

The State of California's System of Capital Punishment
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While many states around the nation are famous for their use of the death penalty, California holds a special distinction in regards to the practice of capital punishment. With 738 offenders currently on death row¹ (CDCR, 2013), California has the largest death row population in the United States (NAACP, 2011). Despite the high number of people who have been sentenced to death, only 13 executions have been carried out in the state over the past four decades.

The number of executions in a post-Furman era marks a sharp decline from the historical practice of executions. Between 1893 and 1967, the state executed 307 individuals by hanging and 292 people were executed by lethal gas. However, the historical practice of sentencing people to death came to a halt in 1972 when the California Supreme Court decided that the state's administration of death sentences were unconstitutional (*California v. Anderson*, 1972). This ruling echoed themes in a national level discussion about the death penalty (*Furman v. Georgia*, 1972). As a result of these decisions, 107 inmates had their death sentences overturned. In 1976, California reinstated the death penalty under the practice of super-due process, guided jury discretion and an automatic appellate review system.

The current practice of California's death penalty illustrates three specific trends. First, the state sentences more defendants to death row than any other jurisdiction in the

¹ Data as of [September 4, 2013](#).

United States. Second, the practice of executions is currently under a de-facto moratorium due to legal challenges. Third, structural challenges have created an extensive delay between the time of conviction and the time of execution. This paper reviews how each of these trends has had a significant impact on the practice of death in California. The paper concludes with a review of recent efforts to abolish the death penalty in California.

I. Death Sentencing Practices in California

While nationwide trends illustrate an overall decrease in the number of sentences of death, California has remained active in sentencing offenders to death row. Table 1 highlights the relationship between death sentences in California to the nationwide practice. For example, in both 2009 and 2010, California sentenced 29 people to death row. This represents more death sentences in a single year than had been handed down in any of the previous seven years.

Table 1: California vs. Nationwide Sentences to Death Row

Year	CA Total Number of Death Sentences	US Total Number of Death Sentences	% of CA sentences
1978	1	185	.05%
1979	7	151	4.6%
1980	7	173	4.0%
1981	10	223	4.5%
1982	20	267	7.5%
1983	13	252	5.2%
1984	16	285	5.6%
1985	11	359	3.1%
1986	16	301	5.3%
1987	15	287	5.2%
1988	25	288	8.7%
1989	26	255	10.2%
1990	25	251	9.9%
1991	19	255	7.5%

1992	37	251	14.7%
1993	30	286	10.5%
1994	23	287	8.0%
1995	36	315	11.4%
1996	38	311	12.2%
1997	35	315	11.3%
1998	31	265	11.7%
1999	40	294	13.6%
2000	32	277	11.6%
2001	22	224	9.8%
2002	16	166	9.6%
2003	20	165	12.1%
2004	10	152	6.6%
2005	22	138	15.9%
2006	16	140	11.4%
2007	16	125	12.8%
2008	20	120	16.7%
2009	29	121	23.9%
2010	28	118	12.7%
2011	10	109	9.2%
2012	12	80	15%
2013*	14	78	17.9%

*As of September 4, 2013

Source: http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf
<http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008>

A closer look at the statewide sentencing practices indicates that death sentences are administered in a clustered fashion, meaning that there are a few jurisdictions that are responsible for a majority of the death sentences in the state. For example, Orange, Los Angeles and Riverside counties in Southern California account for 83% of the state's death sentences. Los Angeles represents the highest number of death sentences nationwide in the modern death penalty era (228) and in 2009, Los Angeles County (13) sent more people to death row than the entire state of Texas (11) (ACLU of Northern California, 2010; Death Penalty Information Center, 2013). Despite sentencing trends in these regions, other jurisdictions have been more likely to hand down sentences of life without the possibility of parole in capital cases.

II. Legal Challenges in California's Death Penalty

The last execution in California was carried out in 2006 when Clarence Ray Allen was executed by lethal injection. Since that time, executions have been halted due to legal challenges brought forth by the case *Morales v. Tilton*, which challenges the constitutionality of California's three-drug lethal injection protocol. The Court agreed with Morales that the use of sodium thiopental, if used improperly, could cause the defendant severe pain, which would violate the eighth amendment protection against cruel and unusual punishment. While the U.S Supreme Court's decision in *Baze v. Rees* (2008) held that "some risk of pain is inherent in any method of execution", the *Morales* case cited additional areas of concern. These included 1) the inconsistent and unreliable screening of execution team members; 2) a lack of meaningful training, supervision, and oversight of the execution team; inconsistent and unreliable recordkeeping from previous executions; 4) improper mixing, preparation, and administration of sodium thiopental by the execution team in previous executions; and 5) inadequate lighting, overcrowded conditions and poorly designed facilities in which the execution team must work.

In response to the Court's decision, the California Department of Corrections and Rehabilitation (CDCR) submitted a revised protocol for carrying out executions via lethal injection. However, this protocol has yet to be approved. In May 2013, the 1st District Court of Appeals unanimously held that the CDCR failed to follow the proper administrative regulations in determining a new protocol for carrying out injections. One concern raised by the courts questioned why California chose to retain the three-drug protocol for executions when other states such as Ohio, Washington and Arizona have

moved to a single drug process (Mintz, 2013). The shift to a single drug protocol comes in response to a shortage of the drugs used in a traditional three-drug protocol.

Traditionally, the three-drug lethal injection cocktail called for the use of sodium thiopental to sedate the offender, and was followed by the use of pancuronium bromide (to paralyze the inmate) and potassium chloride (to stop the inmate's heart). However, many manufacturers around the world have either halted their production of sodium thiopental entirely, or have limited the distribution such that it cannot be used for the purposes of executions.

III. Structural Delays in California's Death Penalty

While many advocates for the death penalty complain that inmates receive too many opportunities to appeal their sentences, many inmates in California have yet to see their sentences confirmed by the State Supreme Court as required by law. Currently, only 299 inmates have had their sentences confirmed on direct appeal (CDCR, 2013). Significant delays also exist at the post-conviction stage, where there are few lawyers who are able to take on these cases. Consider the example of Edward Patrick Morgan, who was sentenced to death in 1996 and despite his request over a decade ago, has yet to have a lawyer appointed to take on his habeas corpus challenge. Such a finding is not unusual, as the average wait for an attorney is 10 to 12 years and 291 death row inmates do not have habeas counsel (CCFAJ, 2008). The shortage of attorneys for these cases is a result of two issues: 1) the California Supreme Court requires that habeas corpus attorneys have experience in handling both death penalty trials and appeals, which can limit the number of

attorney's that are qualified to take on such cases; and 2) the financial compensation in these cases is significantly limited (Dolan, 2010).

Of the 738 inmates residing on death row, at least 14 have exhausted their legal challenges. Should executions resume in the future, it is likely that these offenders would be the first in line. Even if the state were able to efficiently move the remaining 700+ offenders through the appellate experience, the backlog would be significant. Recent data suggest that death row inmates are spending an average of 17.2 years waiting to be executed, with some offenders languishing on death row for almost three decades (Alarcon, 2007). This is particularly ironic given that the state of California argued in *California v. Anderson* in 1972, that California's death penalty was unconstitutional and commented that the lengthy amounts of time that the condemned spent on death row amounted to cruel and unusual punishment under the 8th amendment. At the time of *California v. Anderson*, an inmate spent an average of 8 years on death row awaiting execution. Over the past thirty-five years, Texas has carried out the greatest number of executions at approximately 14 each year. If California were to adopt a similar pace, it would take 52 years to empty out death row (Reese, 2013). Given this timeframe, it is reasonable to assume that most offenders would have expired due to natural causes.

IV. The Future of California's Death Penalty

While supporters of the death penalty search for ways to expedite the process of carrying out executions, abolitionists fight to eliminate the practice entirely.

California's death penalty statute is currently being challenged on the grounds that it is so broad that virtually any first-degree murder case could be viewed as death eligible. As a result of legislative bills and voter initiatives, California penal code lists thirty-three special circumstances that allow for the death penalty (CA Penal Code Section 190.2). In addition, California has a lying-in-wait rule whose interpretation is such that it could capture virtually any case of pre-meditated murder (Shatz & Rivkind, 1997). Nationwide efforts have called to limit the administration to five factors to ensure not only that racial and geographic disparities are eliminated, but the limit the death penalty to the "worst of the worst" of offenders. These factors include 1) the murder of a police officer in the line of duty; 2) the murder of any person at a correctional facility; 3) the murder of two or more people; 4) murder involving torture of the victim; and 5) the murder of anyone involved in the investigation, prosecution or defense of a crime (including witness and jurors) (CCFAJ, 2008). If California's death penalty law were to limit itself to these five criteria, research indicates that the state would have only 368 inmates on death row (Kreitzberg, 2008).

Certainly the state of California's death row has significant financial implications. The cost of administering a system of capital punishment in California is extensive. First, estimates place the cost of trying a death penalty case at \$1 million. With 1,940 capital trials since 1978, these costs are accumulated regardless of whether the offender is found not guilty, given a sentence of life without the possibility of parole or sentenced to death. Second, the cost for automatic appeals and state habeas corpus petitions has been calculated at \$925 million and the costs for Federal habeas corpus petition is estimated at

\$775 million. Finally, providing housing and care for the inmates on death row has cost the state \$1 billion dollars (Alarcon & Mitchell, 2011).

In November 2012, the Savings, Accountability, and Full Enforcement (SAFE) Act was presented to state voters to consider whether the costs of maintaining California's death penalty justified its continued use. The proposition narrowly failed with 47% of voters in favor of abolishing the death penalty. While the cost saving focus of the measure clearly resonated with many voters, critics of the SAFE act argued that the measure did not go far enough to address the concerns for those who support the death penalty on retributive grounds (Hughes, n.d). It remains to be seen whether a similar measure will be successful in the future, which could vacate California's death row in favor of sentences for life in prison without the possibility of parole. Or, will the state be able to overcome its legal and procedural challenges to resume executions? For now, the state remains in a de-facto moratorium.

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