

Yesterday's Daily Journal articles on the death penalty highlight a conundrum for Californians. We want punishment that is *reliable*, distinguishing the innocent from the guilty; *effective*, providing swift justice to prevent future crime; and *cheap*, costing the minimum possible. But as any honest contractor would advise, work can be done better, faster, or cheaper, but not all three.

Prop 62 advocates emphasize the death penalty's costs, and promise to save money by converting capital sentences to life without possibility of parole (LWOP). But these savings would come at the expense of reliability and/or effectiveness.

The very features that drive up the cost of the capital process are those designed to optimize its reliability. Influenced by the legitimate fear of executing the wrong person, California provides far more procedural protections and layers of review to defendants sentenced to death than LWOP.

This intensive review process occasionally leads to reversals. Although opponents cite these as proof that mistakes can be made, the reversals arguably show that innocent defendants are better off sentenced to death than LWOP, as the capital review process is more likely to discover the error. As a former Supreme Court chambers

attorney at the Supreme Court, I will never forget sitting in the Chief Justice's chambers with all seven justices past midnight, connected to the prison by speaker phone, as they diligently remained available to address any last-minute issues.

Prop 62 could also undercut the reliability and effectiveness of punishment by reducing plea bargains, which enhance reliability by avoiding the risk that trial will acquit a guilty defendant, ensure the punishment of the guilty, and save the expense of trial. Yesterday's article cited an Indiana study questioning the cost savings, as it showed death penalty pleas still cost more than LWOP trials. But the same study showed that almost 80 percent of defendants pled guilty when the prosecutor's original request was for death, about 50 percent pled when the initial request was LWOP, and barely 20 percent pled when it was for a term of years. Even if pleas don't save money, they enhance reliability and effectiveness.

The Indiana plea rate supports the Legislative Analyst's observation that Prop 62 could "reduce[] the incentive for offenders to plead guilty." No one will plead to LWOP if it is the maximum possible punishment, as the whole point of pleading is to receive a lesser sentence. Prosecutors thus need to offer a shorter term. Yesterday's article cited a New Jersey

prosecutor who contended prosecutors could still obtain 25-year terms through pleas, but that is less effective in protecting the public than permanent confinement. The point is not that there will be a smaller number of pleas without a death penalty, but that they will necessarily involve a shorter term of imprisonment.

A cascade effect of reduced sentences also might be imposed judicially, notwithstanding Prop 62's Ballot Pamphlet guarantee that special circumstance murderers “will NEVER be released.” When the U.S. Supreme Court abolished the juvenile death penalty, it emphasized the deterrent effect of LWOP. *Roper v. Simmons*, 543 U.S. 551 (2005). But the Court then held that states could not impose LWOP as a mandatory or even presumptive sentence for juveniles. *Miller v. Alabama*, 132 S.Ct. 2455 (2012). If Prop 62 passes, expect opponents to cite *Miller* and cases barring a mandatory death penalty for adult aggravated murderers to contend courts may not impose a maximum sentence (whether death or LWOP) by default. If that succeeds, the sentencing choices for aggravated murder would not be, as now, death or LWOP, but LWOP or 25-to-Life. This would reduce effectiveness and raise costs, as there would still be a separate “penalty phase.”

Sacramento County District Attorney Schubert correctly observes

that if Prop 62 passes, opponents will next target LWOP. Although Europe abolished the death penalty as an inhumane punishment decades ago, it then concluded the difference between death and LWOP was one of degree, not kind. In 2013, Europe's high court ruled "human dignity" requires that all life inmates enjoy "the prospect of release if . . . rehabilitation is achieved," and banned LWOP. *Case of Vintner and Others v. United Kingdom* [2013] ECHR 66069.

Proposition 66, by contrast, seeks to fix the death penalty and retain its effectiveness potential. As simply *finding* attorneys can delay the death penalty review process for years, this measure hopes to recruit more attorneys to take capital cases, which could provide greater reliability and speed. Many of us appellate specialists have been reluctant to take such capital cases due to the delays involved, so Prop 66 offers the *possibility* of achieving the reliability of the current system's intensive review process in years rather than decades.

If Proposition 62 passes, it may well save money. But by reducing reliability and effectiveness, it could benefit the guilty and endanger the innocent. In pursuing justice, you get what you pay for.

