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The Death Penalty's Dirty Little Secret

Abstract: Why is it that the rate of executions per 100 death sentences is vastly higher in states like Texas than in places like California? This essay argues that part of the answer is that states must provide capital defendants who are indigent (virtually all of them) with a legal defense, but providing less skilled lawyers and inadequate resources creates a fast track to execution while better lawyers and more resources can lead to more delay. This creates a “perverse incentive” to restrict effective defenses which can only be restrained if federal courts aggressively enforce the effectiveness of state-provided defenses. The data suggests that the current system does not provide sufficient protections.

Keywords: capital punishment; defense lawyers; effective assistance of counsel; execution risk; perverse incentive

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1 Introduction

The recent history of American capital punishment includes one “natural experiment” in the variation of state experience that warns us of dangerous dysfunctions in the legal controls of state killing. On January 1, 1995, the two largest states in the federal union had almost exactly the same number of prisoners under what the scorekeepers in such matters call “active sentence of death.” As Figure 1 shows, Texas had a total of 391 condemned prisoners and California had 386. Figure 1 also shows that the risk of execution over the 6 years beginning in 1995 was very different for the 391 Texas condemned.

From January 1, 1995 to December 31, 2000, Texas executed a total of 154 persons while California executed a total of six persons, a ratio of about 26 to 1. Assuming that all of the 1995–2000 executions were drawn from the 1995 death row residents, the odds of a Texas condemned prisoner being executed over the 6 years after the beginning of 1995 were >1 in 3.

The chance of a California condemned prisoner being executed in that same period was <1 in 64. Why was a California condemned prisoner more than 20

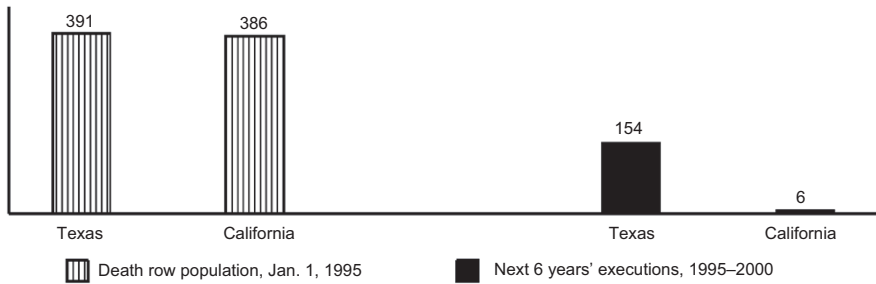


Figure 1: Comparing Death Row Populations and Execution Experience in Texas and California. Sources: (Executions) Death Penalty Information Center, searchable execution database, available at <<http://www.deathpenaltyinfo.org/views-executions>> and last visited February 12, 2013; (Death Row Population) Zimring (2003: p. 74).

times safer than a Texan under death sentence? The two states' definitions of capital crime were close to the same and the legal standards of greatest importance in both states after the death verdict has been rendered are the federal constitutional provisions shaped by the US Supreme Court in the decades after *Gregg v. Georgia* was decided in 1976. Moreover, federal judicial intervention was similarly limited in both states with the enactment of the Antiterrorism and Effective Death Penalty Act in April 1996. So the legal standards are very similar.

Because California executed so few of its condemned prisoners in 1995–2000, the size of its death row grew much faster than in Texas, but the gross disproportion in executions continued. From the beginning of 2001 until December 31, 2012, Texas conducted 253 executions and California conducted five, a ratio of 50 to 1 even without adjusting for California's larger living population of condemned prisoners (Death Penalty Information Center, searchable execution database 2013).

Perhaps some of this huge difference is attributable to the different types of state and federal judges who apply death penalty law in Texas and California. Yet for all its blue state reputation, California voters had removed the three liberal justices from the seven-person State Supreme Court in 1986, and a Republican governor had replaced them with very prosecution-oriented legal thinkers.

By the early 1990s, the California Supreme Court was affirming 90% of the death penalty appeals it heard, a higher rate than even in Texas (Kamin 2000). So the state courts in California are not an obvious explanation for a 26-to-1 difference in execution risk. But California is also under the jurisdiction of federal judges in the Ninth judicial circuit, a liberal circuit by reputation if not a predictable one. Yet even the Ninth Circuit is far from a clear cause of California's very low execution risk. Arizona is also in the Ninth Circuit, had a death row population

less than a fifth of California's and still has managed to conduct twice as many executions as California (27 to 13 over the entire post-*Gregg v. Georgia* period) (Death Penalty Information Center 2013).

So if Arizona can generate execution risks more than 10 times as great as those in California despite being in the Ninth Circuit, something rather different from federal judicial circuit oversight must be creating most of the California difference.

2 Lawyers Matter

Longtime observers of California would regard the low rate of execution in the state as far from a mystery. What remained in the state even after its Supreme Court was deconstructed in 1986 was a professional and effective set of public defender offices (particularly in coastal counties), a powerful state bar association, and dedicated and organized death penalty appeals organizations including the California Appellate Project, created by the state bar, the civil liberties unions in both the north and the south, and later the state government's own Habeas Corpus Resource Center, which has become an important source of coordination and strategy. The otherwise tangled history of capital punishment in California over the past generation is clear evidence that good lawyers make a big difference in death penalty litigation.

California is not alone in providing this testimony to the power of effective lawyering – look behind the stalemates throughout the northern states in death penalty outcomes, in places like New Jersey and New York, and you will find the signature impact of effective legal representation. The quality of defense lawyers matters enormously in the trial and appeal of capital cases, and behind this obvious and undeniable observation lies both an irony and a terrible truth about the American system of death penalty justice.

The irony is that the very state governments that desire swift execution of capital defendants must also provide the financial resources to hire and support virtually all of the defense lawyers who will fight to save their clients from state killing. And the terrible truth is that the huge variation in execution risks observed in the US may reflect what I shall call the power of perverse incentive. States that provide inadequate levels of legal services to indigent defendants benefit from their penury when capital cases are lost and executions happen more quickly.

The massive variations in execution risk that are a prominent feature of the current system may also be evidence that the political economy of capital

punishment encourages states to cheat on their constitutional duties and that the legal controls we have established to control this constitutional corruption do not work.

3 The Anatomy of a Perverse Incentive

So one very plausible reason why the execution rate in Texas is 26–50 times the volume of the execution rate of California is that California provides its indigent capital punishment defendants with better lawyers and more extensive resources to conduct a criminal defense and to prosecute the range of direct and collateral appellate procedures that delay execution. Good lawyers fight the state’s death penalty advocacy to a protracted draw.

Presumably California is giving its capital defendant the quality representation that reduces somewhat the gap between the vast bulk of poor criminal defendants and the tiny cohort of non-poor defendants who can select their lawyers and pay for them. But California’s due process comes at a substantial cost to it, and not just in public money. Good lawyers doing what they are supposed to do directly frustrate the state’s penal ambitions, the execution of offenders under death sentence.

Texas has clearly won the competition between the two states if the major goal of both states is to reduce delay and increasing the volume of executions. And the *less* effective the legal resources that Texas provides to defendants, the *larger* its margin of victory in an execution sweepstakes.

This creates a governmental version of what economists call a perverse incentive, which is a reward to a government for doing the wrong thing. The less effective the legal defense provided by state funds, the more often (and more quickly) the state will achieve the execution of the defendant. So, while the constitutional law requires that the same government that wishes to execute must also provide defendants with lawyers who will try to slow down and to derail the rush to execution, the state’s real interests lie in the opposite direction.

This conflict of interest is inherent in the government’s dual role in criminal prosecution and exists wherever government is supporting advocacy on both sides of the criminal process. What makes the death penalty cases a particularly dramatic setting for this is the very high stakes in both economic resources and penalty in each case and the unbargainable nature of the conflict if the state desires execution. Most felony cases can avoid a trial with an exchange of leniency if the defendant waives his rights. These arms-length “plea bargains” reduce the conflicts between prosecution and defense and mean that the defense

attorney for the indigent does not have to have the skills of Clarence Darrow to help his client.

But when the state is demanding death and is unwilling to remove the ultimate punishment from the equation, there is little room for representation by negotiation, and now the lawyer's role is as trial attorney in the highest stakes litigation imaginable in developed nations. A death penalty trial is the adversary process on steroids – the state-paid lawyer or lawyers for the indigent defendant will face a hundred tests a day of his or her instincts, analysis and strategic judgment – on the admission of evidence, the presentation and cross-examination of witnesses and theories both in the guilt trial and in the unique life or death penalty trial should the client be convicted of the capital offense.

And the trial attorney is not just an advocate during a trial; he or she is a major determinant of whether questions for appeal and potential reversal of adverse rulings and verdicts are preserved. Did the attorney object in a timely fashion on the record? Was there any failure of form or notice by the defense counsel, which under state law restricts or forfeits the right of appellate review? Bad lawyers at the trial stage of the capital criminal process can undermine a defendant's ability to raise important issues on appeal, and thereby doom the defendant's chances of reversing a death verdict. If the defendant's lawyer is bad enough at trial, the only real hope he will have later in the process to reverse a death sentence is to establish that he was denied effective assistance of counsel under current constitutional standards.

So the only real counter to a state's providing inadequate lawyers or resources for capital defendants to create fast tracks to execution is federal courts enforcing the requirement that effective assistance of counsel be provided to defendants by reversing death sentences when lawyers fall below standard. How well does this work in practice?

The applicable legal standards for enforcing minimum standards of defense skills and resources were developed by the Supreme Court in *Strickland v. Washington* and its progeny. And the burden of proof is on the defendant! If a criminal defendant succeeds in demonstrating that his trial attorney fell below the *Strickland* standard (and he had better have found a wonderful post-conviction attorney to achieve this difficult task), the conviction and the death penalty will be reversed and the penal aim of the state – execution – will be frustrated for years if not decades. But the defendant has to prove both serious mistakes at trial and the probability that these influenced a death sentence.

Even if the state does lose an ineffective assistance of counsel case in federal court, the prosecutors can always blame the delay on the courts rather than absorb any personal responsibility. So losing a few cases on appeal is not that much of a political embarrassment. And meager resources and mediocre attorneys can

still produce executions when defendants give up, when appellate counsel for the condemned is not very good either, or when lower federal courts are unsympathetic to defendants in these factually dense contests.

So there is reason to doubt that the current protections generated by *Strickland* as applied in the Fourth, Fifth and Eleventh federal circuits are doing an effective job of neutralizing the perverse incentive. Indeed, the huge variation in state to state execution risk shows conclusively that local legal/judicial environment independent of statutory law, or jury behavior, or anything else that influences death sentencing rates has a powerful influence on actual executions. But what aspects of local legal culture can have a 26-to-1 or 50-to-1 impact on execution risk? State court judges and appellate judges? Local federal court judges and their attitudes? There is certainly room for these variables to influence execution risk to some extent.

But the quality of trial and appellate resources for criminal defense is the elephant in the living room when comparing places like New Jersey and New York and California to Texas and Oklahoma and Louisiana.

4 Blaming the Victim?

One ironic twist makes the sting of inadequate state-provided lawyering particularly sharp – the mistakes of the state-provided lawyer are often chargeable to the defendant.

Coleman v. Thompson decided by the US Supreme Court is one famous example. The defendant's counsel had 30 days under state law to provide notice of claims to be made in a state *habeas corpus* proceeding. Coleman's lawyers were 3 days late in filing the papers. The Virginia Supreme Court therefore refused to ever hear Coleman's claims and the lower federal court ruled this procedural default was an independent state ground to keep Coleman's claims out of federal court.

There are many other kinds of mistakes by lawyers that clients end up paying for – failure to object to prejudicial arguments or testimony, failure to raise factual theories and recruit witnesses at a life-or-death penalty trial.

In all these cases, common sense would suggest that when the state chooses and defines the financial rules for a capital defense, and when the indigent defendant has little choice in the matter, the moral basis for holding the defendant vicariously liable for his appointed lawyer's mistakes is rather tenuous.

The clustering of executions after 1985 in a very few states suggests that a majority of all US executions depend on hostile state environments and less than stellar

resources and attorneys for capital defense and appeal. The tiny trickle of California executions with the nation's largest death row, and the execution-free record of New Jersey from 1980 to 2008, are demonstrations of what good lawyers can do to the complex and convoluted federal system for administering the death penalty.

There is strong circumstantial evidence that the only way the states can achieve high rates of execution is to cheat both their condemned prisoners and the constitution. If the only way the system can function is the corrupt accommodation of a perverse incentive, here is one more good reason to conclude that this nation is too advanced to tolerate a legal system that executes criminals.

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References

- Coleman v. Thompson* (1991) 501 U.S. 722.
Death Penalty Information Center, searchable execution database (2013), available at <<http://www.deathpenaltyinfo.org/views-executions>>.
Kamin, S. (2000) "The Death Penalty Decisions of the California Supreme Court: Politics, Judging and Death," Ph.D. dissertation, University of California, Berkeley.
Strickland v. Washington (1984) 466 U.S. 608.
Zimring, F. E. (2003) *The Contradictions of American Capital Punishment*. New York: Oxford University Press.