HOUSE RESEARCH ORGANIZATION

focus report

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Life Without Parole: A New Punishment Option?

A series of highly publicized death row cases in Texas, coupled with some high-profile crimes, are fueling calls for a new means of punishing serious criminal offenses by imposing a sentence of life without possibility of parole. Texas currently lacks a no-parole punishment option; under all prison sentences imposed in the state, with the exception of the death penalty, offenders eventually become eligible for parole, even when sentenced to life in prison. The debate over the no-parole option centers on the question of whether such punishment is suitable in capital murder cases or for other serious crimes. At issue also is whether life without parole should be used as a clemency option for death row inmates.

A February 1998 Scripps Howard Texas Poll found that 72 percent of Texans surveyed support changing state law to allow life in prison without parole, compared to 20 percent opposed to a change. The Texas Poll also recorded declining — but still strong — support for the death penalty: 68 percent of respondents expressed support, compared to 86 percent in 1994. Of those supporting the death penalty, more than three quarters favored such punishment for capital murder even if the alternative were life without parole.

A 1993 national survey found that support for the death penalty dropped from 77 percent to 49 percent if offenders instead were sentenced to life without parole and to 41 percent if sentenced to life without parole plus restitution, according to the Death Penalty Information Center, an advocacy group opposed to the death penalty. Some observers, however, argue that results of such national surveys are not applicable in Texas because they poll people in states where executions are rarely carried out so that the death penalty is perceived, in effect, as life without parole. Furthermore, some argue that jurors in capital murder cases are more likely to impose the death penalty after hearing the specific facts in a case, even if they initially espoused philosophical support for an alternative punishment.

Meanwhile, debate also has revived over the means by which Texas inmates are afforded assistance in appealing a sentence of death. Procedures used in habeas corpus appeals, last revised in 1995, may again receive legislative attention.

Punishments in Texas

Texas is one of a minority of states without any provision for life without parole, according to the Death Penalty Information Center. Some 30 states and the federal government have laws permitting both life without parole and the death penalty. Eight states that do not have the death penalty do have a life-without-parole statute, as does the District of Columbia. In two other states — Wisconsin and Alaska — sentencing judges can set parole eligibility dates that extend beyond a normal life span, according to the center.

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In Texas, parole is an option under all prison sentences except for the death penalty. Even a sentence of life in prison — reserved for offenders convicted of first degree felonies and capital murder and certain repeat offenders — does not rule out the possibility of parole. The portion of a sentence that must be served before an inmate can be considered for parole is specified in the Code of Criminal Procedure and differs depending on the offense and when it was committed. For the purpose of determining parole eligibility, a life sentence is considered 60 years; hence, life sentences that require inmates to serve one-half of their sentences before being eligible for parole mean that the inmates serve 30 years before parole is considered. Inmates given life sentences for serious, violent crimes committed under the 1993 Penal Code revisions are required to serve a minimum of 30 to 40 years before becoming parole eligible. If inmates sentenced to life are not paroled, they stay in prison until they die; inmates who are paroled while serving a life sentence remain on parole for the rest of their lives.

Capital murder — murder committed under one of eight specified circumstances listed in Penal Code sec. 19.03 — carries a penalty of death or life in prison. Offenders sentenced to death for capital murder never become eligible for parole. Those sentenced to life in prison are eligible for parole after serving 40 years, without consideration of good conduct time. However, the Board of Pardons and Paroles may grant parole to a capital felon given a life sentence only upon a two-thirds vote of the entire 18-member board and only after receiving a report on the probability that the inmate would commit an offense after being paroled.

Persons serving a life sentence for some repeat sex offenses become eligible for parole only after serving 35 years, without consideration of good conduct time. For certain sex offenses, the Board of Pardons and Paroles may grant parole only upon a two-thirds vote of the entire board. Those serving a life sentence for a "3g offense" — a serious, violent offense listed in Code of Criminal Procedure art. 42.12 sec. 3g — or for a felony offense involving a deadly weapon must serve at least 30 years, without consideration of good conduct time, before being considered for parole.

In general, other offenders are eligible for parole when their time served, plus good conduct time, equals one-fourth of their sentence or 15 years, whichever is less.

Sentencing alternative

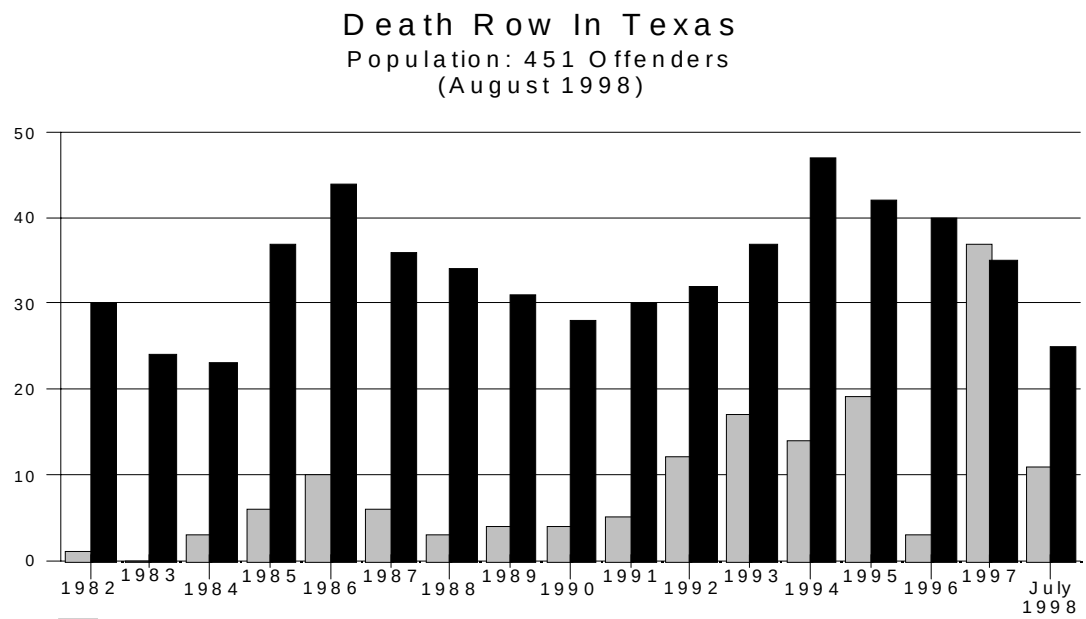
Life without parole is being touted as a new sentencing option that would give judges and juries additional flexibility while ensuring public safety and avoiding the economic and moral issues associated with the death penalty. Some supporters also say the option should be used in other cases of serious, violent crime. Critics, however, say that current punishments often effectively provide a sentence of life without parole and charge that instituting a new alternative penalty could raise legal issues, drive up prison costs, and possibly replace the death penalty, diluting its deterrent effect on crime.

Supporters say that in capital murder cases judges and juries now are limited to choosing between death or a life sentence that carries with it the possibility of parole. If life without parole were an option, courts and juries would have maximum flexibility in deciding punishments, reserving the death penalty for the most heinous cases while ensuring that other criminals live the remainder of their lives in prison.

Prison terms for serious crimes in Texas

- third-degree felony: two to 10 years in prison
- second-degree felony: two to 20 years in prison
- first-degree felony: life in prison or five to 99 years in prison
- capital murder: life in prison or the death penalty

Punishment can be enhanced for certain repeat offenders.



Source: Texas Department of Criminal Justice

Currently, even a "life sentence" does not provide a guarantee that an offender will never be released; eligibility for parole always harbors the possibility that parole eventually may be granted. This forces juries in capital cases to choose between death and possible parole, not always acceptable alternatives. For example, when juries in capital murder cases cannot unanimously agree on the death penalty for a conviction, the only sentencing recourse is life, which automatically carries with it the possibility of parole after 40 years. Even though the current parole rate is low, it was as high as 79 percent as recently as 1990. Furthermore, some inmates have had their death sentences commuted to life in prison, and then been paroled. A real sentence of life in prison without possibility of parole would protect society from dangerous offenders and bring peace of mind to their victims, now forced to monitor an inmate's status throughout a "life sentence" because release on parole remains possible.

Life without parole would provide Texas a punishment option that would address many deficiencies of the death penalty: concerns about the morality of the state taking a life, the possibility of executing an innocent person, and unequal application of the death penalty to the poor and minorities. Life without parole also would bring Texas in line with the overwhelming majority of other states.

Furthermore, life without parole would fit well in the state's court-tested punishment scheme for the death penalty, whether it was used to replace the current option of a life sentence for capital murder or to provide a second alternate to the death penalty. In the first situation, juries would choose between life without parole and the death penalty. In the latter case, juries could choose among all three punishments, and the statute could be written to pass court scrutiny by including guidelines for juries on the elements to consider in selecting among the possible punishments. Texas could use as a blueprint other states' laws that have instituted life without parole in either a two- or three-option punishment scheme.

With life without parole, taxpayers would save a portion of the millions of dollars now being spent on the lengthy trial and appeals process required when the death sentence is imposed. (See "*Habeas Corpus* Appeals of Death Penalties," pp. 4-5.) Although good

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Habeas Corpus Appeals of Death Sentences:

The 76th Legislature may be called upon to review state law governing *habeas corpus* appeals of death sentences. These procedures commonly are used to assert that a defendant has been improperly imprisoned or suffered other illegal restraints of liberty in violation of constitutional rights. Current law, revised in 1995, has been criticized for providing inadequate funding for appeals, unqualified legal representation, and improper administration. Supporters of the 1995 revisions, however, say the new procedures have just come into their own after lengthy rulemaking and court challenges and that the system is now operating properly.

1995 revisions

Defendants sentenced to death in Texas may challenge their convictions in two ways: with a direct appeal, which deals only with errors of law in the original trial and is automatically heard by the Court of Criminal Appeals, or by a *habeas corpus* appeal, which can raise issues outside of the trial record. *Habeas corpus* appeals typically center on constitutional rights, such as the effectiveness of counsel or the satisfactory disclosure of evidence by prosecutors, and may be filed in both state and federal court.

Under federal law, revised in 1996, death row inmates who have completed their state court appeals typically are allowed one year to file an "all-encompassing" appeal in federal court. The law sets deadlines for federal courts to act on appeals, strictly limits the grounds on which federal judges can reverse state court decisions, and limits filing of subsequent federal appeals claiming newly discovered evidence of innocence.

In 1995, the Texas Legislature enacted SB 440 by Montford et al., requiring the Court of Criminal Appeals to appoint and reasonably compensate attorneys for indigent persons who want to apply for a writ of *habeas corpus*. It also sets deadlines for rulings and procedures that are part of the *habeas corpus* appeals process, mandating, for example, that such an appeal be pursued simultaneously with the direct appeal. In addition, inmates in most cases are limited to one *habeas corpus* appeal.

As of July 1, 1998, the Court of Criminal Appeals had appointed attorneys for all state inmates needing counsel, a total of 298 appointments, according to a court official.

Supporters of SB 440 said the state funding provided under the bill would ensure defendants of competent counsel throughout the appeals process. The revisions, they maintained, would establish fair deadlines for the litigation of valid and just claims, save the state money, and end abuses of the appeals process that delay executions rather than serve justice.

Opponents of the bill said the changes would improperly and inefficiently dovetail direct and *habeas corpus* appeals, two different review processes that should be pursued consecutively rather than concurrently in order to ensure that all issues are identified and raised. *Habeas corpus* appeals are a right that should not be limited by arbitrary deadlines because ample time is needed to investigate, file, and rule on the claims, they argued. In addition, they said, the revisions would not ensure that counsel would be fairly compensated nor set any standards for the competency of appointed attorneys.

The current debate

Debate over the law continues, with critics saying that the process is inadequately funded, resulting in attorneys of poor quality being appointed to assist with appeals, and that an entity other than the Court of Criminal Appeals should be in charge of appointing and compensating attorneys.

Funding. For fiscal 1996-97, the Court of Criminal Appeals was appropriated $2 million to fund the new process of appointing counsel to represent indigent defendants in *habeas corpus* appeals, despite some estimates that $4 to $5 million would be necessary to adequately provide for the program. Funding levels rose to $4 million in fiscal 1998-99. In January 1998, the court implemented a "presumed cap" of $100 an hour or $15,000 total on attorneys fees for appointed counsel in a state *habeas* appeal, plus a limit of $5,000 on investigative fees and expert witnesses in the cases. Although the presumed cap is not an absolute limit on payments, according to a court official, the court will consider expenses beyond that amount only in extraordinary cases.

Critics of the current funding level say that the cap on attorneys fees is arbitrary and grossly inadequate considering that hundreds of hours are necessary to adequately prepare a writ of *habeas corpus* in capital murder cases. The process requires reading the *voir dire* and trial records, interviewing witnesses, and researching and writing the appeal. Although the wide variation in cases make estimating an average workload difficult, some observers say an average 400 hours

Renewed Debate Over Legal Representation

of legal time is necessary, easily putting the cost of the process within the range of $25,000 to $50,000.

Critics also charge that caps on expenses for investigation and expert witnesses are inadequate, given the complexity of capital murder cases and the need to have experts analyze evidence and investigate witnesses. The board of directors of the Texas Criminal Defense Lawyers Association in June 1998 adopted a resolution encouraging its members not to seek appointments for death penalty *habeas corpus* appeals for several reasons, including what it termed the "refusal" of the appeals court to pay necessary expenses. According to the association, this practice effectively forces appointed attorneys to finance the proceedings themselves.

Others, however, argue that complaints about the level of funding for cases and payments made to attorneys are fueled by overly generous estimates of the "proper" compensation for working on a *habeas corpus* appeal. Estimates of 400 hours are inflated, they say; the true average workload per case is probably closer to 150 or 200 hours. The Court of Criminal Appeals has set a reasonable limit on the cases with its presumed cap per case of $15,000, and the court will consider paying more if a case is extraordinary, they note.

Attorney qualifications. Although the statute states that inmates shall be represented by "competent" counsel, there are no assurances that this is being done, critics say. Absent minimum standards, unqualified and inexperienced attorneys are being appointed and some defendants are receiving less than adequate legal counsel, critics argue. This situation can jeopardize both their state and federal appeals, they say, noting that, in general, issues not raised in the state *habeas corpus* appeal cannot be raised in the federal appeal. More flexible deadlines for filing the appeal, some argue, would give the Court of Criminal Appeals an escape valve, allowing it to appoint a new attorney if the original appointee turned out to be unqualified or, although experienced, made a serious mistake.

Since the issue of competency often is tied to the issue of compensation, higher compensation levels would encourage more qualified, experienced attorneys to seek appointments, some critics of the current system suggest. Others propose having the Court of Criminal Appeals or some other entity set minimum qualifications or experience levels for attorneys so that all inmates are assured that their attorney is qualified to handle their appeal. Alternatively, the state could establish or fund a program to assist lawyers appointed to handle *habeas corpus* appeals on procedural matters, methods of research, or issues raised in other appeals.

Supporters of the current system argue that concerns about the qualifications of appointed attorneys can be handled without revising the 1995 law. Many of the problems, they maintain, were created when implementation of the new statute was delayed due to the rulemaking process and a legal challenge to the law. When the statute was finally upheld in December 1996, the court had to appoint attorneys quickly for the large backlog of inmates awaiting representation. Now that the court has caught up with appointments, more attention can be focused on the issue of quality representation, they argue. As a matter of fact, they note, the court now requires that attorneys seeking appointment file an application with the court in order to ensure a screening process.

Setting inflexible qualifications for attorneys could result in a new round of reviews concerning the competency of attorneys, thereby undermining the goal of a streamlined appeals process, supporters of the current system argue. In addition, a list of rigid criteria for attorney qualifications could exclude good attorneys who may be capable of handling a *habeas corpus* appeal, as some civil attorneys have done. The state should be cautious about creating an office for helping or training attorneys handling *habeas corpus* appeals because these offices can become political tools used to advocate abolishing the death penalty, they say. Also, creating more flexible deadlines for the appeals would undermine the goal of having one fair review of all claims within a timely and efficient system.

Oversight. State revisions of the *habeas corpus* appeals process made the Court of Criminal Appeals responsible for appointing and paying the appeals attorneys.

Critics say that the court should not have these responsibilities since it also must rule on the cases being appealed. One proposal would have trial courts appoint attorneys, with payments administered by the comptroller.

Supporters of the current system, however, say that the function of appointing and paying appeals attorneys rightfully rests with the Court of Criminal Appeals because it sees the work of numerous attorneys and knows which attorneys are qualified and appropriate for individual cases. In addition, they say, appointments should be made by an entity that can choose counsel from throughout the state.

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estimates of the cost of trying and appealing capital murder cases are lacking, life without parole — with an average annual incarceration cost of about $14,000 to almost $20,000 per inmate — could be cheaper in many cases.

The Texas Department of Criminal Justice (TDCJ) has the expertise and resources to manage a prison population sentenced to life without parole. The department already deals with many hard-to-manage inmates, and privileges and punishments within a prison can be used as management tools. Housing felons, even a large number, sentenced to life without parole would not present a problem for TDCJ, which now has capacity to hold over 140,000 inmates. Resources would be better used to permanently house dangerous capital murderers rather than to pursue the death penalty and respond to a lengthy appeals process.

Other supporters say that life without parole also should be allowed as a punishment option for other serious, violent crimes. Current sentencing laws put judges and juries between a rock and a hard place: the death penalty is reserved for capital murders, yet all prison terms — even for the most heinous crimes — include the possibility of parole. Life without parole would be a meaningful, appropriate punishment in some cases where parole would never be suitable due to the character and abhorrent nature of the offense. For example, the no-parole option may be appropriate in some cases of serious, repeat sex offenders. In these and other cases, life without parole would allow judges and juries a full range of appropriate penalties and assure victims of crime that dangerous offenders would never be released.

Opponents say the wide spectrum of punishments already available to Texas judges and juries works to adequately punish offenders and protect the public. Texas does not need a new law allowing life without parole; current punishment schemes already effectively provide this option.

Many of the high-profile cases that have fueled calls for a life-without-parole option were governed by laws and policies that allowed parole for capital murder after as little as 15 years in prison. These laws and policies are no longer in effect. With the Penal Code revisions of 1993, criminals who commit violent offenses have been subject to stiff penalties, including lengthy prison terms and requirements that they serve longer portions of their sentences before becoming eligible for parole. In many cases, offenders in effect are already serving sentences of life without parole: capital murderers given life sentences must serve 40 years before being eligible for parole; other offenders with life sentences must serve as many as 30 or 35 years; and some offenders must serve one-half of lengthy sentences before parole consideration.

In addition, offenders given life sentences for capital murder, as well as some other offenders, can only be paroled with the approval of two-thirds of the entire 18-member Board of Pardons and Paroles, an unlikely scenario given today's tough parole policies. Also, close scrutiny of inmates eligible for parole resulted in overall parole approval rates of only about 18 percent for 1997.

The procedures used in Texas to determine punishment in capital murder cases have been well litigated and established and may not easily withstand change. Modifications to the law would be subjected to court scrutiny, halting executions while challenges were litigated. Currently, juries decide between the death penalty and a life sentence by considering questions about the offender's future dangerousness and any mitigating circumstances. Adding life without parole as a third punishment option in capital cases would require new in-

"Special needs paroles" — typically parole to a hospital or nursing home — are offered to inmates convicted of less serious crimes who are elderly, mentally or physically ill, handicapped, or mentally retarded and who are considered not threatening to public safety or unlikely to commit new offenses. Citing savings to the state in medical and housing costs, some say such paroles should be allowed even with a sentence of life without parole. Others say offenders who have committed serious, aggravated offenses should have to complete their sentences without special consideration, regardless of their age or physical condition.

structions to aid judges and juries in determining which option would be appropriate in a certain case. Allowing two types of prison terms could complicate the decision-making procedure, resulting in court challenges.

Other states' statutes do not provide an adequate model for Texas because many of these states have not carried out an execution and their laws have not been tested in court. In addition, prosecutors could face difficulties in crafting plea bargains in capital murder cases because defendants would be less likely to accept a deal for life without parole. The result could be more expensive and time-consuming trials.

In the end, life without parole could inappropriately replace the death penalty. Even if not explicitly repealed, the death penalty could be effectively eliminated if judges and juries consistently sentenced capital offenders to life without parole. But life without parole clearly would be inadequate punishment for the most heinous crimes. Furthermore, while life without parole might satisfy one underlying purpose of the death penalty — protecting society — it would not fill other functions, such as deterring crime.

Instituting a no-parole option could lead to increased demand for prison space, rising incarceration costs, and new problems in prison management. Life without parole would not necessarily be cheaper than the death penalty because many costs, such as a trial and appeals, may be incurred regardless of whether a person is sentenced to life without parole or to death. With incarceration costs ranging from about $14,000 to about almost $20,000 per inmate per year, the expense of housing an ever-growing prison population of inmates sentenced to life without parole could drain criminal justice resources from other needs, especially considering medical expenses incurred by aging inmates.

Furthermore, managing inmates without being able to use parole as an incentive for good behavior could be difficult and expensive. These types of problems could ultimately generate exceptions to a life-without-parole sentence, such as a "special needs" parole to move dying and incapacitated inmates out of the prison system.

Other opponents say any life-without-parole option should be reserved for capital murderers. Using this punishment for other offenses could open the door to an ever-expanding list of circumstances warranting life without parole. This could distort the relationship between offense and punishment that reserves the harshest penalties for the most serious crime, capital murder. Also, substantially increasing the number of inmates in prison for life with no option for eventual release could add to security problems and ultimately create situations of overcrowding.

Clemency option

The debate over life without parole also includes discussion of whether the punishment might be an appropriate option in the clemency process to alter the sentence of inmates on death row. Clemency is the power of the governor to grant pardons or temporary reprieves of execution dates or to commute court sentences to lesser penalties. Because Texas has no penalty of life without parole, any commutation of a death sentence to a lesser penalty such as life in prison carries with it the possibility of parole. The governor can grant capital murderers one 30-day reprieve of an execution date without the recommendation of the 18-member Board of Pardons and Paroles. The governor can grant other clemency requests only upon recommendation of the board.

Supporters say life without parole should be an option for the parole board and governor when they consider requests to commute death sentences, especially when inmates have repented and are rehabilitated or questions are raised about their innocence. This additional clemency option would give the parole board and the governor new flexibility to spare an inmate's life yet keep the offender in prison until death, an appropriate punishment that would further the cause of justice in some cases. For example, life in prison would have been appropriate for Karla Faye Tucker, executed in February 1988 for her role in the pickax murder of two persons. Although Tucker did not claim to be innocent of the crime, she asked for clemency, claiming to be fully rehabilitated and to have undergone a religious conversion. Tucker volunteered to spend the rest of her life in prison without the possibility of parole.

Convicted killer Henry Lee Lucas, also scheduled for execution in 1998, similarly would have been a good candidate for such a commutation. Lucas already was serving five life sentences and was unlikely to ever be released from prison. Governor George W. Bush commuted Lucas' death sentence to a life sentence in June

1998 due to questions about the credibility of his confession of guilt. But the governor stipulated that the commuted sentence be served upon completion of the other life sentences, in effect imposing a punishment of life without parole.

Opponents say the clemency process is designed as a way for the governor, with the recommendation of the parole board, to consider last-minute questions of innocence or miscarriages of justice or as a way to express mercy or leniency. If there are compelling reasons to commute a death sentence, the inmate should not be sentenced to die in prison but should have the possibility of parole. So-called "rehabilitated" inmates should have to meet the same standards as other inmates for having their sentences commuted. For instance, in the case of Karla Faye Tucker, questions of innocence or other factors appropriate for the clemency process were not at issue; changing the jury's verdict and commuting her sentence to life without parole would have been inappropriate.

A majority of Texans do not favor allowing capital murderers sentenced to death to be spared even if they become "rehabilitated." Fifty-seven percent of respondents to the February 1998 Texas Poll said inmates sentenced to die should be executed regardless of whether they had turned their lives around. Only 31 percent said inmates' lives should be spared in such situations.

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