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Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque - And Probably Unconstitutional.

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TEXAS'S NEW HABEAS CORPUS PROCEDURE FOR DEATH-ROW INMATES: KAFKAESQUE—AND PROBABLY UNCONSTITUTIONAL

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> It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongly convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.[1]

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1. Herrera v. Collins, 113 S. Ct. 853, 868 (1993).

I. INTRODUCTION

The death penalty never fails to ignite heated debates, not only about its moral acceptability, but also about whether it is enforced quickly enough to achieve its purpose of teaching criminals a lesson.[2] The death penalty is unquestionably the most extreme form of punishment that society inflicts upon a human being for the commission of a crime. While the trend in other areas of the world is toward abolition of the death penalty,[3] public opinion in the United States clearly favors capital punishment.[4]

Texans favor executions as much as, or perhaps more than, their compatriots,[5] which is evidenced by the number of people on death row in Texas.[6] Public support of the death penalty is not lost on the politicians who unabashedly campaign for capital punishment as a

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2. *See* Symposium, *Are Executions in New York Inevitable?*, 22 FORDHAM URB. L.J. 557 *passim* (1995) (reporting panel debate over morality and effectiveness of death sentence); *see also* Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 201 n.4 (7th Cir. 1985) (stating that teaching criminals lesson is one justification for punishing criminals); Wichita v. Lucero, 874 P.2d 1144, 1149 (Kan. 1994) (asserting that severe punishment under recidivist statute should serve as lesson to repeat offenders and cause offenders to reform); Lisa A. Smith, *The Moral Reform Theory of Punishment*, 37 ARIZ. L. REV. 197, 199 (1995) (explaining how moral education theory views punishment as way to teach deviants to avoid wrongful behavior).

3. *See* Michael Hamlyn, *Death Sentence Is Abolished by South Africa*, RUETERS INFO. SERVS., June 7, 1995 (noting that Constitutional Court of South Africa recently invalidated capital punishment), *available in* Westlaw, INT-NEWS Database.

4. *See* Mark Clements, *Parade's National Survey on Law and Order*, PARADE, Apr. 18, 1993, at 4 (finding that 87% of 2,512 people randomly surveyed in country supported capital punishment); *see also Death Row U.S.A.*, NAACP LEGAL DEFENSE AND EDUC. FUND (Capital Punishment Project, New York, N.Y.), Summer 1994, at 1 (stating that as of July 20, 1994, there were 2,870 inmates on death row in United States).

5. *See* Shelly Clarke, Note, *A Reasoned Moral Response: Rethinking Texas' Capital Sentencing Statute After* Penry v. Lynaugh, 69 TEX. L. REV. 407, 408 (1990) (noting that no other state exceeds Texas in number of executions); Sam H. Verhovek, *Texas Opens Door for Death-Row Appeals*, N.Y. TIMES, Apr. 21, 1994, at A12 (finding that Texas has executed nearly one-third of all inmates put to death in United States since Supreme Court reinstated death penalty in 1976).

6. As of September 11, 1995, 406 persons were on death row in Texas. Memorandum from Texas Department of Criminal Justice (Sept. 11, 1995) (on file with the *St. Mary's Law Journal*). In addition, 98 persons have been executed in Texas since the death penalty was reinstated in 1976. Telephone Interview with David Nunnelee, Public Information Officer, Texas Department of Criminal Justice (Sept. 11, 1995); *see also* KELLIE DWORACZYK, AFTER THE DEATH SENTENCE: APPEALS, CLEMENCY AND REPRESENTATION, SPECIAL LEGISLATIVE REPORT 11 (Apr. 4, 1994) (House Research Organization) (stating that inmates average 8.2 years on death row before execution).

remedy for crime.[7] Yet, virtually every study on the matter shows that the death penalty has no deterrent value,[8] and that it is an expensive judicial process as a result of the built-in constitutional safeguards.[9]

The public is divided on the issue of whether the appeals process in death penalty cases should be curtailed. Some argue that curtailing death-row inmates' appeals would expedite executions, save the taxpayers money, and provide swifter justice.[10] On the other hand, many people, including those who firmly believe in capital punishment, agree that the current safeguards are necessary to prevent the tragedy of executing innocent persons.[11] This fear that innocent persons may be executed is not unfounded. Many states have come perilously close to executing persons convicted of crimes that they did not commit,[12] and Texas is no exception.[13]

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7. *See* William Murchison, *We All Want Habeas Reform*, TEX. LAW., Apr. 24, 1995, at 19 (observing that "[i]n the No-Nonsense 'Nineties, Congress and the Texas Legislature alike are moving swiftly to make possible the swifter execution of murderers").

8. *See* Robert M. Morgenthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25 (conceding that 100 years of experience produced no credible evidence to show that executions deter crime).

9. *See* Christy Hoppe, *Executions Cost Texas Millions, Study Finds It's Cheaper to Jail Killers for Life*, DALLAS MORNING NEWS, Mar. 8, 1992, at A1 (discussing study by *Dallas Morning News,* which found that death penalty cases cost average of $2.3 million per case, about three times cost of imprisoning someone in single cell at highest security level for 40 years); Sam H. Verhovek, *Across the U.S., Executions Are Neither Swift Nor Cheap*, N.Y. TIMES, Feb. 22, 1995, at A1 (noting that death penalty cases take longer and cost more, and concluding that lengthy appeals are inevitable because of constitutional standards).

10. *See American Survey: The Waiting Game*, ECONOMIST, Apr. 1, 1995, at A19 (noting that some people believe that answer to costly death-row appeals is streamlining appeals process); *cf.* James Cullen, *The Session at Midpoint*, TEX. OBSERVER, Apr. 7, 1995, at 4 (recognizing that goal of Texas's new habeas law is to "execute people as quickly as possible").

11. *See* Samuel J.M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices' Position*, 24 ST. MARY'S L.J. 1, 76–77 (1992) (discussing ad hoc committee study of federal habeas corpus reform, which found that although public opinion overwhelmingly supports death penalty, safeguards must be in place to ensure its reliability and fairness because death is irreversible).

12. *See* STAFF OF HOUSE COMM. ON THE JUDICIARY, 103d CONG., 2D SESS., REPORT ON CAPITAL PUNISHMENT 3 (Comm. Print 1994) (reporting that since 1973, 52 people have been released from death row after discovering evidence of their innocence).

13. *See* James Cullen, *The Session at Midpoint*, TEX. OBSERVER, Apr. 7, 1995, at 4 (referring to statistics of United States Department of Justice, which indicate that nearly 25% of all death penalty convictions in Texas between 1973 and 1993 were overturned in whole or in part, and at least seven convicted death-row inmates were released during that period).

While it is impossible to know the true number of innocent persons who have been executed, history shows that these tragedies occur more than we care to admit.[14] Executing the innocent contradicts the very reason a democracy exists—to foster individual liberty.[15]

The 74th Texas Legislature addressed this tension between facilitating executions and assuring meaningful protection against wrongful executions. At the strong urging of the governor and the attorney general, and as a result of the persistent lobby of the state's prosecutors, Texas lawmakers decided to dramatically revise and limit Texas's habeas corpus protection for individuals sentenced to death.[16] The Texas Legislature created a special habeas corpus law for capital punishment cases and amended the prior habeas corpus statute for other cases.[17] The law that emerged, Article 11.071 of the Texas Code of Criminal Procedure,[18] runs the

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14. *See* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE 282–356 (1992) (describing 23 cases since 1900 in which innocent people, wrongly convicted of murder or rape, were executed); *cf.* KELLIE DWORACZYK, AFTER THE DEATH SENTENCE: APPEALS, CLEMENCY AND REPRESENTATION, SPECIAL LEGISLATIVE REPORT 14 (Apr. 4, 1994) (House Research Organization) (discussing study by Columbia University Law School Professor James Liebman, which concluded that approximately 40% of all death sentences that were appealed on procedural or constitutional grounds were reversed).

15. *See* Keegan v. Lawrence, 778 F. Supp. 523, 525 (S.D. Fla. 1991) (recognizing tantamount importance of individual liberty in constitutional democracy); *see also* Henderson v. Alabama Power Co., 627 So. 2d 878, 904 (Ala. 1993) (Houston, J., dissenting) (stating that King John sealed Magna Carta, "thereby creating or preserving two concepts of governance that protect individual liberty: representative democracy and trial by jury"); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 253 (1993) (asserting that without respect for fundamental rights, criminal process will abridge individual liberties and ultimately destroy democracy); *cf.* Asherman v. Meachum, 932 F.2d 137, 139 (2d Cir. 1991) (describing writ of habeas corpus in democratic system as "ancient buttress for individual liberty").

16. *See* William Murchison, *We All Want Habeas Reform*, TEX. LAW., Apr. 24, 1995, at 19 (reporting that Texas habeas reform bill was expected to pass promptly, and that Texas Governor George Bush was "ready to sign" habeas bill).

17. *See* Act of May 24, 1995, S.B. 440, § 1, 74th Leg., R.S. (to be codified at TEX. CODE CRIM. PROC. ANN. art. 11.071) (establishing procedures for habeas relief in death penalty cases); Act of May 24, 1995, S.B. 440, § 5, 74th Leg., R.S. (to be codified at TEX. CODE CRIM. PROC. ANN. art. 11.07) (amending procedures for habeas corpus applicants in noncapital cases). Prior to the enactment of Article 11.071, all persons convicted of a felony, regardless of the penalty imposed, petitioned the state for a writ of habeas corpus under Article 11.07. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977 & Supp. 1995) (detailing procedure for pursuing habeas relief).

18. Act of May 24, 1995, S.B. 440, § 1, 74th Leg., R.S. (to be codified at TEX. CODE CRIM. PROC. ANN. art. 11.071).

habeas corpus process concurrent with the ordinary appellate process, so that at the conclusion of both processes, the condemned person is left with no remedy other than limited federal relief.[19]

Prior to the enactment of Article 11.071, death penalty cases proceeded through Texas's criminal appeals system,[20] with final, but infrequently obtained, review from the United States Supreme Court.[21] If the death-row inmate was unsuccessful in the appeals process, he or she could attempt to obtain habeas corpus relief in Texas state courts.[22] If again unsuccessful, the convicted individual could then seek habeas corpus relief in federal court,[23] with the still unlikely possibility of Supreme Court review.[24]

Although the habeas corpus process prior to the enactment of Article 11.071 was long and tedious, it allowed persons who were wrongly convicted and sentenced to death sufficient time to acquire the evidence needed to prove their innocence.[25] This newly

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19. *See* Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 225 & n.1 (1992) (noting that in capital cases, federal courts can be petitioned for habeas relief once state habeas proceedings are exhausted).

20. *See, e.g.*, Matamoros v. State, 901 S.W.2d 470, 473–74 (Tex. Crim. App. 1995) (hearing direct appeal from murder conviction and death sentence); *see also* Kelli Hinson, Comment, *Post-Conviction Determination of Innocence for Death Row Inmates*, 48 SMU L. REV. 231, 236 (1994) (detailing direct-appeal process for capital offenders, which attacks "errors of law" apparent from record). *See generally* Chuck Miller et al., *Annual Survey of Texas Law: Criminal Law*, 48 SMU L. REV. 1077, 1111 (1995) (discussing recent developments in capital murder trial procedure).

21. *See* Christopher E. Smith & Avis A. Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 CONN. L. REV. 53, 64 (1993) (noting that Supreme Court rarely grants review of habeas corpus cases because most certiorari petitions seeking such relief are lacking novel legal issues or are unreviewable because issues raised make it impossible to decide in prisoner's favor).

22. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977 & Supp. 1995) (outlining procedures for invoking writ of habeas corpus).

23. *See* JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 97–103 (1985) (providing overview of federal habeas corpus process).

24. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 362 (1991) (estimating that Supreme Court only reviews between three and seven habeas corpus cases per term involving state and federal prisoners).

25. *See* James Cullen, *140 Days of Solony*, TEX. OBSERVER, June 16, 1995, at 5 (describing how evidence of prisoner's innocence was hidden by sheriff's department and not discovered until after conviction). The attorney for death-row inmate Andrew Lee Mitchell spent five years obtaining a hearing. *Id.* At that hearing, eight years after Mitchell had been convicted of capital murder, it was discovered that the Smith County Sheriff's Department had concealed exculpatory evidence during trial. *Id.* In 1993, the Court of Criminal Appeals finally released Mitchell from jail. *Id.*

acquired evidence was often obtained through the assistance of newspaper reporters, television journalists, or organized community efforts.[26] By shortening the time frame during which a wrongly convicted person can acquire evidence of actual innocence, Texas's new habeas corpus process may actually promote the execution of innocent persons.

Texas's new law raises two primary questions. The first question is whether an unseemly rush toward execution will measurably increase the possibility of a miscarriage of justice at the expense of innocent individuals. Although this first question is unanswered as of yet, the Texas Legislature has promised that the answer will be provided through the crucible of the new habeas corpus procedure.[27] The second question, and the one addressed in this Article, is whether the new habeas corpus process passes muster under the Texas Constitution, particularly the Texas Bill of Rights.[28]

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26. *See* Kyles v. Whitley, 5 F.3d 806, 821–22 (5th Cir. 1993) (explaining how television report prompted witness to call police regarding car he purchased from murder suspect), *rev'd*, 115 S. Ct. 1555 (1995); Fairchild v. Lockhart, 979 F.2d 636, 641 (8th Cir. 1992) (noting that witness reported seeing murder suspect's car in area different from where abduction occurred following television report), *cert. denied*, 113 S. Ct. 3051 (1993); STAFF OF HOUSE COMM. ON THE JUDICIARY, 103D CONG., 2D SESS., REPORT ON CAPITAL PUNISHMENT 14 (Comm. Print 1994) (detailing story of documentary filmmaker Errol Morris who unearthed prosecutorial misconduct and obtained another person's taped confession, all in search of convicted inmate's innocence); Letter from Dan Morales, Attorney General, to Kathy Hackett, Texas Civil Rights Project (June 12, 1992) (on file with the *St. Mary's Law Journal*) (noting that media attention revealed evidence of defendant's innocence that was not presented at trial). Erroll Morris's film, *The Thin Blue Line*, uncovered inconsistencies in the conviction trial of Randall Dale Adams. STAFF OF HOUSE COMM. ON THE JUDICIARY, 103D CONG., 2D SESS., REPORT ON CAPITAL PUNISHMENT 14 (Comm. Print 1994). Adams was released from prison in 1989 after serving over 12 years for a crime he did not commit. *Id.* at 7. For a more detailed discussion of the Randall Dale Adams story, see Montgomery Brower et al., *Crossing a Line That Is Not Thin at All, Randall Dale Adams Wins Release from a Texas Prison*, PEOPLE, Apr. 10, 1989, at 155, 155–56; Mark Singer, *Profiles—Errol Morris*, NEW YORKER, Feb. 6, 1989, at 38, 38–72.

27. *See* William Murchison, *We All Want Habeas Reform*, TEX. LAW., Apr. 24, 1995, at 19 (noting that lawmakers are seeking to rectify criminal justice system's "inability . . . to match actions (executions) with intentions (sentences)"). Lawmakers refer to this as the "scandal in the criminal justice system." *Id.*

28. The United States Supreme Court has been reluctant to intervene in state criminal law matters that comport with the Fourteenth Amendment to the United States Constitution. *See* Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853, 902–05 & nn. 173–74 (discussing how Supreme Court has retreated from its position of implied authority to sue for Fourteenth Amendment violations). Long before the Fourteenth Amendment extended the reach of the federal bill of rights to protect against abusive state power in criminal cases, the states were the sole protectors of free-

The absolute guarantee of an individual's right to habeas corpus relief is deeply embedded in Texas's history. Although federal decisions have restricted the availability of federal habeas relief,[29] an examination of the intentions of the framers of each Texas constitution strongly supports the preservation of the fundamental liberty protection of habeas review afforded each Texan. Because the writ's strength derives from the Texas Constitution, this Article traces the history of the Texas habeas corpus provision, and specifically discusses the perspectives of various delegates to the constitutional convention. A discussion of Texas case law follows, which further solidifies the importance of habeas relief.

This Article asserts that Article 11.071 unconstitutionally restricts the guarantee of the writ of habeas corpus by requiring death-row inmates to file the writ concurrent with a direct appeal. After a brief overview of the relevant provisions of Article 11.071, this Article considers whether the Texas Legislature should be allowed to shorten the time period for seeking habeas relief, given the framers' circumspect construction of the writ guarantee. Next, this Article queries whether Article 11.071 violates the due course of law provisions of the Texas Constitution by denying death-row inmates the opportunity to petition the courts to challenge the constitutionality of the conviction. Finally, this Article addresses the question of whether Article 11.071 runs afoul of the Texas equal rights provision by withholding effective writ relief from only those inmates condemned to death.

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dom. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986) (stating that "the federal constitution sets the floor for individual rights; state constitutions establish the ceiling"). For these reasons, this Article examines only the state constitutional arguments against Article 11.071. In the criminal justice arena, state courts and state constitutions should be the primary guarantors of individual rights and liberty.

29. *See* McCleskey v. Zant, 499 U.S. 467, 487–90 (1991) (applying cause and prejudice standard to abusive writs); Engle v. Isaac, 456 U.S. 107, 128 (1981) (discussing how Great Writ is costly to society and permits federal intrusion into state court decisions); Stone v. Powell, 428 U.S. 465, 480–82 (1976) (declining federal habeas relief for Fourth Amendment claim when "full and fair opportunity" to litigate was previously provided by state court).

II. Federal Habeas Corpus Analysis

A. *Habeas Corpus in the United States Constitution*

Although this Article does not measure the new Texas habeas law against federal constitutional standards, a general overview of federal habeas law is helpful to better understand the overall importance of the writ. The principal purpose of the writ of habeas corpus is to provide a prisoner with the means to challenge the legality of his or her confinement outside of the ordinary appellate process.[30] Habeas corpus law in the United States has evolved along two tracks—federal and state—yet the Great Writ itself existed long before the colonization of North America.[31] Legal historians have traced the origins of the writ back to the Magna Carta.[32] Over 450 years after the Magna Carta, the English Parliament passed the Habeas Corpus Act of 1679.[33] Early statutory origins of the writ indicate that its function was initially to challenge arbitrary confinement by the English Crown's courts.[34] Significantly, however, the American colonies later recognized the Great Writ as a common-law right.[35]

The Framers of the United States Constitution incorporated the fundamental liberty protection of habeas review into Article I, Section 9, which states: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Inva-

30. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 402 (1963) (acknowledging government's responsibility for granting immediate release if imprisonment does not conform to fundamental requirements of law); Townsend v. Sain, 372 U.S. 293, 311–12 (1963) (recognizing writ of habeas corpus as original civil proceeding for unlawful detention of liberty); McNally v. Hill, 293 U.S. 131, 136–37 (1934) (describing function of writ as inquiry into lawfulness of prisoner's detention).

31. *See* Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 Ohio St. L.J. 337, 337–45 (1983) (providing historical background for development of habeas corpus jurisprudence in United States).

32. *See* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 Notre Dame L. Rev. 1079, 1089 (1995) (noting that habeas corpus arose from social and legal process of Magna Carta).

33. *See id.* at 1095–1101 (discussing historical development of 1679 act); *see also* Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 460–63 (1966) (discussing rules of implementation for Habeas Corpus Act of 1679).

34. Note, *Development in the Law—Federal Habeas Corpus*, 83 Harv L. Rev. 1038, 1045 (1969) (noting that Habeas Corpus Act of 1679 grew out of jurisdictional warfare in England during 17th century).

35. *Id.*

sion the public Safety may require it."[36] Subsequently, the First Congress of the United States enacted the Judiciary Act of 1789,[37] which gave federal courts jurisdiction to issue writs of habeas corpus for federal prisoners.[38] This jurisdiction was extended by the Habeas Corpus Act of 1867,[39] which provided for federal judicial review of cases involving state prisoners whose liberties were restrained in violation of federal law.[40] Congress codified the Habeas Corpus Act with little change, extending federal habeas relief to state prisoners to permit collateral review of their convictions.[41] Today, each state has its own habeas corpus provision;[42] however, as this Article discusses, Texas's constitutional provision is fairly unique in its absoluteness.

B. *Federal Case Law*

Over the past several years, the United States Supreme Court has steadily narrowed federal habeas corpus relief.[43] For example, in *Kuhlmann v. Wilson*,[44] the Supreme Court decided that a death-row inmate should have only one chance to obtain federal habeas

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36. U.S. CONST. art. I, § 9, cl. 2.

37. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.).

38. *Id.* ch. 20, § 14, 1 Stat. at 81–82 (current version at 28 U.S.C. §§ 1651, 2254 (1988)).

39. Habeas Corpus Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (current version at 28 U.S.C. §§ 2241–55 (1988)).

40. *Id.* § 1, 14 Stat. at 385–87; *see Ex parte* Siebold, 100 U.S. 371, 398 (1879) (allowing habeas corpus review to challenge constitutionality of prisoner's conviction).

41. *See* 28 U.S.C. § 2254(a) (1988) (stating that federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in [state] custody . . . only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"); *Townsend*, 372 U.S. at 311 (recognizing that hearing provisions of 1867 act remain constant in current codification).

42. *See* Elizabeth A. Faulkner, *The Right to Habeas Corpus: Only in the Other Americas*, 9 AM. U. J. INT'L L. & POL'Y 653, 653–54 & n.5 (1994) (noting that freedom from unlawful detention is basis for each state enacting its own habeas corpus statute).

43. *See* Kevin E. Teel, *Federal Habeas Corpus: Relevance of the Guilt Determination Process to Restriction of the Great Writ*, 37 SW. L.J. 519, 530–42 (1983) (discussing numerous Supreme Court decisions that reveal Court's hostility toward federal habeas review and reflect substantive and procedural hurdles that restricted habeas relief); *see also* Maureen A. Dowd, Note, *A Comparison of Section 1983 and Federal Habeas Corpus in State Prisoners' Litigation*, 59 NOTRE DAME L. REV. 1315, 1322-25 (1984) (suggesting several reasons for Supreme Court's narrowing of federal habeas review, including compromise of finality of state criminal convictions, impact on state autonomy, and reduction of federal caseload).

44. 477 U.S. 436 (1986).

corpus relief.[45] Moreover, in *Teague v. Lane*,[46] the Supreme Court established an anti-retroactivity provision that precludes a writ applicant from seeking the benefit of new habeas corpus law.[47]

In *Herrera v. Collins*,[48] the Court imposed further restrictions by eliminating federal habeas relief for death-row inmates claiming actual innocence.[49] The Supreme Court held in *Herrera* that a claim of actual innocence does not entitle a death-row inmate to federal relief because the trial court is the appropriate forum for determining factual innocence or guilt in criminal cases.[50] The Court emphasized that federal habeas review exists not to correct errors of fact, but to ensure that individuals are not imprisoned in violation of the due process requirements of the federal constitution.[51]

Federal courts have also granted states broad discretion to determine the procedures governing postconviction remedies.[52] In fact, state authorities need not even provide an avenue to collaterally attack a conviction, or any mechanism for habeas corpus relief.[53] This discretion has created a variety of principal postconviction remedies among the states.[54] Furthermore, deference to state postconviction remedies diminishes the necessity for federal habeas

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45. *See Kuhlmann,* 477 U.S. at 454 (stating that purpose of habeas corpus demands that successive petitions for federal habeas relief should only be entertained "where prisoner supplements his constitutional claims with a colorable showing of actual innocence").

46. 489 U.S. 288 (1989).

47. *Teague,* 489 U.S. at 310.

48. 113 S. Ct. 853 (1993).

49. *Herrera*, 113 S. Ct. at 862–63.

50. *Id.* at 860.

51. *Id.*

52. *See* Murray v. Giarratano, 492 U.S. 1, 7 (1989) (noting that Sixth and Fourteenth Amendments do not require states to appoint counsel for prisoners seeking postconviction relief); White v. Swenson, 261 F. Supp. 42, 56 (W.D. Mo. 1966) (stating that responsibility for postconviction policy rests with state courts, and asserting that federal courts should cooperate with implementation).

53. *See* United States v. MacCollom, 426 U.S. 317, 323 (1976) (noting that federal constitution "does not establish any right to collaterally attack a final judgment of conviction"); *see also* Fay v. Noia, 372 U.S. 391, 423–24 (1963) (stating that habeas corpus is purely civil remedy, rather than integral part of criminal justice system).

54. *See* Alice McGill, Comment, Murray v. Giarratano: *Right to Counsel in Postconviction Proceedings in Death Penalty Cases*, 18 HASTINGS CONST. L.Q. 211, 218–19 (1990) (discussing jurisdictional differences in postconviction remedies, including how Texas's remedy is based on common-law writ of habeas corpus, while other states have statutory postconviction hearing acts or are modeled on federal habeas corpus statute).

corpus relief.[55] The Supreme Court's restrictive approach to habeas corpus doctrine suggests that federal courts are unlikely to find fault with the preclusive procedural contours and the substantive import of Article 11.071.

III. The Texas Writ of Habeas Corpus

A. *History of Article I, Section 12: The Habeas Corpus Right*

Although the federal habeas right has been severely restricted, an examination of the intent of the framers of each Texas constitution illustrates that the right to habeas corpus relief is sacred in Texas. Over a period of forty-three years—from 1833 to 1876—the Great Writ became an inviolable writ of right in Texas, which was never to be suspended. The importance of the writ of habeas corpus throughout Texas's history is unquestionable. Texans have lived under a number of different state constitutions, but each constitution has contained a bill of rights with a habeas corpus provision.[56]

Texas's constitutional history began in 1833, when a convention of settlers who were disillusioned with the central government in Mexico City assembled to propose a new constitution.[57] At that time, Texas had not yet gained its independence from Mexico, and was part of the State of Coahuila y Tejas.[58] Led by Stephen F. Austin, the delegates to the convention wished to disengage Texas from Coahuila and make Texas a separate, sovereign state within the Mexican confederation.[59] In seeking a localized government, the Texas delegates considered the creation of a judiciary to be of great importance to the independence of Texas.[60] The delegates

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55. *See* Swain v. Pressley, 430 U.S. 372, 381–84 (1977) (finding District of Columbia's postconviction remedy sufficient to protect applicants' federal right to collateral relief).

56. *See* Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (noting that each of Texas's five constitutions since gaining independence from Mexico has placed bill of rights in first article of constitution). The Texas Court of Criminal Appeals noted that the placement of the bill of rights "indicates the degree of importance of these provisions to the drafters of the constitution and the citizens of this state." *Id.*

57. T.R. Fehrenbach, Lone Star: A History of Texas and the Texans 180–81 (1983).

58. *Id.*

59. *Id.* at 181-82.

60. *See* David G. Burnet, The Memorial to Congress Requesting Separate Statehood (1833) (discussing problems with remote government, including crimes that go unpunished and impracticable nature of judicial administration under centralized gov-

also displayed concern over habeas corpus relief, as evidenced by the language in Article 13 of the constitution proposed in 1833, which read in part: "The privilege of the Writ of Habeas Corpus shall not be suspended, except when in cases of rebellion, or invasion, the public safety may require it."[61] This language is verbatim from the habeas corpus provision in the United States Constitution.[62] Although the Mexican government rejected the proposed 1833 constitution, this document nonetheless laid a foundation for the first Texas constitution.

In 1836, Texas became a free, sovereign, and independent republic,[63] vested with all the rights of an independent nation. The first constitution, which was adopted by the Republic of Texas in 1836, included a declaration of rights that contained the same habeas corpus provision included in the 1833 proposed constitution.[64] The delegates responsible for the 1836 constitution declared that one of the great injustices perpetrated by the Mexican government was the wrongful incarceration of Stephen F. Austin, a Texas political leader who had encouraged acceptance of the 1833 proposed constitution.[65] The framers of the constitution of the fledgling Republic were understandably distrustful of government, and believed that the rights of the people should be free from governmental intrusion.[66] Indeed, the framers forcefully stated their beliefs in the preamble to the 1836 declaration of rights:

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ernment), *reprinted in* DOCUMENTS OF TEXAS HISTORY 76, 78 (Ernest Wallace & David M. Vigness eds., 1963). A localized judiciary would alleviate the problems associated with having to seek justice "seven hundred miles distant from [the] central population." *Id.*

61. WILLIAM H. WHARTON, THE PROPOSED CONSTITUTION FOR THE STATE OF TEXAS (1883), *reprinted in* DOCUMENTS OF TEXAS HISTORY 80 (Ernest Wallace & David M. Vigness eds., 1963).

62. U.S. CONST. art. I, § 9, cl. 2.

63. The Declaration of Independence of the Republic of Texas (1836), *reprinted in* TEX. CONST. app. 478, 479 (Vernon 1993).

64. Constitution of the Republic of Texas, Declaration of Rights (1836), *reprinted in* TEX. CONST. app. 493, 494 (Vernon 1993).

65. *See* Robert E. Hall, *Remonstrance—Citizen's Weapon Against Government's Indifference*, 68 TEX. L. REV. 1409, 1417 (1990) (discussing arrest and incarceration of Stephen F. Austin by Mexican government, which believed that Austin was guilty of treason in attempting to establish independent state of Texas).

66. *See* Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 96–97 (1988) (noting confluence of influences such as Jacksonian Democracy Movement, American Revolution, English and Spanish common law, and abuses of Mexican government, all of which prompted framers to provide protections for individual rights).

> This declaration of rights is declared to be a part of this Constitution, and shall never be violated on any pretence whatever. And in order to guard against the transgression of the high powers which we have delegated, we declare that everything in this bill of rights contained, and every other right not hereby delegated, is reserved to the people.[67]

Nine years later, delegates gathered for the 1845 statehood convention, over which Thomas J. Rusk, a veteran of the 1836 convention, presided.[68] The habeas corpus provision that emerged from the 1845 convention remained textually identical to the 1833 proposed constitution.[69] The provision, however, was severed from the text of the 1836 declaration of rights and presented separately as its own guarantee in the bill of rights.[70] Additionally, the 1845 delegates moved the bill of rights from the end of the constitution to the beginning, including it as Article I.[71] The delegates prefaced the bill of rights with the preamble: "That the general, great, and essential principles of Liberty and Free Government may be recognized and established, we declare that. . . ."[72] Thus, the framers of the 1845 constitution clearly intended the bill of rights to protect the rights of individuals. The bill of rights section in the two constitutions that immediately followed—the 1861 secession constitution and the 1866 post-Civil War constitution—contained the same habeas corpus provision as the 1845 constitution.[73]

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67. Constitution of the Republic of Texas, Declaration of Rights (1836), *reprinted in* TEX. CONST. app. 493, 494 (Vernon 1993).

68. *See* Robert E. Hall, *Remonstrance—Citizen's Weapon Against Government's Indifference*, 68 TEX. L. REV. 1409, 1420 (1990) (noting that Thomas J. Rusk served as Chief Justice of Texas Supreme Court during Republic and was elected president of 1845 statehood convention).

69. TEX. CONST. of 1845 art. I, § 10, *reprinted in* TEX. CONST. app. 502, 503 (Vernon 1993).

70. *Compare* Constitution of the Republic of Texas, Declaration of Rights (1836) (incorporating habeas corpus provision with other language), *reprinted in* TEX. CONST. app. 493, 494 (Vernon 1993) *with* TEX. CONST. OF 1845 art. I, § 10 (allowing habeas provision to stand on its own), *reprinted in* TEX. CONST. app. 502, 503 (Vernon 1993).

71. TEX. CONST. OF 1845 art. I, *reprinted in* TEX. CONST. app. 502, 502 (Vernon 1993).

72. *Id.*

73. *See* TEX. CONST. of 1866 art. I, § 10 (noting that only under extreme circumstances, such as rebellion or threat to public safety, could habeas corpus be suspended), *reprinted in* TEX. CONST. app. 557, 558 (Vernon 1993); TEX. CONST. of 1861 art. I, § 10 (determining that habeas corpus could not be suspended except under extreme circumstances), *reprinted in* TEX. CONST. app. 529, 530 (Vernon 1993).

Subsequently, as part of the Reconstruction movement, the delegates gathered at the 1868 convention to rewrite the Texas Constitution in accordance with Northern dictates. The 1868 convention created a document that was representative of prevailing republican thought and national centralization.[74] The 1869 constitution strengthened the right to habeas corpus relief by providing that only the legislature could suspend the writ.[75] Earlier Texas constitutions had failed to specify who or which branch of government could suspend the writ of habeas corpus, which led to the presumption that anyone could suspend it.

In 1869, political turmoil ruled the day. With the help of the Radical Republicans, and with the Carpetbaggers'[76] penchant for voting fraud and intimidation tactics, E.J. Davis was elected governor.[77] Davis wreaked lawless havoc in Texas. He unilaterally changed laws, extended his own term of office, placed all males between the ages of eighteen and forty-five under his personal command, created martial law under which he punished offenders, granted criminals the honor of the police badge, and allowed this renegade police force to terrorize the people.[78] In 1874, the Texas militia forced Governor Davis to surrender his governorship and abide by his electoral defeat at the hands of Democrat Richard Coke.[79] Nevertheless, Davis's regime left behind a long and deeply trodden path of political, judicial, and social damage.[80]

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74. T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 411 (1983). In 1868, Texas democrats attempted to invalidate a state election, which republicans won by sitting out of the elections. *Id.* The elections were not invalidated, and because of the republican victory, only six of the men that attended the 1866 constitutional convention attended the constitutional convention of 1868. *Id.*

75. TEX. CONST. of 1869 art. I, § 10, *reprinted in* TEX. CONST. app. 591, 592 (Vernon 1993). The provision stated, "The privileges of the writ of habeas corpus shall not be suspended, except by act of the Legislature, in case of rebellion or invasion, when the public safety may require it." *Id.*

76. *See* T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 412–13 (1983) (noting that term "Carpetbaggers" referred to political and economic opportunists who arrived in Texas after Civil War carrying all of their worldly goods in cloth travel bags). Carpetbaggers were political buccaneers searching for opportunity in the aftermath of the war. *Id.* at 413.

77. *Id.* at 413-15.

78. *Id.* at 416-26.

79. *Id.* at 431–32.

80. T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 433 (1983).

When the constitutional convention of 1875 assembled, Texans were permanently scarred by the governmental abuse they had suffered, and they were strongly influenced by the pre-Populist Grange movement.[81] They manifested their political reaction and disdain for big business in the deliberately "anti-government" document that they created.[82] The dominant purpose of the 1876 constitution was to restrict the powers of state government by tying the hands of the legislative and executive branches.[83] The 1876 constitution memorialized Texans' sentiments that no government, legislature, or governor should be trusted. The issues that concerned the 1875 delegates were strikingly similar to those that troubled the drafters of the 1836 constitution.[84] The delegates sought to ensure that Texans would never again experience governmental abuse of their rights.[85] Consequently, in 1876, the right to a writ of habeas corpus became an absolute right.

The constitution of 1876 revised the language of the habeas corpus provision in three important ways. First, the writ of habeas corpus became an inviolable "writ of right," rather than a mere "privilege" as in prior constitutions.[86] Second, the writ became a right never to be suspended under any circumstance, not even by the legislature, whereas under the 1869 constitution, the legislature had the sole power to suspend the writ.[87] Finally, the 1876 constitution directed the legislature to "enact laws to render the remedy

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81. For more detailed discussions of the decidedly populist bent of the 1875 convention and the origins of the 1876 constitution, see JAMES C. HARRINGTON, TEXAS BILL OF RIGHTS LITIGATION MANUAL §§ 3.2–.3 (2d ed. 1994); John W. Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 TEX. L. REV. 1615, 1624–27 (1990); Mikal Watt & Brad Rockwell, *The Original Intent of the Education Article of the Texas Constitution,* 21 ST. MARY'S L.J. 771, 785-91 (1990); John W. Mauer, Southern State Constitutions in the 1870's: A Case Study of Texas *passim* (1981) (unpublished Ph.D. dissertation, Rice University) (on file with the *St. Mary's Law Journal*).

82. *See* T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 434–35 (1983) (noting that Texas Constitution of 1876 was "antigovernment instrument").

83. *Id.* at 435.

84. *Id.* at 437.

85. *Id.*

86. *Compare* TEX. CONST. art. I, § 12 (stating that "[t]he writ of habeas corpus is a *writ of right*") (emphasis added) *with* TEX. CONST. OF 1845 art. I, § 10 (stating that "[t]he *privileges* of the writ of habeas corpus shall not be suspended") (emphasis added), *reprinted in* TEX. CONST. app. 502, 503 (Vernon 1993).

87. *Compare* TEX. CONST. art. I, § 12 (stating that "[t]he writ of habeas corpus . . . *shall never be suspended*") (emphasis added) *with* TEX. CONST. OF 1869 art. I, § 10 (establishing that "[t]he privileges of the writ of habeas corpus shall not be suspended, *except by*

speedy and effectual."[88] Thus, the wording of the 1876 provision represents a marked departure from all former habeas corpus provisions.

The 1875 convention debates on the adoption of the bill of rights clarify the meaning and purpose behind at least two of these changes to the habeas corpus provision. Before final passage, the delegates engaged in extensive discourse regarding how, if at all, to amend the habeas corpus section of the previous constitution.[89] During this time, the delegates debated the meaning of the term "natural right."[90] One of the delegates, E.L. Dohoney, argued that because "liberty was a personal right, and the writ of habeas corpus was the right to protect that natural right," habeas corpus was a "writ of right."[91] This language is reflected in the bill of rights provision which provides that the natural right of liberty should never be taken away except by due course of law.[92] Accordingly, habeas corpus—the writ of right—came to protect the individual's natural right of liberty.

The 1875 delegates further stipulated that the legislature should not have the power to suspend the writ.[93] Delegate W.B. Wright, describing the sentiments of the convention delegates, stated: "History repeated itself, and they could not tell what legislatures might do in the future when they obtained control of those halls, but they knew what they [the legislators] had done in the past ten years."[94] In addition, delegate George Flournoy proclaimed that he "could not foresee any condition of things when it should not be lawful for a citizen of Texas to appeal to the courts of his coun-

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act of the legislature") (emphasis added), *reprinted in* TEX. CONST. app. 591, 592 (Vernon 1993).

88. TEX. CONST. art. I, § 12.

89. *See* DEBATES IN THE TEXAS CONSTITUTION OF 1875, at 290–95 (Seth S. McKay ed., 1930) (summarizing delegates' discussions regarding underlying importance of writ of habeas corpus).

90. *See id.* at 291 (discussing meaning of term "natural right").

91. *Id.* at 292.

92. TEX. CONST. art. I, § 19.

93. *See* DEBATES IN THE TEXAS CONSTITUTION OF 1875, at 290–94 (Seth S. McKay ed., 1930) (discussing various Texas delegates' views concerning legislative power to suspend writ of habeas corpus).

94. *Id.* at 292. When delegate F.S. Stockdale proposed that the writ should be suspended by the legislature in times of war and unrest, Wright purportedly replied that the legislature "should not have the power to suspend the writ, no matter what the circumstances, and that a man's liberty should not be taken except by due course of law." *Id.*

try."[95] As a result of these sentiments, the 1876 Texas Bill of Rights concludes with a final section that states: "[E]verything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void."[96] This final provision is consistent with the language and ideas embodied forty years earlier in the preamble to the Republic's declaration of rights,[97] and is itself a guarantee of the inalienability of the Texas Bill of Rights guarantees.[98]

The delegates' third change to the habeas corpus provision—the addition of the "speedy and effectual" provision—compels the courts to construe habeas corpus relief broadly.[99] The constitution refers to the *relief* itself when it speaks of the habeas corpus remedy being speedy and effectual. Therefore, to further deter abridgement of personal liberty, habeas corpus relief must be speedy.[100] This right to speedy relief, however, belongs to the indi-

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95. *Id.* at 293. Another delegate, Charles DeMorse, reportedly said that "the little clause [habeas corpus] contained the whole charter of human liberty capable of expression on paper, and he trusted that [the legislature] would not change it in one word or sign." *Id.* The delegates subsequently tabled all proposals to change and limit the writ of habeas corpus. *Id.* at 294. In a last-ditch effort to allow the legislature to suspend habeas corpus, Stockdale proposed that the legislature be granted the affirmative power to suspend all laws. *Id.* This proposal was voted down by a 34 to 26 margin. *Id.* at 295.

96. TEX. CONST. art. I, § 29.

97. *See* Constitution of the Republic of Texas, Declaration of Rights (1836) (stating, "This declaration of rights is declared to be a part of this Constitution, and shall never be violated on any pretence whatever."), *reprinted in* TEX. CONST. app. 493, 493 (Vernon 1993).

98. *See* James P. Hart, *The Bill of Rights: Safeguard of Individual Liberty*, 35 TEX. L. REV. 919, 920 (1957) (explaining that, while Article I, § 29 may appear redundant because it bolsters rights already enumerated in bill of rights, it serves to absolutely ensure that all rights in bill of rights are beyond reach of governmental interference).

99. *See* DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 292–95 (Seth S. McKay ed., 1930) (describing various Texas delegates' views concerning proper breadth of habeas corpus relief). This interpretation is in harmony with the framers' position that the legislature cannot tamper with the writ of habeas corpus because it is the individual's means of protecting the natural right to personal liberty. *See id.* at 292–94 (describing framers' position on natural right to personal liberty and habeas corpus review).

100. The repudiation of the collateral bar rule, which prevented indirect challenges to a conviction before a conviction was directly challenged, is another indicator of the preeminent importance of habeas relief in Texas. *See Ex parte* Tucci, 859 S.W.2d 1, 2 (Tex. 1993) (describing collateral bar rule, and noting that Texas courts do not adhere to it). Thus, a citizen can test the validity of a court order by disobeying it and then seeking habeas relief when jailed, rather than appealing the original order through the courts. *Id.* On the other

vidual, not to the government. The "speedy and effectual" provision assures that the person wrongfully deprived of freedom will receive a speedy hearing on a habeas corpus petition. The provision does not exist to allow the legislature to accelerate the habeas corpus process to accommodate legislators' own agendas.

One final note about the origins of Texas's current constitution underscores the importance of the writ of habeas corpus, namely, the framers' deference to the judiciary as guardian of individual liberty. Although the framers of the 1876 constitution deliberately crafted a document that severely limited the power of the legislative and executive branches, they exhibited deference to the judicial branch.[101] In fact, the one provision of the 1876 constitution that departed from the "systematically restrictive approach" of the new organic charter was the hotly debated judiciary article.[102] Under this article, the delegates ultimately deferred to the comprehensive role of the courts, which were "charged with high and holy duties."[103] The delegates apparently believed that the courts, rather than other state authorities, would best protect individual liberties.[104] Thus, the people of Texas long ago entrusted the judiciary with enforcing the newly defined absolute right of habeas

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hand, federal habeas corpus jurisprudence does adhere to the collateral bar rule. *See* Walker v. City of Birmingham, 388 U.S. 307, 320 (1967) (noting that petitioners, one of whom was Dr. Martin Luther King, Jr., "could not bypass orderly judicial review of [an] injunction before disobeying it").

101. *See* Shepherd v. San Jacinto Junior College Dist., 363 S.W.2d 742, 743 (Tex. 1962) (explaining that Texas Constitution, unlike federal constitution, is not so much grant of powers as it is limitation on government); John W. Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 TEX. L. REV. 1615, 1626 (1990) (recognizing that 1876 constitution set limits on state officials' salaries and curtailed legislature's power to pass certain types of laws); *see also* James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 430–31 (1993) (discussing how 1876 constitution shows change in political climate from expansive central government to populist limited government); *cf.* Samuel D. Myres, *Mysticism, Realism and the Texas Constitution of 1876*, 9 SW. SOC. SCI. Q. 166, 173 (1928) (describing constitution of 1876 as "human document" that evidences attempt to overhaul government completely and restrict any future abuses).

102. John W. Mauer, Southern State Constitutions in the 1870's: A Case Study of Texas 246 (1981) (unpublished Ph.D. dissertation, Rice University) (on file with the *St. Mary's Law Journal*).

103. *Id.* at 248.

104. To ensure judicial accountability and prevent abuses of power, the delegates provided for the direct election of judges. *See id.* at 242–43 (noting how convention protected individual voters by refusing to gerrymander state judicial districts for benefit of white supremacy).

corpus and demanded that the legislature keep its hands off the Great Writ and assure its speedy and effectual implementation.[105]

B. *Texas Case Law*

Despite the rather exceptional evolution of the Texas constitutional habeas corpus right, there is a remarkable dearth of case law defining the contours of the right and what is meant by effectual implementation.[106] Many habeas corpus cases have found their way into the reporters, but most turn on whether the underlying facts support habeas relief.[107] Accordingly, the cases contain little applicable criteria for determining the scope of habeas relief.[108]

Development of Texas habeas corpus jurisprudence lies within the exclusive purview of the state judiciary and, ultimately, with the Texas Court of Criminal Appeals.[109] Consequently, Texas judges may devote as much or as little of their creative legal talent

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105. As General L.D. Ross put it during a convention debate, "That great writ and an independent judiciary go hand in hand, and either is powerless without the other, but combined they form the cornerstone of the citizen's liberty." DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 428 (Seth S. McKay ed., 1930).

106. The cases merely define the import of habeas corpus by determining its procedural scope. *See, e.g.*, *Ex parte* Minor, 146 Tex. Crim. 159, 161, 172 S.W.2d 347, 347 (1943) (emphasizing that writ of habeas corpus cannot provide substitute for appeal); *Ex parte* Meador, 93 Tex. Crim. 450, 451, 248 S.W. 348, 349 (1923) (stating that all provisions relating to writ of habeas corpus "shall be favorably construed in order to give effect to the remedy and protect the rights of the person seeking relief"); *Ex parte* Degener, 30 Tex. Crim. 566, 577, 17 S.W. 1111, 1115 (1891) (establishing that review by habeas corpus extends not only to whether confinement is lawful, but also to manner and degree of restraint).

107. *See Ex parte* Davis, 866 S.W.2d 234, 240 (Tex. Crim. App. 1993) (asserting habeas relief from death penalty sentence should be granted because of error during voir dire); *Ex parte* Kunkle, 852 S.W.2d 499, 501 (Tex. Crim. App. 1993) (considering writ of habeas corpus filed for failure to instruct jury on mitigating evidence); *Ex parte* Earvin, 816 S.W.2d 379, 380 (Tex. Crim. App. 1991) (dismissing writ of habeas corpus because it was improvidently filed).

108. Significantly, though, numerous decisions have used habeas corpus relief to test the legality of an underlying court order or the constitutionality of a statute, without requiring that the order or statute first be challenged in an appeal. Historically, Texas courts have granted habeas relief to individuals challenging the constitutionality of restrictions on freedom of expression. *E.g.*, *Ex parte* Tucci, 859 S.W.2d 1, 2 (Tex. 1993); *Ex parte* Henry, 147 Tex. 315, 331, 215 S.W.2d 588, 597 (1948); *Ex parte* McCormick, 129 Tex. Crim. 457, 462, 88 S.W.2d 104, 107 (1935).

109. *See* TEX. CONST. art. V, § 5 (extending final appellate jurisdiction in criminal cases to Texas Court of Criminal Appeals); *Ex parte* Young, 418 S.W.2d 824, 829–30 (Tex. Crim. App. 1967) (delineating jurisdiction of Texas Court of Criminal Appeals over petitions for writs of habeas corpus); *Ex parte* Boman, 160 Tex. Crim. 148, 149, 268 S.W.2d 186,

as they choose, unfettered by federal case law, to the development of Texas habeas corpus jurisprudence. In *Heitman v. State*,[110] a "magna carta" of Texas state court constitutionalism, the Texas Court of Criminal Appeals held that under our system of federalism, "the states are free to reject federal holdings as long as state action does not fall below the minimum standards provided by federal constitutional protections."[111] Therefore, although the court has not yet created much independent Texas constitutional jurisprudence, it may interpret Article I, Section 12 of the Texas Constitution—the habeas corpus guarantee—in a manner that affords Texas citizens greater protection than that allowed by Article I, Section 9 of the United States Constitution.[112]

The Texas habeas corpus jurisprudence that has developed thus far at least illustrates the importance of the Texas habeas corpus right. For example, in *Ex parte Brandley*,[113] the court ruled that a writ of habeas corpus is an appropriate vehicle under Texas law for testing a due process violation.[114] Further, in *Ex parte Bravo*,[115] the court declared that habeas corpus is necessary "to review jurisdictional defect[s] or denials of fundamental or constitutional rights."[116] The court again determined in *Ex parte Binder*[117] that habeas corpus relief should be available in cases involving a violation of a constitutional right.[118] The court went even further in *State ex rel. Holmes v. Third Court of Appeals*,[119] and found that a

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187 (1954) (holding that upon final felony conviction, writs of habeas corpus should be heard in Texas Court of Criminal Appeals, not district courts).

110. 815 S.W.2d 681 (Tex. Crim. App. 1991).

111. *Heitman*, 815 S.W.2d at 682.

112. *See* Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985) (asserting that decision made under state constitution rendered unnecessary any discussion of federal constitution); James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 437–41 (1993) (suggesting framework for litigation of state constitutional issues, and noting that use of independent state constitutional grounds potentially removes United States Supreme Court's jurisdiction to review decision).

113. 781 S.W.2d 886 (Tex. Crim. App. 1989), *cert. denied*, 498 U.S. 817 (1990).

114. *Brandley*, 781 S.W.2d at 887.

115. 702 S.W.2d 189 (Tex. Crim. App. 1982).

116. *Bravo*, 702 S.W.2d at 193; *see also Ex parte* Banks, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989) (holding that proper grounds for habeas corpus review includes jurisdictional defects and denials of fundamental rights).

117. 660 S.W.2d 103 (Tex. Crim. App. 1983), *overruled in part by* State *ex rel.* Holmes v. Third Court of Appeals, 885 S.W.2d 389 (Tex. Crim. App. 1994).

118. *Binder*, 660 S.W.2d at 106.

119. 885 S.W.2d 389 (Tex. Crim. App. 1994).

writ of habeas corpus should be available for death-row inmates who can produce newly discovered evidence of actual innocence.[120] The court stated that to hold otherwise would amount to an execution in violation of a constitutional and fundamental right.[121] Thus, the Texas Court of Criminal Appeals has recognized that the Texas habeas corpus right is significant, even though the court has not yet clearly defined the dimensions of habeas relief.

IV. TEXAS'S NEW HABEAS CORPUS PROCEDURE FOR DEATH PENALTY CASES

The recent legislative amendments to Texas's habeas procedures stand in stark contrast to the case law and constitutional developments that illustrate the significance of the Great Writ in Texas. Article 11.071 dramatically alters the habeas corpus procedure for applicants seeking relief from a death penalty sentence. The new article, which became effective September 1, 1995, generally requires that a habeas corpus proceeding run concurrent with the applicant's direct appeal.

Under Article 11.071, a death-row inmate must apply for habeas corpus relief no later than forty-five days after filing the original brief on direct appeal.[122] Late applications are presumed untimely, and with the exception of a few very narrow circumstances in which a convicted capital felon can establish "good cause by showing particularized, justifying circumstances" for the delay, a death-

120. *Holmes*, 885 S.W.2d at 397–98. For a lengthier discussion of this decision and its procedural history, see James C. Harrington, *Does Real Innocence Count in Capital Convictions?*, 1 TEX. FORUM CIV. LIB. & CIV. RTS. 38, 39–44 (1994).

121. *Holmes*, 885 S.W.2d at 397. At the very least, *Holmes* establishes a due course of law right not to be executed when there is evidence of actual innocence. The court in *Holmes* interpreted the United States Supreme Court's decision in *Herrera v. Collins*, 113 S. Ct. 853 (1993), to mean that the execution of an innocent person would amount to a violation of the Due Process Clause of the Fourteenth Amendment. *Id.* The court of criminal appeals agreed with the *Herrera* proposition, and held that habeas corpus provided the appropriate vehicle by which a death-row inmate could assert an actual innocence claim based on newly discovered evidence. *Id.* at 398.

122. Act of May 24, 1995, S.B. 440, § 1(4)(a), 74th Leg., R.S. (to be codified at TEX. CODE CRIM. PROC. ANN. art. 11.071). An applicant convicted before September 1, 1995, with no habeas petition pending, must file for habeas relief within 180 days from the date counsel is appointed or within 45 days after the original brief is due on direct appeal, whichever is later. *Id.*

row inmate may apply for only one writ of habeas corpus.[123] Any amended or subsequent application must also establish good cause and must be filed no later than ninety-one days after the applicable due date for the original writ application.[124] Untimely applications are not considered unless the application sets forth specific facts establishing: (1) that the claims could not have been timely raised because the factual or legal bases for the claims were unavailable in the exercise of due diligence; (2) by a preponderance of the evidence that, but for a federal constitutional violation, no rational juror could have found the capital felon guilty beyond a reasonable doubt; or (3) by clear and convincing evidence that, but for a federal constitutional violation, no rational juror would have answered one or more of the special issues in the State's favor.[125] Moreover, failure to show good cause and file before the expiration of ninety-one days constitutes "a waiver of all grounds for relief that were available to the applicant before the last day on which an application could be timely filed."[126]

This new procedure only applies to persons who are condemned to death.[127] The legislature did not impose a time period within which the writ must be sought in noncapital cases.[128] However, the legislature narrowed the habeas corpus procedure in noncapital cases somewhat by permitting, with few exceptions, only one habeas corpus application.[129]

Apart from rigidly confining the new habeas corpus process so that it runs concurrently with direct appeals in capital cases, the 74th Legislature created various other procedural limitations on the right to habeas relief. First, the legislature limited the Texas

123. *See id.* § 1(4)(b) (providing that late applications are to be presumed untimely and may not be considered unless specific facts are established by applicant).

124. *Id.* § 1(4)(h).

125. *Id.* § 1(5)(a)(1)-(3).

126. Act of May 24, 1995, S.B. 440 § 1(4)(g), 74th Leg., R.S. (to be codified at TEX. CODE CRIM. PROC. ANN. art. 11.071).

127. *Id.* § 1.

128. Although this Article does not directly discuss the recent changes to habeas corpus procedure for noncapital cases, many of the arguments presented herein are equally applicable to those changes as well.

129. *See id.* § 5(4)(a)(1)-(2) (listing two exceptions in which subsequent applications for writ of habeas corpus may be filed in noncapital cases).

Court of Criminal Appeals' ability to engage in rulemaking,[130] apparently in an attempt to prevent the courts from ameliorating the harshness of the new statute.[131] Second, despite the addition of the provision for appointing "competent" habeas corpus counsel, Article 11.071 does not set forth any standards to ensure the competency of appointed attorneys.[132] This point is particularly relevant because many habeas corpus claimants raise the issue of ineffective assistance of counsel in death penalty cases.[133] Additionally, in a somewhat disingenuous way, this provision makes the Texas Court of Criminal Appeals a party to undermining the writ's efficacy. Because the court of criminal appeals is responsible for appointing competent counsel upon an application for a writ of habeas corpus,[134] the court may not be too willing to find that an attorney it appointed in a capital habeas case provided ineffective assistance of counsel such that the court must set aside a conviction. Finally,

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130. *Id.* § 6. Section 6 restricts the court's rulemaking authority regarding the new provisions of Article 11.071 to the extent that the court's appellate rules are not to conflict with the statutory procedures. *Id.* This section precludes the court from attempting to elevate Texas constitutional violations to the same level as federal constitutional violations.

131. This observation raises the issue of whether Article 11.071 violates Texas's separation of powers doctrine, a discussion of which is beyond the scope of this Article. *See generally* TEX. CONST. art. II, § 1 (establishing Texas's separation of governmental powers); Meshell v. State, 739 S.W.2d 246, 254–57 (Tex. Crim. App. 1987) (discussing Texas's separation of powers doctrine); Harold A. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1337 (1990) (describing separation of powers under Texas law).

132. *See* Act of May 24, 1995, S.B. 440, § 1(2), 74th Leg., R.S. (to be codified at TEX. CODE CRIM. PROC. ANN. art. 11.071) (establishing habeas applicant's statutory right to "competent counsel," but failing to establish standards of competency). The Texas Legislature merely outlined the appointment process for attorneys "qualified" to handle death penalty cases in district courts. *See id.* § 2 (stating that presiding judge of convicting court appoints trial counsel from list of qualified attorneys as soon as practicable after charges are filed).

133. *See* Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After* Furman, 24 COLUM. HUM. RTS. L. REV. 395, 410–11 & n.86 (1993) (discussing how complexity of law in death penalty cases leads to numerous constitutional errors, most common of which is ineffective assistance of counsel); *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837–41 (1944) (describing death penalty cases in which attorneys failed to present evidence of defendants' mental impairments); *cf.* THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 97 (Mar. 1993) (prepared for State Bar of Tex.) (emphasizing importance of representation in capital cases because state habeas questions of ineffective counsel are raised first on appeal).

134. Act of May 24, 1995, S.B. 440, § 2(d), 74th Leg., R.S. (to be codified at TEX. CODE CRIM. PROC. ANN. art. 26.052).

under Article 11.071, the Texas Court of Criminal Appeals must determine reasonable compensation for appointed counsel, to whom payment is made from state funds.[135] The reimbursement of investigative expenses is left to the discretion of the court.[136] The attorney must reveal and justify the expenses incurred to the court,[137] which may chill defense strategy because the court has discretion to deny reimbursement of expenses.

Because of its severe restrictions, the new habeas procedure raises substantial questions concerning its viability. For example, certain standard points of reversal on direct appeal, such as ineffective assistance of counsel, a violation of a constitutional right, or any other error that surfaces during or after the direct appeal, may be precluded from habeas corpus review simply because the habeas proceeding occurs simultaneously with the appeal. Thus, certain reversible errors may not mature or be timely recognized for consideration in the habeas corpus review. Furthermore, the error may not be strong enough to meet the rigid good-cause exceptions that allow for amended or subsequent habeas review.[138]

V. TEXAS'S NEW HABEAS CORPUS LAW VIOLATES SPECIFIC TEXAS BILL OF RIGHTS PROTECTIONS

The Texas Legislature's attempt to expedite capital executions through Article 11.071 illuminates the twin problems that plague the death penalty system. First, death-row inmates must be ensured that they will receive effective legal representation at all stages of the appellate process.[139] Second, sufficient procedural

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135. Act of May 24, 1995, S.B. 440, § 1(2)(h), 74th Leg., R.S. (to be codified at TEX. CODE CRIM. PROC. ANN. art. 11.071).

136. *See id.* § 1(3) (explaining procedure for reimbursement of expenses).

137. *Id.* § 1(3)(d).

138. *See* Act of May 24, 1995, S.B. 440, § 1(5)(a)(1)-(3), 74th Leg., R.S. (to be codified at TEX. CODE CRIM. PROC. ANN. art. 11.071) (setting forth exceptions that allow for review of subsequent or untimely writ application). The rather remarkable facet of this section is that late relief may be obtained for a violation of the United States Constitution, which the United States Supreme Court already requires, but not for a violation of the Texas Constitution. *See id.* (noting that exceptions are triggered only upon finding of violation of United States Constitution). There is no legislative history explaining why lawmakers relegated Texas's own constitution to such an inferior position, although a reasonable suspicion is that they feared the Texas judiciary would create its own jurisprudence. Whether Texas judges will meekly accept this badge of inferiority remains to be seen.

139. *See* THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 96–97 (Mar. 1993) (prepared for State Bar of Tex.) (advocating substan-

safeguards against executing innocent people must be provided.[140] As previously discussed, the new habeas corpus law fails to address the former problem because the law contains no guidelines to ensure the competency of legal counsel.[141] The question of whether or not the latter problem is sufficiently addressed by the new habeas corpus law can be answered by an inquiry into the constitutionality of Article 11.071.

A. *Article I, Section 12: Habeas Corpus*

The severe limitations that Article 11.071 imposes on the right to habeas corpus threaten to render the writ wholly ineffectual, and such a result would be in direct conflict with the design of the writ's crafters. Article I, Section 12 of the Texas Constitution states: "The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual."[142] The actual phrasing of this Texas constitutional guarantee provides for a greater habeas right than does the federal constitution's habeas corpus provision.[143] The federal provision defines habeas corpus as a mere "privilege," and couches it negatively as a restriction on the United States government that may be suspended in cases of rebellion or invasion as public safety requires.[144] Therefore, the Texas Constitution's recognition of the writ as a right, and the explicit command that it be "effectual," may well signal the demise of Article 11.071 because the new law's narrow limitations on habeas corpus relief exemplify the potential leg-

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tial change in process through which counsel is appointed in habeas corpus cases). The 1993 report published by the Spangenberg Group identifies problems associated with representation in habeas corpus cases. *Id.* The report notes the lack of a state-funded public defender system in Texas, as well as the inability of a defendant to raise ineffectiveness of counsel claims until after conviction. *Id.*

140. KELLIE DWORACZYK, AFTER THE DEATH SENTENCE: APPEALS, CLEMENCY AND REPRESENTATION 12 (Apr. 4, 1994) (House Research Organization) (determining that 60% of death sentences are not reversed when appealed on constitutional or procedural defects).

141. *See supra* note 132 and accompanying text.

142. TEX. CONST. art. I, § 12.

143. *See* Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 111 (1988) (explaining that framers of Texas Constitution, by using affirmative language, intended to grant even greater rights to individuals than those provided by United States Constitution).

144. U.S. CONST. art. I, § 9, cl. 2.

islative abuse that the framers of the Texas Constitution sought to prevent.[145]

Furthermore, the constitution's grant of power to the legislature to enact laws to facilitate habeas corpus relief cannot be construed as permitting statutes of limitations.[146] The legislature should be limited to only those changes that would cause habeas corpus relief to be a faster and more effective remedy for the individual. Implementing changes for the sake of expediting the pace of executions is quite antithetical to the very purpose of the Great Writ.[147]

The extent to which the legislature can narrow the time frame within which to file for habeas corpus relief presents a perplexing problem.[148] This issue arose in a death penalty case in Mississippi,[149] and in a noncapital case in Iowa.[150] Both states upheld three-year statutes of limitations; however, both limitations statutes provided exceptions that permitted applicants to file for habeas relief after the three-year period.[151] Moreover, the constitutional habeas corpus provisions of Iowa and Mississippi specifically permit legislative restrictions; therefore, they are not absolute

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145. *See supra* notes 93–95 and accompanying text.

146. *Cf.* DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 290–95 (Seth S. McKay ed., 1930) (noting delegates' views concerning importance of making right to writ of habeas corpus inviolable).

147. *Cf. id.* at 293 (explaining that framers of habeas corpus provision "could not foresee any condition of things when it should not be lawful for a citizen of Texas to appeal to the courts of his country to say whether or not he was guilty of crime").

148. *See* Michael A. Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 452 (1990–91) (concluding that imposing time limits for filing habeas petitions violates Suspension Clause of United States Constitution).

149. *See* Culberson v. State, 612 So. 2d 342, 347 (Miss. 1992) (considering statute of limitations imposed upon habeas relief).

150. *See* Davis v. State, 443 N.W.2d 707, 709 (Iowa 1989) (addressing issue of whether state constitutional prohibition on state's power to suspend writs of habeas corpus prohibits state from establishing reasonable time restrictions).

151. *See Culberson*, 612 So. 2d at 346 (upholding statute of limitations, and stating that exceptions to Mississippi's statute of limitations are restricted to intervening decisions of supreme court of either Mississippi or United States "which would actually adversely affect the outcome of the conviction or sentence"); *Davis*, 443 N.W.2d at 708 (finding Iowa's statute of limitations constitutional, and noting that statute "does not apply to a ground of fact or law that could not have been raised within the applicable time period"). The dissent in *Culberson* contended that the Mississippi statute violated both the federal and state constitutions by creating time limitations for seeking remedies for convictions that deprive persons of life or liberty. *Culberson*, 612 So. 2d at 353 (Banks, J., dissenting).

guarantees like the writ guarantee in Texas.[152] Because the writ guarantee in Texas is absolute, Article 11.071 likely offends the spirit of the habeas corpus provision in the Texas Bill of Rights.

B. *Article I, Section 13: Open Courts and Due Course of Law*

The Texas constitutional provision that guarantees access to the courts is commonly referred to as the "open courts" provision, and represents the foundation of the Texas due course of law doctrine.[153] Article I, Section 13 of the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[154] The open courts provision originated from chapter 40 of the Magna Carta, which declared: "To none will we sell, to none deny or delay, right or justice."[155] Texas courts have long viewed the open courts provision as guaranteeing a substantive right of redress,[156] and both the express language of the open

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152. The Iowa Constitution provides that "[t]he writ of habeas corpus shall not be suspended, or refused when application is made as required by law, unless in case of rebellion or invasion the public safety may require it." IOWA CONST. art. I, § 13. Thus, the framers of the Iowa Constitution expressly provided general authority for legislative restriction on the exercise of the right of habeas corpus. *Davis*, 443 N.W.2d at 709. The Mississippi Constitution similarly states that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in the case of rebellion or invasion, the public safety may require it, nor ever without the authority of the legislature." MISS. CONST. art. III, § 21.

153. *See* Texas Workers Compensation Comm'n v. Garcia, 893 S.W.2d 504, 520 (Tex. 1995) (describing scope of Texas's open courts guarantee). Because liberty is so important, Texans have yet another constitutional due course of law provision. The Texas due course of law provision is somewhat similar to the Due Process Clause of the 14th Amendment, although stronger in terms of individual citizen protection, and states: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. In fact, the United States Supreme Court has recognized that the due course of law provision of the Texas Constitution may afford greater protection than the Fourteenth Amendment. *See* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) (noting that state courts are free to read their own constitutions more broadly than Supreme Court reads federal constitution). For a more detailed discussion of Texas's open courts and due course of law provisions, see JAMES C. HARRINGTON, TEXAS BILL OF RIGHTS LITIGATION MANUAL §§ 5.1-.4 (2d ed. 1994).

154. TEX. CONST. art. I, § 13.

155. *Id.* interp. commentary (Vernon 1984).

156. *See* Clem v. Evans, 291 S.W. 871, 872 (Tex. 1927) (holding that statute which places burden of proof for disproving fraud on defendants and requires defendants to prove they were prevented from fulfilling promise "by act of God, the public enemy, or by some other equitable reason," violates Article I, § 13 of Texas Constitution because it de-

courts guarantee and the caselaw interpreting that guarantee emphasize its importance.[157]

The text of the open courts provision reflects the high value that the drafters and ratifiers attached to the right of redress. For example, the language of the provision is mandatory and comprehensive.[158] Additionally, there is no emergency exception, and the all-encompassing open courts language differs significantly from the qualifying phrases found in other sections of the Texas Bill of Rights.[159]

The caselaw interpreting the open courts guarantee is equally revealing. Since the adoption of the current constitution, the Texas Supreme Court time and again has reaffirmed its abiding commitment to the open courts right.[160] For example, in *Sax v. Votteler*,[161] the Texas Supreme Court invalidated a special medical malpractice

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nies defendants access to courts); Middleton v. Texas Power & Light Co., 108 Tex. 96, 109, 185 S.W. 556, 560 (1916) (recognizing that legislature cannot deny citizens access to courts as guaranteed by Article I, § 13 of Texas Constitution).

157. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 340–41 (Tex. 1986) (discussing court's commitment to open courts provision, which assures constitutional guarantees of open courts and due process of law).

158. *See* TEX. CONST. art. I, § 13 (stating that "[a]ll courts *shall* be open . . . and every person . . . *shall* have remedy by due course of law") (emphasis added).

159. *See LeCroy*, 713 S.W.2d at 339 (discussing difference between mandatory, all-inclusive language found in Article I, § 13 and qualifying language found in other sections of Texas Constitution).

160. *See, e.g.*, Texas Ass'n of Business v. Air Control Bd., 852 S.W.2d 440, 450 (Tex. 1993) (holding that statute authorizing agency to assess fines and require deposit or bond on fines prior to party seeking judicial review violates open courts provision because statute unreasonably restricts access to courts by mandating forfeiture of judicial review if party does not pay deposit or bond); Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988) (holding that statutory limitation on medical malpractice damages violates open courts provision by denying redress for injuries without adequate substitute); *LeCroy*, 713 S.W.2d at 342 (holding unconstitutional court filing fees that fund general state revenue and not judiciary specifically); Waites v. Sondock, 561 S.W.2d 772, 774 (Tex. 1977) (holding that statute requiring mandatory continuances in cases involving legislators violates open courts provision if party opposing continuance faces irreparable harm from delay in enforcing existing rights because adequate remedy may not be available at later date); Eustis v. City of Henrietta, 90 Tex. 468, 473, 39 S.W. 567, 568-69 (1897) (holding that statute requiring payment of taxes as condition for defending against city's taking of property at tax sale violated open courts provision by denying right to defend title to property); Dillingham v. Putnam, 109 Tex. 1, 4–5, 14 S.W. 303, 304-05 (1890) (holding that statute requiring defeated receivers who are parties to litigation to post bond for full amount of judgment prior to appeal violates open courts provision because it denies receivers same access to judicial relief as other parties).

161. 648 S.W.2d 661 (Tex. 1983).

statute of limitations because it severely curtailed the well-established common-law right of a minor, upon reaching majority, to sue for injuries resulting from another's negligence.[162] The *Sax* court concluded that the legislature may abolish or modify a common-law right only if it concurrently provides an "adequate substitute" or "reasonable alternative."[163]

The *Sax* case is instructive in the context of Article 11.071 in two important ways. First, for purposes of the open courts guarantee, a statute of limitations narrowing the time for a minor to file suit based on a common-law cause of action is surely not as offensive as a statute limiting a death-row inmate's constitutionally guaranteed habeas corpus right of redress. Second, because the writ of habeas corpus is also a substantial common-law right, the legislature may not modify or abridge it without providing an adequate substitute. The Texas Legislature overstepped these bounds in enacting Article 11.071.

When the legislature enacted Article 11.071, thereby basically creating two simultaneous appeals, it eviscerated the underlying liberty right of habeas corpus. This result obtains because the creation of two simultaneous appeals naturally renders one of them meaningless. By the structure of Article 11.071, habeas corpus is the appeal rendered meaningless even though it has historically been a critical means of securing postconviction relief. More importantly, Article 11.071 offers no reasonable substitute or alternative. Indeed, because habeas corpus is a constitutional guarantee of supreme importance, there can in fact be no adequate alternative. Thus, the Texas Legislature has virtually abolished the common-law right of habeas corpus without providing an adequate substitute, thereby violating the Texas open courts guarantee and the due course of law doctrine.

There has been limited legislative activity in other states narrowing the time frame within which an applicant may seek a writ of habeas corpus.[164] *Currier v. Holden*,[165] a Utah case striking down a

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162. *Sax*, 648 S.W.2d at 666–67.

163. *Id.* at 667.

164. *See, e.g.*, IDAHO CODE § 27-2719 (1987) (stating that habeas petition must be filed within 42 days of death sentence); IOWA CODE ANN. § 663A.3 (1994) (establishing three-year statute of limitations for postconviction relief); MISS. CODE ANN. § 99-39-5(2) (Supp. 1995) (noting postconviction relief must be filed within three years after ruling made on direct appeal); *In re* Harris, 855 P.2d 391, 397 (Cal. 1993) (holding that writs of

statute similar to Article 11.071, is the most reasoned opinion on this type of legislation, and may provide guidance for Texas courts.[166] In *Currier*, a Utah court considered legislation limiting the time period in which to apply for habeas corpus relief to no later than three months from the date the trial court denies the motion for new trial.[167] The court declared the statute unconstitutional, relying upon the open courts provision of the Utah Constitution.[168] Reasoning that habeas corpus is "an important constitutionally based personal right,"[169] the court found that the rigid three-month limitation on habeas corpus "did not achieve any legitimate statutory objective by a reasonable means" and deprived individuals of a constitutional remedy.[170]

The Utah Supreme Court, like the Texas Court of Criminal Appeals, has demonstrated great respect for the habeas corpus right, and has referred to the writ as a "precious safeguard of personal liberty" and a "procedure for assuring that [an individual] is not deprived of life or liberty in derogation of a constitutional right."[171] The Utah court's protection of the habeas corpus right illustrates a prime function of the writ, namely, to provide a means to collaterally attack convictions that are so constitutionally flawed that they result in fundamental unfairness.[172] Article 11.071, like the Utah

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habeas corpus must be filed within reasonable time period, and if delayed, with adequate explanation).

165. 862 P.2d 1357 (Utah App. 1993), *cert. denied*, 870 P.2d 957 (Utah 1994).

166. *See Currier*, 862 P.2d at 1360 (outlining petitioner's claims in challenging constitutionality of statute of limitations governing habeas corpus relief). The petitioner in *Currier* argued that the statute undermined the extreme importance of the writ, violated the due course of law provision of the Utah Constitution, and was inherently ambiguous. *Id.*

167. *See id.* at 1360–61 (noting that because statute imposes specific time restrictions in which to file lawsuit after violation of legal right, it acts as statute of limitations).

168. *Id.* at 1372. The Utah open courts provision reads in part:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have a remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting of defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

UTAH CONST. art. I, § 11.

169. *Currier*, 862 P.2d at 1365.

170. *Id.* at 1372. The court noted that the legislature did not display a legitimate governmental objective that warranted keeping a person in prison simply because of a missed deadline. *Id.*

171. Hurst v. Cook, 777 P.2d 1029, 1034 (Utah 1989).

172. *See id.* at 1034-35 (noting that constitutional guarantees of liberty are more highly valued than policy favoring finality of judgments).

statute, creates an artificial procedural barrier to an accused's fundamental right to petition the courts to determine the constitutionality of a conviction and death sentence. Thus, just as the Utah statute offended the Utah open courts provision, Article 11.071 runs afoul of the Texas due course of law doctrine.

C. *Article I, Section 3: Equal Rights*

Article 11.071 may also violate the equal rights guarantee of the Texas Constitution[173] by abridging the habeas corpus and due course of law rights of only the sub-class of criminals who have been sentenced to death. The equal rights guarantee of the Texas Constitution dates back to the 1836 Constitution of the Republic of Texas, which predates the ratification of the Fourteenth Amendment to the United States Constitution by thirty-two years.[174] Contained in Section 3 of the Texas Bill of Rights, the equal rights guarantee includes an affirmative grant of a right to equality along with its negative prohibition on the abridgement of equal rights.[175]

Texas has developed its own test to determine if a statute abridges the equal rights guarantee.[176] Under this test, Texas courts will first determine if the purpose of the statute is valid, and then determine if the classifications drawn by that statute are rationally related to the statute's purpose.[177] This test requires that similarly situated individuals be treated equally under a statutory class unless there is a rational basis for not doing so.[178] Although this test sounds like the low-level scrutiny test used in the federal

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173. TEX. CONST. art. I, § 3. The provision states: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." *Id.*

174. *See* Constitution of the Republic of Texas, Declaration of Rights (1836) (stating that "[a]ll men . . . have equal rights"), *reprinted in* TEX. CONST. app. 493, 493 (Vernon 1993).

175. TEX. CONST. art. I, § 3; *see* Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 98 (1988) (explaining that use of affirmative language in Texas Bill of Rights was deliberate attempt to convey greater liberties and protections to individuals).

176. *See* Whitworth v. Bynum, 699 S.W.2d 194, 196–97 (Tex. 1985) (rejecting defendant's invitation to apply federal equal protection standard because Texas has adopted its own standard, which is at least as protective as federal constitutional standards).

177. *Whitworth*, 699 S.W.2d at 197.

178. *Id.*

equal protection analysis, the Texas test is somewhat more stringent in application.[179]

An application of this test to Article 11.071 reveals that Texas's new habeas corpus law likely violates the equal rights guarantee of the Texas Constitution. The first prong of the Texas equal rights test calls for a determination of whether there is a legitimate state purpose behind the challenged statute.[180] Article 11.071 became law because of legislative concern over the abuse of habeas corpus by death-row inmates and the substantial burden on the state coffers for capital appeals in state and federal courts. In essence, the purpose of the statute was budgetary in nature.[181]

The financial justifications offered for Article 11.071 do not satisfy the requisite legitimate governmental interest. Although budgetary concerns, in many instances, may represent a legitimate governmental interest, these concerns should not be a factor in the habeas corpus analysis. As previously stated, the framers directed that habeas relief be speedy and effectual for the *writ applicant*, not the government, and the framers considered the writ of habeas corpus an inviolable right never to be suspended by the legislature.[182] The framers did not contemplate legislative restriction of habeas corpus relief designed to further legislators' own agendas; rather, they specifically provided that the writ be absolute in nature. Even assuming, however, that it is appropriate, let alone moral, to apply a type of cost-benefit analysis to carrying out the death sentence in the face of possible error, the overall cost to the government to confine a prisoner for life—approximately $18,750 a year—is significantly less than the cost of pursuing an execu-

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179. *See* HL Farm Corp. v. Self, 877 S.W.2d 288, 294 (Tex. 1994) (Doggett, J., dissenting) (commenting on "how much less deferential the Texas test is than its federal counterpart"); Reuters Am., Inc. v. Sharp, 889 S.W.2d 646, 656 (Tex. App.—Austin 1994, writ denied) (recognizing distinction between federal and Texas tests).

180. *Whitworth*, 699 S.W.2d at 197.

181. Another state interest likely to be advanced in support of Article 11.071 is that the length of time between sentencing and execution diminishes any deterrent effect of death sentences. However, there is no scientific data to support the argument that capital punishment has any deterrent effect. *See* Robert M. Morgenthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25 (reporting that over 100 years of experimentation has not produced any credible evidence that capital punishment deters crime).

182. *See* TEX. CONST. art. I, § 12 (limiting legislative restriction of habeas corpus relief).

tion,[183] and nothing in the legislative record of Article 11.071 indicates that the new procedure will reduce the cost of executions substantially, if much at all. Therefore, the financial justifications for Article 11.071 under the first prong of the test are weak.

The second prong of the Texas equal rights test asks if the classification drawn by the statute is rationally related to a legitimate state interest.[184] Even if Article 11.071 furthers some legitimate state interest, the statute fails the second prong because it unreasonably creates a sub-class within a class of convicted felons and adversely affects only that class by abridging their habeas corpus right. The Texas Supreme Court has held that Article I, Section 3 of the Texas Bill of Rights "was designed to prevent any person, or class or persons, from being singled out as a special subject for discrimination or hostile legislation."[185] Texas case law is hostile to special class legislation such as Article 11.071.[186]

Further, Texas case law teaches that a statute will not survive the second prong equal rights test if it creates an unreasonable or irrebuttable presumption.[187] Inasmuch as Article 11.071 constricts only the fundamental habeas corpus right of those sentenced to death, the statute necessarily carries with it an impermissible, irrebuttable presumption that all death-row inmates are guilty as convicted, or at least deserving of much less constitutional protection than those convicted of misdemeanors or noncapital felonies. The new law provides a very narrow window of opportunity for a death-row inmate to seek habeas corpus relief from a wrongful conviction or death sentence. In fact, the window is nearly closed. For these reasons, Article 11.071 appears to violate the equal rights guarantee of the Texas Constitution.

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183. *See* Christy Hoppe, *Executions Cost Texas Millions, Study Finds It's Cheaper to Jail Killers for Life*, DALLAS MORNING NEWS, Mar. 8, 1992, at A1 (citing study which found that it costs $750,000 to imprison inmate for 40 years, versus $2.3 million to execute inmate).

184. *Whitworth*, 699 S.W.2d at 197.

185. Burroughs v. Lyles, 142 Tex. 704, 711, 181 S.W.2d 570, 574 (1944).

186. *See* Waites v. Sondock, 561 S.W.2d 772, 775-76 (Tex. 1977) (striking down statute that effectively foreclosed judicial remedy for divorced parents seeking child support).

187. *Whitworth*, 699 S.W.2d at 197.

VI. CONCLUSION

Article 11.071 violates the Texas Bill of Rights' habeas corpus guarantee because it abridges the absolute nature of the right, and renders the remedy ineffectual. Likewise, Article 11.071 deprives a death-row inmate of state constitutional due course of law because it reduces access to the legal system in violation of the Texas open courts provision. Finally, Article 11.071 offends state equal rights protections because it creates a discrete class of convicted persons with less entitlement to the writ, even though those persons have a greater interest in that fundamental right with their lives on the line.

In addition to running afoul of the language, intent, and purpose of these Texas constitutional guarantees, Article 11.071 eliminates procedural protections designed to guard against the execution of innocent persons. Essentially, the new law places Texans in the morally untenable position of sanctioning the death of these innocent persons.[188] As Justice Sandra Day O'Connor correctly noted: "[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event."[189]

Clothed with political jeopardy, the issue of Article 11.071's constitutionality will reach the Texas Court of Criminal Appeals. The court, as guardian of citizens' individual rights, will be called upon to resolve this issue in a manner consistent with Texas's own unique constitutional history. When the time comes, the court should consider the 74th Legislature's purpose in enacting Article 11.071—to lessen the burden of the state's death penalty system on the treasury and judiciary—and recognize that a cost-effective capital punishment scheme may compromise the liberty rights that the framers held sacred. The courts of Texas should embrace their duty to protect the constitution and forbid the legislature from pursuing a politically popular agenda at the expense of the fundamental rights of certain citizens. By limiting access to the Great Writ, the Texas Legislature has engaged in the very governmental abuses that the framers and ratifiers of the Texas Bill of Rights sought to prevent.

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188. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (stating that because death is different from life imprisonment, there must be even greater scrutiny and strict adherence to due process before execution); *see also* Tara L. Swafford, *Responding to* Herrera v. Collins: *Ensuring That Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603, 618–22 (1995) (discussing reality that innocent persons are executed).

189. Herrera v. Collins, 113 S. Ct. 853, 870 (1993) (O'Connor, J., concurring).