

Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment

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INTRODUCTION

There have been fewer executions in California than deaths by lightning strike.¹ But what does the death penalty have to do with lightning? The comparison is drawn from the Supreme Court's landmark decision in *Furman v. Georgia*, which held that the capital punishment schemes then in place in Georgia and Texas were unconstitutional.² The analysis in the case suggests that California's capital punishment system is unconstitutional. In *Furman*, Justice Stewart compared being sentenced to death with getting struck by lightning, in the sense that sentencing was both arbitrary and capricious.³ Justice White's concurrence noted that this state of affairs was unacceptable, because it meant that capital punishment could not serve the legitimizing penal purposes of deterrence and retribution and would therefore be excessive under

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1. See NAT'L SEVERE STORMS LAB., NAT'L OCEANIC & ATMOSPHERIC ADMIN., NOAA TECHNICAL MEMO, NWS SR-193, LIGHTNING FATALITIES, INJURIES, AND DAMAGE REPORTS IN THE UNITED STATES FROM 1959-1994 § 5(d) fig.23 (1997), available at <http://www.nssl.noaa.gov/papers/techmemos/NWS-SR-193/techmemo-sr193-5.html#section5d>; see also CAL. DEP'T OF CORR. & REHAB., INMATES EXECUTED, 1978 TO PRESENT (2009), http://www.cdcr.ca.gov/Reports_Research/Inmates_Executed.html [hereinafter INMATES EXECUTED].

2. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

3. *Id.* at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

the Eighth Amendment.⁴ Subsequently in *Gregg v. Georgia*, the Court held that a punishment violates the Eighth Amendment if it is “so totally without penological justification that it results in the gratuitous infliction of suffering.”⁵ For inmates on death row today in California, where executions are rare and seemingly random, the lightning comparison is, if anything, too generous.⁶ Because the execution rate in California is so low, sentencing corresponds only loosely to the actual imposition of the death penalty. While there are currently 680 inmates on death row,⁷ only thirteen inmates have been executed since 1978.⁸

This Comment aims to show that as a result of a low execution rate and with inmate death row stays averaging roughly seventeen years in duration,⁹ capital punishment in California is certainly no more retributive or deterrent than a life-without-parole sentence, if at all. As such, capital punishment as practiced in California is excessive and violates the Eighth Amendment.

There are four ways California could remedy this violation. First, it could pour more resources into the capital punishment system so that the time between conviction and execution shrinks as much as possible without impinging on a defendant’s due process rights.¹⁰ Second, California could opt in under the Antiterrorism and Effective Death Penalty Act (AEDPA), Chapter 154, which provides which provides for faster resolution of federal habeas proceedings.¹¹ Third, California could consider narrowing the category of death-eligible crimes. Fourth, California could reject capital punishment entirely. This final option would be the most effective remedy.

BACKGROUND

California is not the only state experiencing problems with its capital punishment system. The country as a whole is at a critical juncture when it comes to capital punishment. Recent judicial and governmental actions with respect to capital punishment have oscillated between its reinforcement and its abolishment. In 2008, the Supreme Court decided that the three-drug lethal injection—most states’ method of execution¹²—is not cruel and unusual

4. *Id.* at 311–12 (White, J., concurring).

5. 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

6. *See* sources cited *supra* note 1.

7. CAL. DEP’T OF CORR. & REHAB., CONDEMNED INMATE SUMMARY 4 (2009), http://www.cdcr.ca.gov/Reports_Research/docs/CondemnedInmateSummary.pdf [hereinafter CONDEMNED INMATE SUMMARY].

8. INMATES EXECUTED, *supra* note 1.

9. *Id.*

10. This assumes, of course, that the death penalty actually results in greater deterrence and retribution than life without parole.

11. 28 U.S.C. §§ 2261–2266 (2006).

12. Thirty-seven of thirty-eight states with the death penalty use lethal injection. Charles Lane, *High Court to Hear Lethal-Injection Case*, WASH. POST, Jan. 26, 2006, at A3.

punishment, and is constitutional.¹³ However, in the recent past, the Court has also limited the application of the death penalty. Earlier in 2008, the Court determined that it was unconstitutional to impose the death penalty for child rape or any crime where there was no intention to inflict death and where death did not result.¹⁴ At the state level, courts, legislatures, and governors have taken more dramatic steps with respect to the death penalty. In February 2008, the Nebraska Supreme Court ruled that execution by electric chair constituted cruel and unusual punishment; a subsequent bill to abolish capital punishment ultimately lost, but garnered a significant showing of support.¹⁵ In Illinois, a moratorium on the death penalty continues after its imposition in 2000 by former Governor George Ryan.¹⁶ Perhaps the most striking development comes from New Jersey: in December 2007, the state made headlines nationwide by abolishing capital punishment altogether.¹⁷

California is another state contemplating the direction of its capital punishment system. California consistently sentences defendants to death despite flaws in the administration of the death penalty. Out of concern over the current state of capital punishment in California, the California Commission on the Fair Administration of Justice (CCFAJ) held three hearings on how the administration of the death penalty might be improved.¹⁸ Chief Justice Ronald George of the California Supreme Court testified at one of these hearings that the “[t]he current system is not functioning.”¹⁹ In its final report, issued in June 2008, the Commission stated that it was inclined to agree with Chief Justice George.²⁰ The essential problem is that there are too many inmates and too few resources. California is the state with the highest number of inmates on death row.²¹ The backlog of death penalty cases in the California

13. *Baze v. Rees*, 128 S. Ct. 1520, 1534 (2008).

14. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008).

15. Leslie Reed, *Death Penalty Bill Rejected by Nebraska Legislature*, OMAHA WORLD HERALD, at B3, available at http://www.omaha.com/index.php?u_page=2798&u_sid=10292945.

16. Associated Press, *Quinn Says Ill. Death Penalty Moratorium Stays*, J. GAZETTE TIMES-COURIER (MATTOON, ILL.), Feb. 6, 2009, at 1, available at <http://www.jg-tc.com/articles/2009/02/06/news/doc498cb122e7be2876445277.txt>.

17. Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3.

18. The California Senate created the Commission on August 27, 2004. The Commission lasted until June 30, 2008. Its mission was to “make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate.” CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE: CHARGE, <http://www.ccfaj.org/charge.html> (last visited Mar. 21, 2009).

19. Howard Mintz, *Panel: State Must Fix Death Penalty*, OAKLAND TRIB., Jan. 11, 2008, at 1.

20. CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 5 (2008) [hereinafter CCFAJ REPORT], available at <http://www.ccfaj.org/rr-dp-official.html>.

21. As of February 19, 2009, there were 680 condemned inmates in California. See CONDEMNED INMATE SUMMARY, *supra* note 7, at 4. This is nearly three hundred more than the next highest state, Florida. Death Penalty Info. Ctr., *Death Row Inmates by State*, <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#state> (last visited Mar. 21, 2009).

Supreme Court is so severe that Chief Justice George recently proposed—but then withdrew because of budget concerns—a constitutional amendment to move some capital cases to the appellate courts.²² According to one study, these concerns may have worked their way into public opinion about capital punishment: support for the death penalty has dropped in recent years.²³

In addition to unease about the administration of the death penalty, there is growing concern over the cost of capital punishment in California. The projected deficit for 2008–2009 was \$14.5 billion²⁴ and for the 2009–2010 fiscal year, California will have to close a forty-one billion dollar gap.²⁵ While it is difficult to calculate how much the state spends on capital punishment due to the variety of costs involved, several studies have attempted to find a number. The most recent cost estimates come from a study by the American Civil Liberties Union (ACLU) of Northern California. This study suggests that California taxpayers spend \$117 million per year seeking execution of the people currently on death row, a number that amounts over time to \$4 billion more than the state would have spent if these inmates had been sentenced to life without parole.²⁶ Particularly given California's current fiscal crisis, the costs of capital punishment seem prohibitive.

Part I of this Comment discusses the relevant constitutional standard for assessing a punishment's Eighth Amendment compliance and defines retribution and deterrence in the context of capital punishment. Part II argues that the delay in California between judgments and executions frustrates retributive and deterrent efforts enough to make the system unconstitutional. Part III focuses on the low number of executions in California and how this low rate prevents retribution and deterrence to the point that capital punishment in California violates the Constitution. Part IV discusses potential solutions to California's capital punishment problem. Finally, Part V provides a summary of the key points.

22. Henry Weinstein, *Chief Justice Drops Bid to Speed up Death Penalty Appeals*, L.A. TIMES, Feb. 24, 2008, at B4. Note that in California, only the Supreme Court reviews death penalty appeals. See *The Supreme Court of California: Containing the Internal Operating Practices and Procedures of the California Supreme Court 19* (2007), http://www.courtinfo.ca.gov/courts/supreme/documents/2007_Supreme_Court_Booklet.pdf.

23. Bob Egelko, *Support for Death Penalty Falls Slightly*, S.F. CHRON., Mar. 3, 2006, at B3.

24. CAL. DEP'T OF FINANCE, GOVERNOR'S BUDGET 2008–09: MAY REVISION 1 (2008), available at http://www.dof.ca.gov/budget/historical/2008-09/may_revision/documents/BS-INT.pdf.

25. Tracy Gordon, *California's State Budget*, JUST THE FACTS (Pub. Policy Inst. of Cal., S.F., Cal.), Feb. 2009, at 1, available at http://www.ppic.org/content/pubs/jtf/JTF_BudgetJTF.pdf.

26. NATASHA MINSKER, ACLU OF N. CAL., *THE HIDDEN DEATH TAX: THE SECRET COSTS OF SEEKING EXECUTION IN CALIFORNIA 1* (2008), available at http://www.aclunc.org/docs/criminal_justice/death_penalty/the_hidden_death_tax.pdf.

I

PURPOSES OF CAPITAL PUNISHMENT: RETRIBUTION AND DETERRENCE

Deterrence and retribution are frequently offered as two of the principal penal and moral justifications for punishment in our criminal justice system.²⁷ Within the capital punishment context they hold special importance.²⁸ One of the most important questions in the death penalty debate is whether deterrence and retribution are better served by a death sentence than by a life-without-parole sentence.²⁹ Other justifications for capital punishment as a penal tool exist,³⁰ but this Comment focuses on retribution and deterrence, two primary justifications on which courts and death penalty proponents rely, and therefore the most important.³¹

A. The Eighth Amendment, Retribution, and Deterrence

Retribution and deterrence are requisite components of a constitutional capital punishment system:³² the Court in *Gregg v. Georgia* held that “[a]lthough we cannot invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology,’ the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering,” therefore violating the Eighth Amendment.³³ The first clause of the holding seems to say that the death penalty is constitutional as long as it is at least somewhat retributive or deterrent.³⁴ This interpretation means that it does not have to be more retributive than a lesser punishment such as life imprisonment without the possibility of parole—as long as it is at all retributive or deterrent.

27. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997); see generally JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 2.03 (4th ed. 2006); WAYNE R. LAFAYE, *PRINCIPLES OF CRIMINAL LAW* 22–28 (2003).

28. Incapacitation has also been offered as a justification for capital punishment, but given the prevalence of life-without-parole sentences, it has become less relevant. See *Baze v. Rees*, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring).

29. *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT?*, at ix (Hugo Bedau & Paul Cassell eds., 2005).

30. For theories on the symbolic and ritualistic functions of the death penalty, see Donald L. Beschle, *Why Do People Support Capital Punishment? The Death Penalty as Community Ritual*, 33 *CONN. L. REV.* 765 (2001); see also *supra* note 28.

31. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (Stewart, Powell, & Stevens, JJ.); Beschle, *supra* note 30.

32. Although I concede here for the purposes of argument that this entire sentence forms the holding in *Gregg*, it is worth noting that the Supreme Court only quotes the last half of this sentence as the holding. See, e.g., *Thompson v. McNeil*, 129 S. Ct. 1299, 1299 (2009) (Stevens, J., memorandum respecting denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari); *Thompson v. Oklahoma*, 487 U.S. 815, 838 n.7 (1988); *Spaziano v. Florida*, 468 U.S. 447, 471 n.5 (1984).

33. *Gregg*, 428 U.S. at 182–83 (quoting *Furman v. Georgia*, 408 U.S. 238, 451 (1972) (Powell, J., dissenting)).

34. *Id.*

However, despite what the *Gregg* holding seems to say on its face, there are several reasons, some based on *Gregg* itself and other case law, that penological justification should be examined within the context of a lesser punishment, specifically life imprisonment without the possibility of parole. Justice Scalia has said that if there was evidence to “conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishments Clause would be unnecessary; the Equal Protection Clause of the Fourteenth Amendment would invalidate these laws for lack of rational basis.”³⁵ Though Scalia was arguing against the use of the “without penological purpose” test, his point illustrates that if that standard were interpreted to mean that capital punishment could only be invalidated if it had no deterrent or retributive value, irrespective of a sentence of life without parole, the standard would be unnecessary because society would already be protected from such a scheme by the Equal Protection Clause.

Another reason to believe that the lesser punishment comparison is warranted under the *Gregg* standard is that the *Gregg* opinion itself explicitly and implicitly makes this comparison. First, the Court noted that a jury’s choosing capital punishment *over* life without parole is a testament to the “utility and necessity” of capital punishment.³⁶ The Court also noted that at the time of *Gregg* there were studies suggesting that the death penalty was not more deterrent than life without parole, but that there was “no convincing empirical evidence either supporting or refuting this view.”³⁷ It went on to describe several situations where it was evident that capital punishment would always have some deterrent value but ultimately concluded that “in the absence of more convincing evidence,” it would not go against the legislature’s decision to use capital punishment.³⁸ Given these mentions of life without parole, the *Gregg* Court implied that its comparison with the death penalty was important.

Another reason to interpret the *Gregg* standard as requiring a comparison between life without parole (the lesser punishment) and capital punishment is that prior and subsequent Supreme Court case law do not make much sense without the comparison. For example, in *Furman*, which *Gregg* purported to follow, Justice Stewart described retribution and deterrence as valid purposes to be served by capital punishment.³⁹ Justice White wrote in a separate concurrence that:

[A]t the moment [capital punishment] ceases realistically to *further* these purposes . . . [its] imposition would then be the pointless and needless extinction of life with *only marginal contributions* to any

35. See *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (joint opinion of Scalia, Rehnquist, Kennedy, & White, JJ.), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005).

36. *Gregg*, 428 U.S. at 182.

37. *Id.* at 185.

38. *Id.* at 187.

39. *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

discernible social or public purposes, [and a] penalty with such *negligible returns* to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.⁴⁰

These comments suggest that *some* retributive and deterrent value is not necessarily enough to fulfill Eighth Amendment requirements. Justice White also noted that:

[I]t is difficult to prove as a general proposition that capital punishment, however administered, more effectively serves the ends of the criminal law than does imprisonment. But however that may be, I cannot avoid the conclusion that 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.⁴¹

This statement suggests that for Justice White, “substantial service to criminal justice” meant serving the ends of criminal punishment more effectively than imprisonment. Justice Brennan’s concurring opinion also supports this interpretation. Although Justice Brennan’s opinion is not controlling, he maintained that the punishment was unconstitutional if it did not fulfill retribution and deterrence more effectively than a lesser punishment.⁴² Justice Brennan based this conclusion in part on *Weems v. United States*,⁴³ a case that the *Gregg* Court also relied on.⁴⁴

Though no Supreme Court case following *Gregg* directly addresses the question of whether courts should compare capital punishment to life without parole in determining Eighth Amendment compliance, some case discussions support that interpretation.⁴⁵ For example, the Court in *Roper v. Simmons* held that the death penalty was unconstitutional for minors, and in its discussion it stated that “[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.”⁴⁶ The Court here rejects the death penalty even though it concedes that it may have some penal benefit. This suggests that when the death penalty’s only value is as a small deterrent, it might not be justified above

40. *Id.* at 312 (White, J., concurring) (emphasis added).

41. *Id.* at 313.

42. *Id.* at 280 (Brennan, J., concurring).

43. 217 U.S. 349, 381 (1910), cited in *Furman*, 408 U.S. at 280 (Brennan, J., concurring).

44. See *Gregg v. Georgia*, 428 U.S. 153, 171–72 (1976) (Stewart, Powell, & Stevens, JJ.) (citing *Weems*, 217 U.S. 349).

45. Judge Fletcher from the Ninth Circuit also supports this view and has said “[i]n finding that the Eighth Amendment does not categorically prohibit the state from imposing the ultimate sanction upon our most serious offenders, the Supreme Court has repeatedly articulated an important qualification: the imposition of the death penalty (rather than life imprisonment) upon a serious offender must serve some legitimate penological end that could not otherwise be accomplished.” *Ceja v. Stewart*, 134 F.3d 1368, 1372–73 (9th Cir. 1998) (Fletcher, J., dissenting).

46. *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

life imprisonment. Language from *Baze v. Rees*, finding lethal injection constitutional, also suggests that one means of punishment is only justified if it has some penological value above and beyond the less painful means:

To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification *for adhering* to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.⁴⁷

In other words, if the more painful alternative does not have more or different penal value than the less painful alternative, the more painful alternative is violative of the Eighth Amendment. Although the Court was comparing two methods of carrying out one punishment, certainly the logic would follow that if one punishment, such as death, were more painful than another, such as life without parole, there must be penological justification to continue to implement one over the other.

Perhaps the most coherent way to explain the first part of *Gregg's* holding, in light of the other Supreme Court cases discussed above, is through the Court's concern for respecting federalism. Looking at the context of the first part of the *Gregg* holding, which was taken from Burger's dissent in *Furman*,⁴⁸ reveals that it was motivated by a desire to stay out of the legislative sphere. Justice Burger in his *Furman* dissent noted that the court must be "divorced from personal feelings as to the morality and efficacy of the death penalty."⁴⁹ He also stated that legislative decisions regarding the justifications for capital punishment "are entitled to a presumption of validity."⁵⁰ Justice Marshall described the implication of Justice Powell's decision as follows: "judges are not free to strike down penalties that they find personally offensive."⁵¹ With federalism in mind, the holding in *Gregg* could be read the following way: although we (the Court as opposed to the Legislature) cannot invalidate a category of penalties because we (personally) deem less severe penalties adequate to serve the ends of penology, we can step in if it is very clear that capital punishment is serving no penological purpose beyond life imprisonment without parole.

In this Comment I argue that California's capital punishment system is unconstitutional both because its delays and low execution rate mean that it in many ways is not retributive or deterrent at all, and because it is never more

47. *Baze v. Rees*, 128 S. Ct. 1520, 1547 (2008) (plurality decision) (emphasis added).

48. *Furman*, 408 U.S. at 451 (Powell, J., dissenting).

49. *Id.* at 375 (Burger, C.J., dissenting).

50. *Id.* at 451 (Powell, J., dissenting).

51. *Id.* at 369 n.163 (Marshall, J., concurring).

retributive or deterrent than life without parole.⁵²

B. Proving Lack of Penological Justification

How does one prove to the Court's satisfaction that the death penalty is not more retributive than life without parole or that it is not retributive at all? How does one prove the same with respect to deterrence? As we have seen, indecisive evidence has historically fallen in favor of the state.⁵³ The Court in *Gregg* felt states should be able to take into account their own particular "moral consensus concerning the death penalty and its social utility" when deciding the necessity of capital punishment.⁵⁴ In *Baze*, Justice Scalia maintained that states need not rely on empirical evidence to justify their use of capital punishment, but rather may use "commonsense predictions about human behavior."⁵⁵ In denying certiorari in *Lackey v. Texas*, Justice Stevens advocated leaving the question of capital punishment's effectiveness up to the experimentation of the "laboratories" of state and federal courts.⁵⁶

However, by the time of *Baze*, Justice Stevens had come to acknowledge that such experimentation had failed: he wrote that the current decisions by states to retain the death penalty were more the "product of habit and inattention" than of an acceptable process of weighing the costs of death penalty administration against its societal benefits.⁵⁷ Justice Stevens also declared that in the absence of evidence affirmatively showing that capital punishment deters potential offenders, "deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment."⁵⁸ This statement would seem to place the burden of proof on death penalty advocates. However, this was not a controlling decision,⁵⁹ and deterrence still serves as a justification for capital punishment absent concrete evidence that the death penalty does not, in fact, deter. Nevertheless, California should consider Stevens's statements as a warning to consider more carefully the effects of long stays on death row and of low execution rates on the penal effectiveness of the state's capital punishment system.

52. If the constitutional standard requires comparison between capital punishment and life without parole, the argument that California's scheme is unconstitutional is even stronger.

53. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (Stewart, Powell, & Stevens, JJ.).

54. *Id.*

55. *Baze v. Rees*, 128 S. Ct. 1520, 1554 (2008) (Scalia, J., concurring).

56. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (memorandum respecting denial of certiorari) (quoting *McCray v. New York*, 461 U.S. 961, 963 (1995) (Stevens, J., memorandum respecting denial of certiorari)).

57. *Baze*, 128 S. Ct. at 1546 (Stevens, J., concurring).

58. *Id.* at 1547.

59. *Baze* is a plurality decision, with Roberts joined by Justices Kennedy and Alito, and concurrences by Justices Alito, Stevens, Breyer, Scalia, and Thomas, and a dissent by Justice Ginsburg (joined by Justice Souter). *Id.*

C. *The Court's Evolving Views on Retribution and Deterrence*

In *Lackey*, Justice Stevens specifically discussed the issue of how an inmate spending years on death row before execution might affect the accomplishment of retribution and deterrence.⁶⁰ He suggested that spending seventeen years⁶¹ on death row is so psychologically painful that it is retributive in and of itself, and that a subsequent execution is unlikely to be *more* of a deterrent than continued imprisonment until death.⁶² In *Baze*, he seemed critical of retribution as an underlying goal, and noted that the way the state executes prisoners might actually be too painless to serve the retributive needs of society.⁶³ Justice Kennedy has also questioned the morality of the retributive purpose—although he has not expressly argued for its elimination as a constitutional justification for capital punishment.⁶⁴ Justice Scalia, by contrast, has insisted that capital punishment serves the retributive needs of society, and he criticized Justice Stevens for moving away from the statement in *Gregg*, an opinion that Justice Stevens agreed with, that “capital punishment . . . is an expression of the community’s belief that certain crimes are themselves so grievous . . . that the only adequate response may be the penalty of death.”⁶⁵ However, Justice Stevens recently reverted back to his line of argument in *Lackey*.⁶⁶

Thus, although some justices in recent years have shown a willingness to question deterrence and retribution as justifications, there has generally been a consensus on the Court that deterrence and retribution remain valid penal purposes. Accordingly, capital punishment schemes that do not further deterrent or retributive goals violate the Eighth Amendment. Before analyzing how California’s capital punishment system fits into this national discussion, it is worth exploring the meaning of deterrence and retribution.

D. *What Is Deterrence?*

Deterrence is the principal utilitarian justification for capital punishment.⁶⁷ There are two types of deterrence: general and specific.⁶⁸ General

60. *Lackey*, 514 U.S. at 1045.

61. The number of years that Lackey spent on death row. *See id.*

62. *Id.*

63. *Baze*, 128 S. Ct. at 1548 (Stevens, J., concurring).

64. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008).

65. *Baze*, 128 S. Ct. at 1554 (Scalia, J., concurring) (quoting *Gregg v. Georgia*, 428 U.S. 138, 184 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

66. *Thompson v. McNeil*, 129 S. Ct. 1299, 1299 (2009) (Stevens, J., memorandum respecting denial of certiorari) (suggesting that after long stays on death row, the death penalty may not serve any penal purpose).

67. *See, e.g.*, Paul Robinson & John Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454–55 (1997) (noting that Bentham developed “the classic formulation of the deterrence rationale for punishment”); *see generally* Jeremy Bentham, *Rationale of Punishment*, in 1 THE WORKS OF JEREMY BENTHAM 388 (John Bowring ed., Simpkin, Marshall & Co., London 1843) (1830).

deterrence occurs when an offender's punishment deters the commission of crime by other offenders.⁶⁹ Specific deterrence occurs when an offender's punishment deters the future commission of crime by that same offender.⁷⁰

When discussing the death penalty's supposed deterrent effects, it is important to distinguish between *de jure* and *de facto* capital punishment. Some have argued that the mere existence of capital punishment (*de jure*) has the desired deterrent effect.⁷¹ I argue that only *de facto* capital punishment—the actual carrying out of executions—can have any significant deterrent effect.⁷²

In the criminal justice context, the hope is that punishment can be a tool to prevent further crimes; capital punishment, under this theory, becomes a tool to prevent future murders. In this context, deterrence can also be seen as an ethical and moral imperative: if a state *can* prevent murders, it must try to do so.⁷³

Preventing more murders may require using a harsher punishment. Deterrence theory assumes that potential offenders are rational actors who “weigh the qualities of potential punishment before acting.”⁷⁴ Underlying the theory of deterrence is the presumption that deterrence is marginal—the greater the punishment for a crime, the more it deters that particular crime.⁷⁵ Marginal deterrence in the context of capital punishment means that the death penalty must deter potential murderers more effectively than the punishment of life imprisonment. If it did not, deterrence would not justify a sentence of capital punishment over life without parole.⁷⁶

Death penalty supporters typically prefer capital punishment to life in prison because of a theory of specific deterrence coupled with the goal of incapacitation—detering the convicted murderer from killing while in prison.⁷⁷ The specific-deterrence/incapacitation theory of capital punishment is that if life sentences were the worst punishment for murder, murderers who were

68. Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 856–57 (2002).

69. *Id.*

70. *Id.*

71. See Dane Archer et al., *Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis*, 74 J. CRIM. L. & CRIMINOLOGY 991, 994 (1983).

72. “Significant” for the purposes of the *Gregg* standard discussed *supra* Part I.B.

73. Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 STAN. L. REV. 847, 856 (2005).

74. Archer et al., *supra* note 71, at 991.

75. See A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 63 (2000) (“Deterrence of a more harmful act because its expected sanction exceeds that for a less harmful act is sometimes referred to as marginal deterrence.”); see also Archer et al., *supra* note 71, at 991 (“A corollary of deterrence theory is that increasing the penalty for an offense will decrease its frequency.”); NINA RIVKIND & STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* 12 (2d ed. 2005).

76. For the argument that the death penalty is unconstitutional if it does not deter more than life without parole, see discussion *supra* Part I.B. For an economic argument that capital punishment is not justified if it does not deter more than a lesser punishment, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 248 (5th ed. 1998).

77. See Beschle, *supra* note 30, at 767.

already serving a life sentence would have no incentive to refrain from killing their fellow inmates or prison personnel.⁷⁸

However, deterrence in theory and deterrence in practice are two different things. The deterrent effects of capital punishment continue to be widely debated among academics.⁷⁹ Some studies, for instance, have found that capital punishment has a brutalizing, as opposed to a deterrent, effect on a population. That is, capital punishment may actually encourage *more* murder.⁸⁰ However, for the analysis in this Comment, I focus on how California's current system of capital punishment would affect a theoretical, properly functioning deterrence system, because this is the system on which the Supreme Court has based its Eighth Amendment jurisprudence.⁸¹

Even a robust deterrent effect cannot be the only grounds for capital punishment. If this were the case, no demonstrated connection between guilt and punishment would be necessary. Theoretically, as long as the intended audience of rational potential killers *perceives* the person who is executed as guilty, then that audience will be deterred, regardless of the executed person's actual guilt.⁸² This is clearly not how our criminal justice system works, given the extensive resources we devote to convicting only the guilty. Deterrence alone does not require that only the guilty are punished. This is the gap that retribution works to fill.

E. What Is Retribution?

Retribution is the principal moral justification for capital punishment, tying culpability to punishment.⁸³ As Alice Ristroph has explained, “[r]etribution—renamed as desert, softened to accommodate utilitarian concerns, and legitimized by empirical evidence of community preferences—is central to modern sentencing.”⁸⁴ In this Comment, I will use the most common

78. RIVKIND & SHATZ, *supra* note 75, at 14.

79. For a representation of this debate, see generally Editors' Note, *The Ethics and Empirics of Capital Punishment*, 58 STAN. L. REV. 701, 701 (2005). See also Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 210–13 (2005).

80. RIVKIND & SHATZ, *supra* note 75, at 13 (noting several studies which have found that more homicides occurred after executions and that brutalization effect is greater when executions are well publicized).

81. Of course, as noted earlier, some justices have argued that the evidence shows that deterrence is not working. However, these views have never appeared in a Supreme Court majority opinion.

82. See Beschle, *supra* note 30, at 768.

83. See, e.g., Robinson & Darley, *supra* note 67, at 455 (noting that Kant summarized the “just deserts” rationale of punishment as the idea that punishment should be applied in proportion to how bad the criminal is); see generally IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 198 (William Hastrie trans., Augustus M. Kelley Publ'rs 1974) (1887).

84. Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1306 (2006).

definitions of retribution and add to these what has been suggested by the Supreme Court's capital punishment jurisprudence.

Retribution is sometimes defined as "something given or exacted in recompense."⁸⁵ This definition has its roots in Immanuel Kant's "just deserts" theory: a criminal gets his just deserts when he is punished for his crime.⁸⁶ Embedded in this theory is a sense of proportionality—that a punishment cannot be too little *or* too great as compared to the crime.⁸⁷ However, in order to satisfy this proportionality requirement, whoever punishes must look beyond the crime and the simple "eye for an eye" mentality; he should also determine an individual's blameworthiness based on mitigating and aggravating factors.⁸⁸ The use of mitigating factors explains why not every murderer "deserves" the death penalty. While in theory the community decides what punishment the criminal deserves, the concept of desert may be influenced by the punishments available.⁸⁹ In the broadest sense, when the wrongdoer gets what he deserves, by way of adequate punishment, the community exacts its retribution.⁹⁰

As such, by its definition retribution is distinct from *vengeance* and *closure*, although these terms are often conflated. *Retribution*, as courts today use the term, is not *vengeance*.⁹¹ Retribution can be seen as more equal in its considerations, because it "respect[s] the dignity of the victim as well as the dignity of the wrongdoer."⁹² However, the existence, or inexistence, of any one of these three concepts in a community can affect the presence of the others. For example, a victim or community may take vengeance against a criminal if the individual or community feels the criminal has not received full retribution in a given case. As Justice Stewart noted in *Furman*, "[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of . . . vigilante justice, and lynch law."⁹³ Of course, *retribution* may also be related to

85. MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/retribution> (last visited Mar. 21, 2009); see also OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com> (search term: "retribution") (last visited Mar. 21, 2009).

86. See KANT, *supra* note 83, at 198.

87. See Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 282 (2005) (describing Kant's view that a criminal should not be punished too much or too little (citing Immanuel Kant, *The Metaphysics of Morals*, reprinted in KANT: POLITICAL WRITINGS 131, 154–55 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991))); see also Beschle, *supra* note 30, at 769.

88. Beschle, *supra* note 30, at 770.

89. See Ristroph, *supra* note 84, at 1309.

90. Note that in the retribution context, "community" consists of anyone who has lost something as a result of the wrongdoer's actions. It can range from a community as immediate as the victim's family to something as encompassing as the state.

91. *Ceja v. Stewart*, 134 F.3d 1368, 1373 (9th Cir. 1998) (Fletcher, J., dissenting).

92. Ristroph, *supra* note 84, at 1300.

93. *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring), see also *id.* at 394 (Burger, C.J., dissenting) ("There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements.").

closure in the sense that a victim's community or family may put the murder behind them more easily if they feel that justice has been done.⁹⁴ Nevertheless, it is important not to conflate these terms when discussing the retributive effects of low execution rates and long waits on death row.

Despite the scholarly debate on the question of whether deterrence and retribution are acceptable or justifiable goals of capital punishment, *Furman* and *Gregg* arguably require that all capital punishment schemes further those goals beyond life without parole in order to comport with the Eighth Amendment. In the following two Parts, I discuss the state of deterrence and retribution in California's capital punishment system, and in particular how the delay between sentence and execution as well as the low number of executions undermines retribution and deterrence principles, and therefore the constitutionality of California's death penalty system.⁹⁵ I first address the effects of the delays between sentencing and executions.

II

DELAY BETWEEN SENTENCING AND EXECUTIONS

The time a capital defendant in California spends in the system awaiting execution is staggering and, as I aim to demonstrate, unconstitutional. Jeremy Root, in a student comment, wrote that "[t]he life of a death sentence is extraordinarily long."⁹⁶ There are 680 inmates on California's condemned inmate list.⁹⁷ In California, the thirteen death row inmates who have been executed since 1978 spent between nine and twenty-four years on death row.⁹⁸ On average, they waited for 17.5 years before their execution.⁹⁹ This is considerably longer than the national average of approximately ten years.¹⁰⁰ And the state average may also be misleadingly low, since two of the executed inmates requested execution after withdrawing their appeals and habeas petitions.¹⁰¹ If these two executions are not included in the state figures, then

94. See Marilyn Peterson Armour & Mark S. Umbriet, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 395–96 (2007) (noting that many death penalty advocates reason that the penalty will bring closure to victims' families, but that there is much debate over whether or not this is accurate).

95. Admittedly, retribution is not as easy to measure as deterrence, because it does not lend itself well to empirical evidence. However, when looking at a specific system of punishment, such as the death penalty in California, it is possible to determine whether the community *believes* someone is getting his "just deserts."

96. Jeremy Root, Comment, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 282 (2002).

97. CAL. DEP'T OF CORR. & REHAB., CONDEMNED INMATE LIST (2009), http://www.cdcr.ca.gov/Reports_Research/capital.html [hereinafter CONDEMNED INMATE LIST].

98. INMATES EXECUTED, *supra* note 1.

99. *Id.*

100. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 2007—STATISTICAL TABLES, at tbl.11 (2007), <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st11.htm>.

101. CCAJ REPORT, *supra* note 20, at 22.

the average wait on death row statewide rises to 17.9 years.¹⁰²

California death row inmates currently awaiting execution face similarly long waits. Of these inmates, approximately one-third have already waited on death row longer than seventeen years.¹⁰³ According to one study, a new death row inmate in California will spend twenty years awaiting his execution.¹⁰⁴ Today, 295 California inmates have already spent more than fifteen years on death row.¹⁰⁵ And there are sixty-four inmates in California who have waited on death row for twenty-five years or longer.¹⁰⁶

In order to understand how these delays affect retribution and deterrence, it is important to know what accounts for the delays. Pretrial problems are a principal cause—particularly the search for qualified trial counsel. At the trial level in California, any defendant charged with a capital crime is entitled to an attorney who has experience litigating violent felonies and has tried at least two murder cases.¹⁰⁷ The American Bar Association recommends that at least two attorneys be appointed to all capital defense cases.¹⁰⁸ However, the waning supply of qualified capital defense counsel has made these goals hard to achieve. For example, many attorneys who are qualified to handle capital appeals are retiring, or are close enough to retirement that they do not want to take on cases which will require a decade-long commitment.¹⁰⁹ To compound the problem, California has struggled to attract new, qualified capital defense counsel because of the relatively low pay for such work.¹¹⁰ Ironically, one of the purposes behind California's counsel-appointment requirement in capital defense cases is to help defendants and the courts avoid unnecessary delays.¹¹¹

Another source of delay is the appeals process. Capital defendants are entitled automatically to an appeal.¹¹² However, defendants spend years waiting

102. This figure was calculated based on the statistics available at INMATES EXECUTED, *supra* note 1. David Edwin Mason was executed after nine years and seven months on death row and Robert Lee Massie was executed after twenty-one years and ten months. See also Ann W. O'Neill, *When Prisoners Have a Death Wish*, L.A. TIMES, Sept. 11, 1998, at 1.

103. CONDEMNED INMATE SUMMARY, *supra* note 7, at 2.

104. Judge Arthur Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 726 (2007).

105. CONDEMNED INMATE SUMMARY, *supra* note 7, at 2.

106. *Id.* For example, the following prisoners have all waited over twenty-four years on death row: Rodney Alcalá (twenty-eight years), Keith Adcox (twenty-five years), Lawrence Bittaker (twenty-seven years), John Davenport (twenty-seven years), and Richard Montiel (twenty-nine years). CONDEMNED INMATE LIST, *supra* note 97.

107. CAL. R. CT. § 4.117(d). However, a court may make an appointment even if a candidate does not qualify under section (d) so long as the court finds that the candidate qualifies under the guidelines in section (f).

108. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES § 4.1(A)(1) (2003).

109. See CCFJA REPORT, *supra* note 20, at 45.

110. *Id.* at 47–48.

111. CAL. R. CT. § 4.117(a).

112. CAL. PENAL CODE § 1239(b) (West 2008) (“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

to exercise this right. Additionally, at the appeals stage, the defendant typically receives new appointed counsel. In California, seventy-nine death row defendants currently have no counsel appointed to handle their direct appeal to the California Supreme Court.¹¹³ Current wait time for appellate counsel is between three and five years.¹¹⁴ Once all of the briefs have been submitted to the California Supreme Court, another two-and-a-half years usually lapse before the parties can make oral arguments in front of the justices. The California Supreme Court has a backlog of some eighty cases, and hears only twenty to twenty-five capital cases annually.¹¹⁵ The death row inmate with the eightieth case in line faces a wait that could last anywhere from eight to eleven years. And although the frequency of death sentences in the state has been declining, the courts continue to hand down enough death sentences to keep California's system clogged for years to come.¹¹⁶ The California Supreme Court's struggles to hear cases will only compound over time.

If the direct appeal does not result in relief, the defendant can pursue habeas petitions.¹¹⁷ The first of the delays in the habeas process comes once again from waiting for counsel. Here the wait is eight to ten years.¹¹⁸ Also, before the defendant can appeal the habeas petition in federal court, he must exhaust the habeas petition in state court.¹¹⁹ As of the June 2008 publication of the CCF AJ Report, the California Supreme Court had a backlog of one hundred habeas petitions.¹²⁰ Until recently, a defendant could pursue federal habeas petitions multiple times.¹²¹

In *Lackey*, Justice Stevens commented on the constitutionality of the delays caused in part by the abovementioned problems. He suggested that the only aspect of a delay that should count towards a claim of unconstitutionality would be any caused by "negligence or deliberate action" on the part of the government.¹²² One foreign court has gone so far as to say that irrespective of

his or her counsel.").

113. CCF AJ REPORT, *supra* note 20, at 23.

114. *Id.*

115. *Id.*

116. In 2006 alone, there were seventeen new death sentences in California. ACLU of N. Cal., California Death Sentences Fact Sheet, *available at* http://www.aclunc.org/docs/criminal_justice/death_penalty/california_death_sentences_fact_sheet.pdf (last visited Mar. 30, 2009); *see also* CCF AJ REPORT, *supra* note 20, at 70 (noting that if death penalty sentences continue at the same rate, there will be eleven or twelve new death sentences per year).

117. 28 U.S.C. § 2244 (2006) (outlining right to habeas petition).

118. CCF AJ REPORT, *supra* note 20, at 24.

119. 28 U.S.C. § 2254(b)(1)(A).

120. CCF AJ REPORT, *supra* note 20, at 24.

121. Now, with certain exceptions, a defendant is only granted one habeas review. *See* Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 941–42 (2001).

122. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari). More recently, Justice Thomas has said that a "death-row inmate's litigation strategy, which delays his execution" does not provide "a justification for the Court to invent a new Eighth Amendment right." *Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (2009) (Thomas, J.,

whether or not the defendant takes advantage of any delays, the delays still reflect a problem in the system: in *Pratt v. Attorney General of Jamaica*, the Privy Council of the United Kingdom found that if the particular appellate procedure “enabled the prisoner to prolong the appellate hearings over a period of years” it was the fault of the system and “not the prisoner who took advantage of it.”¹²³

There are several types of delays in California that would fit into the category Justice Stevens identifies. A prosecutor might overcharge the defendant, thereby requiring judicial correction from the state supreme court.¹²⁴ Lower courts may not adequately address the concerns of higher courts, resulting in multiple appeals and remands.¹²⁵ An evidentiary record may contain errors or gaps. The passage of time makes some types of evidence and important witnesses more difficult to find again, compounding the problem of an imperfect record.¹²⁶

However, most of the delays in California seem to be caused by backlogs in the system related to a human capital problem in the courts: there simply are not enough judges or lawyers.¹²⁷ These problems can be attributed to the state. Despite the demanding nature of the qualifications for death row lawyers,¹²⁸ the state is responsible for attracting qualified candidates by providing adequate compensation.¹²⁹ Until recently, there have been few attempts to ameliorate the problems caused by the backlog through either judicial reform or adequate budgeting.¹³⁰

It would seem, then, that most of California's extra delays are not caused by the defendants' abuse of the system but rather by problems inherent in the state's system.¹³¹ Nevertheless, Justice Stevens's comments about culpability in *Lackey* were suggestions, not precedent.¹³² Furthermore, in denying certiorari on a *Lackey* claim in *Thompson v. McNeil*, Justice Stevens concluded that

concurring in denial of certiorari).

123. *Pratt v. Attorney Gen. of Jam.*, 2 A.C.1, 4 All E.R. at 770 (1994).

124. *See Root, supra* note 96, at 293.

125. *See id.* at 293. It will of course depend on the particular conduct of the lower court as to whether or not the determination on remand was negligent.

126. *See id.*

127. *See Alarcón, supra* note 104, at 734, 741–43 (describing delays caused by insufficient court staff and qualified attorneys).

128. *See* text accompanying footnotes 107–08.

129. The CCFAJ made increased compensation for death row lawyers one of the recommendations of its final report. CCFAJ REPORT, *supra* note 20, at 43.

130. The Chief Justice's plan and CCFAJ's focus on capital punishment are a few examples of the recent movement to improve the capital punishment system in California.

131. Alarcón, *supra* note 104, at 706–07.

132. As such, I will omit from my arguments on the effects on retribution and deterrence a consideration of which party “caused” the delays. However, the Supreme Court has recently held that in determining a speedy trial, delays caused by appointed council could not be attributed to the state. *Vermont v. Brillion*, 129 S. Ct. 1283, 1291 (2009). It remains to be seen what, if any, implications this will have for capital cases.

“delays in state-sponsored killings are inescapable.”¹³³ Delay still violates the Eighth Amendment if retribution and deterrence are not fulfilled, even if a portion of that delay represents time spent protecting a defendant’s due process rights.¹³⁴

A. Delays Erode the Retributive Value of the Death Penalty

Concurring in the denial of certiorari in *Lackey*, Justice Stevens outlined two ways in which delays on death row might lead¹³⁵ to Eighth Amendment violations: first, a delay might be considered cruel and unusual punishment in and of itself,¹³⁶ and second, delays would mean that retribution and deterrence would not ultimately be served.¹³⁷ Delays in capital punishment create problems for retribution by violating the principle of proportionality and frustrating the use of capital punishment as a meaningful state sanction. Some might argue that as long as the defendant is executed, “just deserts” will have been had, regardless of how long this process takes. But this argument is overly simplistic. It fails to take into account how the long delay undermines—and is sometimes completely at odds with—several aspects of retribution.

The first and perhaps biggest problem with long stays on death row is that they make capital punishment more than just the punishment of execution. Twenty-five years on death row before execution is an additional punishment beyond execution and therefore disproportionate to the crime. Taken literally, “eye for an eye” means that only the punishment of death can bring retribution after murder, but a more expansive view, as retribution requires,¹³⁸ takes into account the effects that spending so much time on death row has as an additional punishment.

133. *Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., memorandum respecting the denial of certiorari).

134. If anything, the tension between doing justice and injustice in this problem is indicative of the unsustainable nature of capital punishment in the criminal justice system, let alone a scarce resource. See Kathleen M. Flynn, Note, *The “Agony of Suspense”: How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 323 (1997) (discussing the claim that any legalistic society cannot impose the death penalty without an unconstitutionally cruel delay); see also *Thompson*, 129 S. Ct. at 1299 (discussing how long delays in the administration of the death penalty reflect its “fundamental inhumanity and unworkability”).

135. While the Ninth Circuit has not looked favorably on this claim, the Supreme Court is the final word on the subject. Additionally the Ninth Circuit’s negative treatment of the claim was not on the merits. See *McKenzie v. Day*, 57 F.3d 1493, 1494 (“The majority’s assertion of what it would decide if alternatively it should reach the merits, is not a decision on the merits”) (Thompson, J., dissenting).

136. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (memorandum respecting denial of certiorari).

137. *Id.*; see also *Thompson*, 129 S. Ct. at 1299 (noting the “inevitable cruelty” of the death penalty on the one hand and the “diminished justification for carrying out an execution” on the other).

138. See Ristroph, *supra* note 84, at 1306.

For example, in *People v. Anderson*, the court asserted that “carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”¹³⁹ As the title of a recent New York City Bar Symposium suggests, spending a long time on death row before execution is akin to dying twice.¹⁴⁰ But how is this any different from life without parole, the most frequently proposed alternative to the death penalty?¹⁴¹ Life without parole means waiting for a natural death—and the small hope that the law will change in your favor in the interim—while execution at the hand of the state is much more ominous. Unsurprisingly, evidence suggests that the psychological effects of facing your own death every day for twenty-five years for death row inmates is akin to torture.¹⁴² By definition, the visualization of one’s own execution is not something that life-without-parole inmates experience. This is just one example of how a death row inmate might experience more psychological suffering than a life-without-parole inmate.¹⁴³ As one frequent visitor to death row commented:

Torture is intrinsic to the death penalty. And we can argue about how much torture there is to the electric chair, or gas chamber, or even lethal injections, about what people feel physically. . . . You can’t condemn a person to death and not have them anticipate their death, imagine their death, and vicariously experience their death many, many times before they die.¹⁴⁴

The European Court of Human Rights determined in 1989 that the psychological suffering caused by isolation and uncertainty of many years on death row, “the death row phenomenon,” is akin to torture.¹⁴⁵

139. *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) (en banc), *superseded by* CAL. CONST. art. 1 § 27.

140. Symposium, *Dying Twice: Incarceration on Death Row*, 31 CAP. U. L. REV. 853, 855 (2003).

141. The comparison here between life without parole is not aimed at the “valid penological justification” standard but rather at the question raised by a similarity between life without parole and California’s current death penalty administration: if the two punishments look virtually the same, doesn’t it follow that life without parole should also be torture?

142. *See* Dist. Attorney v. Watson, 411 N.E.2d 1274, 1291 (Mass. 1980) (Liacos, J., concurring) (equating the mental stress of a death row inmate with psychological torture); *see also Anderson*, 493 P.2d at 894 (citations omitted).

143. Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, in FROM PRISON TO HOME CONFERENCE PAPERS 79–80 (2002), available at http://www.urban.org/UploadedPDF/410624_PsychologicalImpact.pdf (noting that there is a consensus that “the more extreme, harsh, dangerous, or otherwise psychologically-taxing the nature of the confinement, the greater the number of people who will suffer”).

144. Vicki Quade, *The Voice of Dead Men: Interview with Sister Helen Prejean*, 23 A.B.A. SEC. INDIVIDUAL RTS. & RESPS. 12, 14 (1996) (quoting death penalty abolitionist Sister Helen Prejean).

145. *Soering v. United Kingdom*, European Court of Human Rights (1989); *see also* Death Penalty Info. Ctr., Time on Death Row, <http://www.deathpenaltyinfo.org/time-death-row#drs> (last visited Mar. 24, 2009) [hereinafter Time on Death Row] (“This raises the question of whether death row prisoners are receiving two distinct punishments: the death sentence itself, and the years of living in conditions tantamount to solitary confinement—a severe form of punishment that may

Another type of emotional trauma suffered only by death row inmates results from having to face impending death multiple times. For various reasons, a prisoner may reach execution day, and even the death chamber itself, when suddenly the execution is stayed. For example, in 2006, Michael Morales was hours away from execution when the judge stayed the execution order because the doctors scheduled to administer the lethal injections refused to participate.¹⁴⁶ Inevitably, some are skeptical of this “death row as torture” argument. After all, if death is the worst and ultimate sanction, should it not follow that inmates would want to prolong the process leading up to it as much as possible? However, it is well documented that inmates sometimes give up their appeals, preferring death to more time on death row.¹⁴⁷ The mental processes set in motion when an inmate prepares himself for imminent death should only have to occur once.

Even assuming that decades on death row are not *more* of a punishment than the inmate “deserves,” some have argued that after so many years on death row, retribution has been satisfied and therefore execution would be *more* than an inmate deserves.¹⁴⁸ In *Lackey*, though certiorari was denied, Justice Stevens suggested that after an extended period of time “the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted.”¹⁴⁹ The Ninth Circuit, in denying a request for a stay of execution which was based on the cruel and unusual punishment prong of the *Lackey* claim, rejected the paradox that a practice in place to comport with the Eighth Amendment may actually violate it.¹⁵⁰ In *White v. Johnson*, the Fifth Circuit declined to grant petitioner relief on the claim that his death sentence violated

be used only for very limited periods for general-population prisoners.”).

146. See Henry Weinstein & Maura Dolan, *Sedative’s Efficacy in Executions Questioned*, L.A. TIMES, Sept. 26, 2006, at 1.

147. See, e.g., *State’s Longest-Serving Death Row Inmate to Die*, BERKELEY DAILY PLANET, Mar. 27, 2001, at 1 (discussing California death row inmate Robert Mussie who ended his appeals process after twenty-one years on death row); see also Martha Bellisle, *Many of Nevada’s Condemned Inmates Voluntarily Give up Appeals of Sentences*, RENO GAZETTE-J., June 4, 2005, at 1, available at <http://secure.rgj.com/news/printstory.php?id=101034> (describing Nevada’s high rate of “voluntary executions”); Time on Death Row, *supra* note 145 (“The conditions of confinement are so oppressive, the helplessness endured in the roller coaster of hope and despair so wrenching and exhausting, that ultimately the inmate can no longer bear it, and then it is only in dropping his appeals that he has any sense of control over his fate.” (quoting Dr. Stuart Grassian)).

148. In either case, long delays in a capital punishment system would mean that the capital punishment in these cases would not be retributive. If it was not deterrent either, it would serve no valid penal purpose, in violation of the Eighth Amendment.

149. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (memorandum respecting denial of certiorari); see also *Dist. Attorney v. Watson*, 411 N.E.2d 1274, 1287 (Mass. 1980) (Braucher, J., concurring) (declaring that under the state constitution the death penalty is unconstitutional in part because death sentences “will be carried out only after agonizing months and years of uncertainty”).

150. See, e.g., *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995) (denying a stay of execution and suggesting that delays caused by satisfying the Eighth Amendment cannot themselves violate it).

the International Covenant on Civil and Political Rights on the grounds that the treaty was no broader than the Eighth Amendment and that the delay in execution did not violate the Eighth Amendment.¹⁵¹ The argument may still carry some force however, given that the Supreme Court has not yet provided guidance on the issue.

Delays also undermine retribution because innocent parties sometimes get sentenced to death. Between 1978 and 2005, the average delay in cases where the judgment of guilt or the sentence were vacated, was eleven years.¹⁵² As for sentences vacated by a federal court upon appeal for habeas corpus, the average wait time was 16.75 years.¹⁵³ Retribution is about just deserts for the guilty party. An innocent prisoner on death row is the farthest thing from retribution because it means that not only was the innocent party being punished unnecessarily, but society was not holding the culpable party accountable.

Furthermore, the delays between sentencing and execution frustrate the use of capital punishment as a meaningful state sanction. Anything less than prompt execution cannot satisfy retribution.¹⁵⁴ The passage of so much time “muffles society’s legitimate cry of moral outrage.”¹⁵⁵ In this way, a lengthy stay on death row lessens the potency of capital punishment as an alternative to vengeance. Retribution through capital punishment is conceived of as state legitimated and controlled punishment that evens the score while preventing ongoing feuds.¹⁵⁶ When a defendant lives decades after committing a crime, albeit on death row, a victim’s family sometimes feels that the defendant has literally gotten away with murder.¹⁵⁷ Of the inmates executed in California, Clarence Allen spent the second longest time on death row: twenty-three years and one month.¹⁵⁸ The family of one of his victims released the following statement regarding his execution: “It has taken 23 years but justice has prevailed today. Mr. Allen has abused the justice system with endless appeals until he lived longer in prison than the short 17 years of Josephine’s life.”¹⁵⁹ In response to the delayed execution of Michael Morales, the victim’s mother stated, “The victims are going through more pain than the murderer.”¹⁶⁰ As

151. *White v. Johnson*, 79 F.3d 432 (5th Cir. 1996).

152. See Alarcón, *supra* note 104, at 708.

153. *Id.* at 709.

154. Of course what qualifies as “prompt” is arguable. However, the current average wait on death row of twenty to twenty-five years is not prompt by any measure, as this Comment argues.

155. Ryan S. Hedges, Note, *Justices Blind: How the Rehnquist Court’s Refusal to Hear a Claim For Inordinate Delay of Execution Undermines Its Death Penalty Jurisprudence*, 74 S. CAL. L. REV. 577, 609 (2001).

156. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

157. The following accounts are illustrations of this sentiment.

158. INMATES EXECUTED, *supra* note 1.

159. *Id.* (profile of Allen) (quoting statement of victim’s family).

160. Lisa Leff, *Execution Called Off Because of Lethal Injection Questions*, S.D. UNION TRIB., Feb. 21, 2006, at 1.

such, the “muffled cry” is at once both a symptom and a cause of the failure of California’s capital punishment system to achieve retribution.

Another argument for why California’s system fails to achieve retribution centers on the decreased salience of the original crime in the community. When the execution finally occurs, the “closure” it brings comes not from a sense of retribution, but rather from relief that the arduous judicial process is over.¹⁶¹ An execution thirty years after the crime is too late for too many people. Long delays before execution may mean that by the time the execution happens, some of the secondary victims¹⁶² of the inmate’s murder are no longer alive. In addition, members of the general community may have no recollection of the murder or murderer. If all this is true, how retributive could an execution be? Judge Betty Fletcher, dissenting in *Ceja v. Stewart*, noted that we cannot “assume that the interests that legitimized that initial decision will continue to be vital and strong, no matter how many decades elapse” before an execution is carried out.¹⁶³

B. Delays Make the Death Penalty Less Potent, Preventing Deterrence

Under California’s delay-plagued death penalty system, the pursuit of deterrence fares no better than that of retribution. While the analysis of retribution focuses largely on whether or not society at large feels that a criminal had obtained his just deserts, the deterrence analysis focuses only on the community of potential murderers. In a certain sense, deterrence is an inherently complicated concept because it requires us to ask a question that can be difficult to quantitatively answer: “Is this punishment *preventing* more crime?”¹⁶⁴ More specifically, the question here is: “How much will the prospect of a long life on death row weaken the potency of capital punishment as a deterrent beyond life without parole?”

These questions remain unanswered, not only by courts, but also by empirical studies. One study used a regression model and concluded that, on average, one fewer murder is committed for every 2.75 year reduction in the expected death row wait.¹⁶⁵ These studies demonstrate that, at the very least, there is room to argue that extensive delays on death row diminish or eliminate the deterrent value of capital punishment. Instead of citing inconclusive

161. Marilyn Peterson Armour & Mark S. Umbriet, *Exploring “Closure” and the Ultimate Penal Sanction for Survivors of Homicide Victims*, 19 FED. SENT’G REP. 105, 108 (2006).

162. The phrase “secondary victims” includes everyone negatively impacted by the murder except for the person murdered.

163. 134 F.3d 1368, 1374 (9th Cir. 1998) (Fletcher, J., dissenting).

164. *Furman v. Georgia*, 408 U.S. 238, 307 n.7 (1972) (Stewart, J., concurring) (noting “the difficulty of identifying and holding constant” all of the variables needed to accurately calculate deterrence (citing Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1275–92 (1968))).

165. Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 314–15 (2004).

evidence as the justification for refusing to hear *Lackey* claims, perhaps judges should cite the evidence as a reason to explore the issue further.¹⁶⁶

There are several reasons long stays on death row substantially diminish deterrence to the point where capital punishment is not deterrent at all, or no more deterrent than life without parole. The first argument uses the logic of the assumptions behind the practice of capital punishment itself. Capital punishment is supposed to be the supreme deterrent because death is the worst possible punishment. It follows from this assumption that the more time a potential murderer knows he gets to live before death, the less potency the idea of execution may have.¹⁶⁷ To the outside observer, life on death row may not seem different from life imprisonment at all: after such long stays, more inmates have died because of natural causes than from execution.¹⁶⁸ If this is in fact the perception of outsiders, some tension exists between this argument and the argument that the same time spent on death row undermines retribution. However, it should be noted that the retribution argument and the torture of waiting for death directly challenge the assumptions that the arguments for deterrence rest on. But this does not mean that the arguments are mutually exclusive because for the individual criminal, deterrence operates *before* the crime, while retribution operates *after*. The consistency of these seemingly inconsistent theories is demonstrated by a person who is less intimidated by the death penalty because of the lessened immediacy of execution, but who later gives up his right to an appeal once he has experienced life on death row firsthand.¹⁶⁹

One potential criticism of the diminished deterrence argument is that even if long waits on death row are “better” than prompt executions because they allow for a longer life, many potential murderers are oblivious to the fact that the death penalty is so often delayed. For this group, the only relevant fact for deterrence is that capital punishment is administered at all. However, this problem goes again to the assumptions underlying the theory of deterrence as a legitimate penal purpose.¹⁷⁰ Once those assumptions are in place for the sake of argument, as they are in the deterrence sections of this Comment and as they have been in Supreme Court decisions up until now, this type of logic quickly becomes circular.

166. As Judge Fletcher noted in *Ceja*, this is especially true for appeals courts who have essentially been invited by the Supreme Court in *Lackey* to hear these claims on the merits. *See Ceja*, 134 F.3d at 1370 (Fletcher, J., dissenting).

167. Again, this assumes a rational actor who is aware of what the punishment will be (*i.e.*, seventeen years of life on death row before execution). *See supra* note 71.

168. CAL. DEP'T OF CORR. & REHAB., CONDEMNED INMATES WHO HAVE DIED SINCE 1978 (2009), http://www.cdcr.ca.gov/Reports_Research/docs/CIWHD.pdf [hereinafter INMATE DEATHS].

169. Of course this may not be true for all inmates.

170. Recall that the theory of deterrence assumes that the deterred are rational, informed decision-makers. *See* text accompanying footnotes 74–75.

Since *Furman*, as discussed above, the Supreme Court has consistently denied certiorari on constitutional claims arising from systemic delays and deterrence. However, several justices have discussed the matter in denying certiorari. Justice Stevens noted in *Lackey* that after seventeen years on death row, the difference in deterrence between an execution and continued incarceration would be minimal.¹⁷¹ A few years later Justice Thomas in *Knight v. Florida*, writing in concurrence in the denial of certiorari, stressed that when a defendant had chosen to take advantage of lengthy appeals processes he could probably not claim constitutional problems with those delays.¹⁷² Justice Breyer, however, questioned this reasoning and noted that delays were a constitutional problem and that “the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment’s basic retributive or deterrent purposes.”¹⁷³ It is logical to conclude that with the death penalty becoming more like life imprisonment, the marginal deterrent value of capital punishment has lessened.¹⁷⁴ Justice White affirmed this notion in the context of the administration of the death penalty at the time of *Furman* when he noted that “the threat of execution is too attenuated to be of substantial service to criminal justice.”¹⁷⁵

The long death row delays in California have prevented capital punishment from serving a retributive function, and have made capital punishment no more deterrent than life without parole. For these reasons alone, capital punishment in California violates the “without penological purposes” standard in *Gregg* and as a result, the Eighth Amendment. However, California’s constitutional problems are even more severe as the result of its low execution rate.

III

LOW NUMBER OF EXECUTIONS

Given the statistics on the delay between sentencing and execution, it should be unsurprising that the execution rate in California is as low as it is. Nevertheless, it is worth noting that executions are far from the norm on death row. In 2006, California death row inmates accounted for about 20 percent of the nation’s total death row population, but executions in California accounted for only 1 percent of the nation’s total.¹⁷⁶ With all of the capital cases in

171. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting the denial of certiorari).

172. 528 U.S. 990, 991 (Thomas, J., concurring in the denial of certiorari) (1999).

173. *Id.* at 995 (Breyer, J., dissenting) (citing *Lackey*, 514 U.S. at 1046).

174. For a similar argument with respect to incapacitation, see Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 927 (1982).

175. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

176. Rone Tempest, *Death Row Often Means a Long Life; California Condemns Many Murderers, but Few Are Ever Executed*, L.A. TIMES, Mar. 6, 2005, at B1.

California, there have only been thirteen executions since 1978.¹⁷⁷ This becomes an even more strikingly low figure when compared to the number of death row inmates, which is 680. Additionally, there have been sixty deaths that did not result from execution.¹⁷⁸ Of these inmates, forty-one have died from natural causes, five from other causes, and fourteen from committing suicide.¹⁷⁹ These numbers reveal that executions on death row are so few and far between that an inmate's chance of dying of natural causes is more than three times greater than dying by execution.

Once again, the inability of the courts to handle and process the high volume of capital cases is problematic. The following statistic gives a sense of the backlog: in order to carry out the sentences of all the inmates currently on death row, California would have to execute five prisoners a month for the next twelve years.¹⁸⁰ In actuality, California has executed thirteen inmates over the past twenty years, or the equivalent of .05 inmates per month. This extremely low execution rate erodes both the deterrent and retributive potential of capital punishment. It undermines fear of, and confidence in, the penalty of death as administered by California. As it stands, capital punishment in California is somewhere between *de jure* and *de facto*. By taking this middle ground, California has received none of the benefits and all the costs of capital punishment.

A. No Just Deserts: Why a Low Rate of Execution Means the Death Penalty Is Not Retributive

One of the costs of California's capital punishment scheme is the damage it does to the penal purpose of retribution. A low execution rate is an even more direct affront to retribution than the delay between sentencing and execution. In more ways than one, the failure on the part of the state to impose a full sentence on any particular inmate means that no one is getting what they deserve, at least as that desert is mandated by the state.¹⁸¹ Some inmates, those who are actually executed, will have gotten more than they deserved in the sense that they are no less culpable than inmates who died of natural causes.¹⁸²

There are, however, several arguments that despite the low number of executions, California's capital punishment still fulfills its retributive purposes. Some might ask what is problematic about the symbolic use of the death penalty. In other words, some might find that retribution is satisfied because the

177. INMATE DEATHS, *supra* note 168.

178. *Id.*

179. *Id.*

180. CCFAJ REPORT, *supra* note 20, at 20–21.

181. See Armour & Umbriet, *supra* note 94, at 396, 423–24 (noting the role that the state, in the form of the prosecutor, and society play in determining appropriate punishment).

182. This is also true if one takes into account the *Lackey* argument discussed in the text accompanying footnotes 135–36.

murderer dies, even if not by execution but by natural causes or suicide. Retribution, under this thinking, is still satisfied because the murderer's death is the most important thing, not how the murderer dies.

In another incarnation of this argument, Professor William Lofquist has noted that the death penalty as it stands in California is more symbolic than anything else.¹⁸³ In fact, when California reinstated capital punishment in 1978 it appeared to have had this symbolic use in mind: the state wanted to create a system which would *threaten* to inflict that penalty on the maximum number of defendants—whether it would be the most *effective* system was another issue.¹⁸⁴ However, Professor Lofquist also suggests that this symbolic, though not purely *de jure*, use of the death penalty is a political compromise between anti and pro-death penalty advocates. Presumably, it satisfies (somewhat) the anti-death penalty advocates because it means that no execution takes place. It satisfies the death penalty advocates by making a “statement of social authority and control.”¹⁸⁵ This statement, however, is not fully retributive. It serves the social condemnation purpose which Justice Stewart recognized the importance of in *Furman* and asserts that certain murderers are deserving of the worst punishment. However, it fails on the other half of the retribution theory: meting out punishment so that the murderer *gets* what he deserves.¹⁸⁶

The arbitrariness of the implementation of capital punishment in California may undermine even the somewhat retributive value that Professor Lofquist identified. In *Furman*, Justice Stewart complained that, in its randomness, getting a death sentence was like being struck by lightning.¹⁸⁷ At the time *Furman* was decided, there appeared to be no justifiable reason why certain defendants received the death penalty while others received lesser sentences. In Justice Brennan's words, the system was more like a “lottery” than one of “informed selectivity.”¹⁸⁸ Speaking of arbitrariness and retribution, Justice Stewart was concerned with the small number of defendants, compared with the total number of death-qualified individuals, who actually received the death penalty, as opposed to life in prison. Specifically, at the time *Furman* was decided, the ratio of death sentences to cases where death was a statutorily permissible punishment was estimated at between 10 and 20 percent.¹⁸⁹ But while the arbitrariness in and of itself was problematic for Justice Stewart, what

183. William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505, 1520 (2002). According to Lofquist, the death penalty is symbolic because it is a legal punishment that exists but is rarely used.

184. *Carlos v. Super. Ct.*, 672 P.2d 862, 871 n.13 (Cal. 1983), *overruled by* *People v. Anderson*, 742 P.2d 1306 (Cal. 1987).

185. Lofquist, *supra* note 183, at 1542 (citation omitted).

186. See KANT, *supra* note 83. This argument assumes of course that waiting on death row is not like torture and that execution would not be *more* of a punishment than an inmate deserves.

187. *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

188. *Id.* at 293 (Brennan, J., concurring).

189. *Id.* at 436 n.19 (Powell, J., dissenting).

was also problematic was the relationship between arbitrariness, infrequency, and retribution. Justice White remarked that “when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. . . . or that community values are measurably reinforced by authorizing a penalty so rarely invoked.”¹⁹⁰

The small ratio of death row inmates who are actually executed in California is problematic for the same reasons as the 10 to 20 percent ratio discussed in *Furman*.¹⁹¹ Professor Steven Shatz has argued that although *Furman* addressed the Georgia scheme as a whole, the principle can be applied to a particular death-eligible form of murder, specifically robbery-burglary.¹⁹² He concludes that because the death penalty is only rarely imposed in the case of robbery-burglary murders, and there is no more evidence of “informed selectivity” than there was in *Furman*, its imposition in those robbery-burglary cases violates the Eighth Amendment.¹⁹³ This same logic applies to the use of a ratio of executions over death sentences. Certainly concern for arbitrariness would extend to execution, which is the actual implementation of the death sentence. In fact, perhaps subconsciously, some federal courts, including the Supreme Court, since *Furman* have referred to arbitrary *execution* as opposed to arbitrary sentencing—though without reference to the ratio.¹⁹⁴ In California, the ratio of executed inmates since 1978 to the total number of inmates who have been on death row since then is just 1.7 percent.¹⁹⁵ This underscores the point that, even if sentencing is not arbitrary, the actual imposition can be, therefore corrupting the entire system with respect to retribution and deterrence.

Is there anything to save a system that appears, by Justice White’s logic, to otherwise undermine retribution? For example, is there an “informed selectivity” with respect to the inmates who compose this 1.7 percent?

190. *Id.* at 311–12 (White, J., concurring).

191. 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, 1923 (2006) (discussing the parallel between states with an essentially symbolic capital punishment system and the distribution of pre-*Furman* executions).

192. Steven F. Shatz, *The Eighth Amendment, the Death Penalty and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 749. (2007).

193. *Id.* at 752.

194. *See, e.g.*, *Boyd v. California*, 494 U.S. 370, 387 (1990); *Wainwright v. Goode*, 464 U.S. 78, 83 (1983); *Moore v. Zant*, 734 F.2d 585, 589 (11th Cir. 1984); *U.S. v. Kaiser*, 545 F.2d 467, 469 (5th Cir. 1977); *U.S. v. Davis*, 180 F. Supp. 2d 797, 807 (E.D. La. 2001).

195. Thirteen inmates have been executed since 1978 and there have been 693 inmates on death row since 1978 (including the thirteen who have been executed and the sixty who died of other causes). INMATES EXECUTED, *supra* note 1; CONDEMNED INMATE SUMMARY, *supra* note 7. This statistic is an approximation as it does not account for inmates who may have left death row after exoneration, et cetera. This is also a generous statistic. If, for example, one were to calculate this ratio just for 2009, the percentage would be zero since there have been no executions in California this year.

Although the death penalty is reserved for the “worst of the worst,” is there a hierarchy even within this category? Should there be? If it were true that these thirteen inmates in California who have been executed are somehow more culpable than those who remain, this would at least be more retributive than a situation of total arbitrariness, and might compensate for the infrequency of execution. However, a glance at the facts surrounding the crimes of the thirteen executed inmates reveals that there is no discernable measure making their “heinous crimes” any more heinous than those of the 680 inmates currently living on death row. For example, one might think that brutal serial killers would rank higher on a spectrum of desert than other murderers. Several of the thirteen executed were murderers with multiple victims whose killings took place over a period of time. William George Bonin and David Edwin Mason are two examples, having killed fourteen and five victims respectively.¹⁹⁶ Meanwhile, there are inmates who entered death row at around the same time who killed as many or more people. One example is Randy Kraft, who murdered sixteen young men.¹⁹⁷ There are also several murderers who have been executed, like Thomas Thompson and Manuel Babbitt, who have only killed one victim.¹⁹⁸ Analyzing the executed and current death row inmates by the nature of their crimes yields the same results. Many of the executed inmates committed murders that also involved torture or rape, but that is true of the murders committed by many current death row inmates.¹⁹⁹ It is also true that the crimes of inmates who died naturally or committed suicide do not differ markedly from the crimes of those who have been executed. When the state decides to execute an inmate can only be explained by whether or not the inmate has exhausted all of his legal remedies. However, there is nothing in this explanation that saves the system from its arbitrariness because the time it takes to exhaust all remedies is not based on desert but, as we have seen, on factors like attorney appointments and court dockets.²⁰⁰

The arbitrary order in which death row inmates are actually executed erodes the moral foundation of desert on which the retributive aims of the death penalty supposedly rest. As Carol Steiker notes, a system aiming for retribution should not be arbitrary because arbitrariness undermines “our confidence in the very attribution of desert to the defendants chosen for the execution.”²⁰¹ The undermined confidence of the community affects the capacity of the capital

196. See INMATES EXECUTED, *supra* note 1 (profiles of Bonin and Mason).

197. Cecilia Rasmussen, *Serial Killings Are a Darker Part of State's History*, L.A. TIMES, Oct. 29, 2004, at B2.

198. See INMATES EXECUTED, *supra* note 1 (profiles of Thompson and Babbitt).

199. This type of analysis raises the question, who can determine which kind of murder is worse than another, given that this determination is so subjective? But this is essentially what jurors deciding capital cases must do in every instance. That is, they must decide if the particular facts in front of them are so heinous as to warrant application of the death penalty.

200. See discussion *supra* Part II.

201. Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 768 (2005).

punishment system to be effective in the future. Even if in the future the system is functioning correctly, for the reason that Justice Stewart highlighted in *Furman*, a community is more likely to turn to vigilante justice if it has the impression that its government is not carrying out punishments appropriately.²⁰²

However, the community's concept of what is an appropriate punishment to fit the crime is not static and the elasticity of desert²⁰³ means that California has set itself up for retributive failure. Ristroph has noted that a community's notions of desert are affected by the available punishments for a crime.²⁰⁴ The fact that the death penalty exists in California, that California sometimes offers to execute the worst of the worst, and that it most often does not follow through, sets the level of punishment needed for retribution and then fails to live up to it. To state again what is perhaps obvious, if the court mandates death for a defendant, the community expects, and needs, in the retributive sense, that sentence to be carried through.

As a result of the low execution rate, California's death penalty fails to fulfill the retributive purpose of the punishment. First, California's capital punishment fails to meet retributive standards of desert because its application is arbitrary inasmuch as some death row inmates are executed, some die of natural causes, and yet others remain alive. Second, because part of the success of retribution is based at least in theory on effective societal condemnation, the government's contradictory message with respect to capital sentencing versus administration undermines retribution.

B. Crying Wolf: A Low Number of Executions Lessens the Deterrent Power of the Death Penalty

Just as Justice Stewart questioned the retributive power of a crippled capital punishment system, he noted the potential problem for deterrence: "common sense and experience tell us that seldomly enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted."²⁰⁵ Given this logic, it seems probable that California's low number of executions has seriously

202. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

203. Alice Ristroph coins this term in *Desert, Democracy, and Sentencing Reform*, *supra* note 84, at 1308.

204. *Id.* at 1309. Ristroph explains:

Philosophically, one could distinguish between the claim that a wrongdoer deserves punishment and the claim that the wrongdoer deserves a *specific* punishment. But as a matter of practical psychology, once someone is committed to the first claim, it is relatively easy to secure his approval of whatever punishment current policies impose. Thus the inherently 'mushy' concept of desert preserves the popular legitimacy of penal practices, even as those practices change.

Id.

205. *Furman*, 408 U.S. at 312 (Stewart, J., concurring).

diminished the potential deterrent effect of the death penalty beyond life without parole and generally.²⁰⁶

Under the current sentencing scheme in California, more than 90 percent of adults convicted of first-degree murder are death eligible.²⁰⁷ The percentage of all death-eligible murderers who are actually sentenced to death in California is about 4.8 percent.²⁰⁸ Only 1.7 percent of California's death row inmates since 1978 have actually been executed.²⁰⁹ This means that if you are a death-eligible murderer, the chance that you will be sentenced to death and executed on death row is only .08 percent. These statistics show that California has in essence been crying wolf: it threatens death and metes out death sentences much more frequently than it actually carries out executions. Just as the boy who cried wolf, California's capital punishment system has lost much of its credibility and potency.

Unfortunately for parties in favor of abolishing the death penalty, proof that the tiny probability of execution has negatively affected deterrence is difficult to find. As mentioned above, the empirical studies regarding deterrence and the death penalty nationwide have been inconclusive and contradictory. Many factors must be considered when making these types of calculations. Interstate comparisons are especially difficult because of the state-specific considerations that must be made. John Donohue and Justin Wolfers note that the death penalty is "applied so rarely that the number of homicides it can plausibly have caused or deterred cannot be reliably disentangled from the large year-to-year changes in the homicide rate caused by other factors."²¹⁰ Their study found that the death penalty has small effects on deterrence, but it is unclear whether the effects were positive or negative.²¹¹ Still other studies have shown evidence of a brutalization effect when examining summary statistics from 1977 to 1996, where there had only been four executions.²¹² Some studies have determined that the death penalty was unrelated to the homicide rate.²¹³ If any of these studies are accurate, it seems

206. This conclusion relies, of course, on the assumption underlying the theory of general deterrence that potential criminals are rational, informed actors, who would be aware of the execution rate. See Archer, *supra* note 71, at 991.

207. Steven Shatz, Professor, Univ. of S.F., Summary of Testimony at the Public Hearing on the Fair Administration of the Death Penalty in California 1 (Jan. 10, 2008) [hereinafter Shatz Testimony], available at <http://www.ccfaj.org/tr-dp-expert.html>.

208. *Id.*

209. INMATES EXECUTED, *supra* note 1; CONDEMNED INMATE LIST, *supra* note 7.

210. John Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005).

211. *See id.*

212. Shepherd, *supra* note 79, at 234. Shepherd also found a threshold effect; that is, in states with less than a threshold number of executions during a sample period of time, such as California, murders increased with each execution. *Id.* at 240-42.

213. *See* MIKE MORALES, CENTER ON JUVENILE & CRIMINAL JUSTICE, DEATH PENALTY AND DETERRENCE: THE LAST WORD 2 (2008), available at http://www.cjcj.org/files/Death_Penalty_and_Deterrence.pdf; ("As a murder deterrent, the death penalty appears largely

that at best, a change in homicide rates is unrelated to the death penalty and at worst the homicide rate has increased because of it. The fact remains though, that the empirical evidence does not *prove* that the death penalty is irrelevant to deterrence.

However, there are some arguments that California's capital punishment system should not *in theory* or in actuality negatively impact deterrence: first, as previously noted, deterrence is based on the theory that rational actors consider the nature of the potential punishment before they commit a criminal act.²¹⁴ This assumption feeds into the argument that even if potential death row inmates have doubts about whether or not they will be executed, they still fear the death penalty because it means that they will ultimately die in prison. However, if this fear means the deterrent effect of capital punishment in California has not diminished, it also means that people did not fear execution more than life without parole in the first place. So although this might lead to the conclusion that deterrence has not been affected by California's low rate of executions, it also indicates that California does not need the death penalty at all to deter because life without parole would suffice.

The previously mentioned empirical studies all analyze the effects of the system generally. That is, the studies concern how the general existence and use of the punishment of death affects the homicide rate. However, it is also important to think of deterrence in the context of specific executions that take place. Assuming that the number of executions continues to be low in the future, the low number of executions now lessens the deterrent value of the executions in the future.²¹⁵

Given that the low number of executions in California has diminished the deterrent effect of the death penalty generally and beyond life without parole, and given that the low rate has prevented the penalty from serving any retributive function, the administration of the death penalty in California violates the Eighth Amendment.

IV SOLUTIONS

California is violating the Eighth Amendment by continuing to operate its death row without fulfilling the most fundamental purposes of capital punishment: deterrence and retribution. Our judicial system is backlogged with capital cases and executions are at a near standstill. Given these problems, is there a solution that can bring California's current system into constitutional

irrelevant."); Death Penalty Information Center, Murder Rate Declines in Every Region Except the South, <http://www.deathpenaltyinfo.org/murder-rate-declines-every-region-except-south-where-executions-are-most-prevalent>.

214. See *supra* note 71.

215. There is no reason to think that California's execution rate will change, given the state's current fiscal crisis.

compliance? What can be done to stop the diminution of the retributive and deterrent values of capital punishment in California? I argue that there are four options: executing frequently and more quickly, opting in under AEDPA, narrowing the amount of death-eligible murders, and abolishing capital punishment—by way of moratorium, if possible. I argue that the last of these solutions is the most viable option for California both economically and constitutionally.

A. Executing Frequently and More Quickly

The first potential solution, to state it bluntly, is to kill more people faster. However, speeding up executions is not feasible for various reasons. For one, at a certain point, taking away procedural safeguards would become constitutionally untenable.²¹⁶ Imposed time limits might also be too arbitrary to withstand due process requirements.²¹⁷ Finally, both human and financial resources in California are lacking.²¹⁸

Even if all of California's resources were devoted to capital cases, there would likely still be problematic delays. Chief Justice George estimates that the California Supreme Court already spends 20 percent of its resources on death penalty cases.²¹⁹ In theory, California could protect procedural safeguards and minimize the backlog by pouring all of its judicial resources into capital cases. However, even if the state were to do this, it might not conceivably be able to expedite the process enough to avoid problems with deterrence and retribution. Even if the California Supreme Court were only to take death penalty cases, it would still take several years to process the backlog of appeals.²²⁰

For this reason, Chief Justice George suggested legislation aimed at speeding up the process through other means. His proposal consisted of a constitutional amendment that would push some of the California Supreme Court's capital cases to the state's 105 appellate courts.²²¹ Although George has since pulled his proposed amendment from consideration, its resurfacing is probable and so deserves some attention. There are several problems with this type of proposal. First, capital punishment is conventionally considered the

216. *Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., memorandum respecting denial of certiorari) (“Judicial process takes time, but the error rate in capital cases illustrates its necessity. We are duty bound to ‘insure that every safeguard is observed’ when ‘a defendant’s life is at stake.’” (citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))); *see also* Greenberg, *supra* note 174, at 908-09.

217. *See* Greenberg, *supra* note 174, at 908.

218. *See, e.g.*, Death Penalty Info. Ctr., Budget Crisis Causing More Cuts in the Judicial System, Death Penalty Info. Ctr., <http://www.deathpenaltyinfo.org/budget-crisis-causing-more-cuts-judicial-system>.

219. Chief Justice Ronald M. George, Cal. Sup. Ct., Testimony at the Public Hearing on the Fair Administration of the Death Penalty in California (Jan. 10, 2008), *available at* <http://www.ccfaj.org/rr-dp-expert.html>.

220. *Id.*

221. *Id.*

most severe form of punishment and, by its subject matter alone, may deserve the precedential attention that only California's highest court can confer.²²² Additionally, the proposal is problematic because it will create time and financial resource problems. Because there are many appellate judges, there is a higher risk of judicial inconsistency in their decisions.²²³ By complicating the legal precedent, lawyers and judges alike would have to spend more time sorting through case law. More cases in a given year would mean more money spent on ancillary services that are under the Sixth Amendment.²²⁴

While the California Supreme Court is a key component of California's capital punishment system, it is not self-sufficient. Even if the court system were significantly improved, the problem of finding qualified attorneys would remain.²²⁵ As previously noted, the current demographic of capital attorneys reveals a coming crisis in supply. Only attorneys with at least a few years of experience litigating capital cases are allowed to work on capital cases to be heard by the California Supreme Court.²²⁶ Thus there is no quick fix to the problem. A sharp rise in compensation would potentially attract attorneys who are already qualified for this type of work, but there are only so many of them. Meanwhile, young attorneys interested in entering this field would presumably still have to gain a significant amount of experience before qualifying for capital representation at the appellate level. Even if this were to solve the delays and low executions in the long term, it still presents problems for retribution and deterrence in the short term.

B. The AEDPA Opt-In Provisions

One way to shorten the time between sentencing and execution would be to opt in under Chapter 154 of the Antiterrorism and Effective Death Penalty Act (AEDPA).²²⁷ Congress's purpose in enacting AEDPA was to curb the abuse of the habeas corpus process, and in particular to address the problem of delay and repetitive litigation in capital cases.²²⁸ In return for opting in, qualifying states are rewarded with faster process in federal habeas proceedings.²²⁹ Instead of a maximum time lapse of one year between a state ruling on a habeas petition and its filing in federal court, the opt-in provision

222. Michael C. McMahon, Cal. Pub. Defenders Assoc., *Death-Penalty Dysfunction* (Dec. 24, 2007), <http://www.cpda.org/CPDA-Position-Re-Death-Penalty-Appeals-Proposal-2007-2008.html>.

223. *See id.*

224. *See id.*

225. Clay Seaman, Cal. Appellate Def. Counsel, *Testimony at the Public Hearing on the Fair Administration of the Death Penalty in California* (Feb. 20, 2008), *available at* <http://www.ccfaj.org/documents/reports/dp/expert/Seamantestimony.pdf>.

226. *See id.*

227. 28 U.S.C. §§ 2261–2266 (2006).

228. H.R. Rep. No. 104-23, at 7 (1995).

229. John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 272 (2006).

allows states to shorten this period to 180 days,²³⁰ requires the federal district courts to decide habeas cases within 450 days of the petition being filed,²³¹ and requires the federal court of appeals to decide the case on appeal within 120 days of the briefs being filed.²³²

What exactly is the mechanism for opting in under AEDPA? According to the statute, opting in consists of an “appropriate state official” seeking a determination from the U.S. Attorney General that it “has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent prisoners who have been sentenced to death,” and that it “provides standards of competency for the appointment of counsel” in an indigent’s habeas proceedings.²³³ In other words, opting in basically consists of devising a mechanism to appoint and compensate competent counsel in federal habeas cases.²³⁴

However, California would have difficulty meeting these requirements. In fact, opting in has not been a realistic solution for many states as underscored by the fact that at least as of 2007,²³⁵ nine years after the law’s enactment, only Arizona has successfully²³⁶ opted in to AEDPA’s provisions.²³⁷ California has tried to opt in, but the Ninth Circuit in *Ashmus v. Woodford* held that the state did not qualify.²³⁸ The court noted that in order for the state to opt in under AEDPA, it must affirmatively establish that it satisfied each requirement in the statute.²³⁹ According to the court, California did not have an appointment mechanism embodied in a rule of court or statute, and therefore violated section 2265(a); the court noted that on this basis alone it was disqualified from opting in.²⁴⁰ The court also held that California was ineligible to opt in based on a second independent ground: it failed to provide mandatory and binding standards of competency in a rule of court.²⁴¹

Even if California were able to remedy the two problems noted by the *Ashmus* court, it would still have potential problems with other AEDPA

230. 28 U.S.C. § 2263(a).

231. Jon Gould, *Justice Delayed or Justice Denied? A Contemporary Review of Capital Habeas Corpus*, 29 JUST. SYS. J. 273, 276 (2008).

232. 28 U.S.C. § 2266(c)(1)(a).

233. 28 U.S.C. § 2265 (a)(1).

234. *See id.*

235. Betsy Dee Sanders Parker, Note, *The Antiterrorism and Effective Death Penalty Act (“AEDPA”): Understanding the Failures of State Opt-In Mechanisms*, 92 IOWA L. REV. 1969, 1969 (2007).

236. *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002) (holding that Arizona met the technical requirements for opting in but limiting its ability to take full advantage of the procedural advantages in that case because it failed to timely appoint counsel).

237. Blume, *supra* note 229, at 274.

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

239. *Id.* at 1164.

240. *Id.* at 1167.

241. *Id.*

requirements. The *Ashmus* court never reached the question of whether California provided for the timely appointment of counsel upon certain statutory requirements as required by section 2261(c)(1) or whether California provided adequate litigation expenses for collateral counsel as required under section 2265(a); it is not promising that the district court found that California did not satisfy those requirements.²⁴² Among the compensation problems that the district court specifically noted were: (1) “appellate counsel has no duty, authority or funding to find out whether habeas claims exist” and (2) “unless a factual predicate for such claims is discovered in the course of preparing claims for direct appeal, there remains no duty, authority or funding to investigate.”²⁴³

Even if California were able to opt in under AEDPA Chapter 154, there could still be delays and low execution rates in California, creating problems for retribution and deterrence. Funding problems not at issue in the *Ashmus* district court opinion would make the six-month reduction in delay between final state judgment and the deadline to file federal habeas a *de minimis* contribution to overall delays in the system, and would neutralize any potential benefits from compliance with the opt-in provisions. For example if California were able to opt-in now, an indigent must still wait eight to ten years just to get a habeas attorney appointed to his case, which would likely mean that the habeas investigation would not begin until after a decision in a defendant’s direct appeal.²⁴⁴ This means that the inmate will have experienced a significant delay before he even filed a federal habeas petition. This would certainly run against the purpose²⁴⁵ of AEDPA itself and continued delays and the accompanying low execution rates would mean that capital punishment would not further retributive or deterrent purposes for the same reasons articulated elsewhere in this Comment.

The odds of this situation improving without an influx of funds are poor, especially given California’s budget crisis.²⁴⁶ The latest statistics show that the Habeas Corpus Resource Center (HCRC)²⁴⁷ has seventy cases and private attorneys are handling another 141.²⁴⁸ At the latest count, that left 284 without habeas representation and with current funding it is unlikely that private attorneys could fill this gap.²⁴⁹ The California Commission on the Fair

242. *Id.* at 1165 n.8.

243. *Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1188 (N.D. Cal. 1998), *aff’d*, 202 F.3d 1160 (9th Cir. 2000).

244. CCFJA REPORT, *supra* note 20, at 55.

245. *See supra* note 228.

246. *See Steve Mills, States Weigh Cost of Death Penalty*, L.A. TIMES, Mar. 14, 2009, at 1.

247. The Habeas Corpus Resource Center (HCRC) was established in 1998 to “accept appointments in state and federal habeas corpus proceedings and to provide training and support for private attorneys who take on these cases.” Habeas Corpus Resources Center, About the Habeas Corpus Resource Center, <http://www.hcrc.ca.gov/about.php> (last visited Apr. 1, 2009).

248. CCFJA REPORT, *supra* note 20, at 53.

249. *Id.* at 54. It is interesting to note that the organization that provides counsel for direct appeals surveyed its members on whether or not they would accept habeas cases if the

Administration of Justice estimates that it would take a 500 percent increase in HCRC's budget to alleviate this backlog.²⁵⁰

Even if California did find the funds to hire more habeas attorneys, given the accelerated timeline, the state could have a difficult time finding defense attorneys willing to work with half of the time normally allotted.²⁵¹ Also, increased habeas activity on the defense side would result in increased pressure on the staff in the attorney general's office, which would have to litigate habeas cases more quickly.²⁵² In order to alleviate this pressure, the logical step would be to hire more staff, which of course would require even more funds.

In sum, past case law indicates that California could not now opt in under AEDPA Chapter 154. Because of funding problems, even if California opted in now, the efficiency benefits of doing so would be negated by the problems of delay and low execution rates.

C. Narrowing the Death Penalty Statute, Fewer Special Circumstances

Both of the previously discussed solutions center around trying to handle California's current load of capital cases. Another approach would be to lessen the load of capital cases in the first place. One of the ways to do this would be to narrow the statutory range of qualifying capital cases in California.²⁵³ Currently, California has a broad death penalty statute; by some accounts, it is the broadest in the nation.²⁵⁴ In light of California Penal Code sections 190.2, 190.3, and 190.2(17), there are effectively thirty-six special circumstances accompanying first degree murder which makes the defendant death eligible.²⁵⁵ Because almost every murder is eligible for the death penalty, there is no

reimbursement limit were raised to the current \$50,000; they only received one positive response. *Id.*

250. *Id.* at 8.

251. HCRC provides a good summary of what habeas representation entails:

Litigation of a capital appeal and habeas corpus proceeding is a complex and time-consuming undertaking. Counsel appointed to represent death-sentenced prisoners in the automatic appeals review extensive trial records, which average in excess of 9,000 pages of Reporter's and Clerk's transcripts, and research and prepare voluminous briefing based on state and federal statutory and constitutional law. Representation of the prisoner in habeas corpus proceedings includes the duty to review the trial records; conduct an investigation of potential constitutional and statutory defects in the judgment of conviction or the sentence of death; prepare and file a petition for a writ of habeas corpus; represent the prisoner at the hearing to set an execution date pursuant to Penal Code section 1227; and prepare a request for executive clemency from the Governor of California.

Habeas Corpus Resource Center, *supra* note 247.

252. Gould, *supra* note 231, at 279.

253. ROBERT SANGER ET AL., DEATH PENALTY FOCUS, THE REPORT OF THE FOXES: ANALYSIS OF PROSECUTORS' PERSPECTIVE ON CALIFORNIA'S DEATH PENALTY 3 (2003), available at <http://www.deathpenalty.org/downloads/ResponsetoCDAA.pdf>.

254. See Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1287 (1997).

255. SANGER ET AL., *supra* note 253, at 3.

meaningful narrowing of death-eligible defendants from the entire pool of murders.²⁵⁶ Recent recommendations of the California Commission on the Fair Administration of Justice include limiting the special circumstances to five and excluding felony murder.²⁵⁷ It is estimated that if this recommendation had been instituted in 1978, instead of 680 death row inmates, California would now only have 368.²⁵⁸ We could expect similar differences in the future if we adopted such provisions now.

While this narrowing approach is perhaps the least problematic fix for death penalty retentionists, it still presents problems for retribution. In theory, special circumstances decided by the California legislature represent society's judgment of what kinds of murders are deserving of the ultimate punishment. Narrowing the statutory circumstances with the principal aim of meting out fewer death sentences could result in a statutory policy which would not necessarily reflect the values of the community. Instead, this option reframes the moral capital punishment issue as an economic one: a choice among crimes for death qualification based not upon community approval, but upon affordability. Further, to truly satisfy retributive principles, a narrowing scheme would require some sort of relief or reverse retribution for the inmates who are no longer deemed deserving of death but who have suffered the psychological effects of living in anticipation of it.²⁵⁹ Thus, while a narrowing scheme may be a practical decision, it is not one that conforms to retributive justice unless it also reflects a change in the community's notions of desert.

D. Moratorium or Abolition

It is clear from the above discussion that fixing—if even possible—California's resource-sapping capital punishment system would require a large amount of additional resources. These are resources that California does not have. California's budget deficit for 2008–2009 will be around \$14.5 billion²⁶⁰ and for the 2009–2010 fiscal year, legislatures have a forty-one billion dollar gap to fill.²⁶¹ Overall, California spends \$117 million per year in administering the post conviction capital punishment system; this averages out to about \$175,000 per death row inmate per year.²⁶² Some individual counties alone have spent millions of dollars seeking the death penalty.²⁶³ For example,

256. *See id.*; *see also* Shatz Testimony, *supra* note 207 (noting that 90 percent of first degree murders in California are death eligible).

257. CCFJA REPORT, *supra* note 20, at 61–62.

258. *Id.* at 64.

259. Most likely this would mean a reduced sentence in line with the new maximum punishment for the crime. *See In re Estrada*, 408 P.2d 948, 955 (Cal. 1965) (en banc).

260. CAL. DEP'T OF FINANCE, *supra* note 24.

261. Gordon, *supra* note 25, at 1.

262. MINSKER, *supra* note 26.

263. ROMY GANSCHOW, ACLU OF N. CAL., DEATH BY GEOGRAPHY: A COUNTY BY COUNTY ANALYSIS OF THE ROAD TO EXECUTION IN CALIFORNIA 9 (2008), *available at*

Riverside County has sentenced twenty people to death since 2000, costing it \$22 million more than life sentences.²⁶⁴

The last possible solution to California's capital punishment problems is to do away with capital punishment in California all together. In California's current economic environment, there is no way to significantly ameliorate the Eighth Amendment problems given the diminished fulfillment of retribution and deterrence.

As a practical and political matter, before abolishing capital punishment entirely, California might consider an official moratorium. A governor can declare a moratorium which would have the effect of halting all executions on death row until the moratorium is lifted.²⁶⁵ The idea of moratorium is not new; in the past, former California Governor Pat Brown has argued for one.²⁶⁶ California has already taken the important step of creating a commission, known as the California Commission on the Fair Administration of Justice, to discuss the administration of capital punishment in California.²⁶⁷

Despite California's current fiscal crisis, California Governor Arnold Schwarzenegger is not likely to declare a moratorium. First, Governor Schwarzenegger is a staunch supporter of the death penalty.²⁶⁸ Apparently, the budget crisis was not enough to dampen his support for capital punishment: in January 2007 he approved the allocation of \$399,000 for a new death row; allocating a thousand dollars more would have required legislative approval.²⁶⁹ This move appears to have been made with an eye towards obtaining a more favorable federal review of the lethal injection system, which California was to undergo several months later.²⁷⁰

Nonetheless, a moratorium would be a positive step for the California criminal justice system for a few reasons. Moratorium gives politicians space to

http://www.deathpenalty.org/downloads/Death_By_Geography.pdf.

264. *See id.*

265. A state could also pass legislation instating a moratorium, subject of course to the governor's veto. In 1999, Nebraska's governor vetoed legislation that would have instituted a moratorium. *See Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* 1, American Bar Association, *available at* <http://www.abanet.org/irr/finaljune28.pdf>.

266. John Culver & Chantal Boyens, Political Cycles of Life and Death: Capital Punishment as Public Policy in California, 65 ALB. L. REV. 991, 996 (2002).

267. *See supra* notes 18, 20 and accompanying text.

268. In response to a question about CCFJA's report on the death penalty, the Governor responded "As you know, I'm a big believer in the death penalty and so we're going to do everything we can to move it forward." *See* Press Release, State of Cal., Governor Celebrates Clean Technology Investment in California at Tesla Motors (June 30, 2008), <http://gov.ca.gov/speech/10045/>.

269. Mark Martin, *New Execution Chamber Infuriates Lawmakers: Facility at San Quentin Was Built Quietly*, S.F. CHRON., Apr. 14, 2007, at A1.

270. Gov. Schwarzenegger & the Secret Chamber, Posting to Amnesty USA blog, <http://blogs.amnestyusa.org/death-penalty/archive/2007/04/18/gov-schwarzenegger---the-secret-chamber.htm> (Apr. 18, 2007, 11:32 AM PST).

gauge the public's reaction to the idea of eliminating capital punishment and to explore possible next steps. Given the problem of delays in both states, the recent experience of Illinois gives some insight into how this process might work. Former Illinois Governor George Ryan instituted a moratorium on executions in 2000.²⁷¹ Before then, delays in Illinois between sentencing and executions averaged more than twelve years.²⁷² Unlike California, which has had no official moratorium, Illinois established a commission examining the death penalty concurrently with its moratorium.²⁷³ After the commission delivered its recommendations, the governor commuted all 156 death row sentences to life in prison without parole.²⁷⁴ While California is certainly not bound by the actions of the Illinois governor or the findings of the Illinois commission, it is notable that as of 2003, California had met only 6.17 percent of the Illinois Commission's recommendations.²⁷⁵

There may also be reasons a moratorium would not be right for California. Some might argue that because California already effectively has an unofficial moratorium²⁷⁶ due to pending litigation, instating an official moratorium would not actually accomplish more unless death row was effectively shut down by a commutation of sentences. Others criticize moratoriums as simply adding to the delay of executions.²⁷⁷ If the abolishment of capital punishment were delayed, a moratorium would result in the use of capital punishment *purely* as a symbol, which means that it would lose its deterrent bite. If a moratorium could act as the means to abolishment, it would help California rid itself of a constitutional violation. However, if California had an official moratorium that went on for years, it would look just like the current system, where new death row inmates appear every year, but no one is executed. Ideally, a moratorium serves as a stepping stone to abolition, the only clear cut solution to a constitutionally infirm capital punishment system.²⁷⁸

271. Death Penalty Info. Ctr., Timeline: Illinois Governor's Commission on Capital Punishment, <http://www.deathpenaltyinfo.org/timeline.pdf> (last visited Mar. 25, 2009).

272. Thomas P. Sullivan, *Efforts to Improve the Illinois Capital Punishment System: Worth the Cost?*, 41 U. RICH. L. REV. 935 (2007).

273. *See id.*

274. Death Penalty Info. Ctr., Illinois Death Row Inmates Granted Commutation, <http://www.deathpenaltyinfo.org/node/677> (last visited Mar. 29, 2009).

275. Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 SANTA CLARA L. REV. 101, 118 (2003).

276. Bob Egelko, *3 Years Later, State Executions Still on Hold*, S.F. CHRON., Feb. 22, 2009, at A1 (noting that California has not had an execution in the last three years due to a stay by a federal judge, and that in the best case scenario, executions will not be allowed to resume for another year).

277. Hedges, *supra* note 155, at 596 (arguing that moratoriums offer a "cruel glimmer of hope" by lengthening death row "psychological purgatory" but assuming that they will eventually end and executions will be re-implemented).

278. In fact, in the case of New Jersey, an investigation was performed during a moratorium and it eventually led to the abolition of capital punishment in that state. Bill Mears, *New Jersey Lawmakers Vote to Abolish Death Penalty*, CNN.COM, Dec. 13, 2007,

I have argued that the abolition of capital punishment in California is warranted because the system is not more retributive or deterrent than the punishment of life without parole and has arguably ceased to be retributive or deterrent at all; it is therefore unconstitutional and must end given that there are no viable ways to salvage it.

Abolition would mean that life without the possibility of parole would be the most severe punishment in California. If life in prison without parole were the worst punishment for murder it would still satisfy retribution and deterrence. Retribution is satisfied so long as victims know that the defendant is getting what he deserves, and if what he deserves is based in part on the worst punishment available, life without parole could satisfy retribution.²⁷⁹ As far as deterrence, life in prison ultimately means death, still a severe punishment that would generally deter. However, the ability of life without parole to fulfill retributive and deterrent purposes is the topic of another paper. It suffices to say for the purposes of this Comment that California's capital punishment system is violating the Eighth Amendment without an end in sight and should therefore be abolished.

So far, fourteen states and the District of Columbia have decided to end the use of capital punishment.²⁸⁰ In these states, neither anarchy nor chaos has ensued. In fact, in some states, the abolition of the death penalty has actually brought victims' families, inmates, exonerates, law enforcement officials, and the general public a sense of catharsis.²⁸¹ Additionally, the American Law Institute is currently reviewing a proposal by the Council of Membership to remove the death penalty from the Model Penal Code due to "current intractable institutional and structural obstacles."²⁸²

For California, too, ending capital punishment could increase the state's well-being. The resources used now on a broken capital punishment system could perhaps be better used to prevent crime through youth rehabilitation programs, drug treatment programs, and the like.²⁸³ Another potentially more efficient use of resources would be to redirect money to solving the 40 percent

<http://www.cnn.com/2007/POLITICS/12/13/nj.death.penalty/index.html>.

279. Ristroph, *supra* note 84, at 1309.

280. Death Penalty Info. Ctr., Death Penalty Policy by State, <http://www.deathpenaltyinfo.org/article.php?did=121&scid=11> (last visited Mar. 30, 2009).

281. *See, e.g.*, Letter from Raymond J. Lesniak, State Senator of N.J., to the Cal. Comm'n on the Fair Admin. of Justice (Feb. 13, 2008), *available at* <http://www.ccfaj.org/documents/reports/dp/expert/LesniakLetter.pdf> (describing the scene at the bill signing ceremony at the New Jersey Governor's office).

282. AM. LAW INSTITUTE, REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY (2009).

283. *See generally* John J. Donohue III and Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1 (1998) (noting that the optimal crime prevention strategy may mean diverting funds from punitive to preventative measures).

of murder cases that remain cold (unsolved) as of October 2007.²⁸⁴ Although it is impossible to know how many cold cases could be solved with additional funds, it is at best ironic to focus so much of the state's limited time and energy on appeals and executions of murderers already in custody while hundreds remain on the streets.

V

CONCLUSION

This Comment has argued that the California death penalty violates the Eighth Amendment as its implementation serves neither retributive nor deterrent purposes. Lives spent on death row and sporadic and arbitrary executions cause capital punishment to lose its potency as a warning to future murderers and as a validation of the community's notions of desert. Several states have already renounced capital punishment as an effective punishment for these very reasons. California should join their ranks. Because of current resource limitations, California is certainly not equipped to solve its death penalty problems without neglecting other portions of its criminal justice system. This raises the question of whether California will ever be able to administer capital punishment in a way that does not undermine retribution and deterrence. For the foreseeable future, the answer is no.

284. Editorial, *Getting Away with Murder*, N.Y. TIMES, Oct. 8, 2007, at A28

