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## Essay: Facing the Facts on the Death Penalty

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## ESSAY: FACING FACTS ON THE DEATH PENALTY

*James P. Gray\**

For decades the death penalty has been an emotional and almost unmentionable issue that has affected people in a myriad of different ways.<sup>1</sup> Regardless of people's philosophic points of view, it is important to be aware of the facts. This Essay addresses head-on most of the common arguments that are used in favor of the death penalty, as well as some facts about and responses to them. The Essay also presents additional facts and arguments that should be considered as we all decide how best to proceed in this emotional area. Certainly everyone is entitled to his or her own opinion in this or any other matter, but no one is entitled to his own facts.

Typically, proponents of the death penalty present five justifications for its implementation: (1) reducing to zero the chances that the offender will return to society; (2) closure for the victims' families; (3) deterrence against future violations by other offenders; (4) this is the appropriate punishment for the offender of such a serious crime; and (5) rightful societal vengeance (often cited as "an eye for an eye").<sup>2</sup>

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1. This piece is an adaptation of two entries on Judge Gray's blog: JUDGE JIM GRAY—IT'S A GRAY AREA. Judge Jim Gray, *Facing Facts on the Death Penalty*, JUDGE JIM GRAY—IT'S A GRAY AREA (Mar. 16, 2008), <http://judgejamesgray.blogspot.com/2008/12/facing-facts-on-death-penalty-by-judge.html>, and Judge Jim Gray, *Further Thoughts on the Death Penalty*, JUDGE JIM GRAY—IT'S A GRAY AREA (Mar. 23, 2008), <http://judgejamesgray.blogspot.com/2008/12/further-thoughts-on-death-penalty-by.html>

2. Daniel R. Oldenkamp, Note, *Civil Rights in the Execution Chamber: Why Death Row Inmates' Section 1983 Claims Demand Reassessment of Legitimate Penological Objectives*, 42 VAL. U. L. REV. 955, 969, 970 n.62, 1000 n.166 (2008); see Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U. L. REV. COLLOQUY 17, 18–19, 20–21 (2008); William W. Berry, *Ending Death by Dangerousness—A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 893 (2010); Abram S. Barth, Note, *A Double-Edged Sword: The Role of Neuroimaging in Federal Capital Sentencing*, 33 AM. J.L. & MED. 501, 519

A common concern is the possibility of offenders returning to society. As most people know, when someone is convicted of a “special circumstance” murder, the only two sentences allowed under California law and the laws of most other states are either the death penalty or life without the possibility of parole (LWOP).<sup>3</sup> In times past, a person receiving a “life” sentence could still be paroled, but now if an offender receives an LWOP, parole is simply not possible under the law without a pardon from the Governor—which is politically extremely unlikely. Furthermore, to my knowledge, no one serving such a sentence has ever escaped from prison. As a result, this is probably no longer a reason for the death penalty to be invoked.

Regarding the issue of closure for the victims’ families, consider that, as of today, California has had only thirteen executions since the death penalty was reinstated in 1978.<sup>4</sup> Nonetheless California now has more than 680 convicted offenders on death row.<sup>5</sup> Of those offenders, 112 have been there for more than twenty-five years, 217 for more than twenty years, and 546 for longer than ten years.<sup>6</sup> The last two people executed were Clarence Ray Allen and Stanley “Tookey” Williams, both of whom were executed about twenty-six years after they had committed their offenses.<sup>7</sup> As a result, “closure” for the families, if it comes at all, comes after keeping the books open, sometimes for decades.

Consequently, not only does the death penalty not bring closure, it actually keeps the families of the victims on an emotional roller coaster. Because of the appeals and occasional re-trials, the families are forced for years to relive the grisly details of their loved one’s death—over and over again. In many ways, this is actually using the grieving families as bit players in a long-continuing political drama.

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(2007).

3. CAL. PEN. CODE § 190.2 (2001); Ryan Elias Newby, Note, *Evil Women and Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide*, 22 HASTINGS WOMEN’S L.J. 113, 135 (2011).

4. *Inmates Executed, 1978 to Present*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, [http://www.cdcr.ca.gov/Capital\\_Punishment/Inmates\\_Executed.html](http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html) (last visited Mar. 19, 2011).

5. *Database: California’s Death Row Inmates*, THE DAILY BREEZE, [http://www.dailybreeze.com/ci\\_12852080](http://www.dailybreeze.com/ci_12852080) (last visited Mar. 19, 2011).

6. *Id.*

7. *Inmates Executed, 1978 to Present*, *supra* note 4.

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And when it comes down to it, many of the families discover that it does not furnish much satisfaction to see the object of one's hatred simply go to sleep when hooked up to a needle. For all of these reasons, what we are doing is actually the opposite of closure for the victims' families.

In addition, since many people deem it to be an "insult" to the memory of the deceased victim not to invoke the maximum punishment possible, there is a perceived obligation to seek the death penalty regardless of the costs—either human or financial. But if the maximum authorized punishment were a sentence to life in prison without the possibility of parole, the families would probably be emotionally satisfied with that result and get on with their lives.

Well then, what about deterrence against future offenders? Probably the only circumstances in which deterrence would be a factor would be offenses like murder for hire (both for the people paying for the deed to be done and for the killers themselves), murder after lying in wait, kidnapping in which the victim is killed, multiple murders or murders while already serving an LWOP sentence, and treason. These involve situations in which the acts are usually planned and well thought out in advance.

However, the large majority of offenses for which the death penalty is imposed are for offenses that are not so planned. That is to say, most burglars and robbers do not plan in advance to kill anybody, but things get out of control and people are killed as a result. And the offenders that do make prior plans are often involved in heavily emotional situations, commonly jilted lovers or people with severe psychiatric disorders, so they are not focusing on deterrence anyway. Those realities, coupled with the fact that most offenders never feel that they will ever be caught, negate the effects of deterrence for most offenses.

One more fact enters into this equation. As a practical matter, if a person knows that he has committed an offense that would qualify him for the death penalty, that person tends to feel, with some justification, that he has nothing more to lose. That belief in turn results in the perpetrators killing witnesses to the offense to keep them from testifying against them and also killing the police officers who attempt to arrest them. Consequently, what we end up with is the opposite of deterrence.

Regarding the punishment of the offender, I have no particular

wisdom to suggest, other than saying that in many ways serving a sentence of life without the possibility of ever being released would in many ways be a more severe sentence for most offenders than actually being executed.

That leaves the issue of societal vengeance. Of course, this is a complicated and multifaceted issue. On the one hand, there has been a historical and even biblical rationale that the proper penalty for wrongly taking the life of another is to forfeit one's own life.<sup>8</sup> On the other hand, it is hard to justify our country being the world's champion of human rights if it is so at odds with much of the rest of the world on the issue of capital punishment.

For example, since California reinstated the death penalty in 1978, no fewer than sixty other countries have chosen to abolish it.<sup>9</sup> Although there are dozens of countries that still have the death penalty, only six of those countries, including the United States of America, are responsible for 90 percent of all executions.<sup>10</sup> The other five countries are China, Pakistan, Iran, Iraq, and the Sudan.<sup>11</sup> As such we are keeping pretty lowly company in the area of human rights.

The discussion above outlines the five traditional arguments in favor of invoking the death penalty. The death penalty is an emotional topic. Although some may characterize my views to be ones of a "bleeding heart liberal," I have firsthand experience and a unique perspective as a trial court judge in Orange County from the time I was appointed by Governor Deukmejian at the end of 1983 until I retired in January of 2009.

Additional important facts also affect the discussion. One of those facts that is almost unknown by the general population is the financial cost of death penalty cases.<sup>12</sup> Estimates are that it costs

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8. See generally Ron Gleason, *THE DEATH PENALTY ON TRIAL: TAKING A LIFE FOR A LIFE TAKEN* (2009) (examining the historical and biblical rationale behind the death penalty).

9. *Abolitionist and Retentionist Countries*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Mar. 19, 2011).

10. *Dead Reckoning*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/node/642> (last visited Mar. 19, 2011).

11. History: Federal Death Penalty and International Views, DEATH PENALTY CURRICULUM, <http://deathpenaltycurriculum.org/student/c/about/history/history-9.htm> (last visited Mar. 19, 2011).

12. Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44

taxpayers seven times more money to pursue death penalty cases than it would to try, convict, pursue all appeals, and *keep the perpetrator in prison for the rest of his life*. More specifically, in 2008, the California Commission for the Fair Administration of Justice estimated that it costs taxpayers about \$114 million more per year to process death penalty trials, along with all of the accompanying appeals and writs of habeas corpus proceedings, than it would to process trials in which the maximum sentence were to be life without the possibility of parole.<sup>13</sup> Moreover, if additional recommended reforms to the system are instituted, that amount will jump to about \$232.7 million per year.<sup>14</sup> People do not understand these facts, but the costs of the extra investigators, attorneys, jury selection, court reporter's transcripts, appeals, habeas corpus proceedings, and extra procedural safeguards are staggering.

Why is this process so complicated and expensive? As Justice Sims wrote in a concurring opinion in *Bennett v. Superior Court*,<sup>15</sup> as a practical matter there really are four distinct trials in death penalty cases. The first is a trial (almost always with a jury) that addresses the possible guilt of the offender. In the second trial, assuming the offender is convicted, the jury decides whether the penalty should be death or life without the possibility of parole. Then the third trial focuses on the jurors in the case who arrived at those first two decisions to see if any of them were involved in any form of misconduct, such as telling other jurors about their own personal experiences in life.

The fourth trial confronts the trial attorneys who were involved in the case. At this point, the prosecutors are "tried" to see if they presented their arguments unfairly or too emotionally, and the defense attorneys are "tried" to see if by chance they did not afford the offender the effective assistance of counsel on any material issue. These "trials" usually take place in habeas corpus proceedings in federal courts after the state appeals have finally run their course. At this time the defense is also entitled to virtually every scrap of paper prepared by any law enforcement officer that ever had anything to do

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LOY. L.A. L. REV. (SPECIAL ISSUE) S41, S62–110 (2011).

13. *Death Penalty: The High Cost of the Death Penalty*, DEATH PENALTY FOCUS, <http://www.deathpenalty.org/article.php?id=42> (last visited Mar. 19, 2011).

14. *Id.*

15. 54 Cal. Rptr. 3d 283, 339 (Ct. App. 2006).

with the investigation or any of the witnesses in the case.

How has this situation been allowed to get so extreme? First of all we are a compassionate society, and we seem to be institutionally unwilling to allow anyone to be executed unless all avenues of innocence and mitigation have been explored. Secondly, some people are so radically opposed to the death penalty that they have become zealous in their dedication to an exhaustive defense, or even to delay just for the sake of delay. For them it is a question of morality. Therefore no approach is too extreme if it has even the slightest hope of delaying the final outcome. And in actuality some of these seemingly extreme arguments have been successful in the past in obtaining a reprieve down to an LWOP, or even an exoneration of the underlying offense.

As a result, and also as a practical matter, all cases involving the death penalty have become expensive beyond belief, and are delayed well beyond reason. In fact, I was the judge on the preliminary hearing in the death penalty case of a man named Teofilo Medina who was shown in my court to have robbed four ARCO Mini Marts and thereafter killed the non-resisting clerks by shooting them in the back of the head at point-blank range. In short, he was a bad man. But my hearing took place in 1987, and he was eventually convicted and sentenced to death in 1988.<sup>16</sup> He has been on death row ever since that time and has seven attorneys still actively working on his appeal, which has not yet been heard.

This is not at all an exception. Richard Ramirez, otherwise known as the “Night Stalker,” was convicted in 1989 of thirteen murders, five attempted murders, eleven sexual assaults, and fourteen burglaries.<sup>17</sup> His first appeal went directly to the California Supreme Court, as is required by law. This is an enormous expenditure of resources. In fact, the California Supreme Court’s statistics show that it spends about 20 percent of its time just on death penalty appeals.<sup>18</sup> But even so, Ramirez’s appeal was not heard

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16. *Teofilo Medina Jr.—California Death Row*, CRIME AND CAPITAL PUNISHMENT, <http://www.cncpunishment.com/forums/showthread.php?740-Teofilo-Medina-Jr.-California-Death-Row> (last visited Mar. 19, 2011).

17. *People v. Ramirez*, 139 P.3d 64, 72 (Cal. 2006).

18. 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 (stating that California Chief Justice Ronald M. George estimated that the state’s highest court spends about 20 percent of its time and resources on death penalty cases alone).

until June 2006, which was seventeen years after his conviction. Even though the appeal was decided about sixty days later, if his remaining appeals and writs are heard within the average time schedule of additional writs and appeals, his convictions will not be final until the year 2014—at the earliest.

Moreover, at least Ramirez has appointed appellate counsel. Currently only two of seventeen inmates sentenced to death in the year 2002 have had attorneys appointed for their automatic appeals, and none sentenced in 2003 or thereafter have had any appointed at all.<sup>19</sup> As a result, of the almost 700 prisoners on death row, eighty-eight inmates still have not had counsel appointed for them, and none of them have the funds to hire attorneys themselves.

Why is there such a problem finding attorneys to represent these people? Because one must be experienced in this specialized field, and those professionals can make a great deal more money on other matters than what the state will pay them on these death penalty cases. In addition, it is often emotionally draining work. The number of attorneys willing to accept the appointment is declining, and the number of unrepresented sentenced prisoners continues to increase.

But there are many other serious problems in addition to the financial ones. Although about 60 percent of the general population continues to voice support for the death penalty, more and more of those who are required to impose it are withdrawing their support. That includes prosecutors, juries, judges, and prison officials. As such, the numbers of death penalty convictions nationwide dropped from 317 in 1996 to 128 in 2005.<sup>20</sup> Moreover, this withdrawal of support also includes medical doctors, who are increasingly seeing their participation in the death penalty as a violation of their Hippocratic Oath.<sup>21</sup>

Another large issue that must be considered with regard to the death penalty is both fairness and the appearance of fairness based on things like racial disparities. Statistics show that the death penalty is invoked a great deal more often when the defendant is non-white or

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19. Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 720–21 (2006).

20. Evan Thomas, *Injection of Reflection*, NEWSWEEK, Nov. 19, 2007, at 40.

21. Daniel N. Lerman, Note, *Second Opinion: Inconsistent Deference to Medical Ethics in Death Penalty Jurisprudence*, 95 GEO. L. J. 1941, 1945 (2007).



when the victim is white.<sup>22</sup> In addition, although the U.S. Supreme Court held several years ago that it was unconstitutional to execute juveniles,<sup>23</sup> people are increasingly concerned that we are executing people who are mentally retarded.<sup>24</sup>

Additional problems are seen when either the prosecutors or the judge on the case are up for election in the near future. Are the critical decisions about life or death being made for legal reasons, or for political ones? Many people are having second thoughts about these decisions and are beginning to believe that this is something with which a civilized society should not be involved.

Victims' families are also now frequently seen speaking out publicly against the execution of the convicted perpetrators. One of these is a man named Bud Welch, whose daughter died at the hands of Timothy McVeigh in the bombing of the Oklahoma City Federal Building. As Mr. Welch continued to think about the situation, he stated publicly that he had come to two realizations: (1) that even after McVeigh would be dead, he himself would still not actually feel any better; and (2) that all of this rage and hatred against McVeigh was hardly a fitting tribute to his daughter's memory.<sup>25</sup>

Finally, there is the question of making a mistake. With the development of DNA evidence that is considered more than 99.9 percent reliable, programs like the Innocence Project have shown that more than two hundred inmates have been falsely convicted for crimes they did not commit.<sup>26</sup> And that includes fifteen

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22. Hugo Adam Bedau, *The Case Against the Death Penalty*, ACLU CAPITAL PUNISHMENT PROJECT (Mar. 12, 2011, 9:38PM), <http://users.rcn.com/mwood/deathpen.html>.

23. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005). The Supreme Court held that the Eighth and Fourteenth Amendments prohibit execution of individuals who were under 18 years of age at the time of their capital crimes. *Id.*; see Natalie Pifer, Note, *Is Life the Same as Death?: Implications of Graham v. Florida, Roper v. Simmons, and Atkins v. Virginia on Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOY. L.A. L. REV. 1495, 1498 (2010).

24. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“[D]eath is not a suitable punishment for a mentally retarded criminal. . . .”). The Supreme Court held that executions of mentally retarded criminals were “cruel and unusual punishments” prohibited by the Eighth Amendment. *Id.*; Pifer, *supra* note 23, at 1497.

25. See Yangkyoung Lee, *Father of Bombing Victim Speaks Against Death Penalty*, DAILYNEBRASKAN.COM (Nov. 28, 2008, 4:11PM), <http://www.dailynebraskan.com/news/father-of-bombing-victim-speaks-against-death-penalty-1.992115> (describing Welch's reasons for speaking against the death penalty); see also Terre Haute, “*No Healing From Killing*”: *Timothy McVeigh Set to Die in May*, CBS NEWS, (Mar. 16, 2001), <http://www.cbsnews.com/stories/2001/03/16/deathpenalty/main279319.shtml> (describing Welch's “message of forgiveness”).

26. Richard Willing, *DNA to Clear 200th Person; Pace Picks Up on Exonerations*, USA

defendants who were sentenced to death. Of course, in many ways that can be turned into an argument in favor of future death penalty sentences in which DNA evidence would be used to obtain the convictions. Nonetheless, increasingly, people have been questioning the death penalty because of its inability to correct mistakes.

We are human, and we can make mistakes. The largest numbers of false convictions are based on erroneous eyewitness identifications.<sup>27</sup> Others happen for various reasons based on false confessions by the defendants or unreasonable appeals to the jurors' emotions. So an increasing number of people are concluding that, for many or all of the reasons that have been presented here, it is unworthy for an enlightened society to involve itself in the killing of criminal defendants.

In that regard, the New Jersey legislature passed a law that the governor signed repealing the death penalty, which made it the first state in several decades to do so.<sup>28</sup> More recently, Illinois banned the death penalty.<sup>29</sup> In addition, several other states have imposed moratoriums on its utilization until all of these issues can be studied further.<sup>30</sup> In fact, this position has become so prevalent around the world that no country that imposes the death penalty is deemed qualified to join the European Union.<sup>31</sup>

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TODAY, Apr. 23, 2007, at A1. A former U.S. Army cook spent nearly twenty-five years in prison for a rape he did not commit. He was the 200th person exonerated by DNA evidence. *Id.*; see also Robert Whiston, *DNA Doppelgänger Dilemma*, ROBERT WHISTON POLICYPUZZLES, <http://robertwhiston.wordpress.com/2008/02/29/6/> (last visited Mar. 24, 2011) (describing the use of DNA testing for exoneration purposes).

27. Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1490 (2008) ("Studies of wrongful conviction cases have concluded that erroneous eyewitness identifications are by far the leading cause of convicting the innocent.").

28. Robert J. Martin, *Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute*, 41 U. TOL. L. REV. 485, 543 (2008) ("On December 17, 2007, New Jersey became the first state to repeal its death penalty statute since the United States Supreme Court again legalized capital punishment in 1976."); see also Tom Hester, Jr., *N. J. Governor Signs Death Penalty Ban Into Law*, N.Y. SUN, Dec. 18, 2007, <http://www.nysun.com/national/nj-governor-signs-death-penalty-ban-into-law/68234/> ("Governor Corzine signed into law yesterday a measure abolishing the death penalty, making New Jersey the first state in more than four decades to reject capital punishment.").

29. Monica Davey, *Illinois Bill Eliminating Death Row Is Approved*, N.Y. TIMES, Jan. 12, 2011, at A12.

30. See, e.g., Press Release, Death Penalty Information Center, Maryland Governor Declares Moratorium on Executions (May 9, 2002), <http://www.deathpenaltyinfo.org/node/522>.

31. Richard C. Dieter, *The Death Penalty and Human Rights: U.S. Death Penalty and International Law*, OXFORD ROUND TABLE ON HUMAN AND CIVIL RIGHTS 5 (2002) available at

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So whether the death penalty is appropriate or not in theory, I believe the facts show unmistakably that the system is dysfunctional and that the laws do not work as intended. And, as a practical reality in today's real world, they cannot be made to work.

Accordingly, I have personally concluded that the victims' families would be better served by its repeal; that the huge amount of tax money would be better spent on improving our roads or paying the salaries of our police and firefighters; that both the trial and appellate courts could better devote their resources and energies by addressing a number of other issues in our society crying out for attention; and that this country could rejoin most of the rest of the civilized world by repealing this practice. The system we have today is neither swift nor sure nor effective.