Death By Initiative

Direct Democracy, Criminal Sentencing, and the Politics of Fear

Foreword

I originally wrote *Death By Initiative* over a decade ago, as the final project for my third-year *Understanding Capital Punishment* course with Ellen Kreitzberg at Santa Clara University School of Law. Professor Kreitzberg, now an emerita at SCU, has dedicated her career to representing death row inmates and training law students and attorneys on the nuances of capital defense. I am grateful for her tireless work on behalf of capital defendants and for her mentorship during law school.

When I wrote this paper, California had not executed anyone in three years, and the state's lethal injection protocol was mired in federal litigation. The California Commission on the Fair Administration of Justice had just released its devastating report documenting a system that was arbitrary, expensive, and dysfunctional. I argued that the ballot initiative process bore significant responsibility for this dysfunction — that fear-based campaigns had expanded the death penalty beyond constitutional recognition, and that the same initiative process that created the problem would constrain efforts to fix it.

Nearly two decades later, California still has not executed anyone. What was then a three-year hiatus caused by federal litigation over lethal injection protocols has become a functionally permanent moratorium, sustained first by continued litigation, then by a nationwide shortage of execution drugs, and finally by Governor Gavin Newsom's 2019 executive order halting all executions during his administration.

The initiative process continues to shape California's death penalty in the ways I anticipated, though not always with the outcomes I expected. Abolition initiatives failed narrowly in 2012 and 2016, demonstrating both the enduring appeal of capital punishment to California voters and the difficulty of dismantling a system created through direct democracy. In 2016, voters simultaneously rejected abolition and approved Proposition 66, which promised to expedite executions, in an illusory effort that has proven entirely aspirational, given that no executions have occurred since.

The legal challenges I discussed have continued as well. In 2014, federal Judge Cormac Carney ruled in *Jones v. Chappell* that California's death penalty violated the Eighth Amendment precisely because of the arbitrariness and delay I documented, vindicating the empirical

work of Steven Shatz and Nina Rivkind that formed a cornerstone of my analysis. Though the Ninth Circuit reversed on procedural grounds, the factual findings went undisputed. California's death penalty remains constitutional only because federal courts have declined to reach the merits.

New developments have also emerged that I did not anticipate. The California Racial Justice Act, enacted in 2020 and made retroactive in 2022, now allows death row inmates to challenge their sentences based on statistical evidence of racial discrimination—a direct response to the Supreme Court's much-criticized decision in *McCleskey v. Kemp*. Progressive district attorneys in Los Angeles and San Francisco have pursued resentencing for dozens of condemned inmates. Death row's population has fallen from 670 when I wrote this paper to under 600 today, driven by resentencings, natural deaths, and the simple passage of time.

I have updated this paper to incorporate these developments, though the statutory framework for capital punishment remains largely unchanged since the original edition. The core analysis stands: California's death penalty is a product of initiative campaigns driven more by political ambition and fear than by rational policy, yielding a system too broad to satisfy *Furman*'s narrowing requirement and too dysfunctional to serve any legitimate penological purpose. What has changed is that this dysfunction has calcified into permanent stalemate. California maintains the legal architecture of capital punishment while lacking the political will to either administer or abolish it.

I hope these updates prove useful to practitioners and scholars seeking to understand the dynamics of capital punishment in California and the complicated role of direct democracy in shaping criminal justice policy.

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I. Introduction

On its face, the capital punishment scheme defined in the California Penal Code[1] appears to comply with the mandates of the Supreme Court's modern death penalty jurisprudence.[2] The statutory scheme purports to provide judicial review, guided discretion, and individualized sentencing.[3] Yet underlying its facial compliance with these mandates is a system collapsing under its own weight. Decades of expansion have yielded a statutory scheme that echoes the worst fears expressed in *Furman v. Georgia*[4] and produces such arbitrary and contentious outcomes that it is no longer viable to administer.[5] While the state supreme court has so far refused to look beyond the facade of the statute, the empirical evidence of injustice and dysfunction is difficult to refute.[6] California's capital punishment system is so staggeringly expensive, unjust, and ineffective that not a single death row inmate has been executed since 2006.[7] Yet the law remains on the books.[8]

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1. To sentence a defendant to death in California in 2026, a jury must (1) find that the defendant is guilty of first-degree murder under Penal Code § 189; (2) find that the murder exhibited one of thirty-five special circumstances enumerated in § 190.2; and (3) in a separate penalty proceeding, find that the aggravating factors under § 190.3 outweigh the factors mitigating the defendant's behavior. (Cal. Penal Code current through 2025 legislative session.)
2. *See* Furman v. Georgia, 408 U.S. 238 (1972) (finding that the arbitrary and capricious application of the death penalty resulting from *unguided* jury discretion violates the Eighth Amendment); Gregg v. Georgia, 428 U.S. 153 (1976) (upholding a Georgia death penalty statute because it provided for *guided* discretion and individualized sentencing). *See also infra*, Part II.A.
3. *See* Pulley v. Harris, 465 U.S. 37 (1984) (holding that California's bifurcated trial procedure meets the requirements of Gregg and Furman); Tuilaepa v. California, 512 U.S. 967 (1994) (holding that California's individualized sentencing requirements are adequate in light of the narrowing function of the statutory special circumstances). *See also infra*, Part II.B.
4. *See* Furman, 408 U.S. at 309-10 (Stewart, J., concurring) ("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.").
5. *See infra*, Part II.C.
6. *Id.*
7. *Id.*
8. *See infra*, Part III.B.

This dysfunction is not the result of rational policymaking, but decades of ballot initiatives contrived as publicity stunts by state politicians, who campaigned for their passage using emotional fear tactics.[9] Without judicial intervention, the statutory framework will remain, until the voters who passed these initiatives can be convinced to dismantle them.[10] In the meantime, the state is left with the legal architecture of capital punishment, while lacking the political will to either administer or abolish it.

This article examines the history and expansion of California's death penalty statute, especially in light of the 2008 findings and recommendations of the California Commission for the Fair Administration of Justice (CCFAJ) and subsequent research confirming its conclusions. Part II first provides an abbreviated summary of the Supreme Court's requirements for modern death penalty statutes, focused particularly on the most salient aspects for California's statute, the narrowing and individualized sentencing requirements. It then summarizes the history of California's capital punishment system, and explores the challenges and consequences of the modern statute. Part III explores the role of the ballot initiative in shaping California's death penalty statute, discusses recommendations for reform, and explains the role the voters must play in deconstructing the current system. Finally, Part IV concludes with a look to the future of capital punishment in California.

II. Background

A. The Constitutional Requirements for Capital Punishment

The Supreme Court shocked the nation when it imposed a temporary, nationwide moratorium on most states' death penalty systems under its 1972 decision in *Furman v. Georgia*.[11] Less than a year before, the Court

9. *See infra*, Part III.A.

10. *See infra*, Part III.C.

11. Furman v. Georgia, 408 U.S. 238 (1972).

had upheld a discretionary capital sentencing scheme in *McGautha v. California*,[12] but it abruptly reversed course in *Furman*, invalidating Georgia's death penalty statute for giving juries unguided discretion in applying the death penalty.[13] Each justice wrote separately in *Furman*, yielding no majority opinion.[14] A plurality of justices found that the death penalty, as applied in the cases before the Court, violated the Eighth Amendment's prohibition on cruel and unusual punishments.[15] The plurality focused on the infrequent application of the death penalty and the lack of meaningful basis for distinguishing cases where it was imposed, voicing particular concern that these inconsistencies strongly suggested arbitrary and capricious sentencing.[16]

Four years later, the Court refined its holding in *Furman* when it upheld Georgia's revised capital punishment statute in *Gregg v. Georgia*.[17] In upholding the new Georgia statute, the court focused on two of the statute's features: the guided discretion of the jury and the availability of judicial review.[18] On the issue of guided discretion, the Court explicitly noted that "before *Furman* less than 20 percent of those convicted of murder were sentenced to death in those states that authorized capital

12. McGautha v. California, 402 U.S. 183 (1971) (upholding California's fully discretionary capital sentencing scheme, which gave prosecutors complete discretion over when to seek the death penalty, and jurors complete discretion over whether to impose it). Rejecting the argument that discretionary sentencing led to the arbitrary application of the death penalty, Justice Harlan concluded that "in light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *Id*. at 207.

13. Furman, 408 U.S. at 313 (White, J., concurring).

14. Four years later, in *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), the plurality explained *Furman's* holding as follows: "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

15. In *Furman*, Justices Brennan and Marshall found the death penalty *per se* unconstitutional under the Eighth Amendment, while Justices Douglas, Stewart, and White found the death penalty unconstitutional as applied to the petitioners in the case. *See* Furman, 408 U.S. 238.

16. *See*, *e.g.*, Furman, 408 U.S. at 305 (Brennan, J., concurring).

17. Gregg, 428 U.S. at 153.

18. *Id*. at 198. The court in *Gregg* also applauded the Georgia statute's proportionality review, *id.*, but later held that proportionality review is not required for a statute to pass Constitutional muster. *See* Pulley v. Harris, 465 U.S. 37 (1984).

punishment,"[19] a ratio the *Furman* Court had found intolerably arbitrary. The *Gregg* Court emphasized the importance of distinguishing "the few cases in which [the death penalty is imposed] from the many cases in which it is not."[20] The implication was clear: a constitutional death penalty scheme must narrow the eligible class sufficiently that the sentence is imposed on a substantial portion of that class, not scattered randomly across an undifferentiated population of convicts.

The Court in *Gregg* also reiterated that "'justice generally requires … that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'"[21] Thus, the threshold test for a valid death penalty statute came to require both an objective *narrowing* mechanism at the guilt phase of the trial (to meaningfully limit the class of death-eligible offenders so that a substantial portion receive the sentence), and an *individualized sentencing* component at the penalty phase (to distinguish those criminals most deserving of capital punishment from those less deserving of the sentence).[22]

On the same day that it decided *Gregg*, the Supreme Court also issued its opinion in *Woodson v. North Carolina*, striking down mandatory death penalty schemes for failing to consider "the character and record of the individual offender and the circumstances of the particular offense … a constitutionally indispensable part of the process of inflicting the penalty of death."[23] The individualized sentencing requirement was further affirmed in *Lockett v. Ohio*, in which the Court struck down Ohio's death penalty statute for limiting the mitigating factors a sentencing jury could consider.[24]

While the narrowing principle elucidated in *Gregg* retains strong support on the Court, subsequent rulings have weakened the individualized sentencing prong of *Woodson* and *Lockett* over the years. In 1980, it appeared that the Court would "require that the sentencer's discretion be channeled at the penalty phase by 'clear and objective

19. Gregg, 428 U.S. at 182 n.26.

20. *Id.* at 188.

21. *Id.* at 189, quoting Penn. ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937).

22. *Id.*

23. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

24. Lockett v. Ohio, 438 U.S. 586, 608-09 (1978).

standards,'"[25] but the Court walked back this position three years later in *Zant v. Stephens*.[26] In *Zant*, the Court upheld Georgia's penalty-phase scheme that provided no specific standards to guide the jury's discretion in weighing aggravating and mitigating circumstances, finding that such guidance was unnecessary so long as the class of death-eligible defendants was adequately narrowed at the guilt phase.[27]

Some commentators and jurists have noted the apparent incompatibility between objective narrowing and subjective individualized sentencing requirements,[28] with Justice Scalia announcing in *Walton v. Arizona* that he would no longer follow *Woodson* and *Lockett* because of it.[29] Scalia noted that subjective individualized sentencing "obviously destroys whatever rationality and predictability the [narrowing requirement] was designed to achieve."[30] Justice Thomas has expressed similar concerns.[31] Jeffrey Kirchmeier concludes that "in its attempts to follow both principles while reacting to perhaps unanticipated legislative responses, the Court has retreated from both principles … creat[ing] a system that has the paradoxical problems of a constitutional sentencing scheme that is somehow both mandatory and arbitrary."[32]

Despite this doctrinal retreat, the Court has categorically excluded certain classes of defendants from death eligibility altogether, holding that the Eighth Amendment bars execution of the intellectually disabled,

25. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1293 (1997).

26. Zant v. Stephens, 462 U.S. 862 (1983).

27. *Id.* at 877-88. *See also* Shatz & Rivkind, *supra* note 25, at 1291 ("by the time of *Zant*, the requirement that states reduce the risk of arbitrary imposition of the death penalty had evolved into a requirement that there be a statutory narrowing of the category of death-eligible murderers.")

28. *See* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill Rts. J. 345, 360 (1998); Markus D. Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 Buff. L. Rev. 85, 98 (1993).

29. Walton v. Arizona, 496 U.S. 639, 673 (1990) (Scalia, J., concurring).

30. *Id.* at 664-65.

31. *See* Graham v. Collins, 506 U.S. 461, 493-500 (Thomas, J., concurring).

32. Kirchmeier, *supra* note 28, at 360.

juveniles, and those convicted of crimes not resulting in death.[33] These rulings operate as a form of constitutional narrowing rather than individualized sentencing, removing entire categories from death eligibility regardless of individual circumstances.

The essence of modern death penalty jurisprudence to emerge out of *Furman*, therefore, remains the bifurcated trial framework that requires narrowing at the guilt phase and individualized sentencing at the penalty phase. But the requirements exist in tension, and the Court has never fully reconciled them. As a practical matter, the narrowing requirement does the constitutional heavy lifting, while nearly any *pro forma* individualized sentencing mechanism satisfies *Woodson* and *Lockett*.[34]

B. History of California's Modern Capital Punishment Statute

Against this backdrop emerges the convoluted tale of the California death penalty. Prior to the moratorium imposed on most states by the Supreme Court's 1972 decision in *Furman v. Georgia*,[35] California's death penalty statute was fully discretionary.[36] The High Court upheld this discretionary statute in *McGautha v. California* in May 1971.[37] The 1970 statute before the *McGautha* court made every first-degree murder eligible

33. *See*, *e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (declaring it unconstitutional to sentence a defendant to death for a crime that did not result in the death of the victim); Atkins v. Virginia, 536 U.S. 304 (2002) (declaring the death penalty unconstitutional as applied to the mentally retarded); Enmund v. Florida, 458 U.S. 782 (1982) (declaring the death penalty unconstitutional for felony murder).

34. *See* Shatz & Rivkind, *supra* note 25, at 1293 for a thorough overview of the broad standards that may guide juries in the penalty phase.

35. Furman v. Georgia, 408 U.S. 238 (1972) (striking down discretionary sentencing schemes in Georgia and Texas and imposing a temporary, *de facto* moratorium on death sentencing in most of the United States).

36. Cal. Penal Code § 189 (West 1970).

37. McGautha v. California, 402 U.S. 183, 207 (1971).

for the death penalty at the jury's discretion.[38] In the year between *McGautha* (May 1971) and *Furman* (June 1972), the California Supreme Court overturned the law under the state constitution's ban on cruel or unusual punishments.[39] California voters acted swiftly to reverse the state court by placing Proposition 17 on the 1972 ballot.[40] Before Prop. 17 even made it to a vote, the United States Supreme Court decided *Furman*, invalidating most states' capital punishment statutes, including the one California's voters sought to revive.[41] Despite *Furman*, however, Proposition 17 still passed in November 1972 with 67.5 percent of the vote, reinstating a facially unconstitutional statute.[42]

Faced with the popular mandate of Proposition 17 and the judicial mandate of *Furman*, the state legislature attempted to chart a course that would satisfy both their constituents and the courts. Their initial solution was to adopt a mandatory death penalty for every first-degree murder exhibiting one of ten special circumstances.[43] The United States Supreme Court thwarted this effort only a few years later, in 1976, when it found mandatory death sentences unconstitutional in *Woodson v. North Carolina*,[44] and the state supreme court quickly followed suit.[45]

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38. *See* Cal. Penal Code § 189 (West 1970). Ironically, first-degree murder was more narrowly defined by the 1970 statute than it is today. The 1970 statute defined first-degree murder as killing (1) during the commission or attempted commission of one of six felonies (arson, rape, robbery, burglary, mayhem, or lewd act with a minor); (2) with malice and by means of a bomb, poison, torture, or lying in wait; or (3) with malice and premeditation and deliberation. By comparison, today there are 21 categories of first-degree murder (Cal. Penal Code § 189) and 35 special circumstances that qualify such a murder for the death penalty (Cal. Penal Code § 190.2).

39. People v. Anderson, 493 P.2d 880, 883 (Cal. 1972) (citing Cal. Const. art. I, § 6, amended by Cal. Const. art. I § 17).

40. Proposition 17 (1972) (codified at Cal. Const. art. I, § 27), https://repository.uclawsf.edu/ca_ballot_props/768/ [https://perma.cc/2JES-Z9X3] (amending the California Constitution to exclude the 1972 death penalty statute or "such punishment for such offenses" from the scope of cruel or unusual punishments under Cal. Const. art I, § 6 or "any other provision of this constitution").

41. Furman v. Georgia, 408 U.S. 238 (1972).

42. *Id*. One of the only points the fractured justices in *Furman* could agree on was that giving juries unguided discretion over death sentencing was unconstitutional. Since California's system was fully discretionary, it clearly violated *Furman*.

43. Act of Sept. 24, 1973, ch. 719, §§ 1–5, 1973 Cal. Stat. 1297–1300 (enacting S.B. 450).

44. Woodson v. North Carolina, 428 U.S. 280 (1976).

45. Rockwell v. Superior Court, 18 Cal. 3d 420 (Cal. 1976).

California again reinstated the death penalty in 1977, with a revised statute that became the basis for its modern capital punishment scheme.[46] The 1977 statute brought the advent of California's bifurcated trial procedure, intended to comply with the requirements of *Furman*, *Gregg*, and *Woodson*.[47] To satisfy the narrowing requirement, a jury would have to find one of eleven special circumstances applicable to a first-degree murder at the guilt phase of the trial.[48] To satisfy the individualized sentencing requirement, the same jury would separately weigh the aggravating and mitigating factors in the defendant's case at the penalty phase, and return at its discretion a sentence of death or life without possibility of parole.[49]

This statute came before the Supreme Court in the 1984 case of *Pulley v. Harris*, on the question of whether the statute violated *Gregg* by failing to provide proportionality review.[50] The court declined to require proportionality review, and explained the statute's adequacy as follows:

> By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small subclass of capital-eligible cases. The statutory list of relevant factors, applied to defendants within this subclass, "[provides] jury guidance and [lessens] the chance of arbitrary application of the death penalty, [guaranteeing] that the jury's discretion will be guided and its consideration deliberate." The jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189. Its decision is reviewed by the trial judge and the State Supreme Court. On its face, this system … cannot be successfully challenged under *Furman* and our subsequent cases.[51]

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46. Act of Aug. 11, 1977, ch. 316, §§ 4–14, 1977 Cal. Stat. 1256–62.

47. *Id.*

48. *Id.*

49. *Id.*

50. Pulley v. Harris, 465 U.S. 37 (1984) (holding that the Constitution does not require states to conduct discretionary proportionality review of capital sentences).

51. *Id.* at 74 (internal cross-references omitted).

While *Pulley* was based on the language of the 1977 statute, the law on the books had already broadened by the time it was decided in 1984. In 1978, California voters had again exercised their referendum power over the death penalty by enacting the Briggs Initiative.[52] Officially called the Murder Penalty Initiative, the Briggs Initiative (so called for its sponsor, State Senator John Briggs) broadened the list of special circumstances qualifying first-degree murders for the death penalty, expanding the number from eleven to twenty-eight.[53] It also altered the level of juror discretion at the penalty phase, explicitly allowing the jury to consider prior felony convictions,[54] and *requiring* juries to return a verdict of death where the aggravating factors at sentencing outweigh their mitigating factors.[55]

The breadth of California's death penalty continued to expand into the early 2000s. In 1982 (still two years before *Pulley* was decided), the legislature expanded the definition of first-degree murder to include murder by "armor-piercing bullets."[56] Then in 1990, the people passed two more initiatives expanding eligibility for capital sentencing. Proposition 114 expanded the number of peace officers whose killing constitutes a special circumstance.[57] Proposition 115 expanded the scope of felony murder, adding five new underlying felonies and two new death-qualifying special circumstances, and removing "intent to kill" as a prerequisite for sentencing a felony murder convict to death.[58] Another initiative in 1993 added carjacking and "discharge of a firearm from a motor vehicle" to the

52. Proposition 7 (1978), https://repository.uclawsf.edu/ca_ballot_props/840/ [https://perma.cc/JXA6-KXY4].

53. *Id.*

54. *Id.*

55. *Id.*

56. Act of Sept. 10, 1982, ch. 950, § 1, 1982 Cal. Stat. 3440 (codified as amended at Cal. Penal Code § 189 (current through 2025 legislative session)).

57. Proposition 114 (1990), https://repository.uclawsf.edu/ca_ballot_props/1019/ [https://perma.cc/TWH8-7HNZ] (adding over a dozen categories of peace officers, including university police, housing authority and redevelopment agency investigators, coroners, and arson investigators to the list of peace officers whose killing constitutes a special circumstance).

58. Proposition 115 (1990), https://repository.uclawsf.edu/ca_ballot_props/1020/ [https://perma.cc/RCL2-9LKS] (adding murder during kidnapping, train wrecking, sodomy, oral copulation, or rape by instrument to the list of death-eligible felony murders).

definition of first-degree murder;[59] and three more special circumstances were added by initiatives in 1996.[60]

In 2000, the legislature expanded the definition of first-degree murder to include "felony torture murder."[61] In the same year, the voters further expanded the special circumstances qualifying for capital punishment, by changing the definition of "lying in wait;"[62] amending the arson and kidnapping felony murder circumstances;[63] and adding gang-related homicide as a special circumstance.[64] Most recently, in 2002, the legislature added "murder by means of a weapon of mass destruction" to the definition of first-degree murder.[65]

1972's Proposition 17 thus kicked off a wave of popular expansions of the death penalty that continued into the early 2000s.[66] In the years since 2002, the statutory framework around capital punishment remains substantively unchanged, but the era of expansion by initiative seems to have shifted to an era of contestation. In 2012 and 2016 voters attempted to abolish the death penalty entirely, losing by relatively narrow margins.[67] Instead of abolition, the people voted to accelerate and streamline administration of the death penalty on an alternative 2016 ballot measure,[68] despite the passage of a decade since the state's

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59. Proposition 172 (1993), https://repository.uclawsf.edu/ca_ballot_props/1087/ [https://perma.cc/8LPV-R7PY].

60. Proposition 195 (1996), https://repository.uclawsf.edu/ca_ballot_props/1116/ [https://perma.cc/A96K-927S] (adding murder by drive-by shooting as a special circumstance); Proposition 196 (1996), https://repository.uclawsf.edu/ca_ballot_props/1117/ [https://perma.cc/627X-HCPF] (adding felony-murder carjacking and murder of a juror to the list of special circumstances).

61. Act of Oct. 6, 1999, ch. 694, 1999 Cal. Stat. 5054 (effective January 1, 2000).

62. Proposition 18 (2000), https://repository.uclawsf.edu/ca_ballot_props/1187/ [https://perma.cc/3U5M-U3CQ].

63. *Id.*

64. Proposition 21 (2000), https://repository.uclawsf.edu/ca_ballot_props/1192/ [https://perma.cc/3JCV-TYT6].

65. Act of Sept. 16, 2002, ch. 606, § 1, 2002 Cal. Stat. 3384.

66. *See infra*, Part II.C.3.

67. Proposition 34 (2012), https://repository.uclawsf.edu/ca_ballot_props/1313/ [https://perma.cc/6GG9-AHT5] (failed 52% to 48%); Proposition 62 (2016), https://repository.uclawsf.edu/ca_ballot_props/1355/ [https://perma.cc/X7N9-NXR9] (failed 53% to 47%).

68. Proposition 66 (2016), https://repository.uclawsf.edu/ca_ballot_props/1359/ [https://perma.cc/MCS6-LM4L].

last execution.[69] These developments are discussed in greater detail in Part III.A, below.

In summary, to condemn a defendant to death in California in 2026, a jury must: (1) find the defendant guilty of one of *twenty-one* categories of first-degree murder enumerated in Penal Code § 189; (2) find that one of *thirty-five* special circumstances in § 190.2 applies; and (3), in a separate trial, find that the aggravating factors of the murder outweigh the mitigating factors described in section § 190.3 and introduced by the defense.

C. Problems with California's Capital Punishment System

Against this backdrop, the problems that might arise under California's statutory scheme need little introduction. Underlying California's quagmire are the Supreme Court's own conflicting goals of narrowing and individualized sentencing.[70] These conflicting jurisprudential goals are magnified in California, as Kirchmeier suggests,[71] by a statutory scheme that has broadened out of control, giving jurors the very type of "unguided discretion" that the Supreme Court definitively struck down in *Furman v. Georgia*.[72]

Much of this broadening has occurred through the addition of special circumstances to Penal Code § 190.2, qualifying first-degree murderers for death at the guilt phase. Yet § 190.2 cannot be read without § 190.3, which provides the factors jurors use at the penalty phase in deciding whether to impose death or life without possibility of parole. Less attention has been paid to § 190.3, especially since the Supreme Court seems to have backed away from rigorous individualized sentencing requirements.[73]

69. Cal. Dep't of Corr. & Rehab., *Inmates Executed 1978 to Present*, https://www.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/ [https://perma.cc/3PEW-NTYU].

70. *See supra*, Part II.A.

71. Kirchmeier, *supra* note 28.

72. *See supra*, Part II.B.

73. *See supra*, Part II.A.

Yet the § 190.3 factors present serious difficulties of their own,[74] and work in tandem with § 190.2 to yield a system that is more arbitrary in its outcomes than the Georgia statute in *Furman*, and costs both state and federal taxpayers millions of dollars per year to administer.

1. Challenges to the Modern Statutory Scheme

The Supreme Court's overarching concern in its death penalty jurisprudence has been to prevent the arbitrary application of the penalty. To this end, the Court has indicated that statutes must provide for both statutory narrowing and at least some nod to "an individualized [sentencing] determination on the basis of the character of the individual and the circumstances of the crime."[75]

Thus the most obvious concern with California's statutory scheme is that the growing number of special circumstances and classes of first-degree murder are at odds with the Supreme Court's narrowing requirement. When the Court upheld California's death penalty statute in 1984,[76] it approved of the 1977 language, which contained only eleven enumerated special circumstances and half the categories of first-degree murder in today's statute.[77]

The California Supreme Court has upheld the narrowing function of the modern statute as recently as 1993, explaining that "under our death penalty law ... the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes."[78] The court noted that the statute was nearly identical to that upheld by the Supreme Court in *Pulley v.*

74. Most notably, California, unlike many other states, has chosen to provide no statutory guidance on which factors weigh in mitigation versus which weigh in aggravation. Instead, the statute merely contains a list of factors for the jury to consider. Moreover, the statute *requires* imposition of a death sentence if the aggravating factors of the crime outweigh the factors in mitigation.

75. Zant v. Stephens, 462 U.S. 862, 879 (1983).

76. Pulley v. Harris, 465 U.S. 37 (1984).

77. Act of Aug. 11, 1977, *supra* note 46.

78. People v. Bacigalupo, 862 P.2d 808, 813 (Cal. 1993) (further expressing the view that "as long as a state's capital sentencing scheme 'narrows the class of death-eligible murderers' and then during the sentence selection permits the exercise of discretion and does not limit the consideration of evidence in mitigation, the United States Supreme Court has stated that the Eighth Amendment 'requires no more.'").

Harris,[79] and silently declined to analyze the expansion of § 190.2 special circumstances and any impact they might have on the constitutional narrowing analysis.[80]

Challenges to the penalty-phase factors enumerated in § 190.3 have been similarly unsuccessful. In *Tuilaepa v. California*, the Supreme Court rejected challenges to several of the § 190.3 sentencing guidelines, noting that § 190.2 performs the requisite narrowing, and no more is required.[81] Citing *Tuilaepa*[82] and *Zant*,[83] the state courts have concluded that the breadth and vague guidance of the sentencing guidelines in § 190.3 do not violate either the state or federal constitutions, because the § 190.2 factors perform the necessary narrowing, and § 190.3 provides the jury with the discretion to make an individualized sentencing determination.[84] The state supreme court now regularly rejects challenges to the death penalty statute without comment, citing to *Bacigalupa*, *Tuilaepa*, and prior decisions.[85]

Notably, the United States Supreme Court has not ruled on the Constitutionality of California's modern death penalty scheme as a whole. When the Court upheld the Constitutionality of the penalty-phase sentencing guidelines in 1994, in *Tuileapa v. California*, Justice Blackmun, the lone dissenter, foreshadowed a key problem with the California death penalty statute:

> Of particular significance, the Court's consideration of a small slice of one component of the California scheme says nothing about the interaction of the various components — the statutory definition of first-degree murder, the special circumstances, the relevant factors, the statutorily required weighing of aggravating and mitigating factors, and the availability of judicial review, but not appellate proportionality review — and whether their end result

79. Pulley, 465 U.S. 37.

80. Bacigalupo, 862 P.2d 808.

81. Tuilaepa v. California, 512 U.S. 967, 978-79 (1994).

82. *Id.*

83. Zant v. Stephens, 462 U.S. 862 (1983).

84. *See*, *e.g.*, Bacigalupo, 862 P.2d at 813.

85. *See* Shatz & Rivkind, *supra* note 25, at 1317.

> satisfies the Eighth Amendment's commands. The Court's treatment today of the relevant factors as "selection factors" alone rests on the assumption, not tested, that the special circumstances perform all of the constitutionally required narrowing for eligibility. Should that assumption prove false, it would further undermine the Court's approval today of these relevant factors.[86]

Justice Blackmun's warning proved prescient. In 2014, U.S. District Judge Cormac Carney ruled in *Jones v. Chappell* that California's death penalty violates the Eighth Amendment.[87] Judge Carney documented that of more than 900 people sentenced to death in California since 1978, only 13 had been executed, a rate even lower than the pre-*Furman* ratios the Supreme Court found constitutionally intolerable.[88] The average wait on death row exceeded 25 years.[89] "In California," Carney wrote, "the execution of a death sentence is so infrequent, and the delays preceding it so extraordinary, that the death penalty is deprived of any deterrent or retributive effect it might once have had."[90]

The Ninth Circuit unanimously reversed in 2015, but not on the merits.[91] The court held that Jones's claim sought to apply a "novel constitutional rule" barred by *Teague v. Lane* on federal habeas review.[92] The factual findings went undisputed. California's death penalty remains constitutional only because federal courts have declined to reach the merits of the arbitrariness claim successfully argued in *Chappell*.

A direct challenge to the sentencing procedures reached the California Supreme Court in 2021's *People v. McDaniel*.[93] The defendant argued that jury unanimity and proof beyond a reasonable doubt were constitutionally required for aggravating circumstances — a holding that could have invalidated hundreds of death sentences. Justice Liu, writing for a

86. Tuilaepa, 512 U.S. at 994-95 (Blackmun, J., dissenting).

87. Jones v. Chappell, 31 F. Supp. 3d 1050 (C.D. Cal. 2014).

88. *Id.* at 1053.

89. *Id.* at 1054.

90. *Id.* at 1063.

91. Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

92. Davis, 806 F.3d at 541 (paraphrasing Teague v. Lane, 489 U.S. 288 (1989)).

93. People v. McDaniel, 12 Cal. 5th 97 (Cal. 2021).

unanimous court, rejected the challenge.[94] Yet Liu also wrote separately to acknowledge "a serious question whether our capital sentencing scheme is unconstitutional,"[95] urging the court to "revisit this issue at an appropriate time."[96] The majority opinion thus preserved the status quo while its author signaled that the current system may not survive future scrutiny.

The pattern across these challenges is striking: courts have consistently avoided ruling on whether California's special circumstances actually perform the narrowing function the Constitution requires. The California Supreme Court cites *Bacigalupo* without analyzing the statute's expansion. The Ninth Circuit reversed *Chappell* on procedural grounds while leaving Judge Carney's factual findings undisputed. Meanwhile, the empirical evidence, discussed in the following section, confirms what Blackmun warned and Carney documented: the special circumstances have become so broad that they fail to narrow the death-eligible class in any meaningful way, leaving the broad and subjective § 190.3 sentencing factors — which the *Tuilaepa* Court approved as selection factors, not narrowing mechanisms — to cure a constitutional defect they were never designed to address.[97]

2. Effects of the Statutory Scheme

While the state supreme court apparently remains in denial over the narrowing function of § 190.2, empirical evidence has emerged to contradict its assumptions about the law and vindicate Justice Blackmun's skepticism over the statute's Constitutionality. In 1997, Steven Shatz and Nina Rivkind conducted an empirical review of California

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94. *Id.* at 155 ("... we are unable to infer from the jury trial guarantee in article I, section 16 of the California Constitution or Penal Code section 1042 a requirement of certainty beyond a reasonable doubt for the ultimate penalty verdict.").

95. *Id.* at 157.

96. *Id.* at 176 (Liu, J., concurring). Justice Liu concluded:

> There is a world of difference between a unanimous jury finding of an aggravating circumstance and the smorgasbord approach that our capital sentencing scheme allows. Given the stakes for capital defendants, the prosecution, and the justice system, I urge this court, as well as other responsible officials sworn to uphold the Constitution, to revisit this issue at an appropriate time.

97. Tuilaepa v. California, 512 U.S. 967, 973 (1994) (distinguishing eligibility features that narrow from selection factors that individualize).

death penalty cases, and concluded that "the statutorily defined death-eligible class is so large and the imposition of the death penalty on members of the class so infrequent as to violate *Furman*."[98] The Shatz and Rivkind study showed that 84 percent of convicted first-degree murderers in the state were factually death-eligible, while only 9.6 percent are ultimately sentenced to death.[99] This yields a death sentence ratio of approximately 11 percent, which is considerably lower than Georgia's and California's pre-*Furman* death sentence ratios.[100] Such statistics empirically substantiate Justice Blackmun's fear that the special circumstances indeed are not "perform[ing] all of the constitutionally required narrowing for eligibility."

Shatz and Rivkind's conclusion that the breadth of California's statute leads to arbitrary application of the death penalty was bolstered by subsequent official findings. In 2008, the California Commission for the Fair Administration of Justice released a landmark report on the death penalty, finding that federal courts had granted some form of relief in 70 percent of the habeas petitions received from California death row inmates up to that point, indicating a high judicial error rate.[101] The report also revealed that significantly fewer defendants would be sentenced to death under a narrower set of special circumstances similar to those found in other states and in California's original 1977 legislation.[102] Failure to investigate mitigating factors is also a leading factor in reversals, largely due to open-ended and cross-purpose mitigation factors and underfunded defense counsel.[103]

The CCFAJ also documented the overall inefficiency and staggering financial cost of California's capital punishment system. These findings were nearly as startling as those on the arbitrary application of the death penalty. Due to persistent underfunding, the average length of time a

98. Shatz & Rivkind, *supra* note 25, at 1288.

99. *Id.* at 1332.

100. *Id.*

101. California Commission on the Fair Administration of Justice, *Report and Recommendations on the Administration of the Death Penalty in California*, at 20, n. 22 (2008), available at https://digitalcommons.law.scu.edu/ncippubs/1/ [https://perma.cc/P2NQ-5J7D].

102. *Id.* at 69-71.

103. *Id.*

California inmate spent on death row, from date of sentence to execution, was 20-25 years — the longest of any death penalty state.[104] This ignoble statistic gave California the largest death row in the nation, with 670 inmates awaiting execution at the time.[105] At a marginal cost of $90,000 per year per inmate (compared to serving a sentence of life without parole), the state was spending $63.3 million per year just to maintain its death row.[106] A subsequent study found the CCFAJ figures substantially understated the true cost: when appeals, legal representation, and trial-level expenses are included, California spends over $184 million per year on the death penalty, or more than $4 billion since reinstatement in 1978.[107] Despite the shrinking death row population, the system continues to cost well over $100 million annually.[108]

The dysfunction the CCFAJ documented in 2008 has only deepened. In 2021, the California Committee on Revision of the Penal Code issued the first comprehensive examination of the death penalty since the CCFAJ report.[109] The committee found significant geographic and racial disparities in death sentencing. Despite California's population being only 35 percent non-Hispanic white, just 18 percent of new death sentences between 2010 and 2020 were imposed on white defendants, while over 80 percent were imposed on people of color.[110] The geographic concentration is equally stark: Kern County and Riverside County alone have accounted for a disproportionate share of death sentences, while Los

104. *Id.*

105. *Id.*

106. *Id.*

107. 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, S109 (2011).

108. Alarcón & Mitchell, *supra*, at S110, found the annual marginal cost of death row incarceration to be $63.3 million. In light of the dismantling of San Quentin's death row (described *infra* in Part II.C.3), this cost has likely been reduced. Even assuming its complete elimination, the total annual costs from trial, appeal, and habeas proceedings exceeds $100 million.

109. California Committee on Revision of the Penal Code, *2021 Annual Report and Recommendations: The Death Penalty* (2021), https://clrc.ca.gov/CRPC/Pub/Reports/CRPC_DPR.pdf [https://perma.cc/9GRB-UPT3].

110. CRPC Report, *supra* note 109, at 20-21, fig. 4 (reporting new death sentences by race of defendant from 2010 to 2020: 33% Black, 41% Latinx, 18% White, 7% Other); U.S. Census Bureau, *QuickFacts: California*, https://www.census.gov/quickfacts/CA [https://perma.cc/XAL5-SKBK] (reporting California's population as approximately 35% non-Hispanic white).

Angeles County — historically one of the largest sources — announced in December 2020 that its prosecutors would no longer seek the penalty.[111]

These statistics, drawn from the CCFAJ and CRPC reports and subsequent empirical research, paint a picture of a system that has grown more dysfunctional with each passing year. As described below, this highly problematic capital punishment scheme is a product of the California initiative process, bearing little relationship to legitimate policy goals. While the system may be too expensive to maintain, its legacy in the initiative process may simultaneously make it too difficult to reform.

3. The Collapse of California's Execution Apparatus

The dysfunction documented by the CCFAJ extends beyond the statutory scheme to the mechanics of execution itself. California's last execution occurred on January 17, 2006, when Clarence Ray Allen was put to death at San Quentin.[112] Weeks later, U.S. District Judge Jeremy Fogel blocked the scheduled execution of Michael Morales in *Morales v. Tilton*, finding that California's three-drug lethal injection protocol created "an undue and unnecessary risk" that inmates would experience excruciating pain while paralyzed — violating the Eighth Amendment's prohibition on cruel and unusual punishment.[113]

Judge Fogel offered the state two options: administer a single-drug barbiturate overdose, or have a qualified anesthesiologist present to ensure unconsciousness before administering the painful second and third drugs.[114] Corrections officials recruited two anesthesiologists, but both withdrew hours before the scheduled execution, citing medical ethics concerns about intervening if the inmate regained consciousness.[115] No execution has occurred since.

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111. *See* Los Angeles County District Attorney's Office, *Special Directive* 20-08 (Dec. 7, 2020), https://da.lacounty.gov/policies/resentencing [https://perma.cc/3BPN-AZZJ] (announcing that the office would no longer seek the death penalty in any case).

112. *Supra* note 69.

113. Morales v. Tilton, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006).

114. *Id.* at 983.

115. *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 52-53 (2007).

What followed was a thirteen-year odyssey of failed regulatory attempts. In 2008, a state court held that the Administrative Procedure Act required the Department of Corrections to promulgate the lethal injection protocol as a formal regulation.[116] The department's first attempt, submitted in 2009, was rejected by the Office of Administrative Law in 2010, then approved, then enjoined again by court order in 2012.[117] A second attempt in 2015-2016, proposing a one-drug protocol, drew over 167,000 public comments before the OAL rejected it for failing to meet statutory standards.[118] In 2018, the department filed new regulations under an APA exemption created by Proposition 66, but these were never used.[119] On March 13, 2019, Governor Gavin Newsom issued Executive Order N-09-19, repealing California's lethal injection protocol entirely and imposing a moratorium on all executions during his administration.[120] As of this writing, California has no valid execution protocol, and no execution has occurred in twenty years.

Yet the dysfunction persists. Courts continue to impose death sentences, with 22 people condemned since 2019, all from just 7 of California's 58 counties.[121] In 2024, three new death sentences were imposed; in 2023, four.[122] The result is a system that continues to generate death sentences destined never to be carried out, at enormous cost to the courts and parties involved.

Death row's population has declined through resentencing rather than execution. Progressive district attorneys in several counties have pursued resentencing for dozens of inmates, and San Quentin's death row has been physically dismantled, with inmates dispersed to general

116. Morales v. Cal. Dep't of Corr. & Rehab., 168 Cal. App. 4th 729, 742 (Ct. App. 2008).

117. *See* Cal. Dep't of Corr. & Rehab., *Timeline of Lethal Injection Protocol Regulations*, https://www.cdcr.ca.gov/capital-punishment/lethal-injection-timeline/ [https://perma.cc/4M3V-M5TT].

118. *Id.*

119. *Id.*

120. Cal. Exec. Order No. N-09-19 (Mar. 13, 2019), https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf [https://perma.cc/89NC-QLWN].

121. Death Penalty Information Center, *Death Penalty Census: Sentencing Database*, https://deathpenaltyinfo.org/sentences [https://perma.cc/S42J-BEB7] (listing 22 death sentences imposed in California from 2019 through 2024, concentrated in 7 of California's 58 counties).

122. *Id.*

population facilities throughout the state.[123] Death row's population has fallen from 670 when the CCFAJ issued its report to 580 as of early 2026,[124] a decline driven not by executions, of which there have been none, but by resentencings, judicial reversals, and natural deaths. The dynamics of this resentencing wave are discussed below.[125]

III. Discussion

A. Role of the Ballot Initiative in California's Death Penalty

While the people and the legislature must ultimately share responsibility for the current statutory scheme, it is safe to conclude that California's death penalty would be vastly different absent the role of the ballot initiative. In fact, the death penalty would not likely exist in California but for the ballot initiative.[126] Aside from 1972's Proposition 17, however, the single greatest influence on California's modern death penalty was the 1978 Briggs Initiative (Proposition 7).[127] The Briggs Initiative represents the single greatest expansion of California's death penalty statute to date, and it began a trend of expansion by initiative that would continue for decades.

The motivation behind the Briggs Initiative was entirely political. It was conceived, from the very beginning, to bolster the publicity of State Senator John V. Briggs, a Republican representing Orange County, in his

123. Cal. Dep't of Corr. & Rehab., *California Condemned Inmate Transfer Project*, https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-transfer-program/ [https://perma.cc/9A2M-RF77] (describing the closure of San Quentin's death row and dispersal of inmates to other facilities).

124. Cal. Dep't of Corr. & Rehab., *Condemned Inmate List*, https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request/ [https://perma.cc/JRR7-ZERA] (reporting 580 condemned inmates as of Feb. 2026).

125. *See infra* Part III.C.

126. Recall that the state supreme court outlawed capital punishment in 1972 (Anderson, *supra* note 39), only to be reversed by the voters the following fall via Proposition 17 (*supra* note 40).

127. *Supra* note 52.

1978 gubernatorial bid.[128] Prop. 7 was paired with another initiative that Briggs championed, in an attempt to replicate the political notoriety that Howard Jarvis had garnered by successfully promoting Proposition 13[129] on the spring primary ballot.[130] The other initiative Briggs promoted in the general election would have banned homosexuals from teaching in the state's public schools.[131] A gay reporter following this proposition felt that Briggs "simply didn't take his campaign as seriously as the public Senator Briggs professed" and "found that the private John Briggs seemed as much bemused by his followers as in league with them."[132] Taken together, the stories from the popular media of the time strongly suggest that Briggs conceived of both initiatives primarily as publicity stunts, with little or no basis in sound policy goals.

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128. *See Briggs Unveils Death Penalty Initiative Plan*, Los Angeles Times, Nov. 9, 1977 at A3 ("Briggs said he intended to tie passage of the initiative to his campaign and, if the measure is approved, will seek signatures on petitions at campaign stops."). *See also* Bud Lembke, *Briggs: Out of the Race But Still Running*, Los Angeles Times, May 21, 1978 at OC1:

> "Those two initiatives will be the Proposition 13 of the general election," [Briggs] predicted, implying they will get a lot of attention, as will the fellow who put them before the electorate. "By the time of the general election, people will know me from the initiatives," Briggs said. "I will be very visible on those." And what is he going to do with this enhanced name identification? Briggs isn't saying, but he is also not discouraging speculation that he may run for U.S. senator in 1980.

129. Proposition 13 (1978), https://repository.uclawsf.edu/ca_ballot_props/850/ [https://perma.cc/VV84-K6KJ]. Prop. 13 limited the amount of property tax the State of California can levy against property owners. It is widely considered to have ignited the modern wave of ballot initiatives in California and throughout the country, and to have started the taxpayers' revolt that launched Ronald Reagan to the White House.

130. *See* Ron Javers, *John Briggs Models a Role*, S.F. Chronicle, Oct. 16, 1978 at 8:

> At every turn in the busy two days of campaigning last week, the conservative Republican from Orange County sought to identify with Jarvis and the success of Proposition 13. "We want to send the politicians another message," he told a Castro Valley Rotary-Lions Club meeting earlier the same afternoon. "Just like we sent them with Proposition 13." ... Now Briggs sounds more than a touch bitter that it was Jarvis — and not the state senator from Orange county — who rode the property tax issue to statewide victory and national acclaim. "Do I wish I thought of it first?" he answers a reporter's question wistfully. "Well, what do you think?" In fact, Briggs maintains, "Jarvis was going nowhere until I walked into his life."

131. Proposition 6 (1978), https://repository.uclawsf.edu/ca_ballot_props/838/ [https://perma.cc/CJD6-THCY].

132. Randy Shilts, *A Gay Journalist's Friendship With Briggs*, S.F. Chronicle, Oct. 31, 1978 at 4.

While Briggs was ultimately unsuccessful in eliciting the public fear of homosexuals needed to banish them from the schools,[133] he succeeded in eliciting the fear of criminals needed to expand the death penalty.[134] The Briggs campaign employed unabashed fear tactics in promoting its death penalty initiative. In one such tactic, the campaign sent letters to residents reading "Dear Jane, You can protect yourself from the ruthless killers who are walking the streets of San Francisco if you sign this petition and return it to Citizens for an Effective Death Penalty today."[135] The letter was personalized with the addressee's first name and city of residence.[136] Accompanying the letter was also a brochure declaring "your life is in danger, killers still walk the streets! … If Charles Manson sent his family of drug-crazed killers to slaughter your family, Manson would not face the death penalty under California law."[137]

Given this fear-based campaigning, it can be little surprise that Proposition 7 — designed to "give Californians the toughest death-penalty law in the country"[138] that would "apply to every murderer"[139] — passed by an overwhelming margin. The irrational power of fear-based appeals has been widely documented, especially in the context of public opinion about the death penalty.[140] "Locating the causes of capital crime exclusively within the offender — whose evil must be distorted, exaggerated, and mythologized — not only makes it easier to kill them but also to distance ourselves from any sense of responsibility for the roots of the problem itself," according to noted mitigation expert and psychologist Craig Haney.[141]

Moreover, the invocation of Charles Manson — in addition to R.F.K. murderer Sirhan Sirhan in the Voter Information Pamphlet[142] — appears

133. Proposition 6, *supra* note 131, failed with 58% of the vote.

134. Proposition 7, *supra* note 52, passed with 71% of the vote.

135. W.E. Barnes, *Sen. Briggs: "Your Life is in Danger"*, S.F. Chronicle, Apr. 2, 1978 at 10.

136. *Id.*

137. *Id.*

138. *See* Shatz & Rivkind, *supra* note 25, at 1310.

139. *Id.*

140. *See generally* Craig Haney, Death By Design 27-44 (Oxford 2005).

141. *Id.* at 44.

142. *Supra* note 52.

to be a classic appeal to what Haney terms "case-specific bias,"[143] where the worst and most gruesome aspects of a case are called to the focus of public attention, tending to dehumanize criminals, and feeding into our abdication of social responsibility for crime. Thus, while John Briggs faded into relative obscurity after resigning from the California Senate in 1981, his Proposition 7 legacy lives on with us today.

Other initiatives that have expanded the death penalty in the intervening years have followed similar patterns of appeals to irrational fear or political posturing. For example, Senator Pete Wilson seems to have taken a page directly out of Briggs' playbook in the 1990 Crime Victims Justice Reform Act (Proposition 115).[144] A 1989 editorial in the Los Angeles Times reported:

> Other versions of [the] measure, which is a compendium of ill-advised proposals prudently rejected by the Legislature over the past decade, have been circulated twice since 1984, and then withdrawn for lack of popular support. This year, Wilson — mindful of the public's anxiety over crime — has given the proposal's backers several hundred thousand dollars they could not raise from the people on their own. That money currently is being used to fund a campaign to gather enough signatures to finally put the measures on the ballot.[145]

Not surprisingly, the campaign for Proposition 115 again relied on fear of mythologized, dehumanized criminals — the "Night Stalker" and "Singleton Torturer" — as a key component of its campaign strategy.[146] And once again, it worked.[147]

Thus, while rational policy arguments can be conceived for some of the expansions in California's death penalty over the years since *Furman*, most of the changes, especially those brought about by popular

143. *See generally* Haney, *supra* note 140, at 45-65.

144. Proposition 115 (1990), *supra* note 58.

145. Editorial, *Invading the Initiative Process*, L.A. Times, Aug. 20, 1989, at V4.

146. Proposition 115 (1990), *supra* note 58.

147. *Id.* Prop. 115 passed with 57% of the vote.

initiative, have been motivated more by political posturing and fear than by rational policy motivations.

After the major citizen initiatives of 1978 and 1990 established the framework, subsequent expansions followed a different pattern. Propositions 195 and 196 in 1996, and Proposition 18 in 2000, were not citizen initiatives but legislative referendums. These measures, passed by the legislature, required voter approval only because they amended initiative-enacted code.[148] They sailed through on margins of 73 to 86 percent, with little organized opposition and none of the high-profile campaigns that characterized the Briggs and Wilson initiatives.[149] The political heavy lifting had already been done. The fear-based attitudes cultivated by earlier campaigns had become the default position of California's electorate, requiring no further cultivation to sustain.

After a decade without further expansion, however, the initiative landscape shifted. The era of death penalty expansion gave way to an era of contestation. For the first time since Proposition 17 restored the death penalty in 1972, abolitionists mounted serious initiative campaigns, and death penalty supporters responded with counter-initiatives of their own.

Proposition 34 in 2012 represented the first major abolition effort in four decades. The measure would have replaced all death sentences with life without parole, required condemned inmates to work and pay restitution to victims' families, and allocated $30 million annually to local law enforcement for investigating unsolved homicides and rapes.[150] Supporters, including former death penalty prosecutors, murder victims' families, and civil liberties organizations, outspent opponents by a margin of six to one.[151] Yet Proposition 34 failed, 52 percent to 48 percent.[152] The result demonstrated both the erosion of death penalty support from its 1970s peak and its continued resilience:

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148. *See* CAL. CONST. art. II, § 10(c).

149. Proposition 195 (1996), *supra* note 60, passed with 85.8% support; Proposition 196 (1996), *supra* note 60, with 85.8%; Proposition 18 (2000), *supra* note 62, with 72.5%.

150. Proposition 34 (2012), *supra* note 67.

151. *Despite Cost, Calif. Votes to Keep Death Penalty*, CBS NEWS (Nov. 8, 2012), https://www.cbsnews.com/news/despite-cost-calif-votes-to-keep-death-penalty/ [https://perma.cc/K6ZD-U9S8] (reporting that supporters spent $6.5 million compared to opponents' $1 million).

152. Proposition 34 (2012), *supra* note 67.

a majority of Californians were no longer enthusiastic about capital punishment, but they were not yet willing to abolish it.

Four years later, abolitionists tried again with Proposition 62, while death penalty supporters countered with Proposition 66. The competing measures presented voters with a stark choice. Proposition 62 would abolish the death penalty outright and resentence all condemned inmates to life without parole.[153] Proposition 66, by contrast, promised to fix the system by expediting executions: it would shift initial habeas corpus review from the California Supreme Court to trial courts, impose a five-year deadline on all appeals, and expand the pool of attorneys eligible for capital appointments.[154]

The results were revealing. Proposition 62 failed, 53 percent to 47 percent, a slightly worse margin than Proposition 34 four years earlier.[155] But Proposition 66 passed with only 51 percent support,[156] suggesting that voters were not enthusiastic about the death penalty so much as unwilling to abolish it. When forced to choose between abolition and acceleration, Californians chose acceleration, but barely.

The California Supreme Court upheld Proposition 66 in *Briggs v. Brown*, but gutted its central enforcement mechanism.[157] Writing for the majority, Chief Justice Cantil-Sakauye acknowledged that a mandatory five-year deadline would be impossible to meet given existing caseloads and resources, and held that the deadline was "directive, rather than mandatory," an aspirational goal rather than an enforceable requirement.[158] The promise of expedited executions that voters had approved was rendered illusory before a single case proceeded under the new rules.

The irony was profound: voters chose to "speed up" a system that had not executed anyone in a decade and showed no signs of resuming. As of this writing, nearly ten years after Proposition 66's passage, California

153. Proposition 62 (2016), *supra* note 67.

154. Proposition 66 (2016), *supra* note 68.

155. *See supra* note 67.

156. *See supra* note 68.

157. Briggs v. Brown, 3 Cal. 5th 808 (Cal. 2017).

158. *Id.* at 861-62.

still has not carried out an execution, and the backlog of capital appeals has only grown.

These more recent initiatives confirm that the process responsible for California's overbroad death penalty now constrains efforts to reform it. Abolition requires persuading the same electorate whose attitudes were shaped by decades of fear-based campaigning. The 48 percent and 47 percent support for abolition in 2012 and 2016 represents significant movement from the 71 percent who supported the Briggs Initiative in 1978, but remains short of the majority needed to dismantle what the initiative process created. Meanwhile, the alternative path of "fixing" the system through measures like Proposition 66 has proven entirely aspirational, confirming that California's death penalty dysfunction cannot be cured by initiative any more readily than it can be abolished.

B. The Death Penalty in Suspended Animation

California's inability to develop a functional execution protocol reflects a nationwide crisis.[159] Since 2011, when the European Union banned the export of drugs used in lethal injections, American states have struggled to obtain execution chemicals.[160] Hospira, the sole American manufacturer of sodium thiopental, ceased production due to its use in executions.[161] In 2016, Pfizer joined over twenty pharmaceutical manufacturers in blocking the sale of its products for executions, effectively closing the legitimate market for lethal injection drugs.[162]

States that continue to execute prisoners have responded in divergent ways. Some have turned to compounding pharmacies operating outside normal FDA oversight, often shrouding their drug sources in secrecy statutes to avoid manufacturer pressure.[163] Others have adopted alternative

159. *See supra*, Part II.C.3.

160. Council Regulation 1236/2005, 2011 O.J. (L 338) 31 (EU) (amending export restrictions on goods used for capital punishment).

161. *Hospira Ceases Production of Anesthetic Used in Executions*, Chi. Trib., Jan. 21, 2011, https://www.chicagotribune.com/business/ct-xpm-2011-01-21-ct-biz-0122-execution-drug-20110121-story.html [https://perma.cc/W88D-8S95].

162. Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. Times, May 13, 2016, at A1.

163. *See* Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. Rev. 1367 (2014).

methods altogether. In January 2024, Alabama became the first state to execute a prisoner by nitrogen hypoxia, a method never before used on humans.[164] Witnesses reported that the condemned man "shook and writhed" for several minutes, contradicting state assurances that unconsciousness would occur within seconds.[165] Louisiana has since adopted the method as well.[166] South Carolina, unable to obtain lethal injection drugs, reinstated the firing squad and carried out three such executions in 2025 (the first in the United States since 2010).[167] Idaho has gone further, making the firing squad its *primary* execution method after a botched lethal injection attempt.[168]

California has not pursued any of these alternatives. The state currently authorizes only lethal injection as the method of execution,[169] but this provision was enacted by the legislature in 1992, not by initiative,[170] meaning the legislature could authorize alternative methods without voter approval. That it has not done so reflects political will, not legal constraint. The prospect of California legislators voting to authorize firing squads or untested asphyxiation methods is remote.

The result is a system frozen in place. California cannot execute prisoners using its existing protocol because that protocol was repealed, its means unavailable. The legislature could theoretically authorize alternative methods, but lacks the political will to do so. And even if

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164. *See* Ed Pilkington, *Alabama Inmate Executed With Nitrogen Gas Was 'Shaking Violently', Witnesses Say*, The Guardian, Jan. 26, 2024, https://www.theguardian.com/us-news/2024/jan/25/alabama-executes-kenneth-smith-nitrogen-gas [https://perma.cc/QQM8-ZC5S].

165. *Id.*

166. *See* Nina Motazedi, *Louisiana Resumes Executions After 15-Year Hiatus with First Nitrogen Gas Execution*, Death Penalty Information Center, Mar. 19, 2025, https://deathpenaltyinfo.org/louisiana-resumes-executions-after-15-year-hiatus-with-first-nitrogen-gas-execution [https://perma.cc/JTL9-V329].

167. Death Penalty Information Center, *Execution List 2025*, https://deathpenaltyinfo.org/executions/2025 [https://perma.cc/M2A3-E4EX].

168. Associated Press, *Idaho Governor Signs Firing Squad Bill Into Law*, Mar. 20, 2023, https://apnews.com/article/death-penalty-executions-firing-squads-idaho-law-de6a68243433a4f58f70256c03891adb [https://perma.cc/W2DC-FXP5].

169. *See* Cal. Penal Code § 3604 (current through 2025 legislative session). While the text of the statute states that an inmate may elect to be killed by lethal gas, a federal district court found execution by lethal gas to be a violation of the Eighth Amendment in *Fierro v. Gomez*, 865 F.Supp. 1387, 1415 (N.D. Cal. 1994), and the Ninth Circuit upheld its injunction in *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).

170. Act of Aug. 27, 1992, ch. 558, § 2, 1992 Cal. Stat. 2075 (enacting A.B. 2405).

the state somehow overcame these obstacles, any attempt to resume executions would face immediate constitutional challenge under the reasoning of *Jones v. Chappell*, the 2014 federal court ruling that found California's death penalty violated the Eighth Amendment precisely because decades of delay had rendered it arbitrary and purposeless.[171] The Ninth Circuit reversed that ruling on procedural grounds, but the factual findings went undisputed. A future challenge, brought through a direct appeal, would confront the same damning evidence: over 900 people sentenced to death since 1978, thirteen executed, average wait times exceeding twenty-five years, and a system that serves no penological purpose the Constitution recognizes.

While the execution method could be changed legislatively, the initiative stalemate constrains more fundamental reform. Narrowing the class of death-eligible crimes or abolishing the penalty altogether would require voter approval, because those provisions were enacted by initiative. The same fear-based attitudes that drove voters to expand the death penalty make meaningful reform politically treacherous.

C. Reforming the System

The CCFAJ report offered three recommendations for reforming the death penalty system in California, without giving preference to one over another.[172] The first option was to maintain the current system but provide it with additional resources to clear the backlog of cases awaiting adjudication and inmates awaiting execution. The second option was to narrow the class of death-eligible crimes, perhaps in accordance with the

171. *See supra* Part II.C.1.

172. CCFAJ Report, *supra* note 101.

Mandatory Justice Factors.[173] The final option was complete abolition of the death penalty.

Of these options, only the first was viable without voter participation under the California Constitution, which requires that repeals and amendments of initiative statutes be approved by the voters.[174] As the current list of death eligibility circumstances was largely created by initiative, the legislature cannot act alone to narrow the class of death-eligible crimes. Complete abolition would be even more difficult, as Proposition 17 (1972) amended the state constitution to remove capital punishment from its prohibition against cruel and unusual punishments.[175]

Each of these options has now been tested. The first, maintaining and funding the system, never materialized. The additional $95 million annually that the CCFAJ estimated was necessary[176] proved politically and fiscally impossible. No serious effort was made to fund a functional death penalty system. The second option, narrowing the death-eligible

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173. According to the CCFAJ Report, *supra* note 101, at 61, "An initiative of the Constitution Project, based in Washington, D.C., established a blue-ribbon bipartisan commission of judges, prosecutors, defense lawyers, elected officials, professors and civic and religious leaders to examine the administration of the death penalty." The commission recommended limiting death eligibility to five key factors: (1) the murder of a peace officer killed in the performance of his or her duties when done to prevent or retaliate for that performance; (2) the murder of any person occurring at a correctional facility; (3) The murder of two or more persons regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts, as long as either (a) the deaths were the result of an intent to kill more than one person, or (b) the defendant knew the act or acts would cause death or create a strong probability of death or great bodily harm to the murdered individuals or others; (4) The intentional murder of a person involving the infliction of torture; and (5) the murder by a person who is under investigation for, or who has been charged with or has been convicted of, a crime that would be a felony, or the murder of anyone involved in the investigation, prosecution, or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors, and investigators.

174. Cal. Const. art. II, § 10 provides that the legislature may repeal an initiative statute only with the approval of the voters. In order for the legislature to amend the constitution, as would be required to abolish the death penalty, a two-thirds majority of each house must first approve the amendment, and then the voters must approve it as well. The people could endeavor to change the law through the standard initiative processes outlined in Cal. Const. art. II.

175. Since Proposition 17 amended the Constitution, it would require a 2/3 vote of the legislature — instead of the simple majority needed for an initiative statute — to place an abolition measure in front of the voters. Alternatively, the voters could gather the requisite signatures to place such a measure on the ballot, but that seems even less likely in the current political climate. *See* Cal. Const. art. II.

176. CCFAJ Report, *supra* note 101, at 83.

class, was never achieved. No narrowing initiative reached the ballot, and the initiative stalemate prevented legislative action. The third option, abolition, was attempted twice by initiative and failed both times, though by narrower margins than earlier polls would have predicted.[177]

Yet reform has come through paths the CCFAJ did not anticipate. The first was executive action. On March 13, 2019, Governor Gavin Newsom issued Executive Order N-09-19, halting all executions during his administration, withdrawing the lethal injection regulations, and closing San Quentin's execution chamber.[178] The moratorium achieved *de facto* abolition without confronting the initiative stalemate. The death penalty remains on the books, satisfying voters who refused to abolish it, while no executions occur, satisfying opponents. But this equilibrium is unstable. A future governor could reverse the moratorium and attempt to resume executions, assuming the state could overcome the legal and practical obstacles described above.[179]

The moratorium has significant limits. It halts executions but not death sentences. Whether the governor could order prosecutors to stop seeking death is legally contested;[180] what is clear is that Newsom chose not to attempt it. District attorneys are elected county officials whose prosecutorial discretion is supervised by the Attorney General, not the governor.[181] Courts, meanwhile, retain independent sentencing

177. *See supra*, 67.

178. Cal. Exec. Order No. N-09-19 (Mar. 13, 2019), https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf [https://perma.cc/89NC-QLWN].

179. *See supra*, Part II.C.3.

180. *Compare* Cal. Const. art. V, § 1 ("The supreme executive power of this State is vested in the Governor") *with* Cal. Const. art. V, § 13 (vesting supervisory authority over district attorneys in the Attorney General, not the Governor). *See* California Constitution Center, *A Governor Probably Can Stop Capital Cases by Executive Order*, SCOCAblog, Mar. 14, 2019, https://scocablog.com/a-governor-probably-can-stop-capital-cases-by-executive-order/ [https://perma.cc/7TAQ-NFKY] (arguing the governor could direct the Attorney General to halt capital prosecutions, but acknowledging such an order would likely face legal challenge).

181. Cal. Gov't Code § 26500 (current through 2025 legislative session) (district attorney "shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses"); Cal. Const. art. V, § 13 ("Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State [... and] shall have direct supervision over every district attorney...").

authority that no executive order can constrain.[182] As documented above, 22 people have been sentenced to death since 2019, all from a handful of counties.[183] The system continues to generate condemned inmates who will almost certainly never be executed.

What the governor can do is grant clemency. The California Constitution empowers the governor to commute death sentences to life without parole, permanently removing the possibility of execution.[184] In 2022, Oregon Governor Kate Brown commuted all 17 death sentences in that state.[185] California's death row is far larger, but mass clemency remains legally available. Advocacy groups have urged Newsom to commute all death sentences before leaving office in January 2027, ensuring that a successor cannot resume executions for current inmates.[186] As of this writing, Newsom has not acted on these calls.

A second unanticipated path emerged through the legislature. In 2020, California enacted the Racial Justice Act, which allows defendants to challenge convictions and sentences based on statistical evidence of racial discrimination.[187] The law directly counters the Supreme Court's much-criticized holding in *McCleskey v. Kemp*, which required proof of intentional discrimination in the defendant's own case.[188] Under the RJA, a defendant may establish a violation by showing that the conviction or sentence was more frequently imposed on people of a

182. *See* Cal. Const. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

183. *See supra* note 121.

184. Cal. Const. art. V, § 8(a) ("Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence....").

185. *See* Death Penalty Information Center, *Gov. Kate Brown Commutes the Sentences of Oregon's 17 Death-Row Prisoners*, Dec. 14, 2022, https://deathpenaltyinfo.org/gov-kate-brown-commutes-the-sentences-of-oregons-17-death-row-prisoners [https://perma.cc/A89V-X882].

186. *See, e.g.*, Mary Kate Delucco, *Support for CA Gov. Gavin Newsom to Commute Death Row is Growing*, Death Penalty Focus, Jan. 26, 2026, https://deathpenalty.org/support-for-ca-gov-gavin-newsom-to-commute-death-row-is-growing/ [https://perma.cc/B9J2-JW8X].

187. Cal. Penal Code § 745 (current through 2025 legislative session).

188. McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that statistical evidence of racial disparity in Georgia's death sentencing was insufficient to establish an equal protection violation absent proof of intentional discrimination in the defendant's own case).

particular race, that the state's charging decisions were influenced by race, or that race-coded language was used during trial.[189] The statute explicitly precludes eligibility for the death penalty when a conviction or sentence was racially motivated.[190] The RJA was made retroactive in 2022, with death row inmates given first priority for petitions beginning January 1, 2023.[191] Given the documented racial disparities in California's death sentencing, the RJA represents a significant avenue for case-by-case dismantling of the death penalty without requiring voter approval.

A third path has emerged through prosecutorial action. Progressive district attorneys in Los Angeles and San Francisco have established resentencing units that systematically review death sentences imposed by their predecessors.[192] In 2024 alone, at least 45 death sentences were vacated or reduced, nearly ten percent of the condemned population in a single year.[193] This resentencing wave, combined with judicial reversals and natural deaths, has driven the decline in death row's population documented above.[194] At current rates of attrition (roughly 60 per year) versus new sentences (three to four per year), death row will continue to shrink regardless of whether formal abolition is ever achieved.

In 2021, the California Committee on Revision of the Penal Code assessed these developments and reached a conclusion the CCFAJ had declined to offer: the death penalty should be abolished.[195] "After a thorough examination," the committee wrote, "the death penalty as created and enforced in California has not and cannot ensure justice and

189. Cal. Penal Code § 745(a) (current through 2025 legislative session).

190. Cal. Penal Code § 745(l) (current through 2025 legislative session).

191. The retroactive provisions of A.B. 256 took effect January 1, 2023, with petitions from persons sentenced to death given first priority. *Id.* § 745(j).

192. *See* Leah Roemer, *State Spotlight: California Death Row Shrinks Sharply in 2024*, Death Penalty Information Center, Aug. 25 2025, https://deathpenaltyinfo.org/news/state-spotlight-california-death-row-shrinks-sharply-in-2024-driven-by-the-resentencing-of-at-least-45-people-to-life-sentences-or-less-2 [https://perma.cc/8KY8-X7R8] (reporting 45 resentencings in 2024); *see also* Los Angeles County District Attorney's Office, *Resentencing Unit*, https://da.lacounty.gov/policies/resentencing [https://perma.cc/3BPN-AZZJ].

193. *State Spotlight*, *supra*.

194. *See supra* Part II.C.2.

195. CRPC Report, *supra* note 109, at 3 ("The Committee recommends that the Legislature place on the ballot a measure that would end the death penalty in California.").

fairness for all Californians."[196] Recognizing that abolition requires voter approval, the CRPC also endorsed interim measures already underway, including clemency, the Racial Justice Act (whose retroactive application the committee specifically recommended), and resentencing.[197] The committee's report thus served as an official validation that the system documented by the CCFAJ in 2008 remained irredeemably broken, and that the reform mechanisms emerging outside the initiative process represented the most viable path forward.

The question for death penalty opponents is no longer whether to advocate for reform but how to make the current *de facto* abolition permanent.

IV. Conclusion

The original version of this paper, written in 2009, posed a dilemma for death penalty opponents: advocate for a morally hazardous narrowing initiative that might create a more efficient killing apparatus, or allow the system to fester and collapse under its own weight. It predicted that "California's dysfunctional death penalty system will continue as it stands for some time to come, until its expense bankrupts us or the level of its injustice rises to critical mass."

That prediction articulated a false dichotomy. In fact, the system has somehow both continued *and* collapsed, persisting as an absurdly post-modern simulacrum. No narrowing initiative ever reached the ballot. Abolition initiatives failed twice, narrowly. While the expense has not bankrupted the state, California continues to spend over $100 million per year housing death row inmates and litigating their appeals, while dismantling the means to ever execute another. The level of injustice *has* risen to critical mass, as Justice Carney so eloquently articulated in *Jones v. Chappell*, only to be dismissed on procedural grounds. California maintains the legal architecture of capital punishment while lacking the means, the drugs, and the political will to carry out a single execution. Death row shrinks through attrition while new sentences trickle in from

196. *Id.*

197. *Id.*

a handful of counties. The fear-based attitudes that created this system persist, but they no longer command the majorities they once did.

The dilemma posed in 2009 has thus been overtaken by events. The question is no longer whether to advocate for reform but how to make the current *de facto* abolition permanent. Three paths remain available. The governor could commute all death sentences before leaving office, as Oregon's governor did in 2022, permanently foreclosing the possibility of execution for current inmates. The Racial Justice Act and prosecutorial resentencing could continue to reduce death row case by case until it becomes politically irrelevant. Or abolitionists could try again at the ballot, hoping that continued dysfunction and generational change will finally push support above fifty percent.

Each path has its limitations. Mass clemency depends on the governor's willingness to expend political capital on a cause that remains controversial. Case-by-case attrition is slow and leaves the statute intact for future use. Another abolition initiative could fail as the previous two did, and a loss would signal continued public support for a penalty the state cannot administer. Yet the alternative, doing nothing, leaves the system in its current state of suspended animation, consuming resources, imposing costs on defendants and victims' families alike, and serving no penological purpose the Constitution recognizes.

What California's experience demonstrates is the difficulty of undoing policy made through direct democracy. The initiative process that expanded the death penalty beyond constitutional recognition now constrains efforts to reform it. Voters who enacted these laws must be persuaded to repeal them, and the same fear-based appeals that proved so effective in expansion have made contraction politically treacherous. The result is a system frozen between the will of past majorities and the reality of present dysfunction.

Perhaps the lesson is that some policies should not be made by initiative at all. Criminal sentencing involves complex tradeoffs that do not lend themselves to yes-or-no ballot questions, and the consequences of getting it wrong fall on defendants who have no voice in the process. The architects of California's death penalty, from John Briggs to Pete Wilson, sought political advantage through fear. They succeeded, and California has spent nearly half a century living with the results. Whether

the state can find its way out of this morass through the same democratic process that created it remains an open question.