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## COMMON GROUND

### Let's break the impasse on death penalty

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**W**HETHER the issue is life without parole, executing juveniles or mentally retarded offenders or giving death row inmates better access to the courts, many recent death penalty debates in Texas reveal a widening gulf between penalty supporters and opponents.

Our own public exchanges led to the same impasse. After all, one of us is morally certain some people deserve to die and that society has an obligation to execute them. The other opposes the death penalty.

But when we stopped debating and started discussing, we found real common ground.

One of us has examined the 4,600 American death verdicts reviewed by courts from 1973 to 1995, finding that 63 percent were overturned because of serious error, but that error rates decrease sharply when the death penalty is limited to truly egregious murders. The other has spent thousands of hours over 12 years with scores of imprisoned killers and used their actions and attitudes to show that some murders are worse than others, and some murderers deserve society's severest punishment while others do not.

Despite our different perspectives, we agree that death as a punishment should be inflicted, if at all, only upon the worst of the worst; that society can incapacitate without killing, so future dangerousness and deterrence alone are never sufficient reasons to punish someone with death; and that a state-ordered execution is a terrible, solemn act that should occur only after the greatest deliberation.

We agree that legislatures in states with a death penalty can and should narrow sentencing categories to describe the worst of the worst killings in a more morally refined way: Mass murder, genocide, torture killing, paid assassination and other killings that clearly demonstrate an extraordinarily callous readiness to sacrifice another's life — particularly that of the very young or infirm — for the killer's own convenience are the core of the very worst cases.

More specifically, we agree that legislators in Texas and elsewhere should adopt the following reforms:

■ Most importantly, drop the felony-murder category for a death sentence. It is too broad. Other factors — torture (as in rape), intentional elimination of innocent witnesses — can mark the killings during felonies that are inside the

capital core. Killing for money the way a paid assassin does may count as the worst of the worst, but robbing for money while killing accidentally does not.

■ Stop creating capital crimes undeserving of death in knee-jerk reaction to public outrage at a particular offense or to score political points.

■ Use a higher standard of proof. Jurors should not condemn someone to die if they have anything approaching a "reasonable doubt" that the defendant committed first-degree murder and is eligible for execution. "Absolute" certainty is impossible, but jurors should feel "morally" certain the defendant deserves to die and must spare his life if there is any "lingering doubt" about either guilt or sentence.

■ Forcefully impress upon jurors that informant testimony is untrustworthy and should be fully credited in only the rarest cases. Jailhouse informants and co-defendants often falsely implicate others to help themselves.

■ Provide well-funded, competent attorneys for both sides and DNA tests at state expense wherever relevant. Defense lawyers must actively attempt to show the concrete humanity of each individual defendant. Limiting capital cases to the worst of the worst can free up resources to fund these reforms.

■ Address racial bias — without overstating it. The impact of race is complex, but the best studies clearly show that narrowing the death penalty to the worst of the worst (especially by dropping felony-murder) greatly diminishes racial bias.

■ Make reform comprehensive. Proposals by the Illinois Death Penalty Commission and the Constitution Project are good starting points, though more study and refinement are needed.

■ Make reform possible. Legislators who want to reform the death penalty must be free to do so without fear of being used to further agendas they don't support. Because a moratorium may be seen as an entering wedge for abolition or as too blunt an instrument, many genuinely reform-minded legislators oppose it.

■ If executions are to continue while reform is being considered, they should proceed only in order of "worst first." Once new criteria are adopted, death row inmates who don't qualify as the worst of the worst should be resentenced to life without parole. Although neither of us likes that sentence in principle, states must have a way to jettison the death penalty while still punishing the most serious offenders more severely than other murderers.

■ Make the public discussion more honest. Death penalty opponents should tone down rhetoric equating capital punishment with state sponsored "murder," and admit that the vast majority of people on death row were involved in the killing that led to the death penalty. Claiming we are the only "democracy" with the death penalty is misleading. Most Americans want the death penalty; Europe and Canada abolished it despite majority support.

■ Even if rare, factual error is horrifying. Death penalty advocates should admit that the current system for identifying capital criminals is seriously flawed. They should stop insisting that "no demonstratively innocent person has been executed," and admit there may well have been at least one factually innocent person executed, though it hasn't been proven. Too many factually innocent people have come too close to being executed. And too many factually guilty murderers have been executed, though they were not the worst of the worst.

■ Whatever their editorial view, the media should cover all sides of the debate, present all available data and avoid exaggerating crimes. Pollsters should design questions to more accurately reflect public attitudes.

Believing that society's severest penalty can and must be reserved for the "worst of the worst" and that deep disagreement on the death penalty need not block reform in Texas and nationally, we seek a coalition of the like-minded to pursue it.

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