

From Certainty, Change

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A considered, evidence-based analysis has led me to conclude that capital punishment should be abolished. But that has not always been how I felt.

In the fall of 1977, I wrote the death penalty initiative (the Briggs Initiative) that became the law of the State of California after voter approval (82 percent in favor) a year later. The initiative dramatically increased the number of defendants eligible for the punishment of death. I wrote the initiative after spending almost 8½ years as a prosecutor, first in the Manhattan District Attorney's office and then in the United States Attorney's office for the Eastern District of California in Sacramento. By the time I left the United States Attorney's office, I was a skilled and experienced legal writer and I was certain when I wrote the initiative that capital punishment was the appropriate punishment for willful and intentional murders and for murders committed in the course and furtherance of other serious felonies.

Within four years of the initiative's enactment in 1978, California's death row began to fill with inmates; today, the population is approximately 750. The zeal of prosecutors in populating death row was exceeded only by the lack of skill of defense counsel as reflected in the disproportionate number of death row cases that were reversed for ineffective assistance of counsel. For those of us who participate in a criminal justice system predicated on the right of defendants to have the effective assistance of counsel, especially when they face death as punishment, this was a grave problem.

I became concerned when legitimate questions of disparate treatment of defendants of color and defendants who were indigent were raised. At the time I wrote the initiative, I believed in the idea of "an eye for an eye," and I never considered unacceptable the issue of communally sanctioned executions.

In retrospect, writing the initiative was a huge mistake — one that should be corrected. My change of position occurred over a period of years of observing that capital punishment was not functioning as intended. By 1983, I realized that a combination of factors made it clear that capital punishment was unmanageable and discriminatory, and that it provided the real possibility for the execution of an innocent person. In 1998, with the execution of Tommy Thompson,¹ I became more vocal in speaking out against my

initial certainty about capital punishment and in stating my reasons for supporting its abolition.

At the time I wrote the initiative, the cost of financing capital punishment was never considered. Now, it has become clear that death penalty cases are generating huge capital expenditures for California. The government must pay for both the defense and prosecution, since the vast majority of homicide cases involve indigent defendants. The government never disclosed the real cost in dollars, but a recent study under the direction of Judge Arthur L. Alarcon, senior circuit judge for the U.S. Court of Appeals for the Ninth Circuit, shows that more than \$4 billion has been spent on the mechanism of death, and that taxpayers will continue to pay upward of \$180 million per year for the prosecution and countless appeals of capital cases.

Correctness is an ethereal term of art, whether morally, ethically, or legally. Correctness is dependent upon the facts that drive a particular opinion, decision, or moral position. As facts change, reconsideration is not inappropriate. We know by uncontroverted evidence that there have been 289 post-conviction exonerations nationwide since 1989, 17 of which were death penalty sentences. These judicially vacated sentences occurred because of advancements in modern science that permitted DNA analysis of physical evidence. That evidence proved irrefutably that good faith findings of "guilty beyond a reasonable doubt" could have led to the execution of a factually innocent person — a terrifying thought. There is no way of ensuring that we, as a society, will not execute a factually innocent person. Regardless of cost, a moral society should not risk the execution of an innocent person.

I have retracted my initial position, and I now believe with absolute certainty that capital punishment should be abolished.² A sentence of life without the possibility of parole protects society from convicted murderers; it provides adequate punishment and puts closure to the despair of the families of victims.

By seeking the abolition of capital punishment, I am not suggesting that when confronted with deadly force one cannot use the same in self-defense; nor am I suggesting that as a country we cannot preemptively use deadly force to protect ourselves. But the mechanism of judicially imposed death as a punishment should be abolished.



Donald H. Heller has been an active member of the New York State Bar since 1969 and the State Bar of California since 1973. He has served as an Assistant District Attorney in the New York County District Attorney's Office (1969-1973), an Assistant U.S. Attorney in the United States Attorney's office for the Eastern District of California (1973-1977), and an active civil and criminal trial attorney in the federal and state courts. Heller has tried several hundred civil and criminal cases to verdict and has lectured widely on civil and criminal trial practice. He is a member of Mosaic Law Congregation in Sacramento, and he has been involved in the Jewish community activities since arriving in Sacramento in 1973.

¹ In 1998, Thomas Martin Thompson, a man convicted of a 1981 rape and murder, was executed at California's San Quentin Prison despite overwhelming evidence of his innocence. The U.S. Supreme Court denied Thompson clemency because the Ninth Circuit Court of Appeals, which found that Thompson had been erroneously convicted, failed to meet a procedural deadline for filing its decision.

² An initiative is pending for the November 2012 California ballot that would abolish capital punishment in California.