



CHAPMAN UNIVERSITY
FOWLER SCHOOL OF LAW

Chapman University Dale E. Fowler
School of Law

From the SelectedWorks of Scott W. Howe

January 2012

Can California Save its Death Sentences? Will California Save the Expense

Contact
Author

Start Your Own
SelectedWorks

Notify Me
of New Work



Available at: http://works.bepress.com/scott_howe/25

CHAPMAN UNIVERSITY SCHOOL OF LAW



LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NO. 11-26

*Can California Save its Death Sentences?
Will Californians Save the Expense*

Scott Howe

This paper can be downloaded without charge at:
The Social Science Research Network Electronic Paper Collection:

<http://ssrn.com/abstract=1893804>

Scott W. Howe
Copyright © 2011
Draft Date: July 27, 2011
swhowe@chapman.edu

Can California Save Its Death Sentences?
Will Californians Save the Expense?

By Scott W. Howe*

A death sentence in California is, in most cases, a very expensive form of life imprisonment without parole.¹ The system for judicial review in death cases has become “dysfunctional” according to Ronald George, the former Chief Justice of the California Supreme Court.² For decades, death sentences have been generated in the trial courts at a much greater rate than they have been resolved on direct appeal and in state and federal habeas proceedings.³ Likewise, for five years, executions have been held up over concerns about whether the state’s protocol for lethal injection comports with the Eighth Amendment.⁴ As a result, from 1977 through June 30, 2011, the state accumulated 714 inmates on death row, but executed only thirteen.⁵ According to former Chief Justice George, testifying before the California Commission on the Fair Administration of Justice in 2008,⁶ if the system continues without reform, it will eventually “fall[] of its own weight.”⁷ He did not clarify how the system would collapse. Some observers have suggested that he meant that courts would declare it unconstitutional.⁸

* Frank L. Williams, Jr., Professor of Criminal Law, Chapman University School of Law.

¹ See Gerald F. Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495, 496 (2009).

² Testimony of Chief Justice Ronald M. George Before the California Commission on the Fair Administration of Justice 2 (January 10, 2008) available at <http://www.ccfaj.org/documents/reports/dp/expert/Chief%27s%20Testimony.pdf>.

³ See *infra* notes 34-119, and accompanying text.

⁴ See Carol J. Williams, *State Won’t Execute Anyone in 2011; California Officials Ask Federal Judge to Delay Reviewing Lethal Injection Procedures Until at Least January*, L.A. TIMES, May 4, 2011, at A1..

⁵ See *id.* See also Death Penalty Information Center, *Facts About the Death Penalty* 2-3 (last updated June 30, 2011), available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

⁶ The Commission, created by the California Senate and led by Professor Gerald Uelmen, produced a comprehensive report in 2008 on the administration of the California death penalty. See California Commission on the Fair Administration of Justice, *Report and Recommendations on the Administration of the Death Penalty in California* 60-71 ((June 30, 2008) [hereinafter “California Commission Report”], available at:

<http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>.

⁷ Testimony of Chief Justice George, *supra* note 2, at 38.

⁸ Separate Statement of Commissioners Jon Streever, Kathleen (Cookie) Ridolfi, Michael Hersek, and Michael Laurence Accompanying Report and Recommendations on the Administration of the Death Penalty in California 7 (June 30, 2008), available at: <http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>.

Proposals by government officials⁹ to revamp the system aim to speed up review at both the state and the federal stages. Proponents hope that review within the state system can accelerate through a few basic changes, two of which seem most important.¹⁰ First, increased state funding would help train and pay for enough qualified lawyers to represent condemned inmates on direct appeal and in state habeas. Presently, most condemned inmates languish without qualified counsel for many months after their trials, and the periods when they lack representation delay their cases. Second, dispersion of some of the responsibilities for review to the lower courts, along with increased funding to support the work, would help reduce the overload on the state Supreme Court. Currently, the seven Justices on the state's high court bear the full burden of providing review in capital cases for both direct appeals and state habeas petitions.¹¹ Likewise, for federal habeas, proponents hope that California can soon "opt in" to a streamlined system of review that will fast-track both the pleadings by the litigants and the decisions by federal judges.¹² The fast-track option has existed since 1996,¹³ but the U.S. Court of Appeals for the Ninth Circuit concluded in 2000 that California had not met the pre-conditions.¹⁴ Proponents of capital punishment hope that a 2005 federal statute¹⁵ changing the pre-conditions and moving the certifying decision away from federal courts in the Ninth Circuit to the United States Attorney General will soon enable California to opt in.¹⁶

Without reform, California will remain in a costly quagmire. Death row may continue to grow while a large proportion of condemned inmates die from suicide, disease, old-age, or murder, rather than from execution.¹⁷ There will be great expense in continuing to battle to carry out a modest number of executions and to maintain a large death row.¹⁸ The marginal deterrent or retributive value of a few executions will be low,

⁹ See, e.g., Testimony of Chief Justice Ronald M. George, *supra* note 2, at 12-48; Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697 (2007); Daniel E. Lundgren, *Reforming the Death Penalty's Federal Habeas Corpus Process*, 2 J. OF THE INST. FOR THE ADVANCEMENT OF CRIM. JUST. 5, 7-13 (2008) available at <http://www.iaj.org/PDF/IACJJournalIssue2.pdf>.

¹⁰ See, e.g., Alarcón, *supra* note 9, at 697; Testimony of Chief Justice Ronald M. George, *supra* note 1, at 12-48.

¹¹ See Testimony of Chief Justice Ronald M. George, *supra* note 2, at 12-48; Alarcón, *supra* note 9, at 712-13 & 736-37.

¹² See, e.g., Lundgren, *supra* note 9, at 7-13.

¹³ The fast-track procedures were intended to apply to state capital cases from states that meet certain pre-conditions. See Antiterrorism and Effective Death Penalty Act § 107, Pub. L. 104-132, 110 Stat. 1214, 1221 (1996) (creating new Chapter 154 of the Judicial Code, entitled "Special Habeas Corpus Procedures in Capital Cases," 28 U.S.C. §§ 2261-66 (2006)).

¹⁴ See *Ashmus v. Woodford*, 202 F.3d 1160 (9th Cir. 2000).

¹⁵ U.S.A. Patriot Act Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 577, *codified* at 28 U.S.C. §2266(b)(1)(A).

¹⁶ See, e.g., Lundgren, *supra* note 9, at 9-13.

¹⁷ From 1997 through 2009, the ratio for California's death row was over five deaths from other causes for every execution – 73 to 13. See U.S. Dept. of Just., Bureau of Just. Stats., *Capital Punishment, 2009 – Statistical Tables* 21, tab.20 (Dec. 2010) [hereinafter "Capital Punishment Statistics, 2009"] available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2215>.

¹⁸ In 2008, the California Commission calculated that the system cost the state substantially more than \$126.2 million annually over the cost that would accrue from abolishing the death penalty and commuting all then existing death sentences to life imprisonment without parole. See California Commission Report, *supra* note 6, at 84. The Commission noted that the estimates do not include opportunity costs, such as the resources that could be dedicated by the California Supreme Court to other cases. These estimates also do

especially given the relatively painless death that most condemned inmates appear to experience through lethal injection and the harshness of the competing sanction of life imprisonment without parole.¹⁹ Inmates also will have to wait even longer for review of their cases on direct appeal and in state habeas, and a growing number will die before they receive decisions.²⁰ The families of the victims will also continue to suffer from the long and increasing delays.

This Article addresses two major questions about the future of California's death-penalty. First, it asks whether California can save its pending death sentences and answers negatively. I conclude that the courts are unlikely in the near future to declare most of the death sentences unconstitutional due to delay. Yet, I also conclude that the state is unable to institute reforms that can soon achieve a large and regular flow of executions, which means that a large portion of the pending sentences will not be carried out. Indeed, I conclude that, absent reform that sacrifices many of the pending death sentences, California will, for years, continue to face an enormously expensive quagmire.

The Article then asks whether Californians will avoid the expense of trying to save all of the death sentences. I discuss the possibilities and the doubts. Governor Brown reportedly has stated that he will not grant blanket commutations.²¹ The options for the legislature are also limited, because the state constitution requires voter approval to amend the death-penalty statutes.²² Because of the growing awareness that the current death-penalty system is not sensible,²³ California may be headed toward a public

not include the major costs to the federal government from the federal habeas process in California death cases.

A more recent study estimated the cost differential, taking into account more, but not all, of the actual expenses, to be \$184 million per year. See Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters? A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOYOLA OF L. A. L. REV. S41, S109 (2011).

¹⁹ See *Baze v. Rees*, 128 S.Ct. 1520, 1548 (2008) (Stevens, J., concurring in judgment)(describing lethal injection as "relatively painless" and asserting that the trend toward its use "actually undermines the very premise on which public approval of the retribution rationale is based").

²⁰ Many already die before receiving such review. Condemned Inmate John Post died after nine years on California's death row, while still waiting for review on automatic appeal before the California Supreme Court. See Alarcón & Mitchell, *supra* note 18, at S169. A much larger number have died while waiting for judicial review in state and federal habeas. See *id.* at S50-S60.

²¹ See Bob Egelko, *Halt in Executions to Stay At Least Until Next Year*, SAN FRAN. CHRON. C6 May 5, 2011).

²² Because core provisions of the state's currently death penalty laws were passed by initiative statutes that did not permit amendment or repeal without voter approval, see *infra* notes 37-39 and accompanying text, those statutes may only be amended or repealed by approval of the voters. See CAL CONST. art. II, sec. 10(c). See also *People v. Kelly*, 222 P.3d 186 (Cal. 2010) (overturning convictions for marijuana possession and cultivation because insofar as subsequent legislation burdened a defense under Compassionate Use Act, which had been passed as an initiative statute, the subsequent legislation was unconstitutional for failure to obtain voter approval in accordance with section 10(c) of article II of the state constitution).

²³ See, e.g., *Editorial: Brown should convert death sentences to life without parole*, SAN JOSE MERCURY NEWS, Feb. 20, 2011 (describing California's death-penalty system as "fiscal insanity," and calling for Governor to commute all death sentences). See also *Editorial: Time to abolish California's expensive, ineffective death penalty*, CONTRA COSTA TIMES, June 25, 2011 (calling for abolition); *Editorial: Death row's delays*, L.A. TIMES, May 5, 2011, at A16 (calling for abolition).

referendum in which the voters will decide.²⁴ I present the competing perspectives on the causes of the current malfunction and on the solutions that will vie for public acceptance. Putting aside the view that the death penalty is inherently wrong, I conclude that there will be at least three non-abolitionist accounts plus one that favors abolition. I explain why they are all flawed. Because the California death-penalty system is hemmed in by economic, cultural and legal constraints that create difficult trade-offs, voters can only try to find the lesser evil among bad options. I believe that abolition is the lesser evil in California, but the lesser-evil argument is disquieting in that it calls for real sacrifice, and it may not soon win out.

My project proceeds in four stages. Part I more fully describes the larger challenges for the current death penalty in California. I focus on the three principal elements of the current malfunction: rarity of executions in relation to death sentences, delay in appellate review, and expense related to a large number of pending death-penalty cases. This discussion underscores why close observers generally have concluded that the current approach to the death penalty in California is not sensible.²⁵

Part II assesses the “speed up” reforms proposed by government officials and concludes that they will not soon render the current system highly functional. Regarding efforts to speed up state review, the problem is largely a lack of funding for the changes, but there are also doubts about the effectiveness of the plans. Regarding efforts to speed up federal review, the problem is largely that California, assuming it tries, will not clearly be able to secure the application of fast-track procedures, and efforts to do so will mire the state for years in litigation that will further delay executions. Eventually, executions in California may resume, and the pace may increase to several every year. However, I conclude that, with or without the reform efforts, California will fail to execute a large portion of its current death-row population.

The article asks in Part III whether the judiciary will conclude that all or most California death sentences are unconstitutional and contends that such a collapse seems unlikely soon. Regarding the California constitution, a central problem is that California voters in 1972 amended the document to say that the death penalty does not contravene any provision in it.²⁶ Regarding the federal constitution, an overriding practical hurdle is that California has the largest number of pending death sentences in the country, and the arguments that have been offered for invalidation in California focus on problems that are not unique to California. The current members of the United States Supreme Court do not appear poised to invalidate death sentences on such a broad scale. Thus, the greater pressure on Californians for serious change may well remain simply the “enormous and senseless material costs of producing capital sentences,” a large portion of which will not end in execution.²⁷

²⁴ Recently, for example, state Senator Loni Hancock put forward a bill, SB 490, directing that the question of abolition be presented to voters as a ballot proposition. If passed by both houses of the legislature and approved by the Governor, the measure would appear on the November, 2012, ballot. *See* Steven Harmon, *Death penalty threatens to once again embroil Brown*, SAN JOSE MERCURY NEWS, July 8, 2011, available at: http://www.mercurynews.com/bay-area-news/ci_18491769.

²⁵ *See, e.g.*, Alarcón & Mitchell, *supra* note 18, at S41; Testimony of Chief Justice Ronald M. George, *supra* note 2, at 38.

²⁶ *See infra* note 234 and accompanying text.

²⁷ Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1918 (2006).

In light of this conclusion, Part IV addresses whether Californians will extricate themselves from the quagmire through a public referendum. I present the three non-abolitionist perspectives that will compete in the public discourse over how to understand the current malfunction and the solutions to it. I explain why none of the accounts are either clearly wrong or especially compelling. There can be no compelling account because there is no correct way to reconcile the competing objectives that California faces in pursuing a robust death penalty that is fair, efficient and frugal. At the same time, I explain why most voters will likely view the alternative – abolition – as a form of malfunction regarding the death penalty. Most Californians continue to believe the death penalty has benefits in some circumstances.²⁸ The question for voters is whether abolition is the lesser evil.

I. Problems With the Current Death Penalty

The death penalty has become a serious “practical mess”²⁹ for California. Many would disagree on where the blame lies or even on the precise description of the problem.³⁰ However, all thoughtful persons should concur on three propositions. First, executions are rare in relation to the number of death sentences. Second, there is great delay between pronouncement of a death sentence and an execution. And, third, the use of the death penalty is highly expensive compared to the use of life imprisonment without parole. The predicament can be understood as an interplay of these three developments in a jurisdiction in which the death penalty retains substantial public support,³¹ but also “sustained and vigorous opposition.”³²

A. Rarity of Executions in Relation to Death Sentences

In California, any first-degree murder³³ in which at least one of numerous “special circumstances”³⁴ is present is a death-eligible crime.³⁵ The first-degree murder

²⁸ See *infra* note and accompanying text.

²⁹ Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-on Sentence*, 46 CASE W. L. REV. 1, 28 (1995).

³⁰ See *infra* Part IV.

³¹ A recent Gallup poll revealed that 70% of Californians support the death penalty in the abstract, up from 67% in 2004. See Bob Egelko, *Field Poll finds 70% support death penalty*, SAN FRAN. CHRON. C6 (July 22, 2010). However, when researchers asked a smaller sample of voters whether they preferred death or life imprisonment without parole for first-degree murder, only 41% favored death and 42% favored life imprisonment without parole. Thirteen percent said it would depend on the circumstances and four percent had no opinion. When the same question was asked in 2000, 44% favored death and 37% favored life imprisonment without parole. See *id.*

An April, 2011, survey of 800 high-propensity California voters, by David Binder Research, found that 63% supported converting all current death sentences to life imprisonment without parole if it would save the state \$1 billion dollars over five years and if the money saved would go only to public education and law enforcement. The researchers did not ask about the use of the death penalty against future murderers. See Shanan Alper, *Voters from Across Political Spectrum Support Converting All Current Death Row Sentences to Save California \$1 Billion Over Five Years*, April 26, 2011, available at http://www.aclunc.org/docs/criminal_justice/death_penalty/april2011dppoll.pdf.

³² Kozinski & Gallagher, *supra* note 29, at 29.

³³ The definition of first-degree murder is as follows:

statute includes many forms of murder,³⁶ and the list of special circumstances covers the vast majority of those offenses.³⁷ Both the first-degree murder statute and the list of special circumstances were repeatedly expanded by legislation and voter initiatives, from 1977, when the modern law was first passed, through the voter initiative of 1978, known as the Briggs Initiative,³⁸ and through several additional amendments that occurred into the new millennium.³⁹ As a result, California has one of the broader death penalty laws in the country.⁴⁰ Although it has had a fairly low death-sentence-to-murder rate compared to other states,⁴¹ California has continued to send sizeable numbers of persons to death

All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree. As used in this section, "destructive device" means any destructive device as defined in Section 16460, and "explosive" means any explosive as defined in Section 12000 of the Health and Safety Code.

As used in this section, "weapon of mass destruction" means any item defined in Section 11417.

To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

³⁴ See Cal. Penal Code § 190.2 (2011).

³⁵ If the defendant is convicted of first-degree murder and a special circumstance is found, except in unusual circumstances, the case proceeds to a capital-sentencing hearing, at which the jury is authorized to consider a broad array of aggravating and mitigating circumstances, as provided in Cal. Penal Code § 190.3 (2011).

³⁶ See *supra* note 33.

³⁷ See Uelman, *supra* note 1, at 497 (asserting that the special circumstances "can be applied to 87% of the murders committed in California").

³⁸ See Gerald F. Uelman, *Review of Death Penalty Judgments By The Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237, 244-45 (1989) (discussing initial passage of the modern death penalty statute in 1977 and the voter initiative known as the "Briggs Initiative" that repealed the law and broadened the application of the death penalty in 1978).

³⁹ For a detailed accounting of this history, see Alarcón & Mitchell, *supra* note 18, at S131-58. See also Ellen Kreitzberg, *A Review of Special Circumstances in California Death Penalty Cases 15-19* (2008) (Report to the California Commission on the Fair Administration of Justice) [hereinafter "Kreitzberg Report"] (summarizing the history), available at <http://www.ccfaj.org/documents/reports/dp/expert/Kreitzberg.pdf>.

⁴⁰ See Uelman, *supra* note 1, at 497 (describing it as "the broadest death penalty law in America"); Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y. U. L. REV. 1283, 1287 (1997) (asserting that California's death penalty scheme is "arguably the broadest such scheme in the nation").

⁴¹ See John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMP. LEGAL STUD. 165, 172 (2004) (noting that, for the period from 1977 through 1999, California's death-sentencing rate per 1,000 known murder offenders was 13, which placed it in a tie with Virginia at 25th and 26th among 31 death-penalty states with at least 10 death row enrollees during that period). See also Kent Scheidegger, *Death Penalty Review in California: Enlightening Comparisons to Other States*, 2 J. OF THE INST. FOR THE ADVANCEMENT OF CRIM. JUST. 64, 65 (2008) (noting that, for the period from 1978 to 2004, California's death sentencing rate of 10 per 1,000 homicides was well below the average in death-penalty states of 18 per 1,000 homicides) available at <http://www.iacj.org/PDF/IACJJournalIssue2.pdf>.

row each year, while executing very few.⁴² By the end of 2009, California had sentenced 927 people to death row in the post-*Furman* era.⁴³ During that same period, it had executed only 13.⁴⁴

A major disproportion of death sentences to executions limits the value of the death penalty. A small number of executions by itself does not necessarily raise this concern, because a state's death penalty, if highly focused, might be effective as a deterrent and as retribution in a very narrow category of egregious and premeditated murders. However, where there is a low death sentencing rate imposed across a broad spectrum of murders and there are also very few executions, the death penalty loses much of its function. Condemning a murderer becomes, as a retired California trial judge, who sentenced ten men to die, recently put it, a “meaningless and ultimately fruitless pursuit of death.”⁴⁵ In these circumstances, all thoughtful persons should agree that “[w]hatever purposes the death penalty is said to serve – deterrence, retribution, assuaging the pain suffered by victims’ families”—these purposes are not well-served by such a system.⁴⁶

A high ratio of death sentences to executions tends to lead to a second problem. Unless the high ratio is offset by a high rate of removals due to reversals on appeal, death row tends to burgeon. From 1977 through 2009, there were 142 removals due to reversals in California.⁴⁷ This is a modest number relative to the number in other serious death-penalty states over the same period.⁴⁸ For example, in Florida, there were 977 persons sentenced to death, 68 executions and 447 removals due to reversals. In Texas, there were 1040 persons sentenced to death, 447 executions and 167 removals due to reversals. Because California had a high death-sentence-to-execution rate and a modest number of removals due to reversals, it had accumulated a death row population of 684 by the end of 2009.⁴⁹ That count was, by far, the highest in the nation. Running a very distant second and third was Florida with 389 and Texas with 331.⁵⁰ Since that time, California has also continued to sentence more persons to death but executed no one. By July, 2011, death row numbered 714.⁵¹ We will see that a large condemned population

⁴² For example, from 2001 through 2009, California sentenced an average of almost 19 persons to death each year. The state sentenced 29 persons to death row in 2009. *See* Capital Punishment Statistics, 2009, *supra* note 17, at 19 tab. 18.

⁴³ *See id.*, at 21 tab. 20.

⁴⁴ *See id.*

⁴⁵ Donald A. McCartin, *Second thoughts of a ‘hanging judge.’ A death sentence in California rarely leads to an execution. Let’s stop the charade.* L.A. TIMES A23 (March 25, 2011).

⁴⁶ Kozinski & Gallagher, *supra* note 29, at 3-11.

⁴⁷ *See* Capital Punishment Statistics, 2009, *supra* note 17, at 21, table 20.

⁴⁸ During the ten-year tenure of Rose Bird as Chief Justice, the California Supreme Court reviewed 64 death appeals, and only five were affirmed. *See* Uelman, *supra* note 38, at 237. Largely for this reason, voters removed Bird, along with Associate Justices Joseph Grodin and Cruz Reynoso, effective at the expiration of their terms, in January, 1987. *See* Scott G. Parker & David P. Hubbard, *Comment: The Evidence for Death*, 78 CAL. L. REV. 973, 979 (1990). There has been debate over the degree to which the high percentage of reversals occurred because the Bird Court was “extremely hostile to capital punishment,” Scheidegger, *supra* note 41, at 66, versus that there were “ambiguities” and “reckless drafting in the language of the Briggs initiative.” Gerald F. Uelman, *Death Penalty: Blame Briggs, Not Court*, L.A. TIMES 5 Metro (April 22, 1986).

⁴⁹ *See* Capital Punishment Statistics, 2009, *supra* note 17, at 21 tab. 20.

⁵⁰ *See id.*

⁵¹ *See* Death Penalty Information Center, California Database, available at http://www.deathpenaltyinfo.org/state_by_state (last visited July 18, 2011).

means a large expense associated with litigating the cases and with maintaining death row.

B. Delay Between Death Sentence and Execution

The primary explanation for California's low execution rate is delay in the appellate review of death sentences, with reversals of death sentences less important.⁵² In an article published in 2007, Judge Arthur Alarcón, of the U.S. Court of Appeals for the Ninth Circuit, described the delay problem as "unconscionable," "inexcusable,"⁵³ extraordinary,"⁵⁴ and "inhumane."⁵⁵ He concluded that the delay had caused California to find itself in an "untenable condition" in the use of the capital sanction.⁵⁶

Delay between death sentence and execution in California appears to be well above the national average and growing "at an alarming rate."⁵⁷ According to the federal Bureau of Justice, for the 52 executions that occurred across the country in 2009, the average delay between most recent death sentence and execution was 14.08 years, up from 7.9 years in 1989.⁵⁸ Because there have been no executions in California since early 2006, it is not possible to provide a 2009 average for the state. The average lapse for the thirteen post-*Furman* executions that occurred in California from 1992 through 2006 was 17.2 years.⁵⁹ However, this figure is misleading in that the absence of executions for five years means that most California executions in the future may well involve substantially longer lapses. At the end of 2009, California had 96 inmates who had been on death row since their most recent death sentence for more than 23 years and 100 more inmates for more than 19 years.⁶⁰ Thus, when California begins executing again, the delay between death sentences and executions will likely be greater.

Delay in California death appeals may be near the worst in the country, although there is no perfect measure by which to make this judgment. At the end of 2009, the average number of years spent under their most recent death sentence for condemned inmates across the nation was 12.7.⁶¹ The average for death-row inmates in California was 14.2. The highs were Idaho with 14 inmates having been under their most recent death sentence for an average of 16.7 years and Utah with 10 inmates at 16.4 years.⁶² Others above California included Nevada, with 80 inmates under their most recent death sentence for an average of 16.1 years, Kentucky, with 35 inmates at 15 years, and Florida, with 389 inmates at 14.4 years. Ohio also had 165 inmates with an average of 14.4 years.⁶³ Among states under the national average, Texas had 331 inmates under their last death sentence for an average of 10.8 years.⁶⁴ Several other states had an

⁵² For the number of removals from death row due to reversals, see *supra* text at note 47.

⁵³ Alarcón, *supra* note 9, at 697.

⁵⁴ *Id.* at 705.

⁵⁵ *Id.* at 707.

⁵⁶ *Id.* at 698.

⁵⁷ *Id.*

⁵⁸ See Capital Punishment Statistics, 2009, *supra* note 17, at 14, tab. 12.

⁵⁹ See California Commission Report, *supra* note 6, at 22.

⁶⁰ See Capital Punishment Statistics, 2009, *supra* note 17, at 19, table 18.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

average that was even lower than that of Texas, with Virginia the lowest, at 13 inmates and an average of 5.4 years.⁶⁵ These figures suggest that California's problem is very serious, although they do not reveal that it is the worst. Yet, since 2005, California has imposed the largest number of new death sentences, which brings down its average, while Idaho and Utah, for example, have imposed no death sentences during that period.⁶⁶ Thus, California's problem may well be the most severe.

The lack of executions in California for the last five years has stemmed from concerns over whether the state's protocol for lethal injections satisfies the Eighth Amendment. In 2006, federal district judge, Jeremy Fogel, ruled that the state's lethal injection protocol suffered from "a number of critical deficiencies" and that its implementation "lack[ed] both reliability and transparency," which created "an undue and unnecessary risk of an Eighth Amendment violation."⁶⁷ A *de facto* moratorium ensued on all executions in California.⁶⁸ In the meantime, the Supreme Court decided *Baze v. Rees*,⁶⁹ in which a plurality rejected a challenge to Kentucky's lethal injection protocol on grounds that the inmate had not shown a "substantial risk" of severe pain.⁷⁰ After delay based on litigation in state court over compliance with the state's Administrative Procedures Act, California developed a new protocol, which became effective on August 29, 2010, and which was held presumptively valid in California state court a few days later.⁷¹ Litigation then ensued in federal district court over whether the new protocols met the *Baze* standards.⁷² However, in May, 2011, the state advised Judge Fogel that it would need more time to allow the new warden of San Quentin prison to assemble a new group to carry out executions.⁷³ The *de facto* moratorium on executions in the state is expected to continue until at least the middle of 2012.⁷⁴

Assuming the new protocol is approved, executions presumably will resume and perhaps in a flurry, but, if the past is any indication, they will not, absent extraordinary reform, continue at the rate needed even to match the annual number of new death sentences. In 2009, California trial courts imposed 29 new death sentences⁷⁵ and, in 2010, there were 33.⁷⁶ During the six years from 2005 through 2010, the state averaged more than 21 new death sentences per year.⁷⁷ If a pace of 21 average annual death sentences were to continue, California would need to execute approximately one person every 17 days simply to have executions match new death sentences. Absent extraordinary reform in the appellate review process -- and even with it -- there is good reason to conclude that the state cannot achieve and sustain a level of executions sufficient to reach even this modest goal. Texas, the state with, by far, the most

⁶⁵ *See id.*

⁶⁶ California imposed 97 death sentences during that period. *See id.*

⁶⁷ *Morales v. Tilton*, 465 F. Supp. 2d 972, 979-81 (N.D. Cal. 2006).

⁶⁸ *See Morales v. Brown*, 2010 U.S. App. LEXIS 20012 (9th Cir. 2010).

⁶⁹ 553 U.S. 35 (2008) (plurality opinion).

⁷⁰ *Id.* at 51.

⁷¹ *See Morales v. Cate*, 2010 U.S. App. LEXIS 20012 (9th Cir. 2010).

⁷² *See Morales v. Cate*, 2010 U.S. Dist. LEXIS 131089 (Dist. Ct. 2010)

⁷³ *See Bob Egelko, Halt in executions to stay at least until next year*, SAN FRAN. CHRON., May 5, 2011, at C6.

⁷⁴ *See id.*

⁷⁵ *See Capital Punishment Statistics, 2009, supra note 17, at 19, table 18.*

⁷⁶ *See Alarcón & Mitchell, supra note 18, at S187.*

⁷⁷ *See Capital Punishment Statistics, 2009, supra note 17, at 19, table 18.*

executions in the modern era, executed, on average, about 16 inmates per year from 1982 through 2009.⁷⁸ In contrast, from 1992 until 2006, California executed, on average, less than one prisoner each year,⁷⁹ and, at the beginning of 2006, the state had already accumulated 654 prisoners on death row.⁸⁰ These figures underscore the severe delay that has pervaded the appellate review process in California capital cases independent of the moratorium that began in 2006.

The appellate review process in California death cases focuses heavily on the California Supreme Court before review begins in federal habeas. When a death sentence is returned, there is an automatic appeal directly to the state high court,⁸¹ and the indigent inmate is entitled to appointed counsel under the U.S. Constitution.⁸² A condemned inmate is also entitled by state law to pursue a state habeas corpus petition,⁸³ which typically is resolved after the resolution of the automatic appeal and a subsequent petition for a writ of *certiorari* in the United States Supreme Court. State habeas petitions, although they can be filed in the lower courts, are filed directly in the California Supreme Court, because the California constitution also gives that court original jurisdiction, and there are no appeals to a higher state court if the petition is filed in the lower courts.⁸⁴ Also, the state legislature has given only the state high court the authority to appoint and compensate habeas counsel in capital cases.⁸⁵ After a state habeas petition is denied, the typical capital inmate pursues a habeas petition in federal court,⁸⁶ where counsel at federal expense is provided.⁸⁷

Much of the delay in the state review process occurs because of a lack of qualified defense counsel willing to accept appointments. All of the inmates on the row qualify as indigent and virtually all need state-appointed counsel.⁸⁸ However, California court rules require that the lead attorney for a death-penalty appeal or habeas petition have substantial experience and demonstrated competency in death appeals.⁸⁹ The attorney

⁷⁸ See Death Penalty Information Center, Texas Database, (reflecting 471 executions since post-*Furman* executions began in the state in 1982 through July, 2011), available at http://www.deathpenaltyinfo.org/state_by_state (last visited July 18, 2011).

⁷⁹ Over this period, California executed thirteen inmates, which is the total that it has executed in the post-*Furman* era. See Cal. Dep't of Corrs. & Rehab, *Inmates Executed, 1978 to Present*, available at http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited July 18, 2011).

⁸⁰ See Cal. Att'y. Gen. Off., *Homicide in California, 2005*, 33 (2006), available at <http://ag.ca.gov/cjisc/publications/homicide/hm05/DeathPenalty.pdf> (last visited July 18, 2011).

⁸¹ See Cal. Penal Code § 1239 (West 2010) (“When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or her or his or her counsel.”).

⁸² See *Douglas v. California*, 372 U.S. 353 (1963).

⁸³ Section 10 of article VI of the California Constitution states: “The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings.” California Penal Code Section 1473 also states: “Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus”

⁸⁴ See Alarcón, *supra* note 9, at 737.

⁸⁵ See Cal. Gov't. Code § 68662 (West 2011). Under California Supreme Court policies, an indigent death-row inmate will be appointed counsel for state habeas. See Supreme Court Policies Arising From Judgment of Death, Policy 3 (Cal. 1989), available at www.courts.ca.gov/documents/aa02f.pdf (last visited July 17, 2011).

⁸⁶ See 28 U.S.C. § 2254(a) (West 2010).

⁸⁷ See 18 U.S.C. § 3599(a) (West 2010).

⁸⁸ In recent years, counsel was retained for direct appeal in one case, that of Scott Peterson. See California Commission Report, *supra* note 6, at 21.

⁸⁹ See 2011 Cal. R. Ct. § 8.605.

must have a minimum of four years of relevant experience as a California attorney, with a proven ability to handle a complex death-penalty case competently.⁹⁰ At least through articulated standards for appointment, California has attempted to ensure that counsel will render reasonably good representation. However, Judge Alarcón pointed out in 2007 that the hourly compensation rate of \$140 (since raised to \$145)⁹¹ is approximately half the average hourly rate awarded by federal courts to civil attorneys of the same minimal level of experience and far less than the \$425 per hour awarded to a civil attorney with 20 years of experience.⁹² The rate is also below the \$166 per hour (since raised to \$178 per hour) that was paid in 2007 to counsel appointed to represent death row inmates in federal habeas cases from California.⁹³ A cap on expenses for state habeas counsel also limits investigation and the use of experts in many of the cases involving private counsel.⁹⁴ Apparently, not enough qualified attorneys are willing to take on the stress and frustrations of a death-penalty case in the California courts for the compensation and support provided. Committed and qualified attorneys from two state agencies handle approximately one-third of the appeals and habeas appointments.⁹⁵ Nonetheless, the California Commission found in 2008 that there were 79 inmates on death row who had not had counsel appointed to handle their direct appeals and 291 inmates who had not had counsel appointed to handle their state habeas corpus petitions.⁹⁶ The wait reportedly was “3 to 5 years” for counsel to be appointed on direct appeal⁹⁷ and in the range of “8 to 10 years” from sentencing for counsel to be appointed for state habeas.⁹⁸ Moreover, Judge Alarcón noted that the average delays in appointment were increasing because of the inability of the California Supreme Court to locate qualified and willing counsel.⁹⁹

The second major problem with the state review system is the inability of the California Supreme Court to keep up with the number of death-penalty cases.¹⁰⁰ As of 2008, the Court had a backlog of 80 briefed death cases awaiting argument on direct appeal.¹⁰¹ Although the Court annually schedules 20 to 25 of those cases,¹⁰² there is now

⁹⁰ See 2011 Cal. R. Ct. § 8.605(d).

⁹¹ See Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court 13 (1993)(as amended August 27, 2008).

⁹² See Alarcón, *supra* note 9, at 717-19.

⁹³ See Letter from Clayton Seaman Jr., Chair, California Appellate Defense Counsel to California Commission on the Fair Administration of Justice 6 (Nov. 30, 2007) available at <http://www.ccfaj.org/rr-dp-expert.html>. Regarding the increase, see Alarcón & Mitchell, *supra* note 18, at S83.

⁹⁴ See *infra* note 109 and accompanying text.

⁹⁵ Attorneys from the Office of the State Public Defender handle some of the capital cases on automatic appeal before the California Supreme Court. Attorneys from the Habeas Corpus Resource Center handle some of the habeas corpus cases in the Supreme Court and some of the clemency proceedings before the Governor. Another state agency, the California Appellate Project, provides assistance to private attorneys appointed by the Supreme Court.

⁹⁶ See California Commission Report, *supra* note 6, at 23-24.

⁹⁷ *Id.* at 23.

⁹⁸ *Id.* at 24.

⁹⁹ See Alarcón, *supra* note 9, at 720-21.

¹⁰⁰ See Testimony of Chief Judge Ronald M. George, *supra* note 2, at 16 (stating that the court “no longer can keep up with the increasing number of fully briefed appeals in capital cases while performing its core function of resolving questions of statewide importance in civil and criminal matters”).

¹⁰¹ *Id.* at 11.

¹⁰² See *id.* at 16.

a delay of several years between briefing and argument.¹⁰³ Likewise, in 2008, the Court had 100 fully briefed habeas cases pending decision.¹⁰⁴ Although arguments on those petitions are rare, the average delay between the filing of the petition and the decision was 22 months.¹⁰⁵ Usually, the habeas petitions are denied without an evidentiary hearing and without a written opinion.¹⁰⁶

The federal habeas process in cases from California also moves slowly. Judge Alarcón found that the “total average delay from the filing of the initial application for federal habeas corpus relief to the grant or denial of relief by a district court is 6.2 years.”¹⁰⁷ The additional delay for appeal to the Ninth Circuit and the resolution of a subsequent petition for writ of certiorari totals 3.5 years.¹⁰⁸ This means that the average time for federal habeas is roughly ten years.

Judge Alarcón pointed out that some of the delay in the federal District Court stems from deficiencies in the state review process. First, the limited payment for expenses provided to state habeas counsel often effectively prevents counsel from conducting the thorough investigations that are needed to present constitutional claims in state court in a manner that will satisfy the exhaustion requirement for federal habeas.¹⁰⁹ In 74% of the death-penalty cases, the federal district judge grants a stay to enable the inmate’s federal counsel to return to state court to exhaust the possible state remedies for such claims.¹¹⁰ The average delay for these purposes is 2.8 years.¹¹¹ Second, the inability of the California Supreme Court to hold evidentiary hearings or to issue opinions in most of the state habeas cases makes it more likely that the federal district judge will need to conduct such a hearing and will need more time to analyze and decide the claims presented.¹¹² In addition, Judge Alarcón noted that delay arises because state habeas counsel ends his or her representation at the conclusion of the state process, requiring new federal counsel to spend many weeks becoming familiar with the record and the client.¹¹³ Whether or not these points account for all of what may seem at first to be abnormal delay in the federal district court, they help explain much of it.

The estimate for total delay for review in a California death case is 20 to 25 years,¹¹⁴ and the reasons for alarm over such figures do not require extended discussion.

¹⁰³ See Alarcón, *supra* note 9, at 722-23.

¹⁰⁴ See *id.* at 16-17

¹⁰⁵ See Alarcón, *supra* note 9, at 741.

¹⁰⁶ See *id.*, at 741-42.

¹⁰⁷ *Id.* at 748.

¹⁰⁸ *Id.* at 749.

¹⁰⁹ *Id.* at 742. At the time Judge Alarcón first wrote, the limits on payments for expenses prior to the issuance of a show-cause order was \$25,000. See *Id.* Shortly thereafter, then Chief Justice George successfully secured adoption of a statutory amendment that doubled the amount to \$50,000. See Testimony of Chief Justice George, *supra* note 2, at 12. However, the Commission concluded that “expenses for a habeas investigation and the retaining of necessary experts can easily exceed” even this higher amount. See California Commission Report, *supra* note 6, at 53.

¹¹⁰ Alarcón, *supra* note 9, at 749.

¹¹¹ *Id.*

¹¹² *Id.* at 742 & 744.

¹¹³ See *id.* at 750. In response to this problem and the problem of delay due to the need for a return to state court for exhaustion of state remedies, Judge Alarcon proposed that the California Legislature and the federal Congress should fund a Capital Habeas Agency to represent capital inmates in the state. See *id.* at 744-45.

¹¹⁴ See California Commission Report, *supra* note 6, at 25.

Typical delays of more than 20 years effectively prevent many executions and also fuel controversy about the marginal retributive or deterrent effects of those that occur.¹¹⁵ In addition, survivors of murder victims are plausibly thought tormented rather than assuaged when it takes so long to carry out the punishment handed down.¹¹⁶ Capital inmates who have legitimate claims that reversible error infected their trials also are mistreated by having to wait more than eight years, which is now the average, to receive a reversal on their first appeal.¹¹⁷ Some of them die after waiting on death row for many years without ever having obtained appellate review.¹¹⁸ These concerns alone are sufficient to explain why Judge Alarcón described the current level of delay inherent in the process of review as “appalling.”¹¹⁹

C. Expense of the Death Penalty

The California Commission estimated in 2008 that the annual cost of the death penalty in the state was at least \$126.2 million more than the annual costs that would accrue if the death penalty were immediately abandoned in favor of sentences of life imprisonment without parole.¹²⁰ The Commission started with the greater costs of death penalty trials. Although studies from other states and from earlier research in California suggested a much higher differential, the Commission “adopted a very conservative estimate that seeking the death penalty adds \$500,000 to the cost of a murder trial” and noted that the then-current pace of 40 death-penalty trials per year in California meant an additional annual expense of \$20 million.¹²¹ The commission also found that at least \$54.4 million per year was devoted to attorney costs for post-trial review of death cases.¹²² Most of those costs do not apply in non-capital cases, because the non-capital inmate receives appointed counsel only on direct appeal to the Court of Appeal, and the cases are much less complicated with sentencing issues.¹²³ Costs of confinement on death row per inmate added \$90,000 annually to the normal cost of \$34,150, for a total added confinement cost for the 670 inmates on the row of \$63.3 million.¹²⁴ These figures total \$137.7 million. However, the Commission calculated that the existence of the death penalty would for many inmates shorten the period of confinement, compared with a sentence of life imprisonment without parole, and that this alternative sentence would carry other additional costs – such as for counsel on direct appeal -- for a total of \$11.5

¹¹⁵ See Sara Colón, Comment, *How California’s Administration of the Death Penalty Violates the Eighth Amendment*, 97 CAL. L. REV. 1377, 1394-1400 (2009) (contending that the delay erodes the retributive and deterrent value of the death penalty).

¹¹⁶ See, e.g., Kozinski & Gallagher, *supra* note 29, at 27-28 (asserting that the system “visits repeated trauma on victims’ families”).

¹¹⁷ See Alarcón, *supra* note 9, at 723. The Commission found that the average wait for capital inmates whose conviction or sentence was vacated in state court was 11 years and that the average wait where the reversal occurred in federal court was 16.75 years. See California Commission Report, *supra* note , at 22.

¹¹⁸ See *supra* note 20 (discussing the case of John Post).

¹¹⁹ Alarcon, *supra* note 9, at 752.

¹²⁰ See California Commission Report, *supra* note 6, at 84.

¹²¹ *Id.* at 79-80.

¹²² See *id.* at 81-82.

¹²³ See *id.* at 74-75.

¹²⁴ See *id.* at 82.

million per year.¹²⁵ Thus, the total annual differential cost of the state's death penalty system relative to a system in which the greatest penalty was life imprisonment without parole would be \$126.2 million. The Commission also noted that, as the backlog on death row continues to increase, the annual relative expense of the death penalty will also grow.¹²⁶

The death-penalty review system also carries some costs for the state that are not included in the Commission estimates. The Commission, for example, did not attempt to assess whether additional judicial resources are devoted to death-penalty cases that would not be devoted to those cases if they were cases of life imprisonment without parole. Given the greater length of capital trials and the more extensive review that occurs in death appeals, there is undoubtedly a significant differential. Moreover, the high number of automatic death-penalty cases bears heavily on the California Supreme Court, preventing it from devoting needed time to other important matters. Automatic death appeals account for nearly one-fourth of the court's cases on the argument docket, and this figure does not include the court's review of complex habeas corpus petitions.¹²⁷ Each death penalty appeal also takes "substantially more time for preparation and review than do most other matters" before the court.¹²⁸ For these reasons, former Chief Justice George warned that "the increasing pressures" from the capital cases "are beginning to undermine the court's essential role in the administration of civil and criminal justice in this state."¹²⁹

Because of heightened costs for federal habeas review in death-penalty cases, the California system also imposes extra expenses for the nation as a whole that are not included in the Commission estimates. Those costs are substantial, given the federal court resources devoted to every capital case and the expenditures required to compensate counsel representing inmates in federal court.¹³⁰ All death-penalty states impose such costs, and California is perhaps not fairly viewed as imposing a disproportionate amount, given its large population and its relatively low death-sentencing-to-murder rate.¹³¹ Nonetheless, a fair evaluation of the cost of the death system in California should not ignore the use of federal resources, even if they do not bear as much obvious importance to state citizens as the more direct state expenditures.¹³²

A study published in 2011 by Judge Alarcón and Paula Mitchell identified even more costs associated with the current death-penalty system than those identified by the Commission. The Alarcón and Mitchell study assessed the annual cost of the system over the cost of a system with a maximum sentence of life imprisonment without parole at

¹²⁵ See *id.* at 84.

¹²⁶ See *id.* at 82.

¹²⁷ See Testimony of Chief Justice Ronald M. George, *supra* note 2, at 7-8.

¹²⁸ *Id.* at 8.

¹²⁹ *Id.* at 6.

¹³⁰ For the view that death cases have unduly distracted the United States Supreme Court, see Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N. U. L. REV. 861 (2008).

¹³¹ See *supra* note 41 and accompanying text.

¹³² Judge Alarcón noted that California has engaged in some cost shifting to the federal system by virtue of its failure to provide adequate investigative funds for state habeas counsel: "[California] shifts to the federal government the burden of providing sufficient funds to permit federal habeas counsel to discover evidence to demonstrate additional federal constitutional violations." Alarcón, *supra* note 9, at 748. His point is only made more important, if, as seems likely, the problem is not unique to California.

more than \$184 million.¹³³ This greater amount accounts for some growth in the costs since the Commission study and some reassessment of the Commission estimates. Likewise, the increased figure includes the additional cost of lawyers for the state and the inmate in federal review, costs that were not included in the Commission study. It does not include any of the marginal judicial costs in state and federal court, such as the extra time and expense required in capital cases of judges and court staff.

In the end, the costs savings of abolishing the death penalty are difficult to assess with accuracy.¹³⁴ Neither the Commission study nor the Alarcón and Mitchell study took into account some of the savings that arguably are produced by the death-penalty system. The death penalty might encourage guilty pleas in first-degree murder cases and, thus, save the costs of some extra trials and appeals that would occur if the death penalty were repealed.¹³⁵ Likewise the death penalty might sometimes deter and, thus, save the lives of some potential murder victims and the costs that would go along with prosecuting those cases.¹³⁶ The extent of such savings would be nearly impossible to measure accurately in advance, and, certainly, not in a way that would generate consensus.¹³⁷ However, while speculative, the possibility of those savings should not be dismissed. At the same time, as noted, there are very clear expenses of the death system that are not included, even in the more inclusive Alarcón and Mitchell study. The total cost figures produced by the studies should be understood in light of these limitations.

II. The “Speed-Up” Proposals and Their Problems

This Part evaluates proposals that have been offered by government officials as a way to save pending death sentences in California. The proposals focus on ameliorating the first two concerns noted in the previous discussion—rarity of executions and delays on death row. Proponents contend that these reforms could greatly speed up the appellate review of death cases and enable the state to execute in much greater numbers than it has in the past. Yet, I explain why the proposed reforms probably would not be as effective as proponents hope and certainly would, at least for several years, exacerbate rather than ameliorate the third concern noted earlier – the expense of the death penalty.

A. The “Speed-Up” Proposals

Proposals by government officials to accelerate the appellate process focus on both the state and the federal systems. Regarding state review, the proposals center on the need to better fund and support counsel for death row inmates and on the need to disperse some of the responsibilities for review from the state high court to the lower

¹³³ See Alarcón & Mitchell, *supra* note 18, at S109.

¹³⁴ See, e.g., Susan S. Everingham, *Investigating the Costs of the Death Penalty in California; Insights for Future Data Collection from a Preliminary RAND Effort 1* (Testimony presented before the California Commission on the Fair Administration of Justice, on February 20, 2008) (concluding that “the quantitative data necessary to generate defensible costs estimates” would be difficult and expensive to obtain), available at <http://www.rand.org/pubs/testimonies/CT300.html>.

¹³⁵ On this score, see *infra* note 322 and accompanying text.

¹³⁶ For more on this point, see *infra* note 320 and accompanying text.

¹³⁷ See *infra* notes 322-23 and accompanying text.

state courts. Regarding federal habeas, the proposals focus on California's potential to "opt in" to a streamlined system of review that the current federal habeas statute provides.¹³⁸ If all of these changes could be enacted swiftly, the hope is that they could dramatically increase the pace of executions.

1. State-Review

Former Chief Justice George proposed in 2007 that the extraordinarily delays that have arisen because of the lack of qualified counsel for direct appeal and state habeas could be ameliorated through more ample funding.¹³⁹ While recognizing the budget difficulties that California faced, he argued that more funds were needed to increase the number of attorneys in the state agencies that represent defendants in death-penalty appeals and to encourage more private attorneys to accept those cases.¹⁴⁰ The increased funding would have to come through the action of the legislature and governor, because the Supreme Court already disburses all of the funds available to it.¹⁴¹

Regarding delay in the processing of briefed cases on direct appeal, former Chief Justice George contended that the solution was to disperse some of the responsibilities for review away from the state high court to the lower state courts.¹⁴² He contended that the Chief Justice should be given authority to send a large portion of the cases on direct appeal to the intermediate appellate courts around the state for initial review, once full briefing is complete.¹⁴³ The high court would retain and decide any case in which an issue of statewide concern exists that requires immediate resolution. After review by the Courts of Appeal, the high court would then conduct a second review that would focus on any significant issues. The parties would be required to file a "statement of grounds for reversal" to assist the Supreme Court in evaluating the decision of the intermediate appellate court. Although the high court would review every case to consider whether there was an "error affecting the judgment,"¹⁴⁴ in some, it would summarily affirm the decision below and only in a portion would need to order briefing and argument.¹⁴⁵ He urged that this approach would relieve the bottleneck of fully briefed cases that must wait many months for the high court to consider and resolve.¹⁴⁶

Judge Alarcón offered a similar proposal to relieve the backlog in review of fully pleaded state habeas petitions. He proposed that state habeas petitions be filed in the

¹³⁸ See, e.g., Lundgren, *supra* note 9, at 7-13.

¹³⁹ See *infra* note 145; Testimony of Chief Justice George, *supra* note 2, at 13-14.

¹⁴⁰ See *id.* at 14.

¹⁴¹ See *id.* at 13-15.

¹⁴² More than two decades ago, Professor Gerald Uelman proposed a similar, though different, reform. He proposed allowing death penalty appeals to go, initially, to the Courts of Appeal, with the function of "error correction" to be left at that level. See Uelman, *supra* note 38, at 292-93. More recently, Judge Alarcón proposed the same reform as Professor Uelman. See Alarcón, *supra* note 9, at 727.

¹⁴³ See Testimony of Ronald M. George, *supra* note 2, at 25.

¹⁴⁴ *Id.* at 29.

¹⁴⁵ In late 2007, the Supreme Court of California endorsed a proposal to seek an amendment of the state constitution to allow for the transfer of death penalty appeals to the Court of Appeal. See Judicial Council of California, *Supreme Court Proposes Amendments To Constitution in Death Penalty Appeals* (Nov. 19, 2007) available at

<http://www.ccfa.org/documents/reports/dp/expert/Chief%27s%20Press%20Release.pdf>.

¹⁴⁶ See *id.* at 35-36.

superior courts with the possibility for appeal to the Courts of Appeal.¹⁴⁷ He also proposed that the lower courts be allowed to compensate the inmate's habeas counsel.¹⁴⁸ The Superior Court judge would be obligated to issue a written order explaining the decision, and the Court of Appeal would be required to issue an opinion explaining its ruling. The state high court would have discretionary review and, when a petition for review was granted, the high court would issue an opinion justifying its decision. Judge Alarcón contended that this dispersion of work away from the state Supreme Court would not only relieve the overload on the high court but allow the Superior Court to hold hearings promptly when needed. Likewise, this change would result in the production of written opinions that could speed up review in federal habeas.¹⁴⁹

2. Federal Habeas Review

Proposals to speed up the federal habeas process focus on California's potential to "opt in" to a streamlined system of review that would fast-track both the pleadings by the litigants and the decisions by federal judges.¹⁵⁰ The streamlined system is embodied in Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act of 1996 ["AEDPA"],¹⁵¹ which amended federal habeas law and, thus, has long been an option for California. In 2000, the U.S. Court of Appeals for the Ninth Circuit concluded, in *Ashmus v. Woodford*,¹⁵² that California did not meet the pre-conditions applicable at that time. To be certified, a state must show, in essence, that it has established a mechanism to appoint, compensate and adequately fund competent counsel for death-sentenced inmates in state habeas corpus proceedings and that it has provided competency standards for counsel appointments.¹⁵³ When *Ashmus* was decided, a state must have established the mechanism "by rule of its court of last resort or by statute."¹⁵⁴ The Ninth Circuit determined that, at the relevant time in the *Ashmus* litigation, California had not established the mechanism "by rule" or "by statute," although a mechanism proffered as adequate was embodied in written policies of the state supreme court.¹⁵⁵ Proponents of capital punishment note that a 2005 federal statute¹⁵⁶ eliminated the requirement that the mechanism be established by rule or by statute¹⁵⁷ and moved the certifying decision away from the federal courts in the Ninth Circuit to the United States Attorney General.¹⁵⁸

¹⁴⁷ See Alarcón, *supra* note 9, at 743-44.

¹⁴⁸ See *id.*, at 743.

¹⁴⁹ See *id.* at 743-44.

¹⁵⁰ See, e.g., Lundgren, *supra* note 9, at 7-13.

¹⁵¹ The fast-track procedures were intended to apply to state capital cases from states that meet certain pre-conditions. See Antiterrorism and Effective Death Penalty Act § 107, Pub. L. 104-132, 110 Stat. 1214, 1221 (1996) (creating new Chapter 154 of the Judicial Code, entitled "Special Habeas Corpus Procedures in Capital Cases," 28 U.S.C. §§ 2261-66 (2006)).

¹⁵² 202 F.3d 1160 (9th Cir. 2000).

¹⁵³ For the language of the provision, 28 U.S.C. § 2265(a) (1), see *infra* text at note 188.

¹⁵⁴ 28 U.S.C. § 2261 (b) (1999). This requirement also applied to states, including California for a time, that had a unitary review procedure for both direct appeal and habeas. See 28 U.S.C. § 2265(a).

¹⁵⁵ See 202 F.3d at 1165-70.

¹⁵⁶ U.S.A. Patriot Act Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 577, *codified at* 28 U.S.C. §2266(b)(1)(A).

¹⁵⁷ See *id.* § 2265(a) (1)(A).

¹⁵⁸ See, e.g., Lundgren, *supra* note 9, at 9-13.

Although final regulations from the Attorney General that are necessary to implement the certification process¹⁵⁹ have been delayed for several years, they are expected to take effect soon.¹⁶⁰ Under the new regulations, proponents of capital punishment hope that California will be able to opt in.¹⁶¹

The streamlined system of review in Chapter 154 changes the normal habeas rules in several important ways. First, Chapter 154 imposes an accelerated time limit on the filing of a federal habeas petition – 180 days.¹⁶² Second, it provides strict limitations on the time allowed to the federal district court to decide a habeas petition and on the time allowed the federal appeals courts to decide an appeal.¹⁶³ Third, it imposes greater restrictions on the presentation of claims that were not raised and decided on the merits in state court.¹⁶⁴ Fourth, it allows for a stay of execution upon “entry . . . of an order” appointing counsel for state habeas by an appropriate state court,¹⁶⁵ but conditions the maintenance of the stay on, among other things, whether the federal petition later filed by the inmate makes “a substantial showing of the denial of a Federal right.”¹⁶⁶

If California can secure the application of Chapter 154 to its death cases, proponents of capital punishment believe that the streamlined system could greatly reduce the delay in the federal review process. A particular target is delay in the federal district courts. Judge Alarcón found that the average lapse from the filing of a federal habeas petition in a California death case until its resolution by the district court is 6.2 years.¹⁶⁷ Under Chapter 154, the district court must enter a final judgment within 450 days of the filing of the petition, with the possibility of one 30-day extension in limited

¹⁵⁹ Chapter 154 directs that the “Attorney General shall promulgate regulations to implement the certification procedure” *Id.* at § 2265(b).

¹⁶⁰ Original regulations were proposed by the Bush Administration’s Department of Justice but later were enjoined from taking effect by a federal district judge and, ultimately, were withdrawn by the Obama Administrations’ Department of Justice, in December, 2010. *See* Bob Egelko, *Death penalty fast track removed: Justice Dept. withdraws rules to speed capital cases*, SAN FRAN. CHRON. D1 (Dec. 26, 2010). On March 3, 2011, the Justice Department proposed a new rule containing amended regulations to implement the certification process. *See* Office of the Attorney General; Certification Process for State Capital Counsel Systems, 28 CFR Part 26, 76 FR 11705 (Mar. 3, 2011), *available at* <http://69.175.53.6/register/2011/mar/03/2011-4800.pdf>.

¹⁶¹ *See, e.g.*, Lundgren, *supra* note 9, at 13.

¹⁶² In simplistic terms, the difference is between a 1-year limitation from the end of direct appeal in non-Chapter 154 cases and a 180-day limitation from the end of direct appeal in Chapter 154 cases. However, describing the precise difference is complicated. The time when the limitation begins running in the two situations is different, as are the tolling periods. To understand the differences, compare 28 U.S.C. § 2263, regarding fast-track cases, and § 2244(d), regarding non-fast-track cases.

¹⁶³ *See id.* § 2266.

¹⁶⁴ The relevant statute directs that the district court:

shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is –

- (1) the result of State action in violation of the Constitution or laws of the United States;
- (2) the result of the Supreme Court’s recognition of a new Federal right that is made retroactively applicable; or
- (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

28 U.S.C. § 2264(a).

¹⁶⁵ *Id.* § 2262 (a).

¹⁶⁶ *Id.* § 2262 (c).

¹⁶⁷ *See* Alarcón, *supra* note 9, at 748.

circumstances.¹⁶⁸ The Chapter 154 requirements would also reduce other current delays involved in federal habeas appeals by at least several months.¹⁶⁹ However, the average time reduction for resolution at the district court level alone would amount to almost five years. Because of its potential to reduce federal delays so substantially, Chapter 154 holds a special appeal for California proponents of the death penalty.¹⁷⁰

B. Problems With the “Speed-Up” Proposals.

While the “speed up” proposals, if implemented, could reduce delays in the review process and also eventually lower some of the costs of the current system,¹⁷¹ the challenges to their effective implementation are daunting. The proposals to reduce delay in the state courts would involve much more expense than savings for many years, and those reforms have not yet been adopted. Also, assuming the changes can be implemented, they pose complications that would make them less effective than might first appear. Likewise, efforts to implement the proposed remedy for delay in federal habeas – opting-in by California to the system of fast-track review -- will spur legal challenges that may do more to stall than to facilitate executions for at least several years. Thus, doubt remains that the reform proposals will soon produce a scenario in which California will regularly carry out a large and steady flow of annual executions.

1. Challenges for the Proposals Regarding State Review

One problem with the proposals regarding state review concerns the effectiveness of dispersing review responsibilities to the lower courts.¹⁷² Adding more layers of review in the death-penalty appeal process strikes some as a flawed method to accelerate

¹⁶⁸ See 28. U.S.C. § 2266(b)(1) (2006).

¹⁶⁹ Chapter 154, if followed, would also reduce the average time involved for the Court of Appeals to resolve a federal habeas appeal. Chapter 154, for example, permits the Court of Appeals only 120 days after the date on which the reply brief is filed to render a decision, only 30 days to decide whether to grant a petition for rehearing, and only 120 days more to resolve a petition for rehearing, if granted. See *id.* § 2266(c). Judge Alarcón did not delineate the average lapses involved at each of these precise stages in past capital habeas appeals in the Ninth Circuit. However, he noted that the “average delay from the filing of a notice of appeal from the decision of the district court granting or denying a death row inmate’s federal application for a writ of habeas corpus to the decision of the three-judge panel of the Ninth Circuit is 2.2 years” and that the “average delay from the decision of this three-judge panel to a decision respecting rehearing en banc is 8.7 months.” Alarcón, *supra* note 9, at 749.

¹⁷⁰ See, e.g., Lundgren, *supra* note 9, at 13; Kent Scheidegger, *NYT Ed. Makes Up Its Own Facts*, “Crime and Consequences Blog (April 30, 2011) (“I do not concede that the length of review problem is unfixable. We are close to finally implementing the federal fast track promised in 1996, and states can fix the delay in their own systems.”) available at <http://www.crimeandconsequences.com/crimblog/2011/04/>. (last visited July 18, 2011).

¹⁷¹ Substantially shortening delay in capital cases would eventually reduce some of the costs associated with the death penalty, if only, for example, because the cost of incarcerating condemned inmates for so many years would decrease.

¹⁷² See Laura Ernde, *George Lobbies Panel on Reforming Death-Penalty Appeals*, SAN FRAN. DAILY J., Jan. 14, 2008, at 1 (noting that Chief Justice George “faced some skeptics” over his proposal to reform capital appeal procedures); available at <http://www.ccfaj.org/documents/press/SFDailyJournal01-11-08.pdf>.

review.¹⁷³ Chief Judge George acknowledged that, even under his proposed reform, the state high court would remain more involved in death-penalty appeals than with other kinds of cases.¹⁷⁴ In general, the state high court grants review only “where there is a conflict among the Courts of Appeal or an important issue of statewide importance.”¹⁷⁵ However, his proposal contemplates that the high court would review death appeals simply to correct error affecting the judgment.¹⁷⁶ This point underscores why the judicial reforms, if implemented, probably would not accelerate the state review process as much as many death-penalty proponents might desire.¹⁷⁷ Because of such problems, some commentators have suggested that California instead consider creating a special criminal court to handle death-penalty appeals, which is the approach followed in Texas.¹⁷⁸

A more practical problem with the proposals concerns funding. The proposal to disperse a major part of the responsibilities for review would be expensive, and the proposal to pay more for inmate legal representation would probably be even more costly. In February, 2008, former Chief Justice George withdrew a formal proposal, endorsed unanimously by the state Supreme Court,¹⁷⁹ to allow for the dispersal of review of direct appeals, reportedly because there were no realistic prospects, given California’s budget deficit, to fund the increased resources that would be needed by the lower courts.¹⁸⁰

Former Chief Justice George also made clear that the solution to state delay hinges on the implementation of both the judicial reforms and the increased funding for inmate lawyers.¹⁸¹ Implementing only the dispersal proposal would soon produce under-utilization of the added judicial resources, because the absence of sufficient inmate lawyers would mean a paucity of cases briefed and ready for the courts to consider.¹⁸²

¹⁷³ See Michael A. Piekarz, *Death Penalty Proposal Will Alleviate Backlog, George Tells Commission*, METRO NEWS-ENTERPRISE, Jan. 11, 2008, at 3 (quoting Natasha Minsker, of the ACLU of Northern California: “The proposals would take us from a one step appeals process to a three step process. How is that going to speed things up?”).

¹⁷⁴ See Testimony of Chief Justice George, *supra* note 2, at 29.

¹⁷⁵ See *id.* at 28-29.

¹⁷⁶ See *id.* at 29-30.

¹⁷⁷ Former Chief Justice George responded to these concerns on various occasions, indicating that the plan for the high court to issue merely summary affirmances in many of the cases would speed the process and distinguish it from the “two automatic appeals” schemes of Alabama and Tennessee, which have been criticized as inefficient. See, e.g., *News Release*, *supra* note 145, at Comments, p. 3.

¹⁷⁸ See Dissent to California Commission on the Fair Administration of Justice Report and Recommendations on the Administration of the Death Penalty in California 4 (June 30, 2008)(authored by Commissioner Gregory D. Totten and joined by Commissioners Harold Boscovich, Ron Cottingham, Pete Dunbar & Curtis Hill) (asserting that in considering various resource savings from eliminating the death penalty it is also important to consider, among other things, “deterrence that will save lives”), available at: <http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>. This alternative, however, also has disadvantages. For example, such a structure may foster a culture that accepts a lower standard of practice before the separate criminal court. See Steiker & Steiker, *supra* note 27, at 1880-81 (contending that the separation in Texas has contributed to a lower standard of practice before the Texas Court of Criminal Appeals, which handles automatic appeals in death penalty cases and exercises discretionary review in other criminal appeals).

¹⁷⁹ See *News Release*, *supra* note 145, at 1.

¹⁸⁰ See Henry Weinstein, *Chief Justice Drops bid to Speed up Death Penalty Appeals*, L.A. TIMES, Feb. 24, 2008, at B4.

¹⁸¹ See Testimony of Chief Justice Ronald M. George, *supra* note 2, at 37.

¹⁸² See *id.* at 38

Likewise, providing only the funds for more lawyers would merely increase the large and growing backlog of fully briefed cases awaiting action by the state supreme court.¹⁸³

Reform proponents must gain widespread political support to implement the proposals. The plans to disperse the responsibilities for review of direct appeals would require a state constitutional amendment, which requires approval by California voters.¹⁸⁴ The California constitution expressly forbids the state high court to transfer an appeal involving a judgment of death.¹⁸⁵ Likewise, the proposal to reform the review process in state habeas cases calls for a constitutional amendment providing that original petitions in death cases must be filed in the superior court and allowing for appeals.¹⁸⁶ That proposal also requires legislation “to provide for compensation for appointed counsel when state habeas petitions are filed in the superior court.”¹⁸⁷ Finally, the increased funding for all of the reforms would have to gain support from the legislature and the governor.

2. Challenges for the Proposal Regarding Federal Review

Despite the 2005 act that amended AEDPA, California will also face serious obstacles to gaining the benefits of the streamlined federal habeas system embodied in Chapter 154. Assuming California seeks to have Chapter 154 apply, attorneys for condemned inmates will pose a variety of legal objections. This section summarizes only some of the challenges that California will confront in securing the streamlined habeas benefits soon.

a. Does California Meet the Requirements for Certification By The Attorney General? If California applies to the Attorney General for certification under Chapter 154, opponents will contend that it fails to meet the requirements. The relevant provision, section 2265(a)(1), directs the Attorney General to determine:

- (A) whether the state has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;
- (B) the date on which the mechanism described in subparagraph (A) was established; and
- (C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).¹⁸⁸

¹⁸³ See *id.* at 37-38.

¹⁸⁴ See CAL. CONST., art. XVIII, sec. 4.

¹⁸⁵ CAL. CONST., art. VI, sec. 12.

¹⁸⁶ The California constitution provides: “The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings.” CAL. CONST., art. VI., sec. 10. Under this provision, habeas petitioners need not file in the Superior Court. The United States Supreme Court noted, in *Carey v. Saffold*, 536 U.S. 214, 221-22 (2002), that, under this system, there is also no appeal if the petition is filed in a lower court, although the petitioner who has been denied in a lower court could file a new “original” petition with a higher court.

¹⁸⁷ Alarcón, *supra* note 9, at 743.

¹⁸⁸ 28 U.S.C. § 2265(a) (1).

The most significant challenge will likely arise regarding subdivision (A). Regarding subdivision (C), California has somewhat demanding standards of competency,¹⁸⁹ and while they are not exactly the same as the standards for appointed counsel in capital cases in Federal court¹⁹⁰ they appear to comply with the directions to states in the federal Innocence Protection Act,¹⁹¹ and, thus, are likely to be found sufficient.¹⁹² The question in subdivision (B) may generate dispute, assuming the state is found to have established at some point the “mechanism” required by subparagraph (A). The more central dispute, however, will be whether California currently meets the test in subdivision (A).

Opponents will argue that California has not established the required mechanism for appointment of state habeas counsel. While California will disagree,¹⁹³ opponents will contend that Chapter 154 mandates that appointment occur no later than the date on which the Supreme Court of California denies a capital inmate’s direct appeal. They will contend that section 2265(a)(1)(A) must be read in conjunction with section 2263(a), regarding the 180-day statute of limitations. The latter provision states that the 180-day clock begins running from the date of “final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.”¹⁹⁴ Opponents will assert that the integrity of Chapter 154’s *quid pro quo* arrangement between the federal government and the states, and the fairness of Chapter 154 to condemned inmates, requires that counsel be appointed before the limitations clock begins running.¹⁹⁵ Because inmates become vulnerable to execution at that same time, opponents will assert that this deadline for appointments is also demanded by section

¹⁸⁹ California Rules of Court, Rule 8.605 (2010)(requiring that lead counsel be a member of the bar of California for at least four years and meet other criteria regarding experience and training) *available at* http://www.courts.ca.gov/7260.htm?title=eight&linkid=rule8_605.

¹⁹⁰ See 18 U.S.C. § 3599 (a) – (e) requiring, in general, counsel “who have been admitted to the bar for at least five years and have at least three years of felony litigation experience,” but also allowing that the court “for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant” with due consideration of the seriousness of the penalty.

¹⁹¹ The Innocence Protection Act [“IPA”], 42 U.S.C. §§ 14163 -14163e, directs the Attorney General to provide grants to states to promote “effective system[s] for providing competent legal representation” in death-penalty cases. It defines an “effective system” based largely on the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. Feb. 2003). Under the IPA, the appointing authority or an appropriate designate must “establish qualifications for attorneys who may be appointed to represent indigents in capital cases.” 42 U.S.C. §§ 14163(e)(2)(A). The IPA assumes that the appointing authority can be relied upon to provide appropriate competency standards. Consistent with this mandate, the California Supreme Court has articulated standards that would likely be found appropriate. See *supra* note .

¹⁹² In the amended regulations first proposed by the Attorney General in early 2011, compliance with the directions in the Innocence Protection Act for setting qualification standards is deemed to satisfy the counsel competency standards of chapter 154. See Office of the Attorney General, *Certification Process for State Capital Counsel Systems*, 76 F. R. 11705, 11708 (Mar. 3, 2011).

¹⁹³ The state will assert that such a reading violates a provision limiting the requirements for application of Chapter 154 to those that are stated expressly in the chapter. See 28 U.S.C. §2265(a)(3) (quoted *infra* note 217). The state will also argue that, even assuming such a requirement exists, it is not a requirement at the certification stage.

¹⁹⁴ 28 U.S.C. § 2263(a).

¹⁹⁵ Cf. *Spears v. Stewart*, 283 F.3d 992, 1016-17 (9th Cir. 2001)(concluding that a mechanism must call for appointment of counsel “expeditiously” after affirmance of the conviction and concluding that within 15 days was acceptable).

2262(a),¹⁹⁶ which triggers the authorization for a federal stay of execution only when an order is issued regarding appointment of state habeas counsel.¹⁹⁷ The problem on this score for California is that its policy for appointments specifies no deadline and, as the California Supreme Court recently acknowledged in *In re Morgan*,¹⁹⁸ the court can no longer typically make appointments of habeas counsel by the date of affirmance or even expeditiously thereafter.¹⁹⁹ California now has a sizeable number of capital inmates whose automatic appeals were decided long before the appointment of habeas counsel.²⁰⁰ In light of the state's failure to specify a deadline for appointments and its inability to make appointments that are timely under any reasonable view, opponents will maintain that California cannot legitimately be found to have set up the required mechanism.²⁰¹

Opponents of certification will make a related argument under subparagraph (A) regarding compensation and reimbursement. They will contend that subparagraph (A) requires reasonable compensation and reimbursement.²⁰² They will also contend that

¹⁹⁶ The provision states in pertinent part:

Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254.

28 U.S.C. § 2262(a).

¹⁹⁷ See generally RANDY HERTZ & JAMES S. LIEBMAN, I FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 160-61 (2011)(discussing the interaction of the provisions and concluding that the deadline for the entry of an order appointing counsel must be the same as the date of the “onset of the automatic right to a stay of execution and the commencement of the running of the statute of limitations”).

¹⁹⁸ 50 Cal. 4th 932, 237 P.3d 993 (2010).

¹⁹⁹ See 50 Cal. 4th at 936-38, 237 P.3d at 995-97(granting request of capital inmate, whose automatic appeal had been denied in 2007, to defer decision on a cursory, one-issue habeas petition that inmate had filed until the court appointed habeas counsel and counsel had adequate time to investigate factual and legal matters and prepare an amended petition).

²⁰⁰ See, e.g., *In re Medoza*, 2010 Cal. LEXIS 10119 (Oct. 13, 2010) (order granting request to defer consideration of “shell” habeas petition filed on April 11, 2008, pending appointment of counsel and filing of amended petition within 36 months of appointment; conviction and death sentence affirmed on Nov. 29, 2007, in *People v. Mendoza*, 42 Cal. 4th 686, 171 P.3d 2 (2007)); *In re Bramit*, 2010 Cal. LEXIS 10132 (Oct. 13, 2010) (order granting request to defer consideration of “shell” habeas petition filed on Nov. 19, 2009, pending appointment of counsel and filing of amended petition within 36 months of appointment; conviction and death sentence affirmed on July 16, 2009, in *People v. Bramit*, 46 Cal. 4th 1212, 210 P.3d 1171 (2009)) *In re Lewis*, 2010 Cal. LEXIS 10143 (Oct. 13, 2010) (order granting request to defer consideration of “shell” habeas petition filed on Feb. 16, 2010, pending appointment of counsel and filing of amended petition within 36 months of appointment; conviction and death sentence affirmed on July 16, 2009, in *People v. Lewis*, 46 Cal. 4th 1255, 210 P.3d 1119 (2009)).

²⁰¹ The Court in *Morgan* allowed the condemned inmate to file a “shell” habeas petition and to have review deferred until counsel could be appointed and would have sufficient time to investigate and to prepare an amended petition. This approach helps to ensure that inmates can preserve both their statutory right to a state habeas proceeding in which they are represented by counsel and their ability to meet the one-year deadline for filing a federal habeas petition under regular AEDPA rules, a limitation that is tolled during the pendency of a properly filed state habeas petition. While this solution aims to pursue fairness in a certain sense, it also facilitates state delay in the appointment of habeas counsel. See *In re Morgan*, 50 Cal. 4th 932, 946, 237 P.3d 993, 1002 (2010) (Corrigan, J., concurring) (“Because it eliminates any urgency to secure counsel, capital inmates may languish without representation for several years.”). Opponents of certification will argue that the use of this approach is irrelevant to whether California meets a timing requirement for appointments in chapter 154 and, indeed, that the approach avoids rather than fulfills a state's obligations in the *quid pro quo* arrangement contemplated by that chapter.

²⁰² The provision on certification states that there must be “payment of reasonable litigation expenses.” 28 U.S.C. § 2265(a)(1). In issuing amended regulations in March, 2011, the Office of the Attorney General

California does not compensate and reimburse counsel adequately.²⁰³ California can plausibly disagree and, indeed, the compensation rules for habeas counsel²⁰⁴ recently have been characterized as “generous” by Justice Corrigan of the California Supreme Court²⁰⁵ and “lavish” compared to the compensation in Texas, according to leading death-penalty scholars.²⁰⁶ However, opponents of certification will argue that the lack of qualified attorneys willing to take the appointments strongly suggests that they are inadequate²⁰⁷ “in light of the very demanding expectations . . . of California appellate advocacy.”²⁰⁸

California might prevail on certification, but probably not without an extended battle. The decision of the Attorney General to certify or not is appealable to the United States Court of Appeals for the District of Columbia Circuit, and that court is to make *de novo* determinations.²⁰⁹ Because the Court of Appeals may not be in a position to

also concluded that “when a State relies on a compensation incentive to secure competent counsel, chapter 154 is reasonably construed to permit the Attorney General to review the adequacy of authorized compensation.” Office of the Attorney General, *Certification Process for State Capital Counsel Systems*, 76 F. R. 11705, 11709 (Mar. 3, 2011).

²⁰³ The regulations proposed by the Attorney General in early 2011 indicate that compensation will be reasonable if the rates are 1) the same as those provided to habeas counsel in federal court; 2) comparable to those of retained counsel; 3) comparable to those provided on state direct appeal or in state trials; or 4) comparable to the pay provided to attorneys representing the state in state post-conviction proceedings. In California, the state’s best argument may be that the rates given to private attorneys satisfy the third standard. However, inmate counsel will argue that third criteria assumes that the rates paid on direct appeal attract sufficient number of qualified counsel, which, in California is not true. *See supra* text at notes 96-97.

²⁰⁴ *See supra* notes 91 and accompanying text.

²⁰⁵ *In re Morgan*, 50 Cal. 4th 932, 946, 237 P.3d 993, 1002 (2010) (Corrigan, J., concurring).

²⁰⁶ *Steiker & Steiker, supra* note at 1879 (regarding compensation on direct appeal). *See also id.* at 1889 (asserting that the same is true for state habeas).

²⁰⁷ One reason that qualified counsel for state habeas are in short supply may be that there is a widespread sense among such counsel that participation does not produce the best outcome for the client. Qualified lawyers surely know that death-penalty cases do not go forward without inmate counsel. At the same time, as Professor Uelmen reported in 2009, “of 689 state habeas petitions decided by the California Supreme Court since 1978, the court had issued orders to show cause requiring the attorney general to respond to the petition in only 57 cases, and ordered evidentiary hearings before a *pro tem* judge in only 31 cases.” Uelmen, *supra* note 1, at 502. Moreover, “In California, 70% of habeas petitioners in death cases have achieved relief in the federal courts, even though relief was denied when the same claims were asserted in state courts.” California Commission Report, *supra* note 6, at 136. However, because of the 1996 AEDPA amendments to the federal habeas statute, gaining review on the merits of constitutional claims in federal habeas has become more difficult, and, thus, constitutional violations now must often be ignored by the federal courts. These facts could easily suggest to qualified lawyers that participation in the state habeas process will often only accelerate the date of execution. In general, postconviction death-penalty lawyers surely do not enjoy feeling that they are lending legitimacy to a review process that facilitates executions. *See, e.g.,* MICHAEL A. MELLO, *DEAD WRONG; A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT* 271-72 (1997) (explaining the decision of the author, an experienced death-penalty litigator in Florida, “to conscientiously abstain from representing death row prisoners in postconviction proceedings” because of the conclusion that he had become “a component of the death penalty system”). If the sense has grown among qualified counsel that participation makes one more a legitimizing component of the death penalty than a guarantor of substantive justice and due process, monetary incentives that might otherwise have sufficed may have become inadequate to encourage enough participation.

²⁰⁸ *Steiker & Steiker, supra* note 27, at 1879 (regarding direct appeal). *See also id.* at 1889 (asserting that the same high expectations of counsel apply in state habeas)

²⁰⁹ *See* 28 U.S.C. § 2265(b)(3).

determine all of the relevant facts in a dispute that has not come to it from a fact-finding court, it may need to appoint a referee to hold a hearing and resolve certain factual questions. Also, the decision of the Court of Appeals is subject to review in the United States Supreme Court,²¹⁰ and opponents will likely contest a decision to certify to the end.

b. If California Receives Certification, Does it Meet the Additional Requirements for Chapter 154 to Apply? Certification by the Attorney General does not mean that California is automatically entitled to the application of Chapter 154, and, assuming certification, death-penalty opponents will likely petition the federal courts in the Ninth Circuit to find that Chapter 154 does not apply to the state. The statutory provision regarding the application of the Chapter leaves certain questions to the federal courts even after certification.²¹¹ Perhaps most important, section 2261(c) states that the “mechanism,” found to exist through certification, “must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record appointing” state habeas counsel “upon a finding that the prisoner is indigent and accepted the offer.”²¹² If certification occurs, opponents can be expected to argue that California does not meet this provision. They will contend that, if not the certification provision in section 2265(a), the appointment mandate in section 2261(c), must be read in conjunction with the limitation-period provision in section 2263(a) to require that appointments of state habeas counsel be made by the date of “final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.”²¹³ This argument carries some force, in that timeliness of appointments cannot sensibly be declared irrelevant under chapter 154.²¹⁴ Further, opponents will argue that the “all State prisoners” requirement in section 2261(c) means that there must be timely appointments as a general rule before chapter 154 will apply in any individual

²¹⁰ *See id.*

²¹¹ The provision states in pertinent part:

- (a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections(b) and (c) are satisfied.
- (b) Counsel. – This chapter is applicable if –
 - (1) The Attorney General of the United States certified that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and
 - (2) Counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.
- (c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record –
 - (1) Appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;
 - (2) Finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or
 - (3) Denying the appointment of counsel upon a finding that the prisoner is not indigent.

28 U.S.C. § 2261 (with subdivisions d and e omitted).

²¹² *Id.* at § 2261(c).

²¹³ 28 U.S.C. § 2263(a).

²¹⁴ *See* HERTZ & LIEBMAN, *supra* note 197, at 161.

case.²¹⁵ Inmate counsel will note again that habeas counsel appointments in California capital cases are not subject to a state deadline and are no longer routinely made on time under any plausible view of chapter 154.²¹⁶ California can point to a provision stating that only “express” requirements limit the application of chapter 154²¹⁷ and can argue that a timing requirement for counsel appointments is not express. Yet, because such a conclusion would pose “severe – even constitutional problems” if followed across the country,²¹⁸ California will not clearly prevail. Thus, litigation over this issue is likely to pose another obstacle to the prompt application of Chapter 154.

c. Would Chapter 154 Provisions Apply Retroactively to Petitioners Who Have Already Received an Affirmance of Their Death Sentences on Automatic Appeal? Assuming certification, federal courts probably would not apply chapter 154 in broad, retroactive fashion to California inmates already in state and federal habeas review. The 2005 act that amended Chapter 154 stated that, in general, the amendments “shall apply to cases pending on or after the date of enactment of this Act.”²¹⁹ Likewise, the certification provision states that “the date the mechanism [for appointment, compensation and reasonable reimbursement of state habeas counsel] was established shall be the effective date of the certification.”²²⁰ However, application of Chapter 154 to all condemned inmates who were already habeas petitioners at the time of certification would unfairly prejudice many of them. Many such petitioners, for example, would not have complied with the shortened, 180-day filing limitation under Chapter 154, and, therefore, would be subject to immediate dismissal of their petitions and dissolution of any federal stays of execution.²²¹ Likewise, many petitioners would be barred from

²¹⁵ If this argument were not to prevail, a petitioner for whom the appointment was not made timely could also argue, under section 2261 (b)(2), that chapter 154 should not apply in his particular case. For the language of this provision, see *supra* note 211. However, inmates may argue that the very existence of section 2261(b)(2), supports the view that the “all State prisoners” provision in section 2261(c) means that the failure of the state to articulate and generally comply with a timeliness requirement renders invalid the application of chapter 154 to the state as a whole rather than only in cases in which there was non-compliance.

²¹⁶ See *supra* notes 197-99 and accompanying text.

²¹⁷ The provision states:

Only express requirements. – There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

28 U.S.C. § 2265(a)(3).

²¹⁸ HERTZ & LIEBMAN, *supra* note 197, at 161.

²¹⁹ The full provision, Section 507(d), states:

APPLICATION TO PENDING CASES. –

(1) IN GENERAL.—This section and the amendments made by this section shall apply to cases pending on or after the date of enactment of this Act.

(2) TIME LIMITS. –In a case pending on the date of enactment of this Act, if the amendments made by this section establish a time limit for taking certain action, the period of which began on the date of an event that occurred prior to the date of enactment of this Act, the period of such time limit shall instead begin on the date of enactment of this Act.

Pub. L. 109-177, 120 Stat. 192 (March 9, 2006).

²²⁰ 28 U.S.C. § 2265(c).

²²¹ An exception in section 507(d)(2) of the 2005 Act, providing for delayed time limits in pending cases, would not cure this problem in many cases and would have an uncertain application in others. Indeed, the provision, which is quoted *supra* in note 219, adds confusion regarding the retroactive application of chapter 154. For example, if an inmate were awaiting a decision in state habeas when the 2005 Act was enacted, but did not file his federal habeas petition within 180 days of the denial of his state petition, he

litigating unexhausted claims that they could have litigated under normal AEDPA rules.²²² Particularly given the general and confusing language on retroactivity in Chapter 154, federal courts would not likely interpret the statute to be fully retroactive. At the time of the 2005 legislation, the Supreme Court had already indicated the need for Congress to make a “clear statement” regarding the retroactive effects of chapter 154.²²³ Congress would be presumed to be “aware of such obviously pertinent caselaw when fashioning the language” of the 2005 act.²²⁴ In light of this history, the language of the act is probably insufficiently clear.²²⁵ While the provisions might be applied to pending death cases that had not yet been affirmed on automatic appeal in state court, they do not seem likely to be held fully retroactive to all pending habeas cases. This conclusion suggests that even if Chapter 154 were held to apply to California, its provisions would not apply to many of the older cases.

d. Will the Fast-Track Deadlines Be Rejected By Federal Courts on Separation of Powers Grounds? Assuming Chapter 154 were found to apply to California and, further, to apply in a particular case, federal courts might, nonetheless, conclude that the deadlines imposed infringe the separation of powers in the U.S. Constitution.²²⁶ The deadlines are probably not improper *per se*.²²⁷ In some cases, the issues presented could be relatively limited and simple. The application of Chapter 154 in those circumstances might only encourage the affected federal courts to hasten their decision-making by putting aside work on other matters. However, careful reflection can be understood as central to the judicial function.²²⁸ Therefore, “a Congressionally-imposed time limit that requires resolution of a case at a pace that is inconsistent with the measured exercise of the court’s judgment unconstitutionally encroaches upon an Article III court’s judicial powers and responsibility.”²²⁹ Also, the time limits in Chapter 154 are short enough compared to the average time that federal courts in California currently require to handle capital habeas cases that those deadlines probably could not always be met without

would not be protected under the exception from dismissal of his federal petition and from dissolution of any federal stay of execution. This outcome would be unfair to the inmate, given that he had no notice that he was subject to the shortened deadline when he filed his federal petition. Likewise, under the exception, if an inmate filed his federal habeas petition one year after the enactment of the 2005 Act, the chapter 154 time limit for the district court to decide his petition would already have expired, although neither the inmate nor the district court would have had reason to know that the time limits would apply. Further, the exception does not purport to address the retroactive effect of the limitation in chapter 154 on the presentation of claims not presented in state court. *See supra* note 164 and accompanying text.

²²² *See supra* note 164 and accompanying text. For an in-depth discussion of this subject, see HERTZ & LIEBMAN, *supra* note 197, at 170-76 & n. 95.

²²³ *Lindh v. Murphy*, 521 U.S. 320, 328-29 (1997).

²²⁴ HERTZ & LIEBMAN, *supra* note 197, at 208.

²²⁵ *Id.* at 208-209 (“there is strong reason to conclude that Chapter 154 as amended does not contain the required ‘clear statement’ of Congressional intent to impose retroactive effects”).

²²⁶ *See generally* William F. Ryan, *Rush to Judgment: A Constitutional Analyses of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761 (1997).

²²⁷ *See, e.g., Miller v. French*, 530 U.S. 327, 350 (2000) (rejecting challenge to time limits on federal judicial decisions in the Prison Reform Litigation Act, but noting that the time limits could present a separation of powers concern in a complex case where there is insufficient time allowed for a party adequately to present its case or for the court to decide it).

²²⁸ *See* HERTZ & LIEBMAN, *supra* note 197, at 165.

²²⁹ *Id.*

compromising the courts' considered judgments.²³⁰ This conclusion means that Chapter 154 may not ultimately be followed in important respects even in cases where it is deemed to apply.²³¹

In the end, the proposal by which California could accelerate review in federal habeas, like the proposal regarding state habeas, may not effectuate much change in the short term. Unlike the proposal for state review, the federal proposal – to opt-in to the fast-track system -- does not require approval by California voters, including endorsement of a large outlay of state funds. California may well pursue it. However, if California tries, the effort will produce substantial litigation that may stall more than accelerate the movement of older cases through the federal system. At the same time, cases that remain in the state system will move slowly into federal habeas until the continuing delays in the state review process are remedied.

III. Potential System Collapse Through Constitutional Invalidations

This Part returns to the prediction of former Chief Justice George that, without reform, California's death-penalty system could eventually "fall of its own weight."²³² Some have concluded that he meant that the state would face invalidation by the courts of most or all of California's death sentences.²³³ Many observers would surely welcome such action, if not because they are abolitionist because widespread judicial invalidations could spare the state from the mess that has arisen. However, this Part offers a skeptical view that the system will soon collapse in this way. I begin by summarizing the merits and demerits of the most plausible federal constitutional arguments and follow with some of the procedural barriers that condemned California inmates will also confront in using them to challenge appellate delay. I do not focus on state constitutional claims because they appear no more likely to prevail than the federal claims²³⁴ and several of them have been discussed elsewhere.²³⁵

²³⁰ If chapter 154 were applied and followed, there may also be a reduction in the number of qualified counsel willing to accept appointments in the federal habeas cases.

²³¹ *Id.* at 165-66 (asserting that the time limits "would appear to have an unconstitutional effect in any case in which the issues cannot be adequately resolved in the short time frames afforded").

²³² Testimony of Chief Justice Ronald M. George, *supra* note 2, at 38.

²³³ Separate Statement of Commissioners Streeter, Ridolfi, Hersek, and Laurence, *supra* note 8, at 7.

²³⁴ While the California constitution bans "cruel or unusual punishment," *see* CAL CONST. art. I, sec. 6, and mandates due process and equal protection, *see* CAL. CONST. art. 1, sec. 7(a), it also contains a provision stating that the death penalty shall not be deemed to violate any provision in the document. *See* CAL CONST. art. I, sec. 27. This provision was added through a voter initiative in November, 1972, and overturned the decision in *People v. Anderson*, 493 P.2d 880 (Cal. 1972), which had held the death penalty to constitute "cruel or unusual punishment" in violation of the state constitution. In *People v. Frierson*, 599 P.2d 587 (Cal. 1979), the California Supreme Court noted that the 1972 amendment did not divest the judiciary of its traditional "broad powers of judicial review of death sentences to assure that each sentence has been properly and legally imposed and to safeguard against arbitrary or disproportionate treatment." *Id.* at 614. The distinction meant that, while the death penalty itself is not subject to invalidation under the state constitution, individual death sentences could be invalidated based on violations of that document that did not involve the unconstitutionality of the death-penalty laws. This distinction could leave room for challenges to delays in the California review process under the state constitution, most likely under the due process and equal protection clauses. I do not discuss this possibility extensively, focusing, instead, on claims brought under the federal constitution. *But see infra* text at notes 313-14. However, the California

A. The Merits of the Claims

There are two groups of federal constitutional claims that California's condemned inmates are mostly likely to use to challenge appellate delay. The first group focuses on the ban on cruel and unusual punishment under the Eighth Amendment, and the second arise under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.²³⁶ I conclude that all of these claims have problems on the merits for condemned inmates. However, I conclude that the Fourteenth Amendment claims are more likely to gain judicial sympathy for the very reason that they pose less danger of undermining the death penalty in California and across the country.

1. Claims of Cruel and Unusual Punishment

There is no shortage of arguments that California death sentences violate the Eighth Amendment, but these claims face a practical obstacle. In terms of the number of pending death sentences, California is a symbolically important death-penalty jurisdiction,²³⁷ and the most plausible Eighth Amendment arguments for widespread invalidations in California focus on problems that are not unique to the state. To endorse one or more of these claims, the United States Supreme Court would have to be ready to invalidate death sentences on a broad scale not only in the most populous death-penalty state but throughout the country.

There are at least four plausible Eighth Amendment claims for widespread invalidations in California. First, critics contend that the California death penalty system doesn't narrow the death-eligible group enough to avoid the arbitrariness and resulting disproportionality that gave rise to the decision in *Furman*.²³⁸ The United States Supreme Court has never held that the California scheme sufficiently narrows the death-eligible group,²³⁹ and, in theory, the Court could still reject the system on that basis.²⁴⁰

Supreme Court, at least in theory, could depart significantly in applying the state provisions from the analytic approaches followed in applying the federal provisions.

²³⁵ The possibility that initiatives that repeatedly expanded the scope of California's death penalty after 1977 might be found to violate the state constitution is noted in Alarcón & Mitchell, *supra* note 18, at S161-70. For further discussion of this point, see *infra* note 314 and accompanying text.

²³⁶ Some condemned inmates could also raise a Sixth Amendment claim regarding the failure to timely appoint counsel. *See, e.g., Harris v. Champion*, 15 F.3d 1538, 1569-70 (10th Cir. 1994). However, the challenges confronting an inmate raising such a claim would largely mirror those confronting an inmate raising a due process claims. *See infra* Part III(A)(2).

²³⁷ *See Steiker & Steiker, supra* note 27, at 1927 (noting "California's iconic status as a symbolic state" regarding the death penalty).

²³⁸ *See, e.g., Shatz & Rivkind, supra* note 40, at 1287 ("[T]he scheme, on its face, creates far too broad a death-eligible class to comply with *Furman*.").

²³⁹ *See Tuilaepa v. California*, 512 U.S. 967 (1994) (rejecting claim that selection-phase factors were too vague, and assuming, without deciding, that the limiting definition of first-degree murder along with the requirement that a statutory special circumstances be found at the guilt-or-innocence phase adequately narrowed the death-eligible group).

²⁴⁰ Critics argue that the broad applicability of the California death penalty relates to the current dysfunction in California in that it encourages the imposition of more death sentences than the state is able to carry out. *See infra* note 325 and accompanying text.

However, the California system, though applicable to a broad array of murders,²⁴¹ applies more narrowly than the systems at issue in *Furman*. Before *Furman*, the death penalty covered not only all murders but also “less serious offenses such as rape, armed robbery and kidnapping,”²⁴² and there were no constitutional bars against executing retarded and juvenile offenders.²⁴³ Perhaps equally important, the California death penalty does not apply to a broader group of offenders than the schemes in some other death-penalty jurisdictions,²⁴⁴ such as Georgia, where all common-law murders remain capital crimes and where the list of narrowing factors applies to the vast majority of all murders,²⁴⁵ or the federal death penalty, which covers an even broader array of death-eligible offenses.²⁴⁶ A decision to strike down the California death penalty because of its broad applicability would have major implications beyond California.

Second, critics contend that California’s inability to carry out many death sentences undermines the penological value of the death penalty,²⁴⁷ but this problem is also widespread. In *Furman*, Justices Stewart and White, two of the five majority Justices, concluded that the rare imposition of the death penalty relative to its breadth of possible application deprived the penalty of penological justification.²⁴⁸ The rarity in California of executions among those already condemned also largely undermines the penological value of the state’s death penalty.²⁴⁹ The claim is different for Eighth Amendment purposes from the rarity argument used by Justices Stewart and White in *Furman*. The freakishly rare imposition of the death penalty among the death-eligible group in the pre-*Furman* era created doubt that the decisions to impose death represented valid findings that the offenders deserved death.²⁵⁰ Those systems, thus, risked

²⁴¹ See *supra* note 325 and accompanying text.

²⁴² *Tuilaepa*, 512 U.S. at 982 (Stevens, J., concurring).

²⁴³ The Court has, in the last decade, held the death penalty inapplicable to both groups. See *Atkins v. Virginia*, 536 U.S. 304 (2002) (retarded offenders); *Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile offenders).

²⁴⁴ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections On Two Decades Of Constitutional Regulation Of Capital Punishment*, 109 HARV. L. REV. 355, 373-75 & 415 (1995) (noting that few states have narrowed the death-eligible group in a meaningful way since the pre-*Furman* era and even fewer have come close to doing what the authors conclude should be done, which is to narrow the death-eligible class to no greater than “five or ten percent of all murderers”).

²⁴⁵ See DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 102 & 268 n. 31 (1990) (finding that roughly 86% of those persons convicted of murder in Georgia in the years immediately after the state adopted its modern death-penalty statute were death-eligible under that scheme and that over 90% of the people sentenced to death before *Furman* would have been death-eligible under the modern scheme).

²⁴⁶ See generally LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 352-55 (2nd ed. 2008).

²⁴⁷ See, e.g., Steiker & Steiker, *supra* note 27, at 1920-22; Separate Statement of Commissioners Streeter, Ridolfi, Hersek, and Laurence, *supra* note 8, at 7; Colon, *supra* note 115, at 1405-07.

²⁴⁸ See *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); *id.* at 313 (White, J., concurring) (“As the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.”).

²⁴⁹ See *supra* text at notes 25-26.

²⁵⁰ See Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 768 (2005) (asserting that “arbitrariness” undermines “our confidence in the very attribution of desert to the defendants chosen for execution.”).

disproportional death sentences, which violate the Eighth Amendment.²⁵¹ The rarity of executions in California does not cast the same doubt that some of those who are executed do not deserve it. This means that the rare executions that occur in California can be seen as legitimate retribution in the small number of cases in which they occur. The Supreme Court could plausibly conclude, nonetheless, that the California death penalty creates too much suffering for this tiny retributive benefit.²⁵² However, other jurisdictions also sentence many to death but execute very few. Pennsylvania, for example, condemned 399 persons in the post-*Furman* era through 2009, but executed only 3.²⁵³ Tennessee condemned 221 persons, but executed only 6.²⁵⁴ Kentucky condemned 81 persons, but executed only 3.²⁵⁵ To strike down the California death penalty because of the state's failure to carry out death sentences would have major implications for the death penalty across the country.

The same practical problem arises regarding a claim that lengthy incarceration on death row, followed by execution, is cruel and unusual. Some observers have found this so-called "*Lackey*" claim²⁵⁶ compelling.²⁵⁷ For example, Justices Stevens and Breyer have voted to grant certiorari and have endorsed the claim,²⁵⁸ although the United States Supreme Court repeatedly has denied certiorari.²⁵⁹ A problem on the merits arises from the difficulty of attributing blame for delays entirely to the state.²⁶⁰ Justice Thomas, for example, has inveighed against *Lackey* claims, asserting that guilty inmates always share responsibility for delays by pursuing appellate remedies instead of accepting their death sentences.²⁶¹ A court could ultimately view the cause of delay as immaterial, as have several courts outside of the United States.²⁶² However, extraordinary delays between death sentences and executions are now normal across the country.²⁶³ If the question is time between the last death sentence and execution, several states currently have averages in the same range as California.²⁶⁴ Likewise, if the question is total time on death row,²⁶⁵

²⁵¹ See *McCleskey v. Kemp*, 481 U.S. 279, 301 (1987) (describing the invalidation of death sentences in *Furman* as resting on a conclusion that they were "excessive" and not "proportionate to the crime").

²⁵² See *Steiker & Steiker*, *supra* note 27, at 1922 ("[T]he rare and apparently random execution of only a handful of those sentenced to death does little to promote the functions of retribution or incapacitation beyond what sentences of life without parole could offer.").

²⁵³ See Capital Punishment Statistics, 2009, *supra* note 17, at 21, table 20.

²⁵⁴ See *id.*

²⁵⁵ See *id.*

²⁵⁶ See *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., statement respecting denial of certiorari).

²⁵⁷ See, e.g., *Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1998) (Fletcher, J., dissenting from order denying stay of execution) (concluding that execution of inmate after his incarceration on death row for 23 years would violate Eighth Amendment).

²⁵⁸ See, e.g., *Johnson v. Bredesen*, 130 S.Ct. 541, 542 (2009) (Stevens, J., joined by Breyer, J., statement respecting denial of certiorari).

²⁵⁹ Elizabeth Rapaport, *A Modest Proposal: The Aged of Death Row Should be Deemed Too Old to Execute* 1 (2011), electronic copy available at: <http://ssrn.com/abstract=1814043>.

²⁶⁰ See *id.* at 11.

²⁶¹ See, e.g., *Johnson v. Bredesen*, 130 S.Ct. 541, 554 (Thomas, J., concurring in denial of certiorari).

²⁶² See *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J., dissenting from denial of certiorari) (discussing decisions by courts outside of the United States that have concluded that lengthy delay in administering an otherwise lawful death penalty renders execution inhumane).

²⁶³ See *supra* text at note 58.

²⁶⁴ See Capital Punishment Statistics, 2009, *supra* note 17, at 21, table 20. See *supra* text at notes 61-66.

many states with high reversal and retrial rates will have inmates who have lingered on death row even longer than death-row inmates in California. In 2008, Georgia executed Jack Alderman after 33 years on death row.²⁶⁶ In 2010, Alabama executed Thomas Whisenant after more than 32 years on death row.²⁶⁷ A few months later, Texas executed David Powell after almost 32 years on the row.²⁶⁸ To strike down numerous California death sentences based on the *Lackey* claim would logically require the Supreme Court also to strike down scores of death sentences across the country.²⁶⁹

Finally, a similar prudential problem confronts any claim that death sentences, after many years, become untrustworthy as assessments of defendants' deserts and, thus, stale under the Eighth Amendment. The staleness argument is compelling in theory. The Supreme Court has implicitly acknowledged that the capital sentencer's verdict should amount to a judgment about the defendant's moral merit based on all of his life's works.²⁷⁰ For inmates who have spent more than a decade on death row, their moral merits could often change enough that, if retried, a jury would assess their proper punishment as life imprisonment without parole. "People so change with their experiences that one may sensibly conceive of individuals as different people deserving different fates at different points in time."²⁷¹ The life of Stanley Williams, nominated multiple times for the Nobel Peace Prize during his nearly 24 years on California's death row, but ultimately executed, underscores the point.²⁷² However, the average lapse between last death sentence and execution for the nation as a whole is now over fourteen years.²⁷³ For the Court to reject most California death sentences on grounds of staleness is to open for attack most death sentences across the country.

The Supreme Court has given no warning that a majority of the Justices are ready to strike a major blow against the death penalty. In the last two decades, the Court has not invalidated any state's death-penalty system for failure adequately to narrow the death-

²⁶⁵ For purposes of *Lackey* claims, supporters assert that total time on death row is the measure. See, e.g., *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Breyer, J., dissenting from denial of certiorari) ("Petitioner Charles Foster has spend more than 27 years in prison since his initial sentence of death.").

²⁶⁶ See Marcel Berlins, *Torture on death row*, THE GUARDIAN, Sept. 22, 2008, at 17.

²⁶⁷ See Eric Velasco, *Alabama ranks third in executions*, MOBILE REGISTER, Jan. 2, 2011, at C1.

²⁶⁸ See Tony Plohetski & Chuck Lindell, *Powell executed for killing officer*, AUSTIN AMERICAN-STATESMAN, June 16, 2010, at A1; Tony Plohetski & Chuck Lindell, *With Execution a week away, Powell appeals*, AUSTIN AMERICAN-STATESMAN, June 9, 2010, at B1.

²⁶⁹ Professor Rappaport has proposed that the Court should, at least, recognize a more limited "*Lackey* for the Elderly" claim that would apply to older condemned inmates. See generally Rappaport, *supra* note 259.

²⁷⁰ For example, in *Porter v. McCollum*, 130 S.Ct. 447 (2009), the Court reversed a death sentence based on ineffective assistance of counsel because of the failure of counsel to present, among other things, evidence of Porter's heroic military service in the Korean war. The Court found that this evidence was relevant, in part, simply because it was highly honorable action. See *id.* at 455. See also *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (holding that evidence of defendant's good behavior in jail while awaiting trial should not have been excluded from sentencer's consideration, because, although the evidence did not relate to the petitioner's "culpability for the crime he committed," the jury "could have drawn favorable inferences from this testimony regarding petitioner's character").

²⁷¹ Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1184 (1981).

²⁷² See Jennifer Warren & Maura Dolan, *Death Watch at San Quentin; Tookie Williams is Executed; The killer of four and Crips co-founder is given a lethal injection after Schwarzenegger denies clemency. He never admitted his guilt.*, L. A. TIMES, Dec. 13, 2005, at A1

²⁷³ See *supra* text at note 58.

eligible group, for failure to execute enough of those who have been condemned or for allowing too much delay between the first or final death sentence and execution. For the Court to invalidate most or all of California's death sentences on any of these Eighth Amendment arguments would strike a severe blow against the death penalty not only in California but across the country. Such an outcome from the current Court would certainly cause widespread astonishment.

2. Claims Regarding Due Process and Equal Protection

Claims challenging appellate delay under due process and equal protection principles could produce more limited consequences and, for that reason, could be more appealing to the Supreme Court as a way to confront the California problem. Unlike in non-capital cases, there is good reason to believe that many death-row inmates prefer delay to prompt resolution of their appeals. An approach focused on the Fourteenth Amendment would help the Court limit relief to condemned inmates who actually are aggrieved by appellate delay. However, to the extent that this approach succeeds in restricting claims, it also puts only minor pressure on California to reform. The conundrum reflects, as commentators have noted, that there is no good constitutional remedy for the problem of appellate delay.²⁷⁴

Although the Supreme Court has not weighed in, lower federal courts have concluded that appellate delay, at least in limited circumstances, can amount to a constitutional violation.²⁷⁵ The federal constitution “apparently does not require the states to afford a right to appellate review of a criminal conviction.”²⁷⁶ However, the Supreme Court has stated that when a state provides the right, “the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses.”²⁷⁷ Lower federal courts have concluded that a substantial and inexcusable retardation of the state post-conviction review process can deny due process, where there is a showing of significant prejudice.²⁷⁸ Likewise, the lower federal courts, interpreting more generalized Supreme Court holdings,²⁷⁹ have concluded that inexcusable failure timely to appoint counsel to an indigent condemned inmate on automatic appeal could sometimes violate equal protection.²⁸⁰

²⁷⁴ See Marc Arkin, *Speedy Criminal Appeal: A Right Without A Remedy*, 74 MINN. L. REV. 437, 442-43 (1990) (asserting that, without enactment of a specific statutory remedy, “the defendant’s right to a speedy criminal appeal lacks an effective remedy”).

²⁷⁵ See generally WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE 907-08 (2009).

²⁷⁶ *Id.* at 907.

²⁷⁷ *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).

²⁷⁸ See, e.g., *Rheurk v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980); *United States v. Pratt*, 645 F.2d 89 (1st Cir.) *cert. denied*, 454 U.S. 881 (1981); *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir.), *cert. denied*, 469 U.S. 1033 (1984); *Burkett v. Cunningham*, 826 F.2d 1208, 1221 (3rd Cir. 1987); *Cody v. Henderson*, 936 F.2d 715, 719 (2d Cir. 1991); *United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993)(en banc), *cert. denied*, 510 U.S. 1182 (1994); *Harris v. Champion*, 15 F.3d 1538, 1558 (10th Cir. 1994).

²⁷⁹ See *Douglas v. California*, 372 U.S. 353 (1963) (requiring states to provide counsel to indigent criminal defendants on their first appeal of right); *Ross v. Moffitt*, 417 U.S. 600 (1974) (holding that counsel need not be appointed for indigent defendants on discretionary appeals and for certiorari petitions to the U.S. Supreme Court).

²⁸⁰ See, e.g., *Harris v. Champion*, 15 F.3d 1538, 1567-68 (10th Cir. 1994).

Uncertainty remains over how courts should define a violation, and over the proper remedies.²⁸¹ On this score, it is helpful to distinguish between three situations. The first concerns condemned inmates who wait for their appeals and habeas review to occur and who can show litigative prejudice from excessive and inexcusable appellate delay. The second concerns death-row inmates who wait but who cannot establish litigative prejudice. The third concerns condemned inmates whose cases are stalled in state review and who file claims to challenge the delay at that time. The definition of a violation and the view as to proper remedies may vary in these different settings.

As for the first category, according to lower court decisions, condemned inmates should be able to challenge appellate delay through due process and equal protection claims as part of their state appeals, where they can show litigative prejudice to their cases.²⁸² This means, for example, that a separate claim that cannot be proven but might have been, but for the delay, can give rise to reversal as a matter of due process.²⁸³ For example, a defendant might present a claim of improper jury selection that requires further fact-finding but on which further fact-finding would be fruitless because, due to the excessive and inexcusable appellate delay, witnesses have become unavailable. The state high court could reverse the conviction on due process grounds due to prejudicial appellate delay, although the definition of what is excessive or inexcusable state delay and the degree to which the defendant must establish the prejudice could be disputed.²⁸⁴ Cases involving such litigative prejudice from appellate delay are unusual but not so rare as to present only a theoretical problem.

The second inmate, who waits for his appeals and habeas review and experiences excessive and inexcusable state delay but can show no litigative prejudice, probably cannot obtain relief from his conviction and sentence. Courts typically have rejected the idea that appellate delay, without litigative prejudice, is grounds for reversal of the underlying criminal judgment.²⁸⁵ Where the appeal is otherwise properly resolved

²⁸¹ The Supreme Court has not addressed whether due process and equal protection claims challenging appellate delays should be: 1) analyzed according to the test for due process claims regarding pre-indictment delays, *see United States v. Marion*, 404 U.S. 307 (1971); or 2) analyzed according to the four-factor balancing test articulated in *Barker v. Wingo*, 407 U.S. 514 (1972), for Sixth Amendment, speedy trial claims challenging pre-trial but post-indictment delays;²⁸¹ or 3) analyzed in a way that regards appellate delay (or more particularly, appellate delay in capital cases) as a unique problem. For pre-indictment delay, litigative prejudice must be shown, along with evidence that the government was seeking to gain a tactical advantage through delay or, perhaps, that it acted with reckless disregard. *See United States v. Lovasco*, 431 U.S. 783, 795 & n. 17 (1977). Under *Barker*, courts apply a four-factor balancing test in which a showing of litigative prejudice can be important but is not essential. The four factors are: 1) the length of the delay; 2) the reason for the delay; 3) assertion of the right by the defendant; and 4) prejudice to the defendant. *See* 407 U.S. at 530-32.

²⁸² *See, e.g., Simmons v. Beyer*, 44 F.3d 1160, 1169 (3rd Cir. 1995).

²⁸³ *See id.* at 1160.

²⁸⁴ *See id.*

²⁸⁵ *See, e.g., United States v. DeLeon*, 444 F.3d 41, 57 (1st Cir. 2006) (“The prejudice must be such as to render the proceedings ‘fundamentally unfair.’”); *Diaz v. Henderson*, 905 F.2d 652, 653-54 (2^d Cir. 1990) (requiring litigative prejudice and concluding that, despite lengthy appellate delay, there was none present, because petitioner “could not conscientiously claim that the appeal would have had a different result absent the delay”); *United States v. Johnson*, 732 F.2d 379, 382-83 (4th Cir. 1984) (concluding that despite appellate delay, “where, as here, the appeal has been heard and found lacking in merit there is not any sound reason to order defendant’s release”).

against the defendant, there is no cognizable prejudice that would justify reversal.²⁸⁶ Whether this scenario should be understood as presenting the absence of a constitutional violation or, instead, a violation but one for which relief is simply unavailable, is debatable.²⁸⁷ On either view, the outcome means little pressure would arise from such cases for California to address its delay problem.

The third inmate, whose case is stalled in state review and who files a challenge at that point, presents the most difficult scenario for defining the constitutional violation and determining the remedy. I assume for now that the claim could be considered in federal habeas.²⁸⁸ An initial problem for most condemned inmates, assuming they could establish excessive and inexcusable appellate delay, would be their inability to establish litigative prejudice. Even if such prejudice existed, the inmate's ability to prove it would be impaired because appellate review has not occurred. The most in the way of prejudice that he might show is a particularized anxiety from the delay, a desire to move forward and an allegation of substantial grounds for reversal. Assuming a court in this context found the demonstration persuasive – and the possibility of an improperly convicted inmate mired for years in appellate delay should not be forgotten²⁸⁹ -- the proper remedy would remain unclear. The federal court could allow the inmate to proceed directly to federal habeas on any federal claims challenging his conviction and death sentence²⁹⁰ or grant him a conditional reversal of his conviction or sentence unless the state court moved forward expeditiously with his state appeals.²⁹¹ The inmate would often not prefer proceeding directly with federal habeas review, despite avoiding any further exhaustion requirement, because of the remainder of difficult procedural obstacles and review standards that he would face in federal habeas.²⁹² Also, this course would put little pressure on California to reform. At the same time, to grant a conditional reversal of the conviction or sentence could encourage strategic challenges to delay by inmates who actually prefer delay to prompt resolution of their appeals. On this score, capital inmates generally are not in the same position as non-capital inmates. Given this problem, the remedy provided might only be that the condemned inmate could proceed with federal habeas.

B. Additional Obstacles To Relief in Federal Court

²⁸⁶ See, e.g., *Diaz v. Henderson*, 905 F.2d 652, 653 (2nd Cir. 1990).

²⁸⁷ As to the possibility that there are some constitutional violations for which no recovery is possible, see *id.* at 654 (noting that some constitutional violations do not have a remedy because, for example, the defendant is immunized). See also *infra* Part III(B).

²⁸⁸ But see *infra* text at note 294.

²⁸⁹ See *supra* note 207, regarding the number of condemned inmates from California who secure relief in state appeals or in federal habeas.

²⁹⁰ See, e.g., *Harris v. Champion*, 15 F.3d 1538, 1567 (10th Cir. 1994) (noting the propriety of such a procedure); *Heiser v. Ryan*, 951 F.2d 559, 564 (3rd Cir. 1991) (directing federal district court to proceed to the merits of petitioner's federal claim where state court had inexcusably failed to resolve it after several years); *Burkett v. Cunningham*, 826 F. 1208, 1218 (3rd Cir. 1987) (endorsing district court's conclusion that exhaustion was excused based on inexcusable and excessive state delay).

²⁹¹ In the non-capital context in the pre-AEDPA era, the Ninth Circuit Court of Appeals imposed a conditional release order when confronted with stalled state proceedings. See *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1990). See also *Harris*, 15 F.3d at 1566-67 (endorsing such an order in this context).

²⁹² See, e.g., *infra* note 294 and accompanying text.

In addition to the possible problems for condemned inmates with the merits of the Eighth and Fourteenth Amendment claims, they also face procedural obstacles to gaining effective relief on them in federal court. Various doctrines would limit their ability to pursue the claims under the federal habeas statute, 28 U.S.C. section 2254, and under the federal civil rights statute, 42 U.S.C. section 1983. For condemned inmates to gain meaningful relief on any of the claims in federal court, the United States Supreme Court would probably first have to grant *certiorari* on review from the California Supreme Court and rule in favor of the inmate.²⁹³ Other inmates whose claims had not become final on automatic appeal in state court could then potentially pursue the same challenge.

The problem with current attempts to pursue any of the claims in federal habeas is that the 1996 AEDPA amendments to the habeas statute allow the reversal of a state court decision only if it was “contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.”²⁹⁴ The most plausible Eighth Amendment claims for widespread invalidation of California death sentences do not meet this test.²⁹⁵ There is no clearly established law from the Supreme Court to indicate that the California death-penalty system violates the Eighth Amendment for failure adequately to narrow the death-eligible group, for failure to execute enough of those who have been condemned or for allowing too much delay between the first or final death sentence and execution. The Due Process and Equal Protection challenges to state appellate delay present the same problem.²⁹⁶ There is no clearly established law from the Supreme Court regarding when appellate delay violates the Fourteenth Amendment.²⁹⁷ Thus, federal courts currently are unable to overturn a state court ruling on any of the claims in federal habeas even if the courts are convinced that a constitutional violation has occurred.

The problems for condemned inmates in obtaining meaningful relief on any of the claims under section 1983 are also daunting.²⁹⁸ First, an inmate cannot seek “immediate

²⁹³ The inmate would probably have to wait to raise the claim in state habeas, after having suffered substantial delay on direct appeal. If denied on the challenge by the California high court in state habeas, the inmate could petition for *certiorari* review in the United States Supreme Court. However, *certiorari* review is discretionary, and the time-limitation for filing a federal habeas petition would be running – one year in a non-opt-in circumstance and 180 days in an opt-in circumstance. The Supreme Court in a non-opt-in case has held that the tolling period in 28 U.S.C. § 2244(d) for state habeas does not include *certiorari* review. See *Lawrence v. Florida*, 549 U.S. 327, 332 (2007). The Court, in *Lawrence*, also noted that the analogous provision for opt-in cases, § 2263(b)(2), even more clearly excludes *certiorari* review from the tolling period. See 549 U.S. at 334. Thus, in either context, the inmate would need to file contemporaneously a petition for *certiorari* in the Supreme Court and a habeas petition in the federal district court.

²⁹⁴ 28 U.S.C. § 2254(d)(1).

²⁹⁵ See *supra* text accompanying notes 237-73.

²⁹⁶ See *supra* text accompanying notes 274-92.

²⁹⁷ Two of the U.S. Courts of Appeal, including the Ninth Circuit, have so held in the context of death-penalty cases. See *Hayes v. Ayers*, 632 F.3d 500 (9th Cir. 2011); *Reed v. Quarterman*, 504 F.3d 465 (5th Cir. 2007).

²⁹⁸ The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action

or speedier release from confinement” or the reversal of a death sentence or a judgment that “necessarily implies the unlawfulness of the State’s custody” or death sentence.²⁹⁹ Habeas is the exclusive federal remedy for collateral challenges seeking such relief.³⁰⁰ This proscription forecloses action in a section 1983 suit on the Eighth Amendment claims and on any claim seeking reversal of a conviction or sentence on the Fourteenth Amendment challenges. As for damages or equitable relief on the Due Process and Equal Protection claims, immunity doctrines would foreclose a suit brought directly against states and their “alter ego” entities.³⁰¹ Likewise, state legislators have absolute immunity against damages and equitable relief when they “act legislatively within a ‘traditional legislative capacity.’”³⁰² Judges have absolute immunity from damages liability when they “act judicially within or ‘in excess of jurisdiction,’” although “not ‘in clear absence of all jurisdiction.’”³⁰³ Judges also have absolute immunity against injunctive relief “unless a declaratory decree was violated or declaratory relief was unavailable.”³⁰⁴ Judges also may act legislatively and, in that context enjoy absolute immunity against damages and equitable relief.³⁰⁵ Where judges do not have absolute immunity, they have qualified immunity against damages.³⁰⁶ Further where judges do not have absolute immunity against equitable relief, federal courts might, nonetheless, apply abstention doctrines to reject suits on equitable or institutional grounds.³⁰⁷ Appointed counsel also is not available to an indigent inmate for a 1983 action, and the likelihood of a significant attorney-fee award is even more remote than the likelihood of prevailing on the merits.³⁰⁸ This maze of doctrines leaves little, if any, room for a death-

brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

²⁹⁹ *Skinner v. Switzer*, 131 S.Ct. 1289, 1293 (2011), quoting *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005). Consistent with this limitation, an action under section 1983 is not necessarily foreclosed if the conviction or sentence has already been “reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.” *Heck v. Humphrey*, 512 U.S. 477, 489 (1994).

³⁰⁰ *See id.*

³⁰¹ II SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983*, 9-181 (2010). Immunity is based in part on the Eleventh Amendment, which on its face seems only to apply to non-citizens of the defendant state, but which the Supreme Court has interpreted also to bar a suit in federal court by citizens of the defendant state. *See Hans v. Louisiana*, 134 U.S. 1 (1890). Inmates, in theory, could pursue a 1983 action in state court to avoid the Eleventh Amendment immunity. However, neither the state nor its “alter ego” entities qualify as a “person,” and, for that reason, cannot be sued in state court. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989).

³⁰² II NAHMOD, *supra* note 301, at 7-4 & 7-266 – 2-269. *See Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 734 (1980).

³⁰³ II NAHMOD, *supra* note 301, at 7-4 – 7-5. *See Pierson v. Ray*, 386 U.S. 547, 553 (1967).

Prosecutors also “are absolutely immune from damages liability for their advocacy conduct related to criminal proceedings.” *Id.* at 7-157. *See Imber v. Pachtman*, 424 U.S. 409, 427-30 (1976).

³⁰⁴ 42 U.S.C. §1983.

³⁰⁵ *See Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 734 (1980).

³⁰⁶ *See* II NAHMOD, *supra* note 301, at 7-4.

³⁰⁷ *See* III NAHMOD, *supra* note 301, at 9-298 – 9-299.

³⁰⁸ *See generally id.* at 10-1 – 10-217.

row inmate to gain relief on any of the claims. Indeed, section 1983 actions by death-row inmates aimed at undermining their death sentences are rare.³⁰⁹

In the final analysis, Californians should not expect federal constitutional challenges to produce wide-scale invalidations of California's death sentences. The United States Supreme Court could bring about that result by granting certiorari from a decision by the California Supreme Court, rather than in federal habeas, and ruling in favor of an inmate's broad constitutional claim. A claim based on appellate delay would probably have to be raised in state habeas, after delay has occurred on direct appeal, and then pursued directly in the United States Supreme Court.³¹⁰ However, the Supreme Court has shown no interest since *McCleskey v. Kemp*,³¹¹ in challenges that would widely undermine the validity of existing death sentences.³¹² The Supreme Court could surprise us, but such a ruling from the current Court would, indeed, surprise. The alternative is that the California Supreme Court could become so concerned about its inability to manage its workload that it could find the delays³¹³ or, perhaps previous initiatives expanding the scope of the state's death penalty law,³¹⁴ to violate the state constitution. The resulting flood of claims might also not be easy to manage, and the state high court could have invited and then granted such a claim long ago, which creates doubt that the state court will pursue it now. Yet, absent some extraordinary action by one of the two high courts, there will not be widespread judicial invalidations of death sentences as a remedy to the malfunction described by former Chief Justice George.

IV. Will Californians Vote for Reform?

Whether or not the courts invalidate many of California's pending death sentences, the way forward with the death penalty in the state is uncertain. Especially if the courts do not spare California citizens from the immediate predicament through widespread invalidations, the most likely vehicle for reform would seem to be a state-wide voter referendum. Such a measure can be placed on the ballot through legislation or as an initiative endorsed by a specified number of voters.³¹⁵ In this Part, I address the

³⁰⁹ *But see* *Skinner v. Switzer*, 131 S.Ct. 1289 (2011) (holding that death-row inmate had properly invoked section 1983 in suit for DNA testing of evidence that might exculpate him regarding capital crime).

³¹⁰ *See supra* note 293 and accompanying text.

³¹¹ 481 U.S. 279 (1987) (rejecting, by a 5-4 vote, Eighth and Fourteenth Amendment claims based on a study that revealed a high risk that racial prejudice influenced capital selection in Georgia).

³¹² The Court's recent categorical decisions holding the death penalty inapplicable to certain groups of offenders did not constitute the kind of broad invalidation that would be involved here. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding the death penalty inapplicable to retarded offenders); *Roper v. Simmons*, 543 U.S. 551 (2005) (proscribing the use of the death penalty against juvenile offenders); *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008) (declaring the death penalty excessive for child rape).

³¹³ *See supra* note 234.

³¹⁴ Two leading commentators have recently raised the question whether one or more of the initiatives, could be declared invalid because of deficiencies in the voter information guides concerning their costs, *see Alarcón & Mitchell, supra* note 18, at S161-63, or because they impermissibly impaired essential government functions. *See id.* S163-70.

³¹⁵ In the case of a voter initiative, the state constitution provides that a measure "may be proposed by presenting to the Secretary of State a petition that sets forth the the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the constitution, of the votes for all candidates for governor at the last gubernatorial election." CAL. CONST., art. II, sec. 8.

possibilities for achieving serious change through the referendum process. First, I isolate and highlight three, non-abolitionist accounts about the cause of the current malfunction that will vie for public acceptance. I contend that none of the accounts are either clearly wrong or particularly persuasive. There is no winning version because there will always be an unhappy tension between competing and important objectives for California when it comes to administering a robust death penalty. Yet, I also present the weakness in the case for abolition (or near abolition), acknowledging it as another form of malfunction in the use of the death penalty. I conclude that the choice for Californians is best understood as one among highly imperfect options. Particularly given the difficulty in the referendum process of achieving a negotiated compromise, the chances seem modest, at best, that Californians will coalesce in the near future behind a particular solution.

A. Non-Abolitionist Accounts of Causes and Solutions

Three competing, non-abolitionist accounts about the source of California's death-penalty malfunction already have emerged in public discussions. The first, an administrative account, is one that I have addressed previously. It asserts that the central problem is largely inadequate judicial resources to administer the review system fairly and effectively. The second, a death-penalty control perspective, portrays the problem as far too many death sentences, a result of death-penalty statutes that are too broad and local District Attorneys who do not act with enough self-restraint. The third, the pro-death penalty account, portrays the problem as a judicial system that has shown far more caution and concern for condemned inmates than is needed to have a fair death penalty. Each of these perspectives implies a proper road to resolution. Yet, from a skeptical perspective, none of the accounts are especially compelling, which suggests that none will prevail with a majority of California voters.

1. Not Enough Judicial Resources

One account, as we have seen, portrays the principal cause of California's death-penalty debacle as inadequate judicial resources.³¹⁶ Presently, there is not enough money to provide competent lawyers to represent all of the death-row inmates before the California Supreme Court. Likewise, the Court lacks sufficient time and staff to promptly handle all of the death-penalty matters. The result is a bottleneck of capital cases before the Court and an inability to benefit from the federal fast-track federal habeas system.

On this view, as we have seen, the solution is more resources for capital cases. More funding would help to provide more lawyers for condemned inmates, to support an increased workload for the Office of the Attorney General, and to enable a dispersal of review responsibilities from the state Supreme Court to the Courts of Appeal. The California Commission estimated that, for several years, the extra annual cost to provide more counsel for inmates and to provide more needed support for the Office of the Attorney General would approximate \$85 million.³¹⁷ This sum could reduce delays in

³¹⁶ See Part II.A, *supra*.

³¹⁷ See California Commission Report, *supra* note 6, at 82 ("The added charges to the State general fund would include \$6 million for the State Public Defender, 470 million for the California Habeas Corpus

the resolution of cases from an average of over 20 years to the national average of 12 years.³¹⁸ Also, additional money would be needed for several years to support increased staff in the Courts of Appeal, an amount that is uncertain. Although the state legislature has been unwilling to approve these additional expenditures, voters could endorse them, along with increased taxes, through the initiative process.

While an appealing version for some observers, its principal weakness lies in the assumption that the marginal benefits of a modest number of executions are worth the sum that must be paid to achieve them.³¹⁹ The Commission estimated in 2008 that California already pays substantially more than \$126.2 million per year for its death-penalty system. In 2011, Judge Alarcón & Paula Mitchell concluded that the costs to state and federal taxpayers together totaled more than \$184 million. If these estimates are somewhat accurate, increasing the annual outlay by more than \$85 million would require taxpayers to spend more than one billion dollars for California's death-penalty system in a very short period. This figure also would not account for many of the costs to the state and federal judiciary from time and energy spent on capital cases that could be devoted elsewhere.

The costs of California's death-penalty system are already high and arguably should not go higher. Some will note that there are potential savings factors from the death penalty that are not considered in previous cost estimates, such as the potential that the death sanction encourages guilty pleas in first-degree murder cases and, thus, saves the costs of more trials and appeals, or that the death penalty can sometimes deter and, thus, save the lives of some potential murder victims and the expense involved with prosecuting those would-be murderers.³²⁰ Likewise, some will say that retributive justice is too important to be forestalled by cost considerations.³²¹ However, the extent to which abolition in California would either reduce the number of guilty pleas in first-degree murder cases or increase the number of sentences below life imprisonment without parole appears impossible to assess accurately in advance.³²² In any event, the costs of maintaining the current death penalty would appear to dwarf the costs of any increase in non-capital trials. Likewise, the extent to which the death penalty has a marginal deterrent effect compared to life imprisonment without parole under the California

Resource Center, \$6 million to the Attorney General, and \$3 million to the State Supreme Court for appointed counsel.”).

³¹⁸ See *id.* at 83.

³¹⁹ I have previously explained why the reforms also might not be as effective as proponents contend, particularly in the first few years of implementation. See *supra* text at notes 172-78 and 188-231.

³²⁰ Dissent to California Commission Report, *supra* note 178 at 3(asserting that in considering various resource savings from eliminating the death penalty it is also important to consider, among other things, “deterrence that will save lives”).

³²¹ See California District Attorneys Association, *Prosecutors' Perspective on California's Death Penalty* 48-49 (2003) available at <http://www.cdaa.org/WhitePapers/DPPaper.pdf>.

³²² There apparently are only two studies on this plea-bargain effect, and they do not focus on California. See Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment*, 8 AM. L. & ECON. REV. 116, 140 (2006) (concluding that the death penalty “appears to encourage sentence bargains,” but “does not encourage charge bargains”); Kent S. Scheidegger, *The Death Penalty and Plea Bargaining to Life Sentences* (2009) (study with “significant limitations” finding data consistent with view that repeal of the death penalty would likely result in either more trials or more bargains involving lesser sentences), available at <http://www.cjlf.org/papers/wpaper09-09.pdf>.

system will always remain a contested matter,³²³ and the deterrence question becomes even more difficult if one assumes that some of the savings that would be achieved from limiting the death penalty could be spent on other efforts to achieve deterrence. Moreover, while most California citizens desire to see deserved death sentences imposed against the worst murderers, the rational approach is to accept that costs do matter and that at some point costs exceed benefits.³²⁴

2. Too Many Death Sentences

An alternative, non-abolitionist view asserts that the underlying problem with California's capital-punishment system is the over-production of death sentences, both because the death-penalty statutes cover too many homicides and because county District Attorneys pursue the sanction too often.³²⁵ On this view, an excess of death prosecutions has produced a large number of death-penalty cases at the appellate stages. The high volume of death cases, in turn, has produced the major bottlenecks in the appointment of counsel for automatic appeals and state habeas and in the resolution of briefed cases by the California Supreme Court.

Acceptance of this account leads to a group of solutions that need not require substantial increases in annual spending. First, the death penalty statutes should be narrowed to apply to a reduced group of murders, and existing death sentences that do not conform to the revised standards should be commuted. Narrowing has long been proposed by academics and judges as a way to minimize the number of disproportional

³²³ Until a decade ago, academic research left enough doubt about the deterrent effect of the death penalty for murder as a general offense that the prevailing view was against that view. See ROGER HOOD, *THE DEATH PENALTY; A WORLDWIDE PERSPECTIVE* 230 (2002). In the last decade, several new studies have measured the deterrent effect, with mixed conclusions. Using large data sets from all states, several studies have found a strong deterrent effect from executions. See, e.g., Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shephard, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003); H. Naci Mocan & R. Kaj. Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. L. & ECON. 453 (2003); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163 (2004). Others have found no robust evidence of deterrence. See Lawrence Katz, Steven D. Levitt & Ellen Shustorovich, *Prison Conditions, Capital Punishment and Deterrence*, 5 AM. L. & ECON. REV. 318, 319 (2003) (“Even if a substantial deterrence effect does exist, the amount of crime rate variation induced by executions may simply be too small.”). One study found a brutalization effect – an increase in murders – from executions in death-penalty states with low execution rates. See Joanna M. Shepard, *Deterrence versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 206-07 (2005). In the data sets from California, there was no evidence that executions have deterred murder, although the possibility of deterrence would change as circumstances change. See Joanna Shepard, *Why not all executions deter murder*, CHRISTIAN SCI. MONITOR DEC. 14, 2005, at 9.

³²⁴ See McCartin, *supra* note 45, at A23 (op-ed by former “hanging judge” from Orange County, California, asserting that money spent on death-penalty system would be better spent on other programs).

³²⁵ Judge Alex Kozinski, among others, long ago advocated that states reduce the application of the death penalty to a narrow category so that they only send to death row “the number of people we truly have the means and the will to execute.” Kozinski & Gallagher, *supra* note 29, at 3. The narrowing remedy has also been endorsed as a plausible solution by other leading commentators on California's death-penalty debacle. See, e.g., Alarcón & Mitchell, *supra* note 18, at S218-20; California Commission Report, *supra* note 6, at 60-71; Uelmen, *supra* note 1, at 507-10.

death sentences,³²⁶ but it can also reduce the sheer number of death sentences. A prominent proposal, issued by a bipartisan committee formed by the Constitution Project, from Washington, D.C., calls for limiting death-eligibility to only five offenses.³²⁷ They include murder of a peace officer, murder at a correctional facility, intentional murder of two or more persons, murder by torture, and murder of witnesses or other involved persons by someone under investigation for or charged with a crime.³²⁸ Notably, the death penalty for felony murder would be eliminated.

Alternative or additional legislative approaches to limit county District Attorneys are also possible. For example, each county could be made responsible for funding a much greater portion of the state costs of its death sentences, including the costs expended for courts, state lawyers and inmate counsel throughout appellate and habeas review.³²⁹ Currently, counties do not internalize all of the huge expense associated with post-trial review. By requiring a county, for example, to post a bond of multiple millions of dollars with the state before proceeding with a capital case, the state could change the incentive structure facing District Attorneys and reduce the number of death sentences. Alternatively, the state could enact legislation to require, for example, that the state Attorney General's Office authorize the filing of any capital case.³³⁰

While a compelling story for many observers, its weaknesses lie both in the proposition that California has produced an excessive number of death sentences and in the notion that the number of death sentences can be appropriately reduced by narrowing the death penalty and confining the discretion of District Attorneys. First, by any measure, California has had one of the lower death sentencing rates among all death-penalty states in the country.³³¹ It has produced a large number of death sentences in the modern era – although less than Texas and Florida³³² -- because it is the most populous state with, correspondingly, the largest number of murders.³³³ One recent study found that the state's death-sentencing rate per 1,000 known murder offenders was only 13, which placed it in a tie with Virginia at twenty-fifth and twenty-sixth among thirty-one

³²⁶ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (“If Georgia were to narrow the class of death-eligible defendants to [categories of highly aggravated murders], the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.”).

³²⁷ See The Constitution Project Death Penalty Initiative, *Mandatory Justice: The Death Penalty Revisited* 10 (2005), available at: <http://www.constitutionproject.org/pdf/30.pdf>. This proposal was cited in support of a similar alternative presented by the California Commission in 2008. See California Commission Report, *supra* note 6, at 61-62.

³²⁸ See *id.*

³²⁹ See generally Adam M. Gershowitz, *Pay Now, Execute Later: Why Counties Should Be Required to Post A Bond To Seek The Death Penalty*, 41 U. RICH. L. REV. 861 (2007) (presenting a valuable proposal to use a bond posting requirement, with potential later remittances, to encourage county prosecutors to choose capital cases carefully and prosecute them so as to avoid reversals).

³³⁰ The California Constitution provides that the Attorney General “shall have direct supervision over every district attorney.” CAL. CONST. art. V, sec. 13.

³³¹ See *supra* text at note 41.

³³² See *supra* text at notes 48-49.

³³³ In 2009, for example, California led the nation in homicides, with 1972, while Texas was second, with 1325. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES – 2009, tbl. 20 (2009), available at http://www2.fbi.gov/ucr/cius2009/data/table_20.html (last visited June 28, 2011).

death-penalty states with at least ten death sentences during the period of the study.³³⁴ Further, the significant death-sentencing counties in California, as a group, do not appear to have imposed the death penalty at abusive rates. A separate study found that, over a ten-year period, during which the average capital sentencing rate relative to homicides in California was .89 per hundred, the ten counties with the most number of death row inmates varied in their capital sentencing rates between a low of .58 and a high of 2.44.³³⁵ The county with, by far, the largest number of death sentences -- Los Angeles -- also had the lowest death-sentencing rate among the group. In several other counties, with small numbers on death row, the rate was higher, while in many more rural counties and in San Francisco, there were no death sentences.³³⁶ These variances, while significant from some vantage points, do not suggest that a few of California's District Attorneys have largely filled death row due to a lack of restraint.³³⁷

The proposed remedies also pose problems. Narrowing the death-eligible group of murderers with bright-line rules will tend to produce arbitrary and inequitable outcomes, because narrowing will exclude many horrendous murders.³³⁸ Consider, for example, that the proposal from the Constitution Project does not necessarily cover a sexual assault and murder of a small child, a contractual murder, or a calculated killing of a victim or other witness to an armed robbery. Why should these despicable, premeditated crimes be left out while the murder of a peace officer and the intentional murder of two or more persons are included? The inability to articulate bright-line rules that capture some equitable notion of the worst murders has kept the United States Supreme Court from attempting to articulate those rules under the Eighth Amendment.³³⁹ The right rules

³³⁴ See *supra* note 41.

³³⁵ The breakdown was as follows:

	County	Number of Inmates on Death Row as of Jan. 28, 2004	Death Sentencing Rate Per Hundred Homicides
1.	Los Angeles	194	.58
2.	Riverside	54	2.44
3.	Orange	49	1.61
4.	Alameda	43	1.02
5.	Sacramento	34	1.30
6.	San Bernardino	34	.99
7.	San Diego	32	.75
8.	Santa Clara	27	1.84
9.	Kern	23	1.51
10.	San Mateo	16	1.29

See Glenn L. Pierce & Michael L. Radelet, *The Impact Of Legally Inappropriate Factors On Death Sentencing For California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 26-27, tbls. 7 & 8 (2006).

³³⁶ *Id.* at 27-28, tbl. 8.

³³⁷ The capital sentencing rates and the variances among counties are also of limited meaning, because homicides do not equate with death-eligible murders, and the occurrence of a homicide does not mean there is a known offender. However, the data is unavailable for known, death-eligible offenders.

³³⁸ See Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2129-32 (2004).

³³⁹ The Court has, instead, merely required states themselves to articulate aggravating factors that render a murderer death-eligible and that narrow the death-eligible group. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 432-33 (1980) (plurality opinion); *id.* at 434-34 (Marshall, J., concurring). However, “[w]hile the Court’s guided discretion cases, like *Godfrey*, invalidated ‘broad and vague’ aggravating factors that

cannot be found.³⁴⁰ Likewise, the effort to restrict prosecutorial discretion by requiring counties to pay most of the costs of a death sentence or by involving the Attorney General's Office in decisions to pursue death raise a variety of complications. The problems include, for example, the undue burden that could be foisted on poorer, rural counties to pay in cases of state-wide interest or the potential inability of the Attorney General's office to make better decisions than local District Attorneys would make. From a skeptical perspective, these proposals seem unlikely to lead to a precise plan that will produce a majority consensus among voters about how to maintain and administer a robust death penalty.

3. Too Much Solicitude For Condemned Inmates

The third, non-abolitionist account asserts that the central, underlying problem with California's capital-punishment system is a state Supreme Court that has shown too much solicitude toward condemned inmates and their lawyers.³⁴¹ On this view, the state high court goes too far in requiring that appointed capital counsel have substantial experience handling capital cases and additional qualifying credentials.³⁴² This account asserts that the demanding appointment standards are the reason for the shortage of counsel.³⁴³ Likewise, the Court allows capital counsel to file long pleadings, typically 250-350 pages, covering an exhaustive number of claims, some minor, but which the Court then feels obliged to consider.³⁴⁴ The Court is also liberal with time to allow counsel to conduct state habeas investigations and to prepare papers. Three years is the current time presumptively granted counsel from the date of appointment to file a habeas pleading.³⁴⁵ Even when they don't need that much time, counsel representing the most death-deserving inmates will have little reason not to let the case bog down for the full three years. Likewise, the Court too readily considers claims on the merits presented in successive state habeas petitions. The high courts in Texas, the leader in modern

rendered defendants eligible for the death penalty, the Court never restricted the number of aggravating factors that statutes could contain or the proportion of convicted murderers who could be rendered eligible for capital punishment." Carol S. Steiker, *Furman v. Georgia: Not an End, But a Beginning*, in *DEATH PENALTY STORIES* 95, 119 (John H. Blume & Jordan M. Steiker, eds., 2009).

³⁴⁰ See *McGautha v. California*, 402 U.S. 183, 204 (1971) ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express those characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.").

³⁴¹ See Kent Scheidegger, *A Massive But Dubious Look at California's Death Penalty*, Crime & Consequences Blog (June 20, 2011), available at <http://www.crimeandconsequences.com/crimblog/>.

³⁴² See *id.*

³⁴³ See *id.*

³⁴⁴ See Alarcón & Mitchell, *supra* note 18, at S187 (noting that the average opening brief is 250 to 350 pages and includes 30 to 40 claims, not including *pro forma* challenges included in virtually all such petitions); Scheidegger, *supra* note 44, at 66 ("In California, it is not unusual for briefs to reach 400 pages in capital cases.").

³⁴⁵ See, e.g., *People v. Wilson*, 2010 Cal. LEXIS 7418 (Cal. Sup. Ct., July 21, 2010) (order appointing habeas counsel and noting that the court's policies regarding appointment of counsel in death-penalty cases state that any "petition for writ of habeas corpus will be presumed to be filed without substantial delay if it is filed . . . within 36 months" of the date of counsel's appointment).

executions, and Virginia, a very distant second,³⁴⁶ do not follow such procedures, and those states have managed not only to carry out many more executions than California, but to do so, on average, more rapidly.³⁴⁷ Thus, on this view, the bottleneck of cases in California stems from a level of judicial solicitude to condemned inmates and permissiveness toward their attorneys that goes well beyond what is needed to achieve an acceptable level of protection against erroneous executions.

Acceptance of this account leads to obvious solutions that differ greatly from those presented by the proponents of the other accounts. On this view, the Supreme Court of California needs to expand the pool of attorneys who are deemed qualified for appointments.³⁴⁸ The Court should also enforce a much shorter page limit on inmate appellate briefs and habeas petitions, perhaps 50 pages, which would force counsel to focus on the limited number of claims that present plausible arguments for reversal.³⁴⁹ The Court should reject on procedural-default grounds any claims presented beyond the page limit.³⁵⁰ The Court also should greatly shorten the time permitted for habeas counsel to file the petition to, say, one year.³⁵¹ The Court itself also needs to focus in each case on the few issues identified by counsel as serious. Likewise, except in cases involving extraordinary circumstances, such as a demonstrated showing of actual innocence, the Court should deny successive state habeas petitions on procedural grounds. The citizens of California could try to express their support for these changes by rejecting ballot measures that call for more funding for capital cases or a narrowing of the death-penalty statutes. Although forcing all of the changes on the high court would not be appropriate or possible, citizens could also try to promote a ballot initiative that imposed a few of the reforms, such as filing time-limits and procedural-default rules for state habeas.

This perspective has appeal for many observers,³⁵² but it also has problems. Loosening the competency standards regarding appointment of state habeas counsel could endanger an effort to opt-in to the fast-track federal habeas system.³⁵³ The more fundamental weakness lies in the assumption that there is a correct answer about how careful the California Supreme Court should be in death-penalty cases and, further, that other state high courts have hit upon the right answer. What is the acceptable error-rate for death cases? Is it ten percent? Five percent? Two percent? Perfection? The death penalty is irreversible, and the United States Supreme Court has acknowledged that it is

³⁴⁶ In the modern era, Texas had executed 471 inmates and Virginia had executed 108 by July 18, 2011. See Death Penalty Information Center, *Facts About the Death Penalty* 3 (last visited July 18, 2011), available at http://www.deathpenaltyinfo.org/state_by_state.

³⁴⁷ For the average time lapses between final death sentence and execution in California, Texas and Virginia, see *supra* text accompanying notes 61-65.

³⁴⁸ See Scheidegger, *supra* note 341.

³⁴⁹ See *id.*

³⁵⁰ See Scheidegger, *supra* note 41, at 66-67.

³⁵¹ See Kent Scheidegger, *Fixing California's Death Penalty Appeals*, Crime & Consequences Blog (July 15, 2010), available at <http://www.crimeandconsequences.com/crimblog/2010/07/>.

³⁵² One area in which the California high court has been seen as too lax, even by those who have not otherwise criticized it for the delays, is in the time it allows for the perfecting of capital trial records. See, e.g., Steiker & Steiker, *supra* note 27, at 1901 (“But other decisions, such as the court’s willingness to tolerate and even invite delay in the perfecting of capital records on appeal, suggests some ambivalence about capital sentences ripening into executions.”).

³⁵³ See *supra* notes 189-92 and accompanying text.

qualitatively unique, not only in severity but in the profound moral questions that it raises.³⁵⁴ To have a death penalty is to be caught up against a heightened concern that we are doing something morally dangerous, and morally repugnant when we err. The possibility of error in a death case also applies not only to the question of guilt on all elements of the capital crime but to the highly subjective question posed at the sentencing trial – whether the defendant deserves death.³⁵⁵ Since the end of the Rose Bird era, in 1987,³⁵⁶ the California Supreme Court has reversed relatively few death sentences or capital convictions.³⁵⁷ Thus, its actions in appointing competent counsel, providing counsel plenty of time to prepare and affording counsel wide berth to present claims seem best understood as an effort to ensure a low error rate on the guilt and desert questions.

The leading execution states also may not present good examples of how the California Supreme Court should administer California’s death penalty.³⁵⁸ Professors Carol and Jordan Steiker have noted that the representation in capital cases before the Texas Court of Criminal Appeals has been of much lower quality, overall, than the representation in capital cases before the California Supreme Court.³⁵⁹ In Texas, even in death-penalty cases, “it is common for counsel to waive oral argument on direct appeal,”³⁶⁰ and for “appointed state habeas lawyers” to fail “to conduct meaningful investigation.”³⁶¹ Likewise, “[f]ew state courts have matched Texas in its willingness to sustain death sentences in cases with demonstrably deplorable representation” by trial counsel.³⁶² One example is the case of Calvin Burdine, in which the Texas court found no reason to reverse, although Burdine’s appointed counsel, an elderly lawyer, slept during parts of the trial.³⁶³ The Texas high court also has repeatedly denied the existence of constitutional problems with the Texas capital sentencing statute, resisting the rulings

³⁵⁴ See, e.g., *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980)(explaining that “death is a different kind of punishment from any other which may be imposed in this country”).

³⁵⁵ The defense case should typically include a broad picture, encompassing the defendant’s “childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feedings.” See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 324 (1983); Louis D. Billionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 302-03 (1991) (noting the broad ambit of permissible defense evidence at the capital sentencing trial).

³⁵⁶ See Uelmen, *supra* note 1, at 498 (noting that, from 1978 through 1986, the Rose Bird Court “affirmed only 8% of the death judgments it reviewed,” while during the following ten years, the Court “affirmed 94% of the death judgments it reviewed”).

³⁵⁷ See, e.g., Steiker & Steiker, *supra* note 27, at 1900 (noting that the affirmance rate after the Rose Bird era has remained “comparatively high” and that, “[i]n 2005, for example, the California Supreme Court affirmed all twenty-six capital sentences challenged on direct appeal”).

³⁵⁸ See Scheidegger, *supra* note 41, at 65 (noting that Texas has had “more capital cases than California,” although in Texas, as in California, “a single court reviews all capital cases”); Scheidegger, *supra* note (asserting that “Virginia . . . has shown the nation that capital cases can be resolved in a reasonable time without cutting back the scope of the death penalty and without huge expenditures”).

³⁵⁹ See Steiker & Steiker, *supra* note 27, at 1876-1890.

³⁶⁰ *Id.* at 1877.

³⁶¹ *Id.* at 1888. See also *Editorial: Poor defendants deserve competent appellate lawyers*, AUSTIN AMERICAN-STATESMAN, Dec. 5, 2002, at A16 (“The Texas Court of Criminal Appeals fails regularly to ensure that death row inmates get competent lawyers to handle their appeals.”).

³⁶² Steiker & Steiker, *supra* note 27, at 1896.

³⁶³ See *Ex parte Burdine*, 901 S.W.2d 456, 457-58 (Tex. Crim. App. 1995)(en banc) (Maloney, J., dissenting). Burdine’s conviction was later held invalid in federal habeas corpus review. See *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, *Cockrell v. Burdine*, 535 U.S. 1120 (2002).

of the United States Supreme Court.³⁶⁴ The result is that “scores of inmates have been executed despite strong . . . claims” that Texas juries were not properly allowed to decide whether they deserved the death penalty.³⁶⁵ In addition, three capital inmates in Texas have had their convictions overturned by the federal courts and been freed after those convictions were upheld on direct appeal and in state habeas by the state high court.³⁶⁶ Also, at least six Texas inmates have been executed whose guilt is now widely doubted.³⁶⁷ The most well-known is Cameron Willingham, whose case was featured in a major article in the *New Yorker*, in 2009.³⁶⁸ The Presiding Judge of the Texas court was also publicly humiliated for declining in 2007 to keep the clerk’s office open past 5:00 p.m., to receive a late filing from condemned inmate, Michael Wayne Richard, executed later the same evening.³⁶⁹ The *Houston Chronicle*, not known as liberal, editorialized in 2010 that, with that action, she “has made Texas justice an international joke.”³⁷⁰

The Supreme Court of Virginia, while not generating the same level of capital controversy as the high court in Texas, may also not be the right example for the California Supreme Court when it comes to administering a death penalty. Virginia has achieved, by far, the best execution-to-death-sentence ratio in the country in the modern era.³⁷¹ However, the task of the Virginia Supreme Court in death penalty cases is not comparable in important ways to that of the California Supreme Court.³⁷² Its federal

³⁶⁴ See Steiker & Steiker, *supra* note 27, at 1890-95.

³⁶⁵ *Id.* at 1895.

³⁶⁶ See, e.g., *Martinez-Macias v. Collins*, 810 F. Supp. 782 (W.D. Tex. 1991) *aff’d*. *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992); *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995), *aff’d*. *Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996); *Graves v. Dretke*, 442 F.3d 334 (2006). Federico Martinez Macias, freed by the work of Skadden Arps attorneys Douglas Robinson, Randall Coyne and others, was exonerated by a grand jury after the reversal in federal habeas. See Adam Cohen, *The Difference a Million Bucks Makes*, TIME, JUNE 19, 1995, at 43. Ricardo Aldape Guerra was freed and returned to his native Mexico when the state declined to go forward with his case after his reversal in federal habeas. See *Mexican Long Held in Texas Murder Wins His Freedom*, N.Y. TIMES, April 17, 1997, at A16. Anthony Graves was freed after 18 years of incarceration when the local prosecutor concluded that he was innocent and moved to dismiss the charges after the federal habeas reversal. See Brian Rogers & Cindy George, *AFTER YEARS ON DEATH ROW, ‘HE’S AN INNOCENT MAN’ Prosecutor exonerates Graves, says no evidence ties him to ‘92 massacre graves: St. Thomas, UH got involved*, HOUSTON CHRON., OCT. 28, 2010, at A1.

³⁶⁷ See Death Penalty Information Center, *Executed But Possibly Innocent* (last updated June 30, 2011)(discussing cases of executed Texas inmates Carlos DeLuna, Ruben Cantu, David Spence, Gary Graham, Claude Jones, and Cameron Willingham), available at <http://www.deathpenaltyinfo.org/executed-possibly-innocent>.

³⁶⁸ See David Grann, *Trial by Fire; Did Texas execute an innocent man?* THE NEW YORKER, Sept. 7, 2009, at 42, available at http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann

³⁶⁹ See Editorial, *Double standard Special court should reconsider dismissal of complaints against Judge Keller*, HOUSTON CHRON., Nov. 5, 2010, at B8 (noting that a state Commission on Judicial Conduct had found judicial misconduct by Judge Keller, and had reprimanded her with a Public Warning, but that a special three-judge review panel had reached the “absurd conclusion” to dismiss the charges on the technicality that that the Commission had only three options –public censure, recommendation of removal, or dismissal of the charges).

³⁷⁰ *Id.*

³⁷¹ In the post-*Furman* era through 2009, Virginia sentenced 150 persons to death and executed 105 of them. Only 6 condemned inmates died other than by execution, and 13 remained on death row. See Capital Punishment Statistics, 2009, *supra* note 17, at 21, tbl. 20.

³⁷² California’s failure to execute anyone in the modern era before 1992 is also attributable in part to events that had no counterpart in Virginia – the work of the Rose Bird Court through 1987 in reversing almost all

habeas oversight comes from the conservative Fourth Circuit Court, which rarely reverses death sentences, not the Ninth Circuit Court, which has strong liberal elements and reverses death sentences regularly.³⁷³ Virginia also handles many fewer death sentences than California, which eases the task of finding counsel for appointments. In the same period through 2009 that California imposed 927 death sentences and Texas imposed 1,040, Virginia imposed only 150.³⁷⁴ Moreover, Virginia, unlike California, has not made any serious effort to opt-in to the federal habeas fast-track system and, on that score, does not have the same interest in setting meaningful competency standards for appointed counsel in state habeas.³⁷⁵

The Virginia Supreme Court also hardly deserves a pass on criticism for its work in capital cases. Until the United States Supreme Court intervened and reversed, the Virginia court authorized the execution of an allegedly retarded man.³⁷⁶ Virginia also would have erroneously executed Earl Washington had the governor not stepped in and commuted his death sentence at the last minute.³⁷⁷ The Virginia judicial system also failed five other inmates who should never have received death sentences and were spared only by commutations.³⁷⁸ Likewise, the Virginia Supreme Court unanimously sustained a death sentence in the face of deplorable trial representation in *Williams v. Taylor*,³⁷⁹ where the United States Supreme Court later reversed for ineffective

death sentences that came before it. See Uelmen, *supra* note 38, at 237 (noting that the California Supreme Court during this period affirmed only 5 of 64 death sentences).

³⁷³ See, e.g., James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2060 n. 105 (2000) (noting that “the Fourth Circuit” has “the lowest reversal rate[] in capital cases of . . . any . . . federal circuit court in the nation”); Brooke A. Maters, *4th Circuit Judges Steering to the Right; Supreme Court Likes Appeals Panel’s Direction but Keeps It From Pushing Too Far, Experts Say*, WASH. POST, JULY 5, 2000, at B1 (noting “4th Circuit’s toughest-in-the-nation standard for reviewing capital cases”); Diarmuid F. O’Scannlain, *A Decade of Reversal: The Ninth Circuit’s Record In The Supreme Court Since October Term 2000*, 14 LEWIS & CLARK L. REV. 1557, 1561 (2010) (noting that the Ninth Circuit’s record in the Supreme Court regarding reversals is poor compared to other circuit courts and reveals “the Supreme Court’s concern that vague standards, like ineffective assistance of counsel, are being misused by lower-court judges sympathetic to the claims of defendants, especially in death penalty cases”).

³⁷⁴ See Capital Punishment Statistics, 2009, *supra* note 17, at 21, tbl. 20.

³⁷⁵ Virginia attempted to opt-in shortly after the passage of AEDPA, but federal courts found that it had not met the prerequisites. See *Wright v. Angelone*, 944 F. Supp. 460, 466-67 (E.D. Va. 1996) (finding that Virginia had only promulgated “loose guidelines” regarding counsel competency that did not require any experience in capital cases); *Breard v. Netherland*, 949 F. Supp. 1255, 1262 (E.D. Va. 1996) (concluding that Virginia had not established a mechanism by statute or rule for appointment, compensation and payment of reasonable expenses); *Satcher v. Netherland*, 944 F. Supp. 1222, 1241-42 (E.D. Va. 1996) (concluding, among other things, that Virginia had not established by statute or rule a mechanism for appointment, compensation and payment of reasonable expenses).

³⁷⁶ See *Atkins v. Virginia*, 536 U.S. 304 (2002).

³⁷⁷ See *Editorial: Preventing a repeat of injustice*, VIRGINIAN-PILOT, July 16, 2007, at B8.

³⁷⁸ Between 1990 and 2005, three Governors stepped in 6 times to spare inmates, on several occasions due to concerns about their innocence. In addition to Earl Washington, Governors commuted the sentences of William Saunders, Joseph Giarratano, Joseph Payne, Herbert Bassette, and Calvin Swann. See *DEATH SENTENCES COMMUTED IN VIRGINIA*, RICHMOND TIMES DISPATCH, Nov. 15, 1998, at A17; *Editorial: Kilgore exaggerates death-penalty claims*, VIRGINIAN-PILOT, July 19, 2005, at B10.

³⁷⁹ 529 U.S. 362 (2000). For the decision of the Virginia Supreme Court, see *Williams v. Warden of Mecklenberg Corr. Ctr.*, 487 S.E.2d 194 (Va. 1997).

assistance, despite the procedural obstacles posed in federal habeas.³⁸⁰ The federal ruling means that the Virginia court's decision was "indefensible as a matter of precedent."³⁸¹ Indeed, the "unusually severe disparities between the funding and resources available to prosecution and defense" in Virginia,³⁸² the Virginia high court's willingness to countenance poor lawyering, and the unavailability of federal habeas relief except "in truly exceptional cases"³⁸³ may largely explain Virginia's touted efficiency.³⁸⁴ For these same reasons, we cannot determine how many of the Virginia executions were erroneous in the sense that good representation could have changed outcomes on the question whether the defendant deserved the death penalty. Concerns about "the fairness of the death penalty"³⁸⁵ may help explain why Virginia's use of the sanction has fallen in recent years.³⁸⁶ Those concerns certainly played a central role in the recent decision of the *Roanoke Times* to call for abolition.³⁸⁷

B. The Abolition Option

The abolition option – for those who do not think the death penalty is inherently wrong or valueless – would build on the view that malfunction is an inevitable aspect of California's relationship with the death penalty. On this view, there is no clear cause and solution for the state's current capital malfunction, because there is no obviously correct way to balance 1) the death-sentencing rate, 2) measures to minimize error, and 3) the expense of a death-penalty system. For someone with strong opposition to the current system who could accept a compromise but sees no prospect of achieving an acceptable one, abolition could be the lesser evil.

A central weakness with this lesser-evil argument for abolition, however, is that it calls for sacrifice. A majority of state citizens still appear to support the death penalty in some circumstances.³⁸⁸ To abolish the sanction or to limit its application to the point of near abolition is, for them, to lose the ability to express with a special form of banishment that some heinous murderers deserve our utmost condemnation and to forego, as well, the possibility that the sanction could sometimes marginally deter horrible crimes.

³⁸⁰ On remand, once the available mitigating evidence became apparent, the local prosecutor agreed not to pursue the death penalty. See Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 379 (2008).

³⁸¹ *Id.* at 335.

³⁸² *Id.* at 306-07.

³⁸³ *Id.* at 335.

³⁸⁴ See James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1858 & n. 57 (2000) (making the case that "laxer error detection takes place" in Virginia capital cases).

³⁸⁵ See *Editorial: End Virginia's death penalty*, ROANOKE TIMES, March 20, 2011, at Horizon Editorial p. 2 ("There is no way to design a perfect system of justice, and the ultimate penalty cannot be undone after a mistake.").

³⁸⁶ Virginia executions have tailed off in recent years. The state executed 9 inmates in 1997, 13 inmates in 1998, 14 inmates in 1999, and 8 inmates in 2000. The numbers then began dropping off and are now fairly low. The state executed no one in 2007, 4 inmates in 2008, 3 inmates in 2009, and 3 inmates in 2010. See N.A.A.C.P. Legal Defense Fund, *Death Row U.S.A. Fall 2010*, 20-37 (April 1, 2010) available at <http://naacpldf.org/death-row-usa>.

³⁸⁷ See *Editorial*, *supra* note 385.

³⁸⁸ See *supra* note 31 and accompanying text.

California also has not had the kind of shocking experience with the death penalty that might cause most voters to abandon it for its moral danger.³⁸⁹ There are no serious public controversies over the innocence of any of the thirteen men who have been executed by California in the modern era. Also, the California judicial system itself corrected the earlier errors in the three post-*Furman* cases of death-row inmates who were thought to be not guilty of the homicides underlying their death sentences.³⁹⁰ Other kinds of moral problems, such as evidence of race-of-victim discrimination,³⁹¹ geographical disparities among counties³⁹² or the unfairness of appellate delay to some condemned inmates,³⁹³ may not strike most non-abolitionist voters as particularly alarming, even if those problems would cause widespread concern among, for example, legislators. In California, unlike in other states that have recently abolished the death penalty—New Jersey, New Mexico and Illinois³⁹⁴--the voters themselves, not their elected representatives, must decide to abolish.³⁹⁵ This reality may disfavor abolition, as a majority of the voting public often supports the death sanction even when a majority of their elected representatives have concluded that it should be abandoned.³⁹⁶

The argument that abolition could eventually prevail, however, stems from the unlikelihood that Californians, through the referendum process, can find an enduring balance in the choices to be made about how to administer a robust death penalty. Just as the referendum process in the state may be an obstacle to abolition, it is an obstacle to negotiation and nuanced compromise. Assuming some form of narrowing in the use of the death penalty or some blending of various reforms could produce a more sensible approach in California than the current system provides, those kinds of closely calibrated

³⁸⁹ These kinds of emotion-laden concerns tend to be influential in changing opinions. See Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NORTHWESTERN U. L. REV. COLLOQUY 355, 363 (2008) (“Indeed, the modern political debate over the death penalty has been transformed not by new data about racial disparities or deterrence, but by concerns about convicting the innocent.”).

³⁹⁰ Those three men are Ernest (Shujaa) Graham, Troy Lee Jones, and Oscar Lee Morris. Graham was convicted and sentenced to death in 1976, but was later acquitted after the California Supreme Court reversed his conviction. See *People v. Allen*, 590 P.2d 30 (Cal. 1979). Jones was convicted and sentenced to death in 1982, but the charges were dismissed after the California Supreme Court reversed his conviction. See 917 P.2d 1175 (Cal. 1996). Morris was convicted and sentenced to death in 1983, but the charges were dismissed after the California Supreme Court first vacated his death sentence, see *People v. Morris*, 756 P.2d 843 (Cal. 1988), and later ordered an evidentiary hearing concerning allegations of his innocence. For information on each case, see Death Penalty Information Center, The Innocence List, available at http://www.deathpenaltyinfo.org/state_by_state (last visited July 8, 2011).

³⁹¹ See Pierce & Radelet, *supra* note 335, at 21-22 (finding that, in California, from 1990 to 1999, “2.1% of the offenders suspected of killing non-Hispanic whites were sentenced to death, compared to .68% of those suspected of killing non-Hispanic African American, .48% of those suspected of killing Hispanics, and 1.5% of those suspected of killing non-Hispanics of other races”).

³⁹² See *id.* at 36 (concluding that “[t]he whiter the county, the higher its death sentencing rate will be”).

³⁹³ See Alarcón & Mitchell, *supra* note 18, at S174-79 (discussing examples of such cases).

³⁹⁴ In Maryland, the legislature recently decided to limit the death penalty to certain murders in which there is “biological evidence such as DNA, videotaped evidence of a murder, or a videotaped confession.” Alarcón & Mitchell, *supra* note 18, at S210.

³⁹⁵ For the reasons, see *supra* note 22 and accompanying text.

³⁹⁶ See, e.g., ANDREW HAMMEL, ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE 3 (2010) (noting that abolitionist movements prevailed in Germany, Great Britain and France “not by changing public opinion, but rather by shielding the capital punishment issue from the vararies of the public mood and stiffening the spines of legislators who privately disdained the death penalty but feared a public backlash if they voted to abolish it”).

changes are not easily achieved through a public referendum. Unlike the legislative process, the referendum process does not allow for give-and-take during continuing debate that could lead to a finely-tuned bargain. The choices presented to voters must be limited, and to prevail, an option must be relatively simple and acceptable precisely as presented. Many Californians will support abolition because they find the death penalty inherently wrong or valueless. For those who are ambivalent about the death penalty, abolition, despite its negatives, is easily understood and carries huge monetary savings. Thus, while the prospect seems doubtful in the near term, California voters could eventually come to see that choice, in a short list of simple alternatives, as the least problem-ridden option.

V. Conclusion

Imposing a death sentence in California has become symbolism with a staggering price. From 1973 to 2009, California sentenced 927 persons to death but executed only thirteen.³⁹⁷ No executions have occurred since 2006.³⁹⁸ The primary reason is appellate delay, with reversals a decidedly secondary factor. Average delays between death sentences and executions are among the worst in the nation and in some cases will pass 30 years.³⁹⁹ The cost appears to have been enormous. The Alarcón and Mitchell study estimates that taxpayers have spent more than \$4,000,000,000 on the California death penalty since 1978 and more than \$184,000,000 in 2009 alone.⁴⁰⁰

While continuation of the current approach seems senseless, reform in this decade may have to come from California voters. Despite arguments from some that the judiciary will soon strike down California's death penalty due to the delays, I have offered a more skeptical view. I have argued that Californians should not expect the courts, in the near future, to save the state from the mess that has arisen.⁴⁰¹ Given that relief also does not seem likely to come from the legislature or through commutations by the governor,⁴⁰² any change would have to come through the referendum process.

I have also argued, however, that achieving change through a public referendum will not be easy, because multiple accounts regarding the cause of the malfunction will vie for public acceptance.⁴⁰³ There are three principal, non-abolitionist accounts that have emerged: 1) California has devoted inadequate resources to its death-penalty system; 2) The state has sentenced too many people to death, and 3) The California Supreme Court has shown too much solicitude toward capital inmates and their lawyers. I have argued that none of these perspectives are clearly wrong but none are especially compelling. I also have argued that there can be no compelling account simply because there is no correct way to reconcile the competing objectives that confront California in its effort to administer a robust death penalty fairly, efficiently and frugally. Yet, I have argued that the remaining alternative preferred by many --abolition --- is also best understood in this context as a malfunction in the use of capital punishment. Most California voters do not

³⁹⁷ See Capital Punishment Statistics, *supra* note 17, at 21, tbl. 20.

³⁹⁸ See *supra* text at notes 67-74.

³⁹⁹ See Alarcón & Mitchell, *supra* note 18, at S184-85.

⁴⁰⁰ See *id.* at S109.

⁴⁰¹ See *supra* Part III.

⁴⁰² See *supra* text at notes 21-22.

⁴⁰³ See *supra* Part IV.

currently believe that the death penalty is inherently wrong or without marginal value. In those circumstances, abolition will only win when many of those voters come to view the death-penalty system as unavoidably hemmed in by economic, cultural and legal constraints and plagued by the kinds of trade-offs that make repeal the least flawed choice among only flawed options.

There is reason to doubt that a majority of California voters are ready to give up on the death penalty. In 1986, California voters famously ousted Chief Justice Rose Bird and Justices Joseph Grodin and Cruz Reynoso from the state high court for what was generally viewed as an undue willingness to strike down death sentences.⁴⁰⁴ Through 2000, the voters also have repeatedly endorsed, through initiatives, expansion in the application of the current death-penalty law.⁴⁰⁵ Likewise, in 2006, the California Assembly declined to endorse a two-year moratorium on executions to allow for study of the fairness of the system, despite similar actions in New Jersey, Maryland, and Illinois.⁴⁰⁶ A recent Gallup poll also found that 70% of California citizens who were surveyed support the death penalty, at least in the abstract.⁴⁰⁷ This evidence suggests that, in the near-term, the state faces not abolition but additional years of debate about the death penalty, as rival perspectives of how to reach an elusive sweet spot in its administration play out.

The argument that voters could give up on the death penalty in the near future begins with the acknowledgment that there is already more ambivalence about capital punishment in California than in an aggressive executing state, like Texas.⁴⁰⁸ As Carol and Jordan Steiker have noted, the very existence of the current system in California, which has produced many death sentences but few executions, may both reflect and mediate this ambivalence.⁴⁰⁹ The ambivalence also finds proof in the 2010 election of the current Governor, Jerry Brown, and the current Attorney General, Kamala Harris, who are both personally opposed to capital punishment.⁴¹⁰ As the former District Attorney for San Francisco, Harris announced that she would not use the death penalty, and during six years in office, she kept that promise.⁴¹¹ State-wide voters in Texas almost surely would not presently elect a person with such strong and public views about the death penalty to represent the state in the post-trial prosecution of all death-penalty cases.⁴¹² Moreover, while California has not faced the kind of disturbing possibility of

⁴⁰⁴ See *supra* note 48.

⁴⁰⁵ See Alarcón & Mitchell, *supra* note 18, at S1314-58.

⁴⁰⁶ See Carolyn Marshall, *California Assembly Sidelines a Moratorium on Executions*, N.Y. TIMES, Jan. 20, 2006, at A12.

⁴⁰⁷ See *supra* note 31.

⁴⁰⁸ See Steiker & Steiker, *supra* note 27, at 1927.

⁴⁰⁹ See *id.*

⁴¹⁰ See Williams, *supra* note 4, at A1.

⁴¹¹ See Phil Willon, *CALIFORNIA ELECTIONS: Attorney general; An atypical prosecutor; Kamala Harris stresses prevention as well as punishment*, L. A. TIMES, Oct. 20, 2010, at A1.

Of course, Governor Brown also was previously elected to serve as Attorney General, preceding Kamala Harris in that office, although his personal opposition to the death penalty was well known.

⁴¹² In the past decade, Virginians did elect Tim Kaine as their Governor, although he had stated that he was personally opposed to the death penalty, and, during his tenure, several executions occurred after he denied commutation requests. See Ian Urbina, *A Sniper Who Killed 10 Is Executed in Virginia*, N.Y. TIMES, Nov. 11, 2009, at 20.

error in the use of the death sanction that precipitated abolition in Illinois,⁴¹³ a potentially moving factor in the state is expense. Estimates regarding the enormous costs of maintaining the current system in California, most recently by Judge Alarcón and Paula Mitchell,⁴¹⁴ may change some opinions.⁴¹⁵

The essence of the death-penalty problem facing California voters can largely be understood from a single case. Rodney Alcala, at age 66, was resentenced to death in California, in 2010, after having already spent three decades on death row.⁴¹⁶ The chances that California will execute him are low. Nearly seven hundred condemned inmates wait ahead of him on the row. Yet, the jury at his sentencing trial deliberated only an hour before recommending the death penalty again.⁴¹⁷ He was convicted of five grisly murders, all more than 30 years ago, of young women or girls whom he had sexually assaulted, strangled and killed.⁴¹⁸ Alcala did not admit guilt. He expressed no remorse. He antagonized the family of the victims, law enforcement, the jury, his jailers and the courts.⁴¹⁹ He also had forced the state to spend untold millions on his previous capital prosecutions, which had produced successive death sentences for the murder of twelve-year-old Robin Samsoe, both reversed.⁴²⁰ Few people in California appear to deserve execution more. Of course, Alcala may well not be executed, and for millions less, California could have announced that he would die of old age under a sentence of life imprisonment without parole. Yet, when the death penalty exists, the urge is strong to condemn someone like Alcala, despite the huge expense and although the chances of

⁴¹³ See John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011, at A18 (noting that “heated debate over the bill had focused on more than a dozen death row prisoners who were found to have been wrongfully convicted”).

⁴¹⁴ See Alarcón & Mitchell, *supra* note 18, at S62-S109. See also Carol J. Williams, *Death penalty costs California \$184 million a year, study says*, L.A. TIMES, June 20, 2011, at A1 (discussing the Alarcón & Mitchell study).

⁴¹⁵ An April, 2011, statewide poll found a large margin of majority support for converting all then-existing death sentences in the state to sentences of life imprisonment without parole under certain circumstances. See *supra* note 31.

⁴¹⁶ See Paloma Esquivel, *Alcala victims' families endure a life sentence; As the killer gets the death penalty for a third time, relatives recount their losses*, L.A. TIMES, March 31, 2010, at AA1.

⁴¹⁷ See ., Paloma Esquivel, *Alcala gets death penalty; “He’s a monster,” one juror said of the man who killed a girl, 12, and four women*, L.A. TIMES, March 10, 2010, at AA1.

⁴¹⁸ See Esquivel, *supra* note 416, at AA1.

⁴¹⁹ See, e.g., Paloma Esquivel, *supra* note 417, at AA1 (noting that Alcala, who represented himself in the third trial, played a shocking portion of the movie, “Alice’s Restaurant,” during closing argument); Christin Pelisek, *Rodney Alcala’s Final Revenge: Begged to spare victims’ families at trial, the alleged serial killer ratchets up the suffering*, L.A. WEEKLY, Feb. 25, 2010, at 1 (noting that Alcala, acting as his own counsel, showed no remorse, displayed a “rambling and unprepared defense” and antagonized those involved by “[holding] up the trial for weeks, acting like an absent-minded professor”) available at <http://www.laweekly.com/2010-02-26/news/rodney-alcala-s-final-revenge/>; Larry Welborn, *Serial killer Alcala had filed claims for candy bars*, PLAYBOY, O.C. REGISTER, March 25, 2011, at 1 (noting that Alcala, while in the Orange County jail for his third trial, filed more than two dozen claims, alleging, among other things, “that he was occasionally denied television in the jail dayroom, denied access to his subscription to Playboy magazine, and . . . did not get two candy bars one Thanksgiving when other inmates were given candy bars” and further noting that he sought money damages on grounds that he was carelessly treated for “a toe-nail fungus.”), available at http://articles.ocregister.com/2011-03-25/news/29193266_1_rodney-alcala-serial-killer-alcala-orange-county-jail.

⁴²⁰ See *People v. Alcala*, 685 P.2d 1126 (1984) (reversing the first conviction); *Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003) (upholding reversal of the second conviction).

execution are remote. Rodney Alcala is the poster child both for and against the death penalty in California.