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**Life and the Death Penalty: Passing Life Without Parole  
Legislation in Texas, Future Implications, and an Examination of  
Texas' Death Row**

Adam Chase Parker

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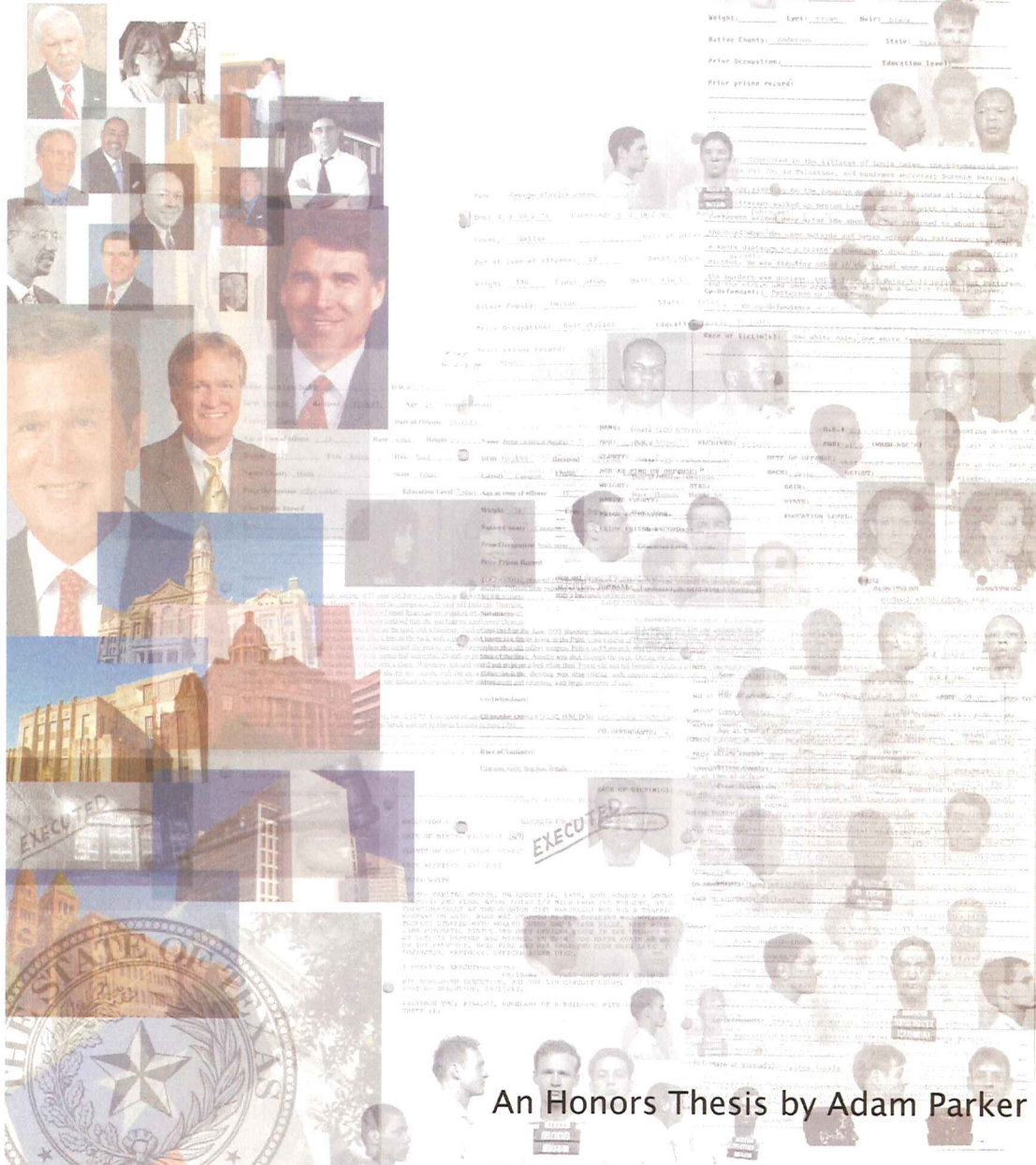


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# Life and the Death Penalty:

Passing Life Without Parole Legislation in Texas, Future Implications, and an Examination of Texas' Death Row



An Honors Thesis by Adam Parker

Life and the Death Penalty:  
Passing Life Without Parole Legislation in Texas,  
Future Implications, and an Examination  
of Texas' Death Row

by

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Undergraduate honors thesis under the direction of

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Submitted to the LSU Honors College in partial fulfillment of  
the Upper Division Honors Program.

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Louisiana State University  
& Agricultural and Mechanical College  
Baton Rouge, Louisiana

## Acknowledgements

My thesis began with a conversation. In my Junior year at Louisiana State University, I enrolled in a class taught by Dr. Tim Cook that dealt with the civil rights movements of African Americans, women, and the recent gay and lesbian civil rights movement for civil rights. I enjoyed the class very much and appreciated the manner in which he critiqued my progress and helped me grow as a student. I asked him to be my thesis advisor, and he promptly asked me about my topic. I ranted for a while about third parties as related to Game Theory Economics, but he quickly found holes in my conjectures and ramblings. We came to the conclusion that it would be beneficial to build upon the work I had completed in his class for my thesis. I started to think of modern social movements that I found interesting, and the movement towards the abolishment of capital punishment piqued my interest. After some research, I found Texas to be far and away the leader in executions nationally, and decided to look for reforms that were being undertaken in the state. I shortly thereafter found a Salon.com article that outlined a bill that would add life without parole bill to the capital sentencing scheme in Texas, and I thought this seemed like a good thesis topic. Dr. Cook agreed, and I began my work.

During the Summer, I received a phone call from the Manship School of Mass Communications at LSU. Ms. Helen Taylor called me with horrible news; Dr. Cook had recently been diagnosed with a brain tumor and he could no longer serve as my thesis advisor. This was very unfortunate, least of all for the future of my thesis. Ms. Taylor then told me that Dr. Kirby Goidel, Director of Public Policy Research and the Department Chair of Political Communication at the Manship School of Mass



Communications, had agreed to be my thesis advisor. I was relieved about the thesis, but incredibly worried about Dr. Cook's health. He remained in my thoughts throughout this research, and has recovered well from his treatment.

Dr. Goidel was of great assistance to me in this research as a friend and mentor. Every week for two semesters, I would venture into Dr. Goidel's Office to tell him of my progress and future plans. He would provide me with questions I hadn't thought of, ideas I hadn't explored, and the constant encouragement as I moved along in the project to get it finished. It was very good of him to step up when Dr. Cook was unable to continue, and at this point, I couldn't imagine having a better person as my thesis advisor.

I would also like to thank the other members on the board of my thesis, Dr. Craig Freeman and Dr. Wayne Parent. They have been very kind to offer their time as readers of my thesis, and I appreciate their comments and criticism.

The first correspondence I conducted was with the Death Penalty Information Center in Washington D.C. I contacted Richard Dieter, the Executive Director, and Jennifer Agder, the Special Projects Coordinator. They were very helpful in directing me to death penalty advocates within Texas and also were very helpful in directing me to related articles and scholarly papers on the subject.

I would like to thank Steve Hall, Will Harrell, Keith Hampton, Senator Lucio, Ian Randolph, Rob Kepple, J.D. Granger, John Bradley, Richard Daly, Suzii Paynter, Bee Moorhead, Rob Owen, Dr. Mark Cunningham, and Senator Lucio for agreeing to be interviewed. They were all instrumental in providing me with a more complete picture of how this legislation went through the process.

I would also like to specifically place emphasis on the amount of assistance Steve Hall and Ian Randolph provided me in researching this legislation. Steve and I enjoyed an excellent lunch in Austin at Las Manitas and he also took time to show me around Austin during my first visit. Steve also was very helpful in connecting me with others who were involved in the legislation. Ian was enormously helpful in providing me with talking points and data, putting me in contact with others I ended up interviewing, and acting as a source to interview himself. Ian also was very helpful in arranging the interview with Senator Lucio, and I am very grateful to him for his aid during the course of my work. I also enjoyed our conversations about Texas' chances of winning the 2006 Rose Bowl and when he set up a personal guided tour of the Texas State Capitol for me.

Some of the committee hearings and floor videos were not available in the online archives of the Texas State Legislature, but the staff of the House Audio/Video Department and the Senate Staff Services provided me with a video and audio of the hearings, for which I am very grateful.

I would also like to thank the Tiger Athletic Foundation for their award of \$750 to begin work on my thesis. With these funds, I was able to make two comfortable trips to Austin and to purchase texts that I would use in my research.

Lastly, I am eternally grateful for the support of my friends and family, especially my parents, Terry and Ann Parker. My parents have been incredibly facilitative of my pursuits since I was a child, and I hope I can make them one tenth as proud of me as I am to call them Mom and Dad. To have parents like I have had, in the words of Lou Gehrig, "I feel like the luckiest man on Earth."

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## ABSTRACT

In this thesis, I examine the adoption of the life without parole option as an alternative to the death penalty in Texas. As a state who has carried out over one third of America's executions and where there exists strong public and elite support of the death penalty, Texas provides the ideal setting for understanding how even deep-seated policies can change when the choices are framed appropriately, when events create new opportunities for rethinking old problems, and when the advocates of change bolster their arguments with empirical evidence. The results of the study are based on semi-structured interviews with 15 participants in the life without parole debates including public defenders, district attorneys, religious organizations, anti-death penalty advocates, and political actors in the Texas State Legislature; content analyses of 625 news articles on the life without parole option and DNA problems at the Houston Police Department's crime lab, the recorded notes of sixteen legislative acts across four sessions of the Texas State Legislature, and 750 individual profiles of death row inmates. I conclude by considering the importance of preventative as opposed to punitive criminal justice policies to reduce murder rates and the incidences of capital punishment in Texas.

## The Death Penalty in Texas: An Introduction

The death penalty has been debated and dissected, enforced and eschewed. It is the subject of numerous critical essays, philosophical arguments, articles of legislation, news articles, and even Sunday school classes. Texas, once an independent nation, has had an especially important role to play in the story of modern capital punishment. Since the decision of *Gregg v. Georgia* in 1976, which reinstated the death penalty as a means of punishment in the United States, there have been over 1,000 individuals executed in the United States. Of the 1,009 executions in the United States, Texas has accounted for 357, more than a third of the cumulative national total.<sup>1</sup> Over 3,400 more prisoners are awaiting executions on Death Row across the United States,<sup>2</sup> and Texas has 413 of these individuals in its borders. Texas does not have the largest number of individuals on Death Row; that distinction belongs to California with 648 inmates,<sup>3</sup> however Texas has been especially effective at passing executions through the appeals process. University of Texas Law Professor and capital punishment opponent Jordan Steiker has said that Texas, unlike many other states, has worked out the statutory and procedural “kinks” in death penalty cases and appeals, facilitating a large number of executions.<sup>4</sup>

Texas has a well-defined capital murder statute with guidelines for a person’s eligibility to be tried in a capital case. Texas’ capital murder statute before September 1,

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<sup>1</sup> *Number of Executions by State and Region Since 1976: Death Penalty Information Center.* (January 31, 2006). Date retrieved February 3, 2006, from <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186#region>

<sup>2</sup> *Death Row Population Demographics by State: Sourcebook of Criminal Justice Statistics Online.* (July 1, 2005). Date retrieved January 31, 2006, from <http://www.albany.edu/sourcebook/pdf/t6802005.pdf>

<sup>3</sup> *Death Row Inmates by State and Size of Death Row by Year: Death Penalty Information Center.* (October 1, 2005). Date retrieved February 3, 2006.

<http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#state>

<sup>4</sup> Walpin, Ned. *PBS’ Frontline: The Execution: Readings: Why is Texas #1 in Executions?* Date retrieved February 3, 2006 from <http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/texas.html>

2005 allowed for two sentences for guilty defendants, the death penalty and life in prison with parole eligibility set at 40 years. Offenses that allowed for a capital murder conviction included the murder of a public safety officer or firefighter; murder during the commission of kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation; murder for remuneration; murder during prison escape; murder of a correctional employee; murder by a state prison inmate who is serving a life sentence for any of five offenses (murder, capital murder, aggravated kidnapping, aggravated sexual assault, or aggravated robbery); multiple murders and murder of an individual under six years of age.<sup>5</sup> Murder cases that do not contain one of these elements cannot be tried for capital murder, the only conviction in Texas that allows for the imposition of the death penalty as a sentence.

The death penalty has historically enjoyed enormous support nationwide when polled. From a high of 60 percent of college freshman that supported abolishing the death penalty in 1971, only 33 percent of college freshmen in 2004 supported the abolition of the death penalty.<sup>6</sup> Nationally, 64 percent of Americans favor the death penalty, with 84 percent of Republicans, and 71 percent of Southerners.<sup>7</sup> Within the borders of Texas, a Scripps-Howard Texas Poll has shown that Texans support the death penalty to the tune of 75 percent in a Fall 2004 survey. Texans' support levels have fallen historically in the mid-70<sup>th</sup> percentiles. This level of support is down somewhat

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<sup>5</sup> *Death Row Facts*. (December 19, 2003) Texas Department of Criminal Justice. Date retrieved October 13, 2005 <http://www.tdcj.state.tx.us/stat/drowfacts.htm>

<sup>6</sup> *College Freshmen Reporting That the Death Penalty Should Be Abolished*. (July 1, 2005). Date retrieved January 31, 2006, from <http://www.albany.edu/sourcebook/pdf/t293.pdf>

<sup>7</sup> *Attitudes Toward the Death Penalty for Persons Convicted of Murder*. (2003). Date retrieved January 31, 2006, from <http://www.albany.edu/sourcebook/pdf/t252.pdf>

from a high in 1988 of 86 percent support, but still higher than polling numbers for national death penalty attitudes would suggest.<sup>8</sup>

Texas' criminal justice system may also have carried out such a large number of executions because the public supports its use, and District Attorneys in Texas face significant re-election pressures at the voting booth. In order to look tough on crime, it has been suggested that prosecutors seek the death penalty to ensure that the electorate knows that they have a tough on crime stance and that prosecutors seek the death penalty for a similar reason. Appellate court judges also face similar election difficulties, and have been suggested to uphold death sentences due to public support for the death penalty. Texas District and County Attorney Association Director Rob Kepple would disagree with this statement. "I don't know any prosecutors that seek the death penalty because it is politically advantageous. Seeking the death penalty is not a political action."<sup>9</sup> Tarrant County Assistant District Attorney J.D. Granger also disagreed; "as a prosecutor, it's not our job to seek the death penalty in every capital murder case. We screen our cases very carefully, we look into their mental history, we make sure we prosecute the right cases. We can lose credibility as a criminal justice system if we aren't careful."<sup>10</sup> It does seem advantageous to support the death penalty in Texas, especially in Harris County. Harris County District Attorney Chuck Rosenthal, while running for the empty seat of the wildly popular District Attorney Johnny Holmes, ran campaign ads where mentioned his record of sending 14 inmates to Death Row, "where they belong."<sup>11</sup> University of Texas Law Professor Rob Owen said that most District Attorneys might

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<sup>8</sup> Scripps-Howard. "Texas Poll." Survey. November 13, 2004.

<sup>9</sup> Kepple, Rob. Personal Interview, January 11, 2006.

<sup>10</sup> Granger, J.D. Personal Interview, January 24, 2006.

<sup>11</sup> Brewer, Steve and Tolson, Mike. Harris County is a Pipeline to Death Row. A Four-Part Series Examines Why, and Explores Whether Justice is Served. *Houston Chronicle*. Section A Page 1.

mention the death penalty in their campaigns, but that “if you look at the actual campaigns of people who run for District Attorney seats, they don’t think about death sentences. They want to say that they are tough on crime, but most of them are not going to brag about how many people they’ve executed.”<sup>12</sup> Rob Kepple would also add “there are a lot of District Attorneys who aren’t big fans of the death penalty. However, if the right case comes along, they have to seek it.”<sup>13</sup>

## Political Pressure and Problems with Application

The issue of innocent individuals being executed has raised concerns about the death penalty in Texas. In 2003, the Harris County Police Department’s crime lab was shown to have serious structural errors in its laboratory responsible for analysis of DNA evidence. The building that contained samples was said to have a roof that leaked water and allowed for the contamination of DNA samples. This drew a firestorm of criticism from *The Houston Chronicle*, who began to call for a moratorium on the death penalty in Texas and issued several critical essays over the handling of the crime lab. Between November 16, 2002 and January 24, 2006, *The Houston Chronicle* alone published more than 350 articles that dealt with the Houston Police Department crime lab. Chronicle columnist Thom Marshall declared “so much water has run through the roof of the police crime lab by now that it surely must have washed away all resistance to a moratorium on the death penalty.”<sup>14</sup> There have also been exonerations of some inmates for rape in Texas, including Josiah Sutton and George Rodriguez, who were convicted on faulty DNA

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<sup>12</sup> Owen, Rob. Personal Interview, December 21, 2005.

<sup>13</sup> Kepple, Rob. Personal Interview, January 11, 2006.

<sup>14</sup> Marshall, Tom. (2003, February 28). Leaky Crime Lab is Tip of Iceberg. *Houston Chronicle*. Section A Page 31.



evidence. The problems at the crime lab certainly raised doubts about the execution of innocent people in Texas, especially given the number of people who were executed over the years. The scandal may have also given some momentum to those groups who oppose the death penalty. “We know for certain that one percent of cases in Texas were dead wrong. The wrong guy, not the proper punishment,” said Steve Hall. “It may be a small number, but it is still a number that is unacceptable.”<sup>15</sup> In spite of these potential errors, support for the death penalty remained high. The same 2004 Texas Poll that showed overwhelming support for the death penalty also showed that 70 percent of Texans believe that Texas has most likely executed an innocent person.<sup>16</sup>

The Presidential candidacy of George W. Bush in 2000 also brought a national spotlight to Texas and its system of capital punishment. Bush oversaw 152 executions while he was the governor of Texas between 1995 and his departure for the Presidency in 2000. This was more than any other Governor in American history since the reinstatement of capital punishment.<sup>17</sup> Bush also has been quoted as saying “I’m confident that every person that has been put to death in Texas, under my watch, has been guilty of the crime charged, and has had full access to the courts.” Additionally, Bush granted one single clemency request during his tenure as Governor, rejecting 68 others.<sup>18</sup> Bush also was criticized for the case of Gary Graham, who was allowed to be executed despite the claims that there was insufficient evidence presented in his case and that he did not receive proper representation. These criticisms came from many death penalty

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<sup>15</sup> Hall, Steve. Personal Interview, December 20, 2005.

<sup>16</sup> Scripps-Howard. “Texas Poll.” Survey. November 13, 2004.

<sup>17</sup> (2001, June 13). The World’s View of Executions. *The New York Times*. Section A; Column 1; Editorial Desk; pg. 32

<sup>18</sup> Bonner, Raymond and Rimer, Sara (2000, May 14). On the Record/Capital Punishment in Texas; Bush Candidacy Puts Focus on Executions. *The New York Times*. Section 1; Page 1: Column 3

opponents, including the Reverend Jesse Jackson.<sup>19</sup> The campaign put a spotlight on the problems within Texas. “There were a lot of things about ourselves that we knew but didn’t want to talk about – health care, the environment, criminal justice. The Texas-bashing forced us to focus more on these issues. A good number of us are saying we can do better,” said State Senator Rodney Ellis, who has played a major role in criminal justice reform within Texas. The effects of the national media attention paid to Texas’ capital punishment system were shown in a spate of new bills introduced in the 2001 regular session of the Texas State Legislature, notably including a bill that would have banned executions of the mentally retarded, and another bill that would have allowed life without parole in the capital sentencing process.<sup>20</sup>

There have also been recent reforms to the application of the death penalty nationwide as the result of two United States Supreme Court decisions. The decision issued in *Atkins v. Virginia* prohibited the execution of the mentally retarded, and another decision, *Roper v. Simmons*, prohibited the execution of individuals for crimes committed while under the age of 18. After the Supreme Court handed down these decisions in 2004, 29 individuals on Death Row in Texas had their sentences reduced to life in prison with parole eligibility in 40 years. “These juvenile capital offenders are the ones most likely to reach parole eligibility, and because of *Roper*, they would have one day been eligible for parole,” said State Senator Eddie Lucio Jr.<sup>21</sup> In the case of Kelsey Patterson, a mentally retarded defendant, a recommendation was given by the Texas parole board for his death sentence to be commuted to life in prison with eligibility of

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<sup>19</sup> Bernstein, Alan (2000, June 25). Death Penalty Debate Unlikely to Trip Bush. *Houston Chronicle*. Section A, pg. 1

<sup>20</sup> Duggan, Paul. Texas Legislators Review Use of Death Penalty; National Criticism During Presidential Campaign Reverberates in a Spate of Bills. *The Washington Post*. Section A, pg. A03

<sup>21</sup> Lucio Jr., Eddie. Personal Interview, January 11, 2006.

parole in 40 years. Governor Rick Perry denied this request, and said that by reducing his sentence to life in prison, “no one can guarantee this defendant would never be freed to commit other crimes where his sentence commuted.”<sup>22</sup> Perry, in explaining his decision, made the point that while parole eligibility is in forty years, it is still a possibility and must be considered for the families of victims and potential future victims.

Many religious organizations have also taken a position on the death penalty in Texas. “My belief, the whole belief of Christianity, is that everyone deserves another chance,” said Bee Moorhead, the director of Texas Impact, a non-profit organization that represents many different faiths at the legislature and helps with informing their denominations to the church’s official position on issues like the death penalty. “There are a lot of people who sit in pews and profess to be good Christians, but when they are polled, they aren’t with the church’s position,” said Moorhead. “Our organization acted as a booster rocket to help get people informed. There are a lot more people in Texas that know their faith’s position on the death penalty than there were 5 years ago.”<sup>23</sup> Other groups, such as the Texas Catholic Conference and the Baptist General Convention of Texas, also have spent a great deal of time informing congregations of their faith’s position of the death penalty. “When Pope John Paul II came out against the death penalty, it made all Catholics rethink their position on the death penalty,” said Brother Richard Daly, Director of the Texas Catholic Conference. “Around 25 percent of Texas is Catholic, and the number of Catholics who have reservations about the death penalty is growing,” said Daly. “When they learn about the executions of juveniles and the

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<sup>22</sup> Berlow, Alan. (2005, May 10). Death Knell for the Death Penalty? *Salon.com* Feature Section. Date retrieved May 11, 2005 from <http://www.salon.com>

<sup>23</sup> Moorhead, Bee. Personal Interview, February 2, 2006.

mentally retarded, they begin to have serious problems with it.”<sup>24</sup> The Baptist General Convention of Texas has also formed a panel to study the death penalty, and decided that a moratorium on capital punishment was in order. “We thought a moratorium was a good idea so that we can take a step back and examine the issue,” said Suzii Paynter, Director of Public Policy for the Baptist General Convention. “The other option that we considered was a change to the statute to allow for life without parole.”<sup>25</sup>

## Texas’ Legal System and Public Defense

Texas also has what has been called relatively weak systems of clemency and public defense. In Texas, a Governor cannot commute the sentence of an inmate sentenced to death unless he receives a recommendation from the Texas Board of Pardons and Paroles. Texas also has been the subject of scorn for its public defender system, although the viewpoints on its effectiveness differ. “Texas has an extremely limited public defender system,” said Steve Hall, director of Texas Stand Down, a non-profit organization devoted to reforming the death penalty in Texas. “There are three or four counties with a public defender system. Texas has relied on judges running indigent defense his or her own way prior to the Indigent Defense Act of 2001,” said Hall. After the law’s passage, “counties were required to submit plans for appointment of counsel in order to receive state funding. With every passing year, we’ve seen improvements in the system, less arbitrary appointments, and complete control by individual judges,” said Hall.<sup>26</sup> Rob Owen sees “continuing improvement in the quality of defense counsel and

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<sup>24</sup> Daly, Richard. Personal Interview, January 23, 2006.

<sup>25</sup> Paynter, Suzii. Personal Interview, January 24, 2006.

<sup>26</sup> Hall, Steve. Personal Interview, December 20, 2005.

an institution at the state level to watch over the appointment and quality of defense counsel in the appellate courts” as critical to the administration of capital punishment in Texas. “There are mechanisms, albeit imperfect ones, in place to monitor the quality of defense counsel at the trial stage, and there need to be corresponding mechanisms to ensure quality representation at the appellate and post-conviction stages.”<sup>27</sup> J.D. Granger has seen a different level of public defense in Tarrant County, however. “In our county, only the best and most expensive attorneys go to a death penalty case,” he said. “The best attorney you can get is when you have no money. Almost every attorney has served on a lot of cases. They have to know the system inside and out. A statewide board wouldn’t make any sense. The best lawyers you’ll find are already on the death penalty cases.”<sup>28</sup> District Attorneys might also be opposed to the idea of a statewide public defender office because this could potentially tip the balance of trials in favor of the defense. “Look at the Colorado Defender’s Office. It won over and over again,” said Keith Hampton, Director of the Texas Criminal Defense Lawyers Association. “They got so good at capital cases that a law was passed to put the decisions in the hands of judges in capital cases. If all you are doing is capital cases, you get would get specialized attorneys and you would ultimately see the death rate plummet.”<sup>29</sup>

## Geographic, Racial, and Resource Distribution

Some have also argued that Texas is part of a clear cut geographic distribution of executions. These individuals will point out that more executions emerged in the former

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<sup>27</sup> Owen, Rob. Personal Interview, December 21, 2005.

<sup>28</sup> Granger, J.D. Personal Interview, January 24 2006.

<sup>29</sup> Hampton, Keith. Personal Interview, January 11, 2006.

Confederate states and possibly suggest that Texas' frequent utilization of the death penalty has a sociological and cultural undertone of racism at its base. In their work that outlines the history of capital punishment in Texas, Marquart, Ekland-Olson, and Sorenson argue "as the exclusionary legacy of slavery moved toward a more inclusive definition of the human community, several trends became apparent." They state that prosecutors practiced discrimination, and that illegal lynchings gave way to state-sanctioned executions.<sup>30</sup> Rob Owen posited a similar stance. "I think that the death penalty is very closely related to race, and that it is the height of cultural and historical blindness to ignore that. We've sort of evaded the history of racism in this country for the last 40 years, and you can see that relationship in the type of person who is sent to Death Row."<sup>31</sup> In Texas, as of July 1, 2005, there were 172 African-American inmates on Death Row and 110 Hispanic inmates, as compared to 128 White inmates.<sup>32</sup> America is one of the few remaining Western nations that uses capital punishment, and Franklin Zimring has said that "the United States and the rest of the Western world are further apart on the death penalty than ever before."<sup>33</sup> However, the use of the death penalty has been confined mostly to southern states, suggesting a large gap between the attitudes in this region from the rest of the world. This geographic pattern has drawn the ire of groups such as the National Association for the Advancement of Colored People, the American Civil Liberties Union, Amnesty International and other advocacy organizations

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<sup>30</sup> *The Rope, the Chair, and the Needle.* p.x

<sup>31</sup> Owen, Rob. Personal Interview, December 21, 2005.

<sup>32</sup> *Death Row Population Demographics by State: Sourcebook of Criminal Justice Statistics Online.* (July 1, 2005). Date retrieved January 31, 2006, from <http://www.albany.edu/sourcebook/pdf/t6802005.pdf>

<sup>33</sup> Zimring, Franklin (2003). *The Contradictions of American Capital Punishment.* New York: Oxford University Press. p. ix

that fundamentally oppose the death penalty or the way it is being applied in the United States.

There has also been a relatively consistent pattern of where executions are being handed out within Texas, with urban areas being much more likely to hand out cases than rural jurisdictions. This appears to have much to do with the large populations of the counties, the size of their budgets, the levels of crime in urban areas, and the philosophy of the different District Attorney offices. Harris County, in particular, has been very proactive in seeking and obtaining death sentences. “If you took Harris County out by itself and made it into its own state,” says Steve Hall, “it would be second in the number of executions nationally right behind the rest of Texas.”<sup>34</sup>

Houston, the third largest city in the United States and a part of Harris County, has a criminal justice system with the resources necessary to try a large number of criminals for the death penalty, whereas a large number of smaller counties do not. In 1992, it was reported that Texas’ death penalty cases cost around \$2.3 million on average by the end of appeals, which was also said to be about three times as expensive as incarceration at the highest security level for 40 years.<sup>35</sup> This is substantially more expensive than trials of a similar nature, such as first degree murder trials. “It is surprising to me that there hasn’t been a call for change in Harris. Costs are hidden in a large office like that, you can’t hide those sorts of costs in a rural county,” said Steve Hall. Rural counties who try criminals for capital murder and seek the death penalty do so at the risk of undercutting other critical items in their budget. The trial against the murderers of James Byrd Jr., where Byrd was dragged to death behind a pickup truck,

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<sup>34</sup> Hall, Steve. Personal Interview, December 20, 2005.

<sup>35</sup> C. Hoppe. (1992, March 8) Executions Cost Texas Millions. *Dallas Morning News*. Section A Page 1.

required Jasper County to find additional funds for seeking the death penalty from the State of Texas. Counties in Texas bear the upfront costs of prosecuting a death penalty case, which can cost between \$350,000 and \$500,000.<sup>36</sup> “When the James Byrd case happened in Jasper, it almost bankrupted their county,” said Ian Randolph, Texas State Senator Eddie Lucio’s Legislative Director.<sup>37</sup>

In fact, the majority of non-negligent manslaughters and murders in the United States are not tried as death penalty cases, even if they are eligible for the death penalty. The ratio of non-negligent manslaughters to the number of prisoners under sentence of death is over four to one.<sup>38</sup> Many cases end up resolved in a plea bargaining situation, some are unsolved, and often many families are left with a feeling of unease at the prospect of the individual who murdered their loved one being eligible for parole. “Cases that are technically capital murder, but without a certain level of aggravation would most likely get life in prison. It’s cheaper for the county and prosecutors are conscious of their budgets,” said Rob Owen. This has involved many victims’ rights groups in supporting the death penalty and stricter sentencing for capital murder cases, such as the group Texas Justice for All.

One specific case that is oft mentioned in Texas is that of Kenneth McDuff. McDuff was sentenced to death in 1966 for the murder of three teenagers. His death sentence was reduced to life in prison because of the 1972 Supreme Court ruling in *Furman*, and he was paroled from prison in 1989 amidst pressures to control a swelling

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<sup>36</sup> Bryce, Robert. (1999, February 25). Trial’s high costs tax Jasper coffers. *Christian Science Monitor*. USA Section, p.2

<sup>37</sup> Randolph, Ian. Personal Interview, December 22, 2005.

<sup>38</sup> Number of Murders and Non-negligent Manslaughters, Prisoners Under Sentence of Death, Executions, and Other Death Sentence Dispositions. (July 1, 2005). Date retrieved January 31, 2006, from <http://www.albany.edu/sourcebook/pdf/t6792004.pdf>



prison population. McDuff, after release, then abducted a teenager in Austin and murdered her, causing a large uproar by the media and public of Texas.<sup>39</sup> This had a major impact on juries, as they were now provided with a vivid example of a parole eligible sentences that was commuted and allowed for a repeat offense. “The biggest fear of a capital juror is that a person they spared from the death penalty will get out and hurt some other person. Yet, since McDuff, nobody has been paroled who was convicted of capital murder and given life in prison. Everybody panicked after what happened,” said Rob Owen.<sup>40</sup> The memory of McDuff has been said to linger in Texas’ courtrooms and in its juries’ hearts, creating confusions in the sentencing phase of capital murder trials. “Jurors complained about the life sentence,” said State Senator Eddie Lucio Jr., a Democrat from Brownsville, Texas. “People had a real misconception about what life meant.”<sup>41</sup>

## An Alternate Sentence: Life Without Parole

The life without parole sentencing option takes away any and all parole eligibility from convicted capital murderers. Life without parole has often been viewed positively in a number of ways; as an alternative sentence to the death penalty (especially by anti-death penalty advocates), as a way to give certainty to the families of victims by victims’ rights groups, as a safe way to incarcerate prisoners while respecting life by religious organizations, and as a more honest form of sentencing by defense lawyers. Its opponents have also viewed the life without parole option as a potential strain on the

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<sup>39</sup> Marquart, James, Ekland-Olson, Sheldon, and Sorenson, Jonathan (1994). *The Rope, the Chair, and the Needle*. Austin, TX: University of Texas Press. p.126

<sup>40</sup> Owen, Rob. Personal Interview, December 21, 2005.

<sup>41</sup> Lucio Jr., Eddie. Personal Interview, January 11, 2006.

management of the prison population, as a danger to the employees and inmates of a prison, as a tool to undermine of the death penalty, and as a way to complicate the capital punishment statute. Life without parole was also said to be unnecessary, as Texas had a system where inmates were not receiving parole in capital convictions, or living the full length of their 40-year sentences. However, this argument was met with resistance from a number of individuals. “Most people believe that a life sentence is not at all what it says. If you sampled people, they would say 8 years, 10 years, and then the criminal will get out,” said Steve Hall. “And with good reason. In the late 80’s, we had a prison population problem and people were being released in 6, 7, and 8 years. But the problem is that you have the same people who say it’s unnecessary arguing before a jury that they should never take the chance that this person will get out of jail.”<sup>42</sup> Others would also say that the problem of early parole doesn’t disappear with the implementing of a life without parole option. “I’m philosophically against life without parole, because I don’t want to make a promise today that others are going to have to carry out,” said Williamson County District Attorney John Bradley. “None of the legislators today will be in office when it comes time to pass spending bills to raise the capacities of our prisons. There is no life without parole, it’s not a reality, and it’s not honest to our juries.” The sentence may result in an increase in the prison population, which may have been one of the original catalysts for Texas’ sharp increase in executions in the 1990s. “It will take about 10 years. We’ll live through this cycle again. This will result in the critical mass that we

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<sup>42</sup> Hall, Steve. Personal Interview, December 21, 2005.

reached before, and there is probably nothing people can do to stop it,” said John Bradley.<sup>43</sup>

Life without parole has enjoyed a fairly large amount of public support nationally and within Texas, but perhaps for different reasons. In a nationwide Gallup poll, Americans were asked to choose which sentence was a more appropriate sentence for murder; 50 percent of respondents cited the death penalty as appropriate, while 46 percent said that life without the possibility of parole would be a better alternative.<sup>44</sup> Within Texas, there has been shown to be a large amount of support for life without the possibility of parole, but not necessarily as a substitute for the death penalty. The Scripps-Howard Texas Poll from Fall 2004 showed 78 percent of Texans favored a life without parole option made available to capital juries in Texas. However, with the life without parole option available, Texans still favored the death penalty to the tune of 76 percent.<sup>45</sup> This presented a situation where a life without parole sentence had the public support necessary to exist, but perhaps not as an alternative to the death penalty. Life without parole, at least in presentation, appeared best suited as an alternative to life sentences that allowed for parole eligibility and as a way to impose harsher penalties on convicted capital murderers.

Life without parole, prior to the 2005 regular session of the Texas State Legislature, was available in 47 other states, but not within Texas. New Mexico was the only other state with capital punishment that did not have a life without parole sentence (Alaska does not have the death penalty or life without parole). As a nationally accepted

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<sup>43</sup> Bradley, John. Personal Interview, January 12, 2006.

<sup>44</sup> *Attitudes Toward the Penalty for Murder*. (May 19, 2004). Date retrieved January 31, 2006, from <http://www.gallup.com/poll/>

<sup>45</sup> Scripps-Howard. “Texas Poll.” Survey. November 13, 2004.

form of punishment, advocates from all sides began to question why Texas did not have life without parole as an option in capital cases. Bringing life without parole to Texas was much discussed in Texas' State Capitol of Austin, but only successfully by State Senator Eddie Lucio Jr. and his staff. Lucio first introduced his version of life without parole in the 1999 legislative session. "Many of the people that I had spoken with around the state had some concerns," when Lucio first started to think of introducing his bill. "We felt like, quite frankly, there were two options on the table; death, or a shorter sentence. The people that didn't get death, many were worried that they might get out someday," said Lucio.<sup>46</sup> Yet the bill to provide jurors with life without parole did not pass in its first try, its second, or even its third. Life without parole was passed in Senator Lucio's fourth attempt late in the 2005 regular session, as a markedly different bill than it began, and in markedly different circumstances than when it was first introduced.

Getting the bill through the process involved the interplay of different circumstances, organizations, and individuals working towards the passage of life without parole. In his work *Political Process and the Development of Black Insurgency 1930-1970*, Doug McAdam constructs a model that articulates what is necessary for the construction of a successful social movement. In his particular work, he articulates how different socio-economic processes led towards the creation and flourishing of the African-American Civil Rights Movement, which ultimately resulted in the passage of the Civil Rights Act and the Voting Rights Act. His model identifies broad socioeconomic processes as instigators, which lead towards an expansion of political opportunities for the aggrieved group and the strengthening of indigenous organizations

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<sup>46</sup> Lucio Jr., Eddie. Personal Interview, January 11, 2006.

within the group who perceives social injustice. His model culminates in a social movement via a process he has labeled cognitive liberation, or the recognition that a situation is subject to change through political action.<sup>47</sup>

In the African-American Civil Rights Movement, a diverse group of organizations congealed to work towards the goals that were ultimately achieved in the passage of the Civil Rights Act and the Voting Rights Act. The campaign for life without parole in Texas was by no means a social movement, nor did it have the size or scope of the African American Civil Rights Movement, but the process by which it passed bears some resemblance to the type of activities a social movement undergoes to achieve a goal. In a similar fashion, many different groups with different goals worked together to pass this legislation, albeit for different reasons and motives. Senator Lucio introduced his bill as a death penalty supporter, as an advocate for the families of victims, and as one of the most revered Senators in the Texas Legislature. “Senator Lucio has been very helpful to prosecutors. We’ve worked with him before, and he has been a great help,” said John Bradley, an opponent of life without parole.<sup>48</sup> Lucio laid out his bill for his own reasons, yet he and his staff had success in forming a coalition of interested parties, presenting factual research for legislators to consider, and presenting a case for the passage of a bill that had some very powerful opponents working against its passage.

This paper will explore how life without parole, a sentencing option that has been widely supported by anti-death penalty advocates around the nation, was able to pass in a state where, as President of the Texas Chapter of the American Civil Liberties Union Will Harrell says, “support for the death penalty is so deeply held, it’s a part of Texans’

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<sup>47</sup> McAdam, Doug (1982). *Political Process and the Development of Black Insurgency 1930-1970*. Chicago: University of Chicago Press, p. 51

<sup>48</sup> Bradley, John. Personal Interview, January 12, 2006.

cultural identity.”<sup>49</sup> The paper will examine the different societal background pressures that contributed to the debates and thoughts of the legislature, the methods and techniques of testimony presentation utilized by Senator Lucio and others testifying before the legislature, media influence within the legislature and to the general public’s awareness of the issue, and the role that lobbying organizations and outside constituencies played in the passage of this legislation. Through consideration of these different factors, I ultimately seek to show how Senator Lucio and his staff were able to pass a controversial piece of legislation amidst determined opposition from powerful opponents. I also seek to impart the lessons learned from strategies that enjoyed success in Senator Lucio’s journey to provide jurists in capital murder trials with a new sentencing option; life without parole.

When considering the conclusions of my research, I began to notice commonalities between the ultimate goals of those involved in this area of criminal justice. These different organizations and individuals desire to ensure the safety of individuals in their communities, the fair and impartial administration of justice, and they ultimately desire to reduce the levels of violent crime in the communities they serve and belong to. The necessary path towards attainment of these goals, however, is not an area of similar agreement. Life without parole was seen on both sides of the aisle as having some effect to these ends, and perhaps pleased some more than others. However, life without parole also deals with a situation that has already occurred, a murder with aggravating circumstances. I began to question whether there were preventative policies that might be undertaken to possibly prevent future capital crimes.

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<sup>49</sup> Harrell, Will. Personal Interview, January 19, 2006.

To examine the underlying issues behind the type of individual likely commit capital murders in Texas, I decided to examine further the types of individuals who have been sent to Death Row in Texas, as well as the types of crimes that were committed to facilitate their trip. This is included in this document as an addendum, being a separate topic from my main area of concentration; the passage of life without parole legislation. I examined of the profiles of inmates on Death Row and of those already executed. This serves as a type of sample population for capital offenses, as the majority of murders that were eligible for the death penalty have been tried for a life sentence. I believe that through the examination of this data, policies could be implemented earlier in the lives of likely potential offenders to avert future crimes that warrant capital murder trials. This section concludes with an examination of these crimes and presents a case to reduce the number of death sentence issuances in Texas by increasing the educational levels of the state's population most likely to become Death Row's future inhabitants.

# Methodology





## News Articles, Legislative Actions, and Interviews

Going into my project, I decided a multifaceted approach of collecting data would be the best approach for covering the story of this legislation. I wanted to collect the media's viewpoints and coverage, the testimony and floor actions of the bill as it passed, scholarly articles and background research into the issue, and the thoughts of the people involved with the legislation. By using these outlets, I felt I would be able to form a more holistic picture of how the legislation passed in Texas and perhaps be able to examine future implications of the bill in Texas' criminal justice system. In the course of my work, I conducted fifteen interviews (each was around an hour and a half in length), I examined and recorded notes for sixteen separate legislative actions (including committee hearings and floor actions that often lasted multiple hours), I examined over 225 separate news articles related to life without parole legislation, over 400 separate articles associated with the Houston Police Department's crime lab, multiple position papers, polls, talking points, and reports from different individuals and organizations involved with the death penalty in Texas and life without parole legislation, and examined over 750 inmate profiles individually to compile a dataset that would ultimately form a composite image of the death row population in Texas.

My interviews were semi-structured in nature, and conducted in person or via telephone. I made two separate trips to Austin, TX to visit personally with some of the different people involved with the life without parole legislation. I felt that direct, face-to-face contact would help establish relationships and a sense of trust with my interviewees. I was able to create a list of individuals I wished to conduct interviews with from various sources, including the legislative hearings I observed, conversations

with other interviewees, and from collecting sources who were cited in the news articles I read. After a draft of this document was created, I conferred with my interviewees to ensure the accuracy of quotations.

One of the first interviews I conducted was with Texas Stand Down Director Steve Hall. Texas Stand Down is a group that works to abolish capital punishment, and one that worked closely with Senator Lucio's Office. Steve was very active in the background of the legislation, and helped organize and locate witnesses who spoke before the Senate in 2005. Steve referred me to others who played a role in the shaping of this legislation, and provided me with articles he had collected throughout the sessions when life without parole was considered. His support and advice during my research has been invaluable.

I spoke with Will Harrell, President of the Texas Chapter of the American Civil Liberties Union. Will has testified on behalf of Senator Lucio's life without parole legislation in the 77<sup>th</sup> legislature, and has been effective at building coalitions around the issue to bring public awareness to life without parole. I also spoke with Keith Hampton of the Texas Criminal Defense Lawyers Association. Keith testified before multiple committees and also worked closely with Senator Lucio's Office. Mr. Hampton had some very interesting points to make about the committee hearings, especially during the 79<sup>th</sup> regular session.

I spoke with Texas District and County Attorney Association Executive Director Rob Kepple, who worked to reconcile the different viewpoints of District and County Attorneys. Many DAs supported life without parole, while other District Attorneys opposed it vigorously. I thought it would be interesting to hear how the District

Attorneys worked together to hammer out a version of the bill that would be acceptable. I also interviewed J.D. Granger, an Assistant District Attorney in the Tarrant County District Attorney's Office. The Tarrant County District Attorney's Office had testified against the bill when it sought to add the life without parole sentence to the old scheme of punishment, but testified for the bill and gathered support for the legislation when it sought to replace the life in prison sentencing option with a life without parole sentence. I conducted a very interesting interview with Williamson County District Attorney John Bradley, a death penalty supporter and opponent of life without parole. Mr. Bradley had testified against the bill in 1999, was often present at the Capitol, and was very helpful in providing me with the main points of opposition that arose. Mr. Bradley provided well-articulated arguments and presented a very convincing case as to why life without parole may not be in Texas' best interest. I had hoped to interview Ms. Roe Wilson, who had testified against the bill numerous times as an Assistant District Attorney in Harris County, but she repeatedly declined interview requests. By bringing in different District Attorneys with different views on life without parole, I hoped to form a more complete picture of the varying degrees of opposition to the bill, and also to explain how the bill changed to become more acceptable for District Attorneys in Texas.

I came to find that religious organizations played a key role in the legislation, which I had not expected at the outset of my research. I contacted Bee Moorhead, the director of Texas Impact, a non-profit that represents many different faiths and has a vocal presence at the legislature. I also contacted Brother Richard Daly of the Texas Catholic Conference, which has worked towards death penalty reform and has a sizable population of constituents in Texas. Lastly, I contacted Suzii Paynter, the Director of

Citizenship and Policy with the Christian Life Commission of the Baptist General Convention of Texas, which has also conducted a study commission on the death penalty. These groups were very important to the legislation and provided a grassroots activism that was visible in the legislature and in the education of the faiths they serve. They contacted many legislators personally and encouraged the members of their congregations to do the same. They were very effective at educating their members as to the official position of their churches on life without parole and the death penalty. There were also victims' groups that were associated with the bill, and many victims testified in favor of the legislation, but as individuals. One of the most visible victims' rights groups in Texas testified against the sentencing option repeatedly. Texas Justice for All is a victims' rights group that fervently supports the death penalty and improvement of what they call an inadequate justice system.<sup>50</sup> They did not respond to interview requests.

To get a feel for the academic viewpoints on life without parole, I decided to contact Rob Owen of the University of Texas. Rob is a law professor and works with the capital punishment clinic at UT in Austin. He also volunteers his time as a lawyer for criminal cases and was interviewed on National Public Radio about the life without parole legislation in Texas. Dr. Mark Cunningham, a Forensic Psychologist from Dallas, has conducted numerous studies on the prison populations of death row and life without parole inmates. He was an incredibly useful and knowledgeable resource as to the future dangerousness of life without parole and Death Row inmates, and testified multiple times in committee as a resource witness. Dr. Cunningham was also very helpful in providing me with research on common characteristics of those who end up on death row, and

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<sup>50</sup> *Justice for All – A Criminal Justice Reform Organization* (2004, April 17). Date retrieved, February 8, 2006 from <http://www.jfa.net/>

helped flesh out some ideas with me that were very useful while writing the conclusion of this thesis. Unfortunately, I was not able to conduct an interview with Dr. Jordan Steiker of the University of Texas Law School. Dr. Steiker testified in past sessions for this legislation, and has published numerous articles regarding capital punishment. He was spoken of highly and criticized harshly in some interviews, and would have been a good person to speak with about his experience with the legislation.

I also wanted to speak with those directly involved in the mechanics of the testimony and crafting the bill. I was able to speak with Damian Durante, the Chief Committee Clerk of the House Criminal Jurisprudence Committee. Damian handles much of the policy work of Representative Terry Keel, who chaired that committee and helped the bill through the process when life without parole became a replacement for the life in prison sentencing option. Mr. Keel had previously been an opponent of the bill until the 79<sup>th</sup> regular session when it added life without parole as an additional option to the life sentence. I spoke with Kenneth Besserman, Senator Rodney Ellis' Chief of Staff, about the legislation. Senator Ellis has played a prominent role in shaping capital punishment related legislation in Texas and was a co-author the life without parole legislation that eventually passed. Lastly, I spoke with Senator Lucio himself, as well as his Legislative Director, Ian Randolph. Senator Lucio provided me with his viewpoints on how the bill worked its way through the process and was very kind to take the time out of a very busy schedule to speak with me about the legislation. I was hoping to also speak with Mary Ann Wiley, the Chief Legal Counsel of Governor Rick Perry, to get a feel for the Governor's stance on the issue as it moved through the process, but she was unreachable. I also was unable to reach Senator Juan Hinojosa, who chaired the Criminal

Jurisprudence Committee while a member of the House, handled the bill for Senator Lucio in prior sessions, and was also a co-author of the legislation that passed in the 79<sup>th</sup> legislature.

I also examined a vast amount of news articles from major Texas news outlets about life without parole. These included *The Houston Chronicle*, *The Austin American Statesman*, *The San Antonio Express News*, *The Corpus Christi Caller Times*, and others. I thought it important to examine the media's coverage of the bill as it moved through the process, to look at how the editorial boards were treating the bill, and to be able to place the media's role in influencing the legislation. These articles also provided me with background information into problems within the Houston Police Department's crime lab, President Bush's 2000 campaign and the issues raised with Texas' system of capital punishment, the Supreme Court decisions of *Atkins v. Virginia* and *Roper v. Simmons*, as well as other items of interest.

I watched every action taken in the Texas Legislature on Senator Lucio's life without parole bills in the 76<sup>th</sup>, 77<sup>th</sup>, 78<sup>th</sup>, and 79<sup>th</sup> legislature. By having the official legislation archived on the Texas State Legislature's website, I was able to "attend" every meeting, floor consideration, and to examine all witnesses present for and against the legislation. By watching all of the testimony and taking copious notes, I was able to see what strategies worked in passage, how the framing of the bill changed, and how the witnesses testifying in committee differed from session to session. This research formed a bulk of my findings, as the debate within the legislature ultimately played a large role in the passage of the legislation and of the narrow margin of defeat in 2001.

## Death Row Analysis and Preventative Policy Options

Compiling data on the inmates was made possible by the Texas Department of Criminal Justice, which has made publicly available detailed descriptions of current and former Death Row inmates and the crimes they have been convicted of. Profiles were accessed via the Internet in the Death Row Information Section of the Texas Department of Criminal Justice web site (<http://www.tdcj.state.tx.us/stat/deathrow.htm>). Profiles are presented on an individual basis throughout the web site in the form of an individual image or webpage. For each individual since 1976 that had been executed in Texas and for those currently serving on Death Row, I viewed their profile, recorded the profile's information into two separate spreadsheets for executed inmates and Death Row inmates, and also sorted the profiles into different groupings based on commonalities between offenders. The most challenging part of collecting this data was to create categories for some of the offenders' crimes. Some profiles detailed multiple offenses of different types (for example kidnapping an individual as well as robbing and murdering them), some provided a crime description that did not fall neatly into a specific area of the capital murder statute, and others were simply incomplete. While other areas of my data collection were subject to less interpretation, I believe that the data I collected is a valid attempt to categorize Texas' Death Row population, past and present, according to their crimes. I believe this information shows the frequency of crime types that received the death penalty.

After collecting the data, I organized it to sort for the race of the offender, the race of the victim, the type of crime committed, age at the time of offense, age of different ethnic groups, highest level of education attainment, crimes that involved robbery, and

crimes that did not contain an element of robbery. Some profiles were incomplete in certain areas of interest and some recently accepted Death Row inmates did not have a detailed profile available at the time of my research. Individual profiles missing certain pieces of information were not counted toward the individual totals for certain categories. For example, if the level of highest educational attainment was not reported in the profile, I would discount the offender from the overall total of profiles with reported levels of educational attainment, the different categories of educational attainment, and the average level of educational attainment. This makes my data subject to some degree of standard error due to lack of data for some profiles.

I also recorded the counties where these crimes were committed, and created a rough image of where death sentences were originating from within Texas. I used population data from the United States Census Bureau to determine the four largest counties within Texas, finding Harris County, Dallas County, Tarrant County, and Bexar County to be the largest, and around 40 percent of Texas' total population. I sorted data for these four counties and created a dataset of their death penalty issuances, which I was then able to compare the sum total of all other counties in Texas. For each of the four largest counties, the sum total of the four counties, and for all other counties, I conducted an identical sorting process as I had for the overall total in Texas.

Additionally, I continued to make use of the interviews I had conducted for my original inquiries into the life without parole legislation. Many of my interviewers had heartfelt stories to tell, as well as their viewpoints as to what policies should be pursued to reduce violent crime and provide for a safer society.



# 76th Legislature: An Introduction



## The Legislative Session Sections

The four legislative sessions in which Senator Lucio introduced life without parole legislation are separated into four sections within this thesis. In these sections, I first outline the background events that unfolded prior to each legislative session to describe the political and societal climate in which the legislature was convened. Knowledge of contributory background events provides an added level of understanding to the different dynamics of each legislature. For example, in the 77<sup>th</sup> legislature, the attention drawn from Bush's Presidential Campaign in 2000 brought added scrutiny to Texas' system of capital punishment. With this scrutiny came an impetus for the legislature to enact reforms to the capital murder statute, which brought life without parole to the forefront of conversations in Austin.

I also followed the four different bills through the different events and debates that accompany the legislative process. In each sequential session, there is discussion of the different legislative stops on the road to passage, providing the arguments of the different parties involved. The 76<sup>th</sup> legislature seemed to act in a way much like a legislative test balloon, seeing which arguments would float, but without expectations of passage. In the 77<sup>th</sup> legislature, there was very nearly passage, although the progress of the bill appears to have been derailed as the bill became viewed as anti-death penalty legislation after some legislators linked the concepts together. The 78<sup>th</sup> legislature presented a new dynamic of redistricting and a Republican majority in both chambers of Congress, as well as the introduction of a new Chairman to the House Criminal Jurisprudence Committee. The 79<sup>th</sup> legislature saw the final passage of the legislation after Supreme Court rulings, media pressure on an obstructionist legislator, and a process

of compromise that resulted in the passage of life without parole to replace the life sentence rather than being added to the statute as an additional option. Each legislative section also has a discussion section at its conclusion, which examines the different strategies that were repeated, that gained success, and the different factors that prevented passage. Ultimately, Senator Lucio was able to successfully present his bill in the 79<sup>th</sup> legislature as a measure to provide certainty to the families of victims and ensure that convicted capital offenders are either incarcerated or executed. By providing compelling evidence, Lucio was able to quell the doubts of his fellow Senators, and ultimately present life without parole as it would be accepted in Texas; as a tough-on-crime measure that does not depreciate the abilities of prosecutors to seek the death penalty.

## 76<sup>th</sup> Legislature: Background

On November 9, 1998, Texas State Senator Eddie Lucio Jr. filed two bills for the upcoming 76<sup>th</sup> Regular Session of the Texas Legislature that dealt with the state's capital murder statute. One bill sought to advise juries as to parole eligibilities in capital murder cases, Senate Bill 39, and was met with support from a broad group of individuals. Prior to the passage of this bill, juries were not advised as to whether there was parole eligibility in a life sentence. The bill drew support from the Harris County District Attorney's Office, the Williamson County District Attorney's Office, and the Walker County District Attorney's Office. Notably, all three District Attorneys also opposed Senate Bill 38, which was heard simultaneously in the Senate Criminal Justice Committee on April 14, 1999.

Senate Bill 38 was Senator Lucio's first attempt to add life without parole as a sentencing option in capital murder cases for Texas juries. This initial form of the bill sought not to add life without parole as an additional sentencing option, but to replace the life sentence with parole eligibility in 40 years with a life without parole sentence. The bill was preceded by a number of news articles, as well as some notable cases that were bringing about controversy in capital murder cases in Texas.

The well-publicized case of Karla Faye Tucker, a woman who admittedly murdered multiple people with a pickax, sparked much debate about death penalty reform in Texas prior to the 76<sup>th</sup> Regular Session. Tucker had also converted to Christianity while in prison, prompting cries for mercy from people such as the Evangelical Pat Robertson and Pope John Paul II.<sup>51</sup> There were also many calls for her sentence to be commuted to a life without parole sentence, which was argued for in the news media as a preferable alternative to the death penalty.<sup>52</sup> The *Austin American Statesman* even stated "there is a strong case to be made for abolishing the death penalty and creating the alternative punishment of life without parole."<sup>53</sup>

After the execution of Tucker, Senate Criminal Justice Committee Chairman John Whitmire effectively cut off talk of a life without parole statute possibly being passed. "The bottom line is my phone has not been ringing that we have a broken system," said Chair Whitmire. Many prosecutors had opposed the bill in the past, most notably former Harris County District Attorney Johnny Holmes; "I think it repeals the death penalty. I

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<sup>51</sup> Rosin, Hanna. (1999, January 29). Pope's Appeal for Mercy Lets Inmate Escape Death. News Section, p.A1

<sup>52</sup> Herbert, Bob. (1998, January 6). Texas' Fetish for Capital Punishment. *Austin American Statesman*. Editorial; p.A9

<sup>53</sup> Editorial. (1998, January 25). Capital Punishment; Texas Legislature Should Review Alternatives. *Austin American Statesman*. p.H2

don't think you could get a verdict of death if the jury knows it can give life (without parole," said Holmes. Groups such as Amnesty International also congregated in Texas to encourage changes within Texas.<sup>54</sup>

However, just as many were calling for reforms in lieu of Ms. Tucker's case, many were also calling for bills to expedite the executions process because of the case involving James Byrd Jr. The Byrd case received a verdict prior to the start of the session, and was the first case since the reinstitution of the death penalty where white defendants were given the death penalty in the murder of an African-American.<sup>55</sup> The trial was also one of great expense to Jasper County, who had to prosecute three capital murders simultaneously. Jasper was forced to raise property taxes eight percent to adjust for the costs of the trial and the national media attention it garnered.<sup>56</sup> Byrd's case led some to argue that life without parole would be a good option to provide certainty for victim's families, and also lead to arguments that the appeals process for death penalty cases should be shortened and streamlined in order to carry out executions faster. Groups such as Texas Justice for All brought up the case of Kenneth McDuff to reiterate the point that certainty can only be had in capital cases when the criminal is executed.<sup>57</sup> Texas was one of the few remaining states that did not allow for life without parole, and would not for another six years. Strangely, when life without parole does pass, it passes in a similar form as was offered in its first attempt at passage in this legislature.

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<sup>54</sup> Ward, Mike. (1998, February 5). Officials Stand Up for Death Penalty; A Day Later, No Rush to Change. *Austin American Statesman*. News section, p.A1.

<sup>55</sup> Gamino, Denise. Racist Convicted in Jasper Murder; Jury Begins Process to Decide. *Austin American Statesman*. News Section; Pg. A1

<sup>56</sup> Bryce, Robert. (1999, February 25). Trial's high costs tax Jasper coffers. *Christian Science Monitor*. USA Section, p.2

<sup>57</sup> Hubbarth, Rusty. (1998, December 20). Murderers Should Pay the Ultimate Penalty. *Austin American Statesman*. Editorial p.A11

## Senate Criminal Justice Committee

(All quotes are from April 14, 1999 meeting unless otherwise noted).

Those who testified before the Senate Criminal Justice Committee on behalf of SB39 were Senator Lucio, Dr. Dennis Longmire of the Criminal Justice Center at Sam Houston State University, Texas Criminal Defense Lawyers Association Director Keith Hampton, Criminal Defense Practitioner Rita Radostitz, Deacon Doots DuFour of the Catholic Diocese of Austin, and Joy McIntosh of the Austin Dieder Foundation.

Testifying against the bill were District Attorney David Weeks of Waker County, Don Stricklin of the Harris County District Attorney's Office, and Williamson County District Attorney John Bradley.

Lucio began and ended his presentation of the bill in the Senate Criminal Justice Committee. Lucio said in his opening remarks that he always thought "life meant life." In other words, if I as a juror felt that a criminal deserved to live, but was not safe enough to walk the streets again, a life sentence would be appropriate." Lucio also mentioned that he supported the death penalty and cited a Scripps Howard Texas Poll that cited 84 percent of Texans who support life without parole. He closed his statement by saying "when the United States Supreme Court calls the criminal justice system in Texas 'especially troubling,' I would ask you on behalf of 84 percent of Texans to let this bill out today." Lucio then introduced Dr. Dennis Longmire from the Criminal Justice Center at Sam Houston State University.

Longmire distributed the Texas Crime Poll, which he conducted at Sam Houston State. He pointed out that people would continue to support the death penalty if life without parole were an option in Texas. He also pointed out that from his survey, 46

percent of people would substitute life without parole for the death penalty. He said he believed that if there is a consequence of changing capital murder sentencing, it is that people that who received life in prison would get a harsher sentence and that the death penalty will remain relatively unaffected.

Rita Radostitz and Keith Hampton then approached the stand. Rita testified that her practice was entirely criminal defense and that she has taught a class on capital defense at the University of Texas. She made an argument that the life without parole law is a truth in sentencing law and that “it allows life to mean life, keeps the trial clearer, more simple for jurors, and it allows jurors to make a decision for what is appropriate for an individual convicted of capital murder.” She said Senate Bill 39 was important because she didn’t think jurors knew what a life sentence was at the time. She participated in a conversation with Senator Lucio about how the plea bargaining process would be streamlined and that the state would ultimately save a large amount of money. Hampton then said that he has heard an undercurrent about the bill, that being which advocate would the law benefit. “Would there be fewer death verdicts if we passed it? Would it have a negligible effect? Please don’t make a decision on this bill based on which side you think will benefit,” said Hampton, “think of the 12 people on that jury, everybody from that committee, everybody from that community, and every citizen of this state. They can know that every single time 12 good people come back with a guilty verdict in a capital case, they can know that that person will be removed from their world forever.” “Because prosecutors and defense attorneys are professional adversaries, you reach a tipping point of suspicions when you are trying to pass good policy,” said

Hampton.<sup>58</sup> Hampton also said in committee that he did not know whether the legislation would cut down on the number of death penalty issuances in Texas, and that “if Johnny Holmes were here, I would tell him that he can still claim he has the death penalty capital of the world. That title will not be taken from you if life without parole is an option for juries in the state of Texas.”

Next to testify was Deacon Doots DuFour of the Catholic Diocese of Austin. He was openly hostile to the manner in which criminal justice was administered, and said that he believes the system is based on vengeance. “When you go to work on vengeance, you fail to address the causes of the problem. We want incidents of crime to stop, not to pursue it.” DuFour also said that he didn’t see value in the death penalty and stated that he didn’t believe it to be a deterrent of crime. He also drew associations between American states with the death penalty and human rights oppressors around the world such as China, South Africa under Apartheid, and others. He also said that the death penalty was a two-tiered system of justice, and said he believes it is a holdover from the Civil War. He also referred to the death penalty as “cold-blooded killing.”

The next to testify was Joy McIntosh of the Austin Diedre Foundation, an anti-homicide group that seeks to lower the number of homicides in the United States. Her testimony was animated, with sudden and often changes in the tone of her voice to accentuate her points. She stated that life without parole would provide juries with the option of putting away dangerous criminals for life. She cited examples of how it could make society safer; she brought up the James Byrd Jr. case, and said that the Jasper Sheriff had a hard time proving the kidnapping element of the conviction. She mentioned

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<sup>58</sup> Hampton, Keith. Personal Interview, January 11, 2006.



the McDuff case, and she also mentioned a number of other cases. She then hypothesized that, out of ten average people in Texas, eight would already believe life without parole was an option, and that two would say it should be available. She then told the story of her daughter, whom her ex-boyfriend killed (the ex-boyfriend also wounded her husband). She said that her case was not given the option for a death sentence and that “more than 75 percent of capital murder cases are not tried for death. Who is tried for the death penalty depends on press and the power of the family to get publicity.” Senator Lucio also noted in that smaller counties across the state are paying as much as \$300,000 in county budgets of around \$5 million for a single death penalty case. Lucio said that many of capital murder cases were not being tried for the death penalty because of the prohibitive expenses associated with the trial.

David Weeks, the District Attorney of Walker County, testified next in opposition to Senate Bill 38. He said that he had testified against life without parole since 1985. He said that the sentence did not make sense from a criminal justice standpoint, the system was not broken, and that prisoners were not being paroled under the current statute. He raised questions about whether inmates will be able to be controlled, whether plea bargains will become more difficult, and whether future geriatric prison populations will increase the costs of imprisonment. Weeks also answered a question from Senator Lucio about containment of Death Row inmates by stating that the cases of death row inmates are constantly appealed until the day they are executed, and “all of them have in their mind that someday they might get another trial. That really helps to control them in that environment.”

Don Stricklin from the Harris County District Attorney's Office testified next in opposition to the bill. He first rebuked Hampton; "it is not Mr. Holmes' claim that we are kings of the death penalty. We are from a county where the citizens, all 3.8 million, generally believe that when you engage in conduct prohibited by the statute of capital murder, that ought to be a very real possibility." Stricklin raised concerns about whether Lucio's legislation would create true life without parole, or rather just a life sentence until another significant budget crisis.

Lucio then said that he supported the prosecutors' professions, that he files most of his bills for prosecutors, but that Senate Bill 38 was for juries. He stated that Harris County has executed the largest number of people, but that its crime rate remains unchanged. Lucio also said that he does not believe the death penalty deters crime and that funds saved with life without parole sentences could be used for additional law enforcement personnel, penitentiary space, rehabilitation treatment programs, and towards education. Stricklin said a true waste of money would be to try to rehabilitate people who are in prison for life, and that juries in Harris would not change their verdicts. Lucio cited examples of Florida where juries continued to issue high levels of death sentences. Bill Turner, Brazos County District Attorney, and John Bradley, Williamson County District Attorney, also testified against the bill, however their testimony was omitted on the copy of the hearing I received from the Texas State Senate's Staff Services. The bill failed to pass out of committee and was not reconsidered.

## Analysis of 76<sup>th</sup> Legislature

Prior to the convening of the legislature, there was a large amount of controversy surrounding the Karla Faye Tucker execution, as well as the murder of James Byrd Jr. In Tucker's case, the emphasis seemed to be very geared towards her reformation as a Christian woman, while Byrd's case required quick justice for a truly heinous, racist, and well-publicized crime. These events were the backdrop upon which the session was placed, but were familiar arguments. Byrd's case was a way for proponents to demonstrate why the death penalty must be available and not weakened, Tucker's case was a way for opponents to humanize the criminals who were being executed. Neither case asserted an overall assumption of fundamental flaws in the system of administering capital punishment; they were continued arguments about whether capital punishment was ideologically and morally correct in certain situations,

Senator Lucio did an excellent job of presenting the bills, but one of the main points of emphasis in his testimony is that the life without parole legislation provided for truth in sentencing, which was also an outcome of the other bill he was introducing, Senate Bill 39. This gave prosecutors an outlet to say they were proponents of truth in sentencing by supporting Senate Bill 39. Lucio also made a point to emphasize his support of the death penalty, but Dr. Longmire made a very important admission about how Texans could potentially treat life without parole as an alternative to the death penalty rather than an additional option. Rita Radostitz also echoed the points of the need for truth in sentencing in the majority of her remarks. Deacon Doots DuFour was also vigorously opposed to the death penalty, and made many associations that were most likely unfavorable to the Senators who heard his testimony.

Keith Hampton and Joy McIntosh made similar points, but in different fashions. Hampton spoke of the problems of who would be the victors should this legislation pass. It was strange to see him, who prosecutors were opposed to, arguing for the bill on behalf of certainty for victims and providing assurances that capital offenders would never get out. Ms. McIntosh presented her testimony very passionately, but in a style that was somewhat unprofessional. She made valid points, but the passionate nature of her testimony made it appear less serious than desired. She also presented her own personal story to make a case for the legislation, which was not as well received because of time restraints the committee faced. She could be accused of having a valid message, but that it was not presented in its best light for the committee.

The District Attorneys presented their case as one that didn't need to be made. They spoke to the capital murder statute essentially having life without parole as it stood, they neutralized the truth in sentencing issue by supporting Senator Lucio's other bill that provided for improved jury instructions, and they also raised doubts as to whether the bill would undermine the ability of prosecutors to seek and obtain the death penalty. "Legislators don't want to question whether they support law enforcement," said Suzii Paynter, Director of the Christian Life Commission.<sup>59</sup> Ultimately, there seemed not to be enough outside factors contributing to an urgency to reform the death penalty statute. This combined with strong prosecutorial opposition, testimony in support of the bill that also lambasted the death penalty, and a lack of emphasis towards the rights of victims' families would be reasons I identify as why this legislation failed to pass in the 76<sup>th</sup> Regular Session of the Texas Legislature.

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<sup>59</sup> Paynter, Suzii. Personal Interview, January 24, 2006.

# 77th Legislature: Within a Single Vote



## 77<sup>th</sup> Legislature: Background

In the 77<sup>th</sup> Regular Session, there was a much different climate than the session prior towards reformation of Texas' system of capital punishment. George W. Bush's 2000 Presidential Campaign drew a large amount of national criticism towards Texas' high number of executions since the reinstitution of capital punishment. Specific cases were highlighted in the national press; *The USA Today*, in a story about Gary Graham, said "the inadequacies of clemency systems in death-penalty states such as Texas, where the system shelters politicians, obstructs accountability and inspires public doubt."<sup>60</sup> Senator Rodney Ellis, who has worked on death penalty reform often during his tenure as a State Senator, referred to the Texas court system in the New York Times as a "essentially a system of judicial apartheid." Ellis also said that in Texas, "our focus tends to be on the law and order, lock them up, throw away of the key stuff, and a refusal to look at the inequities of the system. Part of the problem is that our governor and a number of my conservative colleagues somehow have the view that if you show compassion, you can be perceived as weak."<sup>61</sup> Richard Cohen of the Washington Post also published editorials criticizing Bush's record on capital punishment, and pointed out that Texas has a higher murder rate than Massachusetts, a state without the death penalty.<sup>62</sup> Cohen posited a blistering editorial of Bush's stance on capital punishment, noting that in the 2<sup>nd</sup> Presidential debate of 2000, Bush smiled while discussing how the murderers of James Byrd Jr. would be put to death. Cohen also mentioned an interview with Tucker Carlson in which he says Bush mocked Karla Faye Tucker's pleas for a commutation of her

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<sup>60</sup> Troubling Case for Clemency. *USA Today*. News Section, p.16A

<sup>61</sup> Oppel, Richard. (2000, June 3). Sand in the Gears of Death Row Express. *The New York Times*. Section A, p.9

<sup>62</sup> Cohen, Richard (2000, September 26). Hangman, Be Gone. *The Washington Post*. OP-ED Section, p.A27

sentence.<sup>63</sup> National papers such as *The USA Today*, *The New York Times*, and *The Washington Post* continued to point out that Bush had overseen a large number of executions, and also that Texas was one of the few states without a life without parole option. Bush continually maintained throughout the campaign that “every person that has been put to death in Texas, under my watch, has been guilty of the crime charged, and has had full access to the courts.”<sup>64</sup> Yet, many concerns were raised about the competence of the public defenders assigned to those who could not afford their own counsel. It was often mentioned that in some cases, defense lawyers had slept through the capital punishment proceedings.

Texas also drew enormous criticism beyond President Bush’s record on capital punishment due to a plethora of events. There was significant coverage of the cases of Betty Lou Beets, Gary Graham, Ricky McGinn, John Paul Penry, and calls for a moratorium on executions. Gary Graham’s case drew a host of celebrities to the state to protest his execution, including Jesse Jackson and Actor Danny Glover.<sup>65</sup> Beets’ case also drew a host of criticism, as she was the oldest inmate executed in Texas and only the second woman to be executed in the modern era of the death penalty. Mentally retarded offender John Paul Penry’s sentence was overturned in the United States Supreme Court because of botched jury instructions.<sup>66</sup> Additionally, the former Republican Governor of Illinois, George Ryan, decided to place a moratorium on executions in his state. This decision brought about calls for then-Governor Bush to enact a similar moratorium from

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<sup>63</sup> Cohen, Richard (2000, October 17). And Bush Smiles. *The Washington Post*. OP-ED Section, p.A33

<sup>64</sup> Bonner, Raymond, and Rimer, Sara (2000, May 14). On the Record/Capital Punishment in Texas; Bush Candidacy Puts Focus on Executions. *The New York Times*. Section 1, pg.1

<sup>65</sup> (2000, June 23). Was Justice Served in Graham’s Execution. *Austin American Statesman*. Editorial Section, p.A14

<sup>66</sup> Reinert, Patty (2001, June 5). Court Tosses Death Ruling in Penry Case; Instructions to Jurors Bungled. *Houston Chronicle*. Section A, p.1

media outlets such as *the Austin American Statesman*.<sup>67</sup>

The focus on Texas brought about by local and national media outlets steered the debate over capital punishment to the center of proceedings in the 77<sup>th</sup> Regular Session of the Texas State Legislature. “I call it the perfect storm – the coming together of a number of events. It focuses attention in an unprecedented way on executions, since Bush presides over the killingest state in the nation. It has forced people to reconsider the death penalty because of the fear of executing innocent people,” said Maruie Levin, an attorney for the Texas Defender Service.<sup>68</sup> In response to the national focus upon Texas’ criminal justice system, a climate of change emerged in Texas in the legislative session after Bush’s presidential run. “I think the glare of the campaign spotlights let us see things about ourselves in this state that we didn’t like,” said Senator Rodney Ellis. “As a result, I think we’re seeing a real conscientious commitment in the legislature to improving the quality of our criminal justice system.”<sup>69</sup> Texas lawmakers moved forward on bills that banned the execution of mentally retarded inmates, provided improved counsel for indigent defenders in capital cases, recognized hate-crimes, and also Senator Lucio’s reintroduced bill to add life without parole as a sentencing option in capital murder cases. This was a markedly different feel than was present at the 1999 Regular Session where, as *The New York Times* reports, “Mr. Bush’s unannounced but looming presidential campaign cast a shadow over every legislative vote as his Capitol allies sought to protect him from politically sensitive bills.” Senator Lucio is also quoted

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<sup>67</sup> (2000, July 16). Hang’em High in Houston or Rethink Death? *Austin American Statesman*. Editorial Section, p.H2

<sup>68</sup> Dorsett, Amy (2000, December 31). A Lethal Debate Ahead; Execution Record Draws Spotlight. *San Antonio Express-News*. Metro Section, p.1B

<sup>69</sup> Duggan, Paul (2001, May 14). Texas Legislators Review Use of Death Penalty; National Criticism During Presidential Campaign Reverberates in a Spate of Bills. *The Washington Post*. Section A, p.A03



in the article, “the climate is different basically because Perry is not running for President and Bush was. Bush’s actions and the way he handled some things reflected that.”<sup>70</sup>

House Criminal Jurisprudence Committee Chair Juan Hinojosa made the point to *The Houston Chronicle* that “it’s ironic because the changes that President Bush opposed are now coming about because of his presidential campaign.” Hinojosa also pointed out that Texas executes more people than any other state in the nation and that advancements in DNA evidence have indicated “that there is a very strong possibility that there have been some innocent people executed in our state.”<sup>71</sup>

It was in this markedly different climate that Senator Lucio laid out similar life without parole legislation before the 77<sup>th</sup> Regular Session of the Texas Legislature, which maintained identical personnel from the previous legislature. There was one major difference in the legislation that would ultimately play a large role in determining whether life without parole would become a sentencing option in Texas; the decision to pursue life without parole as a third sentencing option in capital cases rather than as a replacement for the life sentence with parole eligibility in 40 years.

### Senate Criminal Justice Committee

(All quotes are from April 4, 2001 meeting unless otherwise noted).

Those who testified before the committee were Senator Lucio, University of Texas Law Professor Jordan Steiker, Dean Michael Sharlot of UT Law, Denton County District Attorney Bruce Issacks. Bell County Assistant District Attorney Lon Curtis, Texas Criminal Defense Lawyers Association Director Keith Hampton, Executive

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<sup>70</sup> Yardley, Jim (2001, April 24). Back in Texas, Bush’s Legacy Comes Under Fire. *The New York Times*. Section A, p.1

<sup>71</sup> Elliott, Janet. State Pushing Fairness in Justice Reform. *Houston Chronicle*. Section A, p.1

Director of the Texas American Civil Liberties Union Will Harrell, Wichita County District Attorney Barry Macha, Dallas County Assistant District Attorney Toby Shook, Tarrant County Appellate Prosecutor David Curl, Rusty Hubbard of Texas Justice for All, Texas Impact Executive Director Bee Moorhead, Alison Dieter of Citizens for Choice in Sentencing, Travis County Assistant District Attorney Ruth-Ellen Gura, and Criminal Justice Policy Council Executive Director Tony Fabelo.

Senate Bill 85 was introduced with two different committee substitutes. Version A of the bill replaced life in prison with parole eligibility in 40 years with life without parole. Version B of the bill would have added life without parole as a third sentencing option in capital cases. Lucio explained the bill as similar to the bill laid out in the 76<sup>th</sup> legislature. Lucio mentioned the possibility of young offenders being released when they are around 60 years old, and said that he sought to ensure that the most violent offenders are never released from prison. He mentioned the closure that the sentence would provide to families of victims, the costs associated with trying someone for the death penalty (Lucio cited a cost figure of \$2.3 million in capital cases and mentioned Jasper County's troubles with the James Byrd Jr. case), and also cited the Scripps-Howard Texas Poll, which showed an increase in the percentage of Texans who supported a life without parole option to roughly 74 percent. Lucio also explained that his bill offered two different committee substitutes for prosecutors who had asked to consider different forms of life without parole. Lucio also mentioned that Texas was one of five states without the life without parole option.

Professor Steiker also testified in support of the bill, and said juries should be given an expanded range of options. Steiker said that he doesn't believe the two-option

version of the bill would be in the spirit of Lucio's original legislation, and pointed out that capital murder trials are more limited than other trials in the criminal system. Steiker also said that either option would be preferable to the system of life with parole or the death penalty, and cited the reports of the capital jury project that said life without parole is an option that jurors desire. Steiker also insisted that the legislation wasn't an anti-death penalty proposal. He said that with the three-option, "you're going to have changes in decisions in both directions. You will see some jurors who will give life where they would have given 40 years, and a smaller number going from a death sentence down to the life sentence." Dean Sharlot also offered his support of the legislation, and said it "would be an expression of confidence in our citizens." Sharlot called it unfortunate that, after *Furman v. Georgia*, Texas did not ask its juries whether the defendant deserved to die. He said that this legislation goes a long way to help jurors confront this question.

Hampton, Harrell, Issacks, and Curtis then approached the stand. Hampton spoke first, saying that he supported the three-option version of the bill, which he believed would provide a greater level of jury choice. Hampton also said the two-option version of the bill would simply create a harsher sentencing scheme than before. Harrell echoed a similar sentiment and said that the two-option version of the bill "demonstrates the visceral attitude that they (prosecutors) have towards people on death row." Issacks made the point that there is not a real practical difference between life without parole and the current life sentence, but said that his office would support the committee substitute providing for two options. Curtis said that he supported the two-option, but added that he was "shocked to hear constitutional scholars suggest that we should afford capital jurors greater discretion." Curtis added that he harbored concerns about constitutional attacks

upon the three option-sentencing scheme. Hampton pointed out that there have not been constitutional problems with the three-option version of sentencing in other states, and noted that the U.S. Supreme Court previously approved the proposed sentencing scheme. Hampton also said that the three-option version enjoyed support from rank and file prosecutors, and said that just having life without parole would make it more difficult for prosecutors to receive plea bargains in some cases. Lucio also added that there were many cases where families do not want the death penalty, but where prosecutors do not want to give a parole eligible sentence to the defendant.

Issacks continued to push forward his argument that the capital punishment statute would be subject to attack, and that jurors would be confused by the a three-option sentencing scheme. David Curl also made similar points about confusing juries, constitutional issues, and then claimed that the three-option version would lead to an increase in death penalty prosecutions by complicating the waver process, creating a process he called almost as complicated as the death penalty trial itself.

Rusty Hubbarth testified that the life without parole sentence is a fallacy, and that it is not life without clemency, medical reprieve, or pardon. He also said it would become convenient to commute high profile sentences like Karla Faye Tucker's and Gary Graham's. Bee Moorhead testified on behalf of Texas Impact (which represents various religious communities) and said that human judgment is not perfect, and that we should strive to be as close to perfect as possible. Allison Dieter also affirmed that her group is for expanded options in capital cases, as did Ruth-Ellen Gura. Tony Fabelo outlined the process of parole eligibility, and pointed out that many prisoners will die while incarcerated due to their lifestyle choices while incarcerated. Fabelo also said that the

sentence will decrease executions, but that there will also be an increase in life without parole sentences from the people who receive life sentences. The bill passed out of committee on April 19 in its three-option committee substitute form.

## Senate Floor

(All quotes are from May 2, 2001 Senate Session unless otherwise noted).

On the Senate floor, Senator Lucio made the case that Texas juries needed the legislation to provide truth in sentencing and to add additional options to the capital sentencing scheme. He also brought up the questions that jurists have to answer in capital cases, those being whether the defendant is a future danger to society and if there are mitigating circumstances that warrant a sentence other than the death penalty. He also made the point that the lengthy appeals process associated with death sentences leave some families with unresolved feelings as they wait for the death sentence, whereas life without parole does not carry with it the same amount of appeals and brings a sense of closure not found with a parole eligible sentence.

Senator Ogden reiterated the point from committee that the legislation could potentially put the capital murder statute back into the federal courts and also raised the point that a future legislature could commute life without parole sentences to life sentences (Lucio answered this with the possibility of mental retardation cases being declared unconstitutional, life without parole would be available). He also reiterated the point that, in effect, Texas already had a life without parole sentence with the current statute (Lucio responded by saying that it is not the same thing to the families of victims). Lucio moved for suspension of the rules for passage, which failed to pass. The bill is passed in the Senate the next day.

## House Floor

(All quotes are from May 14, 2001 House Session unless otherwise noted).

The House Criminal Jurisprudence Committee received this legislation on May 4, 2001, but did consider the legislation in a formal meeting not open to the public. The legislation was not amended in committee. The Chairman of the Committee, Representative Juan Hinojosa, handled the bill on the floor of the House for Senator Lucio. Hinojosa began to make his case by reaffirming his support of the death penalty, and by mentioning the desire of capital juries for the life without parole sentence. He reasserted that this legislation would not do away with the death penalty, and that over half of Texas' prosecutors support the option.

An amendment by Representative Dan Ellis was offered and adopted. The amendment made capital punishment sentences that are commuted into life without parole sentences automatically. The next amendment offered was from Representative Harold Dutton. The amendment sought to change the additional option of life without parole into an option where, if an inmate had earned the highest level of behavior from the Texas Department of Criminal Justice after serving 25 years in prison, then he would become eligible for parole. Dutton also said that if life without parole became law in Texas, the Texas Department of Corrections would need different types of prisons to manage a different type of prison population. Representative Joe Crabb of Harris County posited the point that when offenders are executed, the problem of prison management becomes a moot point. Representative Ruth McClendon also spoke against the amendment, but for different reasons. She said that the bill was well crafted and that the amendment would take away from promises made throughout the session.

Representative Hinojosa moved to table the amendment and was successful. Another amendment was offered by Representative Harvey Hilderbran to rename the life without parole sentence as simply life, and said “life should mean life.” The amendment also would have renamed life with parole eligibility as 40 to 99 years in prison. Hinojosa, against the amendment, said that the sentencing scheme in the bill was accepted previously by the United States Supreme Court and tabled the amendment successfully.

Representative Talton then offered an amendment that he called “true life without parole.” His amendment would have changed the bill from a three-option version into a two, and reintroduced whether the three-option version would impact the constitutionality of Texas’ death penalty statute. Hinojosa again countered that this the bill has, as he says, a sentencing scheme that has passed “constitutional mustard.” Hinojosa argued that it is much more expensive to execute someone than to place them in prison for life, and made a motion to table the amendment, which failed. He and McClendon then began a defense of expanding jury options and how the bill has been worked on diligently to “pass constitutional mustard.” Representative Pat Haggerty then made a very public showing of why he would vote no against the amendment to make it a two option, but because he is against life without parole in any form. A point of order was raised on the amendment, which was sustained, and the amendment was not adopted.

Representative Haggerty then made an impassioned case against the life without parole sentence based on the alleged difficulties of incarcerating these individuals, which he would again argue in the 79<sup>th</sup> legislature. He first highlighted expense as an issue, stating that the death penalty is only expensive because attorneys drag out the appeals process. He then said that life without parole “is absolutely the most cruel, inhumane

punishment that you can imagine.” Haggerty said that by not allowing for the hope of parole, “all you have done is make me an animal that has to live in a cage for the rest of my life without any kind of mental stimulus whatsoever. You have put me into a living tomb.” Representative Jim Reynolds and Haggerty then make a point together that the medical expenses of Texas’ prison population were over \$700 million and increasing.

The next speaker was Representative Paul Moreno, whose testimony would prove crucial to the final outcome of the bill. The chamber came to a silence, and Moreno made a very passionate, albeit soft-spoken, speech outlining his opposition to the death penalty. “I’ve been waiting for a long time to hear a debate on the abolition of capital punishment not only in this state, but in the world.” He spoke of when he believed he took a human life during his military service in Korea. He said that by executing individuals, they become famous people, which is what they seek. He also said that he spoke on behalf of this bill “because I do believe in the abolishment of capital punishment. If life without parole for a person with a heinous crime is the only option, then so be it.”

Talton then spoke against the bill before Hinojosa closed. He reaffirmed his prior points about the system’s operability in its current form and that altering the statute would complicate the statute and lead to constitutional issues. He also added that he believed in the death penalty, and stated that it is clearly provided for in the Bible, referencing the book of Exodus, Chapter 21. He said that if members vote for the bill, victims’ families would not get the closure that they seek because of constitutional complications that he alleged would arise from the bill.

Representative Hinojosa then closed on the bill. He made an argument that more



people are executed in Texas than all other states put together. He mentioned the costs of the death penalty, and reaffirmed that the bill would be upheld as constitutional. John Longoria and Representative Hinojosa then worked together on a series of questions that argued there would be little additional danger for prison guards if life without parole became a sentence. They also reaffirmed that people wanted the option, and that it would keep society safe. The bill fell short of passage with 65 votes to 72 votes against. The bill was called up for reconsideration by Representative Dale Tillery, who, like others may have switched their vote to oppose the bill to be able to call it up for reconsideration. In the reconsidering vote, it failed to pass once again with a vote of 68 ayes to 77 nays.

## Analysis of 77<sup>th</sup> Legislature

The environment was, as stated previously, markedly different in this legislative session than it had been in the 76<sup>th</sup> session. The legislature was much more open to passing reforms within Texas' system of capital punishment, and did so in passing a ban against executing the mentally retarded (although it was eventually vetoed by Governor Perry), and in nearly passing the life without parole legislation. The bill was also presented much differently than it had been during the 77<sup>th</sup> legislature. There was a much more thorough presentation of witnesses from many different backgrounds, but there also remained a heavy opposition of powerful prosecutors and District Attorneys who were opposed to adding life without parole as an additional option rather than as a replacement for the life in prison sentence. "Three-option was never going to get through. It would have been vetoed," said Williamson County District Attorney John Bradley. "It was just not a good public bill. The three-option would have made the complexity of the

punishment issue tremendous. Trying to get a jury to rationally explain why life without parole is different than life in prison would have been a mess. It was a tactic against the death penalty while calling it reform.”<sup>72</sup> Rob Kepple echoed a similar sentiment. “The defense bar loved this deal because they thought the jury would go towards the middle. They figured they’d get a lot of life without paroles, even though they don’t like the death penalty or life without parole sentences.”<sup>73</sup> There was also a continued and determined oppositional force for any form of life without parole from the Harris County District Attorney’s Office, the largest DA Office in Texas, as well as from Representative Pat Haggerty, who serves on the House Corrections Committee. Serious opposition also remained from the only victims group represented, Texas Justice for All, as was the case in the 76<sup>th</sup> legislature. Lucio and those who favored the bill, presented an argument that the bill was for victims’ families, but did not make it a focal point of their presentation. “It was very strange. One day I was looking at Justice for All’s legislative agenda and saw life without parole,” said Keith Hampton. “I went up to them and said that we could perhaps work with them on adding life without parole as a third option. The next time I saw them, it was removed from their list. It was like I had messed with the prosecutor’s little sister or something.”<sup>74</sup> No victims were brought forth to testify on behalf of life without parole as they had been in prior sessions, and perhaps allowed oppositional victim voices to drown out the arguments made by proponents.

Also new to this session was the introduction of a multitude of new religious groups working towards adding life without parole to the sentencing scheme. Texas

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<sup>72</sup> Bradley, John. Personal Interview, January 12, 2006.

<sup>73</sup> Kepple, Rob. Personal Interview, January 11, 2006.

<sup>74</sup> Hampton, Keith. Personal Interview, January 11, 2006.

Impact, the Baptist General Convention of Texas, and the Texas Catholic Conference all joined the fray, but did not present in a similar fashion as Doots DuFour had in the 77<sup>th</sup> session, but provided simple testimony that jurors needed additional options to account for human error. They did not play the role of anti-death penalty advocates, which does not often seem to be well received by the Texas Legislature. “Many people that have promoted this in the past, like anti-death penalty groups, are good for Democrats,” said Suzii Paynter. “We called every single Republican office and kept on.”<sup>75</sup>

Serious problems arose when the debate on this bill moved from creating additional sentencing options for juries towards a debate over the validity of the death penalty. When Representative Dutton introduced his amendment to change life without parole to allow for parole eligibility in 25 years and Representative Moreno spoke against the death penalty on the House floor, the debate seemed moved away from the original intentions of the bill. “Dutton’s amendment got the debate off track,” said Steve Hall. “Paul Moreno then brought the chamber to a silence. He is one of the few legislators to openly oppose the death penalty. After he spoke, the argument from DAs was that life without parole was a way to get rid of the death penalty.”<sup>76</sup> When the debate then switched away from additional sentencing options to weakening the death penalty, the bill gained new opponents. “When people said that they were against the death penalty, they didn’t get anything,” said John Bradley. “Steiker had written an article that considered if you were against capital punishment, whether you should work on reforms to improve it. It made a basic argument to not say you were against it, but you were just

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<sup>75</sup> Paynter, Suzii. Personal Interview, January 24, 2006.

<sup>76</sup> Hall, Steve. Personal Interview, December 20, 2005.

working to reform it.”<sup>77</sup> Steiker’s testimony, as well as others, was then called into question for the candor of its intentions. When the bill was not offered as a two-option, when the different motives of witnesses were questioned, and when the debate switched from providing jurors with more sentencing options to whether or not this bill was an anti-death penalty bill, there simply were not enough legislators to gain passage. Some legislators who saw that the bill was not likely to pass on the House floor then switched their vote at the last moment to bring the bill up for reconsideration, drawing even more votes away. There were other logistical challenges associated with the vote, including legislators who had other obligations to attend to. “When I pull people out who voted against the bill but said they supported it, I believe the bill failed to pass by a single vote. There were some members who had been excused to go to a funeral, who were other places,” said Steve Hall.<sup>78</sup> “It came within eight votes officially and should have passed,” said Ian Randolph, Senator Lucio’s Legislative Director. “Two things happened; more of our guys were off the floor than theirs and some supporters changed the debate to a death penalty prohibition.”<sup>79</sup>

Despite the overwhelmingly different climate surrounding and increased levels of support within the 77<sup>th</sup> session of the Texas State Legislature, life without parole did not pass. I would see this as being contributed to mostly by a focus on sentencing options rather than victims’ rights (although Lucio has consistently made this point when presenting his bills), the decision to pursue a three-option bill, debate being sidetracked towards opposition to the death penalty, and strong opposition from prosecutors. The

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<sup>77</sup> Bradley, John. Personal Interview, January 12, 2006.

<sup>78</sup> Hall, Steve. Personal Interview, December 20, 2005.

<sup>79</sup> Randolph, Ian. Personal Interview, October 28, 2005.

77th legislature did, however, solidify the coalition of parties that would work towards passage in the 79th; religious organizations, civil liberties groups, law professions, death penalty opponents, and some District Attorneys supported the legislation. There were also undoubtedly some victim advocates who supported the bill, but their stories were not heard by legislators in committee, and so the voice of victims was represented by the oppositional group Texas Justice for All, however rightly or wrongly. Victims' voices were present in the 76<sup>th</sup> legislature with the support of the Diedre Foundation, but the testimony was given in a session without an added sense of urgency provided by George Bush's presidential campaign. In this session, societal elements were present for legislative success, but rather than being considered as a victims' rights measure or tough on crime legislation, the bill was ultimately sidetracked and considered a piece of legislation in direct opposition to the death penalty, which is not a formula for success in a state that overwhelmingly supports the death penalty.



## 78<sup>th</sup> Legislature: Background

The 78<sup>th</sup> Legislature once again presented a much different climate than the legislature prior. Due to redistricting, there was a large shift in power towards the Republican Party. The House, which had been made up of 78 Democrats and 72 Republicans, was now firmly in Republican control with an additional 16 seats. The Senate also added three more Republican seats (it had previously been quite balanced with 15 Democrats and 16 Republicans), and created a dominating majority in both chambers of the legislature. “Redistricting occurred this session,” said Steve Hall. “The Republicans had taken control, and Terry Keel, a prosecutor from Travis County, was now the Chair of Criminal Jurisprudence. In the middle of the session, there was a huge problem with redistricting and Democrats fled the state.”<sup>80</sup> With quite a different makeup in the legislature, Democratic Senator Eddie Lucio once again re-introduced his bill to add life without parole as a third option in capital murder cases. The Executive Branch remained a constant, as Governor Rick Perry and Lieutenant Governor David Dewhurst both retained their positions. The Executive Branch also offered some support prior to the 78<sup>th</sup> legislature. Perry stated that he would consider a number of legislative packages to add life without parole as an option in capital cases, and Dewhurst supported the measure outright.<sup>81</sup>

Editorial boards across Texas maintained their support of life without parole and published stories highlighting Texas’ high number of death penalty issuances, including articles from well-known outlets such as *The Corpus Christi Caller Times*, *The Austin*

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<sup>80</sup> Hall, Steve. Personal Interview, November 2, 2005.

<sup>81</sup> (2003, February 2). On death penalty, two changes key; The state should change the way the mentally retarded are treated and add life without parole. *San Antonio Express News*. Editorial Section, p. 2H

*American Statesman, The Houston Chronicle, and The San-Antonio Express-News.*

Executions also began a steady decline nationwide, with 2002 seeing a decrease and Texas also seeing decreases in the number of inmates executed (33 were executed in 2002, and a lower figure of 24 in 2003). This was the fourth consecutive year with a national decrease in the number of death sentences, in no small part due to Texas' lower level of executions.<sup>82</sup> Additionally, Illinois Governor George Ryan, having already placed a moratorium on executions in his state, commuted the sentences of 167 inmates on Death Row in Illinois and pardoned four Death Row inmates upon leaving his office. This move, while a defining moment for capital punishment nationwide, did not and was not expected to cast a large shadow on Texas' application of the death penalty.<sup>83</sup> While some governmental bodies, including the Travis County Commissioners Court, began to call on the legislature for a moratorium on executions in Texas, major actions were not undertaken or embraced. This Commissioners Court's resolution made Travis County the first county in Texas to pass a resolution that urged a moratorium on capital punishment. The action was ridiculed by some, including Representative Terry Keel, who called the resolution "even more silly than the City Council's resolution against the (Iraq) war."<sup>84</sup>

News coverage specifically focused around the life without parole sentence was dwarfed in comparison to the large amount of articles dealing with the problems of the Houston Police Department's crime lab. Over 400 articles were posited on this subject,

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<sup>82</sup> Tolson, Mike (2003, December 19). U.S. Death Sentences Continue to Decline. *The Houston Chronicle*. Section A, p.37

<sup>83</sup> Murphy, Bill (2003, January 19). Death Row: Status Quo; Texas Undeterred by Illinois' Ripple Effects. *The Houston Chronicle*. Section A, p.1

<sup>84</sup> Kreytak, Steven (2003, April 30). Travis Asks Lawmakers to Postpone Executions; Commissioners Urge Moratorium, Study of Death Penalty System. *The Austin American Statesman*. Metro/State Section, p. B1



drawing coverage from national outlets such as *The New York Times*, *The USA Today*, *The Washington Times*, and other papers around the country. The story was initially reported by KHOU, a television station in Houston, in November of 2002. Their report was a three-month long piece of investigative journalism that raised questions about the accuracy of evidence from the Houston Police Department's crime lab.<sup>85</sup> KHOU also broadcasted a story entitled "Evidence of Errors" in April 2003, which won a George Foster Peabody Award in 2003.<sup>86</sup> A large amount of coverage was devoted to the issue by *The Houston Chronicle*, which posted news or heavily critical editorial opinions nearly everyday. Many were implicated in the scandal, including the former Mayor of Houston, Lee Brown, who admitted that he knew there was a large leak in the roof of the Houston Police Department's crime lab. Houston Police Chief C.O. Bradford was also alleged to have known of the leaky roof for over five years.<sup>87</sup> The crime lab eventually lost its accreditation, and had to contract out its DNA work to private firms. Houston was the largest city in the United States without an accredited crime lab. *The Chronicle* ran numerous editorials linking the crime lab with Harris' application of the death penalty, and made the point that if innocents had been executed, then it would be time to end support for the death penalty. "Perhaps it will take more time for Texans' traditionally strong support of the death penalty to soften in response to the recognition that the system might be flawed. The response to concern that the state might be putting innocent people

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<sup>85</sup> O'Hare, Peggy (2002, November 16). HPD to Review Crime Lab's Work; Investigation by Channel 11 Questioned Whether Errors Led to Jailing of Innocent. *The Houston Chronicle*. Section A, p. 35

<sup>86</sup> McDaniel, Mike (2004, April 1). KHOU Team Picks up Second Peabody Prize. *The Houston Chronicle*. P.1

<sup>87</sup> Khanna, Roma and McVicker, Steve (2003, February 27). Mayor Knew of Lab Woes; Others Contradict Brown's Benign Assessment. *The Houston Chronicle*. Section A, p.21

to death is not to continue supporting a broken system,” the paper wrote.<sup>88</sup> Much of the press and investigation into the crime lab issue came after the session was primary over, however. Texas’ legislature meets once every two years from early January to early June. While there were reports of problems within the crime lab as early as November 2002, they may have been overshadowed by the huge issue of redistricting, and the need for life without parole was perhaps overshadowed by both. “In the 2003 session, you could argue that the whole session blew up over the redistricting issue,” said Steve Hall.

The Supreme Court also issued a ruling in *Atkins v. Virginia* that banned the executions of mentally retarded criminals in the United States in June 2002, which created a potentiality for mentally retarded inmates who had been given the death penalty to be paroled from prison. This brought about some debate over the execution of mentally retarded inmates, and reinvigorated the issue of Governor Perry’s veto of legislation in 2001 that would have banned the execution of mentally retarded inmates. Perry maintained that Texas had several safeguards in place to ensure that the mentally retarded are not executed in Texas, and did not support a judge or jury being able to determine whether a defendant is mentally retarded at the outset of a trial.<sup>89</sup>

In a new legislature with an entirely different voting aesthetic, Senator Lucio’s bill continued to face significant resistance. The same oppositional groups persisted, and the same proponents also took the stand, with a new notable exception. In the Senate Criminal Justice Committee, former capital jurist Cindy Gatto presented testimony outlining how jurors in capital murder cases would prefer to have additional options

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<sup>88</sup> (2003, March 21). Double Think: If Innocent Executed, Time to Stop Death Penalty Support. *The Houston Chronicle*. Editorial. Section A, p.40

<sup>89</sup> McNeely, Dave (2002, August 25). In Texas, the Death Penalty Thrives, but There’s Pressure from Both Outside and Inside the State to Make Some Changes. *Austin American Statesman*. Insight Section, p. H1

when sentencing defendants. Even with this new facet of testimony, the bill failed to progress past the floor of the Senate, most likely due to the overwhelming factors of redistricting, continued opposition from powerful District Attorneys, and the decision to continue to offer the bill as a third sentencing option.

## Senate Criminal Justice Committee

(All quotes are from April 1, 2003 meeting unless otherwise noted).

Those who testified before the committee were Senator Lucio, former Capital Murder jurist Cindy Gatto, Texas Criminal Defense Lawyers Association Director Keith Hampton, Wichita County District Attorney Barry Macha, Hidalgo County Criminal Defense Attorney Rene Guerra, El Paso Assistant District Attorney John Davis, Harris County Assistant District Attorney Roe Wilson, Tarrant County Assistant District Attorney Jim Gibson, Diane Clements of Texas Justice for All, and Defense Attorney David Weeks of Walker County.

Senator Lucio opened his testimony with familiar arguments. He mentioned the 46 other states that have life without parole statutes, stated that the bill was tough on crime, and brought forth the example of Kenneth McDuff as an example of capital murderers who have been paroled and who offend again. He argued that whether or not capital murderers are likely to be paroled under a life in prison sentence did not matter. “This isn’t about statistical likelihoods, but the closure that life without parole offers families,” he said. “A life without parole sentence assures victims’ families that the person that took away their loved one will spend the rest of his natural life behind bars.” Senator Lucio once again cited the Texas Poll’s 72 percent of Texans shown to support

life without parole, and assured his fellow legislators that he was not attempting to get rid of the death penalty. He also once again mentioned the expense associated with the death penalty as opposed to a life sentence.

Rene Guerra provided the next testimony. Guerra said that it is his belief that the most serious and heinous criminals will continue to receive nothing less than the death penalty and that the bill will mostly provide for leeway in negotiations associated with capital murder cases. Cindy Gatto then testified, and said that one of the problems with her jury was the debate over the meaning of life in prison. Gatto stated that not everyone realized that inmates can be released on parole with a life sentence, and that the three options would allow juries to have a clearer view of their choices. She said that in the case where she was a capital jurist, the jury was certain that the individual committed the crime of which he was accused, but that the jury wondered whether, if there was any shred of doubt, they should incarcerate the individual for life. She said “it would be nice to take the person off the street forever.” Barry Macha then provided testimony where he stated his support of the legislation because it would provide an extra option for juries, even if the proposal was more formal than substantive. John Davis then testified on behalf of the El Paso District Attorney’s Office, and simply stated that his office would prefer a two-option version of the bill. Davis said his main concern with the three-option is that in mini-cap cases (cases where the death penalty is not sought), a punishment phase did not exist. He said that with three options, there would be a punishment phase in mini-cap cases, which would add additional expense. Keith Hampton was the next to present his testimony, which was also very similar to legislatures past. Hampton stated that the bill would respect juries, and said that the legislature should show respect for

juries with a three-option form of the bill. “I would like to hear from any DA who doesn’t think that his jurors can count to three,” said Hampton. Hampton also said that the concern about the punishment phase of a mini-cap case is a “sky is falling kind of argument. In reality what you will see is a PSI and then handing it off to the judge.”

Those opposed to the bill then spoke, beginning with Roe Wilson. She first spoke about the hope that criminals on Death Row harbor because their cases are actively litigated until their execution. She also spoke about security problems that would potentially arise in prisons that house life without parole inmates, which caught Chairman Whitmire by surprise. Whitmire said “when I saw your card, the safety of the prison officials was one of the last things I thought the DA’s office would be speaking to.” Lucio also countered this argument with a study conducted by Dr. Mark Cunningham. Cunningham’s research had shown life without parole inmates to act as a stabilizing influence in prisons rather than a violent, uncontrollable population. Jim Gibson of the Tarrant County District Attorney’s Office then testified against the bill, although he mentioned that his office would accept a two-option form of the bill. Gibson also stated, rather candidly, that “increasing the number of non-death choices will lead to more non-death sentences.” Gibson then made an argument that was not very well received by the committee, saying that “if we’re gonna take the time and expend the resources after we decide a defendant is death worthy, if we’re gonna spend resources to prosecute him, we’re going to want to see a death sentence carried out.” This prompted a comment from now-Senator Juan Hinojosa, who said “we execute a lot of people in Texas. We shouldn’t be concerned if we lose two or three to life without parole. That’s bloodthirsty!” Diane Clements then testified, saying her group would support a two-

option version of the bill, and also said that there are still expenses associated with life without parole sentences. She also said that unless there is an execution, the families of victims would never find closure. David Weeks rounded out the testimony, and said that while he believes the three-option version is the preferable option, he still opposes life without parole and has fought it since 1987. Senator Ellis moved that the bill be reported favorably, it is given a full recommendation by the committee with a five to two vote, and sent to the floor of the Texas State Senate.

### Senate Floor

(All quotes are from April 22, 2003 Senate Session unless otherwise noted).

On the floor, Senator Lucio once again made similar arguments as previous sessions. Lucio once again mentioned his support for the death penalty, and said that he presented the legislation not as a death penalty opponent, but as a supporter of jury options. He also mentioned that the bill would add life without parole not only to death penalty cases, but also to cases where the death penalty is not sought. He cited the Texas Poll, closure for victims' families, keeping dangerous criminals off of the streets, and how life without parole is a unique sentence to empower juries. He moved suspension of the rules for passage, and then participated in a conversation with Senator Todd Staples about testimony heard in committee. Lucio also dispelled the notion of additional expense associated with the life without parole prison population, and spoke to Dr. Mark Cunningham's studies which showed the stabilizing influence of life without parole inmates. Staples then asked if a prisoner has ever been paroled under the 40-year sentencing scheme, to which Lucio responded with the McDuff case, and said that McDuff never would have gotten out if he had received a life without parole sentence.

Senator Ogden then asked Lucio about constitutionality issues, as he had in the 77<sup>th</sup> legislature. Ogden said that he believed the statute would be litigated because juries would have to answer in the affirmative a person is a continuing danger to society and at the same time, have the option to sentence a person to life without parole. Lucio mentioned the mitigating circumstances question, which if answered negatively with a positive answer in the future dangerousness question would result in a death sentence. Lucio also mentioned that he and his staff have studied extensively how life without parole is administered in other states, and said that it has worked well. Ogden then said that future legislatures could change the law and not allow for life without parole and that the legislation is not a guarantee of permanent life without parole, but a guarantee for the two years until the legislature convenes again. Senator John Carona then helped Lucio close on the bill and make the case that other states have not had endured constitutional problems with the life without parole sentence. Lucio closed on the bill by stating again that he is wanted to empower juries with an additional option and moved the suspension of the rules towards passage. The measure needed a two-thirds majority vote of the Senate, however Senate Bill 348 received 20 votes for and 11 votes against, and the motion failed. This was the last action of the session for the legislation.

## Analysis of 78<sup>th</sup> Legislature

Arguments were once again similar in this session, with the notable introduction of testimony showing an actual capital jurist who requested that the legislature provide juries with an additional option. It was surprising to see the Harris County District Attorney's Office testify about the future dangerousness of inmates in correctional

facilities, and also surprising to hear testimony from a District Attorney that said when his office puts forth the resources to obtain a death verdict, they expect that sentence. Senate Bill 348's faced the major problem of Senate Bill 85 in the 77<sup>th</sup> legislature; a two-option version of life without parole was acceptable to most prosecutors in Texas, but a three-option version was divisive. With Republicans now holding a majority in the House, a stronger majority in the Senate, and continuing to hold the Governorship, it did not seem likely that this legislation, whose primary benefit was presented as increasing jury choices in capital cases, would pass. The climate was not as receptive to change as it had been in the aftermath of the 2000 Presidential Election, and as such the political opportunities for legislation relating to the death penalty had shrunk considerably.

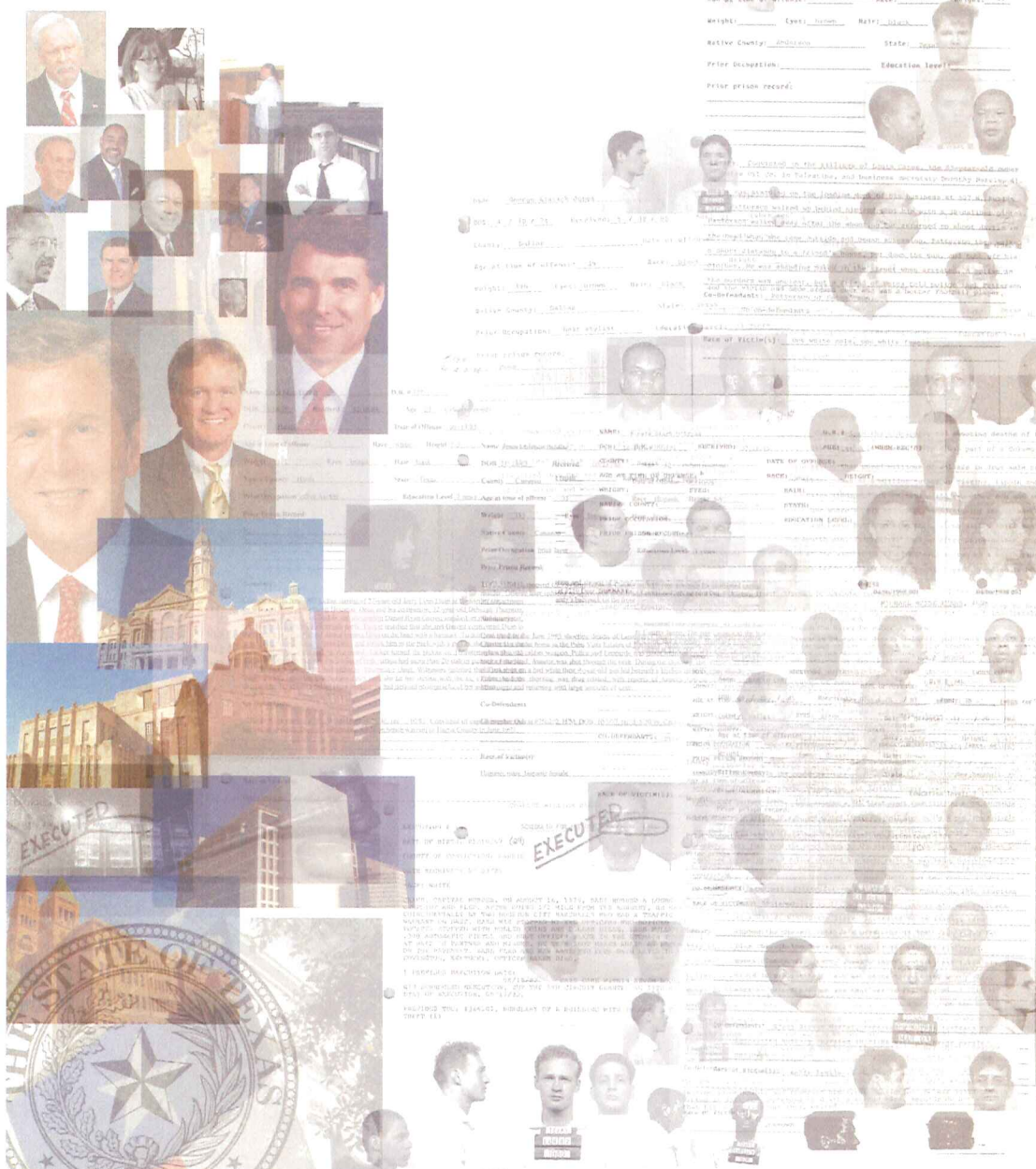
Nonetheless, seeds were planted that would affect the next session. It was made clear that many District Attorneys would support life without parole if it were presented as a replacement for the life sentence with parole eligibility. A very large seed of doubt was placed in the mind of Texans with revelations about inaccurate DNA testing at the Houston crime lab. "The Houston crime lab has been a huge scandal that has continued to grow. I'm not sure that anyone would allege intentional acts, but there was an incredible amount of sloppiness and inattention to detail," said Steve Hall.<sup>90</sup> Consistent attention by the press brought attention to the idea that innocent people in Texas may have been executed, and ultimately may have aided the eventual passage of the legislation the 79<sup>th</sup> legislature.

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<sup>90</sup> Hall, Steve. Personal Interview, November 2, 2005.



# 79th Legislature: Fourth Reading and Final Passage



## 79<sup>th</sup> Legislature: Background

The 79<sup>th</sup> Legislature is where Senator Lucio's work for a life without parole sentence came to fruition. The bill was helped by visibility in prior sessions and a significant number of background issues with the capital punishment statute that came into play. "Back when I introduced the bill, some important factors were coming into play, including the advent of modern technologies in the criminal justice system," said Senator Lucio. "The problems with crime labs in Houston certainly contributed to passage. The Supreme Court rulings, the support of victims groups, and wrongful convictions around the nation, these things all helped," he said. "All of these things made the idea that we had to do something more palatable to prosecutors. Life without parole became an option. It was the right time and we made our case in a stronger fashion."<sup>91</sup>

Indeed, there were a number of factors that contributed to the change of heart in the legislature. Harris County continued to face significant criticisms with respect to its crime lab. Josiah Sutton, accused of rape on faulty DNA evidence in Houston, was released from prison after four and a half years of imprisonment.<sup>92</sup> Throughout the period leading up to the 79<sup>th</sup> legislature, additional allegations of incorrect evidence surfaced. *The Houston Chronicle* suggested that crime lab analysts who testified in courts asserting the accuracy of their findings while knowing the faults of the crime lab should be considered for perjury.<sup>93</sup> Mayors and police were accused of under-budgeting

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<sup>91</sup> Lucio Jr., Eddie. Personal Interview, January 11, 2005.

<sup>92</sup> Khanna, Roma (2004, May 15). Perry Signs Pardon for Sutton; Man Convicted on Faulty DNA May be Entitled to \$100,000. *The Houston Chronicle*. Section A, p.1

<sup>93</sup> (2004, June 7). Having a Look; Perjury Probe of Former DNA Chief is Progress. *The Houston Chronicle*. Editorial. Section A, p.16

their crime labs, ignoring analytical errors, and tolerating cheating.<sup>94</sup> Innocent people were allegedly imprisoned, while actual offenders went unpunished for their crimes. Examples were cited, such as the case of George Rodriguez. Rodriguez was convicted of rape and sentenced to 60 years in prison, while the person thought to be the actual perpetrator, Isidro Yanez, was allowed to remain on the streets due to “the false crime lab conclusion presented in court.”<sup>95</sup> Investigations into the crime lab’s operations remain on-going, but have found numerous flaws inherent in the operation of the crime lab, and implicated many high-ranking officials, including Harris County District Attorney Chuck Rosenthal. Legislators began to ask questions about sentences associated with the lab. Senators John Whitmire and Rodney Ellis questioned Rosenthal’s decision not to support a moratorium on executions in seven murder cases after mislabeled evidence was discovered. They also called for greater oversight of crime labs in Texas and the creation of regional labs independent of law enforcement agencies.<sup>96</sup> This volatile issue would bring capital murder cases once again into the spotlight, through association between the largest executor of death sentences in Texas and a faulty crime lab.

Additionally, the Supreme Court ruled in *Roper v. Simmons* that criminals who commit crimes under the age of 18 cannot be given the death penalty. “This was a big issue in the legislature,” said Lucio. “After the Supreme Court ruling, we had minors that were given life with the possibility of parole. We needed to pass this bill to address the

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<sup>94</sup> (2005, July 10). State of Injustice; Crime Lab Investigation Reveals Indifference to Right and Wrong Throughout the Criminal Justice System. *The Houston Chronicle*. Editorial. Outlook Section, p.2

<sup>95</sup> (2004, August 9). Crime Lab; How Many Cases of Incompetent Analysis Must Come to Light Before an Independent Inquiry is Made to Detect and Correct Miscarriages of Justice? *The Houston Chronicle*. Editorial. Section B, p.6

<sup>96</sup> Khanna, Roma (2005, January 5). Lawmakers Address Crime Lab Problems; Committee Looks at Reforms, Says Local Officials Have Dragged Their Feet. *The Houston Chronicle*. Section A, p.1

different issues that came about because of the ruling,” he said.<sup>97</sup> Texas had 29 offenders who sentences were commuted to life in prison with parole eligibility of 40 years after the ruling. “If this bill (Senate Bill 60) does not pass, this will be the bottom line: during the next two years, some 17-year-old will kill someone in cold blood, and all they can get for it is a life term with the option of parole,” said Lucio. “Then, we are all going to have to explain to the victim’s family why we didn’t pass this bill that would have ensured they would never get out of prison.”<sup>98</sup> Coupled with the 2002 ruling of *Atkins v. Virginia*, a new group of protected persons could no longer be given the death penalty. The case of Kelsey Patterson, in particular, became one that would provide a boost for Lucio’s life without parole bill, Senate Bill 60.

“Kelsey Patterson had a ten year history of being diagnosed with severe mental illness,” said Steve Hall. “On Death Row, his condition steadily declined and it’s questionable whether he was competent enough to be executed. His attorney submitted compelling testimony, and the Board of Pardons sent a 5 to 1 recommendation to Perry to commute his sentence,” said Hall. “Perry didn’t commute the sentence, but I think he did send a clear signal that Texas should have a life without parole sentence to deal with cases like this.”<sup>99</sup> Perry did appear to desire the ability to commute Patterson’s sentence to life without parole, saying that “after carefully reviewing all the facts in this case,” Patterson would have to be executed because Texas had no statute mandating life without parole and “no one can guarantee this defendant would never be freed to commit other

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<sup>97</sup> Lucio, Eddie. Personal Interview, January 11, 2006.

<sup>98</sup> Ward, Mike (2005, April 6). Life Without Parole? They Won’t Hear It; Saying Folks Back Home are Against Bill, Senators Decline to Discuss It. *Austin American Statesman*. Metro/State Section, p. B1

<sup>99</sup> Hall, Steve. Personal Interview, December 20, 2005.

crimes were his sentence commuted.”<sup>100</sup> This would appear to place Perry in the camp of supporting life without parole legislation if it reached his desk. “Perry basically said he wouldn’t veto life without parole. He said ‘it’s ok if you pass this,’” said Hall.<sup>101</sup> Perry’s backhanded endorsement provided a shield for legislators who wanted to continue to maintain a “tough on crime” image, but also to pass life without parole. “No one should ever underestimate the value of political cover,” said Rob Owen. “Criminal justice is not a top priority for some legislators. As long as the Governor has said it’s ok, then they will vote for something.”<sup>102</sup> Lucio’s office was never entirely sure of what the Governor’s position was on the legislation, however. “I’m grateful that the Governor did sign Senate Bill 60,” said Lucio, “I think he saw the benefits of the legislation. Quite frankly though, we were never sure where he stood until the bill went through the process, but in the end, it was a great help.”<sup>103</sup> Legislative Director Ian Randolph shared similar confusions about Perry’s stand. “Perry had been back and forth on the issue. We have a strange system of how we commute cases. Perry was in a bit of a box about commuting sentences.”<sup>104</sup> Perry also could potentially have been appealing to the electorate, as life without parole was a very popular sentence in Texas and Perry faced significant challenges to the Governorship from contenders such as United States Senator Kay Bailey Hutchison.<sup>105</sup>

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<sup>100</sup> Berlow, Alan. (2005, May 10). Death Knell for the Death Penalty? *Salon.com* Feature Section. Date retrieved May 11, 2005 from <http://www.salon.com>

<sup>101</sup> Hall, Steve. Personal Interview, November 2, 2005.

<sup>102</sup> Owen, Rob. Personal Interview, December 21, 2005.

<sup>103</sup> Lucio, Eddie. Personal Interview, January 11, 2006.

<sup>104</sup> Randolph, Steve. Personal Interview, October 28, 2005.

<sup>105</sup> Berlow, Alan. (2005, May 10). Death Knell for the Death Penalty? *Salon.com* Feature Section. Date retrieved May 11, 2005 from <http://www.salon.com>

Senator Lucio re-introduced his bill once again in the 79<sup>th</sup> legislature as Senate Bill 60. The bill was very similar to the bills he had put forth in the past, but his presentation of the bill was most certainly not. In the 76<sup>th</sup> legislature, the focus of testimony was comprised of a variety of components. In the 77<sup>th</sup> and 78<sup>th</sup>, there was a determined effort to present the bill as expanding jury choice in these emotionally taxing cases. Those who opposed life without parole presented many arguments, most notably stating that the correctional system in Texas would face enormous pressures from a new population with nothing to lose. Additionally, victims' rights groups were not featured prominently in testimony for the bill, but mostly were represented by the oppositional group Texas Justice for All. In the 79<sup>th</sup> legislature, Lucio and his staff reconfigured their presentation of the bill. Dr. Mark Cunningham presented compelling testimony to dispel concerns about increased dangerousness in prison. Lucio and proponents of the bill were able to locate key witnesses who had close relationships to the victims of capital crimes. Ms. Cindy Gatto testified once again for the needs of jurists to have additional options in capital murder cases, and the well-known and respected Dean of the University of Texas Law School, Mike Sharlot, testified in support of the bill. Notably absent from testimony were those groups such as the Texas Defense Lawyers Association, the Texas American Civil Liberties Union, and other groups who have been associated with anti-death penalty legislation. Perhaps strategic in nature, the aesthetic of testimony was much different in this session than in sessions past, framing did not stray towards being labeling the legislation as weakening the death penalty, and the bill was presented effectively as a tough on crime measure to provide comfort to the families of murder victims.

## Senate Criminal Justice Committee

(All quotes are from March 15, 2005 meeting unless otherwise noted).

Those who testified before the committee were Senator Lucio, Dean Michael Sharlot of UT Law, Hidalgo County District Attorney Rene Guerra, Paula Kurland, Clinical and Forensic Psychologist Dr. Mark Cunningham, Cindy Gatto, UT Law Student Joshua Houston, Rodrigo Carreon, Harris County Assistant District Attorney Roe Wilson, Texas Justice for All Director Rusty Hubbarth, and Tarrant County Assistant District Attorney Greg Miller.

Senator Lucio began the proceedings, and repeated similar arguments as previous sessions. He reaffirmed his support of the death penalty, but he made specific mention of the Texas Poll in his presentation at the outset of his presentation. He also went into further detail describing other jurisdictions with the option of life without parole, mentioned that 47 other states had the option, as well as the U.S. Military system, the District of Columbia, and the federal prison system. He mentioned the states that border Texas such as Louisiana, Arkansas, Colorado, and Oklahoma. He also stated that the people who argue that the life without parole population would be more dangerous than other prison populations have not examined the facts, which he presented through the testimony of Dr. Mark Cunningham, "The more informed that people become on this issue, the more they trust the facts and the record developed in the 47 states and federal units that have prisoners serving life without parole," Lucio said. He also thanked victims' rights advocate Paula Kurland for her testimony, District Attorneys Barry Macha and Rene Guerra, and pointed out that the United State Supreme Court's decision in *Roper v. Simmons* "now means that 29 offenders sentenced to death as juveniles will someday be considered for parole." He gave the example of Mario Barassa, a convicted

rapist and murderer who became eligible for parole due to the Supreme Court's ruling in 2005. He made the point that if his legislation had been passed in previous sessions, former death row inmates whose sentences were overturned by *Roper v. Simmons* would never have the opportunity for parole, and further reinforced his point on providing certainty to the families of victims. He closed his presentation with "Texans want it, victims want it, and jurors obviously deserve it."

The next to testify was Rene Guerra, who testified that life without parole would help his office in capital murder cases where they were not seeking the death penalty. He said that in celebrated cases, they will still seek and juries will still give the death penalty, but that in marginal cases, jurors will opt for life without parole. Michael Sharlot was the next to testify, and said didn't oppose capital punishment and that there should be a wide range of punishments for a particular case. He mentioned the broad number of jurisdictions that already have the option, and also mentioned that they have been able to control their prison populations.

The next to testify was Paula Kurland, whose daughter and her roommate were killed in 1986. She gave compelling testimony about the process she undertook to ensure her daughter's murderer remained on Death Row, and also spoke to her experience as the first person to participate in Death Row mediation in Texas. She said that she did not want her daughter's murderer to die for her own feelings of vengeance, but to ensure he wouldn't murder again. Kurland stated that the offender, Jonathan Wayne Noble, had said that he would kill again if he had been released from prison during her conversations with him in their mediation process. She called the bill "truth in sentencing," and said that life without parole would provide victims a chance to breathe again. "You have no



idea what it feels like not to be able to breathe,” she said. She also said that victims needed to be aware of and at the forefront of changes made to the criminal justice system. Kurland said that the life in prison sentence should be abolished because it is not an actual life sentence. She testified that the 40-year sentence is not fair because the offender becomes a focal point in the lives of victims’ families.

The next to testify, Dr. Mark Cunningham, also provided convincing evidence in his testimony. In his testimony, Cunningham said that the probability of future incidences of prison violence from life without parole inmates was uniquely amenable to research. The first study he described, by Sorenson and Wrinkle in 1996, looked at 323 life without parole inmates convicted of capital murder and 232 life with parole inmates who had been convicted of second degree murder. The study reviewed disciplinary records across 15 years. Controlling for race, age, and time served, they found that there was no difference in the disciplinary outcomes across the first three years of imprisonment. He then mentioned another study that he co-authored that examined 960 life without parole inmates and compared their conduct to 1500 parole eligible inmates. They were tracked across 11 years in the same high security institution providing, as Cunningham said, “an apples to apples comparison.” Controlling once again for factors such as education, age, prior prison term, prior probation, and the nature of offense they were sentenced for, they found (from data provided by the Missouri Department of Corrections) that inmates serving life without parole sentences were half as likely to be involved in violent crimes in prison than parole eligible inmates in the same prison. A third study he mentioned examined data from the Florida Department of Corrections, and similarly compared 1900 life without parole inmates to 2000 inmates serving 30 or more

years and also to inmates serving 10 to 29 year sentences. They found that the inmates most likely to be involved in violence weren't the inmates sentenced to 30 or more years or the life without parole inmates. The study found inmates serving 10 to 29 years were the most likely to participate in violent acts while incarcerated. Cunningham said that the life without parole inmates acted as a stabilizing influence in the prison population.

Cindy Gatto was the next to testify, and presented a similar case to the one she had described in the 78<sup>th</sup> legislature. She made the argument that jurors desire the life without parole option, which she said provided a good middle ground between the death penalty and a life sentence with parole eligibility. The next to testify was Joshua Houston, a UT Law student (and intern at the Baptist General Convention of Texas) whose good friend had been murdered. He provided testimony on behalf of the victims' family. Houston said that the death penalty was not given in the case and that the family would have to revisit the crime again in future parole hearings, and said that the victim's brother would have to go before parole boards in the future to ensure that the offender is never released. He spoke of the stress it has created within the family, who he said hoped for a call from the Texas Department of Criminal Justice affirming the death of their daughter's murderer. The last to testify on behalf of the bill was Rodrigo Carreon, who testified, somewhat nervously, that in cases where DNA evidence overturns death sentences, it would be beneficial to have a life without parole sentence so that when the death sentence is commuted, the criminals are not released from prison.

The opposition then spoke against the bill, beginning with Roe Wilson. She testified and provided arguments that were similar to other sessions, saying that a life without parole sentence is not truth in sentencing because the law can be repealed and

death sentences can be commuted. She cited an example of a life without parole sentence that was commuted in Nevada and mentioned that the capital murder statute had been found constitutional, saying “if it’s not broke, don’t fix it.” Seantor Hinojosa countered Wilson, and said that Supreme Court had admonished the State of Texas and how it administered the death penalty. He said that there were problems with the death penalty and asked Ms. Wilson “how can you say there are no problems with the death penalty in Texas?” Wilson acknowledged that there were problems, but said that steps were underway to correct them. She also said that the legislature should do what is best for Texas, which does not mean taking a consensus of what other states are doing. Hinojosa then became disturbed, saying that “since 1981, I’ve been in the Texas Legislature and Harris County has never agreed with anything we do in the criminal justice system. It’s unbelievable.” He then brought up the issue of mentally retarded offenders, saying life without parole is a good option to protect the public from these inmates who cannot be executed after the *Atkins v. Virginia* decision by the Supreme Court. Hinojosa then said “No matter what we do, you will be against any bill that you feel will jeopardize your ability to seek the death penalty,” which Ms. Wilson said she had not stated. Lucio then began a series of questions about the capital murder statute, asking about the mitigating circumstances and future dangerousness issues. Lucio used the series of questions to make a point that life without parole is needed for instances when juries find mitigating circumstances and can only sentence inmates to life in prison with parole eligibility. Ms. Wilson then argued that if there were a middle ground option of life without parole, juries might not try as hard to reach the correct decision in cases. Wilson then, seemingly ready to leave the stand, made the argument that the sentence would create a large geriatric

prison population, and that for all practical purposes, life without parole already existed in the capital murder statute.

The next person to testify was Rusty Hubbarth, who began by saying “I must congratulate you today, this is the most polished, professional exhibition you have given yet. You have great minds here, you’ve got great exhibits, you’ve got sentimental testimony, you’ve got intellectual testimony.” He then made the point that the legislation would be better for his group if there were absolutely no hope of release for these prisoners, which would be medical reprieves, commutations, and “all of the problems that we’ve seen in the recent past.” He testified that he doesn’t believe life without release is possible, and said that the bill is nothing but an alternate sentence to the death penalty.

Greg Miller was the last to testify, and said that his office would not be opposed to the bill if, instead of introducing a three-option version of the bill, the bill could be changed to a two-option form. He made the argument that the three-option version would be confusing to jurors. Lucio then said that he didn’t believe options should be eliminated, and argued instead to listen to “what the public is saying. 78 percent of the people being polled lately want this as a third option.” The bill was then put forward for a vote, and passed out of committee with a 4 to 2 vote.

## Senate Floor

(All quotes are from April 5, 2005, April 6, 2005, and April 14, 2005 Senate Sessions unless otherwise noted).

On the floor, Senator Lucio made the case that Texas juries needed life without parole so that there would be truth in sentencing and to add additional options to the capital sentencing scheme. He also brought up many of the same points that he had in the

Criminal Justice Committee, saying that this bill would strengthen the criminal justice system, cited the Texas Poll, and also stressed the 29 capital offenders whose sentences were commuted because of the Roper v. Simmons decision. Hinojosa and Lucio teamed together on a series of questions in an attempt to illuminate the benefits of the legislation for the sentencing of mentally retarded and juvenile offenders. Suspension of rules was called for the three-option form of the bill, which failed to pass, 20 to 11. The next day, Lucio once again moved to suspend the rules for passage, which fails 19 to 10.

This is the point at which Senator Lucio made the decision to allow for a two-option version of the bill. When the bill was reintroduced on April 14<sup>th</sup>, Senator Steve Ogden introduced an amendment that switched the bill from its three-option form into a two-option form. Ogden also added that he thought the bill would “help juries with a very tough decision that they have to make in these cases and I would expect, frankly, if we pass this bill, there would be fewer executions in this state.” Ogden offered his amendment, to which Lucio offered an amendment to allow the office of court administration to collect data on capital cases in Texas. Lucio said that in his research, his office found that there are not adequate records of trials and outcomes of capital murder cases in Texas. The amendment is pulled down over Ogden’s concerns that the amendment does not offer clear enough instructions as to the duties that the trial court must perform. The amendment is adopted, and the bill passed with a vote of 25 to 6.

## Analysis of Senate Actions

As was mentioned by Rusty Hubbarth, the presentation put forth in the Senate Criminal Justice Committee was much stronger than in prior sessions. There was a

determined effort to keep the bill from becoming viewed as a piece of anti-death penalty legislation, with a heavy emphasis on the rights of victims and how the sentence would provide certainty for their families of these victims. The testimonies of Paula Kurland and Joshua Houston were well reasoned and compelling simultaneously. Such strong testimony from those close to actual victims, as well as testimony from Ms. Cindy Gatto on the difficulty of being a capital jurist, put forth compelling emotional testimony on why the legislation was needed. “We focused on individuals. We focused on giving certainty to victims’ families,” said Ian Randolph. “The victims issue was huge with Eddie. As horrifying as innocent people in prison is, he would assert that not enough attention is paid to the families of victims.”<sup>106</sup>

There was also the well-researched testimony of Dr. Mark Cunningham, which effectively took the steam out of the argument that life without parole inmates would create new containment problems in Texas prisons. “My intention in providing the testimony was not to provide a counterpoint. I don’t have an agenda to whether the legislation passes or not,” said Cunningham. “The prosecutors that followed me did not assert that they would be super-predators. I provided irrefutable science to the committee, and prosecutors didn’t argue. Reliable data wins over uninformed speculation,” he said.<sup>107</sup> Coupled with the different cost figures for life imprisonment versus the costs of death penalty cases, life without parole was presented as not only a doable sentence, but also one with significant benefits for the prison population and criminal justice system. However, this point still receives contention from some, and continued to receive contention when it reached the House.

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<sup>106</sup> Randolph, Ian. Personal Interview, October 28, 2005.

<sup>107</sup> Cunningham, Mark. Personal Interview, February 1, 2006

The Supreme Court decisions, especially the 29 inmates who had their death sentences commuted to life sentences with parole eligibility, also helped Senator Lucio's cause in passing the legislation greatly. "The most convincing approach with my fellow legislators was with the juvenile offenders. With others, 11 of them, I had to compromise," he said.<sup>108</sup>

The compromise Lucio speaks of was the single most important action that had to be accepted to gain passage of the legislation, the switch from a three-option version of the bill to a two-option version. "The real issue was if it was going to be a two option or a three-option bill. Everyone closely involved understands this," said Steve Hall. "Everything else was a sideshow. The bill was only going to pass as a two-option. Lucio didn't have the votes to bring it to the floor as a three-option bill."<sup>109</sup> This was the only way that the legislation was going to be palatable for the majority of District Attorneys, who have the respect of their Senators and Representatives at the legislature. "If you're a legislator, and a DA calls you, you can't really oppose them. They're powerful people," said Senator Ellis' Chief of Staff, Kenneth Besserman.<sup>110</sup> District Attorney John Bradley, while opposed to life without parole philosophically, ultimately threw his support behind the bill as a two option. "When I realized it would pass and that Terry Keel supported it, I switched my position and supported it," he said.<sup>111</sup> Rob Kepple also disliked the three-option version of the bill. "The three part system is vastly more complicated. The chances of a jury getting screwed up are much greater," he said. "The more uncertainty I interject into the process, the more success I have as a defense attorney. The three part

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<sup>108</sup> Lucio, Eddie. Personal Interview, January 11, 2006.

<sup>109</sup> Hall, Steve. Personal Interview, December 20, 2005.

<sup>110</sup> Besserman, Kenneth. Personal Interview, October 17, 2005.

<sup>111</sup> Bradley, John. Personal Interview, January 12, 2006.

system was viewed as a anti death penalty bill, and our members wanted to get it into a two-option form.”<sup>112</sup> While Lucio would have preferred the three-option version, and after he pushed it for three sessions prior, he had a decision to make. “The next best thing happened. It brings certainty to their (victims) lives that these individuals would never set foot in society again,” said Lucio. “I was one vote short on the Senate floor this session, but I’m glad we got something. There have been some cases with heinous murders that simply needed to be addressed.”<sup>113</sup>

From here, the bill moved to the House, where it met continued resistance, but considerably less now that a compromise had been agreed upon. Some District Attorney offices were very supportive of the bill in its new form, notably the Tarrant County District Attorney’s Office. “When we talked to juries, frankly they were angry about the life sentence,” said Tarrant County Assistant District Attorney J.D. Granger. “They wanted life. Capital murderers are the most dangerous people in society, and we wanted to keep them safe. Life with parole simply was not as good of a option.”<sup>114</sup> The bill switched from being debated as an alternate sentence to the death penalty to being viewed as truth-in-sentencing and a tough on crime measure. Some were upset by the compromise, however. Will Harrell said that “prosecutors got a slam dunk. I defer in general to the defense lawyers and still do, but I have this personal sense that anybody who got life with the possibility of parole will now get life without parole. We were upset with the outcome.”<sup>115</sup> Religious organizations that had worked for the bill also saw the legislation as less than they had hoped for. “Many of us see this as a step

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<sup>112</sup> Kepple, Rob. Personal Interview, January 11, 2006.

<sup>113</sup> Lucio, Eddie. Personal Interview, January 11, 2006.

<sup>114</sup> Granger, J.D. Personal Interview, January 24, 2006.

<sup>115</sup> Harrell, Will. Personal Interview, January 19, 2005.



backwards,” said Bee Moorhead of Texas Impact. “We are even less disposed now to rehabilitation. All evidence still points to less people being executed in Texas than previously, and we didn’t say anything publicly about this,” she said.<sup>116</sup> One of life without parole’s main supporters in the past, the Texas Criminal Defense Lawyers Association, even testified against the bill when it came before the House Committee. “The Criminal Defense Lawyers supported our bill, but testified against it in committee,” said Ian Randolph. “Keith Hampton testified against it because he believed in the three option, but there were some alligator tears there.”<sup>117</sup> Indeed, as the bill moved through the House, strategic decisions were made to ensure that the bill did not get sidetracked.

### House Criminal Jurisprudence Committee

(All quotes are from April 19, 2005 meeting unless otherwise noted).

Those who testified before the committee were Representative Tony Goolsby, Representative Ruth Johnson Jones, Committee Chairman Terry Keel, Bernadette Ruiz, Tarrant County Assistant District Attorney Greg Miller, Harris County Assistant District Attorney Roe Wilson, Dallas County Assistant District Attorney John Rolater, Texas Criminal Defense Lawyers Association Director Keith Hampton, and Clay County District Attorney Tim Cole.

Representative Goolsby began the testimony, which was for Senate Bill 60 and other bills that sought to create a life without parole sentence. He began by mentioning that 20 of the latest newspapers around Texas have supported life without parole. He listed the newspapers of each committee member and that they supported the measure.

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<sup>116</sup> Moorhead, Bee. Personal Interview, February 3, 2006.

<sup>117</sup> Randolph, Ian. Personal Interview, October 28, 2005.

He made similar arguments as Lucio had in presenting his bill; the sentence enjoyed a large amount of support from the public, was available in 47 states, provided certainty for victims, did not weaken the death penalty, was tough on crime, and presented a solution to the problem of juvenile murderers in the wake of *Roper v. Simmons*. He finished his statements by saying that there will be no changes to the appellate courts because special issues remained in tact, and that the only thing that would change is that “Texas jurors have a power they have never had before; that is to give life without parole. As I said before, they can throw away the key after that.”

Representative Jones then laid out her version of life without parole and spoke on behalf of Senate Bill 60. She mentioned Cunningham’s studies that life without parole inmates would not present additional dangers above other inmates, and spoke of how harsh a sentence it is. Chairman Keel then laid out a committee substitute for the bill that made technical changes, and said the bill “will have the effect of getting rid of a fictitious life sentence and it will eliminate confusion for juries because we will now have one life sentence in Texas and it will mean life.” Keel then called to the stand Bernadette Ruiz.

Ms. Ruiz testified as the widow of Travis County Deputy Sheriff Keith Ruiz, a former deputy of Representative Keel (who was formerly the Sheriff of Travis County). She gave compelling testimony that described how her life changed when her husband was killed in the line of duty. Her husband’s case was not tried for the death penalty, and she said she thought to herself “here we go again being victimized. First by De la Mora, this time, by the system.” She said that by passing the law, “you give victims the certainty of knowing that the person who murdered their loved one will never, ever be released from jail.” She also added “no sentence can ever equal the sentence that me and

my sons have been given, and that's a life without Keith." Keel, obviously affected by the testimony, offered his condolences and Ms. Ruiz was given applause when she left the stand. Greg Miller then testified, thanking Senator Lucio for his work on the bill. He said "it's time to stop the legal fiction of life when it comes to capital murder."

Roe Wilson testified in opposition to the bill, and said "I would like to simply state that our position is that we are against the bill." Representative Terri Hodge probed deeper, asking her the reasons her office opposed the bill. Wilson mentioned that they had, in effect, life without parole, that behavior would be worse with these inmates, and that they will have increased difficulty in plea-bargaining situations. She then said "it's been an extensively debated issue and I feel at this point, we just wanted to register our position." John Rolater then testified, saying that life without parole is an important step by opponents to eliminate the death penalty. He said "it's going to change the dynamic of these cases," and argued that jury selection would be longer, create more trials, and disrupt a working system. Hodge then made the argument that life without parole is potentially a harsher sentence than the death penalty.

Keith Hampton then testified against the bill, and provided one of the more interesting moments of the session. He said that he was "saddened that the prosecutors forced the Texas Senate to strip away that additional option. Texas juries are asking for an additional option, not to have one taken away from them." Hodge then asked Hampton if he would prefer capital murder cases as they are currently over this bill. Hampton then said that he could only support the three-option, and that the bill was supposed to be about empowering juries. Hodge then said "I, like you, would like the three-option. But I only have one vote. But if I can't get to three, for me, I'll take what I

can. Because I feel like, at some point, maybe I can come back and get the one that was left.” However, Hodge may not have understood that defense lawyers as a whole were comfortable with two options. “We would have rather had three options, sure, but the defense bar was fine with two. We were taking something away from juries, but you take what you can get,” said Hampton in an interview.<sup>118</sup>

Next to testify was Tim Cole, who is the District Attorney for a number of small counties in Texas. He testified that rural offices have difficulties seeking the death penalty. “It will simply shut a small DA’s office down to seek death,” he said. He also said that he has had to decide whether to seek death in a large number of cases, ten, and that it was very difficult choosing whether or not to seek death. Representative Harold Dutton then introduced a bill that would give jurors a third option, and spoke at length about his experiences visiting Death Row and the need for redemption for many of these inmates. Representative Goolsby closed on the bill, and emphasized how harsh a sentence life without parole is. Representative Ruth McClendon also closed on the bill, spoke to her experience in trying to pass the legislation in prior sessions, and once again reinforced how strict the life without parole sentence was. Senate Bill 60 was left subject to call and considered in a public hearing on April 19, 2005 to further iron out the bill. It then was sent to the Calendars Committee on April 22, where it sat for over a month.

## House Floor

(All quotes are from May 24, 2005 Session unless otherwise noted).

Before the bill could reach the floor, it had to overcome the obstacle of the House Calendar Committee, chaired by Representative Beverly Woolley, a Republican from

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<sup>118</sup> Hampton, Keith. Personal Interview, January 11, 2006.

Harris County. “When it was stuck in calendars, Harris County was holding it up,” said Keith Hampton. “Under the old rules, you could hold a bill up once, but not over and over. She got lambasted in the press.”<sup>119</sup> Criminal Jurisprudence Committee Clerk Damian Durante said, about the bill being held up in the Calendars Committee, “I’ve heard that conjecture before. I can’t speak to that. It was crunch time for them.”<sup>120</sup> The press apparently did play a significant role in getting the bill out of calendars, however. “It went to the Calendars Committee in the House, which doesn’t meet publicly,” said Ian Randolph. “Any member can block a bill from going to the floor. The press was helpful in getting the bill out of calendars. *The Austin American Statesman* was very supportive.” The paper published an editorial on May 21, with a headline of “Justice is Being Held Up at Capitol.” The editorial stated that “no one speaks publicly about how the bill stalled or why. Privately, however, several sources – including legislators – said that when a bill sits in calendars for that long, it is because at least one committee member blocked it.” The editorial then made an implied connection between Harris County District Attorney Chuck Rosenthal’s opposition to the bill and Chairwoman Woolley.<sup>121</sup> “Two days after that, the bill came out of calendars,” said Randolph.<sup>122</sup>

When the bill reached the floor on May 24, 2005, similar arguments prevailed as were presented in previous sessions, but with a much more concentrated focus on victims than the previous sessions. Representative Goolsby handled the bill on the floor, and explained the broad support from the public and editorial boards across the state. The bill, as it went to the floor, also required persons convicted of first-degree murders to be

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<sup>119</sup> Hampton, Keith. Personal Interview, January 11, 2006.

<sup>120</sup> Durante, Damian. Personal Interview, January 12, 2006.

<sup>121</sup> (2005, May 21). Justice is Being Held Up at Capitol. *The Austin American Statesman*. Editorial Section, p. A18.

<sup>122</sup> Randolph, Ian. Personal Interview, October 28, 2005.

sentenced to between five and 99 years in prison. Goolsby said the bill also had an amendment placed on it that “ensures that any attorney appointed as lead counsel to death penalty cases has not been found by Federal or State court to have rendered ineffective assistance during the trial or appeal of a prior criminal case.”

Some additional amendments were then offered. Representative Robert Talton put an amendment forward that would add life in prison back to the First Degree Murder sentencing scheme. Two amendments were offered by Keel to clean up the bill, which were adopted. Representative Dutton put forth an amendment that made the capital murder statute agree directly with the Supreme Court’s decision in *Roper v. Simmons*. This amendment, and another technical amendment by Keel were adopted. Representative Goolsby then moved passage.

Representative Pat Haggerty spoke against the bill, making similar remarks as he had in the 77<sup>th</sup> session. He spoke of the dangers that would be created in the prison population, and called the bill “stupid.” Representative Paul Moreno spoke for the bill, but without the public display of opposition to capital punishment that he had made in the 77<sup>th</sup> legislature. He said “the United States Supreme Court is in a position now to do exactly what we are proposing with this bill. So let’s, for once, beat the courts by doing something that is going to be here or is here already.” Keel then spoke for the bill, and called the legislation a truth in sentencing bill. Haggerty questioned Keel on whether juries will choose the death penalty or life without parole. Keel responded with an explanation of the capital murder statute, to which Haggerty then resubmitted his argument that a dangerous prison population would be created. Keel then endured further questions about District Attorneys who have opposed this bill on the grounds of it being

an anti-death penalty piece of legislation, which he then explained was not true because of the new form of the bill as a two-option. He also made the point that there would not be extra costs associated with the bill and that the danger to prison guards will not increase. Goolsby then closed on the bill with “Mr. Haggerty is right. A prison is a time bomb, and that’s where all the time bombs should be. Locked up so we can be safe on the streets. I move passage.” The bill passed to engrossment in the House with a vote of 104 to 34. An additional amendment was offered on May 25 to forbid releasing life without parole inmates on medical leave. The bill then passes the house with a vote of 121 to 22. The Senate concurred in the House amendments on May 28 and sent the bill to Governor Ricky Perry, where it was signed on June 17, 2005 and went into effect on September 1, 2005.

## Analysis of House Actions and Closing

This bill was well presented in the House and won over many former opponents. Representative Terry Keel had previously been a major opponent of life without parole legislation, but became one of its biggest supporters in this session. On the bill, he attached provisions about counsel that could be appointed to cases that had not been accepted in a bill he previously put forth in the session. “Keel had authored a bill, House Bill 268, that had similar provisions to the amendment he put on the bill,” said Damian Durante. “It dealt with the appointment system for indigent defendants. Right now, a small group of attorneys keep getting appointed to cases. This allowed for prosecutors to serve as lead counsels.”<sup>123</sup> This was not well received by some, including Keith

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<sup>123</sup> Durante, Damian. Personal Interview, January 12, 2006.

Hampton. “Prosecutors, with all of their experience, can’t just walk into a death penalty case, it’s a totally different world,” said Hampton. “Keel likes to take the Tom Delay approach. He went to the GOP headquarters and filed a lawsuit, which was granted.”<sup>124</sup> Regardless, Keel was warmed to the idea of life without parole. The legislation was most likely aided by having the widow of one of his former deputies appearing before his committee and testifying for the bill. “Bernadette Ruiz gave poignant testimony about how her husband’s killer was in jail and how she has to go to parole hearings 40 years from now. It took the wind out of the sails of Harris County,” said Ian Randolph, who located Ms. Ruiz.<sup>125</sup> In this session, there was a well-assembled group of victims who demonstrated to lawmakers why constituents wanted life without parole.

The bill also benefited, as mentioned before, from the switch to the two-option form. This was palatable to a large majority of prosecutors, and to some victims groups. “What really irritated me was that victims groups got played horribly,” said J.D. Granger. “They were getting played for a third option when they wanted certainty for their families and other victims’ families.”<sup>126</sup> John Bradley also said “ultimately, Terry Keel got a middle ground and I think prosecutors are ultimately satisfied. I think that the anti-death penalty crowd was unhappy. It is in the best form it has ever been, so we didn’t oppose it.”<sup>127</sup> Rob Kepple also added that “life without parole wasn’t our idea, and folks got what they wanted. True life without parole passed in the long run.”<sup>128</sup>

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<sup>124</sup> Hampton, Keith. Personal Interview, January 11, 2006.

<sup>125</sup> Randolph, Ian. Personal Interview, October 28, 2005.

<sup>126</sup> Granger, J.D. Personal Interview, January 24, 2006.

<sup>127</sup> Bradley, John. Personal Interview, January 12, 2006.

<sup>128</sup> Kepple, Rob. Personal Interview, January 11, 2006.



There was also a concerted effort to steer the debate away from the death penalty and reformation in this session. Hampton testified against the bill in its two-option form before the House committee, and debate was not steered off course in any committee hearing or floor session. Groups associated with an opposition to the death penalty did not testify or state their position of support to the legislature. Many religious organizations also helped win over Republican lawmakers. “We contacted legislators and did the direct lobby strategy,” said Bee Moorhead. “We worked in educating people in congregations for three sessions and laid the groundwork for passage.”<sup>129</sup> The Texas Catholic Conference was also influential in grassroots promotion of the bill. “We were regularly contacting legislators, bishops, and constituents about the legislation. It’s an issue that we have worked on as long as it has been introduced,” said Brother Richard Daly of the Texas Catholic Conference.<sup>130</sup> The Baptist General Convention of Texas also participated in similar activism surrounding the bill. The group previously commissioned a report on capital punishment in Texas in which they decided that a moratorium was necessary to study the issue of the death penalty further. They also compiled information to present to legislators who were uncertain, helped place Joshua Houston, an intern with their organization, before committee, and were instrumental in contacting and convincing Republican legislators.

The Supreme Court cases also were immensely helpful in passing the legislation, perhaps in giving a push to some lawmakers and Governor Rick Perry. The Executive Branch of Texas was receptive to the legislation as was passed, and Lucio singled out praise for Lieutenant Governor Dewhurst. “Governor Dewhurst was very supportive in

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<sup>129</sup> Moorhead, Bee. Personal Interview, February 2, 2006.

<sup>130</sup> Daly, Richard. Personal Interview, January 23, 2006.

getting this bill through the Senate. He played an important role worth mentioning,” said Lucio. Perry, who had remained non-committal about the legislation, ultimately decided to sign the bill. “This bill put tough on crime Republicans in a box,” said Randolph. “Their only argument against it was that it would weaken the death penalty.”<sup>131</sup> This box most likely seemed a politically negative place to be; it was surrounded by pressure for reform, a populace that overwhelmingly supported the option, and significant opposition from few (albeit very powerful) prosecutors. “The time was just right,” said Lucio.<sup>132</sup>

The coalition of and cooperation between different groups provided the driving force behind the legislation. Senator Lucio and his Office’s ability to find and locate expert witnesses, to bring together dissimilar groups, and to accept the political opportunities around them led to the passage of life without parole. “We worked with our coalition partners,” said Will Harrell. “More than 1,000 people from the ACLU contacted legislators. We worked with the Christian right, the League of United Latin American Citizens, and others. We’ve become a national model for coalition building.”<sup>133</sup> The diligence of these different organizations and their ability to unite around a common goal with Senator Lucio has led juries in Texas to have a new option in the sentencing phase of capital murder cases; the sentence of life without parole.

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<sup>131</sup> Randolph, Ian. Personal Interview, October 28, 2005.

<sup>132</sup> Lucio, Eddie. Personal Interview, January 11, 2006.

<sup>133</sup> Harrell, Will. Personal Interview, January 19, 2006.