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Burning a Hole in the Pocket of Justice: Prop. 66's Underfunded Attempt to Fix California's Death Penalty

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BURNING A HOLE IN THE POCKET OF JUSTICE: PROP. 66'S UNDERFUNDED ATTEMPT TO FIX CALIFORNIA'S DEATH PENALTY

*Flavia Costea**

California has struggled with the administrative and financial burdens of a flawed death penalty system for decades. In an effort to save the death penalty, the voters of California enacted Proposition 66, which promised to deliver a quicker and more cost-effective system. This Article focuses on the provision of Prop. 66 that expands the number of lawyers who can act as defense lawyers for inmates on death row. While this provision superficially seems to solve the shortage of defense attorneys willing to take on death penalty cases, without significant funding, the shortage of resources and pressure to speed up executions may lead to significant constitutional violations. This Article proposes solutions that emphasize a cost-benefit analysis and considers public policy concerns for the future of the death penalty in California.

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I. INTRODUCTION

The death penalty in California is fundamentally broken. The California Commission on the Fair Administration of Justice has estimated that a death sentence in California costs almost twelve times more than a sentence of life without parole.¹ Keeping an inmate on death row rather than placing the inmate in a maximum security prison for life without parole costs an additional \$90,000 per year.² For the current 740 inmates on death row in California,³ this adds up to an additional \$63.3 million annually.⁴ Despite the death penalty's significant administrative and financial burdens, California has only executed thirteen inmates since 1978.⁵ This means that, on average, California spends \$190 million every three years to complete one execution.⁶

Six years ago, in a careful cost study, the late Judge Alarcón of the Ninth Circuit revealed the financial burden that the death penalty has imposed on the state and implored California to “mend or end” its death penalty system.⁷ Instead, voters enacted Proposition 66 (“Prop. 66”) in November 2016.⁸ Deemed the “Death Penalty Reform and Savings Act,” voters were lured in by what seemed like an attractive solution to a deeply flawed system. Prop. 66 sounds great on paper: it promises fewer appeals, more money donated to victims’ families, streamlined court processes, a mandatory five-year timeframe, and a mechanism to force more lawyers to take on death penalty cases and eliminate the backlog on death row.⁹ Voters’ support for Prop. 66 is

1. CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 147 (Gerald Uelmen & Chris Boscia eds., 2008), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1000&context=ncippubs>.

2. *Id.* at 146.

3. *Death-Row Prisoners by State*, DEATH PENALTY INFO. CTR. (2018), <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>.

4. CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 1, at 146.

5. Evan Wagstaff, *Here Are the 13 Men Executed by California Since 1978*, L.A. TIMES (July 16, 2014, 2:00 PM), <http://graphics.latimes.com/towergraphic-see-13-men-executed-california-1978>.

6. CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 1, at 141.

7. See Judge 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 LOY. L.A. L. REV. S41, S42 (2011).

8. *California Proposition 66, Death Penalty Procedures (2016)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_\(2016\)](https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)) (last visited Oct. 13, 2018).

9. Gen. Elec. (Cal. Nov. 8, 2016).

understandable. The public was tired and frustrated with incurring the costs of a death penalty system, without any of the proffered benefits of one. The unfortunate reality, however, is that Prop. 66 does not “mend” the death penalty system. It ignores many practical realities of the judicial system. These unheeded problems will either make Prop. 66 completely ineffectual in speeding up the death penalty or, succeed, while compromising accuracy and constitutionality within the California death penalty system.

The provision of Prop. 66 that seeks to expand the number of lawyers working on death penalty cases is particularly misguided and will likely have little effect on speeding up executions. If the California courts and the legislature succumb to the pressure of trying to make Prop. 66 effective without more resources, they will likely be forced to lower the standards for death penalty defense counsel. That may cause Prop. 66 to actually prolong appeals, due to a potential of a flood of Sixth and Eighth Amendment challenges.

Part II of this Article will first trace the history of California’s voter initiative process, how Prop. 66 materialized, and the history of the death penalty in both the United States Supreme Court and California. Then, Part III will argue that Prop. 66 will likely be ineffectual and will force the California judiciary to lower the qualifications for death penalty defense counsel, which will cause an influx of constitutional appeals. Finally, Part IV will propose solutions, and Part V will discuss justifications for those proposals and important public policy concerns that should be considered.

II. CALIFORNIA’S TROUBLED HISTORY WITH THE DEATH PENALTY

Despite its problems, Prop. 66 passed through the ballot due to California’s unique voter initiative process. It was written in an attempt to “save” the death penalty through a series of reforms, rather than repealing the punishment completely.¹⁰ The dysfunctional state of California’s death penalty system is the result of a long history of uncertainty concerning the death penalty in the United States Supreme Court combined with the conflicting California state judiciary and legislature. Since the 1960s, the United States Supreme Court has

10. John J. Donohue III, *Q&A with John Donohue About Prop 66*, STAN. L. SCH. LEGAL AGGREGATE BLOG (Sept. 1, 2017), <https://law.stanford.edu/2017/09/01/qa-with-john-donohue-about-Prop-66/>.

debated the constitutionality of the death penalty, often under the Eighth and Fourteenth Amendments, and California has mirrored it.¹¹

A. *A History of Prop. 66 and California's Unique Voter Initiative System*

California is unique in that its voter initiative system allows for one of the most direct forms of democracy in the United States.¹² While this method may seem beneficial in many respects, there is an inherent danger that the civilian groups who write these ballot measures do not always have the necessary specialized knowledge of elected legislators. In many ways, Prop. 66 reflects the flaws of California's voter initiative process and lacks an accurate appreciation of how the judicial system in California functions.

1. Voter Initiatives in California

The voter initiative process has a deep-rooted history in California. It was adopted in 1911 during a time when the California legislature was heavily influenced by railroad monopolies.¹³ Citizens and other business owners were crippled by legislation that largely ignored the will of the voters and focused on benefitting the monopoly of railroads.¹⁴

In response to this government abuse, Hiram Johnson, the governor of California at the time, enacted the voter initiative program so that citizens could be heard again.¹⁵ A voter initiative obviates the need for approval from the governor or legislature and instead is a proposition submitted directly to the voters.¹⁶ To make it onto the ballot, an initiative must start as a petition that is submitted to the

11. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972); *People v. Anderson*, 493 P.2d 880, 883 (Cal. 1972).

12. Hillel Aron, *How California's Ballot Measure Process Got So Kooky*, LA WEEKLY (Oct. 22, 2016, 7:47 AM), <http://www.laweekly.com/news/how-californias-ballot-measure-process-got-so-kooky-7526677>.

13. J. FRED SILVA, PUB. POL'Y INST. OF CAL., THE CALIFORNIA INITIATIVE PROCESS: BACKGROUND AND PERSPECTIVE 1 (2000), http://www.ppic.org/content/pubs/op/OP_1100FSOP.pdf.

14. See *id.*

15. John Myers, *As Major Reform of California's Initiative Process Nears Its Anniversary, the Record Is Mixed*, L.A. TIMES (Jun. 24, 2018, 3:00 AM), <https://www.latimes.com/politics/la-pol-ca-road-map-initiative-overhaul-record-20180624-story.html>.

16. *Ballot Initiatives*, STATE OF CAL. DEP'T OF JUSTICE: XAVIER BECERRA, ATTORNEY GEN., <https://oag.ca.gov/initiatives> (last visited Oct. 14, 2018).

California Attorney General.¹⁷ The petition must then gain a minimum number of signatures, equal to 8% of registered voters if the proposition seeks to alter the California Constitution, or 5% if it seeks to alter a statute.¹⁸ Currently, the minimum number of signatures is 585,407 or 365,880.¹⁹ Once the signatures are acquired, the legislature does not have the ability to alter the text of the initiative.²⁰ Once on the ballot, the proposition must gain more than 50% of the vote to pass.²¹

During the era when the voter initiative was created, it saved the California citizens from oppressive monopoly control.²² The problem, however, is that the voter initiative system has stayed largely the same since that time, while political complexities have increased and the need for stemming monopolistic control by direct initiative has decreased. What we have today is a system that does not require a sufficient amount of deliberation before an initiative is on the ballot. Unlike legislation, which goes through a robust vetting process, ballot initiatives can change the legal and political landscape in California before enough thought has been put into the propositions. The result is often an ill-advised proposition that has not properly weighed the ramifications and practical consequences of its enactment.

2. Tracing Prop. 66's Origins

Prop. 66 was written in part by the pro-death penalty organization, Criminal Justice Legal Foundation.²³ It was on the ballot in November 2016 alongside Proposition 62, which proposed to repeal the death penalty in California completely.²⁴ Prop. 66 passed with a

17. *Id.*

18. CAL. CONST. art. II, § 8(b).

19. *How to Qualify an Initiative*, ALEX PADILLA, CAL. SEC'Y OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/how-qualify-initiative/> (last visited Oct. 10, 2018).

20. Aron, *supra* note 12.

21. SILVA, *supra* note 13, at 1–2.

22. *History of Initiative and Referendum in California*, BALLOTPEDIA, https://ballotpedia.org/History_of_Initiative_and_Referendum_in_California (last visited Oct. 10, 2018).

23. Maura Dolan, *Executions Could Resume After California Supreme Court Leaves Most of Proposition 66 Intact*, L.A. TIMES (Aug. 24, 2017, 3:25 PM), <http://www.latimes.com/local/lanow/la-me-ln-death-penalty-decision-prop-66-20170824-story.html>.

24. Gen. Elec. (Cal. Nov. 8, 2016).

51.3% majority, while hopes of putting an end to capital punishment with Proposition 62 faded into the distance with 46.1% of the vote.²⁵

Prop. 66 is dubbed the “Death Penalty Reform and Savings Act of 2016” and, in its essence, puts in a fast-track to lethal injections and “streamlines” death penalty procedures.²⁶ It amends the California Penal Code and Government Code to change appeal procedures, assign the superior courts sole jurisdiction over capital appeal petitions, establish a five-year time limit for review, allow death row inmate transfers among California prisons, increase the amount of inmate wages that are paid in restitution to the victims’ families, and exempt prison officials from regulations for developing execution methods.²⁷ Most importantly for the purposes of this Article, Prop. 66 also requires attorneys on the California Court-Appointed Counsel list to take on death penalty cases if they wish to remain on the appointment list.²⁸ Specifically, Prop. 66 adds the following text to California Penal Code section 1239.1:

When necessary to remove a substantial backlog in appointment of counsel for capital cases, the Supreme Court shall require attorneys who are qualified for appointment to the most serious non-capital appeals and who meet the qualifications for capital appeals to accept appointment in capital cases as a condition for remaining on the court’s appointment list. A “substantial backlog” exists for this purpose when the time from entry of judgment in the trial court to appointment of counsel for appeal exceeds 6 months over a period of 12 consecutive months.²⁹

Recently, in *Briggs v. Brown*,³⁰ the California Supreme Court upheld the majority of Prop. 66, aside from holding that its five-year

25. Jazmine Ulloa & Julie Westfall, *California Voters Approve an Effort to Speed up the Death Penalty with Prop. 66*, L.A. TIMES: ESSENTIAL POLITICS (Nov. 22, 2016, 7:00 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-proposition-66-death-penalty-passes-1479869920-htmlstory.html>.

26. San Diego Union-Trib. Editorial Board, *Why California Should End, Not Streamline, the Death Penalty*, SAN DIEGO UNION-TRIBUNE (Oct. 23, 2016, 6:00 AM), <http://www.sandiegouniontribune.com/opinion/endorsements/sd-yes-on-prop-62-no-on-prop-66-story.html>.

27. See Gen. Elec. (Cal. Nov. 8, 2016).

28. CAL. PENAL CODE § 1239.1(b); Gen. Elec. (Cal. Nov. 8, 2016).

29. Gen. Elec. (Cal. Nov. 8, 2016).

30. 400 P.3d 29 (Cal. 2017).

time limit was “directive” instead of mandatory.³¹ Although the *Briggs* opinion did not address the attorney appointment section of Prop. 66 in detail, the language continuously hints at the court’s lack of optimism as to whether the proposition will effectively fulfill its goal of speeding up executions.³²

The California Rules of Court provide a list of requirements for death penalty attorneys in order to “promote adequate representation in death penalty cases.”³³ To be lead counsel, these include ten years of criminal law litigation experience, and experience as lead counsel in:

(A) At least 10 serious or violent felony jury trials, including at least 2 murder cases, tried to argument, verdict, or final judgment; or

(B) At least 5 serious or violent felony jury trials, including at least 3 murder cases, tried to argument, verdict, or final judgment;

(4) Be familiar with the practices and procedures of the California criminal courts;

(5) Be familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence;

(6) Have completed within two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and

(7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases.³⁴

These stringent qualifications contrast with the rule for appointed counsel in non-capital appeals. The qualifications of appointed counsel here are largely up to the courts of appeal’s indigent defense projects.³⁵ The court rules simply state:

31. *Id.* at 34.

32. *Id.* at 61.

33. CAL. R. CT. 4.117.

34. *Id.*

35. See *Court-Appointed Counsel Program*, CAL. CTS: THE JUD. BRANCH OF CAL., <http://www.courts.ca.gov/4201.htm> (last visited Oct. 12, 2018).

In matching counsel with the demands of the case, the Court of Appeal should consider: (1) The length of the sentence; (2) The complexity or novelty of the issues; (3) The length of the trial and of the reporter's transcript; and (4) Any questions concerning the competence of trial counsel.³⁶

There are six appellate projects in California, one of which is devoted solely to capital appointments, and the rest of which are devoted to noncapital appointments.³⁷ Under the authority of the California Courts of Appeal and California Rules of Court, rule 8.300, the projects maintain various lists of attorneys qualified for appointment to cases depending on a case's difficulty. The criteria or procedures for the separation of these lists is not available to the public and, from the broad language of Rule 8.300, it seems that the rules are largely up to the discretion of the appellate projects rather than a statutory, publicly available standard.

B. The Evolution of the Death Penalty in the United States Supreme Court and Its Effect on California

The death penalty has a long and tumultuous history in America and California. Death penalty statutes have existed in California since it joined the Union in 1850.³⁸ Between 1893 and 1967 a total of 502 felons were executed, averaging almost seven executions a year.³⁹ The executions immediately ceased, however, during the United States Supreme Court's "de facto moratorium" on capital punishment between 1967–1977.⁴⁰ During this time the Supreme Court debated the constitutionality of the death penalty, and several seminal capital punishment cases emerged.

1. The United States Supreme Court's Emerging Jurisprudence on the Death Penalty

Modern United States Supreme Court jurisprudence can be summarized into three main categories: the period prior to *Furman*,

36. CAL. R. CT. 8.300.

37. *Appellate Projects*, CAL. CTS: THE JUD. BRANCH OF CAL., <http://www.courts.ca.gov/13714.htm> (last visited Oct. 8, 2018).

38. John H. Culver & Chantel Boyens, *Political Cycles of Life and Death: Capital Punishment as Public Policy in California*, 65 ALB. L. REV. 991, 995 (2002).

39. *Id.*

40. *Id.* at 991–92.

when juries were given complete discretion to decide when a death sentence should be imposed, the *Furman* period, when the Supreme Court stopped all executions, and the *Gregg* period when executions were allowed to begin again.

a. The pre-Furman Era

Only one year prior to the national death penalty standstill caused by *Furman*, the United States Supreme Court decided *McGautha v. California*.⁴¹ In *McGautha*, two petitioners, one from California and one from Ohio, appealed their death sentences and argued that, among other issues, the death penalty was unconstitutional because juries lacked any governing standards of when to impose a death sentence.⁴² In *McGautha*'s trial, the jury instructions stated that, "in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion."⁴³ Petitioners argued that such a "fundamentally lawless" method of imposing the death penalty violated their right to due process under the Fourteenth Amendment.⁴⁴

The Court, however, was not persuaded by their argument. Justice Harlan, in his majority opinion, cited various sources of history and a wide swath of cases, which asserted that, in order for the death penalty to work, its imposition should remain solely up to the discretion of the jury and death eligible crimes could not be confined to finite categories.⁴⁵ Justice Harlan further reasoned that the "infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need."⁴⁶ Thus, the Court rejected the notion that a lack of governing standards for death penalty sentences violated anything in the Constitution.⁴⁷

41. 402 U.S. 183 (1971), *reh'g granted*, *vacated by* *Crampton v. Ohio*, 408 U.S. 941 (1972).

42. *Id.* at 196.

43. *Id.* at 189–90.

44. *Id.* at 196.

45. *Id.* at 183–197.

46. *Id.* at 208.

47. *Id.* at 207.

b. The Furman Era

The sentiment in *McGautha* dissipated quickly, as the very next year the United States Supreme Court decided *Furman v. Georgia*⁴⁸ and overturned *McGautha*.⁴⁹ In *Furman*, the Supreme Court held that the death penalty violated the “cruel and unusual punishment” clause of the Eighth Amendment and the due process clause of the Fourteenth Amendment because of the largely arbitrary and discriminatory fashion with which it was being carried out within the states.⁵⁰ The case concerned three black men sentenced to death, one on the basis of felony murder and the other two on the basis of rape.⁵¹ As part of the unusual per curiam opinion in which each Justice wrote a separate concurrence, Justice Stewart wrote,

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.⁵²

The case struck down death penalty schemes in all states until the schemes could be amended to alleviate the arbitrary nature with which they were being applied. During this time, states worked towards revising their death penalty statutes in an effort to make them fairer and more even-handed in application.

c. The Gregg Era

*Gregg v. Georgia*⁵³ then gave new life to the penalty. The Supreme Court affirmed petitioner Troy Gregg’s death sentence for the murder and armed robbery of two men who had picked up Gregg and his companion, Floyd Allen, as hitchhikers.⁵⁴ Gregg was found guilty and sentenced to death under Georgia’s revised death penalty statutes.⁵⁵ The jury was instructed that in order to give a death

48. 408 U.S. 238 (1972) (per curiam).

49. *Id.* at 239–40.

50. *Id.* at 239–40 (1972).

51. *Id.* at 252–53 (Douglas, J., concurring).

52. *Id.* at 309–10 (Stewart, J., concurring).

53. 428 U.S. 153 (1976).

54. *Id.* at 207.

55. *Id.* at 161.

sentence, one of the following three aggravating factors must be found:

One[:] That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore].

Two[:] That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.

Three[:] The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [sic] involved the depravity of [the] mind of the defendant.⁵⁶

The jury found that the first two aggravating factors had been met.⁵⁷

The Supreme Court then held that Georgia's revised death penalty statutes eliminated the arbitrariness that worried the Court in *Furman*, with the addition of its "aggravating factors" that were now required in order to impose a death sentence.⁵⁸ It was believed that by requiring a seemingly objective set of circumstances to impose the death penalty, juries would necessarily be more consistent in their sentencing.⁵⁹ After *Gregg* was handed down, as long as a state adopted their own list of aggravating factors that were similar to Georgia's, they were permitted to start executions again.

2. California's Own Difficulties with the Death Penalty

California was substantially affected by this uncertain period for the death penalty in the United States Supreme Court, and similarly went through several cycles of deciding if and how the death penalty should be carried out. On February 18, 1972, in *People v. Anderson*,⁶⁰ the California Supreme Court ruled that the death penalty violated Article 1, Section 6 of the California Constitution, which forbids "cruel or unusual punishment," and stated that capital punishment in

56. *Id.* at 161.

57. *Id.*

58. *Id.* at 197.

59. *Id.* at 206–07.

60. 493 P.2d 880 (Cal. 1972).

California “offend[ed] contemporary standards of decency.”⁶¹ The California Supreme Court seemed to have missed the mark on their estimation of “contemporary standards,” however, as voters quickly reenacted the death penalty just later that year by passing ballot measure Proposition 17.⁶²

Proposition 17 (“Prop. 17”) amended the California Constitution by adding Section 27 to Article 1, which put into force all death penalty statutes and stated:

The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.⁶³

In the wake of Prop. 17, the state legislature had to figure out a practical way to implement a new statutory scheme that was also within the confines of *Furman* and *Gregg*.⁶⁴ The legislature in California did this by adopting a series of aggravating factors into the death penalty statutes, similar to the ones Georgia adopted in *Gregg*, as to eliminate the potential for arbitrary application of the death penalty.⁶⁵ However, during the same time that the states were adopting the aggravating factors framework, the Supreme Court decided a number of cases that held the new statutory frameworks were unconstitutional because they did not allow for juries to hear mitigating evidence which could potentially bring the sentence down to life without parole.⁶⁶ Thus, the California Supreme Court struck down the new framework, and the legislature had to start again.⁶⁷

The statute was yet again revised, this time allowing juries to hear evidence which would support a life in prison sentence instead of a death sentence, and only allowed a death sentence to be considered if

61. *Id.* at 891.

62. Proposition 17 (1972) added Section 27 to Article I of the California Constitution. CAL. CONST. art. I, § 27.

63. *Id.*

64. Culver & Boyens, *supra* note 38, at 1000.

65. *Id.*

66. *Roberts v. Louisiana*, 428 U.S. 325, 333–34 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976).

67. Culver & Boyens, *supra* note 38, at 1000.

“special circumstances” were present.⁶⁸ These special circumstances included murder for financial gain, murder of a police officer or witness in a trial, and murder in the commission of rape, lewd acts with a child, or by particularly “cruel or atrocious” means.⁶⁹

a. *The Bird Era*

Over the next few years, with Justice Bird as the head of the California Supreme Court, the court slowly chiseled away at Prop. 17. Among the decisions during this period, the California Supreme Court overturned many death sentences by allegedly ignoring the harmless error doctrine, finding almost no trial error too small to merit reversal of a death sentence.⁷⁰ Additionally, they held that the “cruel and atrocious” circumstances standard was too vague and that a defendant’s intent to kill or to aid in a killing was required.⁷¹ The tendency towards reversal in death sentence cases during the Bird Court caused much public discontent among capital punishment supporters, which at the time was the majority of the California population. In 1986, voters refused to reelect Justices Bird, Grodin, and Reynoso, three of the most liberal and anti-death penalty justices on the California Supreme Court at the time.⁷² For the first time in California history, three spots were open on the California Supreme Court in one election.⁷³

b. *The Lucas Era*

The governor at the time of these vacancies, George Deukmejian, was a conservative and a proponent of the death penalty.⁷⁴ The three vacancies on the California Supreme Court gave him the opportunity to nominate more conservative justices who would carry out his pro-death penalty agenda.⁷⁵ While the death penalty was touted as the primary reason for removing the three liberal justices from the

68. *People v. Davis*, 633 P.2d 186, 193–95 (Cal. 1981).

69. John W. Poulos, *The Lucas Court and Capital Punishment: The Original Understanding of the Special Circumstances*, 30 SANTA CLARA L. REV. 333, 354–56, 400–02, 407 (1990).

70. Culver & Boyens, *supra* note 38, at 1002.

71. *Carlos v. Superior Court*, 672 P.2d 862 (Cal. 1983); *People v. Engert*, 647 P.2d 76, 78 (Cal. 1982).

72. Culver & Boyens, *supra* note 38, at 1003.

73. *Id.*

74. *Id.*

75. *Id.*

California Supreme Court, there were also other political forces at play. Four conservative political groups raised \$5.6 million in the campaign against the Bird Court.⁷⁶ These groups convinced supporters that the Bird Court had to be overthrown because it was ignoring the will of the voters by refusing to execute anyone.⁷⁷ The underlying motive for removing the three liberal justices, however, was likely to obtain a conservative majority on the court so that it reflected the newly elected conservative government.⁷⁸ The Bird Court was often accused of being anti-business, which is likely why large oil and insurance companies contributed substantial donations to the campaign against them.⁷⁹

Justice Lucas was appointed as Chief to fill Bird's position, and over the years, the California Supreme Court completely reversed its tendency towards reversal on death-penalty sentences. Harmless error often precluded reversals, and the intent to kill requirement recently instated by the Bird Court was reversed.⁸⁰

For a period, in the aftermath of the Bird Court, it seemed as though the opinions of both the public and the California Supreme Court were finally aligned.⁸¹ However, it was not until 1992 that the first person was executed in California after the enactment of the 1977 laws.⁸² Since then, only nine others have been executed,⁸³ despite the fact that 740 prisoners remain on death row.⁸⁴ Since the end of the Bird Court, California's death penalty statutes have largely remained the same, aside from the addition of death penalty sentences for accomplices who played a major role in the murder and the elimination of the gas chamber in favor of the lethal injection.⁸⁵

76. *Id.*

77. Tom Wicker, *In the Nation; A Naked Power Grab*, N.Y. TIMES (Sept. 14, 1986), <http://www.nytimes.com/1986/09/14/opinion/in-the-nation-a-naked-power-grab.html>; Patrick K. Brown, *The Rise and Fall of Rose Bird: A Career Killed by the Death Penalty*, CAL. SUP. CT. HIST. SOC'Y (2007), https://www.cschs.org/wp-content/uploads/2014/03/CSCHS_2007-Brown.pdf.

78. *See* Wicker, *supra* note 77; Brown, *supra* note 77.

79. Wicker, *supra* note 77.

80. Culver & Boyens, *supra* note 38, at 1004.

81. *Id.*

82. *Id.* at 1005.

83. *Id.* at 1006.

84. *Death-Row Prisoners by State*, DEATH PENALTY INFO. CTR. (Apr. 1, 2018), <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>.

85. Culver & Boyens, *supra* note 38, at 1006–08.

This flip-flopping over the constitutionality of the death penalty reflects a conflict between the legislature, the judiciary, and the California voters. Recent litigation over Prop. 66 is no different. *Briggs v. Brown*, the recent litigation over the constitutionality of “mandatory” five-year period to adjudicate appeals in Prop. 66,⁸⁶ is reminiscent of the same dance that has been going on between the California Supreme Court and the state legislature since the 1960s.

III. PROP 66 WILL LOWER QUALIFICATIONS FOR APPOINTED COUNSEL AND IN TURN RAISE SIXTH AND EIGHTH AMENDMENT VIOLATIONS

Prop. 66’s provision on appointed counsel will likely have no effect in speeding up executions and may also cause a severe degradation in the quality of death penalty representation. Threatening attorneys who are on California’s various appointment lists to take on death penalty cases will inevitably result in the appointment of unqualified attorneys and an increased likelihood of violating the objectively reasonable standard for effective representation required under the Sixth Amendment.⁸⁷ In turn, as there is already a national problem with the quality of defense attorneys in death penalty cases,⁸⁸ Prop. 66 will also potentially increase the arbitrary nature with which death sentences are handed down and create a new *Furman*-like violation of the Eighth Amendment.⁸⁹

A. There Is No Indication of a Group of Capital Appeal Qualified Attorneys Who Are Simultaneously on the Appointment List and Not Taking on Death Penalty Cases

There is serious doubt that Prop. 66’s attorney appointment provision will have a meaningful effect if the legislature leaves it as is. To reiterate, Prop. 66 requires that the California “Supreme Court shall require attorneys who are qualified for appointment to the most serious non-capital appeals *and who meet the qualifications for capital*

86. *Briggs v. Brown*, 400 P.3d 29 (Cal. 2017).

87. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 688–92 (1984).

88. Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 324–25 (1993).

89. *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Brennan, J., concurring).

appeals to accept appointment in capital cases as a condition for remaining on the court's appointment list."⁹⁰

This provision assumes that there is a universe of attorneys in California that are qualified for capital appeals yet refuse to take these cases on. The qualifications require that attorneys have done "at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California" within two years before appointment.⁹¹ It defies logic to assume that there are large numbers of attorneys in California taking specialized capital defense training every two years, and who are meeting all the other qualifications under California Rules of Court, rule 4.117, yet refuse to take on capital appeals. Approved capital defense training is not a requirement for any other type of court appointment,⁹² therefore it would be irrational to assume that attorneys would be participating in specialized training for a type of case that they were going to refuse to take in the end.

If the group of attorneys hypothesized by Prop. 66 does not exist in any meaningful number, the attorney appointment provision of Prop. 66 will fail to have any significant impact on its goal of speeding up executions. This is an example of how Prop. 66 was crafted without a full understanding of the details and realities of the modern legal field. If the attorney appointment provision of Prop. 66 proves to be ineffective and the mandatory five-year period has already been discredited,⁹³ there is little hope left that the remaining provisions will make a meaningful impact on the speed of executions.

B. California Will Likely Be Forced to Lower Capital Appeal Qualifications in Order to Effectuate the Goals of Prop. 66

As it is unlikely that there will be many lawyers who are legitimately qualified for capital appeals and have not already taken on death penalty cases, the legislature is bound to explicitly or implicitly lower the qualifications for appointed defense counsel because of the pressure to effectuate the purpose of Prop. 66.

90. Gen. Elec. (Cal. Nov. 8, 2016) (emphasis added).

91. CAL. R. CT. 4.117.

92. See CAL. R. CT. 8.300.

93. *Briggs v. Brown*, 400 P.3d 29, 59 (Cal. 2017).

1. Explicitly Lowering Capital Appeal Qualifications

Faced with the responsibility of effectuating the will of the voters under Prop. 66, the courts and the legislature may do this by lowering the qualifications for court appointed counsel under California Rules of Court, rule 4.117.⁹⁴ Doing this would expand the number of attorneys who could qualify to represent death row inmates, but, at the same time, it would open a floodgate of ineffective assistance of counsel claims.

The American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, which sought to establish a national standard of qualifications for capital attorneys, stressed that:

[t]he language [of the guidelines] has been amended to call for “high quality legal representation” to emphasize that, because of the extraordinary complexity and demands of capital cases, *a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case.*

....

[D]eath penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.⁹⁵

While courts are not required to use the ABA guidelines as “inexorable commands with which all capital defense counsel ‘must fully comply,’”⁹⁶ the guidelines provide clear evidence of the prevailing expectations and norms of defense counsel after the guidance of cases regarding the effective assistance of counsel standard under the Sixth Amendment left much to be desired.⁹⁷ These guidelines outline some of the unique issues that death penalty attorneys must grapple with. It is difficult to imagine that these issues will be handled well by attorneys who historically have avoided

94. CAL. R. CT. 4.117.

95. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), *reprinted in* 31 HOFSTRA L. REV. 913, 921, 923 (2003) (emphasis added).

96. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009).

97. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

handling death penalty cases, or attorneys who only meet the potentially lower qualifications for death penalty attorneys.

Thus, when the legislature and the California Supreme Court realize that there is still a lack of qualified attorneys under the current statutory standards, there will be pressure from the population to do something in order to bridge this gap. It is likely that this will come in the form of new, lower standards for death penalty defense counsel.

In contemplating whether it wants to chip away at the minimum standards of qualification and performance for death penalty defense attorneys, California should consider that lower qualifications are directly correlated with below average performance in death penalty cases and be informed by the cautionary lessons which have emerged from the aptly named “Death Belt.” The Death Belt is comprised of nine southeastern states that account for 90% of executions in the United States.⁹⁸ Unsurprisingly, these states have historically had some of the lowest qualifications for death penalty defense counsel and have had some of the most shocking accounts of ineffective assistance of counsel during death penalty cases.⁹⁹ A recent study showed that attorneys in the Death Belt who represented death row inmates were disciplined and/or disbarred by the ABA three to forty-six more times than average attorneys for those states.¹⁰⁰

Additionally, out of the 164 people who have been found innocent and exonerated before execution on death row, only five came from California.¹⁰¹ Seventy-nine have come from the Death Belt, meaning, on average, states in the Death Belt were almost twice as likely to sentence an innocent person to death when compared to California.¹⁰² This shows that the measures taken to ensure accurate verdicts in California, more so than other states, have been successful so far and are vital in continuing this accuracy. The United States, and the Death Belt in particular, has seen the cost that comes with shortcutting these

98. The nine states that comprise the Death Belt are Texas, Louisiana, Florida, Georgia, Virginia, Alabama, Mississippi, North Carolina, and South Carolina. Peter Wagner, *NYC Film: Fighting for Life in the Death-Belt*, PRISON POL’Y INITIATIVE (Oct. 3, 2006), <https://www.prisonpolicy.org/blog/2006/10/03/deathbelt>.

99. *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1924–25 (1994).

100. *Id.* at 1925.

101. *The Innocence List*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last updated Apr. 19, 2018).

102. *See id.*

measures. The lives of 164 innocent people were almost ended due to a failure on the part of the justice system, and if California follows in the footsteps of less meticulous states, it could be accountable for more of these failures.¹⁰³

Interestingly, several states in the Death Belt have a system similar to what Prop. 66 proposes.¹⁰⁴ Those who are on the appointment list are required to take court appointments of death penalty cases.¹⁰⁵ The result is often passive, substandard representation.¹⁰⁶ This shows that while the Death Belt is more successful at carrying out timely executions, it comes at a dangerous price. This is a reality that California should not take lightly and may have to confront if it starts to regress on its standards concerning the death penalty system.

2. Implicitly Lowering Capital Appeal Qualifications

Even if the legislature does not explicitly change the qualifications for the death penalty, courts may begin to use their discretion to allow more leeway on the discretionary provisions of requirements for capital appeal attorneys. California Rules of Court, rule 4.117 does provide a few objective requirements, such as the ten years of criminal experience, five serious or violent felony trials, and mandatory capital defense training within the last two years.¹⁰⁷ However, the rest of the requirements are highly subjective. For instance, the rule provides that attorneys must “[b]e familiar with the practices and procedures of the California criminal courts[,] . . . [b]e familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence[,] . . . and . . . [h]ave demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases.”¹⁰⁸

With the demand of Prop. 66, courts are likely to feel pressured to be more lax about what constitutes the “necessary proficiency,

103. *Id.*

104. Telephone Interview with Jack Earley, Certified Criminal Law Specialist, Am. Bar Ass’n, Co-Chair, Cal. Attorneys for Criminal Justice, President, Orange Cty. Criminal Def. Bar Ass’n (Feb. 1, 2018).

105. *Id.*

106. *Id.*

107. CAL. R. CT. 4.117(d).

108. *Id.*

diligence, and quality of representation appropriate to capital cases.”¹⁰⁹ After all, how can courts accurately predict whether attorneys possess these qualifications if the attorneys have previously refused to work on capital cases? This runs the risk of allowing the California standards for attorneys to slide towards a much lower level.

3. Constitutional Violations as a Result of Lower Qualifications for Death Penalty Defense Counsel

If California lowers its standards and qualifications for death penalty defense counsel, the system will become prone to constitutional violations. The present status of the death penalty scheme already generates countless constitutional appeals; reducing the expectations for counsel will only exacerbate this problem by creating numerous violations of the Sixth Amendment effective assistance of counsel clause.¹¹⁰ The potentially lower skill level that may be tolerated as a result of Prop. 66 will increase the arbitrary nature with which death sentences are administered, thus violating the Eighth Amendment in a manner that is reminiscent of the problems during the *Furman* Era.

a. Violations of the Sixth Amendment

The Sixth Amendment to the United States Constitution gives criminal defendants facing capital punishment the right to an attorney.¹¹¹ This was later expanded to include criminal defendants who faced any felony charge.¹¹² The meaning of the Sixth Amendment then came to include the right to *effective* assistance of counsel.¹¹³ This standard of effectiveness was determined by the seminal case, *Strickland v. Washington*,¹¹⁴ which set a high threshold.¹¹⁵ Under this standard, the attorney must have acted as an objectively reasonable attorney would.¹¹⁶ However, *Strickland* did not stop there. Even if the attorney did not act objectively reasonably, the defendant must also

109. *Id.*

110. U.S. CONST. amend. VI; *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

111. *Powell v. Alabama*, 287 U.S. 45, 66 (1932).

112. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

113. *McMann*, 397 U.S. at 771.

114. 466 U.S. 668 (1984).

115. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

116. *Id.* at 688.

show that the attorney's mistakes caused him undue prejudice and denied him a fair trial.¹¹⁷

The standard has been criticized for sanctioning too much discretion in ineffective assistance of counsel cases, especially in death penalty cases, where almost any small mistake should be construed as prejudicial.¹¹⁸ Additionally, it is easy to imagine how difficult it is for defendants to prove that outcomes would have been different had the attorneys acted differently or how they were specifically prejudiced. Many times, whether a mistake was prejudicial is up to the subjective opinion of the judge.¹¹⁹

Before launching into the repercussions of inexperienced and unwilling attorneys taking on death penalty cases, it is important to highlight why specialized and experienced lawyers are crucial for effective assistance in these cases and just how uniquely challenging capital appeals are. Aside from the emotional burden of having a human life on the line, death penalty cases present novel and complex processes and issues. It has been understood by experienced defense attorneys, scholars, and the United States Supreme Court that “death is different.”¹²⁰ The exceptional complexities and difficulties of capital cases have caused some to deem it “perhaps the most technically difficult form of litigation known to the American legal system.”¹²¹ Not only is there the arduous emotional and moral toll of being the only thing that stands between a defendant and a lethal injection, but the unique issues that arise, as well as the massive

117. *Id.* at 687.

118. Amy R. Murphy, *The Constitutional Failure of the Strickland Standard in Capital Cases Under the Eighth Amendment*, 63 L. & CONTEMP. PROBS. 179, 179 (2000).

119. *Id.* at 180.

120. HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* (1987); *see also* *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (noting that “death is different in kind from any other punishment imposed under our system of criminal justice”).

121. *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, *supra* note 99, at 1925; *see also* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, *supra* note 95, at 923 (“More than seventy years later, death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.”); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317 (1983) (“[B]ecause of both the special procedures . . . and the uniqueness of death as a punishment, defense counsel has additional responsibilities in capital cases that are unlike those of counsel in all other criminal trials.”).

investigative efforts that are necessary, are unprecedented by any other type of criminal case.¹²²

The most distinctive and important difference in death penalty cases is the bifurcation of the trial: one trial to determine guilt and another to determine whether the death penalty should be implemented, often called the penalty phase.¹²³ To provide a strong case for mitigation to life without parole at the penalty phase, the defense attorney must step into the role of an investigator to uncover any and all circumstances in the defendant's history which may convince the jury to spare him or her.¹²⁴ Counsel may present evidence of abuse as a child, abuse by the victim, or by any other outside force which may help explain the crimes committed.¹²⁵ Particular hardships or traumatic circumstances in the defendant's life may be used to humanize the defendant.¹²⁶ The defense usually hires a "mitigation specialist" who the defense attorney may use in private or elicit testimony from on the stand.¹²⁷ Additionally, specialists are essential to investigate mental health issues if there is a possibility of an insanity defense.¹²⁸

The ability to present mitigating evidence has proved to be absolutely crucial for many defendants.¹²⁹ The importance of mitigating evidence was recognized by the ABA in its *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.¹³⁰ These guidelines enumerated the duties of defense attorneys and the comprehensive scale at which defense attorneys must investigate their client's life story.¹³¹ While Prop. 66 focuses on the appointment of counsel on subsequent appeals rather than trial counsel,¹³² it is equally necessary that the appellate counsel understands the unique penalty phase so that they can investigate

122. Goodpaster, *supra* note 121, at 317.

123. *Id.*

124. *Id.* at 317–18.

125. *See id.* at 319–20, n.106.

126. *Id.*

127. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, *supra* note 95, at 959–60 (explaining the importance of mitigation specialists).

128. *See* ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, *reprinted in* 36 HOFSTRA L. REV. 677, 677 (2008).

129. *Id.*

130. *Id.*

131. *Id.* at 680–81.

132. *See* Gen. Elec. (Cal. Nov. 8, 2016).

whether a potential mistake was made during the trial. This often creates a complex mixture of factual and legal disputes. A less experienced attorney who has never examined a bifurcated death penalty trial may not detect important issues and nuances that could make a compelling case.

Due to the unique and specialized set of skills required to provide effective assistance of counsel in a death penalty case, Prop. 66 increases the prospect of Sixth Amendment violations. Ineffective assistance of counsel claims are amongst the most common claims on appeal following death sentences and are already a major cause of delay.¹³³ If the prevalence of these appeals is already high with the present standards of defense counsel qualifications, it only seems to follow logically that they will proliferate when Prop. 66 forces courts to lower expectations and inexperienced, unwilling attorneys begin to take on death penalty cases.

Consequently, the increased likelihood of ineffective assistance of counsel claims will only further bog down the system and prolong the time it takes to reach an execution. To solve the lack of quality, qualified counsel, California must fund defense counsel properly—not attempt to lower important standards that protect inmates’ constitutional rights. Although Prop. 66 has attempted to alleviate the lack of willing and qualified attorneys, it seems as though there is a great risk that this attempt may backfire. While Prop. 66 will likely encourage qualification standards to drop, the standards that the Sixth Amendment sets for effective assistance of counsel will not. This mismatch will plague the death penalty system in California with further constitutional violations.

b. Violations of the Eighth Amendment

Lowering the qualifications for death penalty attorneys and forcing unwilling and inexperienced attorneys who are seemingly “qualified” under California Rules of Court, rule 4.117 will not only increasingly violate the Sixth Amendment, but also increase the arbitrary nature of death sentences in violation of the Eighth Amendment. The Eighth Amendment prohibits the use of “cruel and unusual punishments.”¹³⁴ While this is a broad phrase, the United

133. CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 1, at 125.

134. U.S. CONST. amend. VIII.

States Supreme Court has stated that the standard of what qualifies as cruel and unusual punishment evolves as the “public opinion becomes enlightened by humane justice.”¹³⁵ This stands for the principle that the scope of what is cruel and unusual punishment develops with the evolution of modern, public standards of morality.¹³⁶ In *Furman*, the arbitrary imposition of death sentences was deemed to fall within the modern scope of what was cruel and unusual, but was then rectified by *Gregg*.¹³⁷ Under Prop. 66, however, California’s death sentence system will likely fall within that scope again.

For years, members of the legal community have argued that “[i]t is not the facts of the crime, but the quality of legal representation, that distinguishes [cases], where the death penalty was imposed, from many similar cases, where it was not.”¹³⁸ The “cruel and unusual punishment” clause of the Eighth Amendment was largely the cause of the Supreme Court’s de facto moratorium in the 1970s.¹³⁹ The decision in *Furman* highlighted the fact that the death penalty was being applied in an unacceptably arbitrary and discriminatory fashion. While the concerns in *Furman* were seemingly quelled by requiring a mandatory scheme of aggravating factors to reinstate death penalty statutes, lowering the qualifications for death penalty defense attorneys runs the risk of restoring the arbitrariness of the death penalty, depending upon which attorney the defendant happens to get.¹⁴⁰

This problem is not new. Many have recognized that the difference between life and death for many defendants comes down to the lawyer they get. Even Supreme Court Justice Ginsburg acknowledges that seemingly the sole factor determining the application of the death penalty is the quality of defense attorneys: “People who are well represented at trial do not get the death penalty I have yet to see a death case among the dozens coming

135. *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (quoting *Weems v. United States*, 217 U.S. 344, 378 (1910)).

136. *Id.*

137. *See Gregg v. Georgia*, 428 U.S. 153, 225 (1976); *Furman v. Georgia*, 408 U.S. 238, 281 (1972) (Brennan, J. concurring).

138. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994).

139. *Culver & Boyens*, *supra* note 38, at 991–92.

140. *Furman*, 408 U.S. at 281; Bright, *supra* note 138, at 1837.

to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial.”¹⁴¹

Of course, it could be argued that this is the case for any conviction—if you have a good lawyer you get off, if you have a bad lawyer you don’t. However, there is an unusually strong connection between the abilities of death penalty attorneys and the imposition of capital sentences.¹⁴² This is likely because of the unique nature of the penalty phase, and the specialized set of skills attorneys require to provide an effective defense. Once a defendant is found guilty and eligible for the death penalty, the penalty phase can be very fickle.¹⁴³ It often comes down to how well the attorney can humanize or muster mercy and sympathy for the defendant.¹⁴⁴ Whereas, in a non-capital case, attorneys are much more likely to run into familiar issues and root their arguments in objective elements of a crime, once a statutory special circumstance is met, the penalty phase is largely up to the discretion of the jury.¹⁴⁵

The sole determining factor of whether a defendant is sentenced to execution should not be his attorney, just as the Supreme Court determined it should not be the color of his skin in *Furman*.¹⁴⁶ However, the correlation between adequate representation and the imposition of death sentences is a reality that California must grapple with and provide safeguards for. Given the strong correlation between poor defense attorneys and death sentences,¹⁴⁷ it is imperative that California maintains a strong standard of qualifications for these attorneys. Lowering the qualifications or forcing inexperienced attorneys to take on these appeals will potentially reinstate the concerns in *Furman*. Allowing the pool of attorneys eligible for appointment to include a wide swath of skill makes it so that the defendant’s fate is up to the luck of the draw. If they get a good

141. *Statements on the Death Penalty by Supreme Court Justices*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/statements-death-penalty-supreme-court-justices#ginsburg> (last visited Oct. 8, 2018).

142. See *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, *supra* note 99, at 1928.

143. See Goodpaster, *supra* note 121, at 334–39 (discussing the intricacies of the penalty phase).

144. *Id.* at 335.

145. *Id.*

146. *Furman v. Georgia*, 408 U.S. 238, 242 (1972).

147. Bright, *supra* note 138, at 1836.

attorney, his or her life will likely be spared. If, however, he or she gets a new attorney, who has begrudgingly accepted a death penalty defense case so that they can remain on the appointment list, they may have much lower hope of surviving.

The risk of Eighth Amendment violations is not only concerning from a due process standpoint, but also from a practical one. If inmates have the opportunity to file more constitutional appeals, the system will continue to get clogged with an unmanageable amount of appeals.

IV. PROPOSED SOLUTIONS

Meaningful reform must take place to solve the problems with the current death penalty system. California must invest additional money into creating a workable and constitutional death penalty system. Reforms may include increasing the pay and resources for capital appeal appointed defense counsel and creating a judicial body that is solely tasked with adjudicating death penalty cases.

A. Altering the Pay Scheme for Capital Defense Attorneys and Increasing Defense Resources

Although it was not crafted properly, Prop. 66 was indeed onto something by attempting to increase the number of attorneys who would take on capital cases in order to speed up executions.¹⁴⁸ Waiting for the court to find and appoint appropriate counsel is one of the main causes of delay in capital cases.¹⁴⁹ Inmates may sit on death row for over five years before counsel is appointed.¹⁵⁰ The answer, however, does not lie in forcing a nonexistent group of attorneys to begrudgingly take on capital cases for pittance. Instead, California should seek to increase the number of qualified attorneys by funding defense efforts properly and making capital defense work more attractive.

Practitioners agree that death penalty defense is often underfunded.¹⁵¹ Effective attorneys who devote the necessary amount of hours to their case often submit a bill to the court for their compensation, but are only reimbursed for a fraction of the actual

148. *See* Gen. Elec. (Cal. Nov. 8, 2016).

149. Alarcón & Mitchell, *supra* note 7, at S47.

150. *Id.*

151. *See id.*

hours they put in.¹⁵² It becomes clear, then, why the majority of lawyers who agree to take on death penalty cases must be passionate and invested in the cause.

Many capital defense attorneys are adamant abolitionists who are passionate about the cause and are willing to take on death penalty cases even though they know they may not be compensated properly.¹⁵³ While this is commendable, there are simply not enough attorneys willing to take on the emotional burden, and financial setback, of a capital case out of political or moral convictions alone. If California were to alter the pay scheme for appointed death penalty attorneys and provide a substantial amount of additional resources, more defense attorneys may be willing to take on the cases. This again highlights the point that attorneys who only take death penalty cases as a result of Prop. 66's threat to take them off the appointment list will likely not be willing to put in the number of hours required to provide effective assistance, as they know that they will only be compensated for a fraction of those hours.

The California Commission on the Fair Administration of Justice suggested a number of reforms to make a workable death penalty.¹⁵⁴ In order to “address the unavailability of qualified, competent attorneys” the Commission recommended that California: (1) expand the Office of the State Public Defender; (2) expand the Habeas Corpus Resource Center; (3) increase the staff of the Offices of the Attorney General; and (4) increase funding made available to the California Supreme Court.¹⁵⁵ Additionally, the Commission recommended that funds be allocated to counties so that they can *fully* reimburse payments to counsel for defense services, that the current limitations on funding for the expense of homicide trials be reconsidered, and that:

California counties provide adequate funding for the appointment for the performance of trial counsel in death penalty cases In all cases, attorneys must be fully compensated at rates that are commensurate with the provision of high quality legal representation and reflect the

152. *Id.* at S97.

153. Telephone Interview with Jack Earley, *supra* note 104.

154. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 1, at 116–17.

155. *Id.*

extraordinary responsibilities in death penalty representation.¹⁵⁶

Prop. 66 implemented none of these recommendations.¹⁵⁷ With current funding, attorneys are faced with choosing to put in adequate time and be undercompensated, or only putting in the amount of time they think they will be compensated for, which will likely not be enough to effectively defend their client.¹⁵⁸ The Commission estimated that implementing its recommendations would increase the annual cost of the death penalty from \$137 million to \$232.7 million.¹⁵⁹ A starting point may also be to raise the pay of state attorneys to the \$175 hourly rate that federal capital appeal counsel receives.¹⁶⁰ Currently, state counsel usually bid for a flat rate that often only covers a fraction of the funds necessary to properly defend their death penalty cases.¹⁶¹ This will cost taxpayers at least \$85 million per year alone.¹⁶² Voters may be angered and shocked when confronted with realistic numbers of what it would take to fix the system, especially when initiatives such as Prop. 66 have overpromised results without additional funding.

An additional way to guarantee sufficient funds would be to implement a principle of equitable defense in death penalty cases. There is a large disparity between the amount of resources that are allotted to prosecutors versus indigent defense counsel.¹⁶³ Part of this disparity likely comes from the fact that the people's right to state funded prosecution of criminals in California has been present in society since the state was founded.¹⁶⁴ Public defense, however, was much more of an uphill battle. The right to assistance of counsel for indigent defendants was not recognized in death penalty cases until

156. *Id.* at 117.

157. *See* Gen. Elec. (Cal. Nov. 8, 2016).

158. *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 1, at 116–17.

159. *Id.* at 117.

160. Alarcón & Mitchell, *supra* note 7, at S214–15.

161. *See id.* at S80–81.

162. *Id.* at S215.

163. *See* CTY. OF L.A., COUNTY OF LOS ANGELES 2017–18 FINAL ADOPTED BUDGET, http://file.lacounty.gov/SDSInter/lac/1037208_2017-18FinalAdoptedBudgetCharts.pdf (allocating 2,216 positions to the District Attorney and only 1,159 to the Public Defender).

164. *Office History*, L.A. CTY. DIST. ATTY'S OFFICE, <http://da.co.la.ca.us/about/history> (last visited Oct. 13, 2018).

1932¹⁶⁵ and was not incorporated to the states until 1963.¹⁶⁶ Still, since then, the public budget seems to always prioritize prosecution over defense.¹⁶⁷ The author proposes that when the death penalty is on the table, prosecution and defense should be provided with equal resources. If California is willing to execute someone, it should also be willing to invest an equal amount into his or her defense. It will come down to whether California wants to invest the degree of resources required to carry out the death penalty in a constitutional manner.

B. *Creating a Separate Death Penalty Court*

Another practical solution would be to create a specialized death penalty court. This would ensure that there is a judicial body that is solely held accountable for the state of the death penalty system. Additionally, the judges and staff of this court would be uniquely accustomed to death penalty issues, so that they could more efficiently adjudicate the matters.

Although this option is a massive change and would require a great deal of legislation, a subject-specific court is not inconceivable. Other areas with unique issues and ramifications have merited their own court. At the federal level there is the Federal Circuit that deals exclusively with patent suits, the United States Bankruptcy Courts, United States Tax Courts, United States Courts of International Trade, United States Court of Appeals for Veteran Claims, and the United States Court of Appeals for the Armed Forces.¹⁶⁸ In various states there are specialized drug courts, dependency courts, domestic violence courts, juvenile courts, truancy courts, mental health courts, probate courts, and the list goes on.¹⁶⁹ Something as important as life or death should also fall into the category of meriting its own court if the death penalty is to continue.

165. *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

166. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

167. *See* CTY. OF L.A., *supra* note 163.

168. MARKUS, B. ZIMMER, INT'L JOURNAL FOR COURT ADMIN., OVERVIEW OF SPECIALIZED COURTS 8–11 (Aug. 2009), <http://www.iaca.ws/files/LWB-SpecializedCourts.pdf>.

169. *Specialized Courts*, NAT'L INST. OF JUSTICE, <https://www.nij.gov/topics/courts/pages/specialized-courts.aspx> (Mar. 13, 2013).

V. JUSTIFICATION AND PUBLIC POLICY CONSIDERATIONS FOR PROPOSED SOLUTIONS

Additional resources and funding will allow death penalty cases to be heard and adjudicated more quickly while preserving a constitutional system. The vast investment this system would require, however, may not be worth the tenuous societal benefits that the death penalty offers.

A. A Practical and Constitutional Death Penalty System Is Not Possible Without Additional Funding

The only tenable solution to significantly and sustainably improve the death penalty system would require a sizeable investment of taxpayer dollars.¹⁷⁰ If the legislature were to increase pay for death penalty attorneys and/or create a separate court for death penalty cases, the public may see an increase in efficiency. Whether this is an advisable use of public funds should be left up to the voters by generating a realistic funding proposal to accompany Prop. 66.

The unfortunate and unsatisfying truth is that, with the current budget, what the California public desires is impossible. The only thing that could potentially make a real change to the death penalty system is pouring millions of additional resources into it. Going on as we have is not a sustainable option. The mistake California has made is in thinking that Prop. 66 will indeed fix its problems for free. Without more resources, there are two options: a system that executes inmates quicker while compromising accuracy and heightening the potential of killing innocent people or, what we already have, a system that takes an unreasonable amount of time to execute inmates but seeks to preserve accuracy by utilizing all possible precautionary methods and appeals. Prop. 66 is a poorly devised shortcut solution because voters and politicians have yet to accept that a real solution under the current budget is untenable.

B. Public Policy Considerations

While additional funding would help effectuate the goals of Prop. 66, there are considerations as to whether the allocation of additional funding would substantially benefit the public interest. The dollar

170. See CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 1, at 117.

amount that it would take to maintain an efficient and constitutional death penalty system continues to grow while the rationale for sustaining the death penalty dwindles. The dollar amount it would take to properly fund an efficient death penalty system takes away from funds that may be needed and better used elsewhere.

1. Deterring Attorneys from Remaining on the Appointment List

Fears have been expressed that instead of increasing the number of attorneys to work on death penalty cases, Prop. 66 may provide a disincentive for attorneys to stay on the appointment list altogether.¹⁷¹ Not only would this defeat the goal of Prop. 66, but it would also have a negative impact on the criminal indigent defense programs in California as a whole. Additionally, there is also a risk that the pressure to eliminate the backlog on death row may bring the California courts to a standstill in terms of adjudicating other civil and criminal matters. This, in itself, may foster violations of other parties' rights to a speedy trial guaranteed by the Sixth Amendment.¹⁷²

2. Would the Potential Investment Be Worth It?

It seems impractical to invest billions¹⁷³ of taxpayer dollars to maintain a form of punishment that is disfavored by nearly half of the population of California and does not provide substantially more benefits than life without parole.

As far as practicality, life without parole takes criminals off the street so that they are no longer a threat, and a life left to languish in prison is a harsh punishment fit for atrocious crimes that would otherwise merit capital sentences. There is little evidence that death sentences have a significant deterrent effect on crime.¹⁷⁴ In fact, there have been mixed reports as to whether the families of the victims even benefit from the purported sense of closure that executing the inmate is supposed to impart.¹⁷⁵ Many victims' families report feeling a sense of guilt afterwards.¹⁷⁶

171. Donohue, *supra* note 10.

172. U.S. CONST. amend. VI.

173. Alarcón & Mitchell, *supra* note 7, at S65.

174. *See Kirkpatrick v. Chappell*, 872 F.3d 1047, 1063–64, nn.4–5 (9th Cir. 2017) (noting that death sentences alone, without an execution, do little to deter crime).

175. *See id.* at 1064.

176. *Id.*

Over the past forty years, California has spent \$4 billion on a death penalty that has executed just thirteen inmates.¹⁷⁷ That \$4 billion could have been used toward a more proven method in reducing crime: employing more law enforcement.¹⁷⁸ In this time span, California could have employed over fifty-eight thousand more police officers with the money used towards a completely ineffectual death penalty.¹⁷⁹ The additional law enforcement could have prevented roughly seven hundred additional murders.¹⁸⁰ A death penalty that adopted the proper reform proposals suggested above would cost \$232.7 million per year, whereas a system that eliminated the death penalty in favor of life without parole would cost \$11.5 million annually.¹⁸¹ Figures such as this make it difficult justify pouring vast amounts of additional funding into death penalty efforts.

Perhaps the state should focus on redirecting that money into social programs that benefit low-income and minority families, as these are the demographics that are disparately represented on death row. A shift toward preventing the surroundings that have been proven to foster the development of violent criminals, rather than implementing the harshest punishment possible once the crimes happen, could benefit society to a greater degree. The money could be used for afterschool programs to give children in impoverished areas an alternative to joining gangs, in the foster system to create a healthier environment for children with no family, or in social services so that the incredible caseload for social workers could be alleviated so they would be able to devote more attention to individual cases. The list could go on, but it seems logical to recognize that there are other areas that could benefit and ultimately better serve society with billions of dollars in public resources.

As tempting as it is to label the inmates on death row as monsters, there is some truth in the tenet that “[m]ost criminals are not born, they are made.”¹⁸² While it may not be that black and white, there is value in recognizing that at least part of the evolution of a violent criminal

177. Alarcón & Mitchell, *supra* note 7, at S111; Wagstaff, *supra* note 5.

178. *See* Donohue, *supra* note 10.

179. *Id.*

180. *Id.*

181. CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 1, at 147.

182. MRS. FREMONT OLDER, WILLIAM RANDOLPH HEARST, AMERICAN 450 (D. Appleton-Century Co. 1936).

is a reflection of their societal conditions. Many inmates become violent as a result of years of abuse and violence at home, through traumatic events, or in response to emotional and physical cruelty.¹⁸³

A large portion of people in prison were abused as children, brought up in reprehensible circumstances, and endured an amount of suffering that no one would envy before turning to crime and violence.¹⁸⁴ The correlation between childhood abuse and violent crime is astounding; a child that is neglected and abused is at least three times more likely to engage in violent crime.¹⁸⁵ Clearly, repealing the death penalty would not put an end to violent crime as we know it. It would, however, be a step in the right direction toward refocusing our budget and our attention toward preventing the type of environment where these crimes flourish rather than spending billions of dollars on an unfeasible and draconian form of punishment once they have happened.

Nevertheless, if this is what California voters want, they are democratically entitled to it. However, voters need a realistic plan of how to fix the death penalty system, not another ballot initiative with empty promises.

VI. CONCLUSION

For the voters of California, the decision seems easy. Someone who commits an unspeakable, atrocious crime no longer deserves to live. However, for the judiciary and those in charge of managing the death penalty system, the decisions along the way cause great inner turmoil. The voters want a death penalty, but when faced with the practical constraints of a legal system susceptible to human error, the court second-guesses itself. The voters want to make the people who committed these atrocities pay, but then the judges who hear the appeals waver when confronted with the uncertainties of a fact-sensitive, emotion-laden jury trial. The voters want to fulfill a gritty sense of retribution, to send out a deterring message that in California you pay for what you have done. But then, the court takes a nervous

183. See CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 3 (1999), <https://www.bjs.gov/content/pub/pdf/parip.pdf>.

184. *Id.* at 2–3.

185. Diane J. English et al., *Childhood Victimization and Delinquency, Adult Criminality, and Violent Criminal Behavior: A Replication and Extension, Final Report*, NAT'L INST. OF JUSTICE 33–34 (Feb. 1, 2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/192291.pdf>.

step back when it sees how easily a trial can veer in one direction or the other based on a skilled cross-examination, an inexperienced witness, or a nuanced legal fine point.

The erratic history of the death penalty, the halt it has come to, and the recent attempts of Prop. 66 to fix it only reveal the deep-seeded truth that while the voters of California may say that they want a death penalty, the law cannot come to terms with its fatal pitfalls. While they so badly want the satisfaction of reprisal, and of closure for the victims' families, the judiciary's conscience is dragged down by those lingering questions: What if the defense attorney had ordered a mental health evaluation? What if he had called that witness? What if he had introduced that fact? Can any error be "harmless" when someone's life is on the line? Perhaps this is why California is where it is today, stuck in a fog of obscure legal battles and naive reform propositions. Because as much as voters say they want a death penalty, the court is always stopped by the inevitable and communal pit in its stomach; that is, if there was a mistake made along the way, the ability to rectify it perishes along with the inmate.

