter with the punishment limited to damages sought in civil court in the case of murdering a slave.⁴⁷

Data from the Espy files suggests that six men were legally executed in the Republic of Texas.⁴⁸ Of these men, five were convicted of murder and one was convicted of both robbery and

⁴³ Gammel, 1,253.

⁴⁴ Ibid, 1,248-1522.

⁴⁵ Ibid, 1,255.

⁴⁶ Maillard, 395.

⁴⁷ Ibid.

⁴⁸M. Watt Espy, and John Ortiz Smykla, “Executions in the United States, 1608-2002”, *The ESPY File*, (Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor]), last modified July 2016, <https://doi.org/10.3886/ICPSR08451.v5>. The Espy files are considered to be the most extensive collection of

murder, and all were executed by hanging. This data is important because it exemplifies that although there were a multitude of crimes that were considered punishable by death during the Republic Era, only those considered the ‘worst’ criminals were ultimately legally executed. These executions were also distinct in that, for at least two of the six, they were used as community examples to illustrate the “evils of gambling and guns.”⁴⁹ They reflected the morals and standards of the community that implemented the death sentences. In 1838, a man named John Quick was jailed after killing a man at the gambling table. Described as a “talented young lawyer,” Quick entered the gambling tent “for the first time in his life” and “won on...the first game, and the last, on which he ever bet.”⁵⁰ In the same year, David Jones, a native of Wales, was jailed for killing three men with a concealed weapon. Jones was also suggested in trial to have been under the influence of whiskey when he committed his crime.⁵¹ Both men were executed in Houston on March 28th, 1838, with a witness to the execution exclaiming, “Law and Justice have been for once...enforced against the boldest and most reckless offenders.”⁵² This was only two years after Houston had officially established itself as a town, and the same judge presided over both trials.⁵³ Another witness to the execution had a less enthusiastic opinion of the executions, and wrote that he “remembers that the general feeling of the people...were in deep sympathy with the unfortunate men, based on the conviction that neither should have suffered death.”⁵⁴

United States executions in existence. While they are perhaps the most complete records on a whole, the records are still not considered a completed database.

⁴⁹ Suzanne Carlisle, “The Crusade of Dr. Francis Moore,” *Heritage*, Vol. 5, No. 1, (Spring 1987), 30, referenced from The Portal to Texas History, UNT Online.

⁵⁰ John Henry Brown, “An Interesting Tale,” *The Dallas Herald*, Vol. 1, No. 290, Ed. 1, December 14, 1886, 3, referenced from The Portal to Texas History, UNT Online.

⁵¹ *Ibid.*

⁵² Carlisle, “The Crusade of Dr. Francis Moore.”

⁵³ Brown, “An Interesting Tale.”

⁵⁴ *Ibid.*

The third legal execution in the Republic of Texas was tried in front of the same district judge who had convicted Quick and Jones.⁵⁵ Campbell was charged with killing a man named Lindsey after an argument and under the influence of whiskey in Victoria, Texas. Although Campbell's attorneys argued for an appeal, he was executed the same day he was sentenced shortly before 6 p.m. due to a lack of prisons in the area and the general opinion that Campbell had a dangerous character.⁵⁶ The other three men executed under the Republic of Texas were Henry Forbes (1840), Charles Henniker (1843), and William Williams (1844).⁵⁷

Statehood

With little defense as a country to fend off colonial powers eager to take control of the territory, Texas joined the United States of America in 1845.⁵⁸ Soon, Texas gained a reputation as a place where criminals from all over the country could go to escape punishment. As one settler noted in his diary account of early Texas statehood:

Many persons of every rank in life, who had committed crimes in the United States, fled to the woods of Texas, where they were securely hid from their pursuers. They often carried intelligence and knowledge, and not unfrequently dispositions, fitted for the production of every crime. When the number of these persons had multiplied, the old settlers found life and property to become insecure, and they thought it would be necessary to adopt measures to drive away the intruders...A number of old settlers united themselves into a band, and called themselves the 'Regulators,' and whenever a settler became notorious as a murderer or a thief, they gave him the choice of being hung or of fleeing...⁵⁹

It was clear that the criminal justice system in the new Texas state needed to be restructured. The Codes of 1856, also referenced as "the Old Codes,"⁶⁰ were the first codified

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Watt and Smykla, "Executions in the United States, The Espy Files."

⁵⁸ C. T. Neu, "ANNEXATION," *Handbook of Texas Online*, accessed November 29, 2018, <http://www.tshaonline.org/handbook/online/articles/mga02>.

⁵⁹ Edward Smith, *Account of a Journey Through North-Eastern Texas, Undertaken in 1849*, (London: Hamilton, Adams, and Co., Paternoster Row, 1849), 49.

⁶⁰ "The Codes of 1856," Legislative Reference Library of Texas, accessed October 15 2018. <https://lrl.texas.gov/collections/oldcodes.cfm>

criminal law after Texas was annexed as part of the United States of America and laid the foundation for over a century of criminal code structure in Texas. The Old Codes designated all offenses as either felonies or misdemeanors, and further divided up felony offenses into “capital felonies” and “non-capital felonies.”⁶¹ Capital felonies were defined as offenses for which the highest penalty was death, and included intentional murder as well as perjury in capital cases for white men. A married woman who was found to have committed an offense under the persuasion of her husband, and any person under the age of 17 at the time of the offense, were not to be punished by death. Enslaved persons were to be tried under a different set of articles, and capital felonies committed by a free person of color were as inclusive as arson, robbery, aiding in the insurrection of slaves, and rape of a white female.⁶² No matter the race of the accused, Article 709 of the Code of Criminal Procedure mandated that, as the laws of the Republic before, “the sentence of death shall be executed by hanging the convict by the neck until dead.”⁶³

Although Article 710 of the Code of Criminal Procedure mandated that when a jail was located within a county, executions shall take place within the walls of the jail, public hangings were commonplace throughout Texas well into the 20th century. Many Texas counties did not have a jail in which to hold or hang offenders, and ultimately built scaffolds on the outskirts of town in order to carry out executions. Perhaps the most notorious of all public hangings in Texas was The Great Hanging at Gainesville in 1862. When Texas seceded from the Union in 1861, tensions boiled between Southern confederates and those they suspected of being Union sympathizers.⁶⁴ This mass hanging, justified by a Confederate-operated “citizen’s court” and

⁶¹ The Codes of 1856, Title I, Art. 57.

⁶² Art. 824.

⁶³ Texas Code of 1856, “Code of Criminal Procedure.”

⁶⁴ Ralph A. Wooster, "Civil War," Handbook of Texas Online, accessed November 29, 2018, <http://www.tshaonline.org/handbook/online/articles/qdc02>.

praised by the governor of Texas at the time, is said to be the largest mass hanging ever in the history of the United States.⁶⁵ The law enforcement in Gainesville rounded up 200 suspected “Unionists” and after a pseudo-civilian trial by a jury of twelve army officers and civilians, hanged 39 citizens of Gainesville and Cook County for conspiracy and insurrection.⁶⁶ Though the people executed at Gainesville had their time in court, the biased military-driven proceedings and the innocence claimed by descendants of the convicted undermined the values of justice in the Texas legal system. The proceedings on their face followed codes of criminal procedure that were in Texas at that time, but in reality the justification for adapting the criminal codes to allow for the swift mass execution was really a means to meet the needs of the fledgling Confederacy.

The injustice found in these hasty and grisly executions was not limited to war-time conditions, however. The Reconstruction Era in Texas saw tensions of race, and to a lesser extent of class, that seeped into the performance of the legal system. While the Old Codes of 1856 still dictated the correct procedure for criminal trials and sentencing, it was commonplace that the accused would be found guilty in a courtroom and immediately escorted to gallows raised in full view of the community, with no chance to appeal the sentence or ask for clemency from the Governor. The execution of Isam Kapps was one such notorious public execution, with an estimated 8,000 to 10,000 onlookers in attendance.⁶⁷ Isam Kapps was born into slavery in North Carolina, and was a member of the United States Army during the Civil War. He made his way to North Texas in 1872 after he was dishonorably discharged from service in Jacksboro and fled

⁶⁵ Sam Acheson and Julie Ann Hudson O'Connell, "George Washington Diamond's Account of the Great Hanging at Gainesville, 1862." *The Southwestern Historical Quarterly* 66, no. 3 (1963): 331-414, <http://www.jstor.org/stable/30240915>.

⁶⁶ Richard McCaslin, *Tainted Breeze: The Great Hanging at Gainesville, Texas, 1862*, (Baton Rouge, Louisiana State University Press, 1994).

⁶⁷ “The Gallows: The Execution of Islam Kapps at Fort Worth yesterday,” *The Galveston Daily News*, Vol. 39, No. 40, Ed. 1, May 8 1880. <https://texashistory.unt.edu/ark:/67531/metapth463978/?q=%22isam%20kapps%22#search-inside>

for an attempted rape. Kapps was accused of the February 1879 rape of a white Fort Worth woman, Mrs. Thornton, after allegedly breaking into her home in the early morning.⁶⁸ Mrs. Thornton claimed that she recognized Kapps as a driver for another local woman, and that he often watched Mrs. Thornton as he passed her house. Based on the eyewitness identification from Mrs. Thornton, Kapps was indicted and the case was brought to trial. The jury took only fourteen minutes to decide upon a guilty verdict, and assessed the punishment of death for the accused.⁶⁹

Kapps, dressed in a suit, was taken from the jail one mile outside of Fort Worth in the same wagon that held his coffin to the scaffold in the morning of May 7, 1880. “As the condemned man mounted the wagon the acres of people and teams in the neighborhood of the jail broke for the theater of execution.”⁷⁰ A reporter described the mob of men and women who had gathered to watch the execution unfold as reminding him of the “stampede of Bank’s army in the Shenandoah valley in 1862.”⁷¹ On the scaffold, Kapps admitted to not only the rape of Mrs. Thornton but also two other rapes that had previously sent other men to the penitentiary. For the hordes of spectators, this confession verified their need to send this man to an early grave. In-between the shrieks and shrills of the raucous crowd, the executioner draped the noose around Kapps’s neck. It took only ten minutes after the trap was sprung for Kapps to be pronounced dead, and the spectacle of execution to be complete.⁷²

Although there were murmurings by this time of the inhumaneness of these public hangings, and the potential effect watching the spectacle could have on some “delicate” members

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

of the community, these executions were seen by many as providing retribution for the community on behalf of the victim(s), as well as serving as a constant reminder of how Texas dealt with convicted criminals. The efforts of utilitarianism turned the focus on the needs and effects on the community, not the individual convict. For Texans, it was only the beginning of the “tough on crime” mentality that would persist into the later 20th century. This example of Isam Kapps further illustrates the spectacle of these public executions, and the educational and entertainment value they were perceived to contribute to the community.

Some public executions were so meticulously planned for their entertainment value that they took months of preparation. The memoir of Texas Ranger Sergeant W. J. L. Sullivan recounts the public hanging of Bill Longly, who, in 1879, was convicted in Giddings, Texas for the murder of Wilson Anderson. Sheriff Jim Brown reportedly had worked for three months to prepare for the execution, and even selected 200 guards to help him keep order during the event. As custom, Longly was allowed to give a speech on the scaffold to the fiery crowd before the noose was placed around his neck. Longly was said to have addressed the crowd calmly, having already accepted his fate, and asked his enemies to pray for him. Longly admitted that he knew that if he were ever to be caught that this was the penalty he would have to pay, but that he killed many men disregarding this threat to his own life. It seems that for offenders like Longly, the threat of the death penalty did nothing to deter their criminal acts.⁷³

Though the law no longer allowed for torture and brutal killings, oftentimes the lines between legal execution and lynch mob became blurred. Lynching was often condoned or even encouraged by local law enforcement officials, especially for accused African American males.

⁷³ Sergeant W. J. L. Sullivan, *Twelve Years in the Saddle for Law and Order on the Frontiers of Texas*, (Austin: Von Boeckmann-Jones Co., 1909), 25 referenced from the American West Online Archive, http://www.americanwest.amdigital.co.uk.ezproxy.tcu.edu/Documents/Images/Graff_4027/3#Chapters

“Lynch Law” became the norm for 19th century Texas. As part of a state with little centralization of criminal justice processes, counties were left on their own to regulate the capital trial and execution process. Regularly, the counties would hold a formal trial process for defendants, but because of limited county or state resources, would hand off those sentenced to death to mobs waiting outside of the courthouse instead of housing the convicted in the jail for a later execution date. With a severe shortage of law enforcement officers, especially in more rural counties, there was sometimes a lack of any official authority to stop lynch mobs from dragging convicted persons from the steps of the courthouse to the site of execution. In rural areas without a jail in which to hold a legal hanging (as was mandated by law), it was sometimes easier to simply turn over the accused to the public rather than to erect a scaffold in a more orderly fashion and to fend off lynch mobs who would break into wherever the defendant was being kept. In looking to the treatment of the convicted person, this meant that oftentimes the torture elements that had been banished by codified law reappeared in the execution process, and the retribution of the community could be employed in full force and view of the justice system.

In the chaos of law that characterized the Texas Reconstruction Era, “legal lynchings” became a normalized phenomenon, somewhat tolerated by Texans as having comparable ethical and legal hold as standard public executions. As long as the offender served the sentence they had been prescribed, it seemed not to matter if the execution was delivered at the hands of the sheriff or by the hand of the community itself. However, certain lynchings were more extreme than others, such as the abhorrent execution of Henry Smith. Events such as these exemplify the brutality that could occur with any public execution, and where the boundaries between humanity and retribution became blurred.

The photograph below with the caption “Little Myrtle Vance Avenged” was taken at the public lynching of Henry Smith in Paris, Texas in 1893.⁷⁴ Described as “The most horrible, atrocious and revolting lynching of modern times” by out-of-state reporters, crowds of people gathered to watch the execution unfold while smoke steamed from the scaffold. As this picture demonstrates, these events were publically attended by community members young and old. It also shows that executions dubbed as legal lynchings were taken outside of the main areas of town, to places where large groups could view the event.

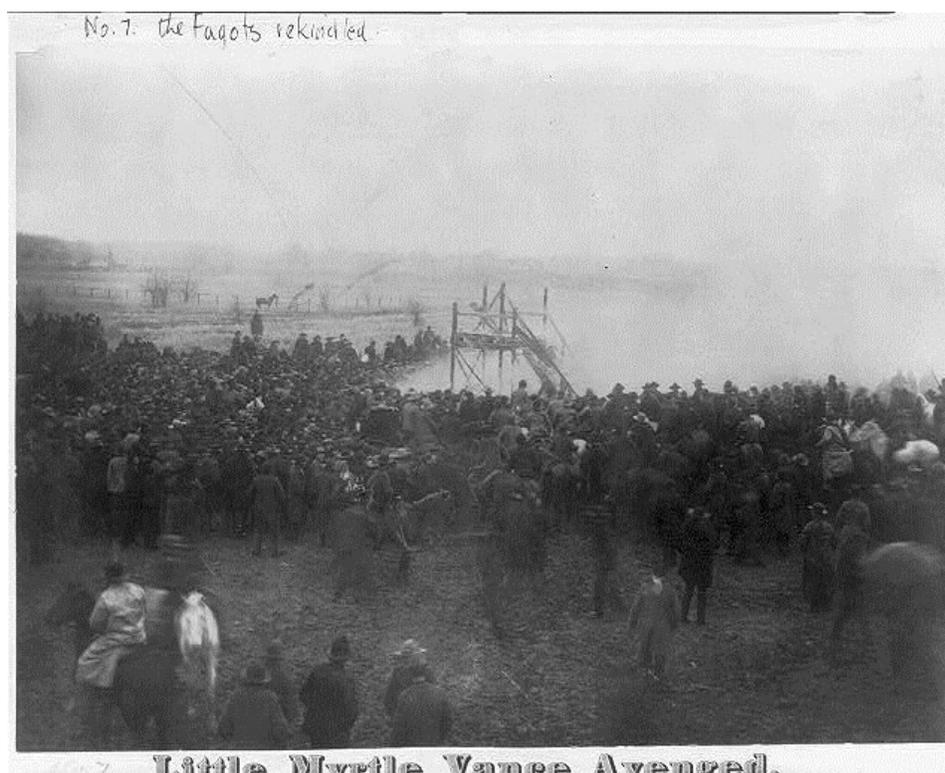


Figure 1. “*Little Myrtle Vance Avenged #7*” Photograph Paris, Texas 1893⁷⁵

⁷⁴ “The Terrible Fate that Befell Henry Smith,” *The Ohio Democrat* (Logan, Ohio), August 19 1893.

⁷⁵ *Little Myrtle Vance Avenged #7*, Library of Congress, ca. 1893. Feb. Photograph. Figure 1. <https://www.loc.gov/item/2016648187/>.

The “Little Myrtle” title of this photograph referred to the four-year old white resident of Paris, Texas who was allegedly sexually assaulted by Smith after being lured from her family home. Smith was allegedly identified by many passersby who, curious what the little girl was doing with the former slave, asked where Smith and Myrtle were heading. According to newspaper reports, Smith took Myrtle to a pasture where he assaulted, killed, and slept next to his victim for the remainder of the night.⁷⁶ Myrtle’s father, a local police officer, led the charge to find his daughter’s assailant, assisted by the enraged community. Smith was tracked down on his way to Arkansas, apprehended, and brought back to face the community’s wrath.

The execution drew people from every surrounding area. The crowds of onlookers were described as “squads of people on horseback and wagons converging from the country to the city—flecks of cloud approaching and joining the gathering storm.”⁷⁷ Parents brought their young children to watch the example of what would happen to people who did not obey the law. “The mayor had ordered all saloons closed in the interest of good order, the stores had been voluntarily closed and all business was suspended except the torture of the negro.”⁷⁸ The killing of Smith was to be the only entertainment of the day for Paris, Texas. Smith was escorted through the city by wagon in front of a crowd of 10,000 people, placed on a 6-foot-tall scaffold inscribed with the words “justice,” and tortured by the family of the victim for roughly an hour using fire and branding irons. Pieces of his clothing were ripped from his body and thrown to the crowd as souvenirs.⁷⁹ Smith was eventually covered in accelerant and lit on fire.⁸⁰

⁷⁶ David Garland, “The Peculiar Forms of American Capital Punishment,” *Social Research*, Vol. 74, No. 2, (Summer 2007), 450, <https://www.jstor.org/stable/40971939>.

⁷⁷ “A Horrible Crime, and a Horrible Expeation,” *Alliance Standard*. (Linden, Tex.), Vol. 5, No. 6, Ed. 1 Monday, February 6, 1893 Page: 2. The Port to Texas History, UNT Online.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Garland, 2.

This story underscores the potential for barbarity in “legal” lynching. In the case of Henry Smith, his executioners were hailed as heroes, not murderers. There was no due process provided for Smith, even though he was now, as a black man, federally protected by the promises of the 14th Amendment. The government, by making no attempt to prohibit these events, was indirectly supporting this message of racism, violence, and vigilante justice. The people who initiated these executions were convinced of their legitimate purposes, such as deterrence and retribution, that could be achieved. Just as in “legal executions,” the example that could be set for proper behavior in Texas communities outweighed any consideration of unethical treatment of the accused. These events would continue side by side with the more confined legal executions for the next thirty years, and soon became part of the culture of the rough and rowdy state.

Even two decades later, these execution events had a similar presence. In 1916, Waco observed the lynching of a Texas 18-year old African American, Jesse Washington, who had confessed to the assault and murder of female Waco resident Lucy Fryer. The jury had brought a guilty verdict when “someone raised the cry to get him and the lynching by fire followed” in the presence of “500 community members in the courtroom.”⁸¹ Washington was taken directly from the 54th District courtroom to the lawn of city hall, where he was burned at the stake in the presence of more than 2,000 onlookers who had been anticipating his departure.⁸² His remains were then dragged behind an automobile to Robinson, Texas to be suspended from a telephone poll in full view of passersby.⁸³ The aggression seen at this trial and rapid execution was not

⁸¹ “Taken From Court and Burned,” *The Evening Index*, (Greenwood, South Carolina), April 18 1916.

⁸² “Jesse Washington is Burned at Stake,” *The Savoy Star* (Savoy, Tex.), Vol. 15, No. 7, Ed. 1 Friday, May 19, 1916, 2. Accessed November 25 2018 from The Portal to Texas History, UNT Online.

⁸³ “Negro Taken out of Court,” *The Albany News* (Albany, Tex.), Vol. 32, No. 50, Ed. 1 Friday, May 19, 1916, 1, The Portal to Texas History, UNT Online.

limited to Waco. These events transpired across Texas counties, publically and in full view of the court and law enforcement officials, and were not suppressed by the state through any meaningful measures.



Figure 2. “Crowd gathering in street to watch the lynching of Jesse Washington, Waco, Texas,”
May 15th 1916⁸⁴

The public lynchings of Jesse Washington and Henry Smith are only two of the estimated hundreds of similar unofficial and official executions that occurred within the state of Texas prior to the 1920s.⁸⁵ According to the Espy files, 254 people were legally executed in Texas from 1845 to 1899, not accounting for legal lynching like Washington and Smith.⁸⁶ In Galveston,

⁸⁴ “Crowd Gathering in Street to watch the lynching of Jesse Washington, Waco, Texas,” Visual Materials from the NAACP Records, Library of Congress. May 15 1916. Figure 2. Accessed October 2018. <http://www.loc.gov/pictures/item/92504979/>

⁸⁵ West C. Gilbreath, *Death on the Gallows: The Encyclopedia of Legal Hangings in Texas*, (Texas: Wild Horse Press, 2017). pp. ADD

⁸⁶ Espy, “Executions in the United States.”

some sources claim that one capital trial for a black defendant lumped the indictment, trial, and hanging into an event lasting less than four hours.⁸⁷ For many of these people, the due process of a courtroom and execution by legal hanging as dictated by criminal code were considered fates “too good.” These lynchings were considered an appropriate execution that could fully express the passion of Texas communities, especially against minority offenders. As long as the community perceived that justice had been served, there was little regard to following statutory procedure for executions. Many times, local law enforcement participated in or oversaw these lynchings, giving further legitimacy to the violence of the mobs. With little incentive to challenge this tradition, Texas, and other Southern states, were held in a conflict between law as officiated by criminal code and law as it was actually practiced within the county level. It was clear to some Texans that there needed to be an official, state-sponsored change.

The push for abolition grew stronger post 1915, after Fort Worth residents witnessed the gruesome hanging of A. C. Myers. Myers was convicted and sentenced to die in Tarrant County for the murder of Terminal Superintendent Montague.⁸⁸ As Myers dropped from the trap door of the scaffold, his head become completely detached from his body. Disgusted, sentimentalists believing themselves “to be prompted by the best of humanitarian impulses,” joined the ranks of those arguing for either reform or abolishment to the dismay of more conservative politicians.⁸⁹ Outspoken critics like State Senator J. C. McNealus of Dallas utilized these outcries to disapprove of the abolitionist’s perceived softness. Where was the mercy, many questioned, for the victim of the heinous crimes that led to the sentence of death to begin with? Senator

⁸⁷Garland, 125.

⁸⁸ “Terrell Substitute Judge,” *The Houston Post* (Houston, Tex.), Vol. 30, No. 136, Ed. 1 Tuesday, August 17, 1915 pp. 10, referenced from The Portal to Texas History, UNT Online.

⁸⁹ “Retain Capital Punishment for Texas,” *The Bryan Weekly Eagle*, December 2 1915. Accessed October 16 2018. <https://newscomwc.newspapers.com/image/64370909>

McNealus, as editor of the *Dallas Democrat*, utilized his role within the media to discuss the aftermath of the North Texas hanging:

From my viewpoint, good public policy would be violated by such abolition. The public safety against the worst of criminals and their crimes would be lessened, in a large degree, by the substitution of life imprisonment for the death penalty. And I do not share in the theory that life imprisonment is a more merciful punishment to the class of criminals who are possessed of average intelligence...⁹⁰

McNealus argued that although accidents during executions are bound to occur, as what had happened in the hanging in Fort Worth, that it was the state's responsibility to minimize any atrocities during the process. McNealus went further to recommend that the state consider the use of electricity and building an electric chair as a means of furthering the "progressive humanitarianism" that swept mid-war America.⁹¹ Others, still, rejected the idea of humanity of any sort for those convicted of capital crimes, especially against white women.

In 1923, Texas statutes named five offenses that were punishable by death. Murder, robbery by firearm, criminal assault upon a female, treason, and perjury were all considered to be capital offenses, though perjury had never been used officially to garner a death sentence.⁹² This was a progression from 19th century thought that allowed for property crime to be considered capital offenses. In a span of fifty years, Texas had already begun to narrow what exactly the state could and could not execute for. And, Texas was still more progressive in its criminal codes by this time than some other states. Unlike their 21st century status, Texas had not yet become an outlier in the United States for its disproportionate use of the death penalty.

Texas had specific qualifications that capital crimes must meet, and allowed for the jury to decide sentencing. By the year 1899, 24 states had absolutes in their statutes that meant that

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² "Fort Worth Lawyers Oppose Abolishing the Death Penalty," *The Daily Herald (Weatherford, Texas)*, Vol. 23, No. 400 Ed. 1 Tuesday, May 8 1923. The Portal to Texas History, UNT online.

the punishment for certain criminal convictions must be death, without allowing for consideration by a jury or judge to determine the proportionality of the sentence.⁹³ Texas also required the signature of the governor on every death warrant issued, allowing for this additional oversight from the state government.⁹⁴ Although these standards were not always upheld, especially in the cases of ‘legal’ lynching, Texas had made the progressive steps of not allowing for complete unrestrained executions in the law. Moving into the 20th century, there seemed to be a budding awareness though that the law on the books was often not the law that was practiced in individual counties. This bothered many Texans, who began to fight to reform capital punishment as practiced in the state.

Part II

Shortly after midnight on the 8th of February 1924, five African American men were escorted one by one from their adjoining holding cells to the death chamber of the Huntsville Walls Unit. Although Texas Governor Pat Morris Neff had granted temporary reprieve to the men earlier in the week, the momentary mercy proved only to allow for the completion of the state’s new method of execution: the electric chair. There would be no further delays. Each of the five convicted murderers took his turn in the chair, calmly professing his peace with God in the moments before 3,000 volts pulsed through his skull. With 40 onlookers, described as prison officials and newspapermen, to witness the first official use of the electric chair in the State of

⁹³ C. G. Garrison and N. J. Camden, "THE FAILURE OF THE DEATH PENALTY." *The Arena* (1889-1909), 04, 1899, 469, http://library.tcu.edu.ezproxy.tcu.edu/PURL/EZproxy_link.asp?http://search.proquest.com.ezproxy.tcu.edu/docview/124453563?accountid=7090.

⁹⁴ Henry W. Wilbur, "REPORT ON CAPITAL PUNISHMENT." *Friends' Intelligencer* (1853-1910), Sep 29, 1900, 723, http://library.tcu.edu.ezproxy.tcu.edu/PURL/EZproxy_link.asp?http://search.proquest.com.ezproxy.tcu.edu/docview/90928637?accountid=7090.

Texas, the only person described as calmer than the convicts themselves was executioner Warden Miller in the moments before he unleashed the electric current.⁹⁵ This brief two-hour moment in Texas history was only the beginning of how the death penalty would be carried out for the next forty years, and parts of the movements that led to this change are still reflected in Texas's penal code today. In the span of little over a year, Texas moved to distance itself completely from its "lawless" past by passing a new law that made capital punishment a quieter and more humane affair, contrasting to the wild spectacles of county hangings that had ran rampant for more than a century before.

The turn of the 20th century saw a heated debate over the morality of continuing the death penalty on the state level in American politics. While differing media sources show the United States to be deeply divided by the idea of abolishing the death penalty, by the 1920s, states began to slowly shift away from allowing legal executions. The justifications for this abolition movement vary, though many abolitionists cited lack of statistical data to back up the claim that the death penalty worked as a deterrent to committing the most heinous crimes. Others claimed that their religious convictions did not allow for earthly judgments regarding life or death, and that it was not the government's place to decide who lives and who dies. There were assertions that moving toward a more humane method of execution was the only way to continue the legitimacy of state-sponsored death sentences.

In 1923, spearheaded by reformists sickened by the lack of structure in the criminal justice system, Texas joined the movement of states away from the unrestrained use of execution

⁹⁵ Houston Post Special: "Wait Death in Chair," *The Houston Post*, February 7, 1924. Accessed Sep. 16, 2018. <https://newscomwc.newspapers.com/image/94881757> (quote); and The United Press, "Five Negros Pay Death Penalty in Electric Chair Today," *The Taylor Daily Press*, February 8, 1924. Accessed Sep. 16, 2018. <https://newscomwc.newspapers.com/image/58305819>; and "Oldest Prisoner to go First," *The Austin American*, February 8th 1924. Accessed Sep. 16 2018. <https://newscomwc.newspapers.com/image/384485800>.

with the introduction of Senate Bill 63 (S.B. 63) in the second-called session of the 38th legislature. S.B. 63 was described as being: “*Relating to providing for the execution of convicts, condemned to death, by electrocution; prescribing the procedure in such cases,*”⁹⁶ and guided the transition to procedures and precedent that are still used today at Texas’s death row. But even the transition to a more “humane” style of execution had its critics, many of whom argued that the bill did not go far enough and that capital punishment should be abolished entirely. Even participants in the criminal justice system expressed their opinions on the change, with the Texas prison commission reporting that it was forced to fill a vacancy for the Huntsville warden, as the former resigned rather than act as an executioner.⁹⁷ Some had their doubts on the morality of the electric chair, and many more continued the trend of questioning the authority of a democratic government to impose death on its own citizens.

S. B. 63 sought to accomplish three main goals. First, it took the power from the individual counties in Texas to execute capital offenders and centralized all executions to one location: Huntsville, Texas. This allowed for the state to maintain a tighter grip on the increasingly violent lynch mobs who intended to take justice from the hands of legitimate authority, as well as to create a better recording system as to who the state was officially putting to death. Second, the bill changed the method of execution, abandoning hanging for what was considered at the time to be a more humane method of execution. The electric chair had been invented for the purpose of execution in New York State during the 1880s,⁹⁸ but its construction

⁹⁶ “S.B. 63 38th 2nd Called Session,” *The Legislative Reference Library of Texas*, n.d. accessed November 2, 2018. <https://lrl.texas.gov/legis/billSearch/BillDetails.cfm?legSession=38-2&billTypeDetail=SB&billnumberDetail=63&submitbutton=Search+by+bill>

⁹⁷ Associated Press Report, “Four Negroes Will Die in New Electric Chair.” *The Houston Post*, February 5, 1924. Accessed Sep. 20, 2018. <https://newscomwc.newspapers.com/image/94881130/?terms=%22electric%2Bchair%22&pqid=10Wq49k8AB5Kz77H4pa5cg:46000:1628953067>.

⁹⁸ Jürgen Martschukat, ““The Art of Killing by Electricity”: The Sublime and the Electric Chair.” *The Journal of American History* 89, no. 3 (2002): 900-21. doi:10.2307/3092345.

was not completed in Texas until 1924. Third, S.B. 63 increased regulations for attendance at executions. No longer were sentences carried out on public gallows in front of thousands. Now, executions came quickly, quietly, and assuredly within the secure boundaries of the prison walls. This movement toward a low-profile and more private method of extermination has continued in practice to present day, where laws still mandate executions only within the hours between midnight and dawn.

This bill was proposed by novice State Senator J. W. Thomas during the only two years he served in public office, who saw hanging as “a method of punishment...ranking in barbarity only with the Salem witchcraft burnings.”⁹⁹ John William “J.W.” Thomas was born February 12, 1884 in Leggett, Texas to Ida C. Thomas and Confederate veteran James Mason Thomas.¹⁰⁰ The eldest boy of 13 children, John was expected to contribute to the labor of the farm throughout his childhood. In 1914, Thomas married Elizabeth Grower, and together they had two children. Although his parents had no formal education, John prioritized his studies at the Polk Prairie Common School and eventually earned a B.A. from Baylor University in June 1915.¹⁰¹ Though he trained in law in Rogers, Texas under Lewis H. Jones, in August of 1920 Thomas opened up a general practice in Belton and took high profile criminal defense cases, where his experiences and observations inspired him to run for the State Senate.¹⁰²

⁹⁹ “Waco Negro Will Be Last to Die by Legal Hangings,” *The Austin American*, July 15, 1923, Accessed September 24 2018. <https://newscomwc.newspapers.com/image/384489155>.

¹⁰⁰ “J.W. Thomas Sr.” *Texas Bar Journal*, March 22 1971. Accessed September 24 2018. <https://heinonline.org/HOL/ViewImageLocal?handle=hein.barjournals/texbarj0034&id=291&size=3&collection=te xbarj>.

¹⁰¹ “The Hogg Organization for Higher Education in Texas,” *The Houston Post*, August 5, 1912. Accessed September 24 2018. https://newscomwc.newspapers.com/image/94935509/?terms=%22J*%2BW*%2BThomas%22%2Bgraduat*&pqsid=0mcqZwxUUesTHvRQQd2Q1Q:113000:483848813.

¹⁰² *Texas Bar Journal*, March 1971.

The moment that sparked Thomas's passionate advocacy against the death penalty as used in Texas at that time occurred after witnessing a hanging firsthand. Thomas's obituary in the *Texas Bar Journal* cites a guilty defendant in Bell County who was hung in the yard of the county jail as being the catalyst to his political candidacy. Newspaper articles from the time suggest that it was convicted murderer George Hornsby's execution and the protests from anti-death penalty advocates that were the starting point to Thomas's campaign for execution reform. Mr. Hornsby was a 30-year-old white man sentenced to hang in the Bell County jailhouse for the 1920 murder of Brownwood automobile salesman J. N. Weatherby. Hornsby's case was moved from Brownwood to Belton, Texas due to high publicity surrounding the trial, but unlike many accused murderers, he did not face the fear of lynch mobs en route to the jailhouse. Hornsby's indictment was controversial, as other suspects with sufficient motive and opportunity were overlooked by both law enforcement and the state. The state's key witness was even said to have signed an affidavit clearing Hornsby of any wrongdoing, but then subsequently recanted his sworn testimony.¹⁰³ One newspaper noted, "If the law is allowed...to quench its thirst for blood, history will record a legal hanging in Texas in the face of more general doubt than has been known in more than a decade."¹⁰⁴ The Travis County attorney weighed in, calling the execution nothing short of judicial murder.¹⁰⁵ An overwhelming majority of people believed Hornsby to be innocent, and began to question the injustice of a system that could hang an innocent man. On Good Friday of 1922, 75 onlookers crowded into the jailhouse to glimpse Mr. Hornsby before his execution. Hornsby, already having been denied reprieve by Governor Neff, prepared two

¹⁰³ "Carter Again Changes Story," *The Austin Statesman*, April 2 1922, pp 2. Accessed November

¹⁰⁴ "Doubt Stalks Behind Justice As She Leads Hornsby to the Scaffold," *The Austin American*, vol. 8 no. 309, April 14 1922. Accessed November 15 2018.

¹⁰⁵ "Travis Co. Attorney Believes Hornsby Innocent of Murder," *The Austin Statesman*, April 1 1922, page 2. Newspapers.com

letters that were to be opened once he was pronounced dead. Both letters proclaimed his innocence unequivocally. Thomas was said to be one of the onlookers, though there is no definitive record of his presence at the event.

As George Hornsby approached the jailhouse scaffold a little after 2 p.m. “thin, haggard, his face whiter than chalk,” he proclaimed, “I am going to a better land... where all will be treated alike. We will all be charged alike.”¹⁰⁶ Rev. Blaylock, whom Hornsby had already requested oversee his funeral ceremony, read a Bible verse while standing under the dangling noose. Sheriff Bonds, with tears filling his eyes, pulled the black cap over Hornsby’s head while wishing him goodbye. Legend holds that weeping onlookers threw flowers onto the scaffold and that “funds for the burial of Hornsby [were contributed] by sympathetic people of the community and state.”¹⁰⁷ At 2:14 in the afternoon the trap fell, and seventeen minutes later Hornsby was pronounced dead.¹⁰⁸

The execution of George Hornsby shook the people of Belton, including J. W. Thomas, to their moral core, and sparked community-wide support for capital punishment reform. Nearly 8,000 sympathizers had signed the petition requesting for Governor Neff to commute Hornsby’s sentence to life imprisonment, and now felt Austin was not listening to their pleas.¹⁰⁹ J. W. Thomas used this passion to propel himself into candidacy for the State Senate, and ran as a Democrat on a platform that included promising to sponsor a bill that would remove the terror of

¹⁰⁶ “Calm to End Hornsby Takes Fatal Plunge,” *The Austin American*, vol. 8 no. 310, April 15 1922. And “Hornsby Protests Innocence to Last,” *Temple Daily Telegram* (Temple, Tex.), Vol. 15, No. 127, Ed. 1 Saturday, April 15, 1922

¹⁰⁷ “To Bury Hornsby Here on Sunday,” *Temple Daily Telegram* (Temple, Tex.), Vol. 15, No. 127, Ed. 1 Saturday, April 15, 1922

¹⁰⁸ “Calm to End Hornsby Takes Fatal Plunge,” *The Austin American*.

¹⁰⁹ “Favorable Report on Thomas Bill to Substitute Chair for Gallows,” *The Lampasas Leader* (Lampasas, Texas), Vol. 35, No. 13, Ed. 1, January 26, 1923.
<https://texashistory.unt.edu/ark:/67531/metaph885586/?q=%22george%20hornsby%22%20AND%20%22J.w.%20thomas%22#search-inside>

executions from the counties and place the duty in the hands of the state. The bill would also substitute the electric chair as the official method of execution. Hangings had the potential to be botched, but death by electricity was ideally a swift and relatively painless death that would only take a matter of seconds to complete. Thomas was considered a well-respected candidate for District 27 to the townspeople of Rogers, who wrote in papers that “[he] is...capable, clean, courageous, and one of the best men I know” (J. H. Wear, President of First National Bank of Rogers, Texas) and that “[he] has the unlimited confidence of the people here” (R. E. Guess of Rogers State Bank).¹¹⁰ In the election of 1922, Thomas carried every box in the district.

Although Bell County, Texas seemed fixed to the notion of necessary reform or complete abolishment of capital punishment, many, if not most, editorials in Texas newspapers from the time appear rooted in the opinion that abolishment was both irrational and impractical. Reporters and columnists used other states that had restricted capital punishment, or had abolished it altogether, as examples why the punishment must be continued. One reporter analyzed Michigan, which was the first U.S. jurisdiction to abolish capital punishment in 1846. Looking at the case of a man sentenced to life in prison who subsequently murdered a prison warden, the reporter claimed that “[he] has made other murderous attacks presumably as ‘a lifer’ he has no greater punishment to fear, is the explanation for a return to capital punishment.”¹¹¹ Henry Barrett, operating director of the Chicago crime commission, was quoted in October of 1922 as stating before the American Prison association, “Crime, though incurable, can be minimized and controlled, and capital punishment is a deterrent and does reduce murder.” The title of his speech

¹¹⁰ “Here’s What J. W. Thomas, Candidate for State Senate, Stands for,” *Temple Daily Telegram*, July 21, 1922. Accessed October 20, 2018. Portal to Texas History Online Database, UNT.

¹¹¹ “Capital Punishment,” *The Austin American*, January 19 1922. Accessed September 16 2018. <https://newscomwc.newspapers.com/image/384490011>

was “The Importance of the Death Penalty for a Murderer.”¹¹² He ended his speech with a sentiment shared by many Texans who feared the perceived naivety of abolitionists,

“The murder rate in the United States is rising...because sentimentalists, well meaning and sincere but badly misguided, are giving most of their attention to the consideration of the murderer rather than to his victim.”¹¹³

Nods to a recent sweeping crime wave as evidence of the necessity of “swift and sure” punishment was prominent in the rhetoric of conservative reporters.¹¹⁴ Dr. Frederick Hoffman, a former president of the American Statistical Association, made conclusions as to the escalating homicide rate in America based on a study he conducted in 1919. He found that the homicide rate in 1919 was 9.1 for every 100,000 inhabitants in the regions he surveyed, a stark increase from 1899’s 5.1 rate.¹¹⁵ Texas residents looked to this apparent crime wave and what they perceived to be a lack of success in reigning in homicides in states that had abolished capital punishment to further their position that the punishment was not only necessary, but was serving its intended purpose as a deterrent. Supporters of retaining capital punishment harnessed the fear Texans held of crime and their own personal security to continue justifying the death penalty’s use.

But not all Texas residents feared an impending crime wave or believed that deterrence was a legitimate justification for state-sponsored executions. Many adamantly opposed such a punishment, and saw it to be a stain on humanity to continue operating within a criminal justice system based on fear and oppression. Prior to the 1920s, a small but vocal abolition movement within both the United States as well as Texas had organized. Just as prohibition and the 18th

¹¹²“Murder Rate is Increasing in U.S., Is Claim,” *El Paso Herald*. October 19, 1922. Accessed October 9, 2018. <https://newscomwc.newspapers.com/image/42598941>

¹¹³Ibid.

¹¹⁴“The Law’s Delay,” *The Houston Post*, March 23, 1922. Accessed October 9 2018. <https://newscomwc.newspapers.com/image/95026564>

¹¹⁵*The Pantagraph*, Bloomington, Illinois, November 23, 1920.

Amendment gained traction as a result of religious revivalism and women's newfound political prowess, abolition of the death penalty became a new target for people concerned with the morality of allowing the state to put its own citizens to death. In fact, by 1911 Maine, Wisconsin, Rhode Island, and Kansas had joined Michigan in prohibiting the punishment entirely.¹¹⁶ Just as progressivism influenced other causes during the first decades of the 20th Century, the ethics of state sponsored death within a functioning democracy began to be criticized as outdated and often barbaric.

Though he proposed substituting electrocution for hanging in putting condemned criminals to death, J. W. Thomas himself was not an advocate for complete abolition of capital punishment. As cited in the April 26th 1923 issue of *The Marshall News Messenger*, Thomas was of the opinion that “complete abolishment of capital punishment in Texas at this time would result in a large increase in lynching and less respect for state laws.”¹¹⁷ He actively opposed the bill proposed by Senator Fairchild of Angelina County, who sought to make capital punishment unlawful in the state entirely. Initially, other politicians were not convinced of the necessity of the proposals in Thomas's bill. Governor Neff initially vetoed the senate bill because “it was so worded it might be construed as retroactive and thereby enable prisoners now under death sentences to escape execution.”¹¹⁸ And although he had passionately pleaded to Neff to allow for the bill's passage, Thomas himself did not expect the submission of the bill to be voted on in the special session.¹¹⁹ But, on May 2nd, under the guidance of the attorney general's department,

¹¹⁶ “Texas Almanac and State Industrial Guide,” *The Galveston-Dallas News*, 1911. Page 168. <https://texashistory.unt.edu/ark:/67531/metapath123781/?q=abolition%20%20%20%22capital%20punishment%22#search-inside>

¹¹⁷The Associated Press: “Abolishment of Death Penalty is Being Opposed,” *The Marshall News Messenger*, April 26, 1923, Accessed September 24 2018. <https://newscomwc.newspapers.com/image/319829694>.

¹¹⁸(no title) *Victoria Advocate (Victoria, Texas)*, April 2 1923, page 2, Accessed September 24, 2018. <https://newscomwc.newspapers.com/image/436686845>

¹¹⁹The Associated Press: “Abolishment of Death Penalty is Being Opposed.”

Governor Neff submitted to the 38th legislature for consideration a bill that would substitute electrocution for hanging in Texas.¹²⁰ Senator Thomas introduced the bill for the first time, and referred it to the Committee on Criminal Jurisprudence.¹²¹ On May 3rd, the Senate Committee on Criminal Jurisprudence recommended for the passage of the bill.¹²² But on a second reading, the bill failed on engrossment by a vote of 11 to 12, with one abstention.¹²³ Senator Bailey called up the motion to reconsider the vote on the bill the next day, with the question: Shall the vote by which S. B. No. 63 failed on passage to engrossment be reconsidered? The motion to reconsider passed by a vote of 15 yeas to 11 nays, with four Senators absent from the vote. The bill was passed to engrossment by a vote of 16 to 11.¹²⁴ Passed in this second called session in a vote of 101 to 19, Governor Neff signed the “Thomas Electrocution Act” into law, to become effective ninety days after adjournment of the session.¹²⁵

Once Texas passed S.B. 63, construction began on nine death chamber cells within the Huntsville penitentiary “Walls Unit”. Belton Harris of Henderson County, Texas, was commissioned to oversee the construction of the machine.¹²⁶ “Old Sparky” as the chair was christened, sat approximately five feet tall and was made primarily of oak. The chair was constructed by the hands of inmates who were serving sentences in Huntsville prisons. Thick

¹²⁰The Associated Press: “Legislature to Choose Hanging or Chair,” *The Waco News-Tribune*, May 1 1923. Accessed September 24 2018.

https://newscomwc.newspapers.com/image/43820081/?terms=%22J*%2BW*%2BThomas%22%2BSenate%2BAND%2Belect%22&pqid=0mcqZwxUUesTHvRQQd2Q1Q:3172000:120674101

¹²¹ *Journal of the Senate of Texas being the Second Called Session of the Thirty-eighth Legislature, 1923*, pp 146.

¹²² Ibid, 193.

¹²³ Ibid, 240.

¹²⁴ Ibid.

¹²⁵ The Associated Press: “Electrocution Bill to Replace Hanging was Signed by Neff,” *The Eagle (Bryan, Texas)*, June 5, 1923, Accessed September 24 2018.
<https://newscomwc.newspapers.com/image/55964645/?terms=%22Governor%2BNeff%22%2BAND%2B%22electrocution%22&pqid=0mcqZwxUUesTHvRQQd2Q1Q:3803000:1502168376>.

¹²⁶ Bob Bowman, “End of the Hanging Era,” *Houston Record Chronicle*, April 25 2011, accessed October 30 2018. <https://www.chron.com/neighborhood/dayton/opinion/article/End-of-the-hanging-era-9343576.php>

leather straps would hold the convict's arms and legs onto the wood, and their chin would rest on “two kidney-shaped rubber plugs.” Their head would then be shaved, and a corkscrew shaped device would sit between a wet sponge on the now bare scalp. This “plunger” or “corkscrew shaped” piece was the part that would be connected to the electric cable, and was how the electricity would be transmitted into the prisoner’s body. A leather strap would next be tightened around the prisoner’s waist, and one around his neck.¹²⁷ A teletype machine would in later years be installed inside the death chamber to deliver news of last minute reprieves, lest the switch be pulled before the message could be delivered by hand. In February of 1924, Texas became the 11th state in the United States to use the electric chair.¹²⁸ Over a span of half a century, 361 convicts met their fate by this machine in the cold and quiet death chambers of Huntsville.¹²⁹

Looking at the first five inmates who met their fate in rapid succession, Charles Reynolds of Red River County was the first in Texas to sit in the electric chair. Reynolds, a 27-year-old African American man, had been convicted for the slaying of a white man. In any year prior, Reynolds would have either been lynched or publically hanged for this act. As fate would have it, he now would be Texas’s first glimpse of what the power of electrocution could do to a human body. As Reynolds was strapped into the chair, he made a short speech making his peace with God and prepared himself for the extreme surge of electricity. Newly appointed Warden Walter Monroe Miller officiated the execution. Miller, when asked how he felt knowing that he would have to be the one that pulled the lever releasing the electric charge, states that “It is a

¹²⁷ Simon Winchester, “Texas Prison to Switch ‘Old Sparky’ back on,” *The Guardian (archive)*, October 16 1976. <https://www.theguardian.com/world/2015/oct/16/old-sparky-texas-prison-electric-chair-capital-punishment-1976>

¹²⁸ Craig Brandon, *The Electric Chair: An Unnatural American History* (North Carolina, McFarland and Company Publishers 1950), pp. 219

¹²⁹ *Ibid*, 222.

case of duty with me...I have hanged several men while I was sheriff...at any rate it's more humane --- the chair.”¹³⁰

After Charles Reynolds came 22-year old Ewell Morris from Victoria County. Morris was described as “mentally deranged,” and was convicted of murdering a white farmer by the name of Oliver Marshall.¹³¹ George Washington was the next in line. At his time of death at the age of 38, he was said to have stood at over six feet tall.¹³² Washington too was a convicted murderer, but unlike the other four, had killed a black man. Mack Matthews was the next to meet his fate. A preacher from Newton County, Matthews was convicted of murder in Tyler, Texas and was originally sentenced to die in September of 1923. He was granted a temporary reprieve so that the electric chair would have time to be constructed before his execution.¹³³ Melvin Johnson was the youngest of the five at only 18. Johnson, convicted for the murder of his aunt along with the shooting of his wife, was the last to die that night, after an hours stay of execution was granted by Prison Commissioner Walter Sayles in order for Johnson’s attorney to try for a final reprieve by acting Governor Davidson.¹³⁴ Johnson’s attorney argued, to no avail, that the murder occurred in self-defense, but this was ultimately not enough to persuade the acting governor to commute his sentence. For each man except Johnson, it took three charges of full

¹³⁰ “Declined to Serve as an Executioner,” *The Nebraska State Journal*, December 25 1927. Accessed November 15 2018.
https://newscomwc.newspapers.com/image/314187309/?terms=%22charles%2Breyolds%22%2B%22death%2Bpenalty%22%2Btexas&pqid=IUAX24dyAhVL1_UfVL3Rqg:401000:59966449

¹³¹ “Negro Sentenced,” *The Houston Post* (Houston, Tex.), Vol. 38, No. 252, Ed. 1 Tuesday, December 12, 1922. The Portal to Texas History, UNT Online. Accessed November 17 2018.

¹³² “Five Pay Penalty in New Electric Chair,” *The Daily News Telegram (Sulphur Springs, Texas)*, February 8 1924. The Portal to Texas History, UNT online, Accessed November 17 2018.

¹³³ “Two Win Reprieve because Death Chair Not Finished,” *The Daily Herald* (Weatherford, Tex.), Vol. 23, No. 208, Ed. 1 Friday, September 14, 1923 Page: 3

¹³⁴ “Five Pay Penalty in New Electric Chair,” *The Daily News Telegram*.

voltage to put them to death. Johnson met his end with only one.¹³⁵ The whole ordeal in the morning of February 8th was described by some newspapers as an orgy of death. In less than two hours, five men had met their end in the electric chair. Compared to modern executions, where multiple executions in one day happen rarely if at all, a day that saw five legal executions is a significant point in Texas history, and marked a new era in capital punishment usage. For some onlookers, this new era would mean a greater push for complete abolition. Senator L. K. Irwin of Dallas announced after witnessing the horror of the five electrocutions that it would be his mission as a legislator to introduce a bill abolishing the death penalty once and for all.¹³⁶

Responses in the media to these first electrocutions were split. On one side, advocates of capital punishment reform were pleased with the restrictions on Texas executions. “Public hangings have been banned,” a column in the March 20, 1923 edition of *The Austin American* wrote, “They should have been banned years and years ago.” Many articles cite the feverish excitement among onlookers as contrary to modern concepts of humanity, and applauded the bill for removing executions from the public spectacle. This reasoning used the potential implications for the people witnessing the county spectacles as the most vital concern for capital punishment reform. The *Brownwood Bulletin* further remarked, “Electrocution in the state’s central institution is far more humane and dignified and awe-inspiring than any county hanging can possibly be.”¹³⁷ In a remarkable evolution in the debate around criminal justice reform, the dignity of the offender began to be considered in how a punishment should be inflicted.

¹³⁵ “Five Murderers Were Electrocuted,” *Honey Grove Signal* (Honey Grove, Tex.), Vol. 34, No. 3, Ed. 1 Friday, February 15, 1924. The Portal To Texas History, UNT Online. Accessed November 16 2018.

¹³⁶ “Would Bar Death Penalty in Texas,” *The Lampasas Leader*. (Lampasas, Tex.), Vol. 36, No. 16, Ed. 1 Friday, February 15, 1924. Portal to Texas History, UNT Online. Accessed November 15 2018.

¹³⁷ “Capital Punishment,” *The Brownwood Bulletin* (*Brownwood, Texas*), Vol. 23, No. 128, Ed. 1 March 16 1923. The Portal to Texas History, texashistory.unt.edu

There were some that argued the “deterrence” justification for utilizing the electric chair. Deterrence, defined by the National Institute of Justice as “the crime prevention effect that comes from the threat of punishment,” has long been considered a legitimate justification for capital punishment. Judge Marcus Kavanaugh, a preacher and attorney speaking at the 1926 State Fair on the topic, argued that having the possibility, for certain crimes, of an ultimately gruesome death would be the only way to drive society towards some sense of morality.¹³⁸ He argued, “When the time comes that nine out of ten guilty of capital offenses are made to pay the death penalty the electric chair will rust and society will improve.”¹³⁹ Kavanaugh was not alone in his sentiments that, though capital punishment is a necessary evil, society would one day progress past having to use the punishment at all. This was common rhetoric for capital punishment supporters during this time, and is an argument that is still echoed somewhat in capital punishment supporters today. Following the proposal of a bill that would completely abolish capital punishment within Texas, attorneys began to speak out. Fort Worth attorney Walter Scott in a published statement claimed that “I do not believe it would help matters any if it were abolished.”¹⁴⁰

But there were still those who felt execution of any person by the state was barbaric, and that the electric chair could prove to be more horrifying than the gallows ever were. In a statement from a Canadian politician, from a country that faced its own debates at the onset of the 20th century, “If crimes are fewer today than they were in the 18th century, that is because intellectually, morally and economically the race has outgrown them; they were not stamped out

¹³⁸ “Almost Abandoned,” *The Democrat-Voice (Coleman, Texas)* Vol. 45, No. 43, Ed. 1 October 22, 1926. <https://texashistory.unt.edu/ark:/67531/metaph724075/m1/2/?q=%22texas+bar+association%22+AND+%22capital+punishment%22+Texas>

¹³⁹I bid.

¹⁴⁰ “Fort Worth Lawyers Oppose Abolishing the Death Penalty,” *The Daily Herald (Weatherford, Texas)*, Vol. 23, No. 400 Ed. 1 Tuesday, May 8 1923. The Portal to Texas History, UNT online.

by the death penalty.”¹⁴¹ In the eyes of 20th century criminologists, killing even murderers could be considered punishing a man for a disease or mental illness that they possessed. As the field of psychology progressed to increase understanding of underlying mental conditions, the state of the offender began to be considered in weighing the morality of putting them to death. Many members of the general public also began to recognize that perhaps their justifications of a deterrence factor were too idealistic, and that there was an underlying need for vengeance that haunted any encouragement for continuing executions. Those were the proponents of complete abolition of the death penalty in any form.

The last prominent line of thought was advocated for by Texas sheriffs at their annual three-day in Fort Worth.¹⁴² These officials too argued that the electric chair was a “horrible and brutal exhibition,” but instead of arguing for abolition, pushed the legislators to return to hanging from the scaffold.¹⁴³ They balked at the state taking away their authority to ensure justice was met for their own community. Some perhaps questioned the purpose of keeping the punishment at all if it was to occur tucked away out of the public view. How could the death penalty be a deterrent if no one in the community could watch the event?

In 1924, the entire Texas Senate went up for re-election due to redistricting. J. W. Thomas lost his seat in the re-election to Carl C. Hardin, a Democrat from Stephenville, Erath County (District 27), and left public office in January of 1925.¹⁴⁴ Although he held his elected

¹⁴¹ “Penology Subject of World-Wide Discussion: Prison Reform Not Local to U.S.” *Alamogordo News* (New Mexico), May 1 1924, Accessed November 3 2018.
https://newscomwc.newspapers.com/image/87213971/?terms=abolition%2B%22death%2Bpenalty%22%2BTexas&pqid=IUAX24dyAhVL1_UfVL3Rqg:964000:1147176397

¹⁴² “Return to Hanging Urged by Sheriffs,” *The Clifton Record* (Clifton, Tex.), Vol. 30, No. 28, Ed. 1 Friday, September 19, 1924. Referenced from the Portal to Texas History, UNT Online.

¹⁴³ *Ibid.*

¹⁴⁴ “Carl C. Hardin,” *Legislative Reference Library of Texas*, accessed November 15 2018.
<https://lrl.texas.gov/legeLeaders/members/memberDisplay.cfm?memberID=1953&searchparams=chamber=S~city=~countyID=0~RcountyID=~district=~first=~gender=~last=~leaderNote=~leg=39~party=~roleDesc=~Committee=>

position for two years and four days, Thomas's impact in helping lead the official legislative charge for capital punishment reform marked the true beginning of mainstream debate of Texas's use of the death penalty. Thomas returned to Belton after his one term, where he resumed his law practice.¹⁴⁵ He continued working in criminal law, advocating for numerous clients charged with criminal offenses. Thomas passed away in Temple, Texas in 1971 at the age of 86.

By 1929, the committee on criminal law and criminal jurisdiction of the Texas Bar Association recommended the complete abolition of capital punishment following adequate penitentiary facilities being constructed in the state.¹⁴⁶ People had become disgusted after witnessing execution through electricity, and now wholeheartedly believed that there was no truly humane method of capital punishment. If more prisons could be built to house the most violent offenders for life, it was thought, there was no need to put them to death. This movement, however well-intentioned, ultimately proved to be a failure. A bill that was proposed in the Texas legislature to abolish the death penalty failed. Executions by electric chair continued for four more decades, and death sentences are still implemented in the chambers of Huntsville today.

Considering the debates of this period provides perspective for scholars today looking at both pro- and anti- death penalty movements. One on hand, the "evolving standards of decency" that propel changes to law and society were overcome by reformers who thought that what was happening in Texas was contrary to the fundamental idea of justice and due process. They were successful in learning from the treachery of their past in order to make revisions that would

¹⁴⁵ "J.W. Thomas Sr." *Texas Bar Journal*, March 22 1971. Accessed September 24 2018. <https://heinonline.org/HOL/ViewImageLocal?handle=hein.barjournals/texbarj0034&id=291&size=3&collection=te xbarj>.

¹⁴⁶ "Judge Morris Dies at Houston Home," *The Tyler Journal*, Vol. 5, No.23, Ed. 1 October 4 1929. The Portal to Texas History, UNT online.

completely change the balance of power within the Texas criminal justice system. On the other hand, some saw this change to be an utter failure for the state. They did not see the need for humanness in punishing those charged with heinous crimes against others in their own community. Public executions fueled their own desires for retribution, and served in what they saw to be an important contribution to the deterrence factor of having the death penalty in the first place. When considering the reactions of many editorial media sources at the time to these proposed changes, it is noteworthy to see how even in the 1920s how firmly rooted in Texas culture the idea of keeping the death penalty had become. This “culture of capital punishment” was echoed in the struggle to pass even the reforms that would bring the death penalty up to ethical standards for the time, and is still reflected in the debate surrounding the punishment present day.¹⁴⁷

Part III

Today in Texas, the death penalty has been described as an institution that hums in the background of mainstream political debate, remaining an abstract issue in the minds of many pro-death penalty supporters and is often lost among more visible (reported upon) criminal justice reform issues.¹⁴⁸ It is seldom in the forefront of people’s thoughts, and executions are now often not considered front page news. The average Texan remains unaware of how many

¹⁴⁷ The book *The Rope, the Chair, and the Needle* remains the leading cited source for looking at the time period between 1923 and 1972.¹⁴⁷ The authors focus on the issue of race and how racial tensions influence trends in execution rates. Using their respective backgrounds in sociology and criminology, Marquart, Ekland-Olson, and Sorensen offer compelling research that supports their idea of a history of exclusion in Texas, and how this influenced 50 years of judicial decisions. One criticism that could be offered from the perspective of a historian looking at this time is the fact that the book reads more as a compilation of data and not a true history of the era. For more information on this period of capital punishment history, look to Timothy V. Kaufman-Osborns’ *From Noose to Needle* or Don Reid’s *Have a Seat, Please*. Looking at the history post-1924, there are no shortages of sources available for historians to reference, and it is therefore redundant to go into great detail on that time period here.

¹⁴⁸ Jim Webner, interview with Claire Demers, November 29 2018.

and exactly when executions take place, or even that Texas currently leads the nation in total numbers of executions post-1976. As of this writing, Texas has executed 11 offenders in 2018 alone, with 2 more offenders set to die before December ends.¹⁴⁹ Today, it is estimated that each Texas death penalty case costs the state an average of \$2.3 million, though getting a definitive value is nearly impossible due to the confidentiality of the finances in the process. If this estimate proves true, “[it] is about three times the total cost of imprisoning an offender in an isolated cell in a high security prison for 40 years.”¹⁵⁰ With high populations in the Texas death row (approximately 235 as of April 2018) and exorbitant costs of fulfilling the punishment of death, it begs the question: why does Texas continue the death penalty at all?¹⁵¹ Has the need for personal retribution for Texans outlasted the evident practicality of continuing to execute offenders? Is the “culture of capital punishment” so strong in Texas that there is a willingness to overlook progressing standards of morality in order to continue its frequent use?

There have been substantial changes to death penalty law starting in the later 20th century. After the 1972 *Furman v. Georgia* decision, when the death penalty was halted for a time by the Supreme Court of the United States, Texas was forced to reconsider *how* and under *what circumstances* it would impose the death penalty in the future. Though the *Furman* decision sparked a nation-wide moratorium on capital punishment, states including Texas began working almost immediately to amend their criminal codes to fit into new constitutional

¹⁴⁹ “Searchable Execution Database,” Death Penalty Information Center, last modified November 15 2018. Accessed November 22 2018. https://deathpenaltyinfo.org/views-executions?exec_name_1=&sex=All&state%5B0%5D=TX&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&page=18.

¹⁵⁰ “Facts about the Death Penalty,” *Death Penalty Information Center*, last modified November 15 2018. Accessed November 20 2018. <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

¹⁵¹ “Facts about the Death Penalty,” *Death Penalty Information Center*.

standards that dictated executions could no longer be carried out in an “arbitrary nature” that “often indicated a racial bias against black defendants.”¹⁵²

In 1973, Texas substantially revised its Penal Codes for the first time since 1856.¹⁵³ In terms of capital punishment, the code reinstated the practice in cases of *aggravated* first degree murder. To be considered a capital offense under this new standard, there had to be a knowing or intentional loss of life defined by statute as a homicide coupled with another factor that would go to prove the heinousness of the crime. In the 1974 revision, there were five aggravated factors that propelled a case to capital murder status: murder of a peace officer or fireman acting in an official capacity (and knowing that said person is a peace officer or a fireman); intentionally committing murder in the course of committing/attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson; committing the murder in exchange for money, or employing another person to commit murder; committing murder while escaping/attempting to escape a penal institution; murder of an employee of the penal institution the inmate is located in. If proof was evident in a capital case, bail could lawfully be withheld and the accused incarcerated until trial. This is significant because in practically all other charges, reasonable bail is considered to be a constitutional right. In sentencing, Texas left the decision to the jury to decide the fate of death under the standard of “beyond a reasonable doubt.”

These revisions are the foundation for the modern Texas Penal Code, and laid the framework for capital punishment to be continued in Texas with the execution of Charles Brooks Jr. Since this 1974 revision, there have been other added aggravating factors that reflect sentiments of different times. For example, if a murder is committed in the course of a terroristic threat,

¹⁵² *Furman v. Georgia* 408 US 238 (1972).

¹⁵³ Charles P. Bubany, “Texas Penal Code of 1974,” *The, 28 Sw L.J.* 292 (1974)
<https://scholar.smu.edu/smulr/vol28/iss1/13>

according to modern revisions, this crime could be classified as capital. The codes are slowly expanding again to incorporate additional criminal acts under capital definitions, with little opposition from the Texas people. This movement is arguably counter to the intentions of the SCOTUS when it set to narrowly limit death penalty charges.

The United States, however, has made strides as a whole in fine-tuning death penalty law since its reinstatement in *Gregg*. As time progresses, there are increasing limitations to the death penalty that are enacted. The first continued narrowing of a state's ability to impose the death penalty came in the case *Coker v. Georgia (1977)*, where the Supreme Court of the United States (SCOTUS) determined that the punishment of death for the crime of rape was "grossly disproportionate."¹⁵⁴ This determination disallowed any further use of the death penalty for the crime of rape.¹⁵⁵ In 2002, SCOTUS in *Atkins v. Virginia* held that executing a mentally ill offender was a violation of the cruel and unusual punishment clause of the 8th Amendment. As mentally ill offenders were deemed to have less culpability for their actions, using the 8th Amendment's "evolving standards of decency" analysis led SCOTUS to their interpretation that modern day standards of ethics prohibited the state from this type of punishment for these specific offenders.¹⁵⁶ Using similar legal analysis, SCOTUS in *Roper v. Simmons (2005)* determined that executing offenders who were minors at the time of their offense was unconstitutional according to the 8th Amendment.¹⁵⁷ While Texas has cooperated fully with these national changes, it appears that Texas bucks the modern trend of limiting capital charges by slowly incorporating more qualifying crimes in their penal code.

¹⁵⁴ *Coker v. Georgia* 433 US 584 (1977).

¹⁵⁵ Texas had abolished the death penalty for rape in its 1974 revision of the state penal code. Georgia, by 1977, was the only state that still allowed for the death penalty in charges of rape of an adult woman.

¹⁵⁶ *Atkins v. Virginia*, 536 US 304 (2002).

¹⁵⁷ *Roper v. Simmons*, 543 US 551 (2005). Texas had disallowed the death penalty for offenders under the age of 17 as early as 1928 (Art. 31 of the 1928 Complete Texas Statutes, Covering the Revised Civil and Criminal Statutes of 1925).

From the date of Charles Brooks Jr.'s execution in 1982 to 2018, Texas has executed approximately 556 people using lethal injection.¹⁵⁸ This number accounts for over a third of the United States' total executions during this period, and is five times the number of the next leading state, Virginia.¹⁵⁹ Texas peaked in executions per year with forty executions taking place in 2000 under Governor George W. Bush.¹⁶⁰ During his time as governor, Bush oversaw 152 total executions, gaining a reputation for being tough on capital offenders by constricting the clemency process.¹⁶¹ In the last ten years, however, the number of executions nationwide has seen a steady decrease for the first time since the 1970s. This has been seen in Texas as well, who after peaking in number of executions per year between 1997 to 2002 has also seen a steady decline.¹⁶² A decline in executions per year in Texas can be attributed to electing more progressive District Attorneys, who are less focused on their own win/loss records and hold more personal qualms about the responsibility of charging an offender to die. It could also be attributed to the makeup of juries, and personal biases jurors may hold when serving on capital cases. While executing less offenders than under peak years, Texas has still executed over 10 offenders every year in the past decade except for 2016 and 2017, with 2018 already appearing to be back on the rise. Only time will tell if the movements towards criminal justice reform have permanently altered the dynamic of capital convictions in Texas.

¹⁵⁸ "Searchable Execution Database," Death Penalty Information Center, last modified November 15 2018. Accessed November 22 2018. https://deathpenaltyinfo.org/views-executions?exec_name_1=&sex=All&state%5B0%5D=TX&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&page=18.

¹⁵⁹ Acker, James R. "SNAKE OIL WITH A BITE: THE LETHAL VENEER OF SCIENCE AND TEXAS' DEATH PENALTY." *Albany Law Review*, Spring 2018, p. 751+. *Business Collection*, <http://link.galegroup.com.ezproxy.tcu.edu/apps/doc/A547694399/ITBC?u=txshracd2573&sid=ITBC&xid=25825b44>. Accessed 23 Nov. 2018.

¹⁶⁰ "Searchable Execution Database," Death Penalty Information Center.

¹⁶¹ Sister Helen Prejean, "Death in Texas," *The New York Review of Books*, January 13 2005, Accessed November 21 2018. <https://www-nybooks-com.ezproxy.tcu.edu/articles/2005/01/13/death-in-texas/>

¹⁶² "Searchable Execution Database," Death Penalty Information Center.

Although some states still utilize other methods of execution, typically at the request of the defendant, Texas has solely utilized lethal injection since 1982. Until 2011, the lethal cocktail of drugs that were used in executions began with the chemical sodium pentothal.¹⁶³ Each drug initiated a certain step in the process of what was intended to be a swift and painless death. The first drug was typically an anesthetic to reduce the sensitivity of pain. Usually this was followed by pancuronium bromide (a muscle relaxant) and potassium chloride, which would then paralyze the body and stop the heart. This sequence of drugs was seen as the best way to limit the suffering of the inmate during execution. From the bystander's perspective, the inmate, though restrained on the gurney, slips quietly into a permanent and gentle sleep. It was a humane death without being as emotionally charged as an electrocution or a hanging.

When shortages of drugs began to occur as a result of European opposition to the death penalty, states began to adapt their formula.¹⁶⁴ In Texas, this meant substituting pentobarbital, a relaxation drug, for the sodium pentothal from 2011 to April of 2012.¹⁶⁵ But after further opposition from European drug manufacturers, who did not want their products being used to end human life, states still utilizing the death penalty have had to go to a one-drug system in order to execute offenders by lethal injection. Texas has moved to use only pentobarbital in its lethal injections, purchased from compounding pharmacies that are unknown to the public. But even this method will not be able to outlast drug shortages. The *Texas Tribune* has recently taken

¹⁶³ "State by State Lethal Injection," Death Penalty Information Center.

¹⁶⁴ Mark Berkman "The Recent History of States Scrambling to Keep Using Lethal Injections," *The Washington Post*, February 19 2014. Accessed November 22 2018. https://www.washingtonpost.com/news/post-nation/wp/2014/02/19/the-recent-history-of-states-scrambling-to-keep-using-lethal-injections/?utm_term=.52fee0b9eb4a. Hospira was the sole manufacturer of sodium thiopental until it exited the market in 2011. Italian officials would not allow for the drug to be exported if it was to be used in U.S. executions. A similar issue occurred with pentobarbital, which many states substituted for sodium thiopental after Hospira discontinued its production. The Danish Corporation that manufactured and supplied the drug, Lundbeck, decided to discontinue shipping it to prisons in the U.S. in opposition to its use in executions. (Mark Berman, Washington Post, February 19 2014).

¹⁶⁵ "State by State Lethal Injection," Death Penalty Information Center.

upon itself to track exactly how many doses of the drug are left in Texas, estimating only nineteen doses remaining in stock, with twelve of these set to expire June of 2019.¹⁶⁶ Texas has fared better than other states in keeping this drug in stock, however, by routinely extending the expiration date of the doses still left on the shelf. This practice is often criticized, with many experts and attorneys adamantly opposing this practice due to an increased risk of pain to the defendant during the execution. Adapting the recipe for lethal injection has again prompted critics of the death penalty to show that the possibility of the procedure going wrong makes the entire process inhumane, and that the death penalty must be abolished. As modern standards of punishment dictate, a painful death would be equated to torture, which would violate not only personal standards of morality but also international conventions on the subject.

With drugs running in short supply, and the doses Texas still has in inventory sparking controversy due to the potential for painful complications (which most certainly could fall short to fulfilling “evolving standards of decency”), it would seem that Texas has two choices: 1) it can find a new method of execution that fits today’s standards of a humane death, or, 2) it could end the death penalty altogether. Ending the practice altogether appears far-fetched given how rooted the establishment of capital punishment is in Texas. While many popular politicians are running on more progressive criminal justice reform platforms, still, legislators and District Attorneys together are both unwilling to be the instigator to abolition. And, according to polling data from the University of Texas at Austin, over 65% of Texans still at least somewhat support continuing the death penalty. The strongest supporters, from this data, appear to come from

¹⁶⁶ Jolie McCullough, “How Many Doses of Lethal Injection Drugs Does Texas Have?” *The Texas Tribune*, last modified October 10 2018. <https://apps.texastribune.org/execution-drugs/>

conservatives, age 45+, in rural areas, who identify as religious fundamentalists.¹⁶⁷

Understanding this data is fundamental for modern abolitionists to know who their target audiences are in educational outreach. For death penalty supporters, that data shows that on average the rural voter is more likely to appreciate policies by the Texas legislature to expand capital punishment usage.

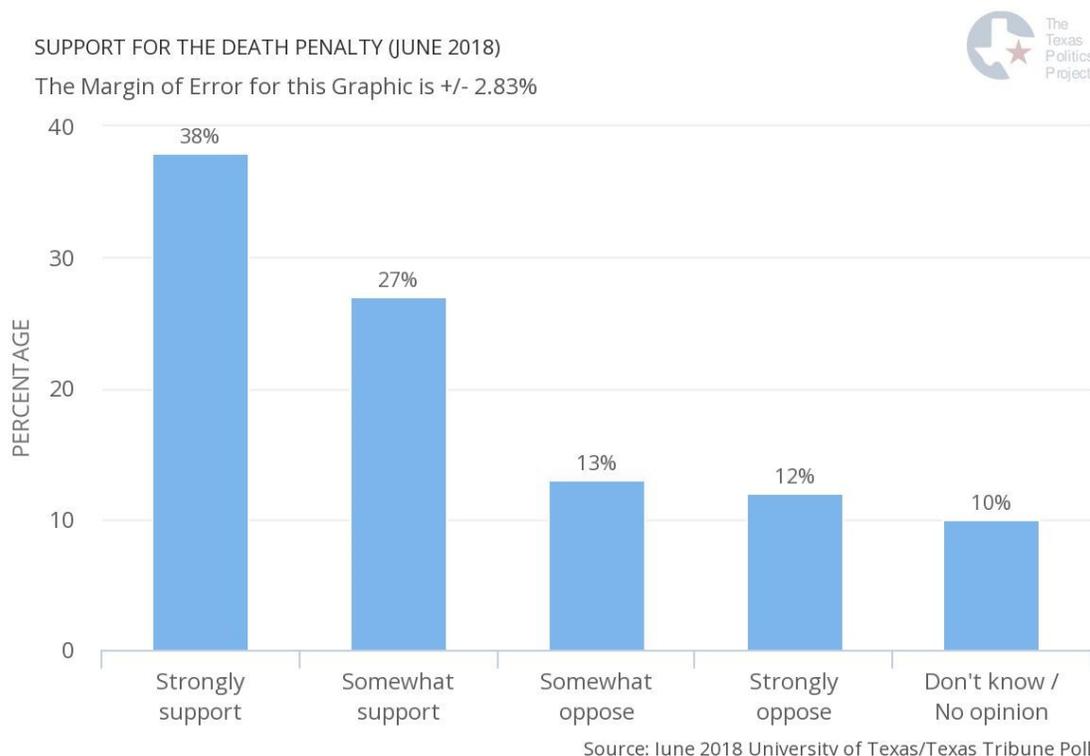


Figure 1. This chart shows polling support for the death penalty, as of June 2018. Respondents were asked, "Which of the following best characterizes your opinion on the death penalty for those convicted of violent crimes?" ("Support For the Death Penalty," The Texas Politics Project at the University of Texas at Austin, last modified June 2018.)¹⁶⁸

Looking at how the death penalty has perpetuated in Texas culture necessitates considering the county level of how processes are structured. By analyzing specific county data, and understanding the working of their court systems, specific patterns in rulings can become

¹⁶⁷ "Support for the Death Penalty," The Texas Politics Project at the University of Texas at Austin, last modified June 2018, accessed November 2018, <https://texaspolitics.utexas.edu/set/support-death-penalty-june-2018>

¹⁶⁸ Ibid.

evident. In the past five years, six Texas counties were responsible for more than half of all total death sentences in Texas.¹⁶⁹ The counties, in order of highest to lowest rates, are: Harris, Dallas, Tarrant, Jefferson, McLennan, and Kaufman. Of the top three, Dallas and Harris make the most sense due to their high population size and status as large metropolitan centers and as the main travel hubs of the state. But what about Tarrant County?

Tarrant County, Texas has a population of 2 million people.¹⁷⁰ It has sent 41 people out of Texas's 556 capital offenders to death row. This is only 7.3% of the total offenders that have been put to death, compared to the population of Tarrant County to Texas as a whole (approx. 7.25% of the total state population). Looking at just the population and the rate of sentencing offenders in Texas, Tarrant County appears to at least be executing a proportional number of offenders according to its size in terms of Texas's rate of execution.

Looking at offenders per year, Tarrant County had a surprising span of years where it sent no person to the Huntsville death chambers. The years 1986 to 1994, under Democrat District Attorney Tim Curry, saw no executions from Tarrant County. Executions from Tarrant County peaked in the year 2009, where 5 out of 24 people executed were from Tarrant County. This was the last year of Tim Curry's, now as a Republican, rule as District Attorney of Tarrant County. Over the last decade (2008 to 2018), Tarrant County only sent 14 offenders to be executed, as compared to 18 the decade prior (1998-2007).¹⁷¹

In the 8th Administrative Region, covering 18 counties whose office is located in Fort Worth, there are only 33 attorneys that meet the requirements of serving as either first chair (10 year

¹⁶⁹ *Texas Death Penalty Developments in 2017: The Year in Review* (Austin: Texas Coalition Against the Death Penalty, 2017), 4.

¹⁷⁰ "Quickfacts Tarrant County, Texas" United States Census Bureau, last modified July 1 2017, <https://www.census.gov/quickfacts/fact/table/tarrantcountytexas,tx/PST045217>

¹⁷¹ "Searchable Execution Database," Death Penalty Information Center.

minimum of intensive criminal litigation experience) or second chair (7 year minimum of intensive criminal litigation experience) in a death penalty trial.¹⁷² This is up from 27 approved attorneys in 2015. These high standards to be approved to sit either first or second chair for defense council for capital trials are in place to help ensure a standard quality of defense, no matter if the council is appointed or hired. In fact, the majority of capital cases out of Tarrant County are represented by appointed council, who are paid by the state to serve as defense council.

The potential for exoneration with expanding DNA technology has increased skepticism for the death penalty. It is difficult to make definitive statements on the exact number of people wrongfully accused in Texas each year, but the Innocence Project of Texas estimates that 2%-5% of felonies per year are wrongful convictions.¹⁷³ While most of these sentences can be overturned with compensation given to the accused, executing an inmate that has been wrongfully accused undermines the fundamental guarantees of the U.S. Constitution to life, liberty, and the pursuit of happiness. Texas has had 13 total death row inmates exonerated for their crimes, with Tarrant County accounting for only one of these cases.¹⁷⁴

Michael Toney was one such victim of false incarceration that almost led to his execution for a crime he did not commit. In 1997, Toney was charged with capital murder in Tarrant County while serving a sentence for burglary after a fellow inmate in the Parker County jail told police

¹⁷² “8th Administrative Region Death Penalty Council,” Effective January 12, 2018. <http://www.txcourts.gov/media/1437291/eighth-administrative-judicial-region-death-penalty-counsel-effective-january-12-2018.pdf> and <http://access.tarrantcounty.com/content/dam/main/criminal-courts/Documents/8thAdministrativeRegionDeathPenaltyCounsel-October%202015.pdf>

¹⁷³ “The Problem: How many people are wrongfully convicted?” Innocence Project of Texas, 2018. Accessed November 2018, <https://innocencetexas.org/the-problem/#how-many-people-are-wrongfully-convicted>.

¹⁷⁴ Christopher Connelly, “What Exonerations Mean for the Texas Death Penalty Debate,” Houston Public Media, University of Houston Online, January 26 2017, accessed November 26 2018, <https://www.houstonpublicmedia.org/articles/exclude/2017/01/26/185267/what-exonerations-mean-for-the-texas-death-penalty-debate/>.

that Toney had confessed his involvement in an unsolved 1985 Lake Worth bombing.¹⁷⁵ Toney consistently denied any involvement in the bombing that had resulted in three deaths, but was still charged with capital murder. Although there was no physical evidence that could tie Toney to involvement with the crime, and the jailhouse informant recanted his testimony, admitting it was a ploy to gain early release, the charges stuck.¹⁷⁶ Prosecutors used both Toney's ex-wife and his former friend to bear false witness against him at trial, and in 1999, Toney was sentenced to death. It was only in 2008 that the Texas Court of Criminal Appeals overturned his conviction, citing that the prosecution had "suppressed evidence relating to the credibility of its only two witnesses against him."¹⁷⁷ While there is only one known case of wrongful capital conviction from Tarrant County, the fear that this phenomena exists at all propels modern day death penalty abolitionists to continue fighting Texas's use of capital punishment.

On the forefront of efforts to abolish capital punishment present day is the Texas Coalition Against the Death Penalty (TCADP). TCADP is a grassroots organization founded in 1995 that works to support legislation in death penalty reform and abolition, as well as to open dialogue on the county level about current issues in maintaining the death penalty. According to their North Texas outreach coordinator Jim Webner, TCADP's efforts in Tarrant County include vigils on execution days, social media outreach to humanize death row inmates, and holding forums during election season to motivate candidates to speak frankly on their opinions of the death penalty. The organization has in the past met with elected officials including District Attorney

¹⁷⁵ Alexandra Gross, "Michael Toney-Other Texas Murder Exonerations," The National Registry of Exonerations, A Project of UCI, University of Michigan Law School, and Michigan State College of Law, last modified June 2012, accessed November 24 2018, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3692>

¹⁷⁶Ibid.

¹⁷⁷ "Michael Toney, Recently Exonerated from Death Row in Texas, Dies in Car Crash," Death Penalty Information Center, n.d. accessed November 24 2018, <https://deathpenaltyinfo.org/michael-tony-recently-exonerated-death-row-texas-dies-car-crash>.

Sharon Wilson as well as former state representative Konni Burton to discuss how and when the death penalty is used in Texas, and to encourage efforts to end its use. TCADP in Tarrant County also works hand in hand with local progressive churches, many that have an open political advocacy focus, in order to encourage Biblically-centered arguments against executions. Reaching religious fundamentalists, who so appear based on polling data to support the death penalty in high numbers, is an important step to challenging hard-set, and often inherited, beliefs on crime and punishment. Unfortunately, the group is often unable to reach congregations of more conservative and traditional denominations, even though these are the groups this organization would do best by educating.

In the past, abolitionist groups were smaller, more localized, and took a much more radical approach to spreading their views. TCADP represents the focus of the modern abolition movement, which is first and foremost to spread awareness and education to the people of Texas. The biggest challenge facing death penalty abolitionists today, says the TCADP, is the fact that they are advocating for people who otherwise no one wishes to advocate for. It is also tough to challenge deeply-rooted beliefs that people hold onto for no other reason than the fact that it is what they have always believed to be true.

From observing Tarrant County, an argument can be brought that Texas's system for handling death penalty cases still is in violation of the 8th Amendment's cruel and unusual punishment standards. But even if the method of execution was changed, and there was technology developed that would make the execution a truly humane process, it would still violate the 14th Amendment as applied. The 14th Amendment promises both "due process of law" and "equal protection of the laws." When prosecutors are seeking the death penalty in large numbers, and there is a limited number of attorneys who meet the basic standards to take on a

case of this scale, there is more chance of mistake or wrongdoing that could be overlooked. When there is a possibility for any error on the side of the state, any punishment with such finality should not be tolerated. The law is not an established science, and it changes to meet the needs of a continuously fluctuating community. The law has been changed in the past, and has the ability to be changed in the future. Looking to these past movements towards creating greater justice in the legal system, and how far Texas has come in a relatively short time span, it is conceivable that even Texas can follow in the world-wide trends of abolishing the death penalty if it so chooses. To follow “evolving standards of decency,” the death penalty must go.

When looking at the law, it is imperative to understand the societal changes that have led to its modern day interpretation. It will give scholars and attorneys alike a greater appreciation for today’s legal system to understand the challenges that have paved the way for today’s world. Analyzing one specific topic, like capital punishment, is a method of exhibiting how the law has evolved to meet the needs of certain influential people in different times. The death penalty in Texas is a topic that perhaps can never be exhausted in analysis, though it is my hope that this work can serve as a backbone to future interpretations of criminal law. As with the TCADP’s main message, it is essential to educate others on this topic in order to facilitate lasting change in today’s legal system.

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