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Report on Exempts Death Sentences from Constitutional Guarantees Against Cruel, Vindictive Punishment (State Measure 6); Requires by Statute Death or Mandatory Imprisonment for Aggravated Murder (State Measure No. 7)

City Club of Portland (Portland, Or.)
Report On
EXEMPTS DEATH SENTENCES FROM CONSTITUTIONAL
GUARANTEES AGAINST CRUEL, VINDICTIVE PUNISHMENTS
(State Measure No. 6)
and
REQUIRES BY STATUTE DEATH OR MANDATORY
IMPRISONMENT FOR AGGRAVATED MURDER
(State Measure No. 7)

Measure No. 6:
Question: "Shall capital punishment for aggravated murder be exempted from Oregon constitutional provisions against cruel, unusual, disproportionate and vindictive punishments?"
Explanation: "Amends Oregon Constitution. Article I, section 15 requires that the laws for punishment of crime shall be founded on principles of reformation and not vindictive justice; Article I, section 16 prohibits cruel, unusual, and disproportionate punishments. The measure would exempt aggravated murder statutes requiring the death penalty on unanimous jury findings from these constitutional guarantees. Where death was not imposed, the penalty would remain as life imprisonment with a mandatory minimum provided by statute."

Measure No. 7:
Question: "Shall the penalty for aggravated murder be death under specified conditions and be life imprisonment with a 30-year minimum otherwise?"
Explanation: "Amends statutes. Requires that penalty for aggravated murder be death by lethal injection when unanimous jury finds beyond a reasonable doubt that defendant acted deliberately with reasonable expectation that death would result, is probably a continuing threat to society, and responded unreasonably to any provocation by deceased. Requires Supreme Court review. Requires life imprisonment with 30-year minimum subject to Parole Board review after 20 years in all other cases."

To the Board of Governors,
City Club of Portland:

I. INTRODUCTION

State Measures 6 and 7 are submitted to the voters through the Oregon initiative petition process. Capital punishment would be reinstated in Oregon if Measures 6 and 7 are approved by the voters at the November 6, 1984 General Election.
II. BACKGROUND

Oregonians last voted to reinstate the death penalty in 1978. Your Committee limited its study, therefore, to events following that time period. For a complete history of the death penalty issue in Oregon, the U.S., and in other nations, we refer you to the 1964 City Club report on Capital Punishment (State Ballot Measure 1) and the 1978 City Club report on "Requires Death Penalty for Murder Under Specified Conditions" (State Measure 8).

A. A Brief History of Capital Punishment in Oregon

In 1903, the State of Oregon assumed responsibility for executions. In December of that year, the Oregon Legislature passed a bill mandating that all executions take place in the state penitentiary.

Nine years later, voters defeated a constitutional amendment that would have abolished the death penalty. In 1914, voters eliminated the death penalty in Oregon by a 157 vote margin.

A constitutional amendment was passed in May 1920 to reinstate the death penalty. At that time, the method of execution was hanging. In March 1937, the legislature changed the method to death by lethal gas, and a gas chamber was built at the penitentiary.

Between 1937 and 1964, several attempts in the legislature and one voter initiative were unsuccessful in abolishing the death penalty. In November, 1964, however, Oregonians again voted to abolish capital punishment. The gas chamber was disassembled shortly thereafter. In 1971, the Oregon Legislature revised the criminal code, making no provision for the death penalty.

B. 1978 Legislation

In 1978, Measure 8 appeared on the Oregon ballot. The measure created a statutory aggravated murder classification by providing for the death penalty under certain specified conditions. The measure restored deliberation as an element of murder for which a greater penalty, death, would be imposed. Although Measure 8 was in the form of an enhanced penalty statute, an indirect effect was to reestablish a crime of deliberate first degree murder punishable by death. Approximately 60 percent of the voters favored this measure.

In 1981, the Oregon Supreme Court overruled the aggravated murder/death penalty statute finding that it violated the defendant's right to trial by jury (State v. Quinn, 290 OR 383, 623 P2d 630). Although the law provided for a jury to decide guilt or innocence, the judge was to determine independently whether to impose the death penalty or life imprisonment in a separate sentencing hearing. According to the statute, the judge was required to weigh the defendant's "mental state" when the murder occurred. The Court said that because mental state is a matter of fact - not law - the measure violated the constitutional requirement that matters of fact be decided by a jury.
C. Post-1981 Activity

In 1981, proponents of the death penalty introduced a bill in the Oregon Legislature providing for reinstatement of the death penalty. The bill failed to make it out of committee. Later that year, the proponents circulated two initiative petitions, a constitutional amendment and implementing legislation, calling for reinstatement of the death penalty. The petition for the constitutional amendment failed to gather enough signatures to be placed on the ballot.

At the 1983 legislative session, proponents of the death penalty introduced two bills in the House providing for reinstatement of the death penalty. House Joint Resolution 3 proposed an amendment to the Oregon Constitution by exempting the death penalty from existing provisions in the Bill of Rights protecting citizens from "vindictive justice" and "cruel and unusual punishment". House Bill 2294 provided the statutory authority for administering the death penalty. Neither bill was referred out of committee. The measures before the electorate are substantially similar to HJR 3 and HB 2294.

D. Effect of Measures 6 and 7

Measure 6 would amend the Oregon Constitution to establish that aggravated murder is a capital crime. Measure 7 implements the Constitutional amendment. If Measure 6 is approved by the voters, but Measure 7 is rejected, the State constitution would allow capital punishment, but there would be no statute to invoke it. If the voters approve only Measure 7, the statute would become part of Oregon law.

Should Measure 6 be defeated and Measure 7 be passed by the voters, the constitutionality of the death penalty statute would be brought into question. In all probability, the court would be asked to determine whether the statute violates the Oregon Constitution on two counts. First the courts would need to determine whether the statute violates Oregon's prohibition against cruel and unusual punishment. Second, the court would determine if the statute met Article I, Section 15 of the Oregon Constitution which states that the "laws for the punishment of crime shall be founded on reformation, and not of vindictive justice". If the courts found the statute violated either section of the Oregon Constitution, the statute (Measure 7) would be struck down. If Measure 6 passes, this situation would not necessarily arise.

At present, Oregon law (ORS 163.095) defines two classes of aggravated murder:

1. (a) murder committed for money or other consideration;  
   (b) solicitation of murder in return for money or other consideration;  
   (c) murder after prior conviction of a homicide;  
   (d) multiple murders in the same criminal episode;  
   (e) murder in the course of or as a result of intentional maiming or torture of the victim; or
(2) (a) murder of a police or corrections officer, a judicial officer, employee, juror or witness in a criminal proceeding;
(b) murder while the defendant was confined in a correctional facility or otherwise was in custody;
(c) murder committed by means of an explosive;
(d) murder personally and intentionally committed by one or more persons when a death results from the attempt, the commission, or flight from first degree arson, criminal mischief, burglary, escape, kidnapping in the first or second degree, robbery in the first degree, any felony sexual offense or when compelling prostitution.
(e) murder committed in an effort to conceal the commission of a crime or to conceal the identity of the perpetrator of a crime;
(f) murder committed after the defendant had escaped from a correctional facility and before the defendant had been returned to custody.

If adopted, Measure 7 would abolish the two categories by combining them into a single aggravated murder classification.

Existing law (ORS 163.105) provides that an individual convicted of aggravated murder and sentenced to life imprisonment under ORS 163.095(1) shall be confined for a minimum of 30 years (20 year minimum upon unanimous vote of the parole board). Individuals convicted for aggravated murder under ORS 163.095(2) shall be confined for a minimum of 20 years (15 years upon a 4-qut-of-5 vote of the parole board).

Measure 7 would amend ORS 163.105 by requiring that persons convicted of any category of aggravated murder be sentenced either to death or to life in prison with a minimum of 30 years (20 years minimum upon unanimous vote of the parole board). Upon finding that the defendant is guilty of aggravated murder, as defined under ORS 163.095, the court would conduct a separate sentencing hearing to determine whether the defendant would be sentenced to life imprisonment or death. The proceeding would be conducted in the trial court before the same jury that heard the principal case. In the proceeding, evidence could be presented as to any matter the court deems relevant to the sentence.

Upon conclusion of the presentation of the evidence, the court would submit the following issues to the jury:

a. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death would result.

b. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and

c. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
The State must prove each issue beyond a reasonable doubt, and the jury would return a special verdict of "Yes" or "No" on each issue considered. The court would charge the jury that it may not answer any issue "Yes" unless it agrees unanimously. If the jury returns an affirmative finding on each issue considered above, the defendant would be sentenced to death. If the jury returns a negative finding on any of the above issues, the defendant would receive life imprisonment. The judgment of conviction would be subject to automatic and direct review by the Oregon Supreme Court.

Measure 7 requires that individuals sentenced to death would be executed by the intravenous administration of a lethal quantity of an ultra-short acting barbiturate in combination with a paralytic agent. The judgment would be executed by the superintendent of the penitentiary or his designee, and attended by a limited number of defined persons. The person who administers the lethal injection shall not be considered to be engaged in the practice of medicine.

Because aggravated murder is defined by statute, the definition and therefore the scope or the existence of the death penalty can be changed by the legislature or by a vote of the people.

III. ARGUMENTS ADVANCED IN FAVOR OF THE MEASURE

1. Capital punishment would act as a deterrent in at least some instances, and if it prevented even one murder, it would serve a valid purpose.

2. It is highly unlikely that an innocent person would be executed, because two unanimous jury verdicts would be required to invoke the death penalty.

3. Capital punishment would only be imposed on criminals who are beyond rehabilitation and whose return to society would cause an undue risk to public safety.

4. Capital punishment is, in limited instances, a just response to aggravated murder. In today's society, too much consideration is given to the criminal and not enough to the victim, loved ones of the victim, and potential future victims.

5. Passage of Measures 6 and 7 would be especially effective with regard to the repeat murderer and the criminal who might otherwise murder witnesses or police officers to cut down his chance of capture.

6. Capital punishment would assist in maintaining order and safety in prison with inmates who have long sentences. Without it, there is little or no deterrent to violent escape attempts, hostage-taking, or murder of guards or other inmates.

7. Like the violence used by the military and the police, capital punishment is an unpleasant but effective vehicle for society to protect itself.
8. Measures 6 and 7 limit capital punishment to aggravated murder and would not be invoked for crimes of passion.

9. The public should not have the cost of detaining, for life, a criminal who is considered too dangerous ever to be released from prison.

10. Once the constitutionality of these measures has been upheld, the public cost of normal appeals would be far less than those associated with long-term incarceration.

11. In Oregon, there is no evidence that the death penalty has been or would be imposed in a discriminatory fashion.

12. Capital punishment would encourage defendants who have committed murder - but who may have possible technical defenses - to plea bargain, thereby making it more likely that such individuals would receive prison time for their crimes.

IV. ARGUMENTS ADVANCED AGAINST THE MEASURE

1. Capital punishment is irrevocable. There is always the possibility regardless of safeguards, that an innocent person could be executed.

2. Capital punishment denies due process of law because it deprives the individual of the benefit of new laws or new evidence that could affect a conviction.

3. Capital punishment is cruel and unusual. As such, it violates one of the United States' most basic constitutional guarantees.

4. Capital punishment violates the constitutional guarantee of equal protection under the law because it is disproportionately imposed against members of racial minorities, the poor and the uneducated.

5. Capital punishment brutalizes society and gives the message that violence is, in at least some instances, a legitimate response.

6. There is no verifiable evidence that capital punishment deters crime.

7. Most murders are crimes of passion and, as such, the possibility of execution is not a factor in the thoughts of the murderer. A cold-blooded killer does not expect to be caught anyway; for him, no punishment is an effective deterrent.

8. The Oregon Constitution guarantees that "punishment of crime shall be founded on the principles of reformation and not vindictive justice." There is no possibility of reformation if the death penalty is invoked.
9. The measures assume that future conduct can be predicted, and studies show that it cannot. In no case can it be said that an inmate is incapable of reformation. In no case can it be said that the eventual release of an inmate would automatically jeopardize public safety.

10. Capital punishment is wasteful of resources. The appeals process demands a disproportionate expenditure of time and energy by the courts, prosecuting attorneys, defense attorneys, juries, courtroom and corrections personnel.

11. During the period when the constitutionality of the statute is being tested, the public cost of normal appeals could exceed those incurred for long-term incarceration.

12. The possibility of a death sentence would tend to discourage defendants from exercising their constitutional right to fight the use of illegally obtained evidence, because such individuals might feel coerced into plea bargaining.

13. The measures are still subject to constitutional question, and many constitutional experts believe that this measure would be struck down.

V. MAJORITY DISCUSSION

In 1964, The City Club approved the Committee report to support repeal of the death penalty (State Measure No. 1). In its analysis, the Committee found that the death penalty did not provide additional protection to society "as a deterrent to murder." In 1978, the City Club supported the Majority opinion which came out in opposition to reinstating the death penalty (State Measure No. 8). In its conclusions, the Majority determined that the "death penalty does not deter murder to any provable degree." In addition, the Committee found that the current sentence for aggravated murder is "sufficient protection and retribution for society".

Putting aside the moral and ethical questions, we found that all the arguments presented pivot around one central thesis: that the existence of capital punishment would deter murder.

The Majority believes there is no verifiable evidence that capital punishment deters murder. In fact, a preponderance of the evidence suggests that the existence of capital punishment makes no difference in the rate of murder. For example, the States of Michigan and Indiana are very similar demographically, economically, racially, and politically. In Michigan, which has no death penalty, the homicide rate per 100,000 population averaged 3.49 between 1940 and 1955. In the neighboring state of Indiana, which executed 9 persons during that time period, the homicide rate was 3.5, nearly the same as Michigan's rate.

In comparing the murder statistics in Oregon between periods in which capital punishment was available and in which it was not, the deterrence theory is also refuted. From 1915 to 1920, when capital punishment was abolished in Oregon, the murder rate was 4.0 per 100,000 in 1918 and 4.1 in
In 1921, the first year the death penalty was reestablished, the homicide rate rose to 7.7 per 100,000. In the Majority's view, other evidence reviewed similarly fails to support the deterrence theory.

Proponents of these measures submit that the prevention of a single murder is sufficient reason to justify the passage of the measures. However, use of the death penalty in a given state may increase the subsequent rate of criminal homicide in that state. One study showed that between 1946 and 1955, in California, the murder rate actually increased in the period immediately preceding well-publicized executions. Anyone who is sick, confused or violent enough to commit murder might also be the type who would envy the celebrity status accorded capital offenders.

Your Committee considered the argument that the existence of the death penalty would deter violence in prisons by those serving extended life sentences. However, testimony before your Committee suggested that the possible imposition of an additional 30-year sentence without the possibility of parole would serve as an even more effective deterrent to an inmate who is contemplating a murder/escape attempt. Because violence against prison guards or other inmates has not been a serious problem in Oregon, this issue should not serve as a basis for passage of a death penalty statute.

Opponents of capital punishment contend that imposing the death penalty tends to be related to the race of the victim. A recent study, which investigated criminal homicides from 1976 - 1980, showed that a person was more likely to be sentenced to death if he killed a white rather than a black. In Illinois, for example, where 1,214 whites were homicide victims, the death penalty was imposed in 35 cases, or 2.9 percent. Of the 1,866 murders of blacks, only 10 or one-half of 1 percent resulted in the death penalty. This disparity may suggest two possibilities: unconscious racism on the part of the criminal justice system causing it to value white life more than black life; and the tendency of largely white juries to identify with white victims. While these may apply in some parts of the United States, your Committee found no verifiable evidence that these factors bear any significant weight in Oregon.

The Minority of your Committee argues that the public should not have to incur the costs of incarceration for life of convicted murderers. However, evidence presented before your Committee suggests that it may be almost as expensive to execute someone when consideration is given to all of the legal costs incurred when prosecuting a murderer under the proposed death penalty statute. Because Measure 7 guarantees direct review by the Oregon Supreme Court, the high security costs will increase as the case proceeds through the appeals process. Further, because many individuals tried for murder are indigent, the state also would have to bear the cost of the murderer's defense throughout the criminal proceeding.

A valid argument made by proponents is that execution will prevent that particular defendant from committing any more murders. This cannot be disputed. There have been several highly publicized cases where paroled murderers have repeated their crime. In Oregon, however, eight individuals have been convicted of aggravated murder since 1978 of the type that would be subject to the death penalty under the provisions of Measure 7. And, in
spite of the safeguards built into Measure 7, there is always the possibility that an innocent person will be executed. One need only to investigate history to discover cases where a conviction has been overturned through the discovery of new evidence, mistaken identity or a criminal confession.

The Majority believes that the threat of 30 years in prison without the possibility of parole (as provided by the present statute) would keep most convicted murders locked away long enough to protect society. Your Committee believes that this form of punishment is far more appropriate than execution, and is not fraught with the difficulties outlined above.

In addition, the Majority is concerned that the measures deceive the voters in that many individuals may support these measures based on the assumption that, if the measures pass, Oregonians will have adopted broad changes in its penal system. This is not true. As defined, the death penalty statute is tightly construed and would apply only to aggravated murder. Even proponents of the Measures agree that it would rarely, if ever, be used.

The Committee also was concerned that the measures violated the defendant's constitutional guarantees against cruel and unusual punishment. However, both the proponents and opponents believe that the problems in this regard with the 1978 legislation have been overcome. In reviewing the proposed statute, your Committee found no evidence to the contrary. Opponents contend, however, that if the measures are approved by the voters, their constitutionality again will be tested in the courts.

VI. MAJORITY CONCLUSIONS

1. The Majority of your Committee is convinced, due to the lack of verifiable evidence, that reinstatement of the death penalty will not deter murder.

2. Because very few, if any, murderers would face a capital sentencing hearing, the measures do not provide any significant increase in public protection against persons committing crimes of passion, persons committing criminal negligence, or persons pleading insanity.

3. There is always the possibility that an innocent person will be executed in spite of the safeguards built into the measures.
VII. RECOMMENDATION

The Majority of your Committee recommends a "NO" vote on Measures 6 and 7 at the November 6, 1984 general election.

Respectfully submitted,

Peter E. Heuser
Marjorie Kafoury
Patricia Wood McCoy
Dr. Paul S. Wright
Thomas J. Gaughen
Helen A. Goodwin, Chairman

VIII. MINORITY DISCUSSION

Supporters of capital punishment agree that passage of these measures would act as a deterrent in at least some instances. In our opinion, if they prevent even one murder, their purpose is valid.

Most obvious, of course, is the argument that an executed murderer will not murder again, i.e., the ultimate deterrent. However, it must be pointed out that the probability a murderer will commit murder again is much higher than the probability that someone will murder for the first time. Further, there is testimony from criminals that, because they feared the death penalty, they did not murder their victims. On April 4, 1980, Ronald Gene Reynolds was accused in Lane County, Oregon of robbery in the first degree, assault in the second degree, and unauthorized use of a motor vehicle. In a tape-recorded session with police on the same day, Reynolds stated that the only reason he was concerned that his victim might die was because he knew Oregon had a death penalty. When asked whether he would be concerned about his victim's death if Oregon didn't have a death penalty, Reynolds replied "No." When asked if he had any regard for the value of his victim's life, Reynolds replied "No."

Passage of Measures 6 and 7 would be especially effective with regard to the repeat murderer, and the criminal who might otherwise murder witnesses or police officers to reduce his or her chance of capture.

Capital punishment is needed to maintain order and safety in prison with inmates who have long terms. Without it, there is little deterrent to violent escape attempts, hostage-taking, or murder of guards or other inmates.

Supporters of capital punishment generally feel that, although it is a strong punishment, it is a necessary, yet effective, vehicle for society to protect itself. In today's society, too much consideration is given to the criminal and not enough to the victim, the victim's loved ones, potential future victims and the effect on society.

The possibility that an innocent person could be executed is extremely unlikely. Two separate and unanimous jury verdicts would be required to invoke the death penalty. Should the jury not agree unanimously on any
issue, or should they return a negative finding, then the defendant shall be sentenced to 30 years imprisonment, with no possibility of parole. It should be pointed out that all death sentences would be automatically referred to the Oregon Supreme Court, thus narrowing further the possibility that an innocent person could be wrongly sentenced.

Additionally, the risk of executing an innocent person is further diminished by modern technology, sophisticated detection methods and inter-jurisdictional communications.

The only type of individual who would face a capital sentencing hearing would be: 1) one convicted of aggravated murder; 2) one whose conduct was deliberate, premeditated, and carried out with the expectation that the death of another human being would result; and 3) one who would, in all probability, continue to commit criminal acts of violence against society. Only this type of person would be subject to capital punishment, and then only through a separate proceeding after guilt had been established beyond a reasonable doubt.

There is no statistical evidence that the death penalty has ever been imposed in a discriminatory fashion in Oregon. Because of this, proponents of the measures consider it unlikely that discrimination would be used if the measures pass.

The monetary costs of both life imprisonment and execution are high. It was unclear which would be more expensive since legal costs of death penalty cases were projected based on appeals to the U.S. Supreme Court. Once the constitutionality of the measures is upheld, the likelihood of each case being granted certiorari review is remote; therefore, the projected costs would be considerably reduced.

Arguments against the death penalty include the idea that execution for aggravated murder is unconstitutional, i.e., "cruel and unusual punishment." The death penalty does not violate the federal Constitution. This is clearly demonstrated by laws permitting capital punishment enacted in several other states. Several such laws have withstood constitutional challenges argued before the U.S. Supreme Court. The ballot measures reviewed by this Committee, would if approved by the voters, likewise be challenged on constitutional grounds. Because drafters of the ballot measures had successful death penalty statutes as models, and because the ballot measures were drafted to satisfy constitutional questions raised by the Oregon Supreme Court in 1981, we feel the statute enacted by Measure 7 would not violate the Constitution.

The death penalty provides for a sense of justice and balance that is essential in a democracy. Our American society depends on the voluntary respect of our people for our laws, and for the basic rights of others. When people who have hideously violated those laws and rights are allowed to regain their freedom through parole, or to continue to exercise their brutality in prison, the whole basis of democracy and personal freedom is brought into question.

The opponents to capital punishment have repeatedly pointed out that few criminals would actually fall under the jurisdiction of Measures 6 and 7.
While that is very likely true, supporters point out that the measures are not intended to invoke the death penalty on masses of criminals. The measures are designed to deter the premeditated murderer. Ideally, of course, if the death penalty measures deterred all potential murderers from killing anyone, the death penalty would never need to be invoked.

IX. MINORITY CONCLUSIONS

1. The Minority of your Committee strongly believes the evidence is clear that society strongly believes it is necessary that capital punishment be reinstated in the State of Oregon.

2. It has been proven by testimony from criminals that the death penalty deters commission of some murders.

3. Innocent victims need to be protected and current laws have failed to do this in too many instances.

4. Capital punishment would, by statute, be used judiciously and only in the most extreme and justifiable cases.

5. The possibility of an innocent person being executed is remote; however, the possibility that an individual will be killed by a repeat murderer is far higher.

X. MINORITY RECOMMENDATION

The Minority of your Committee recommends a "YES" vote on Measures 6 and 7 in the November 6, 1984 general election.

Respectfully submitted,

Ronald A. Iverson
Lynn A. Wokal

FOR THE MINORITY

Approved by the Research Board September 27, 1984 for transmittal to the Board of Governors. Received by the Board of Governors on October 1, 1983 and ordered published and distributed to the membership for discussion and action on October 19, 1984.

APPENDIX A

Persons Interviewed

Marc Blackman, Attorney at Law (Defended the Quinn Case)
Sid Lezak, U.S. Attorney (Retired)
Mike Katz, American Civil Liberties Union
Mike Schrunk, Multnomah County District Attorney
Norm Smith, Chief Petitioner, Concerned Oregonians for Justice
Rollie Smith, Religious Community for Equal Justice
Delight L. Streich, Chief Petitioner, Concerned Oregonians for Justice
Paul Wichman, Oregonians Against the Death Penalty
APPENDIX B

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