

Friday, November 2, 2012

Proposition 34 will undercut justice

By Mitchell Keiter

Is Proposition 34 the solution to California's dysfunctional death row? It depends on voters' priorities. The public has three preferences in punishing murderers, but these inevitably conflict.

One, we want punishment to be reliable; we don't want to punish an innocent person. Two, we want punishment to be effective; it should prevent murderers from killing again, and ideally deter others as well. Finally, we want punishment to be cheap, especially with our budget deficit.

Supporters of converting death sentences into life-without-parole (LWOP) assert Prop. 34 will save the state money. But it can do so only by harming either the reliability or the effectiveness of punishment - or both.

There are different ways to balance the competing priorities. One is the Texas model, where capital punishment is relatively swift and certain. This is effective and cheap, but not so reliable as Californians would like. Instead, our state provides numerous procedural protections, from a second appointed trial attorney to automatic Supreme Court review. These protections make the system more reliable, but less cheap.

Commuting death sentences to LWOP would save money as it would remove these special protections. But this would necessarily undermine the system's special reliability, and increase the possibility of punishing the wrong person. Reliability is expensive; the very costs that Prop. 34 attacks are what prevent mistakes.

Would mistakes become more acceptable because, unlike the death penalty, LWOP would not be irrevocable? Not really. The current capital appellate system takes decades because it is so exhaustive; if exculpatory evidence does not appear in the first 20-25 years, it won't after that. It is better to be wrongly sentenced to death than LWOP, because one has a better opportunity to find and show the error. Innocent individuals will have fewer protections and be more likely to receive permanent punishment if the state has no death penalty.

Effectiveness also may suffer. Many capital defendants now plead guilty to get LWOP and avoid a death sentence. This serves all three goals. It saves money by avoiding trial, and it strengthens reliability and effectiveness by ensuring a guilty person does not walk free after a trial acquittal.

But defendants will have no incentive to plead to LWOP without the capital alternative. To obtain pleas, prosecutors would have to offer a lesser term, which under current law would be 25 years to life. Paroling such murderers could impair effectiveness, both by releasing these individuals and reducing the deterrent effect of the law. Parole hearings would also cost money and deprive survivors of the closure that President Barack Obama described in the presidential debate regarding Osama bin Laden.

Finally, courts might even strike down the mandatory LWOP. The U.S. Supreme Court has barred mandatory death sentences, insisting that juries have the option of considering mitigating evidence to impose a lesser sentence. *Lockett v. Ohio*, 438 U.S. 586 (1978). It seemed that this was a special rule for capital punishment because "death is different."

But this year the court also restricted LWOP for juveniles; the maximum sentence could not be mandatory, but had to be limited to exceptional cases. *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Although there are distinctions, a law making the maximum sentence mandatory might likewise be challenged for denying the jury the opportunity to consider mitigating evidence and impose a lesser sentence. If so, the result of Prop. 34 would be not a choice between LWOP and death, but between LWOP and 25-to-life, thereby reducing effectiveness, and there would still be a penalty phase, thereby raising costs.

Prop. 34 might indeed save the state money. But it cannot do so without undercutting the reliability and effectiveness of our criminal justice system. At the end of the day, we get what we pay for.

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