

# The Potential and Limits of Death Penalty Commissions As Tools for Reform: Applying Lessons from Illinois and New Jersey to Understand the California Experience

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## INTRODUCTION

In 2004, the California legislature established the California Commission on the Fair Administration of Justice, an independent commission charged with reviewing the administration of the state death penalty system, identifying systemic failings, and recommending legislative and administrative measures to address those failings.<sup>1</sup> In its June 2008 final report, the Commission emphatically declared the California death penalty system “dysfunctional.”<sup>2</sup> Although the Commission found flaws of constitutional magnitude endemic to the system, it failed to recommend alternatives – such as replacing the death sentence with a maximum sentence of life imprisonment without the possibility of parole, or narrowing the list of special circumstance factors that render a criminal defendant eligible for the death sentence – that would strike at the root of the problems.<sup>3</sup> Instead, the Commission recommended maintaining the current system and implementing a number of costly legislative, executive, and administrative reforms.<sup>4</sup>

California was not the first state to establish an independent commission to review the death penalty. More than fifteen states have created commissions tasked with reviewing and recommending fixes to state death penalty systems.<sup>5</sup>

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1. See S.R. 44, 2003-2004 Sess. (Ca. 2004) (enacted).

2. California Commission on the Fair Administration of Justice Final Report (June 2008) [hereinafter CCFAJ Report] at 114, available at <http://ccfaj.org/reports.html>.

3. *Id.* at 115-19.

4. See *id.*

5. For a survey of state actions to review and/or end the death penalty, including detailed descriptions of the states that have created death penalty review commissions, see Equal Justice

The findings of the California Commission were markedly similar to those of other state commissions, yet its recommendations are far more limited.<sup>6</sup> In Illinois, for example, the Governor's Commission on the Death Penalty recommended narrowing the list of special circumstances that render a defendant eligible for the death penalty.<sup>7</sup> The report of the Governor's Commission helped lead to a governor-issued blanket moratorium on executions in the state.<sup>8</sup> In January of 2007, the New Jersey Death Penalty Study Commission issued a report recommending abolition of the death penalty.<sup>9</sup> With the support of the commission's findings and recommendations, the New Jersey legislature in December 2007 abandoned capital punishment in favor of life imprisonment without the possibility of parole.<sup>10</sup>

This article examines the California Commission, and compares it to the similar commissions in Illinois and New Jersey, in order to illuminate what the commission experience means for the death penalty reform efforts in California. Although there are far too many nebulous social, political, economic, and legal variables at play in each of the states to present a comprehensive analysis, it is hoped that this comparison will be useful in providing a deeper examination of the California Commission and its potential to influence the administration of the death penalty in this state. Section I of this article provides a brief overview of the history, mechanics, and administration of the California death penalty system. Section II explains in detail the mandates, findings, and recommendations of the California Commission. Section III provides a summary description of the genesis of and reports produced by the Illinois and New Jersey Commissions. Section IV analyzes the variances in the three Commissions' political environments, mandates, and structures, and explores how the New Jersey and Illinois experiences can help us understand the viability of the California Commissions' recommendations. In conclusion, the article explores the potentials and limits of death penalty commissions as tools for reform, and suggests areas for further research and the utility and efficacy of such commissions.

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USA, Moratorium Now!, State by State, <http://www.ejusa.org/> (last visited Jan. 15, 2009).

6. See generally, CCFJAJ Report, *supra* note 2; New Jersey Death Penalty Study Commission Report (Jan. 2007) [hereinafter N.J. Comm'n Report], available at [http://www.njleg.state.nj.us/committees/njdeath\\_penalty.asp](http://www.njleg.state.nj.us/committees/njdeath_penalty.asp); Report of the Governor's Commission on Capital Punishment (Apr. 2002) [hereinafter Ill. Comm'n Report], available at <http://www.idoc.state.il.us/ccp/index.html>.

7. Ill. Comm'n Report, *supra* note 6, at 23-24.

8. See Governor George H. Ryan, Speech at the Northwestern University School of Law (Jan. 2003), <http://www.law.northwestern.edu/news/spring03/ryanspeech.html>; see also Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 SANTA CLARA L. REV. 101, 102 (2003).

9. N.J. Comm'n Report, *supra* note 6, at 2.

10. Act of Jan. 12, 2006, ch. 321, N.J. Laws vol. II 2005 (enacted).

## I. CALIFORNIA'S DEATH PENALTY: AN OVERVIEW

A. *A Brief History of the Death Penalty in California*

The State of California executed its first citizen at San Quentin Prison in 1893, twenty-one years after capital punishment was incorporated into the state Penal Code.<sup>11</sup> During the next seventy-four years, an additional 500 individuals were executed by hanging or gas in California.<sup>12</sup> The state ceased executions during the late 1960s and early 1970s, following a series of California cases<sup>13</sup> and the Supreme Court decision in *Furman v. Georgia*,<sup>14</sup> which found that capital punishment constituted cruel and unusual punishment in violation of the state and federal constitutions. The Supreme Court's 1976 decision in *Gregg v. Georgia*, however, deemed constitutional capital punishment systems in which a defendant's eligibility for a death sentence comports with a rational, narrow, selection process and in which certain procedural processes were established at trial.<sup>15</sup>

Shortly after *Gregg* was decided, the California legislature enacted a death penalty statute,<sup>16</sup> which was adopted by popular initiative in 1978.<sup>17</sup> A total of 813 individuals have received death sentences in California since the 1978 death penalty law was enacted.<sup>18</sup> Thirteen people have been executed between 1977 and the present.<sup>19</sup> Today, with more than 670 inmates<sup>20</sup> on its death row, California has by far the largest death row in the nation.<sup>21</sup> California's death penalty system costs the state an estimated \$137.7 million per year.<sup>22</sup>

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11. See History of Capital Punishment in California, Cal. Dep't of Corr. & Rehab., [http://www.cdcr.ca.gov/Reports\\_Research/historyCapital.html](http://www.cdcr.ca.gov/Reports_Research/historyCapital.html) (last visited Jan. 15, 2009).

12. *Id.*

13. See *In re Anderson*, 69 Cal. 2d 613 (1968).

14. 408 U.S. 238 (1972).

15. *Gregg v. Georgia*, 428 U.S. 153 (1976).

16. CAL. PENAL CODE §§ 189, 190 (2009).

17. See History of Capital Punishment in California, Cal. Dep't of Corr. & Rehab., [http://www.cdcr.ca.gov/Reports\\_Research/historyCapital.html](http://www.cdcr.ca.gov/Reports_Research/historyCapital.html) (last visited Jan. 15, 2009).

18. CCFAJ Report, *supra* note 2, at 120.

19. *Id.* at 121.

20. The difference between the number of individuals who received death sentences and the number of death row inmates is accounted for by the fact that thirty-eight individuals died as a result of natural causes, fourteen committed suicide, thirteen were executed, and ninety-eight had their sentences reversed. *Id.* at 120-21.

21. See Death Penalty Information Center, State by State Information, <http://www.deathpenaltyinfo.org/state/> (last visited Apr. 5, 2009).

22. The estimated total cost of the current system includes trial costs as well as direct appeal and habeas costs. *Id.* at 145-46. Cf. ACLU OF NORTHERN CALIFORNIA, THE HIDDEN DEATH TAX: THE SECRET COSTS OF SEEKING EXECUTION IN CALIFORNIA, available at [http://www.aclun.c.org/docs/criminal\\_justice/death\\_penalty/the\\_hidden\\_death\\_tax.pdf](http://www.aclun.c.org/docs/criminal_justice/death_penalty/the_hidden_death_tax.pdf).

B. *The Legal Framework for Seeking and Rendering a Death Sentence in California*

California law permits a sentence of death for first degree murder conditional on findings of any of 21 “special circumstances.”<sup>23</sup> The number of special circumstances in California far exceeds those enumerated in any other death penalty state.<sup>24</sup> If a jury convicts a defendant of first degree murder and finds that one or more “special circumstances” are true, a second, penalty phase trial ensues, during which the same jury is instructed to return a sentence of death if it finds that aggravating factors outweigh mitigating factors in the case.<sup>25</sup> Under this law, eighty-seven percent of California’s first degree murders could be prosecuted as death penalty cases.<sup>26</sup>

An individual convicted and sentenced to death receives an automatic appeal to the California Supreme Court.<sup>27</sup> Should the Supreme Court affirm the conviction and sentence, the individual has the right to petition for state habeas corpus relief before the California Supreme Court, whose decision is reviewable by the United States Supreme Court.<sup>28</sup> The individual may also file a petition for federal habeas corpus relief in the federal district court, reviewable by the Ninth Circuit Court of Appeals and the United States Supreme Court, in turn.<sup>29</sup> As described in greater detail below, extreme delays plague this procedural system.

At each stage of a capital case, an indigent defendant is guaranteed the right to counsel.<sup>30</sup> Indigent defendants have a right to appointed counsel during trial and on direct appeal. The state also provides counsel to indigents seeking state habeas review.<sup>31</sup> Trial courts exercise discretion in appointing counsel for death penalty cases pursuant to certain minimum qualifications,

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23. CAL. PENAL CODE § 190.2 (2009). The California Penal Code enumerates a twenty-second circumstance in Section 190.2(a)(14) for a murder that is “especially heinous, atrocious, or cruel.” This special circumstance was deemed unconstitutional in *People v. Superior Court* (Engert), 31 Cal. 3d 797 (1982).

24. See Letter from Robert D. Bacon, Att’y, to John Van de Kamp, Chair, Comm’n on the Fair Admin. of Justice, at 3 (Mar. 19, 2008), available at [http://ccfaj.org/documents/reports/dp/expert/Bacon Letter.pdf](http://ccfaj.org/documents/reports/dp/expert/Bacon%20Letter.pdf) (last visited Apr. 5, 2009); ELLEN KREITZBERG, A REVIEW OF SPECIAL CIRCUMSTANCES IN CALIFORNIA DEATH PENALTY CASES: SPECIAL REPORT TO THE CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, at 11 (Jan. 7, 2008), available at <http://ccfaj.org/documents/reports/dp/expert/Kreitzberg.pdf> (last visited Apr. 5, 2009).

25. CAL. PENAL CODE § 190.3 (2009); CALCRIM No. 766 (2008).

26. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1331 (1997); see also Sanger, *supra* note 8, at 108-10 (stating that California’s “special circumstances are so numerous and so broad . . . that they encompass nearly every first degree murder.”).

27. CCFAJ Report, *supra* note 2, at 121-22.

28. *Id.*

29. *Id.*

30. *Id.*

31. CAL. GOV. CODE § 68662 (2008).

such as training in capital defense and extensive felony trial experience.<sup>32</sup> At the time the Commission produced its report, every individual on California's death row was indigent and therefore qualified for appointed counsel.<sup>33</sup> As discussed in Section III, however, insufficient funding has led to considerable delays in appointing qualified and competent defense teams.<sup>34</sup>

## II. THE CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

### A. *Genesis of the California Commission on the Fair Administration of Justice*

In 2004, the California State Senate passed a resolution expressing concern about the risk of wrongful convictions and executions in the state's death penalty system, and establishing the California Commission on the Fair Administration of Justice<sup>35</sup> to study that system.<sup>36</sup> The resolution begins with the observation that, "a number of people have been exonerated and released from prison after serving several years in prison, and more than 100 Americans sentenced to death have subsequently been exonerated and freed from death row based on DNA testing . . . ."<sup>37</sup> The resolution further stated that "thorough, unbiased study and review in other states has resulted in recommendations for significant reforms to the criminal justice system in order to avoid wrongful convictions and executions, and California has not engaged in any such reviews of the state's criminal justice system . . . ."<sup>38</sup>

32. See Cal. Ct. R. 4.117.

33. CCFMJ Report, *supra* note 2, at 121.

34. For a detailed survey of problems in appointing and compensating qualified defense counsel, see generally, Letter from R. Clay Seaman, Jr., Att'y, to Gerald Uelman, Comm'n on the Fair Admin. of Justice (Nov. 30, 2007), available at <http://ccfaj.org/documents/reports/dp/expert/Kreitzberg.pdf> (last visited Apr. 24, 2009); Testimony of R. Clay Seaman, Jr., before the Comm'n on the Fair Admin. of Justice (Nov. 30, 2007), available at <http://ccfaj.org/documents/reports/dp/expert/seamantestimony.pdf>.

35. In addition to its study of the fair administration of the death penalty, the California Commission on the Fair Administration of Justice researched and produced reports on a number of issues that pertained to the criminal justice system generally, including problems with eyewitness identification, false confessions, use of jailhouse informants, use of scientific evidence, professional responsibility and accountability of prosecutors and defense lawyers, and remedies for wrongful conviction. California Commission on the Fair Administration of Justice: Reports & Recommendations, available at <http://ccfaj.org/reports.html> (last visited Apr. 5, 2009).

36. S.R. 44, 2003-2004 Sess. (Ca. 2004) (enacted). Interestingly, the California legislature considered bills prescribing a moratorium on executions pending completion of the Commissions report; these bills, however, died in committee. Assembly Bill 1121, introduced by Assemblyman Paul Koretz, called for a moratorium on executions during the tenure of the Commission or until January 1, 2009. A.B. 1121, 2005-2006 Sess. (Ca. 2006). The bill passed in the Committee on Public Safety in a 4-2 vote but died in Appropriations on January 19, 2006. (*Id.*) Assembly Bill 2266, also introduced by Assemblyman Paul Koretz, would have legislated a moratorium during the tenure of the Commission. A.B. 2266 2005-2006 Sess. (Ca. 2006). The bill passed in the Committee on Public Safety in a vote of 402 on April 25, 2006, and died in the Appropriations Committee on May 10, 2006. *Id.*

37. *Id.*

38. *Id.*

On the basis of these concerns, the Senate resolved to establish a commission “to study and review the administration of criminal justice in California to determine the extent to which [the administration of criminal justice in California] has . . . result[ed] in wrongful executions or the wrongful conviction of innocent persons.”<sup>39</sup> The Commission was tasked with examining measures to improve the death penalty system’s integrity and functionality, and to recommend to the state legislature and governor ways to ensure justice, fairness, and accuracy in the administration of the system.<sup>40</sup>

The Senate Rules Committee was granted sole authority for appointing Commission members.<sup>41</sup> The Committee appointed current and former federal and state prosecutors and defense attorneys, state attorney general representatives, state court judges and court staff attorneys, state and municipal agency officials, police chiefs and officers, sheriff department officials, law professors, private attorneys, religious leaders, community activists, a former governor, and other public servants.<sup>42</sup>

The Commission held three public hearings on the administration of the death penalty: the first in Sacramento on January 10, 2008; the second in Los Angeles on February 20, 2008; and the third in Santa Clara on March 28, 2008.<sup>43</sup> A total of seventy-two witnesses testified at the hearings.<sup>44</sup> Witnesses included victims’ family members, public and private defense attorneys, prosecutors, law professors, and representatives of non-profit organizations both for and against the death penalty.<sup>45</sup> Many witnesses testified in response to eleven focus questions posed by the Commission.<sup>46</sup> The Commission also

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39. *Id.*

40. *Id.*; S.R. 10, 2007-2008 Sess. (Ca. 2007) (enacted). (California Senate Resolution 44, 2003-2004 Sess. (Ca. 2004) initially resolved that the commission should issue recommendations by December 31, 2007. S.R. 10 was passed to extend the deadline to June 2008.)

41. S.R. 44, 2003-2004 Sess. (Ca. 2004) (enacted).

42. For a full listing of and biographic information regarding Commission members, *see* California Commission on the Fair Administration of Justice, Membership, <http://ccfaj.org/membership.html> (last visited Apr. 5, 2009).

43. CCFAJ Report, *supra* note 2, at 113.

44. *Id.* at 114.

45. For a full list of expert testimony provided to the Commission, *see* California Commission on the Fair Administration of Justice, Fair Administration of the Death Penalty, Reports and Recommendations, *available at* <http://ccfaj.org/rr-dp-expert.html>.

46. CCFAJ Report, *supra* note 2, at 114; California Commission on the Fair Administration of Justice, Focus Questions for Hearings on the Fair Administration of the Death Penalty in California (Feb. 18, 2008), *available at* <http://ccfaj.org/documents/press/Press22.pdf>. The focus questions were:

1. Should reporting requirements be imposed to systematically collect and make public data regarding all decisions by prosecutors in murder cases whether or not to charge special circumstances and/or seek the death penalty, as well as the disposition of such cases by dismissal, plea or verdict in the trial courts?
2. Should the California constitution be amended to permit the transfer of jurisdiction over pending death penalty appeals from the Supreme Court to the Courts of Appeal?
3. Should California law be changed to require state habeas corpus petitions in

considered studies and reports concerning the administration of the death penalty in California, and researched death penalty laws of other states.<sup>47</sup>

### B. Major Findings of the California Commission

The Commission's final report, issued on June 30, 2008, unequivocally declared that the California death penalty system is dysfunctional.<sup>48</sup> The Commission found that an extreme backlog of capital appeals and state habeas proceedings was a chief reason for the dysfunction.<sup>49</sup> The average time span between sentence and execution in California – 17.2 years – is the longest of any state, and is nearly a third longer than the national average of 12.25 years.<sup>50</sup> Individuals whose convictions or death sentences were vacated by a federal court waited an average of 16.75 years in California, compared with a national average of 11 years.<sup>51</sup> Today, thirty people have been on California's death row for more than 25 years, 119 have been there for more than twenty

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- death penalty cases be filed in the Superior Courts?
4. Should California law be changed to narrow the special circumstances that would make a defendant eligible for the death penalty?
    - A. Should death penalty eligibility be limited to cases in which the defendant was the actual killer?
    - B. Should death penalty eligibility be limited to cases in which the defendant formed the intent to kill?
    - C. Should felony murder special circumstances be retained?
    - D. Should special circumstances be limited to the "worst of the worst" [sic]? If so, which special circumstances define the "worst of the worst"?
  5. What measures should be taken to assure the prompt appointment of qualified lawyers to provide competent representation for the defendant in death penalty cases at the trial stage, on direct appeal, and for habeas corpus challenges?
  6. Should consistency of representation be provided for state and federal habeas corpus proceedings in death penalty cases?
  7. Are funding and support services for the defense of capital cases adequate to assure competent representation by qualified lawyers?
  8. Are there significant racial disparities associated with the race of the victim or the defendant in imposing the death penalty in California? If so, what remedies are available to minimize or eliminate the problem?
  9. Are there significant geographical disparities from county to county in utilizing the death penalty in California? Is this a problem? If so, what remedies are available to minimize or eliminate the problem?
  10. Is there a need for proportionality review of death penalty sentences in California? If so, how should such a review process be incorporated in California's death penalty law?
  11. Are clemency procedures used by California governors consistent from one administration to the next? Are they consistent with the procedures utilized by other state? Are they adequate to assure a fair opportunity to be heard by all interested parties, and to assure a principled decision on the merits?

47. CCFMJ Report, *supra* note 2, at 114.

48. *Id.*

49. *Id.* at 114-15.

50. *Id.* at 122, 125; See also Judge Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 700 (2007).

51. CCFMJ Report, *supra* note 2, at 122.

years, and 240 have been there for more than fifteen years.<sup>52</sup>

The Commission found that a number of factors contribute to the excessive backlog of capital cases in California, including delays in appointing trial counsel<sup>53</sup> and state habeas counsel,<sup>54</sup> as well as delays in scheduling hearings and deciding cases on direct appeal<sup>55</sup> and in state and federal post-conviction proceedings.<sup>56</sup> Chief Justice George of the California Supreme Court told the Commission that this backlog in state habeas proceedings would increase “until the system falls of its own weight.”<sup>57</sup>

In addition to the backlog problem, the Commission highlighted two other factors that rendered the current death penalty system in California dysfunctional: the high rate of constitutional violations found by federal courts in death row inmates’ habeas petitions, and the risk of wrongful executions, wrongful convictions, and wrongful death sentences.<sup>58</sup> The Commission observed that federal courts remanded seventy percent of capital habeas cases to cure constitutional violations that had occurred in the guilt or penalty phase.<sup>59</sup> Where constitutional violations were based on Sixth Amendment violations for ineffective assistance of counsel, the Commission found that many counties fail to follow the ABA Guidelines for appointment and performance of capital defense counsel.<sup>60</sup> Further, the Commission found that several counties

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52. *Id.* at 125.

53. The current system is plagued by excessive delay in appointments of counsel for direct appeals. At the time of the Commission’s report, there were seventy-nine people on death row still awaiting appointment of counsel for their direct appeal. The current wait time is three to five years. CCFAJ Report, *supra* note 2, at 122. *See also* Alarcon, *supra* note 50.

54. At the time of the Commission’s report, 291 death row inmates lacked counsel appointed to handle their state habeas petitions. Those seeking to file petitions typically wait eight to ten years after their sentence for counsel to be appointed. This in turn leads to significant delays in the investigation for and preparation of habeas petitions. CCFAJ Report, *supra* note 2, at 122.

55. When the Commission’s report was released, the California Supreme Court had a backlog of eighty fully briefed direct appeals awaiting argument. Since the Court typically hears arguments in twenty to twenty-five of these cases each year, the current estimated delay for oral arguments is 2.25 years. CCFAJ Report, *supra* note 2, at 122.

56. At the time of the Commission’s report, the California Supreme Court had a backlog of 100 fully briefed habeas petitions. The average wait between filing a state habeas petition and issuance of a decision was twenty-two months. *Id.* At the federal level, habeas petitioners typically wait 6.2 years from the time of filing for a decision from the district court. Appeals to the Ninth Circuit typically take another 2.2 years. *Id.* at 123.

57. *Id.* at 115.

58. *Id.* at 115, 125-27.

59. *Id.* at 115, 125.

60. Although the ABA Guidelines recommend that capital defense teams comprise at least two lawyers, many California counties appoint only a single lawyer in capital cases. Other counties fail to appoint a second attorney until the prosecution decides to file the case as a capital case, a decision that may not take place until one year after the case is filed. This time lapse significantly delays mitigation investigation for the defendant and harms the quality of the defense. *See* Testimony of Elisabeth Semel, Att’y, before the Comm’n on the Fair Admin. of Justice, at 19-23 (Feb. 20, 2008), available at <http://ccfaj.org/documents/reports/dp/expert/Semel.pdf>. *See also* ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 4.1 (A)(1), (rev. ed. 2003).

contravene the ABA's recommendation against use of flat-fee contracts for appointed counsel.<sup>61</sup> The Commission found that, since 1979, six people initially sentenced to die in California were subsequently acquitted or had their charges dismissed for lack of evidence.<sup>62</sup>

The Commission stated that these failures "create cynicism and disrespect for the rule of law, increase the duration and costs of confining death row inmates, weaken any possible deterrent benefits of capital punishment, increase the emotional trauma experienced by murder victims' families, and delay the resolution of meritorious capital appeals."<sup>63</sup> On the basis of these findings, the Commission made a number of recommendations for legislative and administrative reforms, implementation of which would cost an estimated \$274 million per year, or double what the state spends to maintain the current, flawed death penalty system.<sup>64</sup>

### C. *The Commission's Recommendations for Legislative and Executive Reforms*

The Commission set forth several recommendations for legislative and executive reforms to address the backlogs, ineffective assistance of counsel, and risk of error it identified as problems crippling the administration of the state's death penalty system. The Commission divided its recommendations according to the procedural stages common to most death cases in the state.<sup>65</sup>

#### 1. *Recommendations for Death Penalty Cases at Trial and on Direct Appeal*

The Commission made two recommendations to address the inadequacy of trial counsel and lack of transparency regarding the costs of trying death cases.<sup>66</sup> The Commission recommended that California counties provide sufficient funds to come into full compliance with the ABA guidelines for the appointment and performance of trial defense counsel.<sup>67</sup> To reduce financial burdens on counties for coming into compliance with the guidelines, the Commission recommended improving existing cost-shifting opportunities that

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61. CCFJ Report, *supra* note 2, at 125-26. Several California counties use flat-fee contracts for appointed counsel. These contracts cover both the attorney's expenses as well as investigators' and paralegals' expenses. They therefore disincentivize attorneys from spending adequate resources for other aspects of the defense. In addition, flat fee contracts create a substantial risk of underbidding, as bids must be tendered before a full investigation has occurred. Inadequate pay for appointed counsel has led to a dearth of competent defense attorneys willing to take death penalty trial cases. See Testimony of Elisabeth Semel, Att'y, before the Comm'n on the Fair Admin. of Justice, at 19-23 (Feb. 20, 2008), available at <http://ccfaj.org/documents/reports/dp/expert/Semel.pdf>.

62. CCFJ Report, *supra* note 2, at 126-27.

63. *Id.* at 115.

64. See generally *id.*, *supra* note 2 at 119-37, 147-57.

65. *Id.*

66. *Id.* at 128-31.

67. *Id.* at 131.

permit counties to seek reimbursement by the state for expenses they incur in death penalty cases.<sup>68</sup> The Commission recommended resolving disparities among the counties and increasing state-wide transparency in the death penalty system by imposing a uniform reporting system to track costs of capital trials.<sup>69</sup>

The Commission also recommended resolving access to and quality of counsel by increasing the rate of compensation for counsel appointed to handle direct appeals.<sup>70</sup> The Commission urged that appointed counsel for direct appeals meet the competency standards set forth in ABA Guideline 4.1(A)(2).<sup>71</sup> Finally, the Commission advised against the use of flat-fee contracts for appointed counsel on the grounds that they create conflicts of interest for defense teams striving to allocate finite resources among lawyers, investigators, and mitigation specialists.<sup>72</sup>

## 2. *Recommendations for State and Federal Habeas Review of Death Judgments*

Based on its finding of excessive delays in state habeas proceedings, the Commission recommended a five-fold cost increase to improve access to qualified and competent counsel provided by the Habeas Corpus Resource Center (HCRC).<sup>73</sup> The Commission also recommended that qualified private counsel be appointed in cases that HCRC cannot take due to conflicts of interest, and that appointed counsel receive adequate hourly compensation rather than flat-fee contracts whenever possible.<sup>74</sup>

Despite the infrequency of relief granted in state habeas proceedings, a full seventy percent of death row inmates presenting identical claims in their federal habeas petitions are granted relief.<sup>75</sup> The Commission therefore concluded that access to federal courts is critical in California death cases.<sup>76</sup> The Commission determined that appointing the same attorney to handle both state habeas and federal habeas claims is likely to reduce backlogs.<sup>77</sup> To effectuate continuity of counsel, the Commission recommended that, rather than expanding appointment of private counsel in state habeas claims, the state

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68. CCFJA Report, *supra* note 2, at 128-29.

69. *Id.* at 129.

70. *Id.* at 133.

71. *Id.*; ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 4.1 (A)(1), (rev. ed. ABA 2003).

72. CCFJA Report, *supra* note 2, at 133.

73. *Id.* at 135-36; *see also* Letter from Norman C. Hile, Att'y, to John Van de Kamp, Chair, Comm'n on the Fair Admin. of Justice, at 2 (Feb. 27, 2008), *available at* <http://ccfaj.org/document/s/reports/dp/expert/HileLetter.pdf>. The legislature established HCRC in 1998 to represent individuals sentenced death seeking state and federal habeas review. S.B. 514 (Ch. 869) (Ca. 1998).

74. CCFJA Report, *supra* note 2, at 135-36.

75. *Id.* at 136.

76. *Id.*

77. *Id.* at 137.

should increase funding to HCRC to allow the same team of lawyers to handle both state and federal habeas petitions.<sup>78</sup>

The Commission stated that fulfillment of its recommendations for these reforms would cost \$232.7 million per year, or \$95 million per year on top of the costs of the current system.

#### *D. Commission's Recommendations for Administrative Reforms*

In addition to the proposals described above, the Commission set forth a number of recommendations for administrative reforms to reduce backlogs, ensure thorough, fair, and accurate proceedings, and increase consistency and transparency in administration of the death penalty system.<sup>79</sup> For example, the Commission recommended establishment of a California Death Penalty Review Panel tasked with contemplating a transfer of fully briefed direct appeals from the California Supreme Court to the Courts of Appeal.<sup>80</sup> The Commission also encouraged more evidentiary hearings and explicit findings of fact by the California Supreme Court in state habeas proceedings.<sup>81</sup>

The Commission addressed a lack of transparency in county-by-county administration of the death penalty by recommending systematic monitoring and collection of data on cases selected for prosecution as death cases. Such monitoring, it hoped, would shed light on how much weight prosecutors give various factors – including the victim's race, defendant's race, and geographic factors – in their decisions to seek death.<sup>82</sup> Specifically, the Commission urged the creation and implementation of statewide reporting requirements to collect and publicize comprehensive data about decisions by prosecutors in death-eligible cases to charge special circumstances and seek the death penalty, as well as the disposition of those cases.<sup>83</sup>

The Commission also recommended that District Attorneys' Offices establish written policies identifying who makes decisions to seek death and according to what criteria.<sup>84</sup> Such policies, according to the Commission, should allow for consultation with defense counsel prior to the decision to seek death.<sup>85</sup> The Commission was unwilling to recommend comparative proportionality review or review of local death penalty decisions by a statewide body without additional research indicating the necessity of such measures.<sup>86</sup>

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78. *Id.*; see also Letter from Norman C. Hile, Att'y, to John Van de Kamp, Chair, Comm'n on the Fair Admin. of Justice, at 2 (Feb. 27, 2008), available at <http://ccfaj.org/documents/reports/dp/expert/HileLetter.pdf>.

79. CCFAJ Report, *supra* note 2, at 147-52.

80. *Id.*

81. *Id.* at 149.

82. *Id.* at 151.

83. *Id.* at 152.

84. *Id.*

85. CCFAJ Report, *supra* note 2, at 152.

86. *Id.*

*E. The Commission's Discussion of Possible Alternatives to the Current Death Penalty System*

As described above, the Commission limited its recommendations to reforms that would maintain the current death penalty scheme with improvements designed to reduce backlogs, increase the effectiveness and competency of defense counsel, and create transparency in the administration of the system.<sup>87</sup> The Commission's report also included an assessment of two possible alternatives to the current system: first, narrowing the types of cases in which death can be sought, and second, replacing the death sentence with a maximum sentence of life imprisonment without the possibility of parole. However, the Commission stopped short of affirmatively recommending either of these alternatives.<sup>88</sup>

The first alternative the Commission considered was a narrowed list of special circumstances.<sup>89</sup> The Commission noted that implementing such an alternative would substantially limit the number of death penalty cases, eliminate county-by-county disparities in imposing death sentences, and reduce the cost of administering the death penalty system.<sup>90</sup> Adopting the five-factor limitation proposed by the Illinois Commission and the Constitution Project would reduce the number of people on death row from 670 to 368; the sentences of the remaining 302 would be commuted to life without the possibility of the parole.<sup>91</sup> This change would make the overall cost of the death penalty system \$130 million per year (saving \$27 million per year relative to current costs)<sup>92</sup> and would eliminate the need for expansion of funds to appointed counsel and court staff.<sup>93</sup>

A second alternative the Commission considered would involve

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87. *Id.* at 119-37, 147-57.

88. *Id.* at 137-47.

89. *Id.* at 138-42. There have been numerous proposals nationwide to substantially limit the list of special circumstances in order to reduce the number of individuals on death row to those whom a state has the means and will to execute. Both the Illinois Commission on Capital Punishment and the Constitution Project's Blue Ribbon Committee recommended limiting death penalty eligibility to five factors: murder of a peace officer killed in the performance of his or her official duties when done to prevent or retaliate for that performance, murder of any person at a correctional facility, murder of two or more persons with intent or knowledge, intentional murder of a person involving infliction of torture, murder by a person under investigation for, charged with, or convicted of a felony, or murder of anyone involved in the investigation, prosecution, or defense of that crime. Both entities also recommended that felony murder no longer be a special circumstance. See III. Comm'n Report; Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, at 10 (Jul. 2005). The "citizen impact" proposal by Jon Streeter, one of the California Commissioners, would limit death penalty eligibility to murder of a peace officer, murder of a correctional officer, or murder of a participant in the justice system. CCFJAJ Report, *supra* note 2, at 140-41.

90. CCFJAJ Report, *supra* note 2, at 140-42.

91. *Id.* at 142.

92. *Id.* at 139-40.

93. *Id.* at 142.

establishing a maximum penalty of death in prison, or lifetime incarceration without the possibility of parole (LWOP). The Commission found that this alternative would substantially reduce costs of appointing counsel. It would simultaneously expand the pool of qualified counsel at trial and appellate levels, since, unlike death cases, LWOP cases would not require the same rigorous minimum attorney qualifications that capital cases do.<sup>94</sup> Because there would no longer be a need for automatic appeals to the California Supreme Court, appellate proceedings would be handled more economically and efficiently by the Courts of Appeal.<sup>95</sup> This alternative would also substantially reduce jury costs and expand the jury pool, as it would eliminate the need for time-consuming penalty phase trials.<sup>96</sup> State costs would further be reduced since, unlike capital cases, there is no right to appointed counsel for state habeas proceedings in LWOP cases, and because defense teams would no longer need to include investigators and mitigation specialists.<sup>97</sup> Finally, this alternative would render obsolete the current need for a new prison complex for persons on death row (estimated to cost \$356 million).<sup>98</sup>

In sum, the LWOP alternative would cost \$11.5 million per year, compared with the current costs of \$137.7 million per year, or the \$237 million per year it would cost to maintain the death penalty system with the implementation of the Commissions recommendations.<sup>99</sup>

#### *F. Governmental Response to the California Commission Report*

In the months since the California Commission issued its report, no branch of state government has acted to implement its recommendations. Furthermore, the likelihood that they will do so in the foreseeable future is small. As discussed in greater detail in Section IV, the executive branch seems unlikely to advance the recommended reforms in light of Governor Schwarzenegger's veto record on criminal justice reform bills in recent legislative sessions.<sup>100</sup> In addition, the state legislature would be hard pressed to act on the costly recommendations set forth by the Commission given both the current budget crisis and the legislature's history of gridlock with the executive on criminal justice reform issues. The future of reform in the administration of the death penalty system in California therefore remains uncertain at best, and it is not unreasonable to presume that the Commission's

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94. *Id.* at 143.

95. *Id.*

96. CCFAJ Report, *supra* note 2, at 143.

97. *Id.*

98. *Id.* at 144.

99. *Id.* at 145-46.

100. See Press Release, California Commission on the Fair Administration of Justice, Commission Chair John Van De Kamp Responds to Governor's Vetoes of Critical Criminal Justice Reform Bills Passed by California State Legislature (Oct. 18, 2007), available at <http://www.ccfaj.org/documents/press/Press17.pdf> (last visited Apr. 5, 2009).

recommendations will remain only aspirational.

### III. DEATH PENALTY STUDY AND REFORM EFFORTS IN ILLINOIS AND NEW JERSEY

The California Commission's review and analysis of the death penalty system was the first such effort made in the state since the current death penalty statute was enacted in 1977. It was not, however, the first state death penalty commission established in the country. During the past decade, a number of states – including Arizona, Connecticut, Delaware, Illinois, Indiana, Kansas, Maryland, Nebraska, Nevada, New Jersey, North Carolina, Pennsylvania, Tennessee, Virginia, and Washington – have responded to problems in the fairness and accuracy of death penalty systems by creating or seeking to create death penalty commissions with mandates similar to the California Commission's.<sup>101</sup> In some states, commission reports have resulted in moratoria or abolition of the death penalty, while other states have upheld the death penalty system and either taken measures to address flaws identified by the commissions or maintained the status quo.<sup>102</sup>

This section will explore the genesis, recommendations, and aftermath of two such state commissions on the death penalty: those in New Jersey and Illinois. These states were selected because they present very different political climates regarding death penalty issues, and because the commissions they created were distinct in their origins, mandates, and structures. As such, they provide some of the richest examples of the possibilities of independent state commissions to promote reform in the administration of the death penalty. The New Jersey and Illinois Commissions also differ in significant ways from one another and from the California Commission, thus serving to highlight how various factors contribute to differences in the recommendations produced by and reforms enacted as a result of death penalty commissions.

#### A. *The Case of Illinois*

On January 18, 2000, Steve Manning became Illinois' thirteenth exonerated prisoner in the modern death penalty era.<sup>103</sup> Twelve days later, then-Governor George Ryan declared a moratorium on the death penalty, citing concerns that the system did not sufficiently safeguard against executions of the innocent.<sup>104</sup> Governor Ryan issued an executive order establishing an

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101. See Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions*, 10 PSYCHOL. PUB. POL'Y & L. 577 (2004).

102. See Equal Justice USA, *Moratorium Now!*, State by State, <http://www.ejusa.org/> (last visited Apr. 5, 2009).

103. Northwestern School of Law's Center on Wrongful Convictions, *Clemency: The Illinois Experience, Chronology of Events*, <http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/chronology.html> (last visited Apr. 5, 2009).

104. *Id.*

independent, bipartisan commission tasked with determining whether and what reforms would ensure justice and accuracy in the administration of the death penalty in Illinois.<sup>105</sup>

The order stated at the outset that “there have been persistent problems in the administration of the death penalty as illustrated by the thirteen individuals on death row who have had their death sentences and convictions vacated by the courts.”<sup>106</sup> These cases “raised serious concerns with respect to the process by which the death penalty is imposed.”<sup>107</sup> The order established the Governor’s Commission on Capital Punishment “[t]o study and review the administration of the capital punishment process in Illinois to determine why that process has failed in the past, resulting in the imposition of death sentences upon innocent people.”<sup>108</sup> The Governor’s Commission was tasked with exploring opportunities for improvement of the process and making recommendations to the legislature and court to “ensure the application and administration of the death penalty in Illinois is just, fair and accurate.”<sup>109</sup>

Members of the Governor’s Commission were appointed by Governor Ryan, and included former federal and state prosecutors, federal judges, senators, public defenders, private attorneys, and other public servants and individuals working in the public interest.<sup>110</sup> The Governor’s Commission held a number of public hearings, at which victims’ families, anti-death penalty advocates, experts in death penalty-related fields, and other stakeholders testified as witnesses.<sup>111</sup> The Governor’s Commission specifically studied the risk of wrongful convictions and executions, examining intensively the thirteen death row exonerations in the state.<sup>112</sup>

The Governor’s Commission released its final report in April of 2002.<sup>113</sup> Among its many recommendations, the report called for: reducing of the number of special circumstances for death eligibility from twenty<sup>114</sup> to five to ensure that prosecutors sought death for only the “worst of the worst” cases; oversight and approval of local district attorney’s decisions to seek death by a specially created statewide commission; increased funding for defense trial counsel; and videotaping of questioning of suspects in capital cases.<sup>115</sup>

Although the report of the Governor’s Commission called for prompt and meaningful legislative action, the Illinois legislature failed to enact many of the

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105. Exec. Order No. 2000-4 (Ill. 2000).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Ill. Comm’n Report, *supra* note 6, at v-vii.

111. *Id.* at i.

112. *Id.*

113. *Id.*

114. *Id.* at 5.

115. *Id.* at 19-38.

key recommendations.<sup>116</sup> On January 11, 2003, after ongoing investigations led to the exoneration of an additional forty-two people on death row and the state held a series of public hearings on clemency, Governor Ryan granted blanket commutations of all 167 individuals remaining on death row in Illinois.<sup>117</sup> Governor Ryan's successor, Rod Blagojevich, has maintained the moratorium.<sup>118</sup>

### B. *The Case of New Jersey*

In 2005, the New Jersey legislature made a number of findings regarding the administration of the death penalty. The emphatic and sweeping nature of these legislative statements merits quoting in full:

Life is the most valuable possession of a human being; the State should exercise utmost care to protect its residents' lives from homicide, accident, or arbitrary or wrongful taking by the State;

The experience of this State with the death penalty has been characterized by significant expenditures of money and time;

The financial costs of attempting to implement the death penalty statutes may not be justifiable in light of the other needs of this State;

There is a lack of any meaningful procedure to ensure uniform application of the death penalty in each county throughout the State;

There is public concern that racial and socio-economic factors influence the decisions to seek or impose the death penalty;

There has been increasing public awareness of cases of individuals wrongfully convicted of murder, in New Jersey and elsewhere in the nation;

The Legislature is troubled that the possibility of mistake in the death penalty process may undermine public confidence in our criminal justice system;

The execution of an innocent person by the State of New Jersey would be a grave and irreversible injustice;

Many citizens may favor life in prison without parole or life in prison without restitution to the victims as alternatives to the death penalty; and

In order for the State to protect its moral and ethical integrity, the State must ensure a justice system which is impartial, uncorrupted, equitable, competent, and in line with evolving standards of decency.<sup>119</sup>

As a result of these findings, the legislature established a commission to

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116. See generally Thomas P. Sullivan, *Efforts to Improve the Illinois Capital Punishment System: Worth the Cost?* 41 U. RICH. L. REV. 935 (2007).

117. Northwestern School of Law's Center on Wrongful Convictions, *Clemency: The Illinois Experience, Chronology of Events*, <http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/chronology.html> (last visited Apr. 15, 2009).

118. Equal Justice USA, *Moratorium Now! State by State*, <http://www.ejusa.org/> (last visited Jan. 15, 2009).

119. Act of Jan. 12, 2006, ch. 321, N.J. Laws vol. II 2005 (enacted).

broadly assess the functionality and justifiability of the state's death penalty system.<sup>120</sup> The statute required that commission members reflect the diversity of the New Jersey general population.<sup>121</sup> The legislature detailed how members were to be appointed, which public officials were to appoint them (some by the governor, some by the legislature), and the offices or organizations from which they would be drawn.<sup>122</sup> Like the California and Illinois commissions, the New Jersey Commission held a number of public hearings and took testimony from diverse witnesses, including defense attorneys and prosecutors, victims' families, academic experts, and law enforcement officials.<sup>123</sup>

In stark contrast to the California and Illinois Commissions, the New Jersey Commission's January 2007 final report stated that "[t]here is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent."<sup>124</sup> The Commission found that the death penalty was more costly than life imprisonment without the possibility of parole, and that the latter alternative would ensure public safety and satisfy penological interests.<sup>125</sup> The Commission also stated that although there was no evidence of racial bias in the state's application of the death penalty, the risk of disproportionality remained a concern.<sup>126</sup> Further, the Commission found that the actual risk of executing an innocent person could not be justified by any interest in executing those guilty of murder.<sup>127</sup> Finally, the Commission reported evidence that the death penalty was out of step with state and national evolving standards of decency.<sup>128</sup>

On the basis of these findings, the New Jersey Commission made two recommendations: first, that the death penalty be abolished and replaced with life imprisonment without the possibility of parole, and second, that any resulting cost savings be used to benefit survivors of homicide victims.<sup>129</sup> Within one year of publication of the Commission's report, the New Jersey legislature passed a bill to abolish the death penalty and replace it with life imprisonment without the possibility of parole.<sup>130</sup> The act was signed by the Governor on December 12, 2007.<sup>131</sup> New Jersey thus became the first state to

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120. *Id.*

121. *Id.*

122. The act identified specific victims rights groups, public defenders, attorney generals, bar associations, democrats, republicans, and religious/ethical community leaders. *Id.*

123. N.J. Comm'n Report, *supra* note 6, at 4.

124. *Id.* at 2.

125. *Id.* at 31-34.

126. *Id.* at 41-45.

127. *Id.* at 51-55.

128. *Id.* at 35-40.

129. N.J. Comm'n Report, *supra* note 6, at 4.

130. Act of Jan. 12, 2006, ch. 321, N.J. Laws vol. II 2005 (enacted).

131. *Id.*

repeal its death penalty statute legislatively in the post-*Gregg* era.<sup>132</sup>

#### IV. A COMPARISON OF THE CALIFORNIA, ILLINOIS, AND NEW JERSEY DEATH PENALTY COMMISSIONS AND ANALYSIS OF THEIR ROLES IN PROMOTING CHANGE

The California, Illinois, and New Jersey Commissions were structurally and methodologically similar. All three were tasked with, among other things, assessing the risk of wrongful convictions and executions.<sup>133</sup> All three were comprised of diverse, bipartisan members.<sup>134</sup> And all three convened and deliberated over the course of several years, during which they considered a range of evidence representing various views on the death penalty.<sup>135</sup>

Despite these similarities, the three Commissions differed significantly both in terms of the recommendations they produced and their success in ultimately prompting reform. This section discusses the Commissions' differences and explores how their findings and recommendations impacted death penalty reform efforts in their respective states. First, the section highlights each state's judicial, legislative, and executive branches' postures regarding death penalty issues, and describes their impact on the viability of the Commissions' recommendations. Second, the section describes differences in Commissions' scopes of study and discusses the influence the Commission's mandates had on the nature and outcome of their recommendations. Finally, the section argues that the structure and scope of the Commissions were themselves expressions of extant political will to reform the states' death penalty systems. Throughout this analysis, the New Jersey and Illinois experiences will serve to deepen an understanding of the California Commission, its political context, and the likelihood that it will lead to meaningful reform.

##### A. *Judicial, Legislative, and Executive Attitudes Toward the Death Penalty and Their Impact on the New Jersey, Illinois, and California Commission Experiences*

###### 1. *New Jersey: Convergence*

Jessica Henry observes that abolition in New Jersey resulted from a "unique set of converging factors," including judicial, legislative, and executive

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132. In April 2009, the State of New Mexico became the second state to legislatively abolish the death penalty. H.B. 285, 2009 Reg. Sess. (N.M. 2009) (enacted). Interestingly, New Mexico had not created a commission to study the administration of the death penalty in its state.

133. See S.R. 44, 2003-2004 Sess. (Ca. 2004) (enacted); Act of Jan. 12, 2006, ch. 321, N.J. Laws vol. II 2005 (enacted); Exec. Order No. 2000-4 (Ill. 2000).

134. *Id.*

135. CCFAJ Report, *supra* note 2, at 113; Ill. Comm'n Report, *supra* note 6, at v-vii; N.J. Comm'n Report, *supra* note 6, at 4.

branch actions concerning the administration of the state's death penalty.<sup>136</sup> Specifically, Henry cites the high reversal rate of capital convictions and/or sentences in the New Jersey Supreme Court as an influential factor in political abolition efforts.<sup>137</sup> Henry also argues that Democratic leadership in the legislature and a strongly anti-death penalty Democratic governor were instrumental in the successful abolition of the death penalty in the state.<sup>138</sup> The political branches were motivated to action by non-profit and religious organizing against the death penalty, public attention to the risk of wrongful executions, concerns about the costliness of the death penalty system, and the fact that New Jersey did not perform a single execution during the post-*Gregg* era.<sup>139</sup> Finally, Henry stated that the Commission report itself was an important stimulus in the legislature's vote to abolish the death penalty.<sup>140</sup>

## 2. *Illinois: Executive Mandate*

Whereas New Jersey experienced a convergence of factors favorable to abolition, the blanket commutation and moratorium in Illinois resulted more from the decisive, singular actions of the executive. Indeed, the success of the moratorium effort in Illinois was borne in a starkly different judicial and political environment. In contrast to New Jersey, the Illinois Supreme Court had a significantly lower reversal rate of capital convictions; between 1977 and 2002, approximately one-half of Illinois capital convictions and/or sentences were reversed on direct appeal or in post-conviction proceedings.<sup>141</sup> During the same time period, Illinois had executed a total of 12 people since the state's death penalty statute was enacted in 1977.<sup>142</sup>

In addition, executive leadership in Illinois differed from that of New Jersey with respect to partisan affiliation and position on the death penalty. Illinois' Governor Ryan, a Republican, was an outspoken supporter of the death penalty at the time of his election in 1999.<sup>143</sup> During the course of his term, however, unrelenting and highly public investigations into wrongful convictions by the media and non-governmental organizations spurred the Governor to issue a moratorium on the death penalty and establish the

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136. Jessica S. Henry, *New Jersey's Road to Abolition*, 29 JUST. SYS. J. 408, 416 (2008).

137. *Id.* at 410-12.

138. *Id.* at 418.

139. *Id.* at 409, 417-18.

140. *Id.* at 413-16.

141. Ill. Comm'n Report, Technical Appendix, Reversed / Affirmed Status of Cases, tbls. 13-15, available at [http://www.idoc.state.il.us/ccp/ccp/reports/technical\\_appendix/research\\_report.html](http://www.idoc.state.il.us/ccp/ccp/reports/technical_appendix/research_report.html) (last visited Apr. 5, 2009).

142. Death Penalty Information Center State by State Database, Illinois, available at [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited Apr. 5, 2009).

143. Northwestern School of Law's Center on Wrongful Convictions, Clemency: The Illinois Experience, Governor Ryan's Address at NU Law, <http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/RyanSpeech.html> (last visited Apr. 5, 2009).

Governor's Commission.<sup>144</sup>

Despite the Governor's altered course on death penalty issues and the Commission's recommendations to limit death penalty eligibility, the majority-Democratic Illinois legislature stalled in enacting the reforms.<sup>145</sup> In a 2003 speech at Northwestern Law School, Governor Ryan cited his frustrations at legislative inaction, stating that "[i]t is difficult to see how the system can be fixed when not a single one of the new reforms proposed by my Capital Punishment Commission has been adopted. Even the reforms prosecutors agree with haven't been adopted."<sup>146</sup> The Governor also expressed concern with the judiciary's lack of reform efforts: "My Commission recommended the Supreme Court conduct a proportionality review of our system in Illinois. . . . Instead, [appellate courts'] tinker with a case-by-case review as each appeal lands on their docket."<sup>147</sup>

In the context of this legislative and judicial inaction, Governor Ryan exercised executive authority to overcome the impasse. Fearing continued inertia in enacting the Commission's recommendations, Governor Ryan announced blanket commutations of all death row inmates; the moratorium he instated continues to the present day.<sup>148</sup>

### 3. *California: Fracture and Gridlock*

The judicial and political climate surrounding the death penalty in California diverges in several significant ways from that of Illinois and New Jersey. The California Supreme Court reverses less than one-third of capital cases on direct appeal or in state post-conviction proceedings.<sup>149</sup> California has the largest death row population in the country, and has executed 13 people in the modern death penalty era.<sup>150</sup> Unlike Illinois, California's executive branch is unlikely to act unilaterally to end executions, given Governor Schwarzenegger's support for the death penalty.<sup>151</sup> Furthermore, whatever

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144. Northwestern School of Law's Center on Wrongful Convictions, Clemency: The Illinois Experience, Chronology of Events, <http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/chronology.html> (last visited Apr. 5, 2009).

145. Illinois State Representatives, 93rd General Assembly, *available at* <http://www.ilga.gov/house/default.asp?GA=93> (last visited Apr. 5, 2009); Illinois State Senators 93rd General Assembly, *available at* <http://www.ilga.gov/senate/default.asp?GA=93> (last visited Apr. 5, 2009).

146. Northwestern School of Law's Center on Wrongful Convictions, Clemency: The Illinois Experience, Governor Ryan's Address at NU Law, <http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/RyanSpeech.html> (last visited Apr. 5, 2009).

147. *Id.*

148. *Id.*

149. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 50 tbl. 4 (2000), *available at* <http://www2.law.columbia.edu/instructionalservices/li ebman/Liebman%20Study/docs/1/section8a-d.html> (last visited Apr. 5, 2009).

150. Death Penalty Information Center State by State Database, California, *available at* [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited Apr. 5, 2009).

151. See Press Release, Office of the Governor, Gov. Schwarzenegger Issues Statement on U.S. Supreme Court Ruling Upholding Lethal Injection (Apr. 16, 2008), *available at* <http://gov.ca>.

death penalty reforms the legislature may enact are likely to be rejected by Governor Schwarzenegger given his record of vetoing past criminal justice reform efforts recommended and sponsored by the California Commission on the Fair Administration of Justice.<sup>152</sup> Thus, unlike New Jersey, California's political branches lack synergy and a common vision of the need for death penalty reform.

An additional obstacle to legislative action that is unique to California is the lifetime term limit ban for California legislators.<sup>153</sup> The term limits arguably destabilize long-term agendas and deprive the legislature of institutional knowledge and experience it needs to act on complex political issues like the death penalty.<sup>154</sup>

Thus, in light of judicial, legislative, and executive branches' responses to death penalty issues, the California Commission's recommendations are subject to a distinct combination of factors characterized more by fracturing and gridlock than by political unity or executive leadership on death penalty reform. Although the ultimate impact of the California Commission's recommendations remains to be seen, they are likely to meet a very different fate, precipitated by different conditions, than those of the New Jersey and Illinois Commissions.

*B. Commissions' Scope of Study as an Indicator of Their Effectiveness in Bringing About Change*

While government attitudes toward the death penalty were powerful determinants of reform efforts in New Jersey and Illinois, the Commissions themselves played an important role in prompting political action. This section explores how the scope of the New Jersey and Illinois Commissions' study impacted the breadth and viability of their recommendations and, by way of comparison, discusses what the California Commission's mandate tells us about its usefulness as a tool for reform.

In their analysis of the moratorium movement in the United States, Charles Lanier and James Acker assert that the study of death penalty systems is an essential first step in death penalty policy reform.<sup>155</sup> They posit that, for death penalty commissions to amount to more than "shibboleths, without

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gov./press-release/9336/ (last visited Apr. 5, 2009).

152. See Press Release, California Commission on the Fair Administration of Justice, Commission Chair John Van De Kamp Responds to Governor's Vetoes of Critical Criminal Justice Reform Bills Passed by California State Legislature (Oct. 18, 2007), available at <http://www.ccfaj.org/documents/press/Press17.pdf> (last visited Apr. 5, 2009). For a description of other, non-capital criminal justice issues reported on by the Commission on the Fair Administration of Justice, see *supra* note 35.

153. See CAL. CONST. art. IV, 1.5-2 (amended through Proposition 140: Limits on Terms of Office, Legislators' Retirement, Legislative Operating Costs. Initiative Constitutional Amendment).

154. BRUCE E. CAIN & THAD KOUSSER, ADAPTING TO TERM LIMITS: RECENT EXPERIENCES AND NEW DIRECTIONS (Pub. Policy Inst. of California 2004).

155. Lanier & Acker, *supra* note 101, at 604.

substance,” commission agendas must be carefully designed and their studies comprehensively executed.<sup>156</sup> In order to produce more complete and substantive recommendations, the authors argue, commissions’ areas of investigation should not be limited to innocence, availability and competency of defense counsel, and racial disparities, but must include a broader constellation of issues.<sup>157</sup>

Of the three Commissions discussed here, New Jersey’s experience best bears out Lanier and Acker’s constellation thesis. The mandate of the New Jersey Commission was by far the broadest of the three.<sup>158</sup> The enabling statute in New Jersey demanded an inquiry into the overall justifiability of the death penalty in light of its costs, biases, procedural deficiencies, waning public support, and available alternatives.<sup>159</sup> The breadth of the New Jersey Commission’s inquiry was articulated succinctly in its first enumerated task, which called for an examination of “whether the death penalty rationally serves a legitimate penological intent such as deterrence.”<sup>160</sup> The New Jersey statute also required that the Commission determine “whether the penological interest in executing some of those guilty of murder is sufficiently compelling that the risk of an irreversible mistake is acceptable.”<sup>161</sup> Thus, rather than demand an inquiry into the possibility of wrongful executions, as the Illinois and California mandates did, the New Jersey statute unequivocally stated that there was an actual risk of executing innocent individuals in the current system.<sup>162</sup> Because the New Jersey legislature charged the Commission with assessing the justifiability of the death penalty system as a whole, inclusive of a number of financial, social, and legal concerns, the Commission was better positioned to call for the most sweeping change possible to the state death penalty system: its abolition.<sup>163</sup>

The Illinois experience is similarly consistent with Lanier and Acker’s constellation argument. In contrast to New Jersey, the Governor’s Commission in Illinois was tasked almost exclusively with studying the risk of wrongful convictions and executions.<sup>164</sup> The executive order establishing the Governor’s

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156. *Id.*

157. The authors suggest that while commissions should continue to study traditional issues of innocence, access to competent counsel, and race, other important areas of focus should include appellate and post-conviction judicial review of capital cases, clemency, economic costs of the death penalty system, long-term confinement of inmates on death row, deterrence, future dangerousness of death row inmates, jury selection, jury instructions and decision-making, discretion and misconduct in prosecutorial charging, statutory exclusion from death eligibility, sentencing alternatives, and the impact of the death penalty on family members of homicide victim and death row inmates. *Id.*

158. Act of Jan. 12, 2006, ch. 321, N.J. Laws vol. II 2005 (enacted).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. See S.R. 44, 2003-2004 Sess. (Ca. 2004) (enacted); Exec. Order No. 2000-4 (Ill. 2000)

Commission in Illinois affirmed public and gubernatorial support for the death penalty, but expressed a need to ensure that the system's administration minimized the risk of wrongful convictions and executions.<sup>165</sup> Consistent with its scope of study, the Governor's Commission recommended a number of reforms that would have served to limit death penalty eligibility and thus reduce the risk of wrongful executions.<sup>166</sup> The recommendations were thus neatly tailored to the Commission's mandate. It is unclear whether enactment of these limited recommendations would have ameliorated Governor Ryan's trepidations about the risk of error in the system. As described above, legislative inertia led him to exercise his executive powers to issue a blanket commutation; in so doing, he effected far more sweeping changes than those proposed by the Commission itself.<sup>167</sup>

The mandate of the California Commission was more similar to that of Illinois than that of New Jersey. California's Senate Resolution 44 expressed concern about the growing number of exonerations resulting from DNA evidence and observed that several other states had established commissions for the purpose of avoiding wrongful convictions and executions.<sup>168</sup> The resolution established the Commission to assess these failures and minimize risks by recommending improvements in the administration of the death penalty system.<sup>169</sup>

Thus, although the California Commission addressed some of the areas of investigation suggested by Lanier and Acker, the enabling resolution narrowly focused its scope of study on the risk of wrongful executions.<sup>170</sup> The Commission failed to give meaningful consideration to a number of informative topics, such as deterrence, future dangerousness, jury selection and decision-making, prosecutorial charging practices, and the impact of imprisonment on death row. Ultimately, the California Commission fell short of recommending either LWOP or a limitation of death penalty eligibility factors.<sup>171</sup> This was arguably due to fact that the assessment of the current system was not conducted in light of costs, risks, and the public interest. However, given that the Illinois Commission recommended a substantial narrowing of death penalty factors after being tasked with a narrow mandate similar to that of California's suggests that other factors were at play in determining the scope of the California Commission's recommendations. As

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(enacted).

165. Exec. Order No. 2000-4 (Ill. 2000).

166. Ill. Comm'n Report, *supra* note 6, at i-ii.

167. Northwestern School of Law's Center on Wrongful Convictions, Clemency: The Illinois Experience, Governor Ryan's Address at NU Law, <http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/RyanSpeech.html> (last visited Apr. 5, 2009).

168. S.R. 44, 2003-2004 Sess. (Ca. 2004) (enacted).

169. *Id.*

170. *Id.*

171. CCFAJ Report, *supra* note 2, at 137-47.

discussed in the next section, these same factors are likely to influence the viability of the California Commissions' recommendations as tools for actual reform.

*C. The Structure and Scope of Commissions as Expressions of Political Will to Reform the Death Penalty*

In this section, I argue that the scope of a death penalty commission's mandate begs the question of whether a commission's recommendations will prompt governmental action for two reasons. First, the more inclined a government is to end the death penalty, the more latitude it will give a commission to research flaws in the state's death penalty system. Second, commission members may be less likely to suggest recommendations that fall outside the realm of actual political possibility. In other words, if commission members perceive, based on the commission's origins and mandate, that the government will likely act to limit or end the death penalty, they may be more inclined to recommend such changes. If, on the other hand, a commission originates in a context of political fracturing and gridlock on death penalty issues, members may be less likely to take political risks in recommending reforms.

The New Jersey legislature's creation of the Commission lent factual support for and political legitimacy to the abolition effort that the legislature seemed predisposed to make. In Illinois, meanwhile, the Commission originated on the desk of Governor Ryan, who just months before had declared a moratorium on the death penalty.<sup>172</sup> Upon issuance of the Commission's report, Governor Ryan acted unilaterally to commute death penalty systems after the legislature and judiciary failed to promptly implement the Commission's recommendations to reduce the risk of wrongful executions.

In California, the legislature's decision to create a narrow mandate for the Commission suggests that it will implement the Commission's costly recommendations conservatively, if at all. In spite of the state executive's pro-death penalty platform and the judiciary's low reversal rate in capital cases, it is arguable that tasking the California Commission with a mandate to analyze the global justifiability of the death penalty system would have enabled the Commission to put forth one of the alternatives it suggested as a fully developed recommendation. At the same time, Commission members may have been more inclined to recommend limiting or ending the death penalty had they known that there would be stronger legislative will to act on such measures. Had the legislature been armed with broader recommendations from the Commission, it would have had more political coverage to propose bills

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172. Press Release, Illinois Government News Network, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=359> (last visited Apr. 5, 2009).

that meaningfully addressed flaws in the administration of the death penalty, without draining the state coffers as implementation of the Commission's actual recommendations will require.

The membership structures of the New Jersey, Illinois, and California Commissions further supports the idea that the death penalty commissions generally are barometers of pre-existing political will to reform the death penalty. The New Jersey legislature set forth in great detail the number of members to be appointed by the legislature and those to be appointed by the executive branch; it also specified that a certain number of members were to be appointed based on organizational political party affiliation.<sup>173</sup> In Illinois, the executive order creating the Governor's Commission mandated the appointment of fifteen total Commission members.<sup>174</sup> The Governor was solely responsible for appointing members, with no guidelines from the legislature as to their affiliations or backgrounds.<sup>175</sup> In California, the enabling resolution stated that members were to be appointed by a sole body, the Senate Rules Committee.<sup>176</sup> The resolution did not provide guidelines as to the number of prospective members or their professional or political affiliations.<sup>177</sup>

Although membership of the three Commissions was similar in terms of bipartisanship and professional experience, differences in appointment structures arguably led to differences in the degree of transparency in the Commissions' processes and accountability of their members. Furthermore, diversification of appointing authorities better communicates the breadth of political interest in and support of death penalty reform efforts. The detailed appointment structuring of the New Jersey Commission supports this theory.

#### CONCLUSION

Franklin Zimring has stated that death penalty commissions are "an important indicator of where we are in the discourse about the death penalty."<sup>178</sup> If so, what does the experience of the California Commission tell us about the state of death penalty reform efforts in this state? The California Supreme Court's low reversal rate, the number of executions in the post-*Gregg* era, and the lack of media focus on wrongful convictions in the state have all served to minimize pressures on political actors to reform the death penalty. The Commission's report has arguably done little to fill the gap. Faced with the double handicap of the Commission's costly recommendations and a growing state budget crisis, it is reasonable to assert that the legislature is

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173. Act of Jan. 12, 2006, ch.321, N.J. Laws vol. II 2005 (enacted).

174. Exec. Order No. 2000-4 (Ill. 2000).

175. *Id.*

176. S.R. 44, 2003-2004 Sess. (Ca. 2004) (enacted).

177. *Id.*

178. Franklin E. Zimring, *Symbol and Substance in the Massachusetts Death Penalty Commission Report*, 80 IND. L. J. 113, 120 (2005).

unlikely to enact all or even most of the reforms advised by the Commission. In addition, short of a dramatic shift in Governor Schwarzenegger's views on the subject, there is unlikely to be any movement for change originating from executive action. Indeed, even if the legislature successfully passed death penalty reform measures, the Governor's veto record on past criminal justice reform bills suggests that he would not sign them into law. Where the risk of wrongful convictions was the sole hook of the California Commission, and the Commission's proposed remedy requires pouring more money into an already overtaxed system, enactment of the Commission's recommendations will likely remain chimerical.

Ultimately, if a state government's means and modes of establishing a death penalty commission are themselves indicators of the government's willingness to reform capital punishment systems, one must ask if commissions serve any function aside from providing political cover for governments, or whether they are merely academic exercises. One could argue that where governments are less politically willing or able to meaningfully reform the death penalty, commissions lose credibility as tools for reform or lull the public and political actors into complacency.<sup>179</sup> On the other hand, perhaps even those death penalty commissions whose recommendations are narrow and lie dormant – like Illinois' and, perhaps, California's – serve a tipping point function, adding the gravity of public exposure to systems so flawed they will eventually “fall of [their] own weight.”<sup>180</sup>

Of course, commission mandates, structures, and legal-political contexts are but a few factors among many that may influence a commission's degree of success in tipping the balance toward reform in state death penalty systems. Discussions of commissions' role in reform efforts would benefit from further research on how death penalty commissions are funded, how commissions' recommendations have been shaped by their ability to gather information on prosecutorial charging practices and geographic disparities in administering the death penalty, and whether current state and national financial crises will add significant political weight to commission findings regarding the costs of administering the death penalty.

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179. See Robert C. Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1299 (2005). Schehr argues that commissions may allow for political and public complacency in acting to address death penalty system flaws by serving to diffuse public criticism of death penalty systems, thus suppressing reform efforts or may be established in a manner that aims to maintain the status quo.

180. CCFJA Report, *supra* note 2, at 115.