

# Daily Pilot

Newport Beach and Costa Mesa, California

Print Page

Published Saturday, March 15, 2008 10:12 PM PDT

Opinion

## **IT'S A GRAY AREA: Facing facts on the death penalty**

By JAMES P. GRAY

The death penalty is certainly an emotional issue that affects many people in numbers of different ways. So in today's column I will address head-on most of the common arguments that are used in favor of the death penalty, as well as some facts about and responses to them.

Next week I will suggest some additional facts and arguments that should also be considered as we all decide how best to proceed in this critical and emotional area. Of course and as always, I encourage your comments and responses to whatever I say.

Typically, the proponents of the death penalty present five justifications for its implementation. They are that this is the appropriate punishment for the offender of such a serious crime, rightful societal vengeance (often cited as an "eye for an eye"), reducing to zero the chances that the offender will return to society, deterrence against future violations by other offenders, and closure for the families of the victims.

The first issue I will discuss is the possibility of the offenders returning to society.

When a person is convicted of a "special circumstance" murder, the only two sentences allowed under the law in California are the death penalty or life without the possibility of parole, otherwise known as "LWOP." In times past a person receiving a "life" sentence could still be paroled, but now if an offender receives an LWOP, that is simply not possible under the law without a pardon from the governor, which is politically quite unlikely.

Furthermore, to my knowledge no one serving such a sentence has ever escaped from prison. As a result, this is probably no longer a reason for the death penalty to be invoked.

With regard to the issue of closure for the families of the victims, consider that California has had only 15 executions since the death penalty was reinstated in 1978. But as of this time there are more than 660 convicted offenders on death row. Thirty of those offenders have been there for more than 25 years, 119 for more than 20 years, and 408 for longer than 10 years. The last two people executed were Clarence Ray Allen and Stanley "Tookie" Williams, both of whom were executed about 26 years after their offenses were committed. As a result, "closure" for the families, if it comes at all, comes after keeping the books open for decades.

So not only does the death penalty not bring closure, it actually keeps the families of the victims on an emotional roller coaster. Because of the appeals and occasional re-trials, the families are forced to relive the grisly details of their loved-one's death, over and over again.

To me this is actually using the grieving families as bit-players in a long-continuing political

drama. And when it comes down to it, does it furnish much satisfaction to see the object of one's hatred simply go to sleep when hooked up to a needle? So for all of these reasons, maybe what we are doing is the opposite of closure for those victimized people.

In addition, since it is deemed by many people to be an "insult" to the memory of the deceased victim not to invoke the maximum punishment, there is a perceived obligation to seek the death penalty regardless of the costs, either human or financial. But if the maximum punishment were to be a sentence to life without the possibility of parole, the families would be more likely to be satisfied with that result and go on with their lives.

Well then, what about deterrence against future offenders? Probably the only circumstances in which deterrence would be a factor would be offenses like murder for hire (both for the people paying for the deed to be done and for the killers themselves), murder after laying in wait, kidnapping in which the victim is killed, multiple murders or murders while already serving an LWOP sentence, and offenses like treason. Most of those involve situations in which the acts are usually planned and well thought out in advance.

But the large majority of offenses for which the death penalty is imposed are for offenses that are not that way. That is to say, most burglars and robbers do not plan in advance to kill anybody, but things get out of control and people are killed as a result. And the offenders that do make prior plans are often involved in heavily emotional situations like being jilted lovers, or people of that kind, so they are not focusing upon deterrence anyway. Those realities, coupled with the fact that most offenders never feel that they will ever be caught at all, negate the effects of deterrence for most offenses.

One more fact enters into this equation as well. As a practical matter, if a person knows that he has committed an offense that would qualify him for the death penalty, that person tends to feel with some justification that he has nothing more to lose. That belief in turn results in that person killing the witnesses to the offense to keep them from testifying against him, and also killing the police officers that attempt to arrest him. So in effect, what we end up with is the opposite of deterrence.

With regard to the punishment of the offender, I have no particular wisdom to suggest to you other than saying that in many ways serving a sentence of life without the possibility of ever being released would in many ways be a more severe sentence for most offenders than actually being executed.

That leaves the issue of societal vengeance. Of course, this is a complicated and multifaceted issue. On the one hand, there has been an historical and even biblical rationale that the proper penalty for wrongly taking the life of another is to forfeit one's own life. But on the other hand, people argue that it is hard to justify our country as being the world's champion of human rights if it is so at odds with much of the rest of the world on the issue of capital punishment.

For example, since California reinstated the death penalty in 1978, no fewer than 60 other countries have chosen to abolish it. Although there are dozens of countries that still have the death penalty on the books, only six of those countries, including the United States of America, are responsible for 90% of all of the executions. The other five are China, Pakistan, Iran, Iraq and the Sudan. As such, we are keeping pretty lowly company in the area of human rights.

So that is a short discussion about the traditional arguments in favor of invoking the death penalty. I realize that this can be an emotional subject, and that many of you may feel that people who present information like this are "bleeding heart liberals." But I have been a trial court judge here in Orange County since I was appointed by Gov. Deukmejian at the end of 1983, and I wanted to share with you the facts as I have seen and observed them.

This is important because in the final analysis whether we continue with the death penalty is up to you as the voters, and not up to us as judges. Next week, we will discuss additional factors that I hope you consider before coming to or modifying your own conclusions.

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