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Death Penalty Procedure in California: A Comprehensive Review

Utilizing the death penalty is not a modern day tool to punish criminals. In fact, it has been used for thousands of years. In the Renaissance era, public beheadings and hangings took place very routinely. Military institutions implemented firing squad style executions throughout the World Wars. Even today, many countries, including the United States, use means such as lethal injection and gas chambers to punish criminals. While using the death penalty is still a means of punishment, the actual procedure for deciding whether or not to use it has undergone drastic changes. California, specifically, was a pioneer in developing a sophisticated judicial process for determining guilt and then punishment for potential death row inmates. However, there is still substantial debate surrounding the legitimacy and overall fairness of the process of sentencing convicted criminals to death in California.

First and foremost, the utility of the death penalty serves a much different purpose today than it did before. Today, governments use capital punishment sparingly. While Executions were traditionally used to “impress the audience-to demonstrate, as it were, the wages of sin,” the development of society has prompted this to change (Haines, 126). Guillotines and ropes are not used in the United States today. Moreover, the death penalty is not a means for the government to express power or strike fear into the hearts of its citizens. Instead,” the purpose of today’s rituals are rather than a demonstration of power, the modern orchestration of death lends assurance that everything is in order, everything is humane and civilized and that we aren't, after all, barbarians” (Haines, 126). This focus on order and an established process has prompted

legislators to pay closer attention to the exact process in which convicts are selected for death row. The final decision, ultimately, however, still rested on the jurors.

Death penalty legislation has focused on the judicial process more so after 1976. While the history of the death penalty goes far back in time, it was *Gregg v. Georgia* (1976) that not only overturned an earlier decision, but placed more emphasis on the judicial process from the penalty trial to the executions phase ensuring that it is fair (Haney & Lynch, 411). In fact, this acted as a catalyst for courts to separate the sentencing process from the traditional trial one. Surprisingly, "of the states which use the jury to determine punishment in capital cases, California was the first to separate the determination of punishment from the determination of guilt" (Glenn, 387). California was therefore the first state to implement a process in which jurors would decide only whether the convict would die or not, not whether he or she was innocent or guilty. This was a major step in developing a fair an unbiased decision.

However, there is still substantial debate whether the current judicial process in California represents a fair system. In analyzing this aspect of the death penalty process, I will first discuss the research of Weiss et al (1996) regarding the overall capriciousness, or selection by chance, of the current system in place in California. Furthermore, Douglass (2005) will contribute to our discourse by interpreting the current sentencing procedure from the constitutional perspective of not using the 6th amendment in the sense that it is used for normal guilt trials. Haney & Lynch (2004) will discredit the current procedural standards by arguing that the current protocol utilizes too little standardization and jurors cannot fully understand the concepts of mitigating and aggravating factors when deciding a case. All of this evidence will contribute to the viewpoint that the procedure surrounding the death penalty is not truly a fair system designed for the fairness of the accused.

On the other end of the spectrum, there is evidence that the death penalty procedures in California are not only widely supported among citizens, but opposing evidence can be interpreted as manipulated data. Moreover, while the procedural process is not robust yet, there is an overwhelming consensus that the death penalty is an appropriate punishment. For instance, Field Research Corporation (2004) evidence suggests that within California, there is consistent support for the death penalty while there is some evidence that citizens are not happy with the procedural elements of it. Moreover, Donohue (2005) suggests that empirical evidence against and for the use of the death penalty has sadly been the subject of manipulation. In essence, data and research on both ends of the debate should be utilized with caution because of the nature of how we interpret that data.

According to Weiss et al, in *Assessing the Capriciousness of Death Penalty Charging*, some inmates from San Francisco's correctional facility are subject to a randomized selection of the death penalty. In very blunt terms, this means that "the decision to charge an offender with a capital crime takes on many of the characteristics of a lottery" (Weiss et al, 607). The problem rests on the gray area on the seriousness of crimes. Weiss and his colleagues exemplify this problem: "In California, for example, a homicide that is heinous may qualify for a capital charge. But where exactly is the line between heinous and non-heinous? (Weiss et al, 611). In researching the capriciousness of death row selection, the researchers utilized data from San Francisco's correctional facility along with complex mathematical equations. Their aim was to determine if in fact the selection process provided key patterns or traits or if it was significantly random. Their results were startling.

Weiss and his colleagues determined that there was an overall level of capriciousness in determining death row inmate selection. A few key findings were represented. Firstly, "a

substantial number of cases are judgment calls that could go either way" (Weiss et al, 611). Secondly, "the current procedures in San Francisco wring out about two-thirds of the potential capriciousness," leaving about one third subject to the disparity (Weiss et al, 624). Finally, "death penalty charging decisions in San Francisco, and almost certainly elsewhere, would seem to be marked by substantial capriciousness." (Weiss et al, 625). Essentially, there is a statistically significant level of randomness associated with the selection of death row inmates in San Francisco. Unfortunately, this discredits the death penalty process. Since a lottery style selection, even for a fraction of the population, is not fair by any means, this would suggest that we should either change or discontinue the current procedure regarding death row selection. Therefore, Weiss' research suggests that procedural doctrine in California is neither fair nor reliable.

Another critical aspect of the sentencing doctrine is the power that solely rests on the jury to determine if the punishment is acceptable. According to the work of Craig Haney and Mona Lynch in *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, the current system utilized by California may not be fair. The overarching conclusion was that ""there is now indirect empirical evidence, most gathered shortly after Gregg was decided, suggesting that the Court's confidence in judicial instructions to properly guide death-sentencing behavior of capital juries may have been misplaced" (Haney & Lynch, 414). This emphasis placed upon the power of the jury and their inability to make the best decision poses a dilemma because in most cases, the "jury had produced an unconstitutional pattern of death sentencing" (Haney & Lynch, 414). In essence, the process by which juries decided upon the punishment for the convict was not fair. Specifically in the case of McGautha v. California, Justice Douglass noted lamented:

> In light of history, experience and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution" (Wolfgang & Riedel, 120).

The problem stems from the fact that the current process assumes specific knowledge of protocols that may be more advanced than the usual juror can comprehend.

A juror's personal know-how plays an integral role in deciding life or death for the convict. Haney & lynch place the blame on the current California procedures: "Despite this procedural innovation [separating the death sentence from the guilt trial], California capital juries, like those elsewhere in the country, operated without standards with which to each their sentencing decision" (Haney & Lynch, 417). Essentially, the protocol was not very clear. In their research of 491 upper level college attendees, Haney & Lynch found that "even among these college-educated students there was a widespread inability to comprehend the central terms of capital penalty phase decision making" (Haney & Lynch, 420). Moreover, since jurors are meant to represent community values, "the court has relied heavily upon a juror's own personal understanding of the concepts of mitigating and aggravating in reaching their death penalty verdicts" (Haney & Lynch, 417). Understanding these mitigating and aggravating pieces of evidence remains a difficult task because while each individual has their own values, they are intended to represent those of the whole community. Therefore, if jurors are not able to comprehend the guidelines of making their decision, this ultimately compromises the whole process. This further presents complications to the death penalty procedures because since jurors cannot fully understand the process, convicts may be deprived of their constitutional right to fair and non-prejudicial treatment.

The application of the sixth amendment has also contributed to discourse regarding death penalty procedures. According to John Douglass, in *Confronting Death: Sixth Amendment Rights*

at Capital Sentencing, the author evaluates the pros and cons of using not using the 6th amendment as in normal trials. “Few ‘trial rights’ survive intact after a guilty verdict, and some do not survive at all. Indeed, most sentencing takes place without any witnesses. When witnesses are called, the rules of evidence typically do not apply. At best, a defendant's ‘sentencing rights’ are a faint shadow of his "trial rights," remarked Douglass (Douglass, 1968). The author argued that the convicted inmate potential faces a disadvantage because of it. For instance, Hearsay evidence is permissible and “In the handful of death-penalty jurisdictions that allow the override practice, experience shows that judges frequently exercise the authority to impose death where juries have voted for life.” (Douglass, 2025-2028). Both the use of hearsay and the fidelity of judges to override juror’s decisions delivers ample opportunities for inmates to be subject to unfair treatment by the process of the judicial system. Indeed, the procedure regarding death sentencing was not something that the original framers of the constitution planned for.

Despite evidence that the death penalty procedure may not be robust, there is still overwhelming evidence that California is strongly supportive of the death penalty. For instance, according to the Field Poll conducted in California, “two-thirds (68%) of California voters continue to support capital punishment for serious crimes” (Field, 1). This trend has been steadily increasing since 1956 (with some decline in smaller proportions) (Field, 2). This suggests that despite the literature and data surrounding the criticisms against the process of implementing the death penalty, the majority of citizens in California still believe that it is a just punishment. Even among all of the different races and political affiliations, most groups have a supporting percentage over 50%, except for blacks who are 45% (Field, 4). Among all citizens, over 58% believe that it has been implemented properly (Field, 3). This suggests that even though there are

abundant criticisms of it in California and by other scholars, those who support it still represent a majority of the population.

In terms of the implementation of the death penalty, evidence suggests that while the current system may not be as robust as it could be, the continued discourse surrounding it and flexibility of it to change shows that it is not a rigid set of rules. As Weiss and his colleagues remarked, "charging practices necessarily evolve in response to changing circumstances" (Weiss et al, 1996). This means that the sentencing procedures at the very least can be easily flexible to fit the needs of modern times. This offers probative value in the sense that when considering the procedural elements, legislators are not limited to solely what the framers wrote in the Constitution; instead, legislators can quickly adapt to public consensus and other circumstances that arise with individual cases (Douglass, 2023). Having this fidelity allows for various opinions and viewpoints to be included in the decision making process of how the procedure should be set in California.

Despite an overwhelming amount of statistical evidence and studies regarding the inefficiency of capital punishment, John Donohue, in *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, argues that policymaking has been too impulsive and based on inconclusive evidence. Donohue laments that "studies that were later utterly discredited continue to influence policy since the evidentiary burden required to reverse course appears to be high" (Donohue, 845). Moreover, if we are to discredit pro-death data supporting the deterrent hypothesis (capital punishment deters homicide), we should not neglect carefully analyzing antideath proponents like brutalization hypothesis (capital punishment leads to a more violent society) (Donohue, 2005). Donohue's evidence further suggested that more evidence needed to be presented on both ends of the death penalty debate in order to "reconsider fundamentally

whether existing data can be sufficiently informative as to form the basis of capital punishment policy at all" (Donohue, 843). This suggests that in making drastic changes to the death penalty procedure in California, or anywhere else, empirical data on both sides of the debate should be carefully analyzed and grounded on substantial statistical support that has been documented by numerous researchers across a sufficient timeline.

It is important to note that while there is statistical evidence that suggests that the death penalty procedure may not be robust, it is important to consider the fact that not only may that data not be fully accurate, but the fact that the procedure is subject to flexibility makes it a work in progress. As death penalty legislation is relatively young in the context of modern times, there is still room for improvement and change. Luckily, since defendants are not bound to the traditional rules of the 6th amendment, more rights and privileges can be granted as a way for jurors to make the most informed decisions in California. For instance, allowing hearsay evidence admissible in a death trial may be a way to offer some mitigating evidence that may have been clear cut during the guilt trial. Alternatively, allowing defenders to utilize demographic and research based evidence may offer another way to substantiate that the convict most likely will not commit any further crimes. Nonetheless, this procedure can be used both ways either mitigating or aggravating the claim that the convict should be put to death.

In reviewing the overall fairness of the death penalty procedure, we saw empirical evidence that suggested that one in three inmates are subject to a lottery style selection process. Moreover, we also read that the sentencing trial utilizes a different set of rules and procedure than the traditional guilt trial. In this sentencing trial, not all of the liberties and benefits of the 6th amendment are adhered to. This suggested that the defendant may not have access to full constitutional rights as in a normal trial. Next, jurors may not be fully able to comprehend and

implement the proper decision making process of the potential death row inmate. Because the logic and use of mitigating and aggravating evidence is supposed to represent community values, jurors may not be adequately trained to implement it properly. Thus, the life or death decision is based too much on the personal, and sometimes faulty, understanding by the juror themselves. Despite the academic and empirical evidence discrediting the fairness of the judicial procedure in California, there is still heavy support among California inhabitants for not only the use of the death penalty, but the implementation as well. In fact, over 50% of the residents voted that it was implemented correctly. Moreover, there was evidence presented that suggested empirical evidence used may be misinterpreted and acted upon too quickly by lawmakers. Finally, while the judicial procedure for the death penalty may not be perfectly robust in California, it is nonetheless an open system that is not limited by exact wording within the constitution; instead, researchers and public opinions do have the opportunity to contribute to the discussion surrounding proper implementation.

Works Cited

Donohue, John, and Justin Wolfers. "Uses and Abuses of Empirical Evidence in the Death Penalty Debate." *Stanford Law Review* 58.3 (2005): 791-845. *JSTOR*. Web. 24 Mar. 2011. <http://www.jstor.org/stable/40040281> John Donohue and his colleagues explained how empirical evidence and research has been used in the death penalty debate. Their research included three case studies, a listing of a few problems with the studies and a brief discussion on the practical implications of such knowledge. The different studies used evidence from other researchers as well as their own along with mathematical equations. Their conclusion was that we should be very cautious in empirical data to make impulsive decisions regarding death penalty legislation.

Douglass, John. "Confronting Death: Sixth Amendment Rights at Capital Sentencing." *Columbia Law Review* 105.7 (2005): 1967-2028. *JSTOR*. Web. 24 Mar. 2011. <http://www.jstor.org/stable/4099485> John Douglass explained that certain rights under the 6th amendment applied to trial cases but not to sentencing cases. Mainly, he argued that since a clear application of the amendment is not being utilized, the result is a confused doctrine in which the 6th amendment should be wholly applied, as intended by the original framers of the constitution. Finally, the utility of such utilization would result in protecting the guilty from undeserved death and the innocent of punishment.

Field, Mervin."The Field Poll." *Field Research Corporation*. San Francisco (2005): The Field Poll is an independent and non-partisan public opinion survey established in 1947 as The

California Poll by Mervin Field. The findings were based on a cross-section sampling of 958 registered voters of California. The results have a sampling error of +/-3.3 on a

95% confidence level. The findings were twofold: (i) 68% of California voters

supported the death penalty (ii) 58% supported the implementation process of the death penalty while 31% did not. The study also offered tables and a brief description of the results.

Glenn, Franklin. "The California Penalty Trial." *California Law Review* 52.2 (1964): 386-407. *JSTOR*. Web. 24 Mar. 2011. <http://www.jstor.org/stable/3478926>.Franklin Glenn explained that the California death penalty had several issues regarding the implementation of the judicial process. Glenn first offered a historical overview and remarked that separating the guilt phase from the sentencing phase was a major step in California for making the death penalty a socially accepted judicial process. Moreover, he argued that the separate trial, which allowed evidence out of the scope of the trial and character evidence, served as an effective means of implementing justice.

Haines, Herb. "Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment." *Social Problems* 39.2 (1992): 125-138. *JSTOR*. Web. 24 Mar. 2011. <http://www.jstor.org/stable/3097033> Haines explained the four ways in which executions may be flawed. When these flaws are leaked to the media, they play an integral role in death penalty politics. Haines further argued that these flawed executions that reach the media offer negative sentiment for capital punishment altogether. The paper ends by stressing the importance of the mass media in transforming neutral events into social grievances.

Haney, Craig, and Mona Lynch. "Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions." *Law and Human Behavior* 18.4 (1994): 411-436. *JSTOR*. Web. 24 Mar. 2011. <http://www.jstor.org/stable/1394314>. Haney and his colleagues explained that the intended effects of the instructions given to jurors in capital punishment cases may not be adequate. Their study of capital sentencing

instruction suggested the inability to correctly define and utilize the terms aggravating and mitigating circumstances. Moreover, their study offered evidence that suggested that the jury had the inability to fully implement the judicial process of capital punishment sentencing correctly. Finally, other important factors and the implications of this were discussed.

Weiss, Robert, Richard Berk, and Catherine Lee. "Assessing the Capriciousness of Death Penalty Charging." *Law & Society Review* 30.3 (1996): 607-626. Web. March 24, 2011. <http://www.jstor.org/stable/3054130>. Weiss and his Colleagues discussed the overall chance that was associated with potentially being on death row in a San Francisco correctional facility. Their studies consisted of data from California inmates. Their results suggested that one out of three inmates had a random chance of being selected to go to death row.

Wolfgang, Marvin , and Marc Riedel. "Race, Judicial Discretion, and the Death Penalty." *Annals of the American Academy of Political and Social Science* 407 (1973): 119-133. *JSTOR*. Web. 24 Mar. 2011. <http://www.jstor.org/stable/1038758> Wolfgang and colleagues explained that historical death penalty rates show that blacks are more likely than whites to be sentenced to death. Historical evidence of racial discrimination in sentencing blacks as well as supreme court documents are also discussed. Wolfgang concludes that racial elements are a highly discriminatory factor in the proportion of blacks on death row than whites.

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