



Tuesday, Jul. 08, 2003

## Guarding Death's Door

By John Cloud

On March 20, a man named Keith Clay died in Texas. His death was largely unremarkable except for one thing: he was the 300th person executed in Texas since the U.S. Supreme Court reauthorized capital punishment in 1976. One need not ignore the savagery of his crimes — prosecutors said Clay stood by while a friend murdered a father and his two kids on Christmas Eve 1993, 11 days before Clay himself butchered a store clerk — to pause at his execution.

Three hundred is an impressive milestone, not only because it exceeds the number of executions in the next five top death-penalty states combined, but also because it was reached so quickly. It took nearly two decades for Texas to consummate its first 100 death sentences after 1976--but only five more years to pass 200 and just three after that to hit 300. (The total has since dimbed to 306.)

The approach of the 300th execution happened to coincide with a period of intense scrutiny of capital punishment. In January the departing Republican Governor of Illinois, George Ryan, delivered the biggest blow when he commuted the sentences of all 167 people who were to be executed in his state. "Our capital system is haunted by the demon of error," Ryan declared, "error in determining guilt and error in determining who among the guilty deserves to die." He and others argue that problems like racially motivated prosecutions, coerced confessions and unreliable witnesses have made the system capricious. Such worries may help explain why many states with capital punishment — there are 38 in all — seem to be wavering. The number of executions in the U.S., excluding Texas, fell to 38 last year from a peak of 63 in 1999.

Despite the high-profile second-guessing, most Americans favor capital punishment even though they don't fully trust the system that administers it. Not long before the 300th execution in Texas, a poll by the Scripps Howard Data Center found that three-quarters of Lone Star residents supported the death penalty. But a shocking 69% also said they believe the state has executed innocent people. National polls have generated similar results. In a Gallup poll released in May, 73% of the respondents said they thought at least one innocent had been put to death in the previous five years. Yet only about half of Americans favor a moratorium on executions to ensure that those on death row should be there. In other words, most of us believe the death-penalty system is broken — and we don't care.

Which means that if the system's flaws are to be fixed, they must be fixed from within. And because prosecutors have great control over how a murder case is investigated and whether it deserves the death penalty, they will have to drive any meaningful reform. So where do you find a D.A. willing to both ignore public opinion and challenge his colleagues in the criminal-justice system? Surprisingly, in the

heart of Texas.

The career of Travis County district attorney Ronald Earle coincides precisely with that of the modern death penalty. Earle was first elected D.A. in 1976, the year the Supreme Court reinstated capital punishment. At the time, he enthusiastically backed the decision. "I thought it was too simple to talk about," he says in a clipped Texas cadence. But after prosecuting violent crime for a quarter-century, Earle doesn't believe capital punishment is so simple. To be sure, he still supports death for those few brutal murderers he believes would never stop killing, even in prison. And Earle can still summon the swagger of your typical TV district attorney. He says executing serial killer Kenneth McDuff, who is thought to have murdered at least 11 people, was "like shooting a rabid dog."

But like the rest of us, Earle has now watched broken souls walk free after years of wrongful incarceration; 56 have been released from death row in the past decade, either because they were deemed innocent or because of procedural mistakes, according to the Death Penalty Information Center. Unlike the rest of us, Earle still has to enforce the death penalty. He is often plagued by doubts when he must decide whether to seek death. "I agonize over it," he says. "There was a time when I thought the death penalty ought to have wider application, but my views have evolved." Today deciding whether to seek the death penalty is easily the hardest part of his job.

For a D.A., especially one from Texas, Earle is unusually vocal about his doubts. But many other prosecutors share his mix of philosophical support for the death penalty and nagging uncertainty about which cases are right for it. "When I first became prosecutor and had a death-penalty case, I looked forward to it ... Now I get one and dread it," says Stanley Levco, who has been the prosecuting attorney in Vanderburgh County, Ind., since 1991. Levco strongly backs capital punishment, but he says capital cases take so long and cost so much that he wonders which ones are really worth it. "I tell this to the victim's family: there is an excellent chance this person will not die."

D.A.s have other concerns too. The National District Attorneys Association has called for DNA testing "at any stage of a criminal proceeding — even up to the eve of execution"—and stiff penalties for defense lawyers who don't adequately represent capital suspects. But Earle is going further. He is trying to do in his corner of Texas what death-penalty opponents say is impossible: enforce capital punishment flawlessly, ensuring that the innocent never spend a day on death row and the guilty are sent there only after trials free of bias and vengeance. Earle hopes that by raising every conceivable doubt about defendants before he decides to seek the death penalty for them, he can slay the "demon of error" invoked by Governor Ryan and achieve total certainty in the capital system.

It's a laudable goal. The trouble is, that's not his job. Jurors are supposed to determine innocence, and judges are supposed to ensure fairness. Most prosecutors feel an intense obligation to let the system work as it's built; crusading just isn't part of the prosecutorial gene pool. But Earle believes that, as he puts it, "the system cannot be trusted to run itself." It needs a watchdog, a backup.

Hence Earle has created virtually a second Travis County justice system for murder cases: well before any trial begins, he and his top lieutenants decide for themselves whether someone is guilty and deserves to die. If there's even a hint of doubt, they deny jurors the option of a death sentence. That approach has isolated Earle. Other D.A.s say he worries extravagantly over minor problems. Abolitionists have little use for him because he still sends people to die. But Earle's exertions raise an intriguing question: Does it take someone like him — someone who has more or less come to detest the death penalty — to save its credibility?

Ronnie Earle — even enemies call him Ronnie — is among the longest-serving D.A.s in the nation. He is also one of the most admired — and most controversial. Earle has been re-elected six times, and he can probably keep his job as long as he wants. His popularity doubtless owes something to the low crime rate in Austin, the county's biggest city (and state capital). In 2001, according to FBI figures, Austin had the fourth lowest per capita murder rate among U.S. cities with 500,000 to 1 million residents.

Earle's capital locale has extended his visibility beyond the county. He was one of the first prosecutors in Texas to create a victim-assistance program, in 1979; later he helped write a state law requiring every D.A. to open an office to connect crime victims with social services. He helped start Austin's Children's Advocacy Center, which works with abused kids, and a family-justice division of the D.A.'s office, which prosecutes those accused of domestic violence and helps their families get back to normal. A lot of prosecutors view such do-gooderism as a waste of time, preferring to devote themselves to cases guaranteed to go Live at 5. Earle, by contrast, rarely appears in court. He would rather attend, as he did recently, a conference in a motel ballroom off Highway 35 to talk about how to fight substance abuse. Predictably, those in the movement for community justice, which tries to combat the sources of crime as well as punish it, swoon over him. "He has a track record going back years of working toward crime prevention by working in the community," says Catherine Coles, a fellow at Harvard's Kennedy School of Government who studied Earle's office in the '90s.

He wasn't always so progressive. In the early '80s, when Reagan conservatism was ascendant, Earle sounded pretty much like any other law-and-order D.A. He spent a lot of time in court, and he stood out as a Democrat willing to aggressively prosecute corruption in his own party. (The G.O.P. didn't nominate a candidate to oppose Earle during the entire 1980s.) He seemed particularly conservative on the death penalty. In 1982 he said in a Limbaughesque radio commentary not only that he backed capital punishment but that it "reaffirms our humanity" and fulfills "our moral responsibility." He called it "society's right to self-defense."

But even back then, Earle felt more hesitant about the death penalty than he let on. He had prosecuted only two death cases, and they had taken a lot out of him. Physically, capital cases require weeks if not months of work. More important, Earle found that his get-tough bravado afforded only weak protection against the emotional turbulence of a capital case. Working every day to ensure someone's death — even if he deserves it — can test one's humanity.

"At first, I thought justice was vengeance," he says, settling back into the chair in his second-floor office, which is not far from the pink-granite capitol. "D.A.s feel they have to give voice to the anguish that victims feel. And I tell you, that's a righteous anger. You look at these guys"--the killers, he means--"and some of them are monsters, just awful." Many prosecutors don't concern themselves with why they become awful, but Earle has a theory: "People learn to act through what I call the ethics infrastructure, that network of mommas and daddies and aunts and uncles and teachers and preachers"--he continues the list for some time--"who all teach us how to act. And that infrastructure has atrophied. When I was growing up"--Earle is 61 and was raised outside Fort Worth--"my mother had seven sisters and a brother. My dad had six siblings. So I had all these aunts and uncles plus my mother and father, and that structure is powerful. People don't have that now. And nobody is taking care of the children.

"So it's almost as if most of the people we send to death row, it's like we can say, 'Look what we made you do.' Most of them — if they had someone who had intervened in their life at an appropriate point, this would not have happened. And that's sad to realize. That doesn't necessarily make you squeamish about using the death penalty, but it does make you more discerning about it."

Earle has always been hard to pin down politically and culturally. He's not an unreconstructed liberal — and there are plenty of those in Austin — nor a conservative Democrat. He's an oddity. He grew up on a cattle ranch yet never eats beef. (Though when teased about that at a restaurant recently, Earle ordered the venison to show he would eat red meat.) He drives the beat-up pickup required for a Texas politician, but it's a Nissan. He has the scraggly hands of someone who broke several fingers playing football as a young man, but he has a deep fondness for academics. Three years ago, he and his wife Twila taught a University of Texas (UT) course earnestly titled "Re-Weaving the Fabric of Community."

His weak spot for intellectuals was evident in 1978, when he got his first death case. A young police officer, Ralph Ablanado, had stopped a red Mustang for a traffic violation on a spring night. Prosecutors said the passenger, possibly fearing that the cop would find the drugs he was carrying, reached for his AK-47. Officer Ablanado was shot several times (he was rushed to the hospital but died in surgery). A frantic chase ensued. The gunman, David Powell, fired at other officers but eventually surrendered to police.

Earle, who had been D.A. for less than 18 months, was pretty green. When it came time to decide whether to seek death, he consulted Robert Kane, a UT philosophy professor. Kane has written extensively about how to encourage what he calls the moral sphere--"an ideal sphere in which everybody's rights to life, liberty and the pursuit of happiness are being respected," as Kane describes it. Sitting in Earle's home in the summer of 1978, he told the D.A. that sometimes, society must use the death penalty to send a message that it will protect people in vulnerable situations — people like cops alone on the streets. But, Kane told Earle gravely, "the burden is on you to show that no lesser punishment would do that job."

Earle took that burden seriously, and by the end of his second death case, also in 1978, he was worn out. The defendant was George Clark, who had abducted a young woman from Sears, raped her and stabbed her 38 times. Earle won a death sentence, but instead of trumpeting his victory, he gave a morose press conference calling it "a sad day for everybody." When a friend of the victim's brought him a congratulatory bottle of whiskey, Earle was aghast. "This is not a celebratory event," he scolded. Citing the administrative demands of running a large D.A.'s office and the talent of his staff prosecutors, Earle never again personally prosecuted a death case.

In the late '80s, Earle seemed to flirt with outright opposition to capital punishment. His office brought no death-penalty cases in 1988 or '89 and only one the following year. He took to telling people he was worried that capital punishment had become "a coarsening factor in the culture." Then along came Kenneth McDuff. Decades earlier, in the summer of 1966, McDuff and a friend abducted three teenagers — two boys and a girl. After robbing them, McDuff shot each boy in the head several times. Then he and his accomplice repeatedly raped the girl before crushing her throat with a broom (he was called the Broomstick Killer). Not surprisingly, he was sent to death row. But in 1972, when the Supreme Court ruled the U.S. death-penalty system unconstitutional, McDuff's sentence — like those of some 600 other death-row inmates across the U.S.—was commuted to life.

In 1989, as pressure mounted on prisons to relieve overcrowding, McDuff was paroled along with many other longtime inmates. He settled in Waco, Texas, and it wasn't long before young women in the area went missing. Authorities believe McDuff killed as many as eight before police finally caught on to him in 1992. Earle's office prosecuted McDuff for the murder of Colleen Reed, a 28-year-old accountant he had kidnapped from an Austin car wash, raped and killed. In 1994 McDuff was again sentenced to die, and he was executed four years later.

Earle says anyone who opposes capital punishment must grapple with the lessons of McDuff's case. "He was a clear and present danger," says Earle. "I guess a true [death penalty] abolitionist would say, 'Put this guy in prison for life,' but he had already gotten that punishment, and he got out. Also, murderers can kill again in prison. It happens all the time. The death penalty is a necessity in these cases."

By 2000, Earle seemed to have found a balance with capital punishment. He usually reserved it for the most gruesome murders, but that year he also sought it for Leonard Saldana, who had killed his ex-girlfriend. Death-penalty prosecutions in domestic-violence cases are rare, and rarely successful. Jurors can often be convinced that killing one's lover in a rage doesn't warrant execution. (Saldana got a life sentence. Earle later said he sought the death penalty partly because he wanted to send a message that he took domestic violence as seriously as any other crime.)

But just as the Saldana case was wrapping up, Earle learned that his office had mistakenly prosecuted two men for the 1988 murder of Nancy DePriest, a 20-year-old mother killed at the Pizza Hut where she worked. To Earle, it had seemed a horrific but fairly straightforward case: not long after the murder, a

man named Christopher Ochoa, who worked at another Austin Pizza Hut, signed an intricately detailed confession. Ochoa said that he and a co-worker, Richard Danziger, had raped DePriest and that Ochoa then shot her in the head. The confession said the two had sexually violated her corpse and then washed it off in the restaurant bathroom.

Danziger denied the crime from Day One, but Ochoa's graphic confession helped convict them both. Partly because neither Danziger nor Ochoa had the violent criminal history typically needed to convince jurors of future dangerousness, Earle's office didn't seek the death penalty; the two were sentenced to life in prison. But in 1996 another Texas inmate, Achim Marino, started writing letters — to police, to the Austin American-Statesman, to Governor George W. Bush and eventually to the D.A.'s office — saying he had killed DePriest. Few believed him until 2000, when DNA tests revealed that Marino was in fact the sole killer.

One of Ochoa's attorneys, Keith Findley, says his client signed the confession only because police had threatened that he would get the death penalty if he didn't. Earle and assistant D.A. Claire Dawson-Brown, who worked on the case, say Ochoa may have been frightened in the police station, but they point out that he told the same story for years afterward. Nonetheless, two innocent men had been convicted — and one will pay for the rest of his life. In 1991 a fellow inmate wearing steel-toed shoes kicked Danziger in the head. Part of his brain had to be removed, and he now lives in a residential treatment facility in Jacksonville, Fla.

Earle was devastated. He felt awful for the victim's family, for Danziger and Ochoa, and, frankly, for himself. He told Bryan Case Jr., one of his most trusted assistant D.A.s, he was sure the Danziger-Ochoa debacle would mean the end of his political career. But instead of hunkering down, Earle admitted the system had screwed up. He asked Case to lead a task force to review hundreds of the office's old cases for any other errors. If an inmate still claimed innocence and if biological material from the crime still existed, prosecutors investigated further. Eventually they whittled down the list to seven inmates for whom new DNA tests might establish innocence. (None of the tests have been conducted yet because a new state law requires that the already overworked courts oversee the process of locating and testing biological material.)

After Danziger-Ochoa, Earle realized how lucky he had been that he had not sought the death penalty against the men. He was more determined than ever to ensure that no innocent went to the death chamber — he couldn't live with himself if that happened. But is it possible to create a flawless system within a flawed one?

You might think that deciding whether to seek the death penalty is a simple matter of applying the facts of the case to the letter of the law. But capital statutes contain wide room for interpretation. To win a death sentence in Texas, for instance, prosecutors must first convince jurors "beyond a reasonable doubt" that a defendant is guilty of capital murder, which is an ordinary murder compounded by at least one of

several aggravating factors, ranging from murdering someone you know is a cop to killing a child under 6. Second, the jury must find — again, beyond a reasonable doubt — that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Consider the language. The prosecutor must erase any reasonable doubts that jurors can conjure not just about a past event but also about future ones. The latter presents an enormously tricky challenge for Earle's effort to achieve certainty, since no one can be sure about the future. In the face of that incertitude, many prosecutors punt: they seek the death penalty more often than not and allow jurors to determine whether the defendant is truly guilty and so dangerous that he must die. In the past decade, Earle has asked for the death penalty only 17 times out of a total of 63 capital-murder cases--27% of the time. (In Texas "capital" murder doesn't necessarily mean a death-penalty case; it's the designation for any aggravated murder, and prosecutors have full discretion in deciding whether to seek death in such cases.) By comparison, according to David Baldus of the University of Iowa, Philadelphia prosecutors seek the death penalty in about 70% of eligible cases. The figure is roughly 60% in Lincoln, Neb., and 45% in Georgia and New Jersey.

In other words, if Earle wants moral certainty that no innocent is ever executed, other prosecutors want another kind of moral assurance — that most killers will get the maximum punishment possible. Appellate courts are left to sort out mistakes. Who's right? Actually, both are. According to Texas law, guilt and future dangerousness are matters for jurors, not prosecutors, to decide. Earle shouldn't shoulder responsibility for the entire system. But the U.S. Supreme Court has made clear that the prosecution's main job "is not that it shall win a case, but that justice shall be done." Texas has incorporated similar language into a law, one Earle often quotes.

Why can't we have it both ways? Why is it so hard to have a death penalty and make sure only the guilty receive it? Because of cases like *The State of Texas v. Delamora*. On Feb. 15, 2001, Travis County sheriff's deputy Keith Ruiz was shot and killed while prying open the door to Edwin Delamora's trailer. Ruiz had gone with members of the Capital Area Narcotics Task Force to arrest Delamora on charges of selling methamphetamine. Frightened, Delamora fired his 9-mm pistol through a window in his front door. Prosecutors said the bullet hit Ruiz in the aorta, killing him. Delamora claimed he fired because he thought he, his wife and his two kids were being robbed.

For Earle, it was a difficult case from the start. Because Ruiz was a cop, people would expect a death-penalty prosecution. But Delamora did not have a criminally violent history, which weakened the argument for future dangerousness. On the other hand, a jury might be convinced that a meth dealer who had brazenly fired a pistol through his door had a propensity for violence. Earle remained undecided for months as staff prosecutors worked up the case. During that time, the narcotics task force conducted a second raid that ended in a fatality. And in yet another botched raid, members of the task force held several local residents at gunpoint while they searched their property for pot. They found only ragweed.

Earle has refused to speak publicly about the Delamora case, but associates in his office told me he knew what people were saying around town: those task-force guys were Rambo wannabes; it wasn't surprising that one of them had been shot. But no matter how aggressive the task force had been, it would be politically troublesome for Earle not to seek death for a cop killer. He looked forward to hearing what the death committee would recommend.

Formally called the Capital Murder Review Committee, the death committee is composed of 10 people from the D.A.'s office, most of them senior prosecutors, who hear the evidence in a case and then vote on whether Earle should seek the ultimate punishment. Their recommendation isn't binding — legally, only the D.A. can make the decision — but Earle always considers it carefully. "The amount of information in each case is enormous," says Case, the assistant D.A. "You're looking not only at the crime itself, the evidence there, but, in addition, a person's entire past life is opened for scrutiny ... Maybe the guy was torturing cats when he was a kid." The death committee distills that material for Earle.

Characteristically, Earle picked an interesting mix for the committee. One member is Ellen Halbert, a nationally known victims' advocate who in 1986 was raped, stabbed, beaten in the head with a hammer and left for dead. The only nonlawyer on the committee, she is director of Earle's victim-witness division. Other members include Patricia Barrera, a devoutly Roman Catholic Latina who has a stained-glass cross affixed to her window and tries to reconcile her church's opposition to the death penalty with her duties as a prosecutor; Buddy Meyer, the gruff head of the trial division, who has a handlebar mustache and a picture of a Texas Ranger on his wall; and LaRu Woody, director of the family-justice division, who possesses a strong libertarian streak — she has a SMOKING PERMITTED sign in her office even though she doesn't smoke. First assistant D.A. Rosemary Lehmborg and five other veteran prosecutors round out the group.

The members met to consider the Delamora case several months before the trial, which was held last July. The death committee struggled with this question: Did Delamora know he was firing at a cop? Getting a capital-murder conviction would require proving he did. Meyer, the trial-division director, explains the reservations in the room this way: "The defendant was at home with his wife and children, and it was dark, and they were in the bedroom watching TV, and there was this loud banging on the side of their mobile home. The defendant felt there was evidence that these were people trying to break into his trailer and steal his dope and harm his family."

In the end, though, most members sided with the cops. Other police officers at Delamora's trailer that night said they had clearly and repeatedly made their presence known. Barrera, the devout Catholic, voted against seeking death, as she usually does, but she was in the minority. Most people in the room went with their prosecutorial gut: "It's really difficult for prosecutors to be fully objective about cop killers," says assistant D.A. Case. "Some of us had doubts, and we knew Ronnie would have to make an effort at resolving them in that particular case... I don't know everything that he was thinking when he made that one. I do know it was very hard."

It's likely that Earle went with his gut too. If he has any doubts, he doesn't seek death. He decided that the state would go ahead with its capital-murder case, relying on the jury to determine whether Delamora knew he was shooting at a police officer. But Earle knew jurors could never be dead sure about that, and he took death off the table. "We believe we have to look at it that they are guilty to a moral certainty, almost beyond any doubt whatsoever," says Case. "That's not the legal standard, but it's ours."

At the trial, the jury found Delamora guilty of capital murder, and because death wasn't an option, he automatically received what Texas law calls a "life" sentence in prison — no possibility of parole for 40 years. That wasn't enough for many Texans, who were furious: Ruiz's widow Bernadette and his boss, the county sheriff, were both quoted in the *American-Statesman* as criticizing the decision not to seek death. Texas attorney general John Cornyn, who was in the midst of a successful campaign to become a U.S. Senator, publicly attacked Earle. Nor was Delamora pleased; he is appealing.

In most other jurisdictions that enforce the death penalty, Delamora would be appealing from death row. And maybe that's not such a terrible thing. After all, at least since 1976, the creaky contraption that is the U.S. death-penalty system has worked, in the most narrow sense: it hasn't executed anyone who later turned out conclusively — through DNA evidence — to be innocent (although it should be noted that states haven't allowed DNA testing in all disputed executions).

Reformers like Earle hope that the capital system can promise something greater than merely preventing death at the last minute. It took someone like Earle to keep Delamora off death row — someone willing to ignore a grieving widow, the local sheriff and his own staff. Which makes Earle both courageous and freakish. It's one thing to understand that the vengeful emotions that accompany the death penalty can trump the factual certainties required to mete it out fairly. It's quite another to intellectualize the issue when a woman has lost her husband.

But Earle has always been a little weird. A close observer of Texas politics e-mailed this description of him: "Thoughtful. Conspiratorial. Crusader. Half-whacked. Smart. Insightful. Wise. Nuts." Well, not nuts. But most of it has a kernel of truth. Earle's reputation as conspiratorial derives largely from the workings of his office's public-integrity unit, a watchdog office that prosecutes those (including elected officials) who commit crimes in the course of their dealings with the state. Earle's job, in other words, is to root out conspiracies.

Earle is often suspected of bringing partisan cases on behalf of fellow Democrats. And while he has prosecuted 12 Democrats and only three Republicans, his biggest embarrassment came in 1994, after U.S. Senator Kay Bailey Hutchison, a prominent Republican, was indicted for allegedly using state employees to do political tasks. Earle amassed thousands of documents as evidence, and many thought the new Senator could lose her job. But at a pretrial hearing, the judge and Earle clashed over the admissibility of the documents; fearing he would lose, Earle declined to present a case. Hutchison was quickly acquitted, and Earle was portrayed as a fool. Republicans have never quite forgiven him.

Like most other prosecutors, Earle often sees himself as an advocate — for his constituents, for the state, for crime victims. Because of their role, prosecutors tend to be portrayed in popular culture as modern-day knights. But Earle has come to prefer another metaphor. "I'm the gatekeeper," he says. "I don't dare ask my boss, the public, to sit in judgment of somebody that I don't think deserves to die. That's why they elect me, to exercise that judgment and not bother them." Buried in that philosophy is something radical — the notion that the jury system, as it's currently constructed, can't be trusted to send only the guilty to death row. Most prosecutors wouldn't embrace that philosophy, which is why it may take an Earle, not a knight, to slay the demon of error.

 [Click to Print](#)

**Find this article at:**

<http://www.time.com/time/magazine/article/0,9171,463094,00.html>

Copyright © 2008 Time Inc. All rights reserved. Reproduction in whole or in part without permission is prohibited.

[Privacy Policy](#) | [Add TIME Headlines to your Site](#) | [Contact Us](#) | [Customer Service](#)