

# The Ethics of the Texas Death Penalty and Its Impact on a Prolonged Appeals Process

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Society remains sharply divided as to the deterrent value of capital punishment. Following the reintroduction of the death penalty in the United States, Texas law mandates the affirmative predictability of future dangerousness beyond a reasonable doubt before a jury can impose the ultimate penalty for capital murder. The validity of prediction of dangerousness has been challenged in three Texas landmark cases before the U.S. Supreme Court. The case of Karla Faye Tucker highlights the moral controversy that occurs when execution follows an appeals process stretching over more than a decade, during which time personality growth and the effects of prison rehabilitation may have eliminated or curbed criminal tendencies.

“To trade and traffic with Macbeth in riddles and affairs of death”—Shakespeare, *Macbeth*, Act III, Scene V

Society remains deeply divided on life and death issues, such as abortion, assisted suicide, and capital punishment. Ambivalent attitudes toward the death sentence are reflected in the public's avid but morbid interest in press reports featuring hour by hour details of a condemned prisoner's final day of living: What time did he or she awaken? Which family members and visitors were bid

farewell? What did he/she choose as a final meal? Who were the execution witnesses? What were his/her final words? During the decade from 1966 until 1977, there was a moratorium on executions in the United States. In *Furman v. Georgia*,<sup>1</sup> the U.S. Supreme Court determined that states imposed the death penalty in an arbitrary and capricious manner, thus violating the Eighth Amendment, which forbids cruel and unusual punishment. The Court ruled that for states to execute defendants found guilty of capital crimes, procedural guidelines needed to be developed so that a jury could fairly and objectively consider specific circumstances before imposing the death sentence. In due course, 36 states and the federal government reinstated capital punishment with policies in compliance with the Su-

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preme Court mandate. Texas adopted a new sentencing policy requiring the jury to answer three questions at the punishment phase of a capital murder trial. Was the conduct of the defendant deliberate and with reasonable expectation that death would ensue? Was the defendant's conduct an unreasonable response to provocation, if any, by the deceased? Was it probable that the defendant would commit future criminal acts of violence constituting a continuing danger to society? Should the jury find that the state has proved beyond a reasonable doubt that the answer to each of these questions is affirmative, the death sentence is imposed. If the answer to any of these questions is negative, a sentence of life imprisonment results.

Since the reintroduction of capital punishment in 1977, the country's prison and jail population had increased to an estimated 1.6 million by 1996.<sup>2</sup> Simultaneously the pace of executions has risen steadily. In 1991 there were just 14 executions. By 1997 the annual incidence had increased to 74, half of which were carried out in Texas. Since reinstatement of capital punishment, about 450 persons have been put to death, Texas leading the nation with nearly one-third of the total executions. Texas has executed 145 persons since 1982.

Not only is society sharply divided on the pros and cons of the death penalty, including its deterrent value, but discriminative epidemiological statistics compound the controversy. There is a stark gender difference. Whereas in the past 15 years Texas has killed 144 men, only 1 woman, Karla Fay Tucker, has been ex-

ecuted. The first woman to be executed in the United States since the Supreme Court reinstated the death penalty was Velma Barfield of North Carolina, who poisoned four people.

In addition to gender difference, a University of Iowa study of Georgia's death sentencing occurrences concluded that nearly one-third of the death sentences imposed in Georgia may be racially discriminatory.<sup>3</sup> The study reports that defendants charged with killing whites were sentenced to death in 11 percent of the cases, whereas those charged with killing blacks were condemned in only 1 percent of the cases. Statistical analysis concluded that the odds of the death sentence for those charged with killing whites was 4.3 times higher than odds of the death sentence imposed upon defendants charged with killing blacks. The majority on the U.S. Supreme Court in *McClesky v. Kemp*<sup>4</sup> ruled that these data did not prove the presence of purposeful racial discrimination. However, the dissent argued that demonstration of a significant risk of discrimination, rather than definitive proof, is all that is needed to show constitutional violation. Several studies examining contemporary death sentencing patterns in other states have reached conclusions that parallel the Georgia study.<sup>5,6</sup>

Although Texas has reduced the arbitrariness and capriciousness implicit in imposition of the death sentence by adopting procedural guidelines, its fairness and constitutionality have been repeatedly challenged. In *Jurek v. Texas*<sup>7</sup> the petitioner argued that the imposition of the death penalty under any circum-

## Ethics of the Texas Death Penalty

stances is cruel and unusual punishment. The petitioner stated that arbitrariness still pervades the Texas criminal justice system because of prosecutorial variance between capital charges and plea bargaining. The U.S. Supreme Court upheld Jurek's sentence, asserting that Texas law permits a defendant to offer balancing mitigating evidence to counter and rebut state testimony relating to aggravating factors. In *Barefoot v. Estelle*,<sup>8</sup> the condemned man argued that the imposition of the death penalty by the jury, premised upon state psychiatric testimony that his future dangerousness was predictable beyond a reasonable doubt, constituted unscientific evidence. In this case the state psychiatrist, Dr. Grigson, without having examined Barefoot, hypothetically determined that Barefoot was a severe sociopath and that he constituted a 100 percent absolute risk of committing future acts of criminal violence. Based upon Dr. Grigson's evidence, the jury answered "yes" to the statutory questions that resulted in imposition of the death sentence. Although the American Psychiatric Association, participating in this case as *amicus curiae*, argued that psychiatrists have no special training or skills in predicting future dangerousness, least of all answering hypothetical questions without having examined a patient, the Supreme Court, by a majority of 6 to 3, affirmed the conviction. However, the three dissenting judges opined that the long term prediction of future violence by psychiatrists is extremely unreliable. These judges quoted the research of John Monahan<sup>9</sup> who found that psychiatrists and psychologists were accurate in no more than one out of

three cases in the prediction of future violent behavior. Judge Blackmun wrote that because death in its finality differs so starkly from life imprisonment, absence of reliability in determination of future violence in death sentence cases conflicted with Eighth Amendment jurisprudence. Judge Blackmun pointed out that the American Bar Association had repeatedly warned that sentencing juries are particularly incapable of dealing with information relating to the likelihood that defendants will commit other crimes and similar predictive judgments.

In *Estelle v. Smith*,<sup>10</sup> psychiatric evidence that Smith was sociopathic and likely to commit further acts of violence resulted in his receiving the death penalty. However, because at a competency to stand trial examination the psychiatrist had failed to warn Smith that information that he disclosed could be used as evidence against him, the Supreme Court vacated the sentence at a capital sentencing hearing. Contrary to the psychiatric evidence asserting beyond a reasonable doubt that Smith would continue to be a danger to society, he is currently serving time in a minimal security prison. He has exhibited no recurrence of previous violent propensities. Whether his nonviolent behavior as currently evident will sustain itself outside of the confines of prison life is unpredictable, but remains a reasonably likely possibility.

### ***Texas v. Karla Faye Tucker***

Karla Faye Tucker, a 38-year-old convicted double murderess, was executed in Huntsville, Texas, on February 3, 1998. She was the first woman to be executed in

Texas in 134 years. With her then-boyfriend, Danny Garret, Tucker had participated in a pickaxe murder of a 27-year-old man and his 32-year-old girlfriend. Garret died in prison in 1993 before he could be executed. In mitigation of sentence, Tucker claimed that at the time of commission of the capital offense she was high on alcohol and drugs. She also claimed that a deprived childhood, including being forced into prostitution at an early age, had adversely affected her personality development.

In her final months after an execution date had been set, Tucker acknowledged her guilt and expressed remorse. She sought reprieve from execution based upon her assertion that she had turned to religion and become a born-again Christian. She believed with her new-found faith she could save others. Tucker stated that she opposed any state-permitted killing, whether execution, abortion, or euthanasia.<sup>11</sup> She acknowledged that it made no sense to execute men and not women. Her case precipitated national debate. Millions of television viewers throughout the world saw her being interviewed on *Larry King Live*, just weeks before her execution. There was significant public feeling that at 38 years of age Tucker had been rehabilitated in prison and was no longer the brash 23-year-old antisocial person whom her ghastly murders had portrayed her to be. Evangelist Pat Robertson, a proponent of the death sentence, denounced her execution as vengeance, asserting that she was no longer the same woman who had committed capital crimes. A flood of letters poured into the office of the Governor of

Texas, George Bush III, pleading for clemency. Support for Tucker came from Pope John II, the European Parliament, and the United Nations, moved by her claim that she had turned to God. The Governor responded to letter writers stating that unless the Texas Board of Pardons and Paroles recommended mercy, he had no authority to commute Tucker's death sentence to life imprisonment. The Governor stated that he believed that the death sentence was a deterrent. He reminded the public that as head of the State of Texas he had undertaken an oath to uphold its laws.

On February 2, 1998, the Board of Pardons and Paroles by a majority of 16 to 2 abstentions denied Tucker's appeal for clemency. The Governor did not exercise his gubernatorial power to grant the condemned woman a 30-day stay of execution. She was duly executed by lethal injection at 6:37 p.m. on Tuesday, February 3, 1998.

## Discussion

Studies in the 1940s by sociologists Sheldon and Eleanor Glueck<sup>12</sup> demonstrated that the extent of repetitive criminality diminishes with age. Subsequent research by Robins<sup>13</sup> and O'Neil and co-workers<sup>14</sup> found that the criminality of persons with sociopathic personality diminishes at a mean age of 35 years. Of those who improve, 20 percent do so before the age of 30, 60 percent between the ages of 30 and 45 years, and 20 percent after the age of 45; the decade of greatest improvement, which included 50 percent of all those improved, was from 30 to 40 years of age. In the light of these findings,

## Ethics of the Texas Death Penalty

the question arises, is it moral for Texas to execute persons based upon lay or professional evidence of predictability of dangerousness beyond a reasonable doubt, when more than a decade later, the passage of time may have significantly altered personality behavior? The case of *Estelle v. Smith* lucidly demonstrates the uncertainty of predicting dangerousness beyond a reasonable doubt. Here is a case in which a criminal sentenced to death based upon psychiatric evidence of 100 percent predictability of future dangerousness is rehabilitating in a minimum security prison.

In a leading democracy such as the United States, it is unlikely that the complex appeals process against the death sentence will be significantly truncated, despite enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, which provides for shortening of the appeals process. Condemned defendants have recourse to many state and federal courts, in addition to ultimate review of their cases by the U.S. Supreme Court. It is arguable that a society permitting a prolonged death penalty appeals process stretching over 10 to 15 years is acting immorally when it ultimately executes persons conceivably no longer determinable as dangerous beyond a reasonable doubt. With the availability of sophisticated psychological testing, should criminals about to be executed many years following commission of their capital offenses not be given the benefit of psychological testing to determine attitudinal change, the presence or absence of remorse, and the current status of personality function and growth (all of which are

components of the scientific study of dangerousness)? For example, the MMPI-2 personality test measures psychopathic and antisocial tendencies, in addition to providing validity scales.<sup>15</sup> A democratic society permitting a prolonged appeals process cannot evade the responsibility of closely reevaluating the value of the death sentence. There is no proof that the death sentence is an effective deterrent. Despite 19 executions in Texas in 1995, the incidence of murder the following year hardly diminished; there were 134 murders compared with 138 in the previous year. Furthermore, statistical differences relating to race and gender controversially compound the morality of the death sentence.

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