

For an Honest Death Penalty

By Alex Kozinski
and Sean Gallagher

LOS ANGELES
It is a staple of American politics that there is very strong support for the death penalty; in opinion polls, roughly 70 percent consistently favor it. Yet the popular will on this issue has been thwarted.

To be sure, we have many capital trials, convictions and death sentences; we have endless and massively costly appeals; and a few people do get put to death every year. But compared to the number of death sentences, the number of executions is minuscule, and the gap is widening fast.

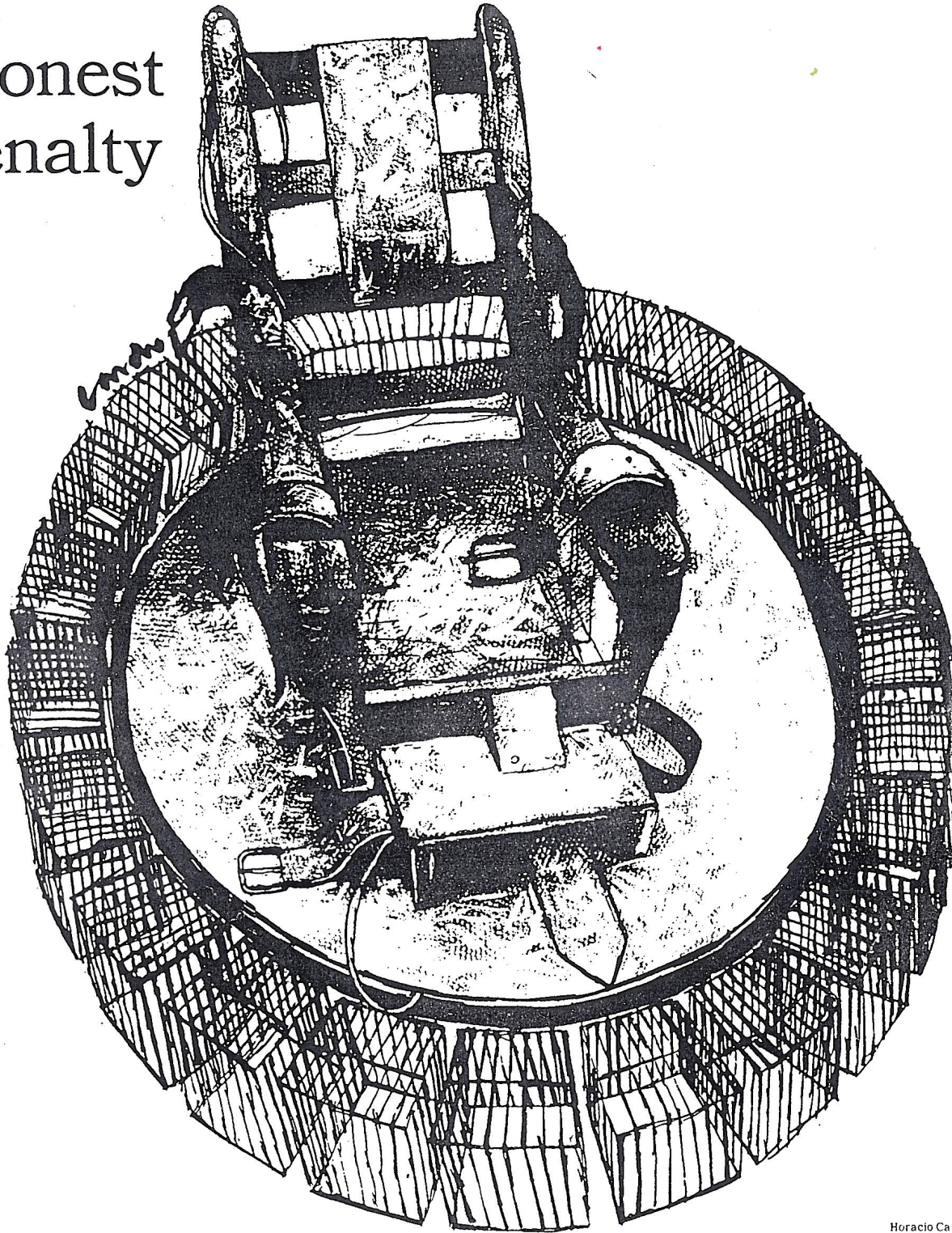
In 1972, the Supreme Court struck down all existing death penalty statutes and emptied the nation's death rows. Almost immediately, states began passing death penalty laws to comply with the Court's reinterpretation of the Eighth Amendment. Since then, more than 5,000 men and a handful of women have been given the death sentence; about 2,000 of those sentences have been set aside; fewer than 300 have been carried out.

The reasons are complex, but they boil down to this: The Supreme Court's death penalty case law reflects an uneasy accommodation between the will of the popular majority, who favor capital punishment, and the objections of a much smaller — but ferociously committed — minority, who view it as a barbaric anachronism.

Assuaging death penalty opponents, the Court has devised a number of extraordinary safeguards applicable to capital cases; but responding to complaints that these procedures were used for obstruction and delay, it has also imposed various limitations and exceptions to these safeguards. This pull and tug has resulted in a procedural structure — what Justice Harry A. Blackmun called a “machinery of death” — that is remarkably time-consuming, painfully cumbersome and extremely expensive.

No one knows precisely how large a slice of our productive resources we force-feed to this behemoth, but we can make some educated guesses. To begin with, while 80 to 90 percent of all criminal cases end in plea bargains, capital cases almost always go to trial, and the trials are vastly more complex than their non-capital counterparts. If the defendant is sentenced to death, the case shuttles between the state and Federal courts for years, sometimes decades.

The Robert Alton Harris case, for example, found its way to the California Supreme Court six times; it was reviewed in Federal district court on five occasions and each time it was appealed to the Ninth Circuit. The U.S. Supreme Court reviewed the case once on the merits, though on five other occasions it considered and declined Mr. Harris's request for review. Before Mr. Harris was executed in 1992, his case was reviewed by at least 30 judges and justices on more than 20 occasions over 13 years.



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State and local governments pay for the prosecution as well as for the defense team — which consists of at least two lawyers and a battery of investigators and experts; much of this money is spent even if the defendant eventually gets a lesser sentence. California reportedly spends \$90 million a year on the death penalty. Once the case gets into Federal court, the United States starts picking up the defense tab, and the sums can be daunting. In one recent case, a Federal district court paid defense lawyers more than \$400,000, which didn't include the appeal or petition to the Supreme Court. Our own estimate is that death cases, on the average, cost taxpayers about a million dollars more than their non-capital counterparts. With 3,000 or so inmates on death row, to paraphrase Senator Everett Dirksen, pretty soon you get into real money.

Another significant cost is the burden on the courts. More than a quarter of the opinions published by the California Supreme Court from 1987 to 1993 involved death penalty cases. Since capital appeals are mandatory while appeals in other cases are discretionary, much of this burden is borne by other litigants who must vie for a diminished share of that court's attention. Estimating the judicial resources devoted to a capital case in the Federal courts is difficult, but a fair guess would be 10 times those in other cases.

Perhaps the most significant cost of the death penalty is the lack of finality. Death cases raise many more issues, and far more complex issues, than other criminal cases; convictions are attacked with more gusto and reviewed with more vigor in the courts. As a result, fully 40 percent of the death sentences imposed since 1972 have been vacated, sometimes 5, 10 or 15 years after trial. One worries about the effect on the families of the victims, who have to endure the possibility — often the reality — of retrials, evidentiary hearings and last-minute stays of execution for years after the crime.

What are we getting in return? Even though we devote vast resources to the task, we come nowhere near executing the number of people we put on death row, and probably never will. We sentence about 250 inmates to death every year but have never executed more than 40. Just to keep up with the number of new death row inmates, states would have to sextuple the pace of executions; to eliminate the backlog, there would have to be one execution a day for the next 26 years.

This reality moots much of the traditional debate about the death penalty. Death penalty opponents have certainly not won the popular battle: despite relentless assaults, the public remains firmly commit-

ted to capital punishment. Nor have opponents won the moral battle: most of us continue to believe that those who show utter contempt for

Endless, costly appeals thwart the popular will. Here's what to do about it.

human life by committing remorseless, premeditated murder justly forfeit the right to their own life.

Other arguments against the death penalty also fall flat. For example, the fear that an innocent person may be convicted also applies to noncapital cases; no one, after all, can give back the 20 years someone wrongfully spends behind bars. Our system is therefore heavily geared to give the criminal defendant the benefit of the doubt. Wrongfully convicted defendants are rare; wrongfully convicted capital defendants are even rarer. The case where the innocent defendant is saved from the electric chair because the one-armed man shows up and confesses happens only in the movies.

Death penalty opponents are winning the war nevertheless. Unable to stop the majority altogether, they have managed to vastly increase the cost of imposing the death penalty while reducing the rate of executions to a trickle. This trend is not likely to be reversed. Even if we were willing to double or triple the resources we devote to the death penalty, even if we could put all other civil and criminal cases handled by the state and Federal courts on the back burner, it would be to no avail.

The great stumbling block is the lawyers: the jurisprudence of death is so complex, so esoteric, so harrowing, this is the one area where there aren't nearly enough lawyers willing and able to handle all the current cases. In California, for example, almost half the pending death penalty appeals — more than 100 — are on hold because the state can't find lawyers to handle them.

We are thus left in a peculiar limbo: we have constructed a machine that is extremely expensive, chokes our legal institutions, visits repeated trauma on victims' families and ultimately produces nothing like the benefits we would expect from an effective system of capital punishment. This is surely the worst of all worlds.

Only two solutions suggest themselves, one judicial and the other political. The judicial solution would require a wholesale repudiation of the Supreme Court's death penalty jurisprudence. This is unlikely to happen. Over the last quarter-century, the Court has developed a substantial body of case law, consisting of some four score opinions, premised on the proposition that death is different and we must exercise extraordinary caution before taking human life. As we learned a few years back in the area of abortion, conservative justices are reluctant to reverse such major constitutional judgments.

A political solution may be no easier to achieve, but it's all we have left. The key to any such solution lies with the majority, precisely those among us who consistently strive for imposition of the death penalty for an ever-widening circle of crimes.

The majority must come to understand that this is a self-defeating tactic. Increasing the number of crimes punishable by death, widening the circumstances under which death may be imposed, obtaining more guilty verdicts and expanding death row populations will do nothing to insure that the very worst members of our society are put to death. The majority must accept that we may be willing and able to carry out 30, 40, maybe 50 executions a year, but that we cannot — will not — carry out one a day, every day, for the foreseeable future.

Once that reality is accepted, a difficult but essential next step is to identify where we want to spend our death penalty resources. Instead of adopting a very expansive list of crimes for which the death penalty is an option, state legislatures should draft narrow statutes that reserve the death penalty for only the most heinous criminals. Everyone on death row is very bad, but even within that depraved group, it's possible to make moral judgments about how deeply someone has stepped down the rungs of Hell. Hitler was worse than Eichmann, though both were unspeakably evil by any standard; John Wayne Gacy, with two dozen or so brutal deaths on his conscience, must be considered worse than John Spengler, who killed only once.

Differentiating among depraved killers would force us to do some painful soul-searching about the nature of human evil, but it would have three significant advantages. First, it would mean that in a world of limited resources and in the face of a determined opposition, we will sentence to death only those we intend to execute. Second, it would insure that those who suffer the death penalty are the worst of the very bad — mass murderers, hired killers, airplane bombers, for example. This must be better than

loading our death rows with many more than we can possibly execute, and then picking those who will die essentially at random.

Third, a political solution would put the process of accommodating divergent viewpoints back into the political arena, where it belongs. This would mean that the people, through their elected representatives, would reassert meaningful control over the process, rather than letting the courts and chance perform the accommodation on an ad hoc, irrational basis.

It will take a heroic act of will for the majority to initiate a political compromise on this emotionally charged issue. But as with democracy itself, the alternatives are much worse. □

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