

Posted 11/08/10

## ANSWERING TO A DIFFERENT AUTHORITY

*When it comes to the death penalty, a would-be Attorney General's fealty to the law has its limits*

*By Julius (Jay) Wachtel.* Is there a point at which a District Attorney should call out the law? For San Francisco D.A. Kamala Harris, now locked in a tight contest for California Attorney General, that threshold has long been capital punishment. It's not as though she's kept it a secret. Her promise to never seek the death penalty was right in her [2004 inaugural address](#):

As a community that is smart on crime, we must reject simplistic approaches to public policy. Dr. Martin Luther King taught us that, "injustice anywhere is a threat to justice everywhere." It takes much more than building prisons and locking away prisoners to keep our city safe. I will only use "3 strikes" when the third strike is a serious or violent felony. **And I will never charge the death penalty...**At the same time, let me be clear that anyone who commits rape, molests a child, commits murder or does any other violent act will meet the most severe consequences and will be removed from this community so that they can do no more harm.

Harris has remained true to her word, recommending not one case for capital punishment during her two terms (San Francisco voters, who are overwhelmingly opposed to executions, reelected her in 2007.)

Yes, there have been a few "glitches" along the way. Perhaps the most notable involved the murder of a San Francisco cop. On an evening in April 2004 San Francisco police gang officers [Isaac Espinoza](#) and Barry Parker were patrolling a dangerous neighborhood in an unmarked Crown Victoria when they encountered two men. One seemed to be hiding a gun under his coat. As Espinoza pursued him on foot the man turned and fired 14 rounds from an AK-47 rifle, killing Espinoza and wounding Parker. The killer, whose coat, ID and weapon were recovered nearby, was identified as a 19-year old gang member who had done time in a youth prison for a gun-related crime.

Three days after the incident D.A. Harris announced that in line with existing policy her office would not seek the death penalty. It did, however, file first-degree murder and other charges. But despite abundant evidence prosecutors couldn't even get that. Jurors were swayed by the defendant's improbable assertion that [he thought the officers were gang members](#), not cops and convicted him of the lesser offense of second-degree murder. Fortunately the judge was not so easily fooled. She imposed a sentence of two consecutive life terms without the possibility of parole.

Harris drew a lot of flack on this case. Some came from a friendly source. [A former San Francisco public defender](#) suggested that her quick decision to forego the death penalty made it seem "more like a reflection of a philosophical animus to the death penalty rather than an individualized exercise in discretion."

Harris just ran for California Attorney General. (See above video. The race was very close and remains undecided.) She caught a lot of grief over her anti-death penalty stance. Her campaign flack, [Brian](#)

[Brokaw](#), tried to deflect criticism over the cop-killing case by suggesting that the jury's verdict supported Harris's decision to not seek the death penalty. What he didn't mention was that the "decision" was predetermined. Neither did he touch on the fact that her office's failure to secure a first-degree murder conviction might simply demonstrate its incompetence.

After the killing Harris reportedly established a committee to review potential death-penalty cases and make recommendations. It's hardly surprising that no such case has ever managed to overcome her philosophical objections.

Bar associations and such offer prosecutors lots of ethical advice, particularly when it comes to defendant rights. To whom a District Attorney owes their fealty gets little attention. Occasionally there's a reference to [Berger v. United States](#), the 1935 Supreme Court case in which Justices addressed the role of the United States Attorney, the top Federal prosecutor in each Judicial District:

As such, he is in a peculiar and very definite sense the **servant of the law**, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Kamala Harris's public stance on the death penalty pretty well thrashes the "servant of the law" model. [California Penal Code section 190.3](#) provides that when the death penalty is an option it's up to the "trier of fact," meaning the jury, to determine whether the special circumstances that justify capital punishment are true, and then to decide on either death or life without parole. Harris made this process moot, apparently by directing her attorneys to not charge special circumstances in the first place. Is that illegal? Your blogger found no law requiring that D.A.'s charge special circumstances when they're present. Prosecutors are typically tough-minded, law-and-order types, so legislators probably didn't anticipate that one might choose to sabotage their work out of hand.

Still, Kamala Harris *did* take the [oath of office](#) prescribed by Article 20 of the California Constitution:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; **and that I will well and faithfully discharge the duties upon which I am about to enter....**

Does openly disavowing a legal penalty, then circumventing the process which the Legislature prescribed for its use, constitute a "well and faithful" discharge of duties? Your blogger thinks not, but then again, he's not a lawyer.

On the other hand, he *has* taught criminal justice ethics, and here the balance turns decidedly against Harris. Criminal justice practitioners who have a conflict between, say, conscience and duty can recuse themselves and leave the decision to others, or, less effectively, have their prospective decision "vetted" by their peers. Alas, San Francisco D.A. Harris is doing neither (her death penalty "committee" seems

nothing more than a pretend version of the latter approach.) So from this perspective your blogger would consider her death penalty decision-making process unethical.

What about Harris's plans as Attorney General? [She has repeatedly promised](#) to "uphold the law" if elected. One hopes so, as it's the A.G.'s duty to contest death penalty appeals. But while it wouldn't be out of line for an Assistant A.G. to be against the death penalty – after all, they can avoid these cases – Harris aims to be top dog. Even if she recused herself from overseeing such matters Harris still decides who gets hired and promoted. Her beliefs could discourage lawyers from applying for a job, and would surely take the wind out of the sails of A.G. staffers who work on death penalty appeals. When the problem lies with the boss, there really is no remedy.

Incidentally, as your blogger's made abundantly clear (click [here](#) and [here](#)) he's against capital punishment. Then again, he's not looking to be A.G.