Proposition 34 and the Future of California’s Death Penalty

California’s Proposition 34 on the November 2012 ballot asked voters to replace the death penalty with life in prison with no possibility of parole.1 The initiative, dubbed the Savings, Accountability and Full Enforcement for California Act, or the SAFE California Act, would have converted the death sentences of more than 700 people now on California’s death row to life in prison without the possibility of parole; required all inmates convicted of murder to work in prison and pay restitution into the victim’s compensation fund; and directed $100 million of the money saved from replacing the death penalty to local law enforcement, to solve more rape and murder cases. Although the initiative fell short, the campaign succeeded in demonstrating widespread support among Californians for replacing the death penalty, paving the way for the end of the death penalty in the most populous state in the nation.

The SAFE California Campaign has been described as “audacious” and “bold.” The last time California had an up or down vote on the death penalty was in 1978 when more than 70 percent of the voters supported the Briggs Death Penalty Initiative.2 Even as recently as 2000, California voters approved expansion of the death penalty,3 and still a majority of Californians say in polls that they “support the death penalty” when given no other choice.4 The only state that has successfully replaced the death penalty by voter approval is Oregon, last achieved in 1964,5 a time when opposition to the death penalty was at its height nationally.6

Nonetheless, supporters of Proposition 34 realized that the 2012 election presented a unique moment. Executions were on hold, the state was in the midst of the worst fiscal crisis since the Great Depression, and crime was at the lowest point in decades. Advocates had prepared for this moment for years, conducting extensive public opinion research and honing campaign messages, organizing in key counties, and developing strong voices of support among law enforcement and murder victim family members. Weighing all of the factors, the campaign leaders concluded that the initiative could pass and that, if it didn’t, it would be very close.

In the end, Proposition 34 came very, very close. With more than 12.4 million votes cast, the final results were 5,974,243 votes in support, and 6,460,264 votes against, a margin of only 486,000 votes.7 A switch of just 250,000 voters would have changed the outcome of the election.8 Proposition 34 has shown that California is essentially evenly divided on the death penalty; what was a 40-point gap in 1978 has shrunk to just a 4-point gap today.

Why did the campaign fall short? The most significant reason is insufficient resources to reach the voters of California. Because this was the first time in forty years that this issue was presented on the ballot, and because one of the key messages—that Proposition 34 would save money—was counterintuitive, the burden was on initiative supporters to get the message to the voters. Precampaign polling showed that if voters were educated about the reality of California’s death penalty—that it is broken beyond repair, costly, and risks executing innocent people—a strong majority would support the initiative. But the campaign had to get this message to the voters.

Although the campaign in support of Proposition 34 succeeded in raising just over $7 million, that amounted to less than $5 million available for paid media, after signature gathering and other campaign expenses were accounted for, and almost nothing for the field campaign. Most close initiative campaigns in California on the 2012 ballot spent four to ten times what the Yes on 34 Campaign spent.9 This made for an incredibly competitive and saturated media market; the campaign simply did not have the budget to break through, particularly to reach those low-information voters who did not understand that replacing the death penalty would actually save money.

The effort to replace the death penalty did not succeed in the 2012 election, but the strong showing of support for Proposition 34 provides clear evidence that the death penalty’s days are numbered in California. Most notably:

- In Los Angeles County, 54 percent of voters supported Proposition 34.10 That the voters in the most populous county in the state showed strong support for replacing the death penalty is highly significant. In recent years, Los Angeles County has sent more people to death row than any other county in the nation—more than the entire state of Texas in 2010.11 The new District Attorney of Los Angeles called that her office has drifted far from the sentiments of the local community.

- Postelection polling shows that Proposition 34 won a majority of voters among people of color, the fastest...
The campaign endorsed by papers from across the state and the political spectrum, including the LA Daily News, the San Bernardino Sun, and the Redding Record Searchlight. The campaign secured the endorsement of more than 1,400 community leaders and organizations. This included the first endorsement in support of replacing the death penalty from the California Labor Federation, the largest labor coalition in the nation, the California Democratic Party, and the American Legal Defense Fund.

The initiative effort brought forward many new and powerful spokespeople, including Gil Garcetti, the former District Attorney of Los Angeles, and San Francisco District Attorney George Gascon, neither of whom publicly supported replacing the death penalty before Proposition 34. Hundreds of murder victims’ family members came out in support of the initiative, including individuals involved in death penalty cases in California.

Overall, the campaign’s greatest accomplishment was to fundamentally change the conversation on the death penalty in California. When the effort began, political pundits and reporters thought the initiative had no chance at all; now, many of these same people say it is only a matter of time before California replaces the death penalty.

Fundamentally, the Yes on 34 Campaign has demonstrated in tangible terms that the standards of decency have evolved in California: nearly half of the voters in the election have gone on record supporting an alternative to the death penalty. In this context, the courts should ask anew whether it is constitutional for the state to proceed with another execution.

That said, the courts may never get a chance to address this question; ongoing problems with California’s execution protocol may well prove to be insurmountable. For years, California’s death penalty has been on hold, as the state has struggled to satisfy the courts that its death penalty procedures can meet constitutional standards. During the campaign, the opponents of Proposition 34 frequently asserted that all the state has to do to “fix” the death penalty is switch to a one drug lethal injection protocol, as Ohio did. This was an easy assertion for the opponents to make but not one based in fact. Whereas Ohio’s protocol change allowed it to continue with executions for a short time, prison authorities in that state recently revealed that by September of this year, they will run out of the execution drug and they have no legal source for obtaining more.

The reality is the death penalty is broken beyond repair not only in California but across the country. Whether it is through the courts or though the initiative process, California’s death penalty machinery is grinding—slowly, inexorably—to a halt.

Notes
1 Text of Proposed Law, Proposition 34, Secretary of State, available at http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop34, at 95 et seq.
OpenDocument.
8 This is an even narrower margin that on Proposition 8, the 2008 initiative to ban same sex marriage in California. See California Proposition 8, available at http://en.wikipedia.org/wiki/California_Proposition_8#Results.
10 See Bowen, supra note 7.
16 See Rina Patta, SAFE California: The political battle over a ballot initiative that would end capital punishment in California is centered on victims, KPCC, July 2, 2012, available at http://
17 See e.g., Franklin E. Zimring, California’s Death Penalty—

