



News&features

Arts&culture

Calendar

Music

Film

Eat It Up

Columns

Classifieds

SN&R Jobs

Personals

Spicy

Promotions

JAMMIES

Guides

About SN&R

Author Pages

Archives

HOME

## News&features

News

[Print Page](#)

[E-mail Page](#)

April 29, 2004

[Table of Contents](#)

[N&R Events, calendar & stuff](#)

[Cover Story  
Manhunt](#)

For the men who were arrested on the 10th Street level, the risk is being convicted of conspiracy. Attorney General Bill Lockyer really entrapped discrimination.

[News](#)

[Closing credit](#)  
City fast-tracks theater subsidy organization to "Save the Tower."

[Come for the  
the National /  
Scenes from the  
2004 Internatic  
Revisionist Con](#)

[Bites](#)

[A Diebold CEC  
get sidelined](#)  
Bites shares so an electronic-voting system and an off-the-

[Arts Feature](#)

[Life on the wi  
The Delta King  
years into its h  
become a majc  
area stages--ar  
braces for char](#)

[Previously in  
News:](#)

[Fables of the  
reconstruction](#)  
Jason Vest 04.:

[Fear of expos](#)  
Chrisanne Beck

[No recruit left](#)  
Paul Ferrell 04.  
more...

# End of an error?

*Don Heller, architect of California's death penalty, says the law should be scrapped*

By **Cosmo Garvin**

As a prosecutor in the early 1970s, Don Heller was a sort of boy wonder. Fresh out of law school, he went to work for what he still calls the "best shop in the country," the Manhattan district attorney's office. There, he quickly began trying major cases and earning a reputation as a "mad-dog" prosecutor (he's still got the framed, studded, black leather dog collar to prove it). After just four years, he moved to Sacramento to become an assistant U.S. attorney, trying high-profile federal cases, including the attempted-murder trial of Lynette "Squeaky" Fromme, the Manson-family acolyte who attempted to shoot then-President Gerald Ford in Capitol Park.



Photo By Larry Dalton

*Don Heller wrote the state's death-penalty law when he was only 33. He said he's grown a lot since then.*

It was that case that led the self-described conservative to an even bigger challenge, what easily could have been the crowning achievement of any prosecutor's career. At age 33, Heller brought the death penalty back to California.

"At the time, I thought capital punishment served a function in the criminal-justice system," Heller explained to SN&R. "I thought it served the function of deterrence and brought justice to those who commit the ultimate crime."

But writing California's death-penalty law is an achievement Heller has spent years wishing he could undo.

"It was summer of 1977. I got a call from Senator John Briggs," recalled Heller. Briggs asked Heller whether, if Fromme had succeeded in killing the president, she could be put to death. No, Heller explained, she could not, thanks to a U.S. Supreme Court ruling that nullified death-penalty laws across the nation. The state Legislature had passed a new law, one that would meet the requirements of the Supreme Court, but it was vetoed by then-Governor Jerry Brown.

So, Heller was hired to write a new California death-penalty law that would pass constitutional muster, to be put directly to the voters.

"I functioned as a Legislature, with no input from anybody but Senator Briggs, who wanted it all-encompassing," Heller said. "There was no dialogue, no committees debating the finer details. Looking back, not having any debate effectively created a death penalty that has the largest death population of any state in the U.S."

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Heller said he crafted a law that he thought could be applied fairly, but after just a few years as a private defense lawyer, he began to have his doubts.

"First of all, it discriminates against the poor," Heller explained. He began to see firsthand how difficult it was for people of little means to hire an effective defense attorney. "If you can hire a dream team, your chances improve. You don't see too many rich people on death row."

Advances in DNA science further shook his faith in capital punishment. Since 1976, 115 death-row inmates nationwide have been found factually innocent and exonerated.

"We've got over 600 people on death row in California. There's a very real possibility that someone sitting there is factually innocent. What if it's 1 percent? What's the acceptable margin of error? I say there isn't one."

**Heller's been a Republican** all his life, though at times, he feels out of sync with his party. "Sometimes, it seems the world has passed me so far to the right that I'm starting to feel like a leftist," he said.

Still, the lefty establishment probably won't be sending a membership application anytime soon. As a defense attorney, Heller has specialized in complex cases against some decidedly upper-crust clients. He headed up former Insurance Commissioner Chuck Quackenbush's defense team during the Republican's corruption scandal. Heller also defended insurance-industry lobbyist Clayton Jackson, when the lobbyist was accused, and later convicted, of bribery.

Heller's always been an opponent of the three-strikes law, and yet his plan for convicted child molesters sounds plenty draconian.

"I say one strike, and you're out. Life. The recidivism rate is just too high," Heller explained.

Of these apparent contradictions, Heller said, "I don't believe in setting my feet in concrete on any issue. I think that, as humans, we ought to grow, and I think I've grown a lot over these years."

And that is why Heller steadily has become more vocal in his opposition to capital punishment. Next week, he'll even attend his first anti-death-penalty rally, where he will challenge Governor Arnold Schwarzenegger to impose a moratorium on the death penalty, as former Illinois Governor George Ryan, also a Republican, did four years ago.

The event, which is being organized by the anti-death-penalty group Death Penalty Focus, will be held on the north steps of the Capitol at noon on Tuesday, May 4. It comes at a time when the opponents of capital punishment in California appear to be gaining momentum.

Earlier this month, Senator Don Perata, D-Oakland, was ready to introduce a bill to impose a moratorium on the death penalty until the law could be reviewed and reformed.

Perata was motivated by a study published in the UC Santa Clara Law Review, which compared California's death-penalty law to that of Illinois. In that state, Ryan commuted the sentences of all death-row inmates, saying the system was "haunted by error." The Santa Clara report found that California's law is riddled with many of the same problems found in Illinois.

"This study gives California a failing grade in its administration of the death penalty," said Chris Lehman, Perata's legislative consultant. "We need to at least take a serious look to make sure we're not executing innocent people. I think the people of California would agree there's no room for error."

Perata, however, has backed off his moratorium bill for now, at the urging of anti-death-penalty activists who felt the timing wasn't right. The decision to hold the bill also was prompted by other anti-death-penalty stirrings in the state Legislature.

Last week, Senate President Pro Tem John Burton, D-San Francisco, announced that he would form a bipartisan commission later this year to study California's death-penalty

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law, similar to the former governor's commission in Illinois.

Burton's announcement was made at an anti-death-penalty fund-raising event, and he has yet to release many details of the commission plan. But, if it proceeds, it may be the most serious discussion of the death penalty California has had since Heller's initiative passed 27 years ago.

"Potentially, it's huge. It's hard to predict what's going to happen, but I think it could be the most groundbreaking event in the history of California's death penalty," said Stefanie Faucher, spokeswoman for Death Penalty Focus.

As the man who wrote California's death-penalty law, Heller said he welcomes the commission, but he added that he's been in a unique position to study the death penalty for nearly three decades: "It simply can't achieve what I thought it was going to achieve: to apply capital punishment in a fair and non-discriminatory way. I'm convinced now that it can't be remedied and it should be abolished."

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