Foreword

It is meaningless, really, to speak about the death penalty in America without being geographically specific. Each death penalty state, as well as the federal government, has its own system for determining who shall be subject to capital punishment. These systems share some basic features, but they are each unique, and some are more problematic than others. It is eminently reasonable to be against the death penalty as practiced in one state but to support it as practiced in another.

Massachusetts, for example, is currently considering a proposal to reinstitute the death penalty with significant procedural protections to ensure against the execution of an innocent person and against discrimination in charging and sentencing. The Massachusetts proposal provides, among other things, that guilt be proved beyond any doubt, that separate juries be charged for the guilt and sentencing phases of the trial (many argue that death-qualified juries are conviction prone), that DNA testing be made available to the defendant, that an independent commission review claims of innocence, and that death sentences be imposed only if physical evidence incriminates the defendant. The Massachusetts proposal addresses the exhaustive list of faults (other than the immorality of execution) that abolitionists have found with the death penalty as applied by the various states and the federal government. All but the most moralistic objectors to capital punishment would have to take a hard look at the Massachusetts plan, which provides, inasmuch as it is humanly possible to assure this, that only the guilty and only the most culpable will be executed.

Texas is at the other end of the spectrum. The Texas sentencing statute is arguably the most troubling in the nation. At its inception, the statute was structured to narrowly restrict the lens through which the capital jury could consider mitigating evidence submitted by a defendant. Some observers have legitimately criticized the Supreme Court for allowing irrelevant mitigating

evidence to infect capital trials. The Court's rule—established in *Woodson v. North Carolina*—is that mandatory death-penalty statutes are unconstitutional and that a defendant in arguing for his life must be allowed to present any and all mitigating evidence he deems relevant. In Texas, defendants could offer any mitigating evidence they deemed relevant, but the evidence could be considered by the jury only in connection with three special issues to be addressed during its deliberations. A defendant named Jerry Jurek argued to the Supreme Court that this scheme effectively amounted to a mandatory death penalty—it did not allow for meaningful consideration of mitigating evidence. The Court rejected Jurek's claim in 1976, and the Texas scheme has been churning out executions since. Although Texas modified its statute to require separate consideration of mitigating evidence in 1991, the Texas statute still controversially focuses jury deliberations on the question of the “future dangerousness” of the defendant, and its motor continues to purr.

Texas's death output is prodigious. In 2002, a total of seventy-one executions were carried out in the United States. Texas accounted for thirty-three of these. Oklahoma had the next highest number with seven. Four hundred fifty prisoners were under sentence of death in Texas at the end of 2002, almost 15 percent of the national total. Only California, with 614, had more. But while Texas executed thirty-three persons in comparison to 450 prisoners under sentence, California executed one. Texas, Virginia, Missouri, Oklahoma, and Florida are collectively responsible for more than two-thirds of the executions that have been carried out in the United States since 1977. In 2002, 159 prisoners were sentenced to die in the United States. Texas was again the leader with thirty-seven admissions to death row. California followed with fourteen.

A host of questions come to mind. Why has Texas been so fervent in pursuing capital punishment? Why has it succeeded (if the number of sentences and executions is a measure of success)? Has an aggressive death penalty produced any benefits? Have rights been trampled in the process—has racism resulted, have innocents been executed? Have the dangerous criminals been incapacitated? The death penalty in Texas is clearly a phenomenon worth studying, and there are few people better equipped to study it than Jon Sorensen and Rocky Pilgrim.

Jon Sorensen is one of the three or four most important researchers who regularly devote their attention to the subject of capital punishment in America. In 1972, in *Furman v. Georgia*, the Supreme Court commuted the sentences of more than 600 death-sentenced defendants when it ruled the death penalty as then applied unconstitutional. Professor Sorensen, together with James Marquart, studied the *Furman* commutees to see whether it was in fact true, as proponents of the death penalty argued, that capital murderers posed a risk

to commit future violent crime above and beyond the risk posed by noncapital murderers. The Sorensen-Marquart study remains to this day the most significant study of the question whether the death penalty is justified from the standpoint of incapacitation. Professor Sorensen has since produced a host of enormously significant empirical studies on, among other topics, deterrence, racial disparity, and the likelihood of incarcerated capital murderers to violate prison rules. He is notably one of the few honest brokers in the field. Most scholars consistently find evidence that supports one side or the other (usually their own). Jon Sorensen has published some studies that support the abolitionist side and has offered other data that support the death penalty. His work is thorough and unbiased. This book is no exception.

Death by Lethal Injection is conspicuously balanced. The authors ask all the right questions. Does the death penalty deter? Is it administered fairly? Their answers are nuanced, as any honest answers to the key questions in this area must be, and bear directly on the debate of the morality of the death penalty. Their discussion of incapacitation includes the relevant fact that capital murderers are not substantially more likely to recidivate or commit prison crime than other inmates, and the details of some of the crimes that released inmates have committed. The authors have complete command of the literature in this field. They present all of the relevant data, and do so even-handedly.

This is the kind of book that is needed in this field. It is not a polemic. It raises the level of the debate by educating readers about both sides of the issue. There is no agenda or bias here. *Death by Lethal Injection* is an important book that deserves to be read and discussed.

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New York, New York
November 2004

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