MORE THAN MORATORIUMS?

The Obstacles to Abolishing California's Death Penalty

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INTRODUCTION

When someone speaks of California, they conjure images of the state's beautiful coastline, Hollywood's movie stars, Silicon Valley's innovation, and Sacramento's progressive policies. California maintains its reputation as a liberal bastion and progressive leader on climate, minimum wage, and a whole range of issues. None of this matters to the more than six hundred people in California sentenced to death. California's tide of progressive idealism stops at death row's shores.

Due to both judicial rulings and political movements, the death penalty remains the law of the land. This means the state has the constitutional power to execute people sentenced to death by a jury of their peers. This is not to say California executes people right and left. California has not executed anyone since 2006,[1] and current Governor Gavin Newsom issued

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[1] *History of Capital Punishment in California*, Cal. Dept. of Corr. and Rehabilitation, at https://www.cdcr.ca.gov/capital-punishment/history.

a moratorium on the death penalty just months after taking office.[2] In February of this year, Governor Newsom announced that he'd dismantle the state's death row and move all the inmates to other prison units.[3] Dismantling death row sounds perfectly in line with California's progressive policies, but this executive action does nothing to stop prosecutors from seeking the death penalty in capital murder cases. The governor cannot abolish the death penalty on his own.[4] Abolition must come from either a proposition passed by the majority of Californians, the California Supreme Court ruling the death penalty statute unconstitutional, or a new law passed by the Legislature and signed by the governor. Until then, the death penalty remains in the California Constitution. This leaves the men and women with capital punishment sentences in a precarious position with their lives tied to how long the governor's moratorium lasts.

Elections feel like life or death for many people, but it is literally true for those with capital sentences in California. Governors are term-limited, and following Governor Newsom there is no guarantee that the moratorium on the death penalty will continue. This is why anti–death penalty advocates are calling for abolition. The call has not been answered. Ballot initiatives, progressive legislation, and judicial decisions have all failed to eradicate this blight on California's progressive reputation.[5] The obstacles that have squelched abolition efforts in the past remain just as poignant in the present, which does not bode well for the future. Because of the power of public opinion and continued support for the death penalty from the majority of Californians, *California's death penalty is not going anywhere anytime soon*.

In this paper, I will analyze the history and trends of California's death penalty to extrapolate how neither legislative nor judicial abolition

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[2] *Governor Gavin Newsom Orders a Halt to the Death Penalty in California*, Office of California Governor Gavin Newsom (Mar. 13, 2019), *at* https://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california.

[3] *California Governor Gavin Newsom Orders Dismantling of State's Death Row*, Death Penalty Information Center (Feb. 1, 2022), *at* https://deathpenaltyinfo.org/news/california-governor-gavin-newsom-orders-dismantling-of-californias-death-row.

[4] *Id*.

[5] *Death Penalty Report*, Committee on Revision of the Penal Code (Nov. 2021), http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_DPR.pdf.

is feasible in the current environment. First, by outlining the decades-long back-and-forth between the different branches of government, I'll show how the current law has been crafted to be almost fully immune from an Eighth Amendment challenge to its constitutionality. By exhausting the legal arguments, I'll show how both legislative and judicial action is limited by the power of public opinion, and how public opinion still favors the continuation of the death penalty. Finally, I'll end by acknowledging that despite these very real challenges to abolition, there are opportunities to change public opinion and to bring legal challenges under the Sixth Amendment.

I. A TRIUMPH OF REVISION: WHY THE CURRENT CALIFORNIA DEATH PENALTY STATUTE IS ALL BUT IMMUNE TO AN EIGHTH AMENDMENT CHALLENGE

California exports ingenuity around the world. Silicon Valley's startup community comes up with new ideas on a daily basis, but not all of them are successes from the start. Sometimes, even the most brilliant ideas fall short when faced with reality, and that's when it's time to go back to the drawing board until the feedback loop of revision comes up with a better outcome. Taking a page out of Silicon Valley's book, the feedback loop between the different branches of government has fine-tuned and perfected a death penalty statute that is likely beyond judicial reproach on Eighth Amendment grounds.

Because of California's ballot initiative process, there are four branches of government that shape California's laws: the executive, the legislature, the courts, and the people. The branches are constantly in conversation with each other, the California Supreme Court striking down laws passed by the Legislature, the people passing laws to bypass the Court's rulings, and so on and so forth. The tale of California's death penalty is a dance between the different branches, but now the feedback loop has reached its pinnacle. The people of California refused to abolish the death penalty through referendum in 2016.[6] Despite a Democratic trifecta in the state

[6] *Id.*

legislature, no abolition bill has passed.[7] And in 2021, the California Supreme Court re-affirmed the constitutionality of the state's death penalty scheme.[8] All the branches with the power to change the status quo are speaking in one voice: this version of the death penalty is here to stay.

The goal of this section is to articulate the timeline and trajectory of different challenges to California's death penalty, in order to show that the trend in the tea leaves is that California's modern death penalty law is likely to sustain any Eighth Amendment challenge. This section will first outline the feedback loop between the courts, the Legislature, and the people that culminated in Proposition 7, passed in 1978, and remains California's death penalty scheme. Then this section will examine the ways in which abolitionists challenged the death penalty in light of the passing of Prop. 7. Once it became clear that the death penalty itself was not inherently unconstitutional, abolitionists turned their attention to attacking the way the death penalty was carried out. After challenges to the mechanisms of execution were no longer feasible, most challenges in California moved away from direct Eighth Amendment challenges and tried to get at it through the Sixth Amendment. This too failed, in *People v. McDaniel*, the 2021 decision that reaffirmed the constitutionality of California's death penalty.

A. Getting to Briggs*: The Feedback Loop to California's Current Death Penalty Statute*

California's current death penalty statute emerged out of the 1970s tug-of-war between legislatures and courts. Its existence emerged from an obstacle course of changing judicial precedent and legislative maneuvering. Prior to the mid-1900s, the death penalty existed in California without much fanfare, similar to the rest of the country.[9] Public hangings dated back to the start of the nation,[10] and the country continued to operate under the

[7] Alexei Koseff, *Is this another way to end California's death penalty?*, Cal Matters (Feb. 9, 2022), *at* https://calmatters.org/politics/2022/02/california-death-penalty-end.

[8] Don Thompson, *California Supreme Court upholds death penalty rules*, Associated Press (Aug. 26, 2021), *at* https://apnews.com/article/courts-california-race-and-ethnicity-c9f9b3d6bcd04f3a8ac6d69d56b59a47.

[9] Cal. Dept. of Corr. and Rehabilitation, *supra* note 1.

[10] *Early History of the Death Penalty*, Death Penalty Information Center, *at* https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty.

presumption that some crimes are so heinous that they warrant the death penalty. Most Americans accepted, and still accept, capital punishment as just another feature of their legal system.[11]

Early death penalty abolitionists viewed the Eighth Amendment as their best chance to eradicate the death penalty from the American criminal justice system. The Eighth Amendment protects individuals from cruel and unusual punishment by the government. Abolitionists argued that the death penalty is state-sanctioned murder, and is no different in practice than the murders these individuals are convicted of.[12] Their argument contended originally that all murder constitutes "cruel and unusual punishment" and is therefore a violation of the U.S. Constitution's Eighth Amendment.[13] The United States Supreme Court cited the longstanding history of capital punishment in the United States as a means to legitimize its future use.[14] However, the Court did not allow the past to retain a stranglehold on contemporary practices of punishment. In *Trop v. Dulles*, the Supreme Court altered the trajectory of Eighth Amendment jurisprudence by stating the analysis should be based on "evolving standards of decency that mark the progress of a maturing society" and not just how things have always been done.[15] The 1958 holding in *Trop* reinvigorated abolitionists, bringing a new wave of suits that would force judges to decide if the death penalty comported with evolving standard of decency despite its long history in this country.[16]

Capital punishment continued to survive federal challenges, with the Court reluctant to find that the death penalty violated the Eighth Amendment.[17] However, in a victory for true textualism, the California Supreme Court changed the structure of its analysis and found California's death

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[11] *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, Pew Research Center (June 2, 2021), *at* https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration.

[12] *The Case Against the Death Penalty*, ACLU (2012), *at* https://www.aclu.org/other/case-against-death-penalty.

[13] *Id*.

[14] Gregg v. Georgia, 428 U.S. 153, 168 (1976).

[15] Trop v. Dulles, 356 U.S. 86, 87 (1958).

[16] Robert M. Bohm, DeathQuest: An Introduction to the Theory and Practice of Capital Punishment in the United States (5th ed., 2015).

[17] Laura E. Randa, Society's Final Solution: A History and Discussion of the Death Penalty (1997).

penalty unconstitutional in *People v. Anderson*. In this 1972 decision, the California Supreme Court looked at the specific diction of the California Constitution and distinguished its language in Article 1, section 6 of "cruel or unusual" from the Eighth Amendment's language, "cruel and unusual."[18] One small conjunction opened the door to the Court's holding that the death penalty violated the California Constitution.

In *Anderson*, the Court used *Trop*'s "evolving standards of decency" approach to reason that, despite the history of executions in California, the death penalty was now barbaric to modern sensibilities of punishment and so infrequently used that it was both cruel and unusual.[19] The Court articulated every point that abolitionists had been making: citing the psychological harm of prolonged appeals, the lack of evidence of any additional deterrence effect, and the inherent cruelty in the ability of the state to take a life. The Court went further in its role as the sole arbiter of constitutionality by stating, "public acceptance of capital punishment is a relevant but not a controlling factor," pushing aside the evidence provided by the state of popular support for the death penalty.[20] However, public opinion ultimately won out against the Court's decision in *Anderson*. The people of California would not allow *Anderson* to have the last say.

Just a few months later, the people of California passed Prop. 17, a ballot initiative bringing the death penalty back to life.[21] Prop. 17 passed with 67 percent of the vote and, just like that, *Anderson* was a thing of the past.[22] However, the ping ponging continued because, just before Prop 17 could be enacted, the U.S. Supreme Court found in *Furman v. Georgia* that all death penalty statutes that were applied in an arbitrary manner were unconstitutional.[23] Not deterred, pro–death penalty leaders went back to the drawing board. In order to avoid any conflict with *Furman*, the California Legislature enacted a mandatory death penalty scheme for certain crimes.[24]

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[18] People v. Anderson, 6 Cal. 3d 628 (1972).

[19] *Id*. at 648.

[20] *Id*. at 633.

[21] *California Proposition 17, Death Penalty in California's Constitution (1972)*, Ballotpedia (accessed June 30, 2022), *at* https://ballotpedia.org/California_Proposition_17,_Death_Penalty_in_the_California_Constitution_(1972).

[22] *Id*.

[23] *Death Penalty Report*, *supra* note 5, at 13.

[24] *Id*.

This took the sentencing power out of the hands of juries and placed it with the Legislature. The Legislature designated certain crimes as the most heinous and deserving of the death penalty regardless of the individual's circumstances. These individual circumstances, such as an abusive childhood or mental distress at the time of the crime, are called mitigating circumstances. A mandatory sentencing structure ignores the existence and the importance of mitigating circumstances.

The Court again acted as a check on legislative power when, in *Rockwell v. Superior Court*, they found the mandatory death penalty and the inability of mitigating circumstances to be factored into sentencing a violation of the Eighth Amendment.[25] Their reasoning followed the 1976 Supreme Court decision in *Gregg v. Georgia*.[26] The reasoning in *Rockwell* reflected the value the Court places on sentencing discretion for both judge and jury. They concluded that the intention of the framers with regard to the Eighth Amendment centered on the human dignity of every person, and that to dole out the highest form of punishment without any chance for the jury to weigh individualized circumstances and history denies the very humanity the amendment seeks to protect.[27] The dance between branches continued.

Intent on preserving the death penalty despite judicial rebuttals, Californians passed Prop. 7 in 1978. Prop 7, referred to as the Briggs Initiative after its sponsor State Senator John Briggs, crafted a death penalty statute that raised the maximum sentence for an increased number of crimes to include capital punishment.[28] It also expanded the list of aggravating circumstances that would trigger the possibility of capital punishment. The campaign supporting the proposition framed it as the most inclusive capital punishment scheme in the nation, seeking to punish every kind of murder.[29] Prop. 7 passed with 71 percent of the vote,[30] a clear statement of

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25 Rockwell v. Superior Court, 18 Cal. 2d 420 (1976).

26 *Id*.

27 *Id*. at 428.

28 *Death Penalty Report*, *supra* note 5, at 13–14.

29 *Id*.

30 *California Proposition 7, Expand Death Penalty and Life Imprisonment for Murderers Initiative (1978)*, Ballotpedia (accessed June 30, 2022), *at* https://ballotpedia.org/California_Proposition_7,_Expand_Death_Penalty_and_Life_Imprisonment_for_Murders_Initiative_(1978).

widespread public support for a harsh death penalty. The death penalty scheme created under Prop. 7 is still the law of the land.

The statute created by Prop. 7 calls for a three-part analysis by the jury.[31] First, it calls for the jury to find that the defendant committed a qualifying crime, most often first-degree murder, beyond a reasonable doubt.[32] Next, the jury must find an aggravating factor that warrants the death penalty such as its being committed in conjunction with another felony like rape or robbery.[33] Finally, the jury must then conduct a balancing test, weighing the mitigating circumstances against the aggravating factors, in order to determine if the mitigating circumstances are such that the jury finds the death penalty would be an inappropriate sentence.[34] The three-part construction of the law results from the back-and-forth between the branches of government. Mindful of the California Supreme Court's decisions in *Anderson* and *Rockwell* as well as the Supreme Court's recent holdings, the drafters of Prop. 7 created a law that allows enough discretion, without being too arbitrary, to survive judicial scrutiny to this day.

B. Fine Tuning the "Machinery of Death"

The passage of Prop. 7 with such a wide margin of victory sent a clear message. The people of California were okay giving their government the power to execute people. Once it became clear that a challenge to the state's ability to execute individuals would be unsuccessful, abolitionists changed their tactics from attacking the death penalty itself to challenging the ways it was carried out.[35] The next wave of challenges used the logic that if the manner in which the state kills people is unconstitutional, then it would have to cease killing people — the same result as if the law itself was found unconstitutional.

Through the 1990s, California executed people using cyanide gas in a gas chamber.[36] Starting in the early '90s, the state allowed those sentenced to die to choose between lethal gas and lethal injection.[37] Then, in *Fierro v.*

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31 *Death Penalty Report*, *supra* note 5, at 14.

32 *Id.*

33 *Id.*

34 *Id.*

35 Cal. Dept. of Corr. and Rehabilitation, *supra* note 1.

36 *Id.*

37 *Id.*

Gomez, the Ninth Circuit upheld a California district court decision that the use of cyanide gas in executions violated the Eighth Amendment.[38] The District Court's decision focused on factual findings that those killed with cyanide gas suffered incredible amounts of pain for what could be several minutes.[39] The testimony of expert witnesses refuted the state's claims that lethal gas was painless for the inmate, "like falling asleep." Instead the facts showed that unconsciousness was not immediate, and the person would feel like they were suffocating from the lack of oxygen, and then would feel the full effects of the poison on their cells as they drift in and out of awareness.[40] Based on these findings, the Ninth Circuit found California's lethal gas mechanism unconstitutional under the Eighth Amendment.[41] However, California statute provided that if lethal gas became constitutionally unavailable then lethal injection would be the default mechanism.[42]

Once lethal injection became the default, the abolitionists focused on challenging lethal injection as an Eighth Amendment violation. In 2006, the District Court of Northern California turned abolitionists' dreams into reality in *Morales v. Tilton*. They found that California's lethal injection procedure violated the Eighth Amendment because the drug cocktail was administered in such a way that unconsciousness was not guaranteed, and it is an accepted fact that injecting a conscious person would constitute cruel and unusual punishment.[43] The District Court cited failures in the execution team's credentials and training along with other administrative issues.[44] The Governor's Office issued an order to the Department of Corrections and Rehabilitation to address the following issues: inconsistent and unreliable screening of execution team members; a lack of meaningful training, supervision, and oversight of the execution team; inconsistent and unreliable recordkeeping; improper mixing, preparation, and administration of sodium thiopental by the execution team; and inadequate lighting, overcrowded conditions, and poorly designed facilities in which

38 *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).
39 *Id.*
40 *Id.*
41 *Id.*
42 Cal. Dept. of Corr. and Rehabilitation, *supra* note 1.
43 *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006).
44 *Id.*

the execution team must work.[45] The CDCR submitted proposed revisions to its execution procedure addressing each of the points above.[46]

Although there continued to be challenges about how effective the CDCR's revisions were in actually changing California's execution procedures, lethal injection challenges, nationwide, were dealt a heavy blow by the 2015 Supreme Court decision in *Glossip v. Gross*. In a challenge to Oklahoma's lethal injection procedure, the Supreme Court squelched abolitionists' hopes that through attacking the means, lethal injection, they could attack the end, the death penalty. The case ruled that as long as the death penalty was constitutional then there needed to be constitutionally valid ways to carry it out.[47] Justice Alito insulated further lethal injection challenges by stating that, unless there was a proven better way of carrying out the execution, the Court would give deference to the mechanism of execution chosen by the state.[48] *Glossip* crushed the last glimmer of hope for abolitionists to find relief in the judicial system. Most states use lethal injection, firing squad, or lethal gas, or offer options of the above mechanisms. Eighth Amendment challenges to the death penalty itself and to the mechanisms of execution now face the monumental hurdle of fine-tuned laws backed by Supreme Court precedent. The Supreme Court shows no signs of changing its position on the death penalty or on lethal injection, and without a national jurisprudence shift, the California Supreme Court's options remain limited. It is Sisyphus at the bottom of the mountain once again.

C. A Change in Tactics: A Surrender of Sorts

In 2021, the California Supreme Court affirmed the constitutionality of the state's death penalty law. The Court in *People v. McDaniel* was neither looking to see if the death penalty itself nor lethal injection constituted "cruel and unusual" punishment. Instead the defendant's claim was that the three-part structure of capital sentencing in California as articulated earlier in this section violated his Sixth Amendment rights.[49] *McDaniel*

45 *History of Capital Punishment in California*, *supra* note 42.
46 *Id*.
47 *Glossip v. Gross*, 576 U.S. 863 (2015).
48 *Id*.
49 *People v. McDaniel*, 12 Cal. 5th 97 (2021).

argued that each part of the proceeding — the determination of guilt, the aggravating factor analysis, and the mitigating factors balancing test — were all questions of fact for the jury and thus all needed to meet the burden of "beyond a reasonable doubt."[50] The court did not agree, stating that such a standard was for the first part of the test alone.[51] If this sounds to you like a vast divergence from the jurisprudence cited earlier in this section, you'd be right. Abolitionists are now trying to eliminate the death penalty through other amendments because the Eighth Amendment arguments have reached a dead end. The arguments presented in *McDaniel* will be explained later in this paper, but the change that *McDaniel* represents in the legal arguments used by abolitionists marks a clear end to this chapter of Eighth Amendment jurisprudence.

In conclusion, any successful challenge to California's death penalty will have to come from somewhere besides the Eighth Amendment. It is still open for debate if any other types of legal challenges will prove to be fruitful in the future.

II. THE POWER OF PUBLIC OPINION: A FICKLE POWER

The California Supreme Court is not the most influential court in the state. That title belongs to the court of public opinion. By virtue of being a democracy, we are a nation beholden to the whim of opinion rather than facts. Those who hold the power of persuasion hold the ultimate power. The tug-of-war between death penalty abolitionists and retentionists is really a war to control the narrative. Both sides know that neither the California Legislature nor the California Supreme Court will abolish the death penalty until Californians clearly decide they no longer want the death penalty.

California's recent history weighs against abolitionists. In 2012, California voters decided to keep the death penalty when Prop. 34 was on the ballot.[52] Fifty-one percent of Californians voted to keep the death penalty

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[50] *Id.*

[51] *Id.*

[52] *California Proposition 34, Abolition of the Death Penalty Initiative (2012)*, Ballotpedia (accessed June 30, 2022), *at* https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012).

that year, the same year that President Obama was on the ballot. However, even liberal President Obama never came out against the death penalty during either of his campaigns.[53] The failure of Prop. 34, which would have ended the death penalty, shocked many because even State Senator Briggs, the sponsor and the face of Prop. 7, supported abolishing the death penalty. He wrote in an editorial that he no longer supported the death penalty in California because no one was being executed, yet the cost of capital appeals continued to burden taxpayers.[54] Popular support or disdain for the death penalty was largely abstract and unrelated to the executions themselves.

Keep in mind, no one had been executed in the state since 2006. In 2016, the death penalty was once again on the ballot in Prop. 62, and once again Californians voted to keep it.[55] This time, 53 percent of Californians voted to keep the death penalty, contradicting the narrative that California was becoming more progressive and that more people opposed the death penalty than ever before. Ballot initiatives are an expensive battleground for the messaging war. Anti–death penalty advocates spent $10 million on Prop. 62.[56] Pro–death penalty advocates spent $12 million.[57] Ultimately that is $22 million spent on a proposition about a punishment that hadn't been carried out in the state in over a decade.

Unless something drastically changes to shift the tide of public opinion, abolitionists will be wary of spending millions on another failed proposition. However, without a proposition to abolish the death penalty, the death penalty will remain on the books in California. Every avenue for abolition is subject to the power of public opinion. Legislators do not want to get ahead of voters on any issue. It is reminiscent of the often-quoted observation attributed to Alexandre Auguste Ledru-Rollin during the French

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53 Josh Gerstein, *Death Penalty Decisions Loom*, Politico (June 21, 2009), *at* https://www.politico.com/story/2009/06/death-penalty-decisions-loom-023974.

54 Ron Briggs, California's death penalty law: It simply does not work, Los Angeles Times (Feb. 12, 2012), https://www.latimes.com/archives/la-xpm-2012-feb-12-la-oe-briggs-death-penalty-20120212-story.html.

55 *California Proposition 62, Repeal of the Death Penalty (2016),* Ballotpedia (accessed June 30, 2022), *at* https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016).

56 *Id.*

57 *Id.*

Revolution of 1830: "There go my people. I must find out where they are going so I may lead them."

Unfortunately, this is not just true of the legislative branch. The judicial branch, the safe haven of minority opinion, the least political branch, is still a victim of public opinion. In California, judges maintain their seats on the bench through retention elections. It's a lethal combination. Public opinion failed to abolish the death penalty with Propositions 34 and 62, and both the legislative and judicial branch will take their cues from such failures. Again, it is the feedback loop between the different branches of government. However instead of ping-ponging legislation back and forth, public opinion acts like a domino force, getting all branches to fall in line. The subsequent sections will explore in depth the hurdles that public opinion creates for both legislative and judicial abolition.

A. Legislative Abolition: Tougher on Crime

Every politician, no matter their political affiliation, fears being smeared with the "soft on crime" brush. For decades, politicians have bolstered their election credentials by touting how "tough on crime" they are. It's an easy appeal to make to voters: "I want to keep you safe. I want to put the bad guys away," and it's all too easy to distort criminal justice reform as dangerous: "If criminals aren't in prison, they are on the streets." Republican strategists used that exact messaging during the 2022 primary elections.[58] Both Democrats and Republicans are trying to seem tough on crime ahead of the 2022 elections.[59]

Republicans are optimistic that 2022 could be the backlash to California's trend toward progressive criminal justice reform.[60] Over the past few years, California passed legislation decriminalizing drug use and shortening sentences, and it joined the national progressive call for less prosecutorial and police discretion.[61] This should have given death penalty

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[58] Phil Willon & Hannah Wiley, *Why Crime is at the Center of California Elections this Year*, Los Angeles Times (Mar. 2, 2022), https://www.latimes.com/california/story/2022-03-02/crime-debate-center-california-election-season.

[59] Dan Walters, *California politicos now talking tough on crime*, Cal. Matters (Jan. 19, 2022), *at* https://calmatters.org/commentary/2022/01/california-politicos-now-talking-tough-on-crime.

[60] Willon & Wiley, *supra* note 58.

[61] *Id.*

abolitionists the momentum they needed to think the time was ripe for another proposition. However, it likely had the opposite effect.

Nationally, 2020 saw a 30 percent rise in homicide rates. California's Republicans were ready to make 2022 the referendum on liberal criminal justice policies. Republicans' messaging blames the recent increases in homicide and property crime on the criminal justice reforms passed in 2014 and 2018. Republican candidate for governor Brian Dahle campaigns with the message that liberal policies are costing people their lives and taxpayers their dollars.[62] Public opinion polling shows that Californians are more concerned about crime than in recent years.[63] It's a risky time to be seen as soft on crime as a Democrat. The political risk is too high. To strongly advocate for death penalty abolition in a political climate where people are now considering overturning other forms of sentencing reform is political suicide.

B. Politicized Prosecution

California elects its prosecutors. California has fifty-eight elected district attorneys, one for each county.[64] Elected prosecutors are not unique to California, but they present additional challenges to abolitionists. Prosecutors play an important role in shaping the political narrative around crime in their communities.[65] They can point to victims' families and paint themselves as white knights riding in to ensure justice is brought. Because of these narratives, people tend to believe what prosecutors tell them about the criminal justice system.

Prosecutors use their credibility as a messaging tool. They point to the "practical" considerations and challenges of doing their job. Conservative prosecutors have said they need the flexibility that the death penalty provides.[66] They've stated that with the death penalty on the table, they

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62 *Id.*

63 Mark DiCamillo, *Voters offer a wide range of issues they'd like the state to address* (Institute of Governmental Studies, UC Berkeley, Release #2022-08, Apr. 14, 2022), https://escholarship.org/uc/item/7sn293xs.

64 *Meet Your DA Campaign*, ACLU Foundations of California (2018), *at* https://meetyourda.org.

65 *Id.*

66 Elizabeth Renter, *The Death Penalty and The Ugly Power of Prosecutors*, The Crime Report (Mar. 25, 2011), *at* https://thecrimereport.org/2011/03/25/2011-03-the-death-penalty-and-the-ugly-power-of-prosecutors-2.

are better able to negotiate plea bargains.[67] Just days ago, at the time of this writing, the San Francisco district attorney was recalled (the process in which voters revoke their support and remove an elected official from office).[68] His recall was branded as a rebuttal to "lenient prosecution."[69] People saw him as too soft on crime, even people in one of the most liberal cities in the country. This is emblematic of the risks prosecutors take in this hyper-partisan debate on criminal justice by supporting progressive policies. Given this current environment where politicians are walking the tightrope between the recent "defund the police" narrative and the continued "tough on crime" narrative, the winds of change on the death penalty might blow anti–death penalty leaders right off the rope.

C. Checks Without Balances

The founding fathers feared mob rule. They feared the tyranny of the majority. They decided that one branch of government, the judicial branch, would be the check on the more political branches. However, the myth of an independent judiciary crumbled when judges started being on the ballot. In California, the governor appoints members of the state Supreme Court, but to retain their seats, they must be elected in what's called a "retention election." This means that every time a justice of the California Supreme Court is penning a decision, they know that their opinion could be used against them the next time they are on the ballot.

Rose Bird, California's first female chief justice and one of the most progressive people to sit on that bench, was not retained by California voters in 1987.[70] She was a strong advocate against the death penalty.[71] She reviewed sixty-five capital cases, and voted to overturn the death penalty each time.[72] She found legal technicalities to couch her decisions in, and

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[67] *Id*.

[68] Jeremy B. White, *San Francisco district attorney ousted in recall election*, Politico (June 8, 2022), *at* https://www.politico.com/news/2022/06/08/chesa-boudin-san-francisco-district-attorney-recall-00038002.

[69] *Id*.

[70] *The Campaign Against Rose Bird*, Death Penalty Focus (Nov. 4, 2016), *at* https://deathpenalty.org/the-campaign-against-rose-bird.

[71] *Id*.

[72] *Rose Bird ProCon.org: The Death Penalty*, Britannica ProCon.org (accessed June 30, 2022), *at* http://www.rosebirdprocon.org/pop/DeathPenalty.htm.

was never the sole dissenting voice on a death penalty case.[73] Conservatives painted her as hyper-partisan and failing to fulfill her duty as judge, rather than as a policymaker.[74] The people of California wanted a death penalty, and they did not want a chief justice who was unwilling to support it. She served as an example to future judges that in California even the courts are subject to public opinion. A Reuters report found that elected judges reverse death penalty sentences at less than half the rate of appointed judges.[75] The same analysis found that judges who are first appointed and then must keep their seats through retention elections reverse 15 percent less than appointed judges.[76] Despite the idea of checks and balances, it is clear that when judges face elections they make decisions informed more by politics than by legal reasoning.

Changing public opinion on the death penalty remains the North Star for abolition movements. By changing public opinion even by a small margin, the outcome of the next death penalty ballot initiative could be wildly different. By changing public opinion, legislators who support abolition in private will be willing to sponsor bills and declare their support publicly. By changing public opinion, California Supreme Court justices who have already expressed their dissatisfaction with California's death penalty can strike down the laws without fear of being ousted. By changing public opinion, everything in California death penalty politics could change.

III. GLIMMERS OF HOPE

A. The Battle over Narrative

If public opinion is the crux of the problem, then it is also the opportunity. Abolitionists across the country continue to employ a variety of strategies

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[73] *Id.*

[74] Cynthia Gorney, *Rose Bird and the Court of Conflict*, The Washington Post (Apr. 8, 1986), https://www.washingtonpost.com/archive/lifestyle/1986/04/08/rose-bird-and-the-court-of-conflict/d391da7f-33dd-4fa5-87b2-a7c79e62e048.

[75] Dan Levine & Kristina Cooke, *In states with elected high court judges, a harder line on capital punishment,* Reuters Investigates (Sept. 22, 2015), *at* https://www.reuters.com/investigates/special-report/usa-deathpenalty-judges.

[76] *Id.*

to change the public perception of the death penalty. They focus on the emotional, fiscal, and logistical arguments.

From 1989 to the early 2000s, two hundred people had been wrongfully convicted of a serious crime in California.[77] This means that among those wrongfully convicted were people sentenced to death but later exonerated through Section 1983 innocence claims. Although the California Supreme Court now affirms most death penalty sentences, these are often overturned in federal court. Abolitionists make the argument that it tarnishes the credibility of California's legal system to punish innocent people and to be contradicted by federal courts.[78]

One of the original arguments for the use of the death penalty focused on the deterrence factor. However, studies continue to refute the argument that the death penalty serves as a greater deterrence to crime than a life sentence.[79] There's no conclusive evidence that the risk of a death sentence factors into a person's decision to commit a crime.[80]

Opinion pieces continue to be penned citing data point after data point that the death penalty is a costly and inefficient use of taxpayer dollars. The cost argument fueled Prop. 66 which passed in 2016. Prop. 66 shortened the appeals process for death sentences, attempting to "streamline" the process.[81] People lamented that the lengthy appeals process drove up the cost unnecessarily, and now because of Prop. 66 there's a directive to resolve capital cases in five years or less. Even current California Supreme Court justices have cited the high cost and dysfunctional nature of the system.[82] The cost argument stretches beyond the cost of appeals. The cost to acquire lethal injection drugs also plays into the conversation.

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77 *Fact Sheet on Wrongful Convictions in CA*, ACLU Northern California (Dec. 1, 2006), *at* https://www.aclunc.org/publications/fact-sheet-wrongful-convictions-ca.

78 *Death Penalty Report*, *supra* note 5, at 15.

79 *Studies on Deterrence, Debunked*, Death Penalty Information Center (accessed June 30, 2022), *at* https://deathpenaltyinfo.org/policy-issues/deterrence/discussion-of-recent-deterrence-studies.

80 *Id*.

81 *Death Penalty Report*, *supra* note 5, at 31–33.

82 Steve Gorman, *Two California Supreme Court justices decry death penalty as 'dysfunctional,'* Reuters (Mar. 28, 2019), *at* https://www.reuters.com/article/us-usa-california-death-penaty/two-california-supreme-court-justices-decry-death-penalty-as-dysfunctional-idUSKCN1RA05Z.

The cost arguments have been the most effective in bringing conservatives to the table. In Utah, the libertarian think tank, the Libertas Institute, is one of the loudest anti–death penalty voices in the state. They advocate for a small government that carefully uses taxpayer dollars, not a government so big it has the power to kill people while costing taxpayers millions.[83]

In California, specifically, there's the argument of living up to the values of the state. Abolitionists press the point: can California really call itself progressive if it still has a death row? This is especially poignant for the racial justice argument used in California and around the country. The death penalty is disproportionately handed down to Black and Brown defendants for the same kinds of crimes committed by Whites.[84] President Obama qualified his support for capital punishment with his concerns of its racist application.[85] The racism in the death penalty's application has been an effective tool in engaging progressive elected officials.

There's hope that Governor Newsom's 2022 Executive Order to move all death row inmates to lower security units that allow them more freedom and opportunities will slowly change public opinion.[86] Since California does not actively execute people, death row exists as a symbol and as a threat. Once the threat no longer looms like the grim reaper in California's prisons, abolitionists hope that people will realize it did not do much to begin with.[87] It's easier to abolish something that you have no emotional connection to, and abolitionists believe that this executive order will dissolve whatever emotional connection is left to the death penalty.

Each of the approaches articulated above has slowly moved the needle on public opinion, but there's a long way to go. In a public opinion poll conducted in April 2022, crime was listed as one of Californians' top concerns. As long as there are fears to play on, pro–death penalty advocates will play to those fears. Fear of crime plays to our most irrational selves, and so rational arguments about cost, innocence, and racial justice go out the window.

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83 *A Case Against the Death Penalty*, The Libertas Institute (May 17, 2022), *at* https://libertas.org/justice-and-due-process/a-case-against-the-death-penalty.

84 *Death Penalty Report*, *supra* note 5, at 20.

85 *President Obama Calls Death Penalty "Deeply Troubling,"* Death Penalty Information Center (Oct. 26, 2015), *at* https://deathpenaltyinfo.org/news/president-obama-calls-death-penalty-deeply-troubling.

86 Koseff, *supra* note 7.

87 *Id.*

B. The Sixth Amendment Window

Justice Liu's concurrence in *People v. McDaniel* opened the door to future challenges to the death penalty on Sixth Amendment grounds. As discussed earlier in this paper, Eighth Amendment challenges have become futile because the current death penalty statute is too well insulated, after years of back-and-forth between the Legislature, the people, and the courts. The law's staying power is further bolstered by the power public opinion holds over each branch of government with the power of abolition. However, in his concurrence, Justice Liu pointed out future opportunities, although he refused to explore them with regard to the case at bar.[88]

The holding in *People v. McDaniel* validated the current death penalty scheme where jury members are allowed to determine aggravating factors without the "beyond a reasonable doubt" standard.[89] This means different jury members can all have different reasons for issuing a death sentence. The majority opinion in *McDaniel* attributed the constitutionality of such variability to the bifurcation of capital cases.[90] The initial factfinding trial that decides guilt is subject to the Sixth Amendment protection that the jury must find guilt beyond a reasonable doubt.

However, the court refused to extend those same protections to the sentencing part of the trial. Justice Liu points abolitionists toward challenging that bifurcation and making the claim that the Sixth Amendment applies to both the fact finding and sentencing components of a capital trial, and that both demand the jury to rely on facts proven beyond a reasonable doubt. Liu wrote in his concurrence: "The constitutionality of our death penalty scheme in light of two decades of evolving Sixth Amendment jurisprudence deserves careful and thorough reconsideration."[91] The Supreme Court has expanded the Sixth Amendment rights of criminal defendants over the years, and therefore the Sixth Amendment might be the window of opportunity that abolitionists have been looking for.[92]

It is a small window, but a window nonetheless.

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88 People v. McDaniel, 12 Cal. 5th 97 (2021) (Liu, J., concurring).

89 *Id.*

90 *Id.*

91 *Id.* at 160.

92 *Id.*

IV. MORE THAN MORATORIUMS? IN CONCLUSION . . . NOT YET

California does not carry out its death penalty, yet Californians are reluctant to let go of it. The tough on crime narrative continues to persist even in a state where criminal justice reform succeeded in both 2018 and 2020. However, it might be those very successes combined with an uptick in people's concern over crime rates that will make it even harder for death penalty abolitionists.

It might be troubling to read a paper about life-and-death issues and have it all come back to narrative. Yet narrative remains the greatest obstacle to abolition. We've constructed this idea of law as an entity devoid of passion, devoid of opinion, devoid of politics. We call it "black-letter" law because we want to believe the law is black and white, good or bad. This is not the case. Not in California. Not anywhere.

Narrative fueled the progressive court decision in *People v. Anderson* where the court cited psychological harm, innocence, and other abolition talking points. The justices' thinking in *Anderson* was as much a product of narrative and political spin as was the reaction to *Anderson*, the passage of Prop. 17. Narrative fueled the ouster of Chief Justice Rose Bird, and Republicans are hoping that narrative will fuel their victories in the November 2022 election. Every branch of government is made of people, and as people we are shaped by the narrative around us. The abolition movement might consist of lawyers, but their best tool and biggest obstacle is not the law. It is public opinion.

The legal history of the death penalty in California is the story of our beliefs around the death penalty — beliefs about its effectiveness, about its power, about what it does for victims' justice, for prosecutors' flexibility, for communities' safety. The longevity of the death penalty is intertwined with a narrative that Californians believe. Until that narrative changes, it is doubtful that California will see more than moratoriums when it comes to the death penalty.

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