

Death of the death penalty? An examination of California's capital punishment system

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ABSTRACT

If California were a country, it would be the eighth largest economy in the world, yet that economy has been decimated in recent years by the Great Recession. Recent figures show California's 9.8 percent unemployment is the third highest in the nation. This figure is much higher when one accounts for the under-employed and those who have given up looking for work. Even more sobering is the Census Bureau's conclusion that 16.3% of Californians had incomes below the federal poverty line in 2010. Californians are losing their homes in record numbers, and school classrooms are busting at the seams. Given this dire picture, California can ill-afford to waste money.

A recent study of California death penalty costs reveals that state taxpayers have spent billions of dollars to execute 13 inmates since capital punishment was reinstated in 1978. What is more, forecasts suggest the costs will soar to \$9 billion by 2030 when San Quentin's death row grows to over 1,000 inmates. When compared with those facing life in prison without the possibility of parole, California's death row prisoners cost millions more per year to maintain. In fact, a death penalty prosecution costs up to 20 times as much as a life-without-parole case. This paper examines the costs and other problems associated with California's death penalty in light of traditional arguments favoring capital punishment. It further considers whether the proposed Safe California Act, or Proposition 34, was a viable alternative that would have meant the death of the state's death penalty.

Keywords: California, death penalty, economy, costs, life-without-parole, capital punishment

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INTRODUCTION

The death penalty is one of the most controversial forms of punishment in the United States, if not in the entire world. It is final. There is no opportunity to reconsider once the sentence has been administered. The controversy goes beyond this fact. Many oppose and support the death penalty based on entrenched convictions from their religious beliefs. Other factors that shape one's standing on the death penalty include deterrence, due process, mistake, and cost. This paper will examine the cost, the problem with delay, due process issues, mistake, the special status of offenders, deterrence, and justice. The paper will consider all these issues in determining whether the death penalty is indeed a proper form of punishment for those offenders who have committed the ultimate crime against society: the willful taking of the life of an innocent victim.

John Edward Smith was convicted of a murder he didn't commit. Though a gang member, he adamantly maintained his innocence in a 1993 drive-by shooting, insisting he was three miles away at his grandmother's house with his girlfriend and two others. The lone witness saw the shooter for a mere split second from 18 feet away. Nevertheless, Smith was convicted. The witness later recanted and, in September 2012, Mr. Smith walked out of prison a free man. This was after spending 19 years in jail (Ryan, 2012).

Kenny Waters also spent time in prison for a murder he didn't commit. Authorities withheld evidence and pressured Waters' girlfriend into making a false accusation. His sister was so convinced he was innocent that she returned to college and then went on to earn her law degree and began working on his case. DNA evidence eventually proved his innocence. This was after he spent 18 years in jail. Waters died six months after his release (Innocence Project, 2012).

Harold Hall received a double-murder conviction in 1985. It was based on a jailhouse informant's falsified documents and Hall's coerced confession. Hall had agreed to admit guilt only after several hours of questioning in which he was handcuffed, denied food and never advised of his rights. A court later concluded his confession was the result of "desperation, fear and fatigue." Hall spent 19 years in prison (Dolan, 2012).

THE PROBLEMS WITH CALIFORNIA'S DEATH PENALTY

Opponents of California's death penalty cite numerous arguments against its imposition. They include the death penalty's mounting costs; delays caused by, among other things, the backlog of cases at the California Supreme Court and the shortage of death row attorneys; purported denials of due process based on bias, mistake, and the destruction of or tampering with evidence; wrongful convictions; and the perception that death row inmates are viewed by some as victims or celebrities.

Despite these significant and legitimate concerns, polls in California consistently have shown support for the "eye for an eye" response to such crimes. In November, 2012, California voters again showed support for the death penalty by failing to pass Proposition 34 which would have repealed the death penalty (Mintz & O'Brien, 2012). Capital punishment supporters argue that, if society deems the death penalty an appropriate punishment for killing another human being, society must find a way to pay for it and overcome these other arguments. But how?

Cost

In their 183-page exhaustive analysis of California's death penalty published in 2011, Arthur Alarcon, senior judge of the U.S. Court of Appeals for the Ninth Circuit, and Loyola Law School professor, Paula Mitchell, revealed several startling findings regarding the costs to execute a prisoner (Alarcón & Mitchell, 2011).

- California taxpayers have spent \$4 billion over the last three decades to execute only 13 individuals. This figure represents approximately \$308 million per execution;
- The state's death row prisoners cost \$184 million more per year than those sentenced to life in prison without the possibility of parole;
- A death penalty prosecution costs up to 20 times as much as a life-without-parole case;
- The least expensive death penalty trial costs \$1.1 million more than the most expensive life-without-parole case;
- Jury selection in a capital case runs three to four weeks longer and costs \$200,000 more than in life-without-parole cases;
- The state pays up to \$300,000 for attorneys to represent each capital inmate on appeal;
- The heightened security practices mandated for death row inmates added \$100,663 to the cost of incarcerating each capital prisoner last year, for a total of \$72 million.

What is equally startling is that, of the 724 people currently on California's death row (Death Penalty Information Center, 2012), only seven have exhausted all appeals thereby making them eligible for execution. Moreover, their executions are not expected to occur in the foreseeable future. California's last execution was in January 2006 and legal challenges to its lethal injection procedures are ongoing (Williams, 2011). Thus, the staggering costs to feed, care for, and guard all 724 inmates continues, and is combined with previously incurred legal expenses for attorneys, investigators, jury selection, court documents, appeals, habeas corpus proceedings, and other expenditures.

But how does one put a price tag on justice? The issue cannot truly be one of cost, for if it were, the state would find a way to pay for it. The issue is one of priorities. Is paying for California's capital punishment a higher priority than other budget items vying for scarce public resources? California continues to face one of the worst financial crises in recent memory. The state's educational infrastructure is suffering as K-12 teachers continue to lose their jobs and university tuitions steadily increase. Reductions are being threatened to health and safety positions. As one commentator put it, "Do we really want to be spending \$308 million to snuff

out one individual” (Skelton, 2011)? Moreover, state lawmakers’ repeated attempts to remedy the system by adopting prior recommendations have consistently failed (Williams, 2011).

Death Penalty Delays

The fact that there have been no executions in California since 2006 raises another important consideration in the death penalty argument: The time lag between conviction and execution. Five years ago that differential was more than 17 years, or twice the national average of 9.8 years. Today it is more than 25 years, partly due to the stay of all executions in the state (Williams, 2011). In fact, a condemned convict in California is more likely to die of old age than by execution. Although thirteen California inmates have been executed, 78 have died of natural or other causes (California Dept. of Corrections, 2012). Thus, in addition to compounding the escalating costs of death penalty cases, these delays create other issues, such as due process concerns and a lack of closure for the victims’ families.

Shortage of Death Row Attorneys

A shortage of qualified death penalty attorneys is a significant factor causing delays in death penalty appeals. Fewer than one hundred attorneys in the state are qualified to handle capital cases (Williams, 2011). There are several reasons for this shortage. One is that handling death penalty cases requires special knowledge and experience (Gray, 2011). Though other areas of law do so as well, this is particularly so when the client’s life is in jeopardy.

The work also necessarily requires a certain personality type. Death penalty cases can be rewarding, but often are time consuming and emotionally demanding. Defense counsel are fighting against a complex legal system that is reluctant to admit that an error was made and even less inclined to free a convicted - albeit erroneously - murderer. That kind of repeated defeat throughout the appeals process can wear on the most seasoned attorney. Those who handle death penalty cases also find themselves torn between, on the one hand, an incarcerated client often with no means to pay for legal services and what little the state will pay, and on the other hand, clients who are willing to pay large sums of money for their time. As evidence of this, nearly thirteen percent of the prisoners on death row do not have appointed counsel and all lack the resources to hire their own attorneys (Gray, 2011).

California Supreme Court Backlog

A backlog at the California Supreme Court is another reason for death penalty delays. California law requires that every death sentence be reviewed by the California Supreme Court. This process now takes over ten years (Williams, 2011). In the words of former California Supreme Court Chief Justice, Ronald George, “The seven justices of the California Supreme Court no longer can handle the state’s entire death penalty appeal workload while at the same time fulfilling the court’s primary purpose: to consider the 9,000 to 10,000 petitions it receives annually.” (Gray, 2011).

Denial of Due Process

Other issues arise when examining a death row inmate's due process rights. At the trial court level, bias on the part of the jury, judge and prosecutors remains an ever-present possibility, particularly when the latter two face upcoming re-election. This leads to a recurring question of whether critical decisions regarding life and death are being made for political, rather than legal, reasons (Gray, 2011). Some courts have openly acknowledged that the death penalty is racially biased (*McKleskey v. Kemp*, 1987). There also are instances in which the police or prosecution have coerced defendants or witnesses into false confessions, or have withheld key information from the defense (Death Penalty Information Center, 2012).

At the appellate level, Alarcón and Mitchell concluded in their study that federal judges remand approximately 70% of California death row cases to the trial courts for further proceedings (Alarcón & Mitchell, 2011). Moreover, even when a reversal occurs and a retrial is required, there can be serious due process concerns. Oftentimes the reversal occurs long after the conviction. By then, witnesses may have died or are otherwise unavailable, memories may have faded, physical evidence may have been lost or destroyed, and the facts and circumstances of the case may no longer be capable of proper contextual evaluation.

Mistake

Perhaps the most significant concern many death penalty opponents have is the possibility that the state will execute the wrong person. The nation's judicial system is based on participation from the parties, witnesses, judges, jurors, and others, any one of whom is capable of human error. Indeed, with the development of DNA evidence that is considered 99 percent reliable, three hundred convicted individuals have been exonerated in the U.S. based on DNA testing. Seventeen of those were sentenced to death (Innocence Project, 2012). Since 1973 and prior to the increased use of DNA testing, 141 prisoners have been exonerated after receiving a capital sentence (Death Penalty Information Center, 2012).

These exonerations have been based on such improprieties as eyewitness misidentification, unvalidated or improper forensic science, false confessions or admissions, government misconduct, biased informants, and poor lawyering (Innocence Project, 2012). Nevertheless, the average sentence served by DNA exonerees has been thirteen years and, in nearly forty percent of DNA exoneration cases, the actual perpetrator has been identified by DNA testing (Innocence Project, 2012).

The Perpetrators' Special Status

The increase in exonerations has contributed in part to a rise in public opposition to the application of capital punishment in individual cases. Greater acceptance of DNA testing has escalated society's apprehension that, in some cases, it may not be executing the right person. This apprehension, coupled with the considerable lag time between sentencing and execution that allows the incarcerated prisoner to demonstrate his or her model conduct, often can shift society's perceptions of the perpetrator from "horrible monster" to that of a victim or martyr. Particularly in California where that lag time is over 25 years, death row inmates have acquired during their long incarceration deeply held religious beliefs, published poetry, books and other

materials, earned academic degrees, and otherwise become productive citizens to the extent that they are able to do so within the confines of the prison system.

What is more, some of these condemned prisoners have gained special celebrity status. One was Karla Faye Tucker who was convicted of brutally murdering two people in Texas in 1984 and executed fourteen years later. She converted to Christianity in prison and married her prison minister. Her execution garnered considerable international attention because of her conversion and gender that inspired several songs, films and other media (*Tucker v. State*, 1988). Similarly, the Menendez brothers were another well-publicized case after they brutally murdered their parents with a shotgun in their home. Their first trial was broadcast on Court TV. Both later married and have repeatedly been interviewed in print and on television. As one former Los Angeles County District Attorney put it, "Fan mail, private cells, their own personal television and other special privileges are not what I envisioned when I sought the death penalty as district attorney. I am sure that is not what family members of victims envisioned either." (Garcetti, 2012).

“Death is Different”

Beyond the staggering costs of California’s capital punishment system, there is a more fundamental notion that death is different from all other forms of punishment available to society. First, it is irrevocable and permanent. Unlike other forms of punishment, if an executed prisoner is later found to have been innocent, there is no mechanism for correcting that mistake. Moreover, it forecloses the possibility of rehabilitation which many believe is the primary purpose of sentencing, rather than punishment or revenge. True, many on death row have years to redeem their lives while awaiting their execution. How and when that change occurs, however, varies from individual to individual and can be affected by a myriad of circumstances.

This was the argument of several Justices in *Furman v. Georgia*, 408 U.S. 238 (1972). Justice William Brennan said that death is "in a class all by itself because of its severity, finality and enormity. A death penalty differs from all other punishments not in degree but in kind." Justice Potter Stewart identified three ways in which death is different in kind. First it is unique in its total irrevocability. Second it is unique in its rejection of rehabilitation of the convict. Finally, according to Justice Stewart, it is unique in its absolute renunciation of all that is embodied in our concept of humanity (Comiskey, 2010).

ARGUMENTS IN FAVOR OF CALIFORNIA’S DEATH PENALTY

Deterrence

Aside from punishing the perpetrator and avenging a wrong, deterrence is perhaps the most commonly cited argument in support of the death penalty. Upon closer examination, however, the death penalty may only deter a small percentage of offenses. These involve premeditated circumstances where future actions are considered and the killing is then planned in advance. Deterrence may be a factor in offenses such as a murder for hire, including both the people paying for the crime and for the killers themselves, murder after lying in wait, kidnapping in which the victim is killed, multiple murders, murders while already serving a life without parole sentence, and treason (Gray, 2011).

The majority of offenses for which the death penalty is imposed, however, are for offenses that are not premeditated. As one commentator put it, “Most burglars and robbers do not plan in advance to kill anybody, but things get out of control and people are killed as a result. And the offenders that do make prior plans are often involved in heavily emotional situations, commonly jilted lovers or people with severe psychiatric disorders, so they are not focusing on deterrence anyway. Those realities, coupled with the fact that most offenders never feel that they will ever be caught, negate the effects of deterrence for most offenses.” (Gray, 2011).

An additional scenario must be considered when examining the deterrent effect on would-be killers. As a practical matter, if a person knows that he has committed an offense that would qualify him for the death penalty, he tends to feel, with some justification, that he has nothing more to lose. That belief, in turn, results in the perpetrator killing witnesses to the offense to prevent them from testifying against him and killing the police officers who attempt to arrest him. Consequently, oftentimes the result is the opposite of deterrence.

Justice for the Victims’ Families

Many victims and their families understandably seek justice and restitution. The thought of a murderer living out his days in a comfortable jail cell after a loved one has been brutally murdered can be unbearable. The sister of a sixteen-year-old murder victim put it this way: “[J]ust the thought of [the convicted murderer] enjoying family visits in prison bothered them. ‘If we want to visit my sister,’ she said, ‘we have to go to a cemetery and talk to a stone.’” (Serrano, 2012).

In many instances, however, victims’ families just want the ordeal to end. Each time there is an appeal, a court hearing, a stay of execution, or a new legal maneuver, it reopens the wound and the healing process is delayed. Closure becomes elusive. By the time a death sentence is finally implemented with the attendant spectacle and media attention that accompanies it, the victim’s family rarely finds closure and may feel as though the perpetrator is now viewed by society as the real victim, rather than their loved one (Walshe, 2012). The family’s wishes, then, can be a determining factor in whether the death penalty is sought. The District Attorney does not want to be viewed as seeking execution when the victim’s family is telling the public they do not want it (Comiskey, 2010).

One other group of victims is often overlooked. They are the families of the convicted killers. They, too, experience the emotional heights and depths of the seemingly unending court process until, in the end, their loved one also is killed. Sometimes they witness the mishandling of the execution. While the victim’s family receives sympathy and support from those around them, the family of the convicted killer often is castigated by society. The parents of a convicted killer are the prime targets. “How could you let your child commit such a heinous act?” “Why didn’t you stop his misbehavior early on in his life?” “Why weren’t you a better parent?” The family members of the person executed suffer grief, hostility, isolation, and a feeling of being branded by society (Comiskey, 2010).

PROPOSITION 34: A SOLUTION TO CALIFORNIA’S DEATH PENALTY WOES?

Last November, California voters had the opportunity to change the state’s death penalty. The Safe California Act, or Proposition 34, was proposed as a means of balancing justice with current economic realities and a broken capital punishment system. Its authors offered three

options for voters to end the increasing costs and infrequent executions: Fully preserve capital punishment with approximately \$85 million more in funding for courts and lawyers each year; reduce the number of crimes that are eligible for the death penalty for an annual savings of \$55 million; or abolish capital punishment and save taxpayers approximately \$1 billion every five or six years (Williams, 2011). Advocating the last option, Proposition 34 proposes to commute the sentences of all 724 inmates currently on death row to life without the possibility of parole, where they would remain until they die (Dolan, 2012). In addition, they would be required to work within the prison system and pay restitution for their crimes (Garcetti, 2012). Had the Safe California Act become law, California would have become the eighteenth state to abolish the death penalty (Walshe, 2012).

How would the new law have saved Californians money? The U.S. Supreme Court has stated that the Constitution requires extra protections in death penalty cases to ensure that the state does not mistakenly execute an innocent person or send someone to their death just because they are poor (*Gregg v. Georgia*, 1976). These stringent protections are not required for those sentenced to life imprisonment without parole. Instead, such trials are conducted like other criminal trials and usually are completed more quickly. A prisoner sentenced to life in prison without the possibility of parole also is entitled to only one tax-payer funded appeal, a process that is usually completed within 18 months after conviction (Get the Facts, 2012).

The voters did not support Proposition 34. California voters rejected the ballot measure by 6 percentage points. The hopes of death penalty opponents who were trying to abolish the death penalty in California and clear the largest death row in the nation were dimmed. This was the first time in more than 30 years that California voters could have decided to reject the death penalty. "The people of California sent a clear message that the death penalty should still be implemented for those who commit the most heinous and unthinkable crimes," McGregor Scott, former United States Attorney and Co-Chair for No on Prop 34, said in a statement (Mintz & O'Brien, 2012).

Other Possible Solutions

In November 2004, Californians made a major investment in the use of DNA evidence to fight crime by passing Proposition 69. It requires a significant expansion of the statewide DNA Database and Data Bank Program (Comiskey, 2010). Early access to DNA testing could be another cost-savings strategy that minimizes the time and resources a wrongfully accused person spends incarcerated. Other solutions have been proffered to reduce costs and the likelihood that an innocent person is executed. They include better eyewitness identification and evidence preparation, and mandatory recordings of interrogations to avoid false confessions (Innocence Project, 2012).

CONCLUSION

While many proponents of death penalty reform argue that California can ill afford such an exorbitantly expensive system of punishment, money should never be the sole criteria on which to base such reform. One should never have to say to the victim of a heinous crime, or his or her family, that the state simply lacks the fiscal resources to mete out what society deems is an appropriate punishment. Other factors favoring reform are persuasive.

The first is mistake. The judicial system is imperfect and, when humans are involved, mistakes are made. Unfortunately, an error in a capital case can be both costly and irreversible. Just as no one can fully make a crime victim whole, nothing can fully remedy an innocent person's incarceration or execution. Statistical evidence reveals a growing number of prisoners on death row who ultimately were vindicated, either by DNA evidence or otherwise, or those who were executed and later discovered to be innocent.

A second compelling factor favoring death penalty reform is the perpetrator's potential for redemption. There are some who believe that the object of the state's system of punishment is rehabilitation, not necessarily retribution. The death penalty, however, always resolves this question in favor of a permanent removal from society. There is no middle ground. The death penalty is certain, lasting and final. It disregards the possibility that the perpetrator may have had a radical change of heart or mind regarding his misconduct or level of remorse. It disregards the power of forgiveness. Indeed, it may even disregard the victim's or victim's family's wishes for the perpetrator's life to be spared. Moreover, the death penalty forecloses any possibility that the perpetrator could be rehabilitated or redeemed once the execution has been carried out.

Those favoring capital punishment often cite punishment and deterrence as two main arguments. Studies have shown, however, that the death penalty has little deterrent effect and, after a years-long process of emotional ups and downs, many victims' families simply want the ordeal to end and avoid the perpetrator being viewed by society as the victim.

The Safe California Act could have meant the death of the death penalty in California. With its passage, the state had the opportunity to address at least some of the issues discussed herein, such as curbing escalating capital punishment costs, minimizing judicial delays, helping to bring closure sooner to victims' families, and avoiding the irreversibility of a wrongful execution. It would not have solved all the issues relating to handling the most serious criminal allegations in society, and no law can bring back a loved one or an innocent person who has been wrongly put to death. Rather than passing Proposition 34, however, Californians voted to continue the death penalty, thereby continuing to breathe life into a broken and costly system of punishment.

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