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Opinion

The death penalty -- it's unworkable

The American Law Institute, instrumental in structuring the model statutes on which most death sentences are based, has withdrawn its support of such laws.

By Michael Traynor

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Nearly 50 years ago, as concern grew in the country about the fairness of death penalty laws, the American Law Institute published a "model statute" aimed at helping state lawmakers draft laws to ensure that death sentences were meted out fairly and consistently.

Last fall, the institute withdrew its support for the model death penalty law. The decision was a striking repudiation from the very organization that provided the blueprint for death penalty laws in this country.

The institute, with a membership of more than 4,000 lawyers, judges and law professors of the highest qualifications, is the leading independent organization in the United States producing scholarly work to clarify and improve the law.

In the decade after the institute published its law, which was part of a comprehensive model penal code, the statute became the prototype for death penalty laws across the United States. Some parts of the model -- such as the categorical exclusion of the death penalty for crimes other than murder and for people of limited mental abilities -- withstood the test of time. But the core of the statute, which created a list of factors to guide judges and jurors deciding when to sentence someone to death, has proved unworkable and fostered confusion and injustice.

Now, after searching analysis by our country's top legal minds, the institute has concluded that the system it created does not work and cannot be fixed. It concluded that we cannot devise a death penalty system that will ensure fairness in process or outcome, or even that innocent people will not be executed.

I am speaking for myself, not as a representative of the institute, but I can say with certainty that the institute did not reach these conclusions lightly. It commissioned a special committee and a scholarly study, heard various viewpoints and debated the issues extensively. A strong consensus emerged that capital punishment in this country is riddled with pervasive problems.

The death penalty cannot balance the need for consistency in sentencing with the need for individualized determinations. Its administration is unequal across racial groups. There is a grave lack of resources for defense lawyers. The law is distorted by the politics of judicial elections, and it consumes a disproportionate share of public resources.

California's death penalty exemplifies these problems. Portions of California's law were copied from the institute's model statute. The system now is on the verge of collapse. There are about 700 people on death row in California, and it can take 25 years for mandatory appeals to be completed. Since 1978, California has executed 13 prisoners, while 72 have died of old age or other causes.

Resources are woefully inadequate. More than half of the people on death row don't have access to a constitutionally-required lawyer. A statewide commission found that there remains a serious risk that the state will execute an innocent person. And then there is the cost. Housing a prisoner on death row costs taxpayers \$90,000 a year more than if that prisoner were held in another type of high-security prison. The total additional cost for housing all of California's death row inmates is more than \$60 million a year.

These problems are entrenched in the death penalty system, both in California and nationwide. The cumulative result: Executions remain as random as lightning strikes, or more so, and that is the very problem the institute's model statute intended to fix. In addition, across the country, at least 139 individuals have been released from death row after establishing their innocence.

The institute's action comes at a time of widespread reevaluation of capital punishment. Fifteen states have abandoned capital punishment, including three in the last three years. In 2009, the country saw the lowest number of death sentences since the death penalty was reinstated in 1976.

We now have decades of experience, which the institute lacked when it proposed its model statute almost 50 years ago. Life without the possibility of parole, now an important alternative in nearly every state, was then virtually untried. To the extent that society needs to punish murderers severely, it can do so far more effectively using tough yet fair prison sentences rather than through an ineffective and extravagant death penalty.

The American Law Institute could have chosen to do nothing. But having laid the intellectual and legal groundwork for the modern death penalty, it concluded that it had a responsibility to act now that the system's fatal flaws have fully emerged.

The withdrawal of the model death penalty statute recognizes that it is impossible to administer the death penalty consistently and fairly, and it therefore should not remain a punishment option in this country. The institute could no longer play a role in legitimizing a failed system. How much longer can any of us?

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