
POSTSCRIPT

WOULD CALIFORNIANS HAVE THE COURAGE OF THEIR CONVICTIONS IN THE FACE OF A FULLY FUNCTIONING DEATH PENALTY?

JEAN ROSENBLUTH*

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

Californians overwhelmingly support the death penalty, we are told. In the most recent Field Poll, conducted in 2006, nearly two-thirds of the State's denizens expressed support for this harshest of penalties when imposed for the most serious crimes.¹ But I wonder if their support is something like my opposition: as lukewarm as the Chinese food I had delivered last night. Perhaps they, like I, have formed their views and the depth of their attachment to them in the abstract, given how few executions actually take place in this State. As my father, a fellow Californian, used to say, "I oppose the death penalty, but it's about last on my list of things to

* Director of Legal Writing and Advocacy and Clinical Associate Professor of Law at the USC Gould School of Law. Before joining USC, I was a federal prosecutor in the Central District of California for seven years, primarily in the criminal appeals unit. As a law clerk to the Honorable Alicemarie H. Stotler, Chief Judge of the U.S. District Court for the Central District of California, I worked on a pending death penalty habeas case.

I would like to thank Kai Bartolomeo for his thorough and timely research assistance, always delivered with a smile. I could not have completed this comment without his help. I would also like to thank Yael Levy, a fellow former prosecutor and a wise and thoughtful death penalty opponent, for her comments on my draft.

1. MARK DICAMILLO & MERVIN FIELD, FIELD RESEARCH CORP., WHILE STILL STRONGLY SUPPORTING THE DEATH PENALTY, CALIFORNIANS HAVE MIXED VIEWS ON SOME ASPECTS OF CAPITAL PUNISHMENT: MAJORITY OPPOSES THE DELAY IN THE MORALES EXECUTION 2 tbl.1 (2006), available at <http://www.field.com/fieldpollonline/subscribers/RLS2183.pdf>.

worry about.” Perhaps if it were more than an “illusion,” as Judge Kozinski has called the death penalty,² I and others might be more concerned.

If Judge Arthur Alarcón of the U.S. Ninth Circuit Court of Appeals has his way, Californians may be forced to reevaluate their views on the subject in the face of a fully functioning death penalty. Judge Alarcón wants to greatly speed up the review process in death penalty cases; the nearly eighteen-year average delay between when a defendant is sentenced to death and the date the sentence is carried out effectively means that the death penalty is only rarely implemented in this State.³ As Judge Alarcón notes in *Remedies for California’s Death Row Deadlock*, in the May 2007 issue of the Southern California Law Review, a condemned prisoner is four times as likely to die in prison of natural or other causes as he⁴ is to have his death sentence carried out.⁵

Judge Alarcón proposes a number of ways to accelerate the review process for death sentences. Many of them are eminently reasonable and can hardly be challenged by those on either side of the fence. It is indefensible, for instance, that California prisoners sentenced to death must wait an average of more than three years to have an attorney appointed to prepare their direct appeal.⁶ Other of his suggestions are likely to engender healthy debate: will it really speed up the process, for instance, to allow intermediate courts of appeal to hear death penalty habeas challenges if discretionary Supreme Court review is still available, or will that simply add another layer of review?⁷ Is it really desirable to have the same attorney handle a condemned prisoner’s state and federal habeas proceedings, or do we want a fresh set of eyes to review a prisoner’s case before we execute him?

I do not know whether Judge Alarcón’s (or others’) proposals to

2. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 3 (1995).

3. Judge Arthur L. Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S. CAL. L. REV. 697, 698, 700 (2007).

4. I use the male pronoun because the vast majority of condemned prisoners in California are men. See TRACY L. SNELL, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2006: STATISTICAL TABLES, at tbls.4 & 12, available at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/cp06st.pdf>.

5. Alarcón, *supra* note 3, at 724.

6. As Judge Alarcón points out, this is because few attorneys are qualified to handle death penalty cases and because those who are have no incentive to take the cases on given the poor pay. *Id.* at 751.

7. In his article, Judge Alarcón does not promote another idea that others have put forth as a means of reducing the delay in carrying out the death penalty: reducing the number of crimes that are death penalty eligible and the circumstances under which the penalty may be imposed.

shorten the “delays”⁸ in the death penalty process would work. The California Supreme Court recently concluded that at least one of them, allowing the California Courts of Appeal to hear death penalty appeals, would and recommended to the state judicial council that it be implemented (until, however, it became clear that California’s depleted budget would not provide enough money to pay for the reform, and the proposal was withdrawn).⁹ A blue-ribbon panel of prosecutors, professors, defense attorneys, and other experts, the California Commission on the Fair Administration of Justice, is currently examining many of Judge Alarcón’s proposals, and others, with a mandate to report to the state legislature by June concerning their viability and desirability.¹⁰

I wonder, however, what would happen if Judge Alarcón’s plan was implemented and worked—in other words, the “machinery of death,” as Justice Blackmun famously called the death penalty and its administration,¹¹ ran smoothly and executions became commonplace in California. Some anecdotal evidence suggests that people do not really like the death penalty when they are regularly confronted with it. In Louisiana, for instance, a spate of eight executions in three months back in 1987 was followed by a long period averaging just one death sentence a year.¹² Here in California, two executions in rapid succession in late 2005 and early 2006 have been followed by what has essentially been a moratorium on executions until the U.S. Supreme Court sorts out the constitutionality of lethal injections and other legal challenges are resolved.¹³ Maybe we

8. Judge Alarcón refers to all periods of time as “delay.” For example, he uses that word to refer both to the time it takes a court reporter to prepare transcripts and to the years-long period before some U.S. district courts rule on a death penalty habeas claim pending before them. Alarcón, *supra* note 3, at 706–07. Some of these lengths of time are not truly “delays” but rather unavoidable time periods inherent in the process. Even the most diligent court reporter, for example, needs a certain amount of time to prepare the transcripts from the trial court proceedings. And certainly, some of these “delays” are desirable: we want courts to take whatever time is necessary—although not more—to carefully review all claims stemming from imposition of the death penalty.

9. Henry Weinstein, *Chief Justice Drops Bid to Speed Up California Death Penalty Appeals*, L.A. TIMES, Feb. 24, 2008, at B4.

10. Howard Mintz, *Death Penalty Flaws Cited: Experts Confer on Failings in State System*, SAN JOSE MERCURY NEWS, Jan. 11, 2008, at 2B; Mike McKee, *Two Stunners Stole '07 Spotlight: California Supreme Court*, THE RECORDER (S.F.), Dec. 31, 2007.

11. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

12. Jason DeParle, *Abstract Death Penalty Meets Real Execution*, N.Y. TIMES, June 30, 1991, at E2.

13. Henry Weinstein, *Executions Unlikely for Rest of Year*, L.A. TIMES, Apr. 28, 2006, at B1; Bob Egelko, *Ruling Rips Lethal IV Procedure*, S.F. CHRON., Nov. 1, 2007, at B3. In *Baze v. Rees*, No. 07-5439, 2008 WL 1733259 (U.S. Apr. 16, 2008), the U.S. Supreme Court recently held that Kentucky’s lethal-injection death penalty procedures do not violate the Eighth Amendment because they do not present a substantial risk of serious harm to the person being executed. Although the

support the death penalty only as long as we do not have to think about it.

In 1995, when I interviewed for an assistant U.S. attorney position in the Central District of California, I was asked whether there was any kind of case I would not want to work on. I replied that I did not support the death penalty and would not want to handle a death penalty case. I was told that that was fine; the office preferred to have cases prosecuted by people who fully supported them.

I was hired and joined the criminal appeals unit. Very few federal cases are death penalty eligible, so my convictions were rarely put to the test. Several years into my stint at the office, I was asked to participate in a moot of a prosecutor who would be arguing a death penalty case to the U.S. Ninth Circuit Court of Appeals, and I declined.

But then Buford Furrow happened. Furrow was a mentally disturbed engineer who in August 1999 shot up a Jewish daycare center in the San Fernando Valley, injuring three children, a counselor, and a receptionist, and then, while fleeing, killed a Filipino postal worker.¹⁴ By his own admission, he had chosen his victims because of their religion or the color of their skin.¹⁵ Shortly after Furrow was arrested, law enforcement discovered that he had rented a storage locker in Lacey, Washington, a week before his crimes.¹⁶ Various legal issues arose concerning their ability to search the locker. I was asked to help research these issues on an emergency basis, overnight. I knew that Furrow was likely death penalty eligible, and yet I said yes. I have often wondered what prompted me to agree—the sheer odiousness of Furrow’s crimes, the fact that I knew he was extremely unlikely ever to be put to death even if convicted, or both?¹⁷

It is an important question, and I believe I deserve an answer to it.

decision will undoubtedly enable some executions to move forward, those in California will likely remain effectively stayed until the resolution of other legal challenges pending in federal courts in the state.

Of course, support for the death penalty does not appear to have waned significantly in Texas even as the State has sometimes executed almost a prisoner a week. See DEATH PENALTY INFO. CTR., *THE DEATH PENALTY IN 2007: YEAR END REPORT 2 (2007)*, available at <http://www.deathpenaltyinfo.org/2007YearEnd.pdf>; R.A. Dyer, *Poll Indicates Iraq War Is Texans' Top Concern*, STAR-TELEGRAM (Fort Worth, Tex.), June 14, 2007, at B2 (providing recent polling data reflecting widespread support for death penalty among Texans).

14. *Postal Worker Gunned Down Because of Race, Authorities Say Furrow Faces Death Penalty Case*, SEATTLE POST-INTELLIGENCER, Aug. 13, 1999, at A1.

15. *Id.*

16. *Id.*

17. On January 24, 2001, Furrow pled guilty and agreed to serve five life sentences without the possibility of supervised release. Henry Weinstein, *Furrow Gets 5 Life Terms for Racist Rampage*, L.A. TIMES, Mar. 27, 2001, at B1.

Judge Alarcón is right that California's death penalty apparatus is so "dysfunctional" as to effectively render the sanction nonexistent.¹⁸ We cannot know the true measure of California's support for the death penalty while the penalty remains as amorphous as a bad dream. Do Californians have the courage of their convictions? Only time and the execution of the nearly 700 prisoners currently on death row will tell.¹⁹

18. See Alarcón, *supra* note 3, at 750 (quoting California Chief Justice Ronald M. George).

19. *Patt Morrison: Rethinking California's Dysfunctional Death Penalty* (KPCC radio broadcast Sept. 14, 2007), available at http://www.scpr.org/programs/pattmorrison/listings/2007/09/pattmorrison_20070910.shtml (click on "Listen" hyperlink). If a sharp increase in the rate of executions causes the public's support for the death penalty to decrease, Judge Alarcón will be sanguine. I raised this issue during an appearance I made with him on KPCC's Patt Morrison show, following the publication of his article. He responded that it was for the people of the State of California to decide whether, in the face of a sharply increased number of executions, they continued to want a death penalty. *Id.*