


4-6-2017

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Recommended Citation

Cornelius V. Loughery, *California Propositions 62 & 66 as Misguided Models for the Capital Punishment Debate: The Argument for the Inclusion of Catholic Social Teaching and Other Religious Denominations in the Discussion and a Proposed Solution*, 43 J. Legis. 264 (2016). Available at: <http://scholarship.law.nd.edu/jleg/vol43/iss2/5>

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CALIFORNIA PROPOSITIONS 62 & 66 AS MISGUIDED
MODELS FOR THE CAPITAL PUNISHMENT DEBATE: THE
ARGUMENT FOR THE INCLUSION OF CATHOLIC SOCIAL
TEACHING AND OTHER RELIGIOUS DENOMINATIONS IN
THE DISCUSSION AND A PROPOSED SOLUTION

Cornelius V. Loughery[†]

INTRODUCTION

Embedded in the United States' core at the time of the founding was a deep reverence for the gifts bestowed on humanity by its Creator—"that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are *Life, Liberty and the Pursuit of Happiness*."¹ This notion of a human's right to life, however, has become obfuscated over the years through the apparent unsettled development of capital punishment statutes, and court decisions, and value judgments of "arbitrariness" or "capriciousness" with respect to capital punishment death penalty schemes. With that said, public sentiment on the death penalty has shifted considerably in recent years, as indicated by a number of factors—most importantly among those is California's recent ballot initiative to abolish the death penalty.² A close analysis of the discussion leading up to California's November 8, 2016, ballot Proposition—discussed in Part I of this Note—indicates that much of the sentiment reversal within the state can be attributed to the recent spate of exonerations of death row criminals in the United States, the fallacy of the penological justifications for capital punishment and, perhaps most importantly to some commentators, due to the exorbitant costs of execution resulting, in part, from the prolonged appeals process. This Note seeks to demonstrate, however, that while these aforementioned rationales for repeal of the death penalty are of paramount importance and worthy of critical consideration, they do not effectively redress the totality of the underlying issues in the matter of capital punishment. More specifically, the discussion fails to recognize the effects of omitting any real consideration of the views of the Catholic faith and other religious denominations from the discussion surrounding continuation of capital sentencing; that is, the continued deleterious impact on capital

[†] Notre Dame Law School, J.D./MBA Candidate, May 2018. I would like to thank Professor Richard Garnett for his insight and guidance in the development of this Note. Additionally, I would like to thank my parents for teaching me the importance of maintaining a steadfast devotion to my Catholic faith.

¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

² Mike Farrell, *Request for Title and Summary for The Justice That Works Act of 2016*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE (Sept. 15, 2015), <https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0066%20%28Death%20Penalty%29.pdf?>.

legal proceedings caused by the voluntary or involuntary removal of actors who hold these views. As a result, this Note seeks to illustrate why it is imperative that Catholicism and other faiths be incorporated into and inform the discussion concerning the death penalty and its future as an acceptable component of the United States legal system.

Part I of this Note traces the development of the death penalty and repeal attempts in California and the underlying rationale, as found in the official proposition statements and the media's perception conveyed to—and influencing to some extent—the voting public. Part II of this Note outlines the tenets of the Catholic faith and other religious denominations—though the focus is on Catholic Social Teaching—as foundational information for why the problems discussed in Part III of this Note may arise in capital cases. Part III of this Note demonstrates that, while the concerns prompting the repeal (Proposition 62)³ or expediting the process (Proposition 66)⁴ in California were certainly valid, neither ballot initiative adequately incorporated a discussion of three of the core underlying problems with the death penalty in the state as it is currently administered. Namely, the creation of death panels through death qualified jury selection based on faith-based for cause removal and peremptory challenges during voir dire, recusal of judges due to conflicts with their religious beliefs, and the requests of religious based anti-death penalty prosecutors that they not be assigned cases in which the sentence of death is a possibility. Finally, Part IV of this Note discusses why the California approach in its recently passed Proposition 66 is shortsighted, why the possibility for a continuation of the problems discussed in Part III necessitates the inclusion of the beliefs of the Catholic faith and other religious denominations in discussions of the death penalty, and possible solutions working toward abolishment going forward. While the United States prides itself on the separation of church and state—and this Note is not advocating a rejection of this notion or an overhaul of the relationship—the idea of religious views weighing on public policy does not infringe on this principle. Rather, as Kevin Doyle, a New York Capital Defender, aptly stated in a panel discussion on the death penalty, “there is a fundamental misunderstanding about the separation of church and state. It’s not a separation of religious morality and policy.”⁵ With Doyle’s thoughts in mind, the general trend in societal views on capital punishment, and some of the varying reasons underlying these views,⁶ indicate the need for the United States to consider a return to its moral foundations in discussing the death penalty—foundations built on core values influenced, at least to some extent, by religious beliefs.

³ See *infra* Part I, subsection B.

⁴ See *infra* Part I, subsection C.

⁵ Kevin M. Doyle & Charles J. Hynes, *Catholics and the Death Penalty Panel Discussion*, 44 J. CATH. LEGAL STUD. 297, 338 (2005).

⁶ See *infra* Part I, subsection B-C.

I. THE CURRENT STATUS OF THE DEATH PENALTY IN CALIFORNIA. RECENT
PENDING PROPOSITIONS, AND MEDIA PERCEPTION

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

To fully understand capital punishment in California, it is necessary to understand its history. The implementation and administration process of the death penalty in California is best characterized as one of marked turbulence.⁷ From 1893 to 1937, state-conducted executions were carried out by hanging, only to be changed to execution by lethal gas from the years of 1938 through 1967.⁸ However, in 1967, the state underwent an uninterrupted period of twenty-five years in which no executions took place due to court decisions—both state and United States Supreme Court decisions.⁹ Most notably, the California Supreme Court “found that the death penalty constituted cruel and unusual punishment under the California state constitution” in 1972.¹⁰ However, this period of reprieve did not last long, as the death penalty was reinstated by the legislature in 1977. The 1977 legislation was later reaffirmed by voters in 1978 through Proposition 7—the current status of the law today.¹¹ This early instability evident in California’s death penalty legislation has not ceased in the twenty-first century due to questions concerning the method of execution.¹² In the 2006 case of *Morales v. Tilton*, “condemned inmate Michael Angelo Morales’ execution was stayed because of his claim that California’s administration of its lethal injection protocol... would subject him to an unnecessary risk of excess pain and violate the Eighth Amendment’s prohibition on cruel and unusual punishment.”¹³ After the California Department of Corrections and Rehabilitation (CDCR) attempted to mend the lethal injection methodology, a court again “issued an injunction prohibiting CDCR from executing anyone until such time as new lethal injection regulations were promulgated” in the case of *Mitchell Simms v. CDCR*.¹⁴

The foregoing was the backdrop for the recent attempt, prior to Proposition 62, to abolish the death penalty and implement a change to the penal system in which life without parole was the maximum sentence through Proposition 34 in 2012.¹⁵ A re-

⁷ See Cal. Dep’t of Corr. and Rehab., *The History of Capital Punishment in California*, http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html.

⁸ *Id.*

⁹ *Id.* (noting that in 1972 “the California Supreme Court found [] the death penalty constituted cruel and unusual punishment under the California state constitution and 107 condemned inmates were resentenced to life with the possibility of parole. In 1973, the United States Supreme Court held that the death penalty was unconstitutional as it was being administered at that time in a number of states. In November 1972, the California electorate amended the state constitution and in 1973, legislation was enacted making the death penalty mandatory in specified criminal case ... In 1976, the California Supreme Court, basing its decision on a United States Supreme Court ruling earlier that year, held that the California death penalty statute was unconstitutional under the U.S. Constitution because it did not allow mitigating circumstances to be admitted as evidence.”).

¹⁰ *Id.*

¹¹ *Id.*

¹² See *id.*

¹³ See Cal. Dep’t of Corr. and Rehab., *supra* note 7.

¹⁴ See Cal. Dep’t of Corr. and Rehab., *supra* note 7.

¹⁵ Sec’y of the State of Cal., *California General Election Official Voter Information Guide* (2016), <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf>.

view of the rationale for Proposition 34—asserted by former LA County District Attorney Gil Garcetti and former Warden of California’s Death Row prison Jeanne Woodford—provided in the California General Election Official Voter Information Guide for the November 6, 2012, General Election (hereinafter, “2012 Information Guide”) reveals similar reasoning to that found in Proposition 62. The key factors influencing the Proposition 34 proposal include, among others: the grave risk of executing innocents, the system was broken (only thirteen inmates sentenced to death had been executed since 1967, and no one had been executed for the last six years), and abolition would have saved taxpayers millions.¹⁶ Noticeably absent from the 2012 Information Guide rationale for abolition is any rejection of capital punishment based on moral repugnance or criticism of some of the underlying factors that directly contribute to conviction of innocent citizens sentenced to death.¹⁷ Though defeated by a 52% opposition vote,¹⁸ the status of the death penalty remained far from situated on stable ground, as Proposition 62 was placed on the ballot shortly thereafter.¹⁹

B. California’s Proposition 62

Though four years had passed since Proposition 34, much of the same rationale for its original support remained consistent with the reasoning for Proposition 62, which sought to repeal the death penalty and make life without parole the maximum sentence available.²⁰ The ballot initiative submission to the Attorney General focused on the exorbitant costs for an ineffective system, the grave possibility of executing innocent inmates, and “fairness and uniformity in sentencing through retroactive application of this act to replace the death penalty with life in prison without the possibility of parole.”²¹ More specifically, much of the support for Proposition 62 found in the November 8, 2016, California General Election Official Voter Information Guide (hereinafter, “2016 Information Guide”) is grounded in the fact that the death penalty penal process, as it has been administered over the years, has cost taxpayers “\$5 billion since 1978 to carry out thirteen executions—a cost of \$384 million per execution,” and repeal would save taxpayers \$150 million per year. Additionally, the 2016 Information Guide noted that repeal would put an end to a system that has not been fixed for almost forty years and has not met the stated penological justifications for which it was created, and highlights the one hundred and fifty death row inmates that were later found to be innocent.²²

Of particular salience to the discussion in this section is the viewpoint of Archbishop Gomez, though it was not included in the 2016 Information Guide.²³ In his support for Proposition 62 and advocacy for mercy as “the only credible witness to the sanctity of life and the dignity of the human person,” Archbishop Gomez stated

¹⁶ *Id.* at 38.

¹⁷ *See id.*

¹⁸ *Proposition 34*, U.C. BERKLEY INST. OF GOVERNMENTAL STUD., <https://igs.berkeley.edu/library/elections/proposition-34>.

¹⁹ *See* Sec’y of the State of Cal., *supra* note 15.

²⁰ *See* Sec’y of the State of Cal., *supra* note 15, at 82.

²¹ Mike Farrell, *Request for Title and Summary for The Justice That Works Act of 2016*, (Sept. 15, 2015), <https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0066%20%28Death%20Penalty%29.pdf?>

²² *See* Sec’y of the State of Cal., *supra* note 15, at 82.

²³ *See* Sec’y of the State of Cal., *supra* note 15, at 82.

that “[t]he Catholic Church has always taught that legitimate governments have the right to impose the death penalty...[b]ut in recent years, there has been a growing consensus that the use of the death penalty can no longer be accepted.”²⁴ Further, he went on to cite a “‘strange appetite for violence’ in American culture, violent video games, demeaning music and entertainment, [asserting that] ‘[i]n this cultural context, I do not see how the death penalty can ever again express society’s ultimate value for human life. In this cultural context, the death penalty can only function as one more killing.’”²⁵ However, this focus on the morality of the death penalty and incorporation of religious viewpoints on the subject is, again, noticeably absent from the rationale in the official Proposition 62 argument for repeal.²⁶ These religious viewpoints appear to have garnered much less coverage and attention by the media and commentators on the Proposition—as shown in subsection D, Part I of this Note—who seem to be more singularly focused on what might best be described as the economic pragmatism underlying the Proposition.²⁷ As a result of the omission of religious considerations in the discussion, a handful of the underlying factors—discussed in Part III of this Note—that potentially contribute to the unfairness and lack of uniformity in sentencing that the ballot initiative submission sought to redress, remain unaddressed.²⁸

C. Proposition 66

A counter initiative to Proposition 62 in the November 8, 2016, election was Proposition 66,²⁹ which eventually passed by a small margin.³⁰ The impetus for Proposition 66 in the ballot initiative submission to the Attorney General was fixing the inefficient, broken system, rather than repealing the state capital punishment statute, and expediting the slow litigation process for inmates sentenced to death in order to bring justice to the victims and families, dramatically reduce the costs, and “ensure fairness for both defendants and victims,” among other benefits.³¹ The 2016 Information Guide stated similar objectives for the ballot initiative, explicitly spelling out the measures to be implemented to achieve the stated goals of the Proposition as follows:

1. All state appeals should be limited to 5 years.
2. Every murderer sentenced to death will have their special appeals lawyer assigned immediately. Currently, it can be five years or more before they are even assigned a lawyer.
3. The pool of available lawyers to handle these appeals will be expanded.
4. The trial courts who handled the death penalty

²⁴ Archbishop Jose H. Gomez, *Archbishop Gomez: It’s Time to End the Death Penalty*, CATHOLIC NEWS AGENCY (Sept. 24, 2016), <http://www.catholicnewsagency.com/news/archbishop-gomez-its-time-to-end-the-death-penalty-19521/>.

²⁵ *Id.*

²⁶ See Sec’y of the State of Cal., *supra* note 15.

²⁷ See *infra* Part I, subsection D.

²⁸ See *infra* Part III.

²⁹ Kermit Alexander, *Request for Preparation of Circulating Title and Summary for Proposed Initiative* (Oct. 16, 2015), https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0096%20%28Death%20Penalty%29_0.pdf?

³⁰ *2016 California Ballot Measures Election Results*, POLITICO (Dec. 13, 2016), <http://www.politico.com/2016-election/results/map/ballot-measures/california/>.

³¹ Alexander, *supra* note 29.

trials and know them best will deal with the initial appeals. 5. The State Supreme Court will be empowered to oversee the system and ensure appeals are expedited while protecting the rights of the accused. 6. The State Corrections Department (Prisons) will reform death row housing; taking away special privileges from these brutal killers and saving millions. Together, these reforms will save California taxpayers over \$30,000,000 annually, according to former California Finance Director Mike Genest, while making our death penalty system work again.³²

The problem with this initiative, as the *San Francisco Chronicle* pointed out, is that, among other issues, “it brushes aside the legal and practical realities in the way of achieving any time savings.”³³ Noting the increase in the number of attorneys required, the *Chronicle* pointed out that “attorneys less steeped in the fine points of capital appeals—and it is a specialized part of the law—will be representing inmates with their lives on the line.”³⁴ In other words, rather than addressing the problems and potential for injustice in the system as it is currently administered, it arguably amplifies them. These changes made in Proposition 66 are particularly problematic, given the issues raised in Part III of this Note.

D. Media Perception and Opinion

The views and rationale reinforced to the public by some of California’s largest news publications were often aligned with those discussed in the 2016 Information Guide, though with a couple outliers in terms of the scope and direction of the position. For example, the *Sacramento Bee*’s Editorial Board encouraged readers to vote for Proposition 62, describing the current California death penalty scheme as “dysfunctional” and “beyond repair.”³⁵ Specifically, the paper cited the flaws in the system, the current “de facto moratorium” in the state, the economic shortcomings of the current system and those that might be exacerbated by Proposition 66, the potential questions of equal treatment in sentencing, and the disproportionate representation of specific California counties in terms of inmates sent to death row.³⁶ The *San Francisco Examiner* Editorial Board took a slightly different position, highlighting the purported cost savings under each Proposition and the ineffectiveness of the capital punishment process in California, but took the position that “[b]eyond arguments of cost savings and critiques of a biased justice system, a civilized society must stand against institutionalized brutality and murder.”³⁷ On the other hand, the *San Diego Union Tribune* noted the cost considerations for Proposition 66, but eschewed any of the remaining rationales stated in the prior periodicals above—instead taking a

³² See Sec’y of the State of Cal., *supra* note 15.

³³ See generally S.F. Chron. Editorial Board, *Fight Crime, Not Futility: Abolish Death Penalty*, S.F. CHRON. (Sept. 1, 2016), <http://www.sfchronicle.com/opinion/editorials/article/Fight-crime-not-futility-Abolish-death-penalty-9185804.php>.

³⁴ *Id.*

³⁵ Sacramento Bee Editorial Board, *End the Illusion: Abolish the Death Penalty*, SACRAMENTO BEE (Oct. 7, 2016), <http://www.sacbee.com/opinion/editorials/article106795422.html>.

³⁶ *Id.* (“Nothing in [Proposition 66] forces the Legislature and governor to increase funding to pay for the additional appellate costs—estimated by the legislative analyst to be in the tens of millions annually.”).

³⁷ Examiner Editorial Board, *Examiner Endorsements: Statewide Ballot Measures*, S.F. EXAMINER, Oct. 23, 2016, <http://www.sfexaminer.com/examiner-endorsements-statewide-ballot-measures/>.

wholly pragmatic approach to rejection of Proposition 62.³⁸ After rejecting any ethical reservations with the death penalty, the Editorial Board stated its position that “[t]he branches of California’s government have for decades shown they don’t like the death penalty and don’t want it to be used. If Proposition 66 were enacted, history suggests its fixes would not be executed with good faith.”³⁹

There were, however, two outliers among the articles examined for this Note. The *San Francisco Chronicle* discussed the costs associated with the Propositions as well, but went beyond the broad generalized statements that either of the Propositions would be a move toward correcting injustice and bias in the system stated by some commentators.⁴⁰ Instead the Board based its position, in part, on a focus on issues pertaining to the actors within the legal system.⁴¹ Specifically, as previously noted, the Board took note of the reality that Proposition 66 “attempts to compel attorneys to take up capital appeals,” which leads to the potential situation where “attorneys less steeped in the fine points of capital appeals... will be representing inmates with their lives on the line”—a situation that does not “suggest a path toward greater justice.”⁴² By alluding to the potential for injustice, the *Chronicle* inched toward the problems discussed in Part III of this Note, but fell short. Additionally, by focusing on the practicality and economic advantage of Proposition 62 in the final statement of the position, it somewhat undermined the initial strength of the prior points.⁴³ The other notable outlier was the *Los Angeles Times*. Although the *Times* did discuss the dysfunction, the lack of “equal justice,” and dedicated a substantial amount to the discussion of the cost to taxpayers, the *Times*’ “chief reason to abolish the death penalty in California is that it is cruel and unusual punishment, both immoral and inhumane and out of step with the ‘evolving standards of decency’ in the United States.”⁴⁴ This discussion of morality was noticeably absent in the other newspaper articles. With that said, there was no further discussion by the *Times* concerning the underlying basis on which the decision of morality was formed.⁴⁵

While the foregoing newspaper statements and the 2016 Information Guide statements in support of Proposition 62 all raise valid points, pointing to a combination of fiscal reservations and injustice concerns with the continuation of capital punishment, in general, the bulk of the focus and attention appears to be on the former and less on the latter. That is, the reasoning and information set forth in support of the repeal appears to be monetary in many cases, as does the discussion, and the broader implication of this media content is that it is reflective, to some extent, of an overall societal perception of the underlying rationale behind Proposition 62. When questions of

³⁸ See The San Diego Union-Trib. Editorial Board, *Why California Should End, Not Streamline, the Death Penalty*, THE SAN DIEGO UNION-TRIB. (Oct. 23, 2016), <http://www.sandiegouniontribune.com/opinion/endorsements/sd-yes-on-prop-62-no-on-prop-66-story.html>.

³⁹ *Id.*

⁴⁰ See S.F. Chron. Editorial Board, *supra* note 33.

⁴¹ See S.F. Chron. Editorial Board, *supra* note 33.

⁴² See S.F. Chron. Editorial Board, *supra* note 33.

⁴³ See S.F. Chron. Editorial Board, *supra* note 33. (“It’s humane, it’s practical, and it’s fiscally prudent.”).

⁴⁴ L.A. Times Editorial Board, *Props 62 and 66: California Voters Should End the Death Penalty, Not Speed it Up*, L.A. TIMES (Sept. 3, 2016), <http://www.latimes.com/opinion/editorials/la-ed-prop-62-prop-66-20160826-snap-story.html>.

⁴⁵ See *id.*

morality or inherent bias in the system were raised, there was no real in-depth research into, or emphasis, on the underlying reasoning for the amoral nature of the punishment or the real ramifications—discussed in Part III of this Note—of the system as it currently is administered. The economic argument is bolstered by well-researched, hard and fast statistics by the Legislative Analyst⁴⁶ about the savings to taxpayers, while the discussions of morality boil down to one word labels, such as labeling capital punishment “immoral,” or the inclusion of sound bites like “evolving standards of decency” drawn from capital punishment case law with nothing more.⁴⁷ This, however, begs the question: on what basis are judgments of morality or immorality formed? The answer to that question was most aptly stated by The Honorable Michael R. Merz, a United States Magistrate Judge for the Southern District of Ohio: “we learn our morality as we learn everything else—in community—or rather in overlapping and competing communities: the family, the neighborhood, the school, and the church.”⁴⁸

It is, in part, the tenets of the religious denominations discussed below that have informed the social conscious since the founding of the United States and, thus, should continue to do so.

II. ALTERNATIVE VIEWPOINTS ON THE DEATH PENALTY: THE PERSPECTIVES ADVANCED BY CATHOLIC SOCIAL TEACHING AND OTHER RELIGIOUS DENOMINATIONS

While there are many faiths practiced in the United States, and various subdivisions within each denomination, the following discussion is meant to map out the main religions practiced in the United States and their respective beliefs regarding capital punishment in order to demonstrate the breadth of the potential for conflict between personal beliefs and public responsibilities as a professional or actor within the legal system—conflict that can lead to recusal, request for non-assignment, or prospective juror removal during voir dire and the resultant problems discussed in Part III. To begin, the United States Census Bureau’s calculation of the U.S. population in 2010 was just under 309 million citizens.⁴⁹ As recently as 2015, Evangelical Protestants composed 25.4% of the population, Mainline Protestants registered 14.7%, Non-Christian faiths registered 5.9%, Catholics registered 20.8%, and those with no affiliation registered 22.8%.⁵⁰ Arguably, one of the most outspoken critics of capital punishment in the United States requiring exposition is the Roman Catholic faith, and thus is the logical place to begin the discussion.

⁴⁶ Sec’y of the State of Cal., *supra* note 15, at 78, 81.

⁴⁷ See The L.A. Times Editorial Board, *supra* note 44.

⁴⁸ Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305, 310 (2004).

⁴⁹ *Quick Facts*, U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, <https://www.census.gov/quickfacts/table/PST045216/00>.

⁵⁰ *America’s Changing Religious Landscape*, PEW RESEARCH CENTER (2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.

A. Catholic Social Teaching

As Archbishop Gomez alluded to in his statement in Part I of this Note, the Catholic Church's stance has undergone an important evolution in the last couple decades as compared to the early views of the Catholic Church. Dating back to 1980, the United States Conference of Catholic Bishops (USCCB) voiced unified opposition to the continued imposition of capital punishment in the United States and its "intent has been...to limit, restrain or end the use of society's ultimate punishment" over the course of the last three decades.⁵¹ Moreover, the USCCB was not merely paying lip service to these ideals, as in 1999, it "made an appeal to abolish the death penalty . . . followed in 2000 by . . . 'Responsibility, Rehabilitation and Restoration: A Catholic Perspective on Crime and Criminal Justice' . . . [and] in 2005 the bishops began a national Campaign to End the Use of the Death Penalty...to educate Catholics and non-Catholics and to inform state and congressional legislators as well as the courts about the church's teaching."⁵² This pivot in position by the USCCB has been mirrored elsewhere in the Catholic Church's new Catechism, most notably in St. John Paul II's encyclical, *Evangelium Vitae*—though St. John Paul II's position is slightly more nuanced.⁵³

St. John Paul II's encyclical has garnered much more attention and commentary by the legal community, and rightly so, given St. John Paul II's position as Pope and leader of the Catholic Church when the document was written. In it, St. John Paul II elaborates on the Church's current view of the death penalty through his assertion that:

punishment . . . ought not go to the extreme of executing the offender except in cases of absolute necessity . . . '[i]f bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.'⁵⁴

Of critical importance in St. John Paul's exposition—as it pertains to Part III of this Note—is that the "necessity" described above only occurs "when it would not be possible otherwise to defend society," a condition that he notes is essentially non-existent given the improvements in the modern penal system.⁵⁵ In drawing on St. John Paul's statements above, the logical inference is that, in the Catholic Church, it is imperative that the United States use "bloodless means" to protect society, given the advances in modern incarceration facilities and techniques, and commentators have come to similar conclusions.⁵⁶

⁵¹ Wilton D. Gregory, *The Church's Evolving View on the Death Penalty*, CATHOLIC CULTURE (2008), <https://www.catholicculture.org/culture/library/view.cfm?recnum=8506>.

⁵² *Id.*

⁵³ See St. John Paul II, *EVANGELIUM VITAE* (1995).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 309 (1998).

Before continuing, it is important to note—as commentators discussed in Part III have pointed out—that St. John Paul’s statements above were not said *ex cathedra*, and therefore, there is debate about what binding force they have on Catholics. However, given the direction of the Catholic position—the Catholic Church’s continued emphasis on issues concerning respect for life—it appears that the day may not be too far off where a Pope makes an *ex cathedra* statement on the death penalty, further magnifying the issues discussed below for Catholics.

B. Other Religious Denominations

This sentiment held by the Catholic Church aligns with many other religious denominations that have a significant amount of followers in the United States. First, the United Methodist Church has come out strongly against the death penalty. Specifically, the Methodist Church’s rationale for opposition to capital punishment, similar to the Catholic Church, puts great weight on the “possibility of reconciliation with Christ . . . through repentance. [Noting] [t]his gift of reconciliation is offered to all individuals without exception and gives all life new dignity and sacredness. For this reason, we . . . urge [the] elimination [of the death penalty] from all criminal codes.”⁵⁷ Moreover, the United Methodist Church “urge[s] the creation of a . . . new system for the care and restoration of . . . offenders . . . [i]n contrast . . . [to retributive justice].”⁵⁸ Additionally, a number of Jewish denominations have spoken out in opposition to the death penalty—“Conservative, Reform, and Reconstructionist movements in the United States, [and] [o]rthodox Jewish leaders called for a moratorium . . .”⁵⁹—for reasons related to those of the United Methodist Church. For example, the Union of Reform Judaism opposes capital punishment because they “believe that there is no crime for which the taking of human life by society is justified, [and] . . . appeal to [their] congregants and to our co-religionists and to all who cherish God’s mercy and love to join in efforts to eliminate this practice [of capital punishment] which lies as a stain upon civilization and our religious conscience.”⁶⁰

While a comprehensive list could be compiled with similar or related reasons that a number of churches oppose the death penalty, for the sake of brevity the following are the positions of a handful of other notable denominations that have come out against the death penalty: the Episcopal Church, the American Baptist Church, the Presbyterian Church, and the National Council of Churches, “which represents 35 mainstream Protestant and Orthodox churches.”⁶¹ However, with that said, there are a significant number of Protestant churches that have voiced support for the con-

⁵⁷ *Social Principles: The Political Community*, THE UNITED METHODIST CHURCH (Jan. 24, 2016), <http://www.umc.org/what-we-believe/political-community#death-penalty>.

⁵⁸ *Id.*

⁵⁹ *Religious Groups’ Official Positions on Capital Punishment*, PEW RESEARCH CENTER (2009), <http://www.pewforum.org/2009/11/04/religious-groups-official-positions-on-capital-punishment/>.

⁶⁰ *Position of the Reform Movement on the Death Penalty*, RELIGIOUS ACTION CENTER OF REFORM JUDAISM, http://www.rac.org/position-reform-movement-death-penalty?id=1665&pge_prg_id=8089&pge_id=2396.

⁶¹ See PEW RESEARCH CENTER, *supra* note 59.

tinuance of the death penalty, including National Association of Evangelicals, Lutheran Church-Missouri Synod, and most notably, the Southern Baptist Church, which accounts for over 5% of the practicing citizenry in the United States.⁶²

Though there is clearly some dispersion in the positions held in denominations across the United States and some important religious groups on each side of the debate, the message is clear: a large body of faiths in the United States, most notably the Catholic Church with over eighty million members, opposes the death penalty. The repercussions of these views on the legal system—discussed in Part III—is of even greater importance, given the significant amount of judges, lawyers and prosecutors in the United States who belong to one of the aforementioned faith traditions.

III. DEATH PANELS, JUDGE RECUSALS, AND PROSECUTOR REQUESTS FOR NON-ASSIGNMENT

The impetus for Proposition 62—saving taxpayer money, and removing risk of executing innocents⁶³—and Proposition 66—speeding up death penalty proceedings to enhance efficiency and save money⁶⁴—were laudable attempts at reform in pursuit of worthwhile goals. As the history of capital sentencing in California, the Proposition rationales, and the media publications in Part I illustrate, the system is broken and the citizenry is correct in discussing the need for a change. The problem, however, is that the discussion and rationales advanced in Part I are missing the full scope of the issue. They are overlooking the larger issue of the bias introduced into capital proceedings caused by voluntary or involuntary removal of religious professionals and actors in the legal system, the need to give due consideration to religious views, and the resultant consequences of ignoring their impact. As a result, the Propositions were short sighted, misguided, and inadequate remedies for California's failing capital punishment administration. Had Proposition 62 passed, it would not be unreasonable to envision a time in the future where, given adequate death penalty reform proposals, it becomes cheaper to execute inmates that would have otherwise been eligible for the death penalty than to continue incarcerating them for life without parole; thus, undermining one of Proposition 62's chief arguments for repeal and leading to a situation where capital punishment could be reinstated. The passage of Proposition 66 was misguided because it failed to properly address the potential problems in the administration of the death penalty discussed in the subsections that follow. In both of these 2016 Propositions, California's crucial flaw in the system went unaddressed—a flaw that merits further in-depth consideration but has only received little, if any, serious discussion. This flaw—the unaddressed potential for systematic bias against criminal defendants throughout the capital punishment trial process that undermines its legitimacy as a permissible course of action for sentencing—arises from pro-death penalty judges, bloodthirsty prosecutors, and death qualified juries. This Note will address each in turn.

⁶² *Religious Landscape Study*, PEW RESEARCH CENTER, <http://www.pewforum.org/religious-landscape-study/>.

⁶³ See Sec'y of the State of Cal., *supra* note 15, at 83.

⁶⁴ See Sec'y of the State of Cal., *supra* note 15, at 108.

A. Judge Recusal

Given the potential moral reservations that judges, particularly Catholic judges, with strong religious beliefs might have with fulfilling their judicial duties in a capital punishment case as a result of their faith, it should come as no surprise that there is an abundance of commentary from legal scholars and attorneys on the matter. As one scholarly collaboration notes, “[Catholic judges] are obliged by oath, professional commitment, and the demands of citizenship to enforce the death penalty. They are also obliged to adhere to their church’s teaching on moral matters.”⁶⁵ This inherent complexity of the role of a judge, combined with the position espoused by Pope John Paul II’s recent encyclical⁶⁶ and the USCCB,⁶⁷ however, has sparked some disagreement among commentators about the implications of this position as it pertains to a Catholic judge’s participation in capital cases.

A review of the commentary surrounding the issue reveals two very different approaches to answering the question of whether or not Catholic judges must recuse themselves from capital cases in light of the aforementioned recent statements of the clergy. The first of these approaches, taken by John Garvey and Amy Coney,⁶⁸ among others,⁶⁹ attempts to parse out the intricacies of the concept of cooperation with evil from Catholic Moral Theology.⁷⁰ Through an elaborate discussion⁷¹ of formal cooperation with evil⁷² versus material cooperation with evil,⁷³ Garvey and Coney came to the conclusion that “Catholic Judges (if they are faithful to the teaching of their church) are morally precluded from enforcing the death penalty. This means that they can neither themselves sentence criminals to death nor enforce jury recommendations of death.”⁷⁴ In order to arrive at this conclusion, Garvey and Coney undertook an analysis of the different stages of capital cases (sentencing with a jury, sentencing by the judge, among others).⁷⁵ This analysis, when applied to California’s death penalty

⁶⁵ Garvey & Coney, *supra* note 56, at 303.

⁶⁶ See St. John Paul II, *supra* note 53.

⁶⁷ See Gregory, *supra* note 51.

⁶⁸ See generally Garvey & Coney, *supra* note 56.

⁶⁹ See generally Edward A. Hartnett, *Catholic Judges and Cooperation in Sin*, 4 U. ST. THOMAS L. J. 221 (2006).

⁷⁰ See Garvey & Coney, *supra* note 56, at 309-21.

⁷¹ See Garvey & Coney, *supra* note 56, at 309-21.

⁷² See Garvey & Coney, *supra* note 56, at 318 (“A person formally cooperates with another person’s immoral act when he shares the immoral intention of the other...Formal cooperation is always immoral.”).

⁷³ See Garvey & Coney, *supra* note 56, at 318-19 (“Material cooperation involves an act that has the effect of helping a wrongdoer, where the cooperator does not share the wrongdoer’s immoral intention...Material cooperation is only sometimes immoral. We judge this by a kind of moral balancing test—weighing the importance of doing the act against the gravity of the evil, its proximity, the certainty that one’s act will contribute to it, and the danger of scandal to others.”).

⁷⁴ See Garvey & Coney, *supra* note 56, at 305.

⁷⁵ See Garvey & Coney, *supra* note 56, at 310-11 (“Let us begin by considering the action of the judge who sentences a defendant to death upon the jury’s recommendation... This is a straightforward case of formal cooperation, one in which the judge sets the wheels of injustice in motion. Once the judge enters the order, the government is authorized—indeed unless there is a pardon, bound—to put the defendant to death. And the judge intends that this should happen.”); see Garvey & Coney, *supra* note 56, at 311 (“Under the drug kingpin law a defendant can opt, with the government’s agreement, to dispense with a jury and have his sentence determined by the judge alone. A judge who imposes the death penalty in such case is plainly engaged in formal cooperation... He bears responsibility for the entire decision, and could make it either way.”).

procedure (which gives the judge discretion in final sentencing),⁷⁶ would lead to a similar situation in which recusal was the appropriate avenue for a practicing Catholic judge under Garvey and Coney's view.

The other common approach taken by commentators on this issue omits any discussion of Catholic Moral Theology. Rather, the beliefs are based on one of three common interpretations of the Catholic stance on capital punishment: a literal interpretation of Papal authority in specific instances espoused by Justice Scalia⁷⁷ and others;⁷⁸ an apparent acceptance of Pope John Paul II's encyclical based on a plain reading;⁷⁹ or, in some cases, a logical perspective based on personal legal experience and bolstered by the Church's teaching.⁸⁰ This Note will discuss each interpretation in turn. First, Justice Scalia "noted . . . that *Evangelium Vitae* did not represent *ex cathedra* teaching."⁸¹ Justice Scalia:

argue[d] that since the Church has long allowed the use of the death penalty as a tool of retribution, this 'tradition' cannot be swept away by 'a couple of paragraphs in an encyclical' or by 'a latest, hot-off-the-presses version of the catechism.' [Rather,] [r]elying on 'canonical experts,' Justice Scalia postulate[d] that although *Evangelium Vitae* must receive 'thoughtful . . . consideration,' it may be rejected by the individual Catholic.⁸²

Though Justice Scalia's statements clearly indicate that he is not personally of the opinion that Church teaching in this area is binding on Catholics, he did further note that "[t]he choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted . . . laws."⁸³

The second interpretation is exemplified in the statements of Kevin Doyle. Though Doyle acknowledged that the Church's teaching in the area is not binding,⁸⁴ he asserted that "a good-faith reading of what the Church teaching is—the only good-faith reading—is that currently we have reached the point where if we are able to

⁷⁶ Cal. Penal Code § 190.3 (West 2006) ("If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole.").

⁷⁷ See Art C. Cody, *Introduction: The King's Good Servants: Catholics as Participants in Capital Litigation*, 44 J. CATH. LEGAL STUD. 283, 287 (2005).

⁷⁸ Doyle & Hynes, *supra* note 5, at 303 ("It has certainly never spoken *ex cathedra* on the issue. So it has not influenced my position on supporting the death penalty where I have to.").

⁷⁹ Doyle & Hynes, *supra* note 5, at 342 ("[A] good-faith reading of what the Church teaching is—the only good-faith reading—is that currently we have reached the point where if we are able to incapacitate someone, then it is not morally right to execute them; that is not permissible.").

⁸⁰ Gerald F. Uelmen, *Catholic Jurors and the Death Penalty*, 44 J. CATH. LEGAL STUD. 355, 376 (2005) ("I started out in my legal career . . . as a prosecutor . . . Fifteen years later, I concluded that the death penalty is unethical, immoral, and unacceptable under any circumstances. I would not be a 'death qualified' juror, and if I were a judge, I would have to recuse myself in a death penalty case. I reached that conclusion not because of anything that the Pope or any bishop had to say about it, although giving respectful consideration to those views has certainly reinforced my own.").

⁸¹ Merz, *supra* note 48, at 317.

⁸² Cody, *supra* note 77, at 287 (citing Antonin Scalia, *God's Justice and Ours*, FIRST THINGS 17, 20-21 (2002)).

⁸³ Cody, *supra* note 77, at 292 (citing Antonin Scalia, *God's Justice and Ours*, FIRST THINGS 17, 20-21 (2002)).

⁸⁴ Doyle, & Hynes, *supra* note 5, at 328.

incapacitate someone, then it is not morally right to execute them; that is not permissible.”⁸⁵ Lastly, the final interpretation, held by Judge Michael Merz, focused on the fact that, in his view of *Evangelium Vitae*, mandatory rejection of capital punishment is not required of Catholics.⁸⁶ However, his “own conclusion as a citizen . . . after much thought and nearly a decade of experience is that *Evangelium Vitae* is right as a matter of policy,”⁸⁷ and that his views “as a Catholic American citizen [are] partly informed by current papal teaching.”⁸⁸ With that said, Judge Merz did state that “the prudential judgment about whether capital punishment remains necessary to defend innocent life is one about which reasonable, moral people can differ, whether we shall have it or not should be left to the mechanisms of democracy . . . [A] Catholic can still be a conscientious judge and participate in capital cases.”⁸⁹

As the foregoing demonstrates, it is unclear whether or not the faith of a Catholic judge would cause them to recuse themselves from capital cases. Additionally, given the lack of commentary on the issue as it pertains to the other faiths discussed in Part II of this Note, the role that faith plays in the decision of whether or not recusal is the appropriate measure for judges of other faiths is also unclear. That said, given the strength of the positions these faiths hold in opposition to capital punishment, it is not unreasonable to infer that consideration of one’s faith might also require at least some devout judges from these respective faiths to recuse themselves. What is clear, however, are the implications that recusal might have on the administration of capital punishment in California. In the event of recusal, a judge may be replaced by a pro-death penalty judge who is willing to hear the case. For example, it has been argued that a pro-death penalty judge may take the case because he does not want to appear “soft on crime,” and that the judge may hold this position on capital punishment, in part, to win favor with the electorate for upcoming elections,⁹⁰ similar to the discussion of prosecutors in Part III, subsection B. This sentiment was echoed by Justice John Paul Stevens in his dissent in *Harris v. Alabama*:

[t]he ‘higher authority’ to whom present-day capital judges may be ‘too responsive’ is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King

⁸⁵ Doyle, & Hynes, *supra* note 5, at 342.

⁸⁶ See Merz, *supra* note 48, at 311 (“If capital punishment is not wrong absolutely, in every instance, then there is room for statesmen, acting in good conscience, to disagree with the Pope’s prudential judgment that it is not necessary in modern industrial societies. This is not to say . . . Pope John Paul’s conclusions are wrong, just that they are not mandatory.”).

⁸⁷ See Merz, *supra* note 48, at 311-13 (“First of all, Pope John Paul’s reasons are good ones. The traditional justification of capital punishment—that it is necessary to redress the injustice of the murder of the innocent—is not working in our society If we were to teach ourselves that every human has an unalienable absolute right to life . . . [m]ight that not ward off the potential for extending the culture of death to euthanizing our dependent elderly? But I have reasons in addition to the Pope’s. The death penalty seriously skews allocation of criminal justice resources If capital punishment worked to reduce innocent deaths, it might be worth the costs. But innocent life seems no more respected now than it did when executions were far fewer in the 1960’s and 1970’s.”).

⁸⁸ See Merz, *supra* note 48, at 313.

⁸⁹ See Merz, *supra* note 48, at 318.

⁹⁰ See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 760-61 (1995).

George III.⁹¹

Justice Steven's remarks are particularly relevant due to the manner in which California's judiciary is selected: "[a]ccording to California's constitution, judges of the supreme court and courts of appeal are nominated by the governor . . . Appellate judges must stand for retention in the next gubernatorial election after their appointment . . . Superior court judges are chosen in nonpartisan elections for six-year terms."⁹² The implication of this system of judicial selection, as Justice Stevens highlights, is that judges may not be as immune to political pressures as one might hope, as they seek to retain their position on the bench or advance their career. As one commentator points out, "[t]his raises serious questions about the independence and integrity of the judiciary and the ability of judges to enforce the Bill of Rights and otherwise be fair and impartial in capital cases."⁹³ While it could be argued that the current election climate may not be as hostile toward judges who do not strongly support capital punishment as it once was, the fact still remains that, while support for the death penalty has fallen in recent years, a majority of the Americans who express their opinion on the issue still favor it,⁹⁴ and Californians are no exception.⁹⁵

Regardless of a pro-death penalty judge's reasoning for hearing a case, the pro-death penalty stance of a judge may introduce conscious or unconscious bias into death penalty proceedings in California due to the discretion afforded to judges in the process. Further, this bias in proceedings may occur more frequently than it otherwise might due to the pro-death penalty judge replacing the prior judge in continued instances of recusal. While there are many factors that may bias legal proceedings against a defendant, the replacement of a religiously devout judge who has recused himself with a pro-death penalty judge has the potential to lead to the injustice and conviction of the innocent that Propositions 62 and 66 were trying to remove. Although the case for obligatory recusal of Catholic judges or judges of other faiths is not settled, the fact still remains that, as the aforementioned legal practitioners' beliefs demonstrate, some judges would—or will, in fact—recuse themselves, opening the bench up for a pro-death penalty judge and leading to potential pro-death bias in some capital cases. Though the scope of the problem is unclear, the seriousness of the potential resultant consequences—bias in a trial that leads to conviction and a sentence to death row—when one or more judges recuse themselves from hearing capital cases necessitates inclusion of faith in the discussion of the rationale for whether or not to retain the death penalty. Otherwise, one is left asking the same question that Judge Merz asked: "[w]hat sort of public officials shall we have if we exclude all those who leave their morality, their consciences, at the door to their new federal offices?"⁹⁶

⁹¹ *Id.* at 760 (citing 513 U.S. 504, 518 (1995) (Stevens, J. dissenting)).

⁹² *Judicial Selection in the States: California*, NATIONAL CENTER FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/index.cfm?state=CA.

⁹³ Bright & Keenan, *supra* note 90, at 760.

⁹⁴ Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CENTER. (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/>.

⁹⁵ POLITICO, *supra* note 30.

⁹⁶ Merz, *supra* note 48, at 315.

B. Prosecutorial Requests for Non-Assignment

Much of the same analysis that applies to judges applies to prosecutors; however, it is arguably more important in the case of prosecutors, given the discretion that prosecutors have to seek the death penalty and the role that they play within a trial. Similar to the discussion on judges, there appears to be a conflict of views regarding the weight (either binding or informative) that the Catholic Church's position should have in the professional lives of prosecutors. While Garvey and Coney do not examine prosecutors in their discussion of cooperation with evil, it is fair to infer from their position that a practicing Catholic prosecutor could not participate in a capital case, as he or she would be formally cooperating with evil.⁹⁷

On the other hand, there are prosecutors who, in relying solely on the hierarchy of statements by church authorities, have come to vastly different conclusions in their beliefs on whether or not the Catholic Church's stance on the death penalty precludes them from prosecuting a capital case. For example, Charles Hynes, a former Kings County District Attorney, held the position that he was "not at all influenced by the Church's position. I'm not sure that it is as clear as it ought to be. It has certainly never spoken *ex cathedra* on the issue. So it has not influenced my position on supporting the death penalty where I have to."⁹⁸ In referencing the fact that the Church's teaching does not represent an *ex cathedra* statement, Hynes adopts a model similar to Justice Scalia.⁹⁹ However, Hynes does further note that "[f]or [him] it would be very simple if the Pope said tomorrow, *ex cathedra*, 'capital punishment is wrong; it's immoral.' Then I have no problem. I recuse myself as a Catholic. I think that might lead to Pataki removing me, as he did Johnson"¹⁰⁰

Here, again, the frequency with which a Catholic prosecutor (or a prosecutor of another faith) might find that the strong positions their faith maintains precludes them from prosecuting a capital case, and thus be compelled to request non-assignment on all capital cases, remains unclear. But, similar to the discussion concerning judges, it is clear that some prosecutors might find it necessary to request non-assignment. The problem with this, as Doyle points out, is that "when you recuse yourself, if you recuse yourself because you're not bloodthirsty enough, the guy or the gal that they are going to put in after you is going to be plenty bloodthirsty."¹⁰¹ If a prosecutor recuses themselves for religious reasons, this scenario has the potential to lead to a whole host of other problems, given the power a prosecutor has in capital cases and the potential for the injustice that Proposition 62 and 66 were attempting to fix.

To understand the problems that may arise from prosecutor recusal, it is necessary to understand the nature of the prosecutor's influence in charging defendants. As noted by E. Michael McCann, a Milwaukee County District Attorney, this power allows a prosecutor to exercise great influence over the direction of a potential capital

⁹⁷ See Garvey & Coney, *supra* note 56, at 318 ("A person formally cooperates with another person's immoral act when he shares the immoral intention of the other Formal cooperation is always immoral.")

⁹⁸ Doyle & Hynes, *supra* note 5, at 303.

⁹⁹ See Merz, *supra* note 48, at 317.

¹⁰⁰ Doyle & Hynes, *supra* note 5, at 327.

¹⁰¹ *Id.* at 340.

punishment proceeding and the likelihood that a defendant will be sentenced to death.¹⁰² More specifically, as Carrie Leonetti asserts:

[p]rosecutors have enormous power in determining who is subjected to criminal punishment because they have broad discretion in deciding whom to charge. Through their charging decisions, choices among case-ending options (including dismissal and plea offers), and sentencing recommendations, they often become adjudicators of guilt and punishment, with courts simply confirming their underlying decisions. Absent a showing of invidious discrimination based on race or religion, for instance, courts will not question a prosecution's decision of whom and how to charge in a given case

. . . The only legal checks on prosecutorial discretion are the burden of proof and the procedural requirements that prosecutors meet during the pretrial process. In most cases, prosecutors may 'charge at will.'¹⁰³

This influence, as Leonetti points out, has the potential to lead to prosecutorial overreaching¹⁰⁴ or misconduct, in part because a prosecutor's win-loss record influences future possibilities for career advancement based on "career-advancement structures in prosecutors' offices," which can lead to a –win-at-all-costs attitude.¹⁰⁵

Unfortunately, this potential for misconduct is not merely theoretical; it has played out repeatedly across the country, as found in a recent study by Harvard's Fair Punishment Project.¹⁰⁶ In the study of the top five deadliest prosecutors, the researchers noted the problems with "personality-driven prosecutors" and cited staggering statistics on the role that this handful of prosecutors has played in placing defendants on death row.¹⁰⁷ Of note, the prosecutor ranked first on the list obtained thirty-eight death sentences, with misconduct found in 36.8% of his cases;¹⁰⁸ the second on the list obtained fifty-four death sentences, with a misconduct rate of 33.3%;¹⁰⁹ and the third obtained thirty-nine sentences, with a misconduct rate of 65.1%.¹¹⁰ In addition, the study demonstrated the win-at-all-costs attitude Leonetti raised in her commentary.¹¹¹

¹⁰² E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 649 (1996) ("In 1940, then United States Attorney General Robert H. Jackson stated, 'the prosecutor has more control over life, liberty, and reputation than any other person in America.' 'It's local prosecutors, not judges or governors, who most often decide which criminals live or die for their crimes,' Tina Rosenberg flatly postulated in her *New York Times* magazine article entitled *Deadliest D.A.* Both statements are entirely accurate.").

¹⁰³ Carrie Leonetti, *When the Emperor has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J. L. & PUB. POL'Y 53, 54-55 (2012).

¹⁰⁴ *Id.* at 54.

¹⁰⁵ *See id.* at 81-82 ("Prosecutors' career incentives do not encourage them to carefully assess which defendants are most deserving of punishment. For them, punishment is not merely a matter of justice, but an adversarial tool to be used to increase conviction rates . . . Threats of harsh sentences are not only allowed, they are expected.").

¹⁰⁶ *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty*, FAIR PUNISHMENT PROJECT (2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf.

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.* at 5.

¹⁰⁹ *Id.* at 8.

¹¹⁰ *Id.* at 11.

¹¹¹ Leonetti, *supra* note 103, at 77.

The foregoing commentary and study lead to the logical inference that, whether recusal for religious beliefs leads to replacement of the recused prosecutor with a younger, inexperienced prosecutor,¹¹² or a bloodthirsty prosecutor with a win-at-all-costs mentality, or both, the practical implication of recusal is that it has the potential to create a significant bias against a defendant, which carries with it important implications for the opportunity to receive a fair trial and the possibility of being sentenced to death row. With the passage of Proposition 66, the potential for the problems discussed above still exists in the system, and yet the issue has received no airtime in the commentary on remedying the injustice currently present in the system. It is for this reason that any discussion of the inherent injustice that must be fixed in the capital punishment system as it is currently administered in California must include a discussion of the role that faith considerations, or lack thereof, actually play as a contributing factor in the injustice that Proposition 62 and 66 were seeking to fix. To do otherwise leads to a perpetuation of the problematic system that undermines the credibility of the penal system at the highest levels.

C. Death Panel Formation: Death Qualified Juries and Peremptory Challenges

The final aspect of capital punishment trial proceedings that merits further exposition is the process of death qualification and peremptory challenges. At the outset of a trial, the court oversees the voir dire process of selecting jurors who are able to participate in the proceeding in a fair and unbiased manner.¹¹³ However, “unique to the trial of a capital offense is the voir dire process of ‘death qualification,’ in which prospective jurors who are unalterably opposed to the death penalty are eliminated from the jury panel.”¹¹⁴ It is at this stage at which any strongly held religious beliefs in opposition of the death penalty may serve to disqualify potential jurors from the jury pool. It is also at this stage where the intended unbiased jury pool of one’s peers begins to become less unbiased. This has been confirmed by many commentators, most notably a former prosecutor, Gerald Uelmen, with intimate understanding of the death qualification process who asserted that “[j]urors whose religious views disfavor death are less likely to make it through the selection process than jurors whose religious views encourage its use.”¹¹⁵ This is particularly problematic, given that fact that “[r]esearch studies further suggest that death-qualified juries are more conviction-prone than juries whose membership has not been affected by the death qualification process.”¹¹⁶

In order to understand why this is the case, it is necessary to provide an overview of voir dire standards and the operation of the process in capital cases. At the

¹¹² McCann, *supra* note 102, at 662 (“The young, inexperienced prosecutor, not having confronted erroneous or biased or perjurious witnesses, is more likely to accept their credibility than the more seasoned, veteran district attorney who has encountered many such persons over years of practice.”).

¹¹³ Michael W. Peters, *Constitutional Law: Does ‘Death Qualification’ Spell Death for the Capital Defendant’s Constitutional Right to an Impartial Jury?* [Lockhart v. McCree, 106 S. Ct. 1758 (1986)], 26 WASHBURN L. J. 382 (1987).

¹¹⁴ *Id.*

¹¹⁵ Uelmen, *supra* note 80, at 362.

¹¹⁶ James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York’s Death Penalty Legislation*, 17 PACE L. REV. 41, 154 (1996).

outset of the process for impaneling a capital jury, prospective jurors often are required to complete a questionnaire where they “will ordinarily be asked if they hold any religious views that might affect their decision whether to impose a sentence of death...[t]he lawyers, and often the judge, will then follow up with additional voir dire questions,” to determine which jurors to impanel, “and the religious affiliation of the juror will emerge.”¹¹⁷ There are two methods—relevant to this Note—through which a prospective juror might be excused for duty. The first of these is a for-cause removal.¹¹⁸ The standards for a for-cause removal of a prospective juror were established in *Witherspoon v. Illinois* and *Wainwright v. Witt*.¹¹⁹ In *Witherspoon*, the Court “held that a ‘sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding [potential jurors] for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.’”¹²⁰ However, “the Court also implied that jurors who avowed that they would refuse to impose death in any circumstance could constitutionally be excluded for cause without violating the rights of the defendant.”¹²¹ The *Witherspoon* standard was subsequently altered by the Supreme Court in *Wainwright*, where the Court “ruled that a juror may be excluded for cause in a death penalty case if the juror’s views would ‘prevent or substantially impair’ the performance of his duties as a juror in accordance with his instructions and his oath.”¹²² This new standard “broadened the range of people who could be excluded by death qualification.”¹²³

The other method through which a prospective juror might be excluded from a jury is by peremptory challenge,¹²⁴ where an “attorney may act on belief, bias or prejudice or to eliminate the perceived bias or prejudice of the potential juror.”¹²⁵ However, the number of peremptory challenges is limited.¹²⁶ With that said, there is one key difference between for-cause removals and peremptory challenges; for a peremptory challenge, “[t]he attorney does not state a reason for the challenge and the judge does not decide if the challenge is appropriate, unless the other attorney alleges that the challenge was made for an impermissible reason.”¹²⁷ In the context of a religious-based peremptory challenge in a death penalty case, one impermissible reason

¹¹⁷ Uelmen, *supra* note 80, at 358-59.

¹¹⁸ Brian Galle, *Free Exercise Rights of Capital Jurors*, 101 COLUM. L. REV. 569, 569-70 (2001).

¹¹⁹ *Id.*

¹²⁰ Uelmen, *supra* note 80, at 356 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968)).

¹²¹ Galle, *supra* note 118, at 570; *see also* Uelmen, *supra* note 80, at 360 (“In a footnote, the Court added that prospective jurors could be excluded if they made it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them. Many courts subsequently adopted the standard expressed in the footnote ...”).

¹²² Uelmen, *supra* note 80, at 360-61 (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

¹²³ *Death Qualification*, CAPITAL PUNISHMENT IN CONTEXT, <http://www.capitalpunishmentincontext.org/resources/deathqualification>.

¹²⁴ Galle, *supra* note 118, at 569.

¹²⁵ 73 Am. Jur. 3d Proof of Facts § 89 (2003).

¹²⁶ *Id.*

¹²⁷ *Id.* (“Challenges for cause must be for a specific reason which persuades a judge that the juror cannot be impartial. Peremptory challenges can be based on the attorney’s guess, hunches, prejudices, or on no reason at all”).

may be religious affiliation.¹²⁸ However, there is case law that supports the idea that “challenges on the basis of [jurors’] beliefs” are not permissible.¹²⁹ The reason being that “[i]f the person’s religious beliefs affect his or her ability to judge the facts of the case and apply the law fairly and if it is shown that the juror has expressed those beliefs (as opposed to the attorney attributing the beliefs to the juror), that is a legitimate basis for peremptory challenge.”¹³⁰

Similar to the discussion on judges and prosecutors, the implications of the standards governing the usage of for-cause removals and peremptory challenges on Catholics and other religious persons is unclear. As the foregoing sections of this Note on judges and prosecutors demonstrated,¹³¹ there is no clear interpretation of what the Catholic Church’s teaching means as it relates to their role in the legal system, and the same analysis applies to jurors. It has been argued Catholics are not “obligated to hold the view espoused in the Catechism of the Catholic Church because it does not represent *ex cathedra* teaching,” which would mean that a Catholic juror might survive voir dire questioning.¹³² However, a Catholic juror who accepts the Church’s position on the death penalty and expresses those views would likely be excluded from a capital case.¹³³ The reality is that it is likely that at least some Catholics and members of other faiths will express views that will cause them to be removed from capital cases, a situation that has already occurred in prior cases.¹³⁴ The removal of Catholic jurors and members of other faiths who are faithful to their respective church’s teaching can have a profound influence on the adjudication of cases. It has been noted that “[d]eath-qualified juries tend to deliberate for less time, discuss the evidence presented less extensively, and are more apt to convict defendants and find them guilty of more serious charges than are juries that have not been death-qualified.”¹³⁵ Thus, the injustices and biases that Proposition 62 and 66 sought to correct are, in fact, able to persist in our system of capital punishment—in part, as a result of the failure to bring religious considerations to bear on the issue. Without going beyond a cursory analysis of the problems surrounding capital punishment and delving deeper into how the capital punishment system actually operates and its effects on the fair adjudication of cases, California will continue to engage in a misguided approach that fails to consider the totality of the underlying factors contributing to injustice in capital cases. It is this reality that requires at least some inclusion of religious beliefs in the discussion and a consideration of the effects they have on the administration of capital punishment.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *infra* Part III.

¹³² Uelmen, *supra* note 80, at 363.

¹³³ Uelmen, *supra* note 80, at 362.

¹³⁴ Uelmen, *supra* note 80, at 368 (discussing *Arizona v. Purcell*, 18 P.3d 113, 122 (Ariz. Ct. App. 2001); 73 Am. Jur. 3d Proof of Facts, *supra* note 125, at § 89 (discussing *State v. Naranjo*, 321 P.3d 398 (Ariz. 2014); *People v. Bryant*, 334 P.3d 573 (Cal. 2014)).

¹³⁵ Acker, *supra* note 116, at 154.

IV. CALIFORNIA'S SHORT SIGHTED BALLOT INITIATIVES AND PROPOSED SOLUTION

As discussed previously, one of the key factors advanced by the respective supporters of both Proposition 62 and Proposition 66 was the financial impact. There was no meaningful discussion or research advanced to highlight why injustice, at times, permeates the capital punishment trial process. Rather, in reading the discourse around the initiatives, it often seemed to boil down to a discussion of dollars and cents. Assuming for the sake of argument that Proposition 62 had been passed, it would have at least temporarily mitigated the risk that the problems discussed in Part III would arise. However, if, in the future, it became cheaper to execute criminals, capital punishment could potentially be reinstated and the risk would return. With the passage of Proposition 66, the problems discussed in Part III of this Note are ever present, undermining the administration of justice and potentially public trust and support. It is for this reason that, among other factors, the short-sighted focus on the monetary benefits was misplaced. Instead of delving into the deeper problems with the system and bringing to the fore discussions of the impact of various constituencies on the process, such as the religious viewpoints of different faiths represented in the state, Californians simply left them unaddressed. In order to remedy the potential biases introduced in Part III, the following discussion proposes a solution that California and other states might follow to solve the problem.

Given the strongly entrenched pro-death penalty views of the citizenry in some states—illustrated by the recent affirmation and staunch support for the death penalty in Oklahoma and other states—and the general support among United States citizens for the continuation of capital punishment as a viable sentencing option, it is clear that there are many obstacles to overcome before remedying the injustices discussed in Part III. One potential course of action—suggested by former prosecutor Uelmen—to set change in motion and address these problems could be best described as a wait-and-see approach. Uelmen asserts that, “[a]s the proportion of jurors, judges, and prosecutors who refuse to participate in the continued administration of a morally bankrupt law continues to grow, more and more states will consider the wisdom of continuing this folly and will join with the civilized nations of the world in rejecting laws that permit death as a penalty.”¹³⁶ Although support for capital punishment has been waning to some degree in the last decade,¹³⁷ a more comprehensive approach than the one Uelmen advocates is necessary to further the discourse on the death penalty.

In order to bring about a substantive change in the manner in which the death penalty is currently discussed, this Note advocates a two-pronged approach. It is, in part, modeled off of New Jersey's recent success in abolishing the death penalty, which incorporated input from religious leaders by appointing them as members of an investigatory committee.¹³⁸

¹³⁶ Uelmen, *supra* note 80, at 362.

¹³⁷ Oliphant, *supra* note 94.

¹³⁸ See generally Robert J. Martin, *Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal its Death Penalty Statute*, 41 U. TOLEDO L. REV. 485 (2010).

A. Prong 1: New Jersey Approach

Through the confluence of multiple factors—the advocacy of a grassroots group called New Jerseyans for Alternatives to the Death Penalty,¹³⁹ a lawsuit that challenged the process of execution and led to a moratorium,¹⁴⁰ and a protracted course of bipartisan politicking¹⁴¹—New Jersey passed a bill, which, among other things, created a New Jersey Death Penalty Commission.¹⁴² The bill stipulated that the composition of the Commission was to be set as follows:

The Governor made five appointments, of which at least one had to be a representative of the Murder Victims Families for Reconciliation and New Jersey Crime Victim's Center, as well as at least two representatives from the 'religious/ethical community' in New Jersey. The Senate President and the Speaker of the Assembly both had two appointments and, in each case, one of their appointments had to be a Republican and one Democrat. The other four appointments consisted of the state Public Defender, the state Attorney General and the President of the New Jersey State Bar Association, or their respective designees, and a representative of the County Prosecutor's Association of New Jersey. Although unstated, it was understood that the DPSC membership was supposed to be unbiased or at least balanced in its views at the outset, in other words, not possessing a clear majority of members either favoring or opposition abolition of the death penalty.¹⁴³

Notably, the Commission selected Reverend M. William Howard, Jr., a Baptist Pastor, as its Chairman¹⁴⁴ and also included a Rabbi on the Commission.¹⁴⁵ After engaging in five public hearings where the Commission "received testimony from more than seventy witnesses, representing many varying points of view [including 'bishops, ministers, rabbis, and law professors']" and further Commission deliberation, the Commission recommended that New Jersey abolish the death penalty,¹⁴⁶ which eventually bolstered legislative efforts to finally do so.¹⁴⁷ It is telling that the New Jersey legislature thought it important to include these viewpoints. While it is unclear the extent to which the religious viewpoints offered by members of the Commission—and other faith leaders at the public hearings—factored into the ultimate decision to abolish the death penalty, the fact remains that the religious viewpoints were at least considered and brought into the discourse, an approach by which California and other states might also benefit.

¹³⁹ See *id.* at 497-511.

¹⁴⁰ *Id.* at 495-96.

¹⁴¹ See *id.*

¹⁴² *Id.* at 516.

¹⁴³ *Id.* at 517.

¹⁴⁴ Martin, *supra* note 141, at 519.

¹⁴⁵ *N.J. Death Penalty Study Comm'n*, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT (2007), http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

¹⁴⁶ Martin, *supra* note 141, at 518-519, 522.

¹⁴⁷ Martin, *supra* note 141, at 522.

B. Prong 2: Public Service Announcement Campaign

The second aspect of the solution to enact a substantive change in the discourse surrounding the death penalty is a public service announcement campaign. It has been noted that Justice Marshall “maintained that despite the thirty-five death penalty statutes then in existence, a ‘fully informed’ citizenry would reject capital punishment.”¹⁴⁸ It is my supposition that Justice Marshall was referring specifically to the flaws inherent in the death penalty charging and trial process and the lack of public awareness on the matter. This dual approach of including religious perspectives—in the same vein as the New Jersey approach—coupled with an added layer of discussion to the debate in the form of a public service announcement campaign providing information to the public on which to form their views of the death penalty, would address Justice Marshall’s position and meaningfully add to the discussion on capital punishment.

As with many social issues, one’s individual beliefs are generally the culmination of a long-term socialization process, beginning from a young age and often strengthening in resolve into adulthood. However, oftentimes one’s social issue positions are only formed through abstract thought—hypothetical scenarios, such as “what sentence should the perpetrator receive if they murdered someone I love”—and potentially a discussion of the merits, rather than viewpoints formed on the basis of well-researched, in-depth knowledge and thorough understanding of the subject matter. This disconnect between one’s conceptualization of the death penalty and having actual knowledge of the operation of the death penalty in the judicial system, from the initial discretion of the prosecutor in seeking a capital charge through the jury’s verdict and potential for abuse, erects an informational barrier to the average citizen’s understanding of the implications of the death penalty and skews the basis on which they assert their continued support. It is for this reason that the infusion of religious viewpoints into the discussion must also be accompanied by information educating the citizenry on the implications of capital cases, the manner in which they are carried out at each stage, and the associated flaws that have continued to occur with the death penalty.

The three aforementioned issues that arise with capital punishment concerning juries, judges, and prosecutors are matters that the average citizen voting on Proposition 62 and 66 most likely has never had any exposure to, and with good reason. These issues are discussed in Notes similar to this one, read only by actors in the legal system and academics. It is easy to adopt an “out of sight, out of mind” mentality when it comes to issues like capital punishment because they do not directly impact the average citizen tasked with passing judgment on the merits of initiatives like Proposition 62 and 66. In order to remedy this trend, advocates must engage in a more robust informational campaign. With honest, open dialogue and a presentation of empirical evidence on the matter, it would become that much harder for those in

¹⁴⁸ Kenneth Williams, *Should Judges Who Oppose Capital Punishment Resign? A Reply to Justice Scalia*, 10 VA. J. SOC. POL’Y & L. 317, 328 n. 62 (2003) (citing *Furman v. Georgia*, 408 U.S. 238, 36-63) (Marshall, J., concurring) (recognizing that “American citizens know almost nothing about capital punishment,” but maintaining “that the great mass of citizens would conclude on the basis [of accurate information] that the death penalty is immoral and therefore unconstitutional.”)).

support of the death penalty to maintain their viewpoint and defend its merits. The stranglehold that previously socialized beliefs have over these individuals would necessarily begin to weaken when they are confronted with incontrovertible facts. With this consistent exposure and engagement of the material at issue begins the growth of changing societal attitudes and pressure on the legislature from voting blocks that cannot be ignored—a trend that has been repeated consistently with great success regarding other social issues in modern day.

CONCLUSION

Regardless of one's faith, or lack thereof, there is value in bringing in the perspectives of Catholicism and other faiths into the discussion on the death penalty as a comparative law model.¹⁴⁹ Perhaps the best method of doing so would be Professor Sam Levine's intermediate approach, which would "allow religious arguments to be considered and possibly adopted on the basis of their potential relevance and logic vis-à-vis American Legal thought."¹⁵⁰ Under this approach, "[certain limitations are placed] on the influence of religious principles in American law, [and] at the same time this mode of analysis does not automatically exclude religious arguments that have relevance independent of their religious significance."¹⁵¹ A model of discourse based on this, "likely allows for widespread use of religious ideas in American legal discourse, as religious ideas are acceptable to the extent that they present ideas that are helpful in considering questions arising in American legal thought."¹⁵² While this approach highlights the utility of bringing religion into the judicial sphere, Levine also notes a logical perspective for why it should be permissible when he puts forth a prior argument by Professor Stephen Carter. Carter noted, "in the context of constitutional interpretation, 'if judges may properly consult views of morality or philosophy outside the text, then there is no good reason to restrict them from considering religious perspectives.'"¹⁵³ While this idea raises a very valid point, and might be a compelling rationale for lawyers and other actors within the legal system who are familiar with this practice of judges, at times, drawing on sources outside of the text in their reasoning, it might ring hollow to legislators and members of the public who are not so well versed in legal opinions and the modes of operation in the judiciary. Therefore, if Professor's Levine's argument is unacceptable to certain members of the public, perhaps there is an alternative approach that better addresses

¹⁴⁹ Samuel J. Levine, *Capital Punishment and Religious Arguments: An Intermediate Approach*, 9 WM. & MARY BILL RTS. J. 179, 184-88 (2000) ("Religion, then, may provide a contrast case to the American legal system, offering perspectives that may shed light or perhaps offer useful alternatives in assessing both settled and emerging areas of law...An examination of some of the attempts to apply religious principles in [the area of capital punishment] suggests that religious thought has much to offer the contemporary debate over capital punishment. At the same time, it appears that the value of many religious arguments lies in their appeal to a logic that need not rely on the authority of a religious system...to the extent that religion offers insights that, at the very least, enrich the level of discussion, ignoring these insights would seem to prove counterproductive and unfortunate.").

¹⁵⁰ *Id.* at 181.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 182 (citing Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989)).

the concerns of those who are still hesitant to allow religious views into judicial discourse. But the fact remains, there is value in the inclusion of religious perspectives in the discussion surrounding the death penalty, as Part III of this Note demonstrates.

With that said, the position this Note is advocating is neither an easy task nor one that is likely to gain political support, especially given the increasingly fractured nature of political parties and views and the progressively strengthening push to remove religion from any political or legislative discussion. However, the difficulty of the task at hand does not detract from the necessity of engaging in the discussion and bringing the views of Catholicism and other faiths to bear on the issue. The issues raised in Part III of this Note have grave consequences in the capital punishment context, and California and other states would be well-advised to consider the ramifications of the current system. To do otherwise would be an affront to our criminal justice system and a continuing disregard for the pillars upon which our criminal justice system was built—the right to a fair, just, unbiased criminal trial.