Liberate the capital docket by sending it to the Court of Appeal

Overview

California Supreme Court
Justice Goodwin H. Liu recently wrote that "the promise of justice in our death penalty system is a promise that California has been unable to keep."[1] He's right. The state has
struggled for decades to resolve the policy debate over capital punishment after the California Supreme Court banned it in 1972.[2] The electorate reinstated capital
punishment by passing Proposition 17 in 1972;[3] the legislature re-enacted the death penalty statute in 1977; the electorate expanded its application with Proposition 7 in 1978; and the voters attempted to accelerate executions by enacting Proposition 66 in 2016.[4] After forty years of
volleying this issue between various policymakers, the state is no closer to consensus.

And now the state faces a
dilemma: while Proposition 66 ordered faster executions, in March 2019 Governor Gavin Newsom signed an executive order halting executions.[5] This sets up a conflict
that can only be finally resolved by returning to the ballot; indeed, a draft initiative is currently circulating in the legislature.[6] Since an initiative is likely, we propose that it divest the California Supreme Court of its exclusive jurisdiction over capital cases, permitting the Supreme Court to better focus its limited bandwidth on clarifying the law and safeguarding our constitutional rights. The Court of Appeal has the institutional competence to handle initial appeals, and the Supreme Court will retain its discretionary review authority to address death penalty law as needed.

An initiative amendment could make capital case review non-exclusive to the California Supreme Court

Considered alone, Governor
Newsom's executive order is a fine idea. It pauses the capital punishment system's one irreversible act of executing condemned inmates while other solutions are considered. And those solutions are sorely needed: regardless how one feels about the death penalty's morals, there is little basis to argue that the existing system is a success. Yet in such a complex area of the law it is impossible to consider the executive order in isolation; no one could think that the order is the final word; and the order cannot hold death penalty litigation in stasis. Some further action is necessary, and because the death penalty is permitted by the California constitution (Article I, section 27), changing that fact requires electorate approval at the ballot.

We assume that, consistent with its
recent past acts, the electorate will vote to keep capital punishment. So we suggest an alternative: removing the California Supreme Court's exclusive capital case jurisdiction. Today, the California Supreme Court must hear every merits appeal from a death judgment. Only that court may hear those appeals. Otherwise,
Article VI, section 11(a) assigns initial appellate jurisdiction mostly to the Court of Appeal:

> *The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute. When appellate jurisdiction in civil causes is determined by the amount in controversy, the Legislature may change the appellate jurisdiction of the courts of appeal by changing the jurisdictional amount in controversy.*

This provision creates a
bottleneck in the state's capital docket. With just seven justices, the California Supreme Court has limited resources to process the voluminous files in dozens of active capital cases — while still deciding other important civil and non-capital criminal cases. As a blue-ribbon commission reported in 2008,

the state endures “a severe backlog in the review of appeals and habeas petitions before the California Supreme Court.”[7] Proposition 66 did little to address this problem, and arguably made it worse by attempting to impose an arbitrary five-year deadline for resolving capital cases — with no enforcement mechanism and little guidance.[8] And the bottleneck remains.

Until California arrives at consensus on this issue (by abolishing the death penalty, improving the existing system, or something else) removing the California Supreme Court’s exclusive capital case jurisdiction will improve the current situation. This can be done with either (or both) of two actions: the electorate can pass an initiative amendment to make capital cases appealable just as all other cases are, or one to permit transferring capital cases.

By initiative, the electorate could strike the first sentence in Article VI, section 11(a), making capital cases reviewable in the Court of Appeal just like most other cases. The new section would read:

> ~~*The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception c*~~*Courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute. When appellate jurisdiction in civil causes is determined by the amount in controversy, the Legislature may change the appellate jurisdiction of the courts of appeal by changing the jurisdictional amount in controversy.*

Ending exclusive high court capital jurisdiction has many advantages. This simple change will end the capital case logjam by spreading the work of reviewing death judgments among the appellate districts. Eliminating this provision should improve the speed of death penalty review and reduce the burden on the Supreme Court, freeing it to focus its resources on its true purposes: safeguarding constitutional rights, and ensuring clarity in the law on issues of statewide importance. The high

court would retain its discretionary review power in capital cases under Article VI, section 12(b): “The Supreme Court may review the decision of a court of appeal in any cause.” No longer would the high court need to devote pages to declining to revisit legal arguments advanced by death penalty counsel. With our proposal, the court can take on novel or important questions as needed through its discretionary review and leave most of the appellate work to the Court of Appeal as the institution most prepared to address wide-ranging appeals on repeat issues.

The need for increased judicial resources is a possible objection here. But keeping the death penalty requires more resources regardless of which court has jurisdiction. This was a core flaw in Proposition 66: it required more work, faster, with no additional resources. Our proposal at least has the advantage of spreading the same volume of work among more courts. The 100 appellate justices may well wish for more staff attorneys if they start receiving some capital cases, but the high court has made do with its seven justices handling every capital case. And the Supreme Court’s capital central staff could continue assisting Court of Appeal justices as needed.

This is not an original idea; proposals like this have been around for years. So far, the substantial issues raised by such a change made it just as politically difficult to achieve as a more complex systemic overhaul. Yet now may be this idea’s time: the voters approved Proposition 66, which involved many complex changes to the Penal Code. A simple fix like this may have more voter appeal, and be politically easier to achieve, than more complex and larger changes.

An initiative amendment could make capital cases transferable

Alternatively, or combined with our suggestion above, the electorate could make capital cases transferable. Under Article VI, section 12(a) the California Supreme Court may transfer Court of Appeal cases: to itself, from itself to the Court of Appeal, or between appellate districts. But subdivision (d) bars transferring capital cases: “This

section shall not apply to an appeal involving a judgment of death."

Deleting subdivision (d) would make capital cases transferable like every other case on the state high court docket. Even if that court remains vested with exclusive initial appellate jurisdiction, it may simply transfer some (or all) of its capital cases to the Court of Appeal. Although this is more procedurally cumbersome than sending capital cases directly to the intermediate court, this approach may strike a balance between respecting the gravity of death judgments and the need to reduce the high court's burden. This approach also provides the high court with a first look and opportunity to retain cases that require its immediate attention. Indeed, the blue-ribbon commission in 2008 endorsed then-Chief Justice Ronald M. George's recommendation to amend the state constitution in exactly this way.[9]

There is a concern that this solution will permit the defense bar to pursue a strategy of repeating arguments across the intermediate courts, resulting in conflicting decisions or a net increase in work for the state judiciary. This concern is unmerited. The California judiciary is already structured with mechanisms (review petitions, grant and hold, depublication) to avoid and resolve those conflicts. And it takes little judicial effort to decline to revisit repetitive legal arguments advanced by death penalty counsel: courts already commonly decline to revisit arguments decided in previous cases.

The chief benefit of transferring capital cases to the Court of Appeal is that it spreads the work around. Untangling new variants on appellate arguments is easier when they are spread across the whole appellate judiciary and not exhausting only the California Supreme Court's time. Ultimately, the high court can always weigh in to sort out thorny issues, using discretionary review to take on novel or important questions as needed.

A third option permits the legislature to act without the electorate

There is another, more aggressive

strategy: amending the statutes that authorize charging capital cases to remove that authority, a legislative act that would not require voter approval. The proposal to distribute capital appeal litigation in the Court of Appeal is a middle ground, compromise solution that presumes capital punishment remains constitutionally permitted in California. And it will remain so, absent a change to Article I, section 27, which provides:

> *All statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. [¶] The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.*

Yet section 27 merely validates the death penalty as a permissible type of punishment under the California constitution.[10] It does not require imposing that penalty. Instead, section 27 was intended only to cancel the decision in *People v. Anderson* (1972) 6 Cal.3d 628 (holding death an impermissibly cruel punishment) and to clarify that capital punishment violates no provision of the California constitution.[11] The authority to charge capital cases relies on the statutes that section 27 says are constitutional.

Those statutes are, as always, subject to amendment or repeal at the legislature's sole discretion. Section 27 itself acknowledges that such statutes are "subject to legislative amendment or repeal by statute, initiative, or referendum." For example, capital punishment is presently authorized by Penal Code section 190.2(a): "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section

190.4 to be true." The legislature only needs to amend section 190.2(a) to remove "death or" to prevent any state prosecutor from charging new capital cases under that statute. And the legislature could give the change retroactive effect.[12]

The legislature has already started the ball rolling on a variant of this idea. Assembly Constitutional Amendment 12, introduced on March 13, 2019, would amend the California constitution to delete Article I, section 27 "and instead would prohibit the death penalty from being imposed as a punishment for any violation of law."[13] This is one solution to our point that abolishing capital punishment requires removing its authorization in the state constitution, which must be presented to the electorate. But an amendment to section 190.2(a) is a statutory act well within the legislature's power that need not be presented to the electorate. The end result is that section 27 remains in place and still permits capital punishment, but the statute that provides for charging capital cases no longer exists — all without the need for an initiative amendment.

Conclusion

Some further step beyond the execution moratorium is necessary. The executive order does nothing to relieve the California Supreme Court's burden. Absent statutory or constitutional changes, the judicial branch must continue processing death penalty cases, assigning capital counsel, and reviewing capital appeals even if a governor freezes the system at the execution end. Proposition 66 requires the courts to proceed with death cases, and every pending capital appeal remains a live action because the death sentences themselves are untouched. The Superior Court will continue to bear the expense of holding death penalty trials, and the California Supreme Court — bound by Proposition 66 — must attempt to meet the "directive rather than mandatory" five-year timeline for judicial review without any additional resources to do so.[14]

Facing that reality, the legislature is weighing initiative amendments for the 2020 ballot. And citizen initiative amendments likely will also be proposed, setting up a repeat of the competing 2016 proposals: Proposition 66 (which passed) and Proposition 62, which would have repealed the death penalty but failed at the ballot. Our proposals deserve consideration because they offer paths that will help the judiciary better achieve justice if the death penalty remains a constitutional option. Two of these proposals will further the electorate's intent (expressed in Proposition 66 in 2016) to expedite capital litigation. The third proposal could permit the legislature to functionally resolve the death penalty question without repeated ballot fights. Any of these proposals will permit the Supreme Court to focus its limited bandwidth on clarifying the law for the entire state and safeguarding our constitutional rights. Short of an electorate decision to end capital punishment, these proposals can effect large improvements.

Capital punishment has always been presented to the voters as a binary choice: keep it or ban it. No one knows what the electorate will do when the death penalty next appears on the ballot. Yet past ballot results show the voters consistently rejecting a capital punishment ban. That past may be prologue. In a Public Policy Institute of California poll released March 28, 2019, just 38% of likely voters favored the death penalty when asked whether someone convicted of first-degree murder should get a death sentence or life in prison with no possibility of parole. But those voters opposed the governor's death penalty moratorium by a narrow 46–44% margin. Our suggestions are a middle path alternative to quixotically presenting the electorate with the same opportunity to ban capital punishment that they have repeatedly declined.

Senior Research Fellow Brandon V. Stracener contributed to this article. With thanks to our colleague David A. Kaiser for his assistance.

---

[1] *People v.*

Potts (2019).

[2] *People v.*
Anderson (1972) at 657.

[3] *People v.*
Frierson (1979); Cal. Const., art.
I, § 27.

[4] *Briggs v.*
Brown (2017) at 822.

[5] Governor's Exec. Order No. N-09-19 (Mar. 13, 2019).

[6] Assem. Const. Amend. No. 12 (2019–2020 Reg. Sess.).

[7] *Potts* (2016), *supra*
note 1 (conc. opn. of Liu, J.) citing Cal.
Com. on the Fair Admin. of Justice, Final Report (2008) at 111, 114–115.

[8] The Supreme Court concluded the five-year limit on
judicial review of death penalty cases was not a mandatory limit. *Briggs* (2017), *supra* note
4, at 857. The alternative would have been declaring that provision
unconstitutional. *Id.* at 862 (conc.
opn. of Liu, J.); *Id*. at 872–73 (conc.
& dis. opn. of Cuéllar, J.).

[9] Commission
Report, *supra* note 7, at 147–48.
The report did note that its proposal should advance only if accompanied by additional
funding.

[10] *Frierson*
at 186.

[11] *People v. Ramos* (1984) at 152 n.6, citing *People v. Super. Court (Engert)* (1982) at 808.

[12] "The Legislature ordinarily makes laws that will apply to events that will occur in the future. Accordingly, there is a presumption that laws apply prospectively rather than retroactively. But this presumption against retroactivity is a canon of statutory interpretation rather than a constitutional mandate. Therefore, the Legislature can ordinarily enact laws that apply retroactively, either explicitly or by implication." *People v. Super. Court (Lara)* (2018) at 307 (citation and quotation omitted). "The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive." *McLung v. Employment Development Dept.* (2004) at 433.

[13] Assem. Const. Amend. No. 12 (2019–2020 Reg. Sess.), *supra* note 6.

[14] See, for example, Justice Liu's *Potts* concurrence, *supra* note 1, and the 2008 Commission Report, both noting the never-implemented recommendations for increasing the Office of the State Public Defender budget by one-third, increasing private attorney compensation for taking on capital cases, and dramatically expanding the Habeas Corpus Resource Center. The "directive rather than mandatory" language comes from Justice Corrigan's opinion in *Briggs*, *supra* note 4, at 823.