

ARTICLES

OREGON'S DEATH PENALTY: THE PRACTICAL REALITY

by
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In November 2011, Oregon Governor John Kitzhaber declared a moratorium on the Oregon death penalty, calling it a system that is “compromised and inequitable” and “fails to meet basic standards of justice.” With Governor Kitzhaber’s refusal to allow any further executions under his watch, Oregon became one of the most recent states to withdraw from the death penalty. Indeed, Governor Kitzhaber’s statement recognized the practical and financial difficulties with, and ultimately the unjustness of, Oregon’s death-penalty system and, as such, called on Oregonians to discover a better alternative.

In this Article, Professor Kaplan examines Oregon’s lengthy and dysfunctional death-penalty system and the practical realities that make it so problematic. The discussion analyzes the history of Oregon’s death penalty; the serious and prevalent issue of wrongful convictions across the country (including Oregon); the extraordinary taxpayer costs associated with maintaining the death penalty in Oregon, where only two people—both of whom were volunteers—have been executed; and the changes in state law and death penalty jurisprudence that have slowed the administration of Oregon’s death penalty to render it ineffective. Professor Kaplan argues that, given these practical concerns, the Oregon death penalty, as it currently stands, is in serious need of examination from a public policy standpoint to ensure that

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cost, effectiveness, and time, are given proper consideration. To do this, she recommends that Governor Kitzhaber designate a non-partisan committee to study Oregon’s death penalty as it currently stands and report its findings. Professor Kaplan concludes that a comprehensive committee report on Oregon’s death penalty will ultimately allow Oregonians to decide whether to maintain or abolish the death penalty.

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INTRODUCTION

[I]n practice Oregon has an expensive and unworkable [death penalty] system that fails to meet basic standards of justice. Twenty-seven years after voters reinstated the death penalty it is clear the system is broken.

—Governor John Kitzhaber, November 22, 2011

Oregon’s relationship with the death penalty has been characterized by ambivalence and unpredictability. Its numerous twists and turns have resulted in proponents and opponents alternately gaining the upper hand with the law enacted and repealed over and over again. To be spe-

cific, it was enacted by statute in 1864.¹ It remained in force for 60 years until voters repealed it in 1914.² Its abolition was short-lived as voters changed their minds and voted to reinstate it in 1920.³ The voters again repealed the death penalty in 1964, only to have them re-enact it in 1978.⁴ The Oregon Supreme Court deemed it unconstitutional in 1981, and still, voters reinstated it again in 1984.⁵ Most recently, in November 2011, Oregon Governor John Kitzhaber declared a moratorium on Oregon's death penalty until the end of his term stating that he "refuse[s] to be a part of this compromised and inequitable system any longer; and [he] will not allow further executions while [he is] Governor."⁶

The debate over the death penalty in Oregon and around the country is constant with both moral and legal arguments presented for and against it.⁷ And yet, when Governor Kitzhaber declared the Oregon death-penalty system "broken," placed a moratorium on all executions, and issued a temporary reprieve of the December 2011 scheduled execution of Gary Haugen,⁸ his focus was more on the death penalty in prac-

¹ *History of Capital Punishment in Oregon*, OR. DEP'T OF CORR. (2000), http://www.oregon.gov/DOC/PUBAFF/pages/cap_punishment/history.aspx. Oregon's original Constitution did not contain a death-penalty provision. *Id.* However, "Oregon's death penalty for what was then called first-degree murder reaches back to the time of provisional (1843–1849) and territorial (1849–1859) governments." William R. Long, *Death Penalty*, OR. ENCYCLOPEDIA, http://www.oregonencyclopedia.org/entry/view/death_penalty; see also *infra* Part I, The History of Oregon's Death Penalty.

² *History of Capital Punishment in Oregon*, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Helen Jung, *Gov. John Kitzhaber Stops Executions in Oregon, Calls System 'Compromised and Inequitable'*, OREGONLIVE (Nov. 22, 2011, 2:00 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov_john_kitzhaber_stops_all_e.html (article contains a link to the Governor's full statement).

⁷ See generally Evan J. Mandery, *Capital Punishment in America: A Balanced Examination* pt. I (2d ed. 2012).

⁸ Press Release, John Kitzhaber, Governor of Or., Governor Kitzhaber Issues Reprieve—Calls for Action on Capital Punishment (Nov. 22, 2011), http://www.oregon.gov/gov/media_room/pages/press_releasesp2011/press_112211.aspx. Gary Haugen waived all of his future appeals in May 2011. See Helen Jung, *Oregon Death Row Inmate Wants to Drop Appeals, Paving Way for First Execution in 14 Years*, OREGONLIVE (May 9, 2011, 10:30 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/05/oregon_death_row_inmate_says_he_wants_to_drop_all_appeals_paving_way_for_first_execution_in_14_years.html. Haugen challenged the Governor's reprieve and on August 3, 2012, Marion County Circuit Timothy P. Alexander ruled that Haugen "has the right to reject Governor Kitzhaber's reprieve." Lynne Terry, *Gary Haugen Can Reject Gov. Kitzhaber's Reprieve, Judge Rules*, OREGONLIVE (Aug. 3 2012, 12:44 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/08/gary_haugen_can_reject_gov_kit.html. The Governor is appealing that ruling. Yuxing Zheng, *Gov. John Kitzhaber Files Brief with Oregon Supreme Court over Gary Haugen Death Penalty Reprieve*, OREGONLIVE (Dec. 21, 2012 5:24 PM), http://www.oregonlive.com/politics/index.ssf/2012/12/gov_john_kitzhaber_files_appea.html.

tice than on its moral or legal merits; Governor Kitzhaber urged Oregonians to “find a better solution” to a system that he said is arbitrary, expensive and “fails to meet basic standards of justice.”⁹ With this announcement, Oregon became one of the latest states in the country to abolish or retreat from the death penalty.

In 2011, Illinois abolished its death penalty;¹⁰ New Mexico repealed its death penalty law in 2009;¹¹ New Jersey in 2007;¹² and in 2004, New York’s highest court ruled its death penalty statute unconstitutional.¹³ And the trend continues. Just this past spring (2012), Connecticut lawmakers voted to repeal its death penalty, making it the 17th state to have abandoned the death penalty.¹⁴ Nationally, the momentum towards repeal seems to be building.¹⁵ Due to high profile death penalty cases like Troy Davis, who was executed in Georgia in 2011 despite a lack of physical evidence linking him to the crime and recantations by a number of critical eyewitnesses who originally implicated him,¹⁶ there has been renewed attention to how the death penalty is working in practice rather than whether it is right or wrong in theory.

Moreover, many of the states that have recently abolished the death penalty (or are considering it) are examining the cost of maintaining it especially in this time of fiscal crisis. Some have concluded that maintenance of the death penalty is a waste of millions of taxpayers’ and state dollars that could be spent elsewhere—especially in states that rarely execute anyone—another practical (rather than moral or legal) considera-

⁹ Jung, *supra* note 6.

¹⁰ See Ariane de Vogue & Barbara Pinto, *Illinois Abolishes Death Penalty; 16th State to End Executions*, ABC NEWS (Mar. 9, 2011), <http://abcnews.go.com/Politics/illinois-16th-state-abolish-death-penalty/story?id=13095912#.T-oFbY5OTww>.

¹¹ *New Mexico Governor Repeals Death Penalty in State*, CNN (Mar. 18, 2009), http://articles.cnn.com/2009-03-18/justice/new.mexico.death.penalty_1_penalty-trial-death-row-death-penalty-information-center?_s=PM:CRIME.

¹² Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3.

¹³ See *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004) (ruling that the state’s death-penalty statute was unconstitutional because of the statute’s direction on how the jury was to be instructed in case of deadlock). New York has since been without the death penalty, as the law has not been amended.

¹⁴ David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN (Apr. 25, 2012, 5:41 PM), http://articles.cnn.com/2012-04-25/justice/justice_connecticut-death-penalty-law-repealed_1_capital-punishment-death-penalty-information-center-death-sentences?_s=PM:JUSTICE.

¹⁵ Dalina Castellanos, *States Rethink Capital Punishment: Connecticut Will Be the Fifth to Scrap It in Five Years. High Cost Is Increasingly a Factor*, L.A. TIMES, Apr. 15, 2012, at 16, available at 2012 WLNR 7915428.

¹⁶ Colleen Curry & Michael S. James, *Troy Davis Executed After Stay Denied by Supreme Court*, ABC NEWS (Sept. 21, 2011), <http://abcnews.go.com/US/troy-davis-executed-stay-denied-supreme-court/story?id=14571862#.T-oHC45OTww>; Brandon L. Garrett, *Eyes on an Execution: The Troy Davis Case Shows How Wrong Eyewitness Evidence Can Be*, SLATE (Sep. 20, 2011, 3:52 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/09/eyes_on_an_execution.html.

tion. In Oregon, for example, the State has been unable to administer an effective capital-punishment system. What it does have is a lengthy, unwieldy and dysfunctional system in which only volunteers (those that waive their appeals) are executed. Since 1978, when capital punishment was reinstated in Oregon, the State has obtained 85 death sentences, but there are only 37 on death row today and only two (volunteers) have actually been executed.¹⁷ Due to the numerous changes to the death penalty law over the years many on Oregon's death row had their sentences remanded, reversed, or reduced.¹⁸ Consequently, to this day, there remain a handful of death row prisoners who were originally sentenced to death in the late 1980s, who are still litigating their first direct appeal—more than twenty years later.¹⁹ Moreover, any future change to Oregon's death penalty statute or in death penalty jurisprudence could result in all of these cases (and any newer ones) being reexamined, adding more years to each defendant's appeals process and costing Oregon's taxpayers more money.²⁰

Governor Kitzhaber's suspension of the death penalty and his call to "all Oregonians to engage in the long overdue debate that [the death penalty] deserves"²¹ has provided a unique opportunity to examine some of the practical considerations implicated in the death penalty in Oregon and around the country. In this Article, I hope to participate in this debate by setting forth a few of the pragmatic reasons why it is not worthwhile to maintain the death penalty in Oregon. In Part I, I explain the history of the death penalty in Oregon. In Part II, I focus on wrongful convictions. Included in this section are stories of innocent people sentenced to death who were innocent of the crimes for which they were convicted, sentenced and imprisoned. Wrongful convictions have significantly changed the discussion of the death penalty around the country. Oregon, like most states, has wrongfully convicted and imprisoned innocent people and thus, there is always the possibility that Oregon could execute an innocent person. In Part III, I examine the costs to taxpayers of maintaining a death-penalty system in Oregon and in other states, like Oregon, that rarely execute anyone. In Part IV, I focus on Oregon's inability to administer an effective death penalty—how changes in the law have contributed to Oregon's lengthy, dysfunctional and costly death-penalty system and how potential future litigation and changes to the law

¹⁷ OREGON JUST. RESOURCE CTR., DEATH SENTENCES RESEARCH DATABASE (2012) (on file with author) (last updated Nov. 15, 2012); Press Release, John Kitzhaber, *supra* note 8. The "37 on death row today" includes those whose death sentences have been reversed and are awaiting resentencing. OREGON JUST. RESOURCE CTR., *supra*; see *infra* notes 398–405 and accompanying text.

¹⁸ See *infra* Part IV, Oregon's Lengthy Death-Penalty System.

¹⁹ See, e.g., State v. Guzek (*Guzek III*), 86 P.3d 1106 (Or. 2004); State v. Langley (*Langley III*), 16 P.3d 489, (Or. 2000); State v. Rogers, 4 P.3d 1261 (Or. 2000); State v. McDonnell, 987 P.2d 486, (Or. 1999).

²⁰ See *infra* Part IV, Oregon's Lengthy Death-Penalty System.

²¹ Press Release, John Kitzhaber, *supra* note 8.

will only exacerbate these problems. And last, in Part V, I conclude with the recommendation that the Governor designate a committee to conduct a comprehensive review of Oregon's death-penalty system—a review designed to assess all aspects of Oregon's death penalty, to identify its problems and to determine whether solutions exist for its overhaul. If the Committee concludes, as I expect it will, that the death-penalty system is broken and dysfunctional, the Governor should commute the sentences of those on death row.

I. THE HISTORY OF OREGON'S DEATH PENALTY

A. 1864–1914

While the Oregon Constitution, originally enacted in 1857, had no provision for the death penalty, in 1864, capital punishment by hanging became legal by statute for first-degree murder²² (having previously been recognized by the territory of Oregon).²³ In 1903, to restrict public attendance, the law was amended to require executions be carried out at the Oregon State Penitentiary in Salem.²⁴ Prior to this change in law, a public hanging was a community event. H.D. Egbert, a 26-year-old, convicted of murder, became the first person to be hung under the new law in 1904.²⁵ Twenty-three more individuals were hung over the next ten years.²⁶

Even in these early death penalty cases, the constitutionality of capital punishment was at issue.²⁷ Most opponents who challenged the law saw it as contrary to Article 1, section 15 of the Oregon Constitution, which at the time read, “Laws for the punishment of crime shall be founded on the principles of reformation and not of vindictive justice.”²⁸ In *State v. Finch*, the Oregon Supreme Court recognized the section's ambiguous terminology, and set out to define its scope, holding that the death penalty was constitutional.²⁹ First, it reasoned that because the territorial law prior to Oregon's admittance into the union inflicted the

²² See *History of Capital Punishment in Oregon*, *supra* note 1.

²³ *Ex parte Kerby*, 205 P. 279, 279 (Or. 1922). First degree murder included “some other evidence of malice than the mere proof of the killing . . . unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation when necessary to constitute murder in the first degree [was] evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood and not hastily upon the occasion.” *State v. Anderson*, 10 Or. 448, 463 (1882) (quoting GENERAL LAWS OF OREGON, CRIM. CODE, ch. II, § 519, at 407 (Deady & Lane 1843–1872)) (internal quotation mark omitted).

²⁴ *History of Capital Punishment in Oregon*, *supra* note 1.

²⁵ *Id.*

²⁶ See *id.*

²⁷ See, e.g., *State v. Finch*, 103 P. 505, 511–12 (Or. 1909); *Anderson*, 10 Or. at 465.

²⁸ OR. CONST. art. I, § 15 (1859) (amended 1996); *Finch*, 103 P. at 511.

²⁹ *Finch*, 103 P. at 511–12.

death penalty “and no change was made in that penalty, or in the law itself, . . . [but only] re-enacted with some slight amendments,” capital punishment was deemed constitutional.³⁰ Second, comparing the section with others in the Constitution, the Court noted that Article V, section 15 allows reprieves by the Governor, which operate “only in capital cases.”³¹ Third, “the section in question was substantially copied from the Constitution of the state of Indiana.”³² The Indiana Supreme Court had previously upheld the death penalty, finding that, despite the death penalty, “[t]here is indeed nothing vindictive in our penal laws. The main object of all punishment is the protection of society.”³³ Accordingly, capital punishment remained the law in Oregon until 1914.

B. 1914–1978

The early part of the 20th century was the most active period of capital punishment repeal and reinstatement in American history. Between 1897 and 1917, 10 states abolished capital punishment, and eight of them reinstated it by the end of the 1930s, some within a few years of abolition.³⁴ Oregon was one of these states. In 1914, Oregonians voted to repeal the death penalty, only to reinstate it just six years later.³⁵

In many states, abolition of the death penalty occurred during the first two decades of the 20th century along with other Progressive Era reform legislation.³⁶ Oswald West, Oregon’s governor from 1911 to 1915, enacted numerous progressive reforms and vowed to eliminate the death penalty during his term of office.³⁷ Following a failed attempt in 1912, Oregon voters repealed the death penalty in 1914 by constitutional amendment with a margin of 50.04%, a mere 157 votes.³⁸ Article I, section 36 read, “The death penalty shall not be inflicted upon any person under the laws of Oregon. The maximum punishment which may be in-

³⁰ *Id.* at 511.

³¹ *Id.*

³² *Id.* at 512.

³³ *Id.* (quoting *Driskell v. State*, 7 Ind. 338, 343 (1855)).

³⁴ See John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 543–73 (1992) (providing state-by-state accounts).

³⁵ *History of Capital Punishment in Oregon*, *supra* note 1.

³⁶ See Galliher et al., *supra* note 34, at 539–41.

³⁷ *Id.* at 540, 549.

³⁸ *Id.* at 550; *History of Capital Punishment in Oregon*, *supra* note 1; see also OR. CONST. art. I, § 36 (1914) (repealed 1920); *Initiative, Referendum and Recall: 1912–1914*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections12.htm>. Governor West believed that by including the death-penalty repeal in the state constitution, Oregonians would never again need to vote on the issue. Instead, there have been seven voter initiatives on the death penalty during last century, far more than any other state. HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 155–56 (1987).

flicted shall be life imprisonment.”³⁹ It is interesting to note that this repeal amendment passed with the help of women, as this was the first ballot measure in which women were allowed to vote in Oregon.⁴⁰ The vote may also have been influenced by the placement of a ballot initiative for prohibiting the manufacture and sale of liquor that appeared on the official ballot immediately before the death penalty initiative.⁴¹

The end of the Progressive Era coincided with the end of World War I’s economic recession, and, according to Oregon’s then governor Ben Olcott, a “wave of crime [that] ha[d] swept over the country.”⁴² Olcott continued, “Oregon has suffered from this criminal blight, and during the past few months the commission of a number of cold-blooded and fiendish homicides has aroused our people to a demand for greater and more certain protection.”⁴³ One case in particular undoubtedly influenced voters’ opinions on the death penalty at the time. The Centralia Massacre was a violent and bloody incident that occurred in nearby Centralia, Washington on November 11, 1919, during a parade celebrating the first anniversary of Armistice Day.⁴⁴ This conflict between the American Legion and workers who were members of the Industrial Workers of the World resulted in at least three deaths, many wounded, numerous prison terms, and an ongoing dispute over the motivations and events that caused the massacre.⁴⁵ Following this massacre, the Governor, the

³⁹ OR. CONST. art. I, § 36 (1914) (repealed 1920); *State v. Hecker*, 221 P. 808, 813 (Or. 1923). Prior to the adoption of this amendment, while the Constitution was silent on the subject of the death penalty, there were statutes fixing death as the penalty for treason, 1 LORD’S OREGON LAWS § 1892 (1910), and for murder in the first-degree, *id.* § 1903; and there were three sections of the Code prescribing the mode of executing the death sentence, *id.* §§ 1598–1600. *Hecker*, 221 P. at 813.

⁴⁰ See *Oregon Constitutional Amendments over the Decades*, CRAFTING OR. CONST., <http://arcweb.sos.state.or.us/pages/exhibits/1857/after/initiative.htm>. See generally Kimberly Jensen, *Woman Suffrage in Oregon*, OR. ENCYCLOPEDIA, http://www.oregonencyclopedia.org/entry/view/woman_suffrage_in_oregon/.

⁴¹ The official pamphlet for the November 3, 1914, election was mailed to every registered voter; the pamphlet contained the proposed prohibition amendment in full, and advised the voters that the object was to amend Article I of the Constitution “by adding thereto a section to be designated section 36 of article 1,” and that the purpose of the amendment was to prohibit the manufacture and sale of intoxicating liquors within the state of Oregon after January 1, 1916, except for medicinal, scientific, sacramental, or mechanical purposes. The official ballots, among other things, referred to the measure as the ‘Prohibition Constitutional Amendment’ The official pamphlet also contained a full copy of the proposed amendment abolishing the death penalty.” *Hecker*, 221 P. at 813.

⁴² Robert H. Dann, *Capital Punishment in Oregon*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 110, 111 (1952).

⁴³ *Id.*

⁴⁴ See LOWELL S. HAWLEY & RALPH BUSHNELL POTTS, COUNSEL FOR THE DAMNED: A BIOGRAPHY OF GEORGE FRANCIS VANDERVEER 273 (1953).

⁴⁵ *Id.* at 273, 277–78, 280, 284.

Oregon American Legion, a majority of the state prosecutors and the Oregon Bar Association all endorsed reinstating the death penalty.⁴⁶

In response, 56% of Oregon voters ended the state's six-year moratorium on the death penalty in 1920 by supporting a constitutional amendment for its restoration.⁴⁷ The amendment read: "The penalty for murder in the first degree shall be death, except when the trial jury shall in its verdict recommend life imprisonment . . ." ⁴⁸ The method of execution "must be inflicted by hanging the defendant by the neck until he be dead, and the judgment must be executed by the superintendent or one of the wardens of the penitentiary. All executions must take place within the inclosure of the penitentiary."⁴⁹ It is interesting to note that at that time a minor could be given a death sentence, even though no person under the age of 21 was allowed to witness an execution.⁵⁰ Emmet Bancroft, a 25-year-old convicted of murdering a local sheriff during a prison break, was the first person hung under the newly reenacted law.⁵¹ Fifteen others were executed between 1920 and 1931, including L.W. Peare, who, at 67, was the oldest man ever executed in Oregon.⁵² Two inmates also committed suicide on Oregon's death row during this same period.⁵³ Like many states around this time, in 1931, Oregon stopped hanging individuals⁵⁴ and began using lethal gas.⁵⁵ Eighteen gas-chamber

⁴⁶ See Dann, *supra* note 42, at 111; *Back to Justice*, MORNING OREGONIAN, Nov. 19, 1919, at 12; *Bar Urges Return of Death Penalty*, MORNING OREGONIAN, Nov. 19, 1919, at 4; *Law or the Mob?*, MORNING OREGONIAN, Nov. 14, 1919, at 13; *State Prosecutors in Favor of Noose*, SUNDAY OREGONIAN, Nov. 30, 1919, at 14.

⁴⁷ *History of Capital Punishment in Oregon*, *supra* note 1; see Stephen Kanter, *Brief Against Death: More on the Constitutionality of Capital Punishment in Oregon*, 17 WILLAMETTE L. REV. 629, 632 (1981).

⁴⁸ See OR. CONST. art. I, § 37 (1920) (repealed 1964). Section 38 stated "[a]ll provisions of the laws of Oregon abrogated and repealed as in conflict with section 36, which section is herein repealed, are hereby revived as of full force and effect from and after the adoption of this constitutional amendment, subject to amendment by the legislative assembly." OR. CONST. art. I, § 38 (1920) (repealed 1964).

⁴⁹ 1920 Or. Laws, ch. 20, § 2. The only change in procedure for execution between the 1920 and the 1978 versions of the amendments was the method of execution used. 1979 Or. Laws ch. 2, § 7 (requiring executions to be carried out by "lethal gas").

⁵⁰ 1920 Or. Laws, ch. 20, § 2.

⁵¹ *History of Capital Punishment in Oregon*, *supra* note 1.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Hanging is one of the oldest methods of execution in the United States, but fell into disfavor in the 20th century after many failed attempts, and was replaced mostly by lethal gas or electrocution. See *Descriptions of Execution Methods*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/descriptions-execution-methods>. Delaware and Washington still use hanging but have lethal injection as an alternative method. *Id.*

⁵⁵ *History of Capital Punishment in Oregon*, *supra* note 1. The first person to be executed in the United States by lethal gas was Gee Jon on February 8, 1924 in the Nevada State Prison, *Descriptions of Execution Methods*, *supra* note 54, and Walter LeGrand was the last elected to be executed by lethal gas in Arizona on March 3,

executions took place between 1931 and 1964, including 17-year-old John Anthony Soto, “the youngest person ever executed in Oregon,” who was convicted of murdering three people.⁵⁶

Besides Governor West, who successfully abolished the death penalty in 1914 during his time in office, “probably no chief executive in Oregon gave firmer public opposition to capital punishment than Robert Holmes, a Democrat, elected [governor] in 1956 to complete the unexpired two-year portion of his predecessor’s four-year term.”⁵⁷ In his two years as governor, Holmes commuted all three death sentences that were brought before him.⁵⁸ He became “thoroughly identified with the abolition movement, so that many of his opponents became its opponents and vice versa.”⁵⁹ Oregon abolitionists tried once again to repeal the death penalty in November 1958, but the vote was “entangled in the gubernatorial struggle.”⁶⁰ Holmes’s opponent, then Secretary of State Mark Hatfield, also against the death penalty, “insisted he would uphold the law if elected governor and not use his power of commutation to accomplish what the legislature, trial juries, appellate courts, and electorate refused to do.”⁶¹ Governor Holmes lost the 1958 election to Mr. Hatfield,⁶² and the referendum on capital punishment lost in 25 out of 36 counties.⁶³ In Multnomah County, which accounted for one-third of the votes cast, the measure lost by 8,000 votes.⁶⁴

In the early 1960s, death penalty opponents argued in court that the death penalty was a “cruel and unusual” punishment, and therefore unconstitutional under the Eighth Amendment.⁶⁵ But, in Oregon, it was the popular Governor Hatfield, a staunch opponent of the death penalty,

1999. See *Searchable Execution Database: Gas Chamber Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions> (select “Gas Chambers” from drop-down menu for “Methods,” and click “Search by Details”).

⁵⁶ *Executions*, OREGON.GOV, http://www.oregon.gov/DOC/PUBAFF/docs/pdf/exec_table.pdf; *History of Capital Punishment in Oregon*, *supra* note 1.

⁵⁷ Hugo Adam Bedau, *The 1964 Death Penalty Referendum in Oregon: Some Notes from a Participant–Observer*, 26 CRIME & DELINQUENCY 528, 529–30 (1980).

⁵⁸ *Id.* at 530; see also *Eacret v. Holmes*, 333 P.2d 741, 742 (Or. 1958).

⁵⁹ Bedau, *supra* note 57, at 530.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² John M. Swarthout, *The 1958 Election in Oregon*, 12 W. POL. Q. 328, 328 (1959).

⁶³ Bedau, *supra* note 57, at 530.

⁶⁴ *Id.* (“[M]any opponents of the death penalty noted that the abolition referendum would have succeeded if only Multnomah County could have been moved into the abolition column.”).

⁶⁵ In *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958), the U.S. Supreme Court held that the Eighth Amendment contained an “evolving standard[] of decency that mark[ed] the progress of a maturing society.” Abolitionists applied the Court’s logic to executions and argued that the U.S. had progressed to a point that its “standard of decency” should no longer tolerate the death penalty. See ROBERT M. BOHM, *DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 11–12 (1999).

who influenced the state's electorate to consider repeal.⁶⁶ On August 20, 1962, LeRoy Sanford McGahuey was executed in the gas chamber; he was the first person put to death in Oregon since 1953⁶⁷ (and the last involuntary person executed to date⁶⁸) and Oregon voters for the second time in their history repealed the death penalty on November 3, 1964, by a 60% vote.⁶⁹ Two days later, Governor Hatfield commuted three death sentences, including Jeannace Freeman, the only woman at the time ever sentenced to death in Oregon.⁷⁰ The repeal remained in effect until 1978.

C. 1978–2011

In 1978, Oregon voters again reinstated the death penalty via Ballot Measure 8, incorporating the law into the Oregon Revised Statutes (ORS) sections 163.115 and 163.116.⁷¹ This was the largest majority vote in favor of the death penalty to date, with 64% of the electorate favoring the measure.⁷² However, because the law required that the trial judge, not a jury, determine a defendant's sentence, it was struck down by the Oregon Supreme Court in 1981 and deemed unconstitutional.⁷³ Only

⁶⁶ See *Mark O. Hatfield Biography*, OR. HIST. PROJECT, <http://www.ohs.org/the-oregon-history-project/biographies/Mark-O-Hatfield.cfm>. "In an effort to make his point about the death penalty in a 1991 Senate floor speech, [then Senator Hatfield] proposed public executions to show the 'barbaric' nature of the government-sanctioned killings." *Oregon Political Icon Mark O. Hatfield Dies at Age 89*, KATU (Aug. 7, 2011 7:26 PM), <http://www.katu.com/news/local/127131578.html>.

⁶⁷ See *Executions*, *supra* note 56.

⁶⁸ Jeff Ellis, *The Death Penalty in Oregon: 2010*, OR. DEF. ATT'Y, Mar./Apr. 2011, at 8.

⁶⁹ 1965 Or. Laws 6; *History of Capital Punishment in Oregon*, *supra* note 1. "How is this triumph to be explained? Those experienced in other ballot measure campaigns in Oregon could say, with some claim to truth, that the death penalty was abolished by concentrating \$10,000 worth of political effort in the state's single most populous county. No doubt the referendum effort was helped also by the general interest surrounding the presidential contest between Lyndon Johnson and Barry Goldwater. With a light vote in an off-year election, the death-penalty referendum might have failed even with a campaign like the one mounted in 1964. Victory at the polls may also have been helped by other factors, such as the growing number of young voters (who tend, more than their elders, to oppose the death penalty). Probably the great majority of those who became eligible to vote between 1958 and 1964 favored passage of Ballot Measure No 1." Bedau, *supra* note 57, at 534–35.

⁷⁰ *History of Capital Punishment in Oregon*, *supra* note 1. That changed in 2011 when Angela McAnulty was sentenced to death for killing her daughter. Karen McKowan, *Child Killer Gets Death*, REGISTER-GUARD (Eugene), Feb. 25, 2011, at A1, available at <http://projects.registerguard.com/csp/cms/sites/web/news/cityregion/25931485-41/death-mcanulty-jurors-jeanette-oregon.csp>.

⁷¹ OR. REV. STAT. § 163.116 (repealed 1981); see also *History of Capital Punishment in Oregon*, *supra* note 1.

⁷² See *History of Capital Punishment in Oregon*, *supra* note 1.

⁷³ *State v. Quinn*, 623 P.2d 630 (Or. 1981). "With the abolition of capital punishment in 1964, there was no longer a need for the statutes to distinguish between those murders for which a death penalty could be imposed and those for which it could not. . . . In summary, the new statute, as drafted, restores deliberation

three years later in 1984, Oregon voters passed Ballot Measure 6 with 55% of the vote, creating Article I, section 40 to exempt Article I, sections 15–16 of the Oregon Constitution from the death-penalty system⁷⁴ and Ballot Measure 7 with 75% of the vote, which amended ORS 163.150 “to require that, following a conviction for aggravated murder, a defendant be given a separate sentencing hearing before the trial jury,”⁷⁵ again reinstating the death penalty.

The reinstatement of Oregon’s death penalty in the late 1970s and early 1980s reflected a nationwide increase in public support for capital punishment.⁷⁶ Likewise, the use of desert theory,⁷⁷ or more generally the country’s “tough on crime” attitude, resulted in a staggering growth in the U.S. incarceration rates in the 1990s.⁷⁸ This “tough on crime” attitude was first introduced in 1964 (the same year the death penalty was voted down in Oregon) during Barry Goldwater’s presidential campaign.⁷⁹ New

as an additional element of murder for which a greater penalty, death, may be imposed much as it was under the pre-1971 statutory scheme.” *Id.* at 641–42; *see also* Ring v. Arizona, 536 U.S. 584, 609 (2002) (applying rule from *Apprendi v. New Jersey*, 530 U.S. 466, 496–97 (2000), to capital sentencing schemes, holding that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty); Kanter, *supra* note 47, at 633–34; *History of Capital Punishment in Oregon*, *supra* note 1.

⁷⁴ *History of Capital Punishment in Oregon*, *supra* note 1. OR. CONST. art. I, § 15 (1859), prior to its 1996 amendment, stated, “Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice.” OR. CONST. art. I, § 16 covers excessive bails and fines, and cruel and unusual punishment. OR. CONST. art. I, § 40 (1984) states, “Notwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law.”

⁷⁵ *History of Capital Punishment in Oregon*, *supra* note 1. Oregon’s 1984 death-penalty statute is codified at OR. REV. STAT. § 163.150 (2011).

⁷⁶ WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 16 (1987). “By the end of the 1970s, the [past] goals of rehabilitation were no longer the primary purpose of incarceration; rather, arguably more punitive or retributive goals emerged as the dominant purpose of prisons and incarceration.” Lyn Suzanne Entzeroth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 OR. L. REV. 797, 811–12 (2012). It is interesting to note that Oregon was the only state to reinstate the death penalty that did not have it in place at the time of *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), in 1972 and *Gregg v. Georgia*, 428 U.S. 153 (1976), in 1976.

⁷⁷ *See* Andrew von Hirsch, *Proportionate Sentences: A Desert Perspective*, in *Why Punish? How Much?: A Reader on Punishment* 207, 207 (Michael Tonry ed., 2011). Desert theory—punishing someone because they *deserve* it—involves “holding someone accountable for some harm and expressing the consequent anger and indignation” of society. *See* Andrew Oldenquist, *Retribution and the Death Penalty*, 29 U. DAYTON L. REV. 335, 336–37 (2004).

⁷⁸ *See* Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 J. C.R. & ECON. DEV. 153, 157 (2010).

⁷⁹ *Id.* at 158.

York introduced mandatory minimum drug sentences in 1973, including a 15-year minimum sentence for four ounces of heroin or cocaine possession.⁸⁰ This law prompted the federal government to create its own mandatory drug and violent crime sentences in the 1980s.⁸¹ In fact, “[t]his system of almost unfettered judicial discretion came under increasing attack in the 1970s and early 1980s due to the perceived unjustness of vast disparities in sentences for similar crimes, widespread fear about rising drug abuse and drug-related crime, and concerns about the effectiveness of penal rehabilitation.”⁸² The Federal Sentencing Guidelines of 1987 resulted in “narrow—and often quite severe—sentencing ranges.”⁸³ Likewise, in the 1990s, states began eliminating parole, enacting three-strikes laws, and regularly sentencing felons to life without parole.⁸⁴

It is not surprising that public support for the death penalty would go hand in hand with support for increased incarceration and harsher sentences. From 1980 to 1986, the nationwide death row population grew from 715 to 1,714.⁸⁵ However, over time, the resultant increase in execution numbers apparently worked to decrease the significance of execution to the public.⁸⁶

In Oregon, desert theory was introduced as the primary justification for harsher sentencing in the mid-1970s.⁸⁷ In addition to reinstating the death penalty in 1978, other laws reflected the “tough on crime” mentality. In 1977, Oregon’s legislature enacted its aggravated murder statute, which “provided for life imprisonment with significant mandatory minimums (at least twenty years) before a convicted individual could even be considered for parole, let alone released.”⁸⁸ In 1979, the year after capital punishment was reinstated, the Oregon Code was amended to allow execution in murder cases where a person “places or discharges a destructive

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 158–59.

⁸⁴ *Id.* at 159. “Since then, while the rate of increase has begun to slow, the incarceration rate itself has continued to rise. In 2003, [the United States] surpassed Russia to become the worldwide leader in incarceration. We have become, to put it bluntly, an outlier. And our status as the world’s most enthusiastic incarcerator cannot be attributed to anything unique about American culture Instead, our current incarceration epidemic is the direct result of political choices.” *Id.* (footnotes omitted).

⁸⁵ WHITE, *supra* note 76, at 17.

⁸⁶ *Id.* at 15–16.

⁸⁷ See von Hirsch, *supra* note 77 at 207. For a discussion on criminal punishment founded on retribution under Oregon law, see Stephen Kanter, *Dealing with Death: The Constitutionality of Capital Punishment in Oregon*, 16 WILLAMETTE L. REV. 1, 30–52 (1979).

⁸⁸ Stephen Kanter, *Sleeping Beauty Wide Awake: State Constitutions as Important Independent Sources of Individual Rights*, 15 LEWIS & CLARK L. REV. 799, 807 (2011) (citing Act of July 14, 1977, ch. 370, 1977 Or. Laws 303, 303–04).

device or bomb or who commits or attempts to commit aircraft piracy.”⁸⁹ Further, when death is not imposed, a person convicted of murder “shall be required to serve not less than 25 years before becoming eligible for parole.”⁹⁰

As in many states, Oregon’s reinstatement of capital punishment was partially influenced by the landmark U.S. Supreme Court decisions *Furman v. Georgia*⁹¹ and *Gregg v. Georgia*.⁹² Prior to 1972, most states gave jury discretion to determine both guilt and sentencing in a single proceeding.⁹³ Under this system, “about 100 defendants a year were sentenced to death during the two decades before 1972, and until the Supreme Court imposed a de facto moratorium on capital punishment in the late sixties, about half of them were executed.”⁹⁴ In *Furman*, the Supreme Court explained that “death is different” and declared such a jury-based discretionary system unconstitutional.⁹⁵ At the time of the ruling, the general belief was that capital punishment was unconstitutional. However, some states, including Georgia, responded by enacting new death penalty statutes to challenge this ruling. As a result, only four years later, in 1976, the Court in *Gregg* ruled that the Georgia death penalty statute, which included certain safeguards against arbitrarily imposed death sentences, was constitutional.⁹⁶ Between 1976 and 1981, the Court went on to decide at least nine additional cases regarding capital punishment safeguards.⁹⁷

The overall effect of these changes in capital-punishment laws was “a roller coaster system of capital justice, in which large numbers of people [were] constantly spilling into and out of death row, but virtually no actual executions [took] place.”⁹⁸ In the six years following *Gregg*, 1,240 defendants nationwide were sentenced to death, with 841 ultimately being removed from death row.⁹⁹ Of the remaining 399, only six were executed, five of them volunteers.¹⁰⁰ Furthermore, the length of time in determin-

⁸⁹ Act of Dec. 7, 1978, ch. 2, sec. 1, § 163.115(1)(c), 1979 Or. Laws 4.

⁹⁰ *Id.* § 163.115(5), 1979 Or. Laws 4.

⁹¹ 408 U.S. 238 (1972) (per curiam).

⁹² 428 U.S. 153 (1976).

⁹³ WHITE, *supra* note 76, at 5; *see also* OR. REV. STAT. § 163.010 (1963) (repealed 1971) (“Every person convicted of murder in the first degree shall be punished with death, except when the trial jury in its verdict recommends life imprisonment, in which case the penalty shall be life imprisonment.”).

⁹⁴ WHITE, *supra* note 76, at 5 (footnote omitted).

⁹⁵ *See, e.g., Furman*, 408 U.S. at 286 (Brennan, J., concurring) (“Death is a unique punishment”); *id.* at 289 (“Death . . . is in a class by itself.”); *id.* at 306 (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”); *see also* WHITE, *supra* note 76, at 5.

⁹⁶ WHITE, *supra* note 76, at 5–6; *see Gregg*, 428 U.S. at 169 (“We now hold that the punishment of death does not invariably violate the Constitution.”).

⁹⁷ WHITE, *supra* note 76, at 8.

⁹⁸ *Id.* at 9 (quoting Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 926 (1982) (internal quotation marks omitted)).

⁹⁹ *Id.* at 9–10.

¹⁰⁰ *Id.* at 10.

ing the constitutionality of a death sentence was significantly increased post-*Furman*.¹⁰¹ In fact, “with the single exception of the *Spenkellink* case [in Florida], no capital sentence had been litigated to its conclusion unless it had either been reversed or the defendant had voluntarily chosen to forgo further appeals.”¹⁰² While the Supreme Court attempted to speed up the process in the years following *Furman*, this phenomenon continues today.¹⁰³

In Oregon, adding to this “rollercoaster system of capital justice,” was the direct impact of the 1989 Supreme Court decision in *Penry v. Lynaugh*.¹⁰⁴ There, the Court reversed a Texas death-penalty sentence as violating the Eighth Amendment and requiring jury consideration of mitigating evidence at death sentencing.¹⁰⁵ As Oregon’s 1984 death penalty was based substantially on Texas’s law,¹⁰⁶ it required Oregon’s legislature to amend its death penalty accordingly. The 1984 law with this change and a few other statutory amendments remains the law today.¹⁰⁷ As noted above, since Oregonians reinstated the death penalty in 1978 and 1984, only two people have been executed in Oregon. In 1996, death penalty volunteer Douglas Franklin Wright was the first person executed by lethal injection.¹⁰⁸ One year later, another volunteer, Harry Charles Moore, was the second.¹⁰⁹

D. Today

On December 6, 2011, Oregon was set to execute Gary Haugen, another death-penalty volunteer who successfully waived his appeals and requested execution.¹¹⁰ With the intervention of Governor Kitzhaber, who declared a moratorium on the death penalty at least until 2015,

¹⁰¹ *Id.*

¹⁰² *Id.* (footnote omitted).

¹⁰³ See *infra* Part IV, Oregon’s Lengthy Death-Penalty System.

¹⁰⁴ 492 U.S. 302 (1989).

¹⁰⁵ *Id.* at 316–19; see *infra* Part IV, Oregon’s Lengthy Death-Penalty System.

¹⁰⁶ *History of Capital Punishment in Oregon*, *supra* note 1; see Kanter, *supra* note 47, at 634 (“The drafters of Oregon’s Ballot Measure 8 borrowed the worst and ignored the best provisions of the Texas statutory scheme . . .”).

¹⁰⁷ OR. REV. STAT. § 163.150 (2011). Under the amended law, life imprisonment with the possibility of parole should only be imposed upon a jury finding of mitigating circumstances by 10 or more members of the jury. *Id.* § 163.150(2); see also *id.* § 163.150(1)(b)(D).

¹⁰⁸ *Executions*, *supra* note 56. Douglas Franklin Wright was executed in 1996, after waiving his right to appeal. James Pitkin, *Killing Time: Dead Men Waiting on Oregon’s Death Row*, WILLAMETTE WK. (Jan. 23, 2008), <http://wwweek.com/portland/article-8334-killme.html>.

¹⁰⁹ *Executions*, *supra* note 56. Harry Charles Moore, who was executed in 1997, similarly gave up his right to appeal, threatening to sue anyone who tried to stop his execution. See Pitkin, *supra* note 108.

¹¹⁰ Jung, *supra* note 8; Terry, *supra* note 8.

Haugen gained a temporary reprieve.¹¹¹ Haugen would have been only the third person (and the third death-penalty volunteer) executed in Oregon in 49 years.¹¹²

II. WRONGFUL CONVICTIONS AND THE DEATH PENALTY¹¹³

While many of those charged with capital murder in Oregon will likely receive competent counsel, adequate funds for the hiring of experts, and sufficient court time to present their cases, there is no guarantee that the State will not wrongfully convict an innocent person and sentence him to death. The hundreds of wrongful convictions nationwide have proven that procedural fairness differs considerably from substantive perfection. Even in cases where the trial is fair—the prosecutor ethical, the judge attentive, and the appeals thoughtfully decided—criminal cases regularly turn on informant or witness credibility, eyewitness identifications, and scientific and circumstantial evidence. As a result, there is no guaranteed method of determining the innocent from the guilty. Moreover, the belief that Oregon’s ten-part appeals process in capital cases protects against wrongful convictions¹¹⁴ is misguided. In fact, a thorough appeals process does not ensure against a wrongful conviction. On the contrary, it often works against innocence or resists it.¹¹⁵ Indeed,

¹¹¹ Jung, *supra* note 6. On August 3, 2012, Marion County Circuit Judge Timothy P. Alexander ruled that Haugen “has the right to reject Governor Kitzhaber’s reprieve.” Terry, *supra* note 8. The Governor is appealing that ruling. Zheng, *supra* note 8.

¹¹² Terry, *supra* note 8. The last non-volunteer execution in Oregon took place in 1962 when LeRoy Sanford McGahuey, a 40-year-old logger, was convicted of murdering a woman and her son. *See Sister Recalls Last Man Executed in Oregon*, REGISTER-GUARD (Eugene), Aug. 21, 1988, at 6B.

¹¹³ For the purposes of this Article, “wrongful conviction” applies to a defendant who was factually innocent, yet convicted of a crime. Factual innocence can apply when the defendant was “not the actual perpetrator [of the crime] (and bore no accomplice responsibility) or . . . no crime was committed.” D. Michael Risinger & Lesley C. Risinger, *Innocence is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 875 (2011/12).

¹¹⁴ Proponents and opponents of the death penalty agree that appeals are lengthy because death is the ultimate punishment and there’s no room for error. *See, e.g., Morning Edition: Josh Marquis on Death Penalty Appeals Process* (NPR radio broadcast June 13, 2000), available at <http://www.npr.org/templates/story/story.php?storyId=1075372> (Clatsop County district attorney Joshua Marquis discussing the death and his belief “that the lengthy appeals process catches the few cases where people end up on death row who shouldn’t be there”); *see also* Tim Novotny, *Coos County D.A. Responds to Kitzhaber Decision*, KCBY NEWS (Nov. 23, 2011, 9:07 PM), <http://www.kcby.com/news/local/Coos-County-DA-responds-to-Kitzhaber-decision-134436918.html>.

¹¹⁵ In fact, actual innocence at post-conviction is an open question of law in Oregon. *See* Appellant’s Opening Brief at 1, 6, *Moskios v. Coursey*, 268 P.3d 821 (Or. App. 2011) (No. A145756) (affirming denial of relief without opinion), *rev. denied* 275 P.3d 968 (Or. 2012); *see also* *Anderson v. Gladden*, 383 P.2d 986, 991 (Or.

most wrongful-conviction cases are not discovered and reversed within the system, but are solved by dedicated attorneys, journalists, innocence projects, and students *working outside the system*.¹¹⁶ As Oregonians discuss and debate the pros and cons of maintaining the death penalty, it is important to examine wrongful convictions around the country to better understand what is at stake. Then it should be clear that unless the death penalty is abolished, there will always be the possibility that Oregon will wrongfully convict, sentence and execute an innocent person.

As mentioned above, Troy Davis' case¹¹⁷ brought a significant amount of attention to the possibility that innocent individuals not only have been wrongfully convicted but wrongfully executed as well.¹¹⁸ Unfor-

1963) (leaving open the question "whether newly discovered evidence can ever give rise to any kind of common-law post-conviction judicial relief").

¹¹⁶ On appeal, courts are concerned with whether legal errors occurred in the trial proceedings. Appellate courts do not reconsider whether the defendant is guilty or innocent; rather they consider whether there were errors in the legal proceedings, such as jury misconduct, prosecutorial misconduct or ineffective assistance of counsel, that compromised the reliability of the jury's verdict. Because of this limitation, an appellate lawyer cannot directly argue that the appellant is innocent. See Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 601-03 (2009). Moreover, while there have been a number of procedural protections to protect against wrongful convictions implemented in many states, many of them have not been implemented in Oregon. See *Reforms by State*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawView.php>. Also, because Oregon does not have a local Innocence Project (or like organization), it is likely that the true number of innocent individuals wrongly convicted in Oregon is substantially under-reported.

¹¹⁷ *In re Davis*, 130 S. Ct. 1 (2009). In the years between Davis' conviction and his execution date, seven crucial witnesses for the State recanted their testimony, and several people implicated the State's principal witness, Redd Coles, as the shooter. *Id.* at 1; see also Garrett, *supra* note 16 (explaining no physical evidence linking Davis to the crime was ever introduced and testimony shed light on a "perfect storm of botched eyewitness-identification procedures," where police used suggestive procedures, pressured witnesses during a crime reenactment to develop a consistent story, showed some of the witnesses Davis' picture before conducting a line-up, and inexplicably waited for days before compiling photo arrays for witnesses to identify the shooter, severely impacting the reliability of any identification); Editorial, *A Grievous Wrong*, N.Y. TIMES, Sept. 21, 2011, at A30.

¹¹⁸ When Troy Davis was executed, polls showed that 57% of Americans believed that he was innocent. Guy Adams, *Troy Davis Executed After Appeals Fail*, INDEPENDENT (Sept. 22, 2011), <http://www.independent.co.uk/news/world/americas/troy-davis-executed-after-appeals-fail-2358927.html>. Over 500 people demonstrated outside of the prison on the night of Davis' execution, echoing the high-profile and vocal slogan that there was "too much doubt" in Davis' case. Kim Severson, *Georgia Inmate Executed; Raised Racial Issues in Death Penalty*, N.Y. TIMES, Sept. 22, 2011, at A1. This same call to stay the execution was reflected in a record 630,000 petition signatures delivered to the Georgia Board of Pardon and Paroles and the list of people asking for clemency including former President Jimmy Carter, Archbishop Desmond Tutu, Pope Benedict XVI, the European Union, and 51 members of Congress. *Id.*; see also Vicky Eckenrode, *Pope Makes Plea to Spare Life of Troy Davis*, SAVANNAHNOW (July 21, 2007, 1:24 AM), <http://savannahnow.com/troy-davis/2007-07-20/pope-makes-plea-spare-life-troy-davis>; Michael King, *Timeline of Troy Davis Case*, USA TODAY (Sept. 22, 2011, 3:07 PM),

tunately, Davis' case is unique only in the amount of public attention and outrage it generated. There are countless other examples of people who have been convicted and imprisoned, and some who have been executed, despite their innocence or there being serious doubts regarding their guilt. The effect of these stories has reverberated across the country. As a 2009 Gallup poll showed, 59% of Americans believed that a person had been executed under the death penalty in the previous five years, despite his innocence of the crime with which he was charged.¹¹⁹ The evolution of DNA evidence and the rapid increase in exonerations¹²⁰ have revealed a "non-trivial percentage of factually innocent people are convicted of serious crimes in the United States."¹²¹ Additionally, because so many cases do not have DNA evidence available, DNA based exonerations "surely reflect only the tip of a very large iceberg."¹²²

While it is difficult to determine an exact number of innocent persons who have been convicted, an often-quoted statistic is about 0.5% of all criminal cases.¹²³ Applying this rate to the total estimated number of annual convictions (4,940,890), this percentage suggests a rough approximation of 24,704 cases of innocent people who are convicted each year.¹²⁴ Furthermore, some estimates place the true rate of wrongful convictions much higher. Between 1977 and 2001, 553 people were executed in the United States while another 80 death-row inmates were released

<http://usatoday30.usatoday.com/news/nation/story/2011-09-21/troy-davis-timeline/50498302/1>.

¹¹⁹ Frank Newport, *In U.S., Two-Thirds Continue to Support Death Penalty*, GALLUP (Oct. 13, 2009), <http://www.gallup.com/poll/123638/in-u.s.-two-thirds-continue-support-death-penalty.aspx>.

¹²⁰ More than 300 people have been exonerated through DNA testing nationwide. *Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/>.

¹²¹ Risinger & Risinger, *supra* note 113, at 874.

¹²² Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects in Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333, 339 (2011) (quoting Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291 (2006) (citing Samuel Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 529 (2005))).

¹²³ Leon Friedman, *The Problem of Convicting Innocent Persons: How Often Does It Occur and How Can It Be Prevented?*, 56 N.Y.L. SCH. L. REV. 1053, 1054 (2011–12). See also C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 56–70 (1996) for a study of innocence rates in Ohio that concluded that 0.5% of those convicted of serious offenses were innocent. And see Marvin Zalman et al., *Officials' Estimates of the Incidence of "Actual Innocence" Convictions*, 25 JUST. Q. 72 (2008), for a Michigan study concluding that the innocence rate in that state is a little less than 1%. For a study that arrived at a much higher rate of factual error—3.3%–5%—for capital rape-murders in the 1980s, see D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007).

¹²⁴ Friedman, *supra* note 123 at 1056.

after they were found innocent.¹²⁵ That means that for every seven people executed in that time frame, one innocent person was freed—an “error rate” of more than 12%.¹²⁶ “Since 1973, 142 people in 26 states have been released from death row with evidence of their innocence.”¹²⁷

A. *Causes of Wrongful Convictions*

While wrongful convictions occur for many different reasons, an examination of wrongful convictions in capital cases can have particularly tragic results.¹²⁸ The case of Carlos DeLuna, a mentally retarded Texas man, provides an example of a wrongful conviction, and ultimately, an innocent person’s execution. DeLuna was convicted for the brutal murder of a female gas station attendant, despite the fact that there was no DNA, blood evidence, fingerprints, or footprints linking him to the blood-covered crime scene.¹²⁹ “Police investigators botched the crime scene by turning it back to the store manager just two hours after the murder to be washed down and reopened immediately.”¹³⁰ Evidence from the initial investigation was examined by a prosecutor the day after the trial and never returned, thereby destroying any possibility of further testing of DNA evidence.¹³¹ There was only one eyewitness, who was unclear about what he had seen.¹³² Police had initially sought another suspect who looked like DeLuna (and was also named Carlos), but they did not share this information with the defense, nor did they follow up with the other suspect when DeLuna identified him as the killer.¹³³ DeLuna’s defense attorney had no criminal trial experience and did not call a single

¹²⁵ Roger Roots, *How Often Does the Criminal System Get it Wrong?*, CAUGHT.NET (Feb. 5, 2001), <http://caught.net/innoc.htm> (summarizing findings from JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 218 (2000)). Although rare, there are some who dispute innocence in some of these cases. See, e.g., Jessica Dealy, *Fisher Parole Opposed*, WTKO (Jan. 7, 2011, 7:38 PM), http://www.wtok.com/home/headlines/Fisher_Parole_opposition_113105294.html; Anonymous, Comment to *And Then There Were 121*, ABOLISH THE DEATH PENALTY, <http://deathpenaltyusa.blogspot.com/2005/08/and-then-there-were-121.html>; Taggerez, Comment to *The Cantrell Murders 1976*, FIND A DEATH.COM (Oct. 29, 2009, 2:19 PM), <http://www.findadeath.com/forum/showthread.php?24004-The-Cantrell-Murders-1976>.

¹²⁶ Roots, *supra* note 125.

¹²⁷ *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last updated Dec. 26, 2012).

¹²⁸ See Krieger, *supra* note 122, at 339 (citing BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011)).

¹²⁹ Andrew Cohen, *Yes, America, We Have Executed an Innocent Man*, ATLANTIC (May 14, 2012), <http://www.theatlantic.com/national/archive/2012/05/yes-america-we-have-executed-an-innocent-man/257106/>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

mitigating witness in the sentencing phase of the trial.¹³⁴ In other words, “[t]he DeLuna case was flawed at virtually every level.”¹³⁵

1. Informants

In capital cases, informant perjury is the leading cause of wrongful convictions.¹³⁶ These “snitch” cases most commonly involve jailhouse informants who are promised leniency in their own cases or killers with incentives to divert attention away from themselves.¹³⁷ In 111 death row exonerations since the death penalty was resumed in the 1970s, “snitch” cases accounted for 45.9% of the wrongful convictions.¹³⁸ In Illinois, where the death penalty was ultimately abolished, partially due to the high rate of wrongful conviction, prosecutors used “snitch” testimony to win the convictions for 14 of the 18 capital case exonerees.¹³⁹

2. Eyewitness Identifications

The second most common cause of wrongful capital convictions is erroneous eyewitness identifications, which occur in 25.2% of capital cases¹⁴⁰ and plays a role in nearly 75% of all convictions overturned through DNA testing.¹⁴¹ The inaccurate identifications are often due to human error of the witness as well as faulty execution of police identification procedures (such as live lineups, photo spreads, or show-ups—where a suspect is identified at the crime scene), which can reinforce potential flaws in the original observation.¹⁴²

¹³⁴ *Id.*

¹³⁵ *Id.* See James S. Liebman et al., *Los Tocayos Carlos*, 43 COLUM. HUM. RTS. L. REV. 711 (2012), for further detail about all of the ways that DeLuna’s case was flawed, providing just one example of how causes of wrongful convictions often combine and overlap, and could result in the execution of a man who was almost indisputably innocent.

¹³⁶ ROB WARDEN, CTR. ON WRONGFUL CONVICTIONS, *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3* (2004), available at <http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Rob Warden, *Illinois Death Penalty Reform: How it Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 381–82 (2005).

¹⁴⁰ WARDEN, *supra* note 136, at 3.

¹⁴¹ *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/EyewitnessMisidentification.php>.

¹⁴² Krieger, *supra* note 122, at 341. On November 29, 2012, in *State v. Lawson*, the Oregon Supreme Court issued a groundbreaking decision requiring major changes in the way courts are required to evaluate identification evidence. In setting up a new legal framework designed to reduce the likelihood of wrongful convictions, the Court took into account more than 30 years of scientific research on eyewitness identification and memory. The new framework requires courts to consider all the factors that may affect an identification’s reliability and instructs courts to use remedies, such as limiting the witness’s testimony and permitting expert testimony, to explain the scientific research on memory and identification when appropriate. It

3. *False Confessions*

False confessions account for 14.4% of wrongful capital convictions.¹⁴³ There have been “hundreds of documented false confession cases” often resulting from misleading suspects “during hours and hours of interrogation.”¹⁴⁴ Innocent people may confess for a variety of reasons, including any combination of the following factors: duress, coercion, intoxication, diminished capacity, mental impairment, ignorance of the law, fear of violence, the actual infliction of harm, the threat of a harsh sentence, and misunderstanding of the situation.¹⁴⁵ It is not surprising that confessions from juveniles and people with diminished mental capacity are often unreliable.¹⁴⁶

4. *Unvalidated or Improper Forensic Science*

False or misleading scientific evidence, which may take the form of DNA analysis or other scientific evidence and testimony, is the cause of wrongful convictions in 9.9% of capital cases.¹⁴⁷ There are critical problems of deficiency amongst the crime labs that perform DNA testing. These include:

- (1) a lack of training of forensic examiners; (2) a lack of science in forensic “science” (i.e., certain techniques such as fingerprinting are not based on legitimate scientific principles); (3) a lack of preventative measures in forensic science that account for and minimize observer effects (i.e., subconscious effects on the examiner); (4) a lack of clear standards to counter the highly subjective nature of forensic examinations that renders them very susceptible to an assortment of errors, particularly those caused by subconscious observer effects; [and] (5) a lack of funding for the forensic science community¹⁴⁸

Additionally, other scientific evidence is often faulty or analyzed using incorrect or outdated methods. And yet, with all the reservations detailed above, the testimony of a “scientific expert” can be disproportionately convincing to a jury unfamiliar with the person’s area of expertise.

The case of Cameron Todd Willingham is another tragic example where, despite clear and concrete evidence contradicting the science that was initially used to convict him, the state of Texas refused to overturn

also shifts the burden to the state to establish that the evidence is admissible. *State v. Lawson*, 352 Or. 724 (2012).

¹⁴³ WARDEN, *supra* note 136, at 3.

¹⁴⁴ Krieger, *supra* note 122, at 356.

¹⁴⁵ *False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php>.

¹⁴⁶ *Id.*

¹⁴⁷ WARDEN, *supra* note 136, at 3.

¹⁴⁸ Krieger, *supra* note 122, at 348 (footnotes omitted) (citing Craig M. Cooley, *Forensic Science and Capital Punishment Reform: An “Intellectually Honest” Assessment*, 17 GEO. MASON U. C.R. L.J. 299 (2007)).

his conviction or spare him from execution.¹⁴⁹ Willingham was convicted of setting fire to his house and killing his three infant children, largely on the basis of fire investigators' "expert" conclusions and testimony that the physical evidence after the fire indisputably proved arson. Willingham refused to accept a plea deal, despite knowing he could face the death penalty because, as he said, "I ain't gonna plead to something I didn't do, especially killing my own kids."¹⁵⁰ After hearing "expert testimony," in August 1992, a unanimous jury convicted Willingham after deliberating for barely an hour.¹⁵¹

In the years that followed Willingham's conviction, holes surfaced throughout his case. Of the two medical experts who testified that Willingham fit the profile of a sociopath, one had a master's degree in marriage and family issues, had previously gone hunting with the chief prosecutor, and had not published any research in the field of sociopathic behavior.¹⁵² The other expert was expelled from the American Psychiatric Association three years after the trial for unethical behavior, because he repeatedly made psychiatric diagnoses without first having examined the individuals in question and indicated, while testifying in court as an expert witness, that he could predict with "100-percent certainty that the individuals would engage in future violent acts."¹⁵³

The eyewitness accounts in Willingham's case were full of contradictions, and had changed significantly, becoming more damning after authorities had concluded that Willingham was guilty of murder.¹⁵⁴ The jailhouse informant who claimed that Willingham had confessed to him disclosed that he had been diagnosed with "post-traumatic stress disorder" after he was sexually assaulted in prison, and that he often suffered from "mental impairment."¹⁵⁵ The informant later recanted his testimony (and then, without explanation, recanted his recantation).¹⁵⁶

However, the most damning criticism in the case occurred when Gerald Hurst, a widely respected chemist and arson investigator, reviewed the evidence and found no indication of arson.¹⁵⁷ Hurst wrote in a report just weeks before Willingham's execution that based on the evidence, he had "little doubt that it was an accidental fire," and that "a man who had already lost his three children and spent twelve years in jail was about to be executed based on 'junk science.'"¹⁵⁸ Despite all of this, the Texas

¹⁴⁹ David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, at 42, 62.

¹⁵⁰ *Id.* at 48.

¹⁵¹ *Id.*

¹⁵² *Id.* at 51.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 49–50.

¹⁵⁵ *Id.* at 52.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 61–62.

¹⁵⁸ *Id.*

Board of Pardons and Paroles, which reviews an application for clemency, unanimously denied his petition. On February 17, 2004, Willingham was executed.¹⁵⁹

In the months following his execution, additional questions about the scientific evidence surfaced and, “[i]n 2005, Texas established a government commission to investigate allegations of error and misconduct by forensic scientists.”¹⁶⁰ Noted scientist Craig Beyler conducted an investigation of Willingham’s case and concluded that “investigators in the Willingham case had no scientific basis for claiming that the fire was arson, ignored evidence that contradicted their theory, had no comprehension of flashover and fire dynamics, relied on discredited folklore, and failed to eliminate potential accidental or alternative causes of the fire.”¹⁶¹

In 2010, state district court Judge Charles Baird reviewed Willingham’s case and concluded that Texas had wrongfully convicted him.¹⁶² He drafted an order exonerating Willingham, but the posthumous inquiry was halted while the state court of appeals considered whether the judge had the authority to examine the case.¹⁶³ While Willingham’s lawyers continue to push for a pardon to clear his name, the Texas Forensic Commission has since issued a report saying the evidence from the fire investigators was no longer valid.¹⁶⁴ While the “junk science” was not the only faulty component of the case against Willingham, without the fire investigators’ confident testimony regarding the evidence of arson, it is hard to imagine that Willingham would have been convicted and subsequently executed.

Similarly, in Oregon, while not death-penalty cases, Eric Proctor and Christopher Boots were wrongfully convicted of a murder based on junk scientific evidence regarding “high-velocity blood spatter” and erroneous analysis of gunpowder particles (in addition to false testimony by jailhouse informants who later recanted).¹⁶⁵ On June 7, 1983, the two men stopped at a convenience store in Springfield, Oregon, but left after not

¹⁵⁹ *Id.* at 62–63.

¹⁶⁰ *Id.* at 63.

¹⁶¹ *Id.*

¹⁶² Michael McLaughlin, *Cameron Todd Willingham Exoneration Was Written but Never Filed by Texas Judge*, HUFFINGTON POST (May 19, 2012, 8:01 AM), http://www.huffingtonpost.com/2012/05/19/cameron-todd-willingham-exoneration_n_1524868.html.

¹⁶³ *Id.*

¹⁶⁴ *Id.*; see also Brandi Grissom, *Forensic Panel Calls for Review of Past Arson Cases*, TEX. TRIBUNE (Sept. 9, 2011), <http://www.texastribune.org/2011/09/09/science-panel-agrees-review-past-arson-evidence/>.

¹⁶⁵ Ruth Teichroeb, *Forensic Scientist in Crime Lab Tied to Wrongful Convictions in Oregon*, SEATTLE POST-INTELLIGENCER, Dec. 27, 2004, at A1, available at <http://truthinjustice.org/charles-vaughn.htm>.

finding a clerk in the store.¹⁶⁶ After Boots dropped Proctor off at home, he returned to the store, where he found the body of the store clerk, who had been bound and shot three times in the head.¹⁶⁷ Within a few days, Boots and Proctor were arrested as suspects in the murder of the store clerk, only to be released soon after, when the district attorney decided there was insufficient evidence to indict them.¹⁶⁸ Two years later, a new district attorney decided to reopen the investigation and obtained indictments against Boots and Proctor.¹⁶⁹ Charles Vaughan, an Oregon state crime laboratory analyst testified that “high velocity” blood spatter—“the type of spatter that could only have come from being in close proximity during the shooting of [the] victim”—was on the men’s clothing, and that he found two gunpowder flakes on Proctor’s pants.¹⁷⁰ In separate trials in 1986 and 1987, Proctor and Boots were both convicted of aggravated murder and sentenced to life in prison.¹⁷¹

In 1994, an anonymous informant tipped the police that a man named Ricky Kuppens, who had not been a suspect in the original trial, had committed the murder.¹⁷² After reopening the investigation, police found Kuppens’s fingerprints on the tape used to bind the victim and obtained a taped confession from Kuppens before he committed suicide.¹⁷³ Proctor and Boots’s attorneys arranged for new DNA testing of the blood particles, which revealed that “all but one particle did not match the victim.”¹⁷⁴ Furthermore, Vaughan admitted that he had “used the same ruler to scrape both the victim and suspects’ clothing on the same day—and had failed to wear gloves.”¹⁷⁵ Experts also re-examined the alleged gunpowder flakes and determined they were not gunpowder.¹⁷⁶ That same year, Boots and Proctor were exonerated and released, after spending eight years in an Oregon prison for a crime they did not commit, based on evidence that was either “highly suspect” or “flatly fake.”¹⁷⁷

5. *Government Misconduct*

Prosecutorial misconduct often is at the root of many wrongful conviction cases.¹⁷⁸ “The institutional culture of prosecutor’s offices, where

¹⁶⁶ Maurice Possley, *Christopher Boots*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3034>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Teichroeb, *supra* note 165.

¹⁷¹ Possley, *supra* note 166.

¹⁷² *Id.*; Teichroeb, *supra* note 165.

¹⁷³ Possley, *supra* note 166; Teichroeb, *supra* note 165.

¹⁷⁴ Teichroeb, *supra* note 165.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Prosecutorial misconduct may include intimidating witnesses, presenting false evidence, discriminatory jury selection, violating the Fifth Amendment right to

the 'professional incentives to obtain and maintain convictions' and the emphasis on conviction rates as a barometer for professional advancement, will eventually conflict with prosecutors' role as 'ministers of justice.'¹⁷⁹ Prosecutors may be reluctant to admit errors in the original handling of a case and often face intense departmental pressure to stick to a faulty story rather than publicly raise doubts about a case.¹⁸⁰ Even when DNA or other evidence has been discovered or made available that would prove a defendant's innocence, prosecutors often are resistant to revisiting cases where they have already secured a conviction.¹⁸¹

In Virginia, Earl Washington's case demonstrates how prosecutors can remain committed to a conviction despite clear evidence to the contrary. In 1983, Washington, an African-American man, was charged, convicted, and sentenced to death for the rape and murder of a white woman, "despite the fact that the seminal fluid found at the crime scene did not match Washington's blood type."¹⁸² Years later, when DNA testing confirmed that there was no way that the seminal fluid matched Washington's, Governor Douglas Wilder commuted his sentence from death to life in prison, as opposed to exonerating him.¹⁸³ It was not until 1999 that media pressure mounted on Virginia's new governor, James Gilmore, to disclose the 1993 DNA results and order another round of tests—which confirmed Washington's innocence, linked the semen to the true perpetrator, and led to Gilmore's pardon of Washington, 16 years after his arrest.¹⁸⁴ His exoneration was based on the same evidence that had been in the prosecution's possession since before Washington's conviction.¹⁸⁵

silence, failure to disclose exculpatory evidence, improper examination, and improper argument. Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California, 1997–2009*, N. CAL. INNOCENCE PROJECT 25 (Oct. 2010), http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf; see also Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases*, INNOCENCE PROJECT (Aug. 2010), http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf (a 2010 study examining 255 cases where DNA proved the person convicted was innocent, and determining that prosecutorial misconduct was raised as an issue on appeal or in a civil law suit in 65 of those cases).

¹⁷⁹ Krieger, *supra* note 122, at 350 (quoting Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134 (2004)).

¹⁸⁰ See Krieger, *supra* note 122, at 350; see also Medwed, *supra* note 179, at 138.

¹⁸¹ Medwed, *supra* note 179, at 129–30; see also Krieger, *supra* note 122, at 350.

¹⁸² Locke E. Bowman, *Lemonade out of Lemons: Can Wrongful Convictions Lead to Criminal Justice Reform?*, 98 J. CRIM. L. & CRIMINOLOGY 1501, 1513 (2008) (reviewing JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* (2007)).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1514.

¹⁸⁵ *Id.* See also the case of John Thompson, who spent 18 years in prison (14 on death row) for a crime he did not commit after the New Orleans Parish District Attorney's Office concealed scientific evidence of Thompson's innocence for 15

6. *Bad Lawyering*

Finally, ineffective defense counsel plays a significant role in the rate of wrongful convictions. “Among the country’s first seventy DNA exonerations, 23 percent of the wrongful convictions resulted from ineffective defense representation.”¹⁸⁶ In general, public defenders are overworked, underpaid and have far fewer resources than prosecutors.¹⁸⁷ However, these facts do not excuse the egregious behavior noted. In some cases, lawyers have slept in the courtroom during trial, been disbarred shortly after handling a death penalty case, failed to investigate alibis, failed to call or consult experts on forensic issues, or failed to show up for hearings.¹⁸⁸ Despite evidence of this behavior, “[t]he judicial system has largely turned a blind eye to the possibility of ineffective counsel in capital [punishment] cases,” with the Supreme Court reversing only one case on the basis of ineffective counsel from 1976 to 2002.¹⁸⁹

In October 1986, Santiago Ventura Morales was wrongfully convicted of murder by a unanimous jury in Oregon, in large part because of the poor quality of his legal defense.¹⁹⁰ Morales was accused of murdering a 19-year-old migrant farm worker in a strawberry field in Sandy, Oregon, after a fight in which he and other men pursued the victim (who had escaped in his car), burned and vandalized the car, and then murdered the victim.¹⁹¹ While Morales admitted to vandalizing the car, he maintained his innocence regarding the murder, and there was no physical evidence

years. John Thompson, Op-Ed., *The Prosecution Rests, but I Can’t*, N.Y. TIMES, Apr. 10, 2011, at WK 11; see also David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 203–07 (2011), <http://yalelawjournal.org/2011/10/25/keenan.html>.

¹⁸⁶ Krieger, *supra* note 122, at 354 (citing Sheila Martin Berry, “*Bad Lawyering*”: *How Defense Attorneys Help Convict the Innocent*, 30 N. KY. L. REV. 487, 489 (2003)).

¹⁸⁷ See John Rudolf, *Pennsylvania Public Defenders Rebel Against Crushing Caseloads*, HUFFINGTON POST (June 16, 2012, 11:18 AM), http://www.huffingtonpost.com/2012/05/30/pennsylvania-public-defenders_n_1556192.html (“Public defenders are infamous as the workhorses of the legal system, charged by the courts with representing poor defendants in criminal matters ranging from misdemeanors to death penalty cases. The pay is low, the hours long and the turnover high. Complaints that they suffer from crushing caseloads and inadequate support staff can probably be heard in any courthouse in the country.”).

¹⁸⁸ See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1838–39, 1843 (1994) [hereinafter Bright, *Counsel for the Poor*]; Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 786 [hereinafter Bright, *Neither Equal Nor Just*]; Krieger, *supra* note 122, at 354.

¹⁸⁹ See Krieger, *supra* note 122, at 355; see also Bright, *Counsel for the Poor*, *supra* note 188, at 1882–83; Bright, *Neither Equal Nor Just*, *supra* note 188, at 783.

¹⁹⁰ William C. Crum, *Wary Jurors Win Freedom for Man They Found Guilty*, THE DAY (New London, Conn.), Jan. 21, 1991, at A3, available at <http://news.google.com/newspapers?id=igchAAAAIBAJ&sjid=m3YFAAAAIBAJ&pg=4917%2C391032>.

¹⁹¹ *Id.*

linking him to the crime.¹⁹² Although the court provided Morales with a Spanish interpreter during the trial, the appointment was most likely insufficient as Morales did not speak much Spanish or English; he spoke Mixteco, a language spoken by indigenous inhabitants of Central America. As a result, he could not fully understand the court hearings or the interpreter and defend himself properly.¹⁹³

One witness who initially testified that he saw only a burning car altered his story after speaking with the district attorney during a break. He later claimed to have seen Morales stab the victim.¹⁹⁴ Even though there were no traces of the victim's blood on Morales' knife, the state deputy medical examiner testified that the victim's fat tissue had wiped it clean. Morales' public defender never disputed that claim.¹⁹⁵ While Morales was in prison, a few of the jurors who had voted to convict him changed their minds and advocated for his release. After four years, the real murderer was found and Morales was freed largely due to the unfairness of his trial.¹⁹⁶ Although it was not a death penalty case, Morales' conviction for murder is just one of a number of cases in Oregon which resulted in a wrongful conviction.¹⁹⁷

B. *Wrongful Convictions and Recent Repeals*

As the causes of wrongful convictions are expanded and documented in both large studies and specific cases, advocates are calling for reform of the criminal justice system to prevent future abuses. They are also trying to convince the public, state legislatures, and the courts that the risk of wrongful conviction is too great when it leads to executions and a reversal of the sentence is impossible. Nationally, efforts to reform or abolish the death penalty have focused on wrongful convictions,¹⁹⁸ indeed, as state governors and legislatures have abolished the death penalty, they have cited the risk of executing an innocent person as one of the most important reasons behind their decision.¹⁹⁹

¹⁹² *Id.*

¹⁹³ Maurice Possley, *Santiago Ventura Morales*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3492>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (select "State" dropdown; then select "Oregon"), for the cases of Christopher Boots, Phillip Scott Cannon, Laverne Pavlinac, Eric Proctor, Pamela Sue Reser and John Sosnovske.

¹⁹⁸ See Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 607 (2005).

¹⁹⁹ See, e.g., *Gov. Bill Richardson Signs Bill to Repeal New Mexico's Death Penalty*, in HISTORIC DOCUMENTS OF 2009 137 (Heather Kerrigan ed., 2010) [hereinafter *Richardson Signs Repeal*], available at <http://debates.cqpress.com/DeathPenalty/richardson.html>; Jessica S. Henry, *New Jersey's Road to Abolition*, 29 JUST. SYS. J. 408, 416

Illinois provides one of the most egregious examples of a state that was plagued by wrongful convictions. Anthony Porter's 1999 exoneration has been called "the beginning of the end" of the death penalty in Illinois.²⁰⁰ After his exoneration, three additional death row exonerations—Steven Smith, Ronald Jones, and Steven Manning—followed in quick succession during that same year.²⁰¹ Then-Governor George Ryan (who had entered office a death penalty supporter) was faced with shocking statistics—between Illinois's enactment of capital punishment in 1977 and 2000, more death row inmates had been exonerated than put to death.²⁰² For each defendant executed in Illinois, 9.5 death sentences had been overturned—and that accounting reflected only mistakes that had been documented.²⁰³ In other words, "the actual magnitude of mistakes in the Illinois capital-punishment system no doubt was somewhat greater than it ever would be possible to prove."²⁰⁴ While it was a difficult political decision, Governor Ryan set a moratorium on the death penalty in 2000, which he followed by commuting all 167 death sentences in Illinois before he left office in 2003, stating that because the Illinois death penalty was arbitrary and capricious—and therefore immoral—he could no

(2008); Press Release, Conn. Governor's Office, Gov. Malloy on Signing Bill to Repeal Capital Punishment (Apr. 25, 2012) [hereinafter Press Release, Governor Malloy], available at <http://www.governor.ct.gov/malloy/cwp/view.asp?Q=503122&A=4010>; Press Release, Ill. Governor's Office, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), available at <http://www.illinois.gov/pressreleases/showpressrelease.cfm?subjectid=3&recnum=359>.

²⁰⁰ Christina McMahon, *Illinois Abolishes the Death Penalty*, 16 PUB. INT. L. REP. 83, 84 (2011) (internal quotation marks omitted) (citing Steve Mills, *What Killed Illinois' Death Penalty*, CHI. TRIB. (Mar. 10, 2011), http://articles.chicagotribune.com/2011-03-10/news/ct-met-illinois-death-penalty-history20110309_1_death-penalty-death-row-death-sentences). Porter spent 16 years on death row after being convicted for the murder of two teenagers in a trial riddled with error: clearly faulty eyewitness testimony, no physical link between Porter and the crime, and an incompetent defense attorney. *Anthony Porter: False Testimony by a Purported Eyewitness Landed Anthony Porter on Death Row*, NORTHWESTERN LAW: CTR. ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/cwc/exonerations/ilPorterSummary.html>. With 50 hours to go before Porter's execution, the Illinois Supreme Court granted a temporary reprieve because of serious questions regarding Porter's mental competence. *Id.* During the stay of the execution, a team of Northwestern University journalism students and a private investigator were able to prove Porter's innocence." *Id.* The original witness recanted, saying he had been pressured by police to falsely identify Porter, and the actual killer confessed in a videotaped recording. *Id.* In February 1999, Porter was released and all the charges against him were dropped. *Id.*

²⁰¹ Bowman, *supra* note 182, at 1504.

²⁰² McMahon, *supra* note 200, at 84 ("Between 1977 and 2000, 13 inmates were exonerated and 12 were executed." (citing Steve Mills et al., *Gov. George Ryan Plans to Block the Execution of Any Death . . .*, CHI. TRIB. (Jan. 30, 2000), http://articles.chicagotribune.com/2000-01-30/news/0001300266_1_death-row-inmates-death-penalty-george-ryan)).

²⁰³ Warden, *supra* note 139, at 382.

²⁰⁴ *Id.*

longer support it.²⁰⁵ In May of 2004, former death row prisoner Gordon Randy Steidl was exonerated, pushing the error rate of convictions in capital cases in Illinois to above 6%.²⁰⁶ The moratorium on the death penalty remained in effect until March 9, 2011, when Governor Pat Quinn signed a law formally abolishing the death penalty in Illinois.²⁰⁷ Quinn cited the 20 exonerations from death row in Illinois between 1977 and 2011, and stated:

As a state, we cannot tolerate the executions of innocent people because such actions strike at the very legitimacy of a government. . . . To say that this is unacceptable does not even begin to express the profound regret and shame we, as a society, must bear for these failures of justice.²⁰⁸

He went on to explain that since there is no way to design a perfect death-penalty system, free from the flaws that can lead to wrongful convictions, then it must be abolished.²⁰⁹

On December 17, 2007, in between Illinois's moratorium and later abolition of its state death penalty, New Jersey became the first state in nearly 40 years to eliminate capital punishment legislatively.²¹⁰ Since reinstating capital punishment in 1982, the New Jersey Supreme Court had reversed nearly every capital conviction that it reviewed, and there had been no executions in the state since 1963.²¹¹ National attention on the risk of executing innocent defendants also contributed to the momentum for abolishing the death penalty in New Jersey.²¹² In 2005, the legislature authorized a Death Penalty Study Commission, which conducted five days of public hearings before issuing a report that recommended that New Jersey abolish capital punishment and replace it with life without the possibility of parole.²¹³ In support of its recommendations, the Study Commission made eight factual findings including that "the penological risk in executing a small number of guilty persons is not sufficiently compelling to justify the risk of an irreversible mistake."²¹⁴

As the state debated abolishing the death penalty, Byron Halsey was exonerated through DNA evidence in May 2007.²¹⁵ Halsey had been charged with capital murder and later convicted and sentenced to life

²⁰⁵ Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at L1.

²⁰⁶ Warden, *supra* note 139, at 381.

²⁰⁷ Press Release, Ill. Governor's Office, Statement from Governor Pat Quinn on Senate Bill 3539 (Mar. 9, 2011), *available at* <http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265>.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Henry, *supra* note 199, at 408.

²¹¹ *Id.* at 410, 412.

²¹² *Id.* at 417.

²¹³ *Id.* at 413–15.

²¹⁴ *Id.* at 416.

²¹⁵ *Id.* at 417.

imprisonment for the sexual assault and murders of two young children.²¹⁶ He had a sixth grade education and severe learning disabilities, and had signed a confession after 30 hours of interrogation.²¹⁷ DNA evidence later revealed that the star prosecution witness against Halsey was the real perpetrator.²¹⁸ At the time of Halsey's exoneration there were nine men on death row in New Jersey.²¹⁹ A combination of factors created the right climate for the legislature to abolish the death penalty: the national attention given to wrongful conviction cases, state financial constraints, the fact that no executions had actually taken place in the state for decades, and political timing (in 2007, Democrats controlled the governorship, the senate, and the assembly).²²⁰

In 2009, New Mexico followed New Jersey's lead and became the second state to legislatively abolish the death penalty since the Supreme Court upheld the practice in 1976.²²¹ As in Oregon, New Mexico had rarely used the death penalty—only nine people were executed since 1933.²²² Between 1979 and 2007, New Mexico sentenced 15 men to death yet had only executed one volunteer, who had instructed his lawyers to drop his appeals.²²³ By the time Governor Bill Richardson signed the death penalty repeal into law, only two individuals remained on death row in New Mexico.²²⁴ Richardson, a former death-penalty supporter, said he had changed his mind after four death row inmates had been exonerated in New Mexico over the previous ten years, and that “[i]nnocent people have been put on death row all across the country.”²²⁵ He noted that “[t]he sad truth is the wrong person can still be convicted in this day and age,” and as a result, he was unable to take the risk that this could happen in a case where death was the punishment.²²⁶ Finally, he concluded his remarks by saying that “the potential for wrongful conviction and, God forbid, execution of an innocent person stands as anathema to our very sensibilities as human beings. That is why I’m signing this bill into law.”²²⁷

²¹⁶ *Id.*

²¹⁷ Tina Kelley, *DNA in Murders Frees Inmate After 19 Years*, N.Y. TIMES, May 16, 2007, at B1.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Henry, *supra* note 199, at 416–18.

²²¹ *New Mexico Abolishes Death Penalty*, CBS NEWS (Mar. 18, 2009, 9:05 PM), http://www.cbsnews.com/2100-201_162-4874296.html.

²²² *Id.*

²²³ Entzeroth, *supra* note 76, at 823.

²²⁴ All of the other death sentences had been overturned or set aside. For an in-depth examination of the application of the death penalty in New Mexico, see Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 Through December 2007: An Empirical Analysis*, 38 N.M. L. REV. 255 (2008).

²²⁵ *Richardson Signs Repeal*, *supra* note 199.

²²⁶ *Id.*

²²⁷ *Id.*

Most recently, in 2012, Connecticut Governor Dannel P. Malloy signed a bill abolishing the death penalty in his state. In a statement, Malloy noted that he was a former prosecutor and death-penalty supporter who had changed his stand on the death penalty issue after seeing firsthand that “our system of justice is very imperfect. . . . [I]t is subject to the fallibility of those who participate in it.”²²⁸ Furthermore, he had personal experience with people who were “wrongly accused or mistakenly identified.”²²⁹ These experiences convinced him that abolishing the death penalty was the only way to ensure that it would not be “unfairly imposed.”²³⁰ Similar to Oregon, very few people had actually been executed in Connecticut—only two volunteers in 52 years.²³¹

C. *Wrongful Convictions in Oregon*

In Governor Kitzhaber’s recent statement issuing a moratorium on executions in Oregon, he referenced similar decisions made by governors in other states and noted the “evidence of wrongful convictions” countrywide.²³² While Kitzhaber did not directly address the issue of wrongful convictions in Oregon, the Morales, Proctor, and Boots cases, among others,²³³ show that Oregon is susceptible to the same potential for wrongful convictions as any other state. All of the causes leading to wrongful convictions are present in Oregon. Laverne Pavlinac and John Sosnovske spent five years in jail because of Pavlinac’s false confession and implication of Sosnovske in a brutal murder they did not commit.²³⁴ Philip Scott Cannon was wrongfully convicted of a triple murder in 2000, and spent 11 years in jail before he was released because ballistic evidence used to convict him was so unreliable that prosecutors could no longer maintain a case against him.²³⁵ These are just some of the wrongful conviction cases that are well known in Oregon.

No state wants to believe that it could wrongfully convict, imprison, or worse, execute an innocent person—until someone comes along and proves it has. To date, most believe that Oregon has not executed an innocent person. However, it is surely possible, given the statistics and the multiple exonerations throughout the country, that there will be an innocent person sitting on Oregon’s death row someday. There is an “inevitability of factual, legal, and moral error [that] gives us a system that we

²²⁸ Press Release, Governor Malloy, *supra* note 199.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² Press Release, John Kitzhaber, *supra* note 8.

²³³ *See id.* (discussing Gary Haugen).

²³⁴ *Evidence Clears Two. The Law Doesn't*, N.Y. TIMES, Nov. 26, 1995, at 28.

²³⁵ Jeff Barnard, *Missing Evidence Found in Philip Scott Canon Murder Case*, KATU (Oct. 17, 2011, 3:10 PM), <http://www.katu.com/news/local/132015398.html>.

know must wrongly kill some defendants.”²³⁶ The only way to avoid the inevitable in Oregon is to abolish the death penalty.

III. THE COST OF THE DEATH PENALTY

In these days of economic instability and crisis, the practical issue of cost fuels many current debates on the death penalty.²³⁷ As Governor Kitzhaber noted in his moratorium announcement, “a growing number of states have reconsidered their approach to capital punishment” for, among other issues, “the expense of the process.”²³⁸ While the discussion about the cost of the death penalty is not a new one,²³⁹ numerous state studies over the last few years have consistently found that pursuing a capital case is by far more costly than housing a convicted murderer for life in a high security prison.²⁴⁰ High costs strain state budgets, divert money from other programs (including other criminal justice needs), and increase taxes.²⁴¹ These studies, combined with a difficult economy,²⁴²

²³⁶ *Callins v. Collins*, 510 U.S. 1141, 1145–46 (1994) (Blackmun, J., dissenting from denial of certiorari).

²³⁷ See, e.g., Charles M. Harris, *Why Florida Should Abolish the Death Penalty*, GAINESVILLE SUN (Apr. 18, 2012, 8:27AM), <http://www.gainesville.com/article/20120418/OPINION/120419608>; Deirdre Pike, Op-Ed., *Death (Penalty) and Taxes*, RENO NEWS & REV. (April 7, 2011), <http://www.newsreview.com/reno/death-penalty-taxes/content?oid=1953534>; *Think Out Loud: The Economics of the Death Penalty* (OPB radio broadcast Nov. 23, 2009), available at www.opb.org/thinkoutloud/shows/high-costs-death-penalty/; Daniel C. Walters, *Capital Punishment a Waste of Tax Dollars*, OLYMPIAN (Feb. 11, 2011), <http://www.theolympian.com/2011/02/11/1539367/capital-punishment-a-waste-of.html>; Scott Woodham, *Why Alaska Shouldn't Reconsider the Death Penalty*, ALASKA DISPATCH (Apr. 20, 2012), <http://www.alaskadispatch.com/article/why-alaska-shouldnt-reconsider-death-penalty?page=full>.

²³⁸ Press Release, John Kitzhaber, *supra* note 8.

²³⁹ Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 671 (2010) (“Concerns about the cost of capital punishment were first voiced with some frequency beginning in the 1990s . . .”).

²⁴⁰ See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 13 (2009), available at <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>; see also LEGISLATIVE FIN. COMM. FOR THE N.M. LEGISLATURE, FISCAL IMPACT REPORT: H.B. 285, at 3 (2009), available at <http://www.nmlegis.gov/Sessions/09%20Regular/firs/HB0285.pdf>; Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S46 (2011); Mary E. Forsberg, *Money for Nothing? The Financial Cost of New Jersey's Death Penalty*, N.J. POL'Y PERSP. (Nov. 8, 2005), http://www.njpp.org/assets/reports/budget-fiscal/16-rpt_moneyfornothing.pdf.

²⁴¹ See Editorial, *Capital-Punishment Cost: Death Penalty and Taxes*, LEDGER (Lakeland, Fla.), Feb. 24, 2009, at A8; see also *The Death Penalty: Saving Lives and Money*, ECONOMIST, Mar. 14, 2009, at 32, 32 (detailing a proposed bill in Colorado to overturn the death penalty and use the savings to fund investigations of unsolved murders).

have revived discussions on the financial impact of death penalty cases and legislative activity on capital punishment. They have questioned its value, especially in states like Oregon where the high price tag has not delivered the intended punishment of execution.²⁴³ The expense of maintaining the death penalty has also been a significant factor in recent repeal efforts in Connecticut, New Jersey and New Mexico, and in the 2012 ballot initiative to end capital punishment in California.²⁴⁴

A. *The Cost of Oregon's Death Penalty*

In Oregon, as in other states that rarely execute those on death row,²⁴⁵ the death penalty has become an “extremely expensive life prison term.”²⁴⁶ For the taxpayers, as well as for the state itself, it is a costly system that is dysfunctional and does not deliver. Oregon's 1984 death-penalty law allows for a ten-part review process prior to execution for all those convicted of aggravated murder and sentenced to death²⁴⁷ which

²⁴² Bob Willis, *U.S. Recession Worst Since Great Depression, Revised Data Show*, BLOOMBERG (Aug. 1, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aNivTjr852TI>.

²⁴³ Cristina Corbin, *Lawmakers Cite Economic Crisis in Effort to Ban Death Penalty*, FOX NEWS (Feb. 24, 2009), <http://www.foxnews.com/politics/2009/02/24/lawmakers-cite-economic-crisis-effort-ban-death-penalty/>; Abigail Goldman, *Debating the Cost of the Death Penalty*, LAS VEGAS SUN (Mar. 4, 2009), <http://www.lasvegassun.com/news/2009/mar/04/debating-cost-death-penalty/>; Emanuella Grinberg, *Budget Concerns Force States to Reconsider the Death Penalty*, CNN (Mar. 2, 2009, 9:44 AM), <http://www.cnn.com/2009/CRIME/03/02/economy.death.penalty/index.html>; Scott Rothschild, *Death Penalty Opponents Introduce Bill to Abolish Executions Based on Cost*, LAWRENCE JOURNAL-WORLD (Feb. 5, 2009), <http://www2.ljworld.com/news/2009/feb/05/death-penalty-opponents-introduce-bill-abolish-exe/>; Rebecca Sunshine, *One State Looks to Cut the Death Penalty, Put Money Elsewhere*, KTIV (Feb. 4, 2009, 4:16 PM), <http://www.ktiv.com/Global/story.asp?S=9790524>. Moreover, “[t]he concern about costs also indirectly sheds light on numerous pathologies in prevailing capital practice, including the inability of states to satisfy minimum constitutional requirements in capital trials (reflected in high reversal rates), the absence of political will to carry out executions, the arbitrariness wrought by the few executions that are in fact implemented, and the difficulties (both pragmatic and moral) stemming from prolonged death-row incarceration.” Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 161.

²⁴⁴ See *infra* Part III.C, Financial Considerations in Recent Repeals.

²⁴⁵ “Twenty-five of 53 jurisdictions in the U.S. (50 states, the District of Columbia, the Federal Government, and the Military) either do not have the death penalty or have not carried out an execution in at least 10 years. Most of those have not carried out an execution since the death penalty was reinstated in 1976. An additional 8 have not had an execution in 5 years, for a total of thirty-three jurisdictions with no executions in that time.” *Jurisdictions with No Recent Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions> (last visited Feb. 10, 2013).

²⁴⁶ Press Release, John Kitzhaber, *supra* note 8.

²⁴⁷ If a death sentence is given in Oregon, it is automatically appealed to the Oregon Supreme Court for direct review. OR. REV. STAT. § 138.012 (2011); see also

can take years, even decades, and be expensive.²⁴⁸ Furthermore, capital trials themselves are lengthier and more costly than ordinary trials, as they are more complicated, requiring more pre-trial time, more experts, twice as many attorneys, and two trials instead of one (one for guilt and one for punishment) during which the inmates are held in the high security of death row.²⁴⁹ Moreover, even before the majority of appeals are submitted, numerous sentencing reversals and remands have become commonplace in Oregon.²⁵⁰ In fact, to date, not one inmate has come close to completing all ten steps in the review process and been executed. Rather, Oregon has only executed two volunteers who dropped their appeals.²⁵¹ Of the remainder, 37 inmates sentenced to die on Oregon's death row are in varying stages of their state or federal appeal proceedings.²⁵² On average, they have been on death row for more than 15

State v. Wagner, 786 P.2d. 93, 94 (Or. 1990) (discussing direct review). The defendant may further appeal to the U.S. Supreme Court on a discretionary basis. *Id.* (discussing Supreme Court's remand). It is only after these appeals are complete that the case can move into the post-conviction process. OR. REV. STAT. § 138.510(3). If the post-conviction petition is denied, that ruling can be appealed to the Oregon Court of Appeals and review sought in the Oregon Supreme Court and then the U.S. Supreme Court. *Id.* § 138.650; 28 U.S.C. § 1257 (2006). After post-conviction appeals, the defendant may file a habeas corpus petition in federal district court, and if the petition is denied, can appeal to the Ninth Circuit and seek review from the U.S. Supreme Court. Antiterrorism and Effective Death Penalty Act of 1996 § 104, 28 U.S.C. §§ 2253–54; 28 U.S.C. § 1254.

²⁴⁸ See Mary Mooney, *Can Oregon Afford the Death Penalty?*, OREGONLIVE (Apr. 18, 2009, 6:56 PM), http://www.oregonlive.com/news/index.ssf/2009/04/can_oregon_afford_the_death_pe.html.

²⁴⁹ Steiker & Steiker, *supra* note 239, at 670–71 (“The combination of increased trial costs, increased postconviction litigation costs, and increased incarceration costs in capital cases, together with the absence of significant numbers of executions in many states, has changed the way in which the ‘costs’ of the death penalty are understood and discussed. The relative cost of the death penalty is no longer captured by a simple comparison of the cost of a capital trial together with the cost of carrying out an execution, on the one hand, versus the cost of a non-capital trial and the cost of lengthy imprisonment, on the other. Rather, the relative cost of administering the death penalty post-*Furman* now often requires a comparison of the cost of *multiple* capital trials *and* the cost of lengthy, often indefinite imprisonment on death row versus the cost of a single, non-capital trial and the cost of lengthy (non-capital) imprisonment.”); see also OR. REV. STAT. §§ 136.001–145 (providing general criminal trial procedures); *id.* § 136.230(1) (allowing twelve preemptory challenges in capital cases); *id.* § 163.095 (defining circumstances that constitute aggravated murder); *id.* § 163.150(1)(a) (requiring separate sentencing hearing for aggravated murder).

²⁵⁰ See *infra* Part IV, Oregon's Lengthy Death-Penalty System.

²⁵¹ See *supra* Part I, The History of Oregon's Death Penalty.

²⁵² *Summary of Death Row Inmates: June 16, 2011*, OR. DEP'T OF CORR. (2011), available at http://www.oregon.gov/DOC/PUBAFF/docs/pdf/death_row_inmates.pdf. Note that Haugen has volunteered to drop his appeals, so he is not currently involved in the appeals process. Kristian Foden-Vencil, ‘*On the Row, You Never See the Stars*’—Gary Haugen on Death Row, OREGON PUB. BROADCASTING (Jul. 17, 2012, 8:03 AM), <http://news.opb.org/article/row-you-never-see-stars-gary-haugen-death-row/> (“Haugen wants to waive all his appeals to the death sentence and proceed to execution.”). But

years,²⁵³ with Randy Lee Guzek the longest serving death row inmate, at 24 years.²⁵⁴ In addition to the costs of incarcerating a death row defendant over the years, Oregon taxpayers pay most of the expenses of prosecuting and defending the capital trials and ten-part review process, which includes lawyers, experts, doctors, and investigators. It has been estimated that this lengthy legal process can take anywhere from 20–45 years and cost up to \$10 million per case, depending on the number and length of the appeals.²⁵⁵ Although some have estimated the costs of individual death cases,²⁵⁶ there have been no cost studies conducted to date. In fact, the State has no procedure or requirement for collecting any type of data regarding the death penalty, cost included. Thus, while some costs can be computed and/or estimated, without a detailed cost study and analysis, it is impossible to determine the exact amount the death penalty costs Oregon taxpayers.²⁵⁷

In 2006, Dr. William Long examined and compared “the costs of administering the Oregon death penalty for one who pursues all of his appeals as provided by law with the costs of life imprisonment without the possibility of parole for a defendant who has waived, at the trial court level, all rights to further appeals.”²⁵⁸ The purpose of his research was to provide testimony on the cost of Oregon’s death penalty in defendant Sebastian Shaw’s death penalty sentencing phase trial.²⁵⁹ Long concluded

he is currently involved in challenging the Governor’s moratorium and his reprieve. Pitkin, *supra* note 108; Terry, *supra* note 8. Clinton Wendell Cunningham, Mark Pinnell, Jesse Clarence Pratt, and Jeffery Ray Williams are the only four who have completed post-conviction relief appeals. See Summary of Petition for Writ of Habeas Corpus by a Person in State Custody at 28, Williams v. Belleque, No. 03-1678-JO (D. Or. 2007), available at [http://blog.oregonlive.com/breakingnews/Williams%20v.%20Belleque%20\(summary\).pdf](http://blog.oregonlive.com/breakingnews/Williams%20v.%20Belleque%20(summary).pdf) (Williams); Kathleen Glanville, *Death Row Inmate Seeks New Trial Because Other Killer Will Soon Be Free*, OREGONLIVE (May 30, 2007, 10:36 AM), http://blog.oregonlive.com/breakingnews/2007/05/death_row_inmate_seeks_new_trial.html (Pinnell); *OR: Death Penalty Case Filed in Federal Court*, P’SHP FOR SAFETY & JUSTICE (Nov. 15, 2005), <http://www.safetyandjustice.org/review-status/story/758> (Cunningham).

²⁵³ *History of Capital Punishment in Oregon*, *supra* note 1; OREGON JUST. RESOURCE CTR., *supra* note 17.

²⁵⁴ *Oregon Death Row*, OREGONLIVE, http://www.oregonlive.com/pacific-northwest-news/index.ssf/oregon_death_row.html (noting Guzek has been sentenced to death four times); see also *Summary of Death Row Inmates*, *supra* note 252.

²⁵⁵ Pitkin, *supra* note 108.

²⁵⁶ See, e.g., Mooney, *supra* note 248 (“The taxpayers’ tab for Guzek’s legal bills stands at \$2.2 million—and it’s still growing.”); Pitkin, *supra* note 108 (citing Willamette University law professor Bill Long’s estimate that Oregon’s oldest cases could end up costing more than \$10 million per defendant); *Tab for Haugen Case: \$1.2M in Past 5 Years*, KGW (Dec. 18, 2011, 6:04 PM), <http://www.kgw.com/news/Tab-for-Haugen-case-12M-in-past-5-years-135834368.html> (estimating that Oregon spent \$1.2 million over the last five years to execute Gary Haugen).

²⁵⁷ See *infra* Part V, Conclusion.

²⁵⁸ *Costs of the Oregon Death Penalty I*, DR. BILL LONG (May 5, 2006), <http://www.drbilllong.com/LegalEssaysII/Costs.html>.

²⁵⁹ *Id.*

that while “there are many numerical uncertainties in the cases as they go forward, the cost to put a person to death in Oregon is at least 50% more, and may be as much as five times, the cost of a sentence of life imprisonment without the possibility of parole.”²⁶⁰ In 2012, the Department of Corrections (DOC), Oregon Public Defender Services (OPDS) and Department of Justice (DOJ) provided the following information about death penalty costs: the average cost to house an inmate (death row or otherwise) at \$30,105.20 per year or \$82.48 per day;²⁶¹ the average cost of defending a death penalty case at the trial level over the last ten years was \$438,651, while the average cost of defending a non-death aggravated murder case at the trial level was \$216,693,²⁶² less than half. The DOJ has spent on average \$66,728.65 and 818.5 attorney hours on just direct automatic appeals in the cases of 61 defendants (for a total amount of \$4,070,447.60 and 49,928.80 hours respectively).²⁶³ These figures from the DOC, OPDS, and DOJ are not comprehensive, as they do not include all the costs related to housing inmates in Salem’s high security Intensive Management Unit or prosecuting the two-stage death penalty trials (or

²⁶⁰ *Id.* Dr. Long looked at the cost of incarceration, appeals provided by law (appellate, post-conviction review and habeas corpus review), potential interlocutory appeals, remands, and the cost of executing someone after all appeals provided by law are exhausted. According to Long, “[t]he empirical data is readily available to permit one to conclude that, for the defendant who has *not* waived his appeals, the cost to execute a person in Oregon in the ‘best case’ scenario—i.e., when everything goes ‘smoothly,’—is almost twice that for a person who receives an LWOP sentence and waives his appeals. For one whose case is remanded, however, the costs can be four to five times as much as one who faces life imprisonment without the possibility of parole and has waived his appeals.” *Costs of the Oregon Death Penalty II*, DR. BILL LONG (May 5, 2006), <http://www.drbilllong.com/LegalEssaysII/CostsII.html>. To see a detailed explanation of Dr. Long’s data and calculations, see *id.*

²⁶¹ Telephone Interview with Anita Nelson, DOC Government Efficiencies and Communications Office (May 14, 2012) (referencing the 2011–2013 DOC budget). The DOC does not separately calculate the costs for housing death row inmates yet there is a special unit, the Intensive Management Unit, at the Oregon State Penitentiary that provides housing and control for inmates on death row. *Commonly Requested Information*, OREGON DEP’T OF CORR., http://www.oregon.gov/DOC/OPS/PRISON/osp.shtml#Commonly_Requested_Information.

²⁶² Email Correspondence & Telephone Interview with Billy J. Strehlow, Or. Office of Pub. Def. Servs. (May 11 & May 14, 2012). These amounts are based on the average cost of the 232 adult trial level cases with an aggravated murder charge and final disposition between January 1, 2002, and December 31, 2011. Sixteen of these cases resulted in a death sentence. *Id.* It is important to note that this average amount is for defense trial costs only, which includes all the costs related to attorney time, investigators, mitigation specialists, various experts, administrative and assistance, but does not include any costs associated with the defendants’ automatic appeals to Oregon’s Supreme Court or appeals to the U.S. Supreme Court, as OPDS does not keep a record of those costs. *Id.*

²⁶³ See OR. DEP’T OF JUSTICE, Time and Expenses by Matter Client 137680, Inception to May 16, 2012 (unpublished chart) (on file with the author). The average cost to fully prosecute a capital case or even a capital trial has never been recorded by the DOJ. Email Correspondence & Telephone Interview with Tony Green, Spokesperson, Or. Dep’t of Justice, (May 15, 2012) (notes on file with author).

any of those cases where the defendant is not sentenced to death). Neither do they include the majority of costs related to litigating each stage of the ten-part appeals process.²⁶⁴

It is also difficult to determine the exact costs of Oregon's death-penalty system as there have been many cases that have resulted in numerous remands and retrials.²⁶⁵ Many of these cases, which have involved complicated and confusing interpretations of the law, have cost Oregon taxpayers millions of dollars and are barely accounted for in the calculations above. Furthermore, they are also years or decades away from completion.²⁶⁶ Randy Lee Guzek's case is illustrative of how long some of these death row cases have lasted in Oregon²⁶⁷ and therefore, how inordinately expensive and wasteful maintaining capital punishment has been. In 1988, Guzek was convicted of murdering couple Rod and Lois Houser in Terrebonne, Oregon and sentenced to death; at eighteen years old, he became the youngest person in Oregon history on death

²⁶⁴ In addition to not keeping any records of the costs associated with litigating the death penalty in Oregon, there is also no procedure or requirement for any type of related data collection. This means that without a comprehensive study of every aggravated murder case in Oregon since 1984, it is impossible to know the true costs associated with having a death penalty in Oregon. For example, How many capital trials has the State prosecuted (convictions where the state requested death as the sentence)?; How many of these cases resulted in death sentences?; How many non-capital aggravated murder trials has the State prosecuted (convictions where the state did not request death as the sentence)?

²⁶⁵ See *infra* Part IV, Oregon's Lengthy Death-Penalty System; see also Email from Tony Green, Spokesman, Or. Dep't of Justice, (May 15, 2012, 2:47 PM) (on file with author). ("The first four cases to make it through PCR are going to be the most expensive because we had to brief every issue on direct appeal and every issue in PCR because they were all new issues for the Oregon Supreme Court. An average of those four cases would not only be statistically insignificant, it would totally distort the current cost of litigating a capital case.").

²⁶⁶ "[T]he 34 other inmates on Oregon's death row aren't there cheaply. At just the initial trial court level, the average cost of defending a capital murder case is nearly 10 times the cost of a case without the possibility of a death sentence. And each condemned criminal gets 10 state and federal levels of appeal." Mooney, *supra* note 248; see also *State v. Guzek (Guzek III)*, 86 P.3d 1106 (Or. 2004) (vacating the death sentence and remanding for further proceedings); *State v. Langley*, 16 P.3d 489 (Or. 2000) (vacating petitioner's second death sentence and remanding for further proceedings); *State v. Rogers*, 4 P.3d 1261 (Or. 2000) (vacating death sentence and remanding for further proceedings); *State v. McDonnell*, 987 P.2d 486, 496 (Or. 1999) (same); *Dayton Leroy Rogers, Oregon's Most Prolific Serial Killer, Appealing Death Sentence*, OREGONLIVE (Jan. 13, 2012, 12:51 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/01/dayton_leroy_rogers_oregons_mo.html; Steve Duin, *Appealing for an End to the Randy Guzek Saga*, OREGONLIVE (Feb. 19, 2011, 10:00AM), http://www.oregonlive.com/news/oregonian/steve_duin/index.ssf/2011/02/appealing_for_an_end_to_the_ra.html; Helen Jung, *State Supreme Court Overturns Death Sentence Against Robert Langley for Fourth Time*, OREGONLIVE (March 29, 2012, 9:06 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/03/state_supreme_court_overturns.html; Pitkin, *supra* note 108.

²⁶⁷ See *infra* Part IV, Oregon's Lengthy Death-Penalty System.

row.²⁶⁸ His original trial ended with a unanimous jury verdict that Guzek should be executed for his crimes,²⁶⁹ yet 24 years later Guzek has not yet exhausted the sentencing phase (or “penalty phase”), the first of the ten-part appeals process available to each defendant sentenced to death in Oregon.

In response to Guzek’s first automatic appeal in 1990, the Oregon Supreme Court affirmed his conviction, but vacated the sentence, holding that his death sentence violated the Eighth Amendment. The Court reasoned that because the jury was not presented with a “general mitigation question,” it did not have the opportunity to give effect to any relevant mitigating evidence outside of the statutory factors that were submitted to it.²⁷⁰ The Court remanded the case back to the trial court for a new sentencing trial²⁷¹ in which Guzek was again sentenced to death.²⁷² In his second automatic appeal to the Oregon Supreme Court, the Court again vacated his sentence, ruling that the State’s “victim impact” at sentencing was not relevant, and so it had unconstitutionally secured Guzek’s death sentence.²⁷³ On remand at his third sentencing trial in 1997, Guzek was again sentenced to death. However, the trial judge failed to instruct the jury about the possibility of a “true-life” (life in prison without the possibility of parole) sentence as an alternative to the death penalty.²⁷⁴ Based on this error, the Oregon Supreme Court in 2004, for the third time on automatic appeal vacated Guzek’s sentence and remanded the case for a new sentencing trial.²⁷⁵ The Court also addressed the issue of exclusion of alibi evidence that Guzek had sought to admit, which consisted of live and transcript testimony by his mother and grandfather, which stated that he was with them at the time of the murder.²⁷⁶ The Court ruled that under state law and the Eighth Amendment, Guzek had a right to present this evidence during the penalty phase, and directed the trial court to admit all submitted alibi evidence.²⁷⁷ On appeal by the State to the U.S. Supreme Court on this issue, the Court held that live alibi testimony could not be admitted.²⁷⁸ The Oregon Supreme Court reviewed and re-

²⁶⁸ Mooney, *supra* note 248.

²⁶⁹ Duin, *supra* note 266.

²⁷⁰ State v. Guzek (*Guzek I*), 797 P.2d 1031, 1034 (Or. 1990).

²⁷¹ *Id.* at 1034.

²⁷² State v. Guzek (*Guzek II*), 906 P.2d 272, 276 (Or. 1995).

²⁷³ *Id.* at 287.

²⁷⁴ “[T]he trial court erred in failing to instruct the jury on the ‘true-life’ sentencing option and . . . this court again must vacate the sentence of death.” State v. Guzek (*Guzek III*), 86 P.3d 1106, 1108 (Or. 2004), *vacated*, 546 U.S. 517 (2006), *modified on remand*, 153 P.3d 101 (Or. 2007).

²⁷⁵ *Id.* at 1108.

²⁷⁶ *Id.* at 1121.

²⁷⁷ *Id.* at 1128–29.

²⁷⁸ Oregon v. Guzek (*Guzek IV*), 546 U.S. 517, 527 (2006). Specifically, the Court held that the state did have the authority to regulate, through exclusion, the live alibi testimony that Guzek sought to present. *Id.* at 526.

manded the case for a new sentencing trial yet again in 2007 in accordance with the U.S. Supreme Court's ruling.²⁷⁹

In 2010, Guzek had his fourth sentencing trial and again, a jury unanimously sentenced him to death for the 23-year-old murder of the Housers.²⁸⁰ His fourth automatic appeal to the Oregon Supreme Court (still the first part of Oregon's ten-part appeals process), is currently pending before the Oregon Supreme Court. While Guzek is merely one of 37 on Oregon's death row, in 2009, Guzek's case alone had already cost Oregon taxpayers approximately \$2.2 million.²⁸¹

B. *The Cost of the Death Penalty in Other States*

As Oregon has not engaged in any data collection or cost analysis of its death-penalty system, it is useful to examine comprehensive assessments done in other states associated with maintaining their capital-punishment systems.²⁸²

1. *Nevada*

In a 2012 study, Dr. Terance Miethe of the Department of Criminal Justice at the University of Nevada, Las Vegas, compared the costs of defending capital and non-capital murder cases.²⁸³ Dr. Miethe examined the time spent by defense attorneys at different stages of a case and discovered that in Clark County (Nevada's most populous county, which includes Las Vegas), defense attorneys spend an average of 2,298 hours on

²⁷⁹ State v. Guzek (*Guzek V*), 153 P.3d 101 (Or. 2007).

²⁸⁰ *Randy Guzek, Convicted of Murdering Couple in Their Home, Sentenced to Death for Fourth Time*, OREGONLIVE (June 17, 2010, 8:37 PM), http://www.oregonlive.com/news/index.ssf/2010/06/andy_guzek_convicted_of_murde.html. Interestingly, at the beginning of this fourth penalty phase trial, Guzek waived an option that would have given him the chance for life in prison with no opportunity for parole. Jurors were then left with two options: a death sentence or life in prison with possibility of parole when Guzek is 78. Steve Duin, *Randy Lee Guzek Revels in the Endless Spotlight*, OREGONLIVE (May 19, 2010, 5:58 PM), http://www.oregonlive.com/news/oregonian/steve_duin/index.ssf/2010/05/andy_lee_guzek_revels_in_the.html.

²⁸¹ Mooney, *supra* note 248 ("The taxpayers' tab for Guzek's legal bills stands at \$2.2 million—and it's still growing.")

²⁸² Some have been critical of death-penalty cost studies. See, e.g., JOHN ROMAN ET AL., URBAN INST. JUST. POL'Y CTR., *THE COST OF THE DEATH PENALTY IN MARYLAND I* (2008), available at http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf (discussing the shortcomings of the 2008 Maryland cost study); Dudley Sharp, *Death Penalty Costs: California*, PRODPINNC (Aug. 2, 2012, 12:21 PM), <http://prodpinnc.blogspot.com/2012/08/death-penalty-costs-california.html> (providing different cost amounts of California's death penalty in 2007–2008 compared to the 2011 study); Dudley Sharp, *Death Penalty and Sentencing Information*, PRO-DEATH PENALTY.COM (Oct. 1, 1997), <http://www.prodeathpenalty.com/dp.html#D.Cost> (admitting that the death penalty costs more, but arguing that it is not as costly as most studies indicate).

²⁸³ Terance D. Miethe, *Estimates of Time Spent in Capital and Non-Capital Murder Cases: A Statistical Analysis of Survey Data from Clark County Defense Attorneys*, ACLU OF NEV. (Feb. 21, 2012), <http://aclunv.org/files/clarkcostreport.pdf>.

capital murder cases compared to an average of 1,087 hours on non-capital-murder cases—a difference of 1,211 hours, or 112%.²⁸⁴ The study found that defending the average capital murder case in Clark County cost \$229,800 for a public defender or \$287,250 for appointed counsel. In addition, the cost of defending capital murder cases was \$170,000 to \$212,000 more per case than defending a non-capital murder case.²⁸⁵ It further revealed that the 80 pending capital murder cases in Clark County would cost about \$15 million more to defend than if they were prosecuted as non-capital cases.²⁸⁶ Dr. Miethe's study did not include the costs of prosecution or all appellate expenses, and as he explained,

It is important to note that this statistical extrapolation does *not* cover the full array of time spent in capital cases by other court officials (e.g. judges, prosecutors, jurors), staff and administrative personnel, mitigation specialists, investigators, and expert witnesses. It also does not take into account the additional costs of capital litigation that are associated with state/federal appeals and the extra costs of imprisonment of death-eligible inmates pending trial and sentencing.²⁸⁷

Dr. Miethe's study was the result of a 2011 legislative bill requiring an audit on capital-punishment costs, after the state had failed to execute a single convict since 2006.²⁸⁸ Several of the inmates currently on death row in Nevada, as in Oregon, date back to the 1980s; one of them has been on death row since 1979.²⁸⁹

2. Maryland

In 2008, the Urban Institute examined 1,136 death-eligible murder cases in Maryland between 1978 and 1999, and found that the state's taxpayers paid \$186 million for a system that at the time had resulted in only five executions.²⁹⁰ The study estimated that the average cost to Maryland

²⁸⁴ *Id.* at 4.

²⁸⁵ *Id.* at 8.

²⁸⁶ *Id.* at 7.

²⁸⁷ *Id.*

²⁸⁸ Cy Ryan, *Lawmakers Advance Bill to Conduct Audit on Death Penalty Costs*, LAS VEGAS SUN (May 28, 2011, 4:58 PM), <http://www.lasvegassun.com/news/2011/may/28/senate-advances-bill-conduct-audit-death-penalty-c/>.

²⁸⁹ *Id.* Since 1976, Nevada juries have handed down 131 death sentences, with 69 currently on death row. Only 12 have been executed, 11 of which were volunteers. *The Death Penalty Statistics for Nevada*, NEV. COAL. AGAINST THE DEATH PENALTY, <http://www.nvcadp.org/node/4>.

²⁹⁰ "In order to estimate the costs of each stage of case processing, we turned to two additional sources. First, we searched administrative databases containing official records on individual case processing, using the Maryland Judiciary Case Search (MDJCS) database and the federal PACER database. All records that matched our sample were coded into our research database. Second, estimates of the time attorneys, judges and support staff spent processing these cases were developed from semi-structured interviews and survey data. Complete administrative data on case processing were available for 509 of the 1,136 cases. This sample of 509 cases was weighted to resemble the population of 1,136. In addition, a propensity score analysis

taxpayers for reaching a single death sentence was \$3 million, \$1.9 million more than the cost of a non-capital case.²⁹¹ Furthermore, in the 106 cases tried by prosecutors who sought the death penalty but were unsuccessful, the state spent an additional \$71 million; the final result of these cases was a life or long-term prison sentence.²⁹² In 2009, an effort to abolish the death penalty in Maryland narrowly failed in its General Assembly, which instead passed a law restricting it to murder cases where there is DNA evidence and a videotaped confession or video linking the suspect to a murder.²⁹³

3. California

In California, a recent death-penalty study revealed that California, a state that has rarely executed prisoners since the death penalty was reinstated there in 1978,²⁹⁴ has still managed to spend \$4 billion of taxpayer money on capital punishment in that time.²⁹⁵ The 2011 study conducted over a three year period by U.S. Court of Appeals Judge Arthur L. Alarcón and Loyola Law School Professor Paula M. Mitchell estimated that capital trials, enhanced security on death row, and legal representation for capital defendants increase California's annual budget by \$184 million.²⁹⁶ Specifically, the authors calculated that the 13 executions California carried out in the past 30 years cost California's taxpayers an average

was conducted to adjust estimates to account for the possibility that capitally prosecuted cases may have been more egregious, on average, than the typical case that did not receive a death notice. If true, these cases would have been more expensive to prosecute even if no death statute had been in place. Finally, we estimate the cost to Maryland taxpayers associated with each stage of case processing. We estimated two key costs: 1) those associated with the filing of a death notice; and, 2) those associated with the imposition of a death sentence. We compared the costs for these cases with the cost of processing a capital-eligible case in which no death notice was filed. In this study, the no-death-notice cases represent the cost of processing a felony homicide case in Maryland as if there was no death penalty." ROMAN ET AL., *supra* note 282, at 1–2. Note that in determining this total cost, the study calculated total costs for all capital cases and divided the amount by the number of actual executions.

²⁹¹ *Id.* at ii ("We found that an average capital-eligible case in which prosecutors did not seek the death penalty will cost . . . more than \$1.1 million A capital-eligible case in which prosecutors unsuccessfully sought the death penalty will cost \$1.8 million . . . [and an] average capital-eligible case resulting in a death sentence will cost approximately \$3 million [In total,] we forecast that the lifetime costs of capital-prosecuted cases will cost Maryland taxpayers \$186 million.")

²⁹² *Id.* at 3.

²⁹³ MD. CODE ANN., CRIM. LAW § 2-202(a) (3) (LexisNexis 2012).

²⁹⁴ Since 1978, 13 people have been executed by the state of California. *Inmates Executed, 1978 to Present*, CA DEP'T. OF CORR. & REHAB., http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html; see also Carol J. Williams, *State Won't Execute Anyone in 2011*, L.A. TIMES, May 4, 2011, at 1, available at 2011 WLNR 8643241 (California has not executed anyone since 2006 because of lethal injection challenges).

²⁹⁵ Alarcón & Mitchell, *supra* note 240, at S51.

²⁹⁶ *Id.* at S109.

of \$308 million each.²⁹⁷ The California study also demonstrated that the prosecution of a death case costs up to 20 times as much as a life without the possibility of parole case.²⁹⁸ They also projected that the cost of maintaining California's death penalty under the current system will increase to \$9 billion by 2030.²⁹⁹ The cost of California's death-penalty system, combined with the rarity of executions, has played a large part in gathering support for the ultimately unsuccessful November, 2012 ballot measure where voters considered replacing capital punishment with a life without the possibility of parole term.³⁰⁰

C. *Financial Considerations in Recent Repeals*

As discussed above, Nevada and Maryland are among those states that have considered eliminating the death penalty,³⁰¹ and California voters narrowly missed abolishing the penalty by ballot measure in November 2012.³⁰² In New Jersey,³⁰³ cost was a key reason why the state abolished capital punishment in 2007.³⁰⁴ A 2005 study by the New Jersey Policy Perspective determined the State's death penalty cost New Jersey taxpayers \$253 million between 1983 and 2005.³⁰⁵ Examining the cost of death pen-

²⁹⁷ Carol J. Williams, *Death Penalty in State Comes With a High Price*, L.A. TIMES, June 20, 2011, at 1, available at 2011 WLNR 12262729.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Maura Dolan, *Measure That Would End Death Penalty Qualifies for Ballot*, L.A. TIMES (Apr. 24, 2012), <http://www.latimes.com/news/local/la-me-death-penalty-california-20120424,0,4305928.story>. The ballot measure (Proposition 34), was ultimately unsuccessful, losing by a margin of 52.8% against and 47.2% in favor. Despite its failure, commentators have noted the silver lining: "Prop 34 reflects a trend of declining support for this ultimate form of punishment, in which the innocent are at risk of being executed." David A. Love, *Prop 34 Fails But Signals the Imminent Demise of California's Death Penalty*, GUARDIAN (Nov. 9, 2012), <http://www.guardian.co.uk/commentisfree/2012/nov/09/proposition34-fails-california-death-penalty>.

³⁰¹ "In 2009, eleven state legislatures considered bills to end capital punishment and its high costs were part of these debates." DIETER, *supra* note 240, at 6; see also Matt Gouras, *Montana Senate Favors Abolishing Death Penalty*, SPOKESMAN-REVIEW (Spokane, Wash.) (Feb. 17, 2009), <http://www.spokesman.com/stories/2009/feb/17/montana-senate-favors-abolishing-death-penalty>; Kirk Johnson, *Death Penalty Repeal Fails in Colorado*, N.Y. TIMES, May 5, 2009, at A16; *New Hampshire House Votes to Abolish Death Penalty*, CNN (Mar. 26, 2009), http://articles.cnn.com/2009-03-26/justice/death.penalty.abolish_1_death-penalty-capital-punishment-new-hampshire-house?_s=PM:CRIME.

³⁰² Love, *supra* note 300.

³⁰³ New Jersey reinstated the death penalty in 1982, yet from 1982 to 2007, no one was executed. Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A03, available at 2007 WLNR 28540214.

³⁰⁴ *Id.* ("[E]qually persuasive to lawmakers was not saving lives but money . . ."). New Jersey's Legislature abolished the death penalty on December 17, 2007. Act of Dec. 17, 2007, ch. 204, 2007 N.J. Laws 1427.

³⁰⁵ Forsberg, *supra* note 240, at 16.

alty cases to prosecutor and public defender offices, courts, and correctional facilities, the study revealed that “New Jersey taxpayers over the past 23 years have paid more than a quarter of a billion dollars on a capital-punishment system that has executed no one.”³⁰⁶ To be specific, between 1983 and 2005, New Jersey prosecuted 197 capital trials that resulted in 60 death sentences, the majority of which were reversed.³⁰⁷ There were no executions, and 10 men were housed on the state’s death row.³⁰⁸ Moreover, the study set forth the numerous increased costs associated with death-penalty cases. Some of these discrepancies are: many more pre-trial motions (10 to 25 motions instead of five to seven in non-capital cases); a longer time for jury selection (an average of five and a half days instead of half an hour to two hours); approximately 30 more court days per trial and \$66,000 more per case in court fees; additional personnel (two defense lawyers instead of one and two clerks at the New Jersey Supreme Court working almost full-time for mandatory review of death sentences); and much longer and more complicated appeals.³⁰⁹ The year following the release of this report, the New Jersey legislature created the Death Penalty Study Commission; it was charged with studying all aspects of the state’s death-penalty system including its cost “from indictment to execution and the cost of life in prison without parole.”³¹⁰ In January 2007, the Commission recommended that the state abolish the death penalty and replace it with life imprisonment without the possibility of parole.³¹¹ The Committee found that New Jersey’s death-penalty system was more expensive than sentencing a person to life imprisonment.³¹² In other words, to abolish the death penalty, with all its added expenses, and adopt a life-without-parole system, the state would save \$1.3 million per prisoner in incarceration costs because death-row inmates receive special housing and security.³¹³ New Jersey abolished its death penalty in 2007.³¹⁴

Cost was also a factor in abolishing capital punishment in New Mexico in 2009. New Mexico Governor Bill Richardson cited the high cost of

³⁰⁶ *Id.* at 19. The report “does not include the additional costs for jury selection or the larger costs for the jury due to longer trials,” or the actual costs of executions. *Id.* at 16, 18. “Given the difficulty in obtaining precise information from the various state and county entities that play a role in capital cases—and what appear to be decisions by those entities not to keep track—there is considerable reason to believe that the actual figure is higher.” *Id.* at 18.

³⁰⁷ *Id.* at 4, 7–8.

³⁰⁸ *Id.* at 4.

³⁰⁹ *Id.* at 9–14.

³¹⁰ *New Jersey Death Penalty Study Commission: Overview of the Commission and Its Work*, N.J. LEGISLATURE, http://www.njleg.state.nj.us/committees/njdeath_penalty.asp.

³¹¹ NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 67 (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

³¹² *Id.* at 32.

³¹³ *Id.*

³¹⁴ Richburg, *supra* note 303.

capital punishment as a relevant factor in his decision to sign the repeal.³¹⁵ Also, in a report issued in connection with the New Mexico repeal bill, the Public Defender Department indicated that abolishing the death penalty would save millions of state funds.³¹⁶ In addition, the State Bar Task Force on Administration explained that maintaining capital punishment involves significant costs not found in noncapital cases.³¹⁷ It was further reported that New Mexico's Supreme Court spent up to \$700,000 on appeals in typical death penalty cases.³¹⁸ Yet only 7% of death penalty cases resulted in death sentences and 68% of those few convictions were overturned on appeal.³¹⁹ State Representative Gail Chasey, who introduced the repeal bill that New Mexico Governor Bill Richardson signed into law in 2009,³²⁰ also noted that cost was at issue for legislators.³²¹ Cost was again at issue in Connecticut's 2012 repeal. There, the State's Office of Fiscal Analysis estimated that the death penalty cost the state approximately \$5 million a year with \$3.8 million of that amount spent by the Public Defenders Commission, which is responsible for the defense and appeals of death penalty convictions. Another figure worth mentioning here is the approximately \$660,000 spent annually just on expert witnesses.³²² Following Connecticut's 2012 House of Representatives vote to repeal the death penalty, Representative Gerald Fox, chairman of the House Judiciary Committee stated that the death penalty "and the litigation that ensues places a financial burden on the judicial system and the

³¹⁵ Ian Urbina, *In Push to End Death Penalty, Some States Cite Cost-Cutting*, N.Y. TIMES, Feb. 25, 2009, at A1 (Cost-cutting is a "valid reason in this era of austerity and tight budgets.").

³¹⁶ LEGISLATIVE FIN. COMM. FOR THE N.M. LEGISLATURE, *supra* note 240, at 2.

³¹⁷ *See id.*

³¹⁸ Garry Boulard, *Hard Times Have Legislators Looking Everywhere for Ways to Beat Back the Fiscal Crisis*, STATE LEGISLATURES, June 2009, at 20, 20, available at http://www.ncsl.org/Portals/1/Documents/magazine/articles/2009/SL_0609-Squeeze.pdf.

³¹⁹ Gail Chasey, *Verbatim: The Whole World is Celebrating With Us*, CHAMPION, May 2009, at 59, 59.

³²⁰ H.B. 285, 49th Leg., 1st Sess. (N.M. 2009). Representative Chasey also introduced bills to repeal the death penalty in 1999, 2001, 2003, 2005, and 2007. H.B. 190, 48th Leg., 1st Sess. (N.M. 2007); H.B. 576, 47th Leg., 1st Sess. (N.M. 2005); H.B. 377, 46th Leg., 1st Sess. (N.M. 2003); H.B. 239, 45th Leg., 1st Sess. (N.M. 2001); H.B. 305, 44th Leg., 1st Sess. (N.M. 1999).

³²¹ *New Mexico Governor Repeals Death Penalty in State*, *supra* note 11. ("We can put that money toward enhancing law enforcement, public works, you name it." (internal quotation marks omitted)).

³²² OFFICE OF FISCAL ANALYSIS, CONN. GEN. ASSEMBLY, FISCAL NOTE ON AN ACT REVISING THE PENALTY FOR CAPITAL FELONIES, available at <http://www.cga.ct.gov/2012/FN/2012SB-00280-R000111-FN.htm>.

state.³²³ In 2012, Connecticut became the 17th state to abolish the death penalty.³²⁴

D. *The Relevance of Cost*

Those in favor of the death penalty argue that cost should not be a consideration when meting out justice or that restricting appeals could lower death-penalty expenses.³²⁵ While it is true that states have put in place numerous reforms to create a less arbitrary system since the Supreme Court reinstated the death penalty,³²⁶ these reforms have resulted in a lengthier and more costly appeals process.³²⁷ However, as Randy Guzek's case demonstrates, the length of a death-penalty case in Oregon has not been solely about appeals.³²⁸ In addition to a slow moving Supreme Court, Oregon's numerous changes to its law and complicated interpretations of the law have left it unable to deliver a functional, swift, and fair death-penalty system.³²⁹ Perhaps the most common argument in favor of the death penalty is that the fear of the death penalty produces

³²³ Mary Ellin Godin, *Connecticut Lawmakers Vote to Repeal Death Penalty*, NBC NEWS (Apr. 11, 2012, 5:42 PM), http://usnews.nbcnews.com/_news/2012/04/11/11147466-connecticut-lawmakers-vote-to-repeal-death-penalty?lite.

³²⁴ Ariosto, *supra* note 14.

³²⁵ See, e.g., Anna Canzano, *Cost of Capital Punishment May Not Be More than Life in Prison*, KATU (Nov. 23, 2011), <http://www.katu.com/politics/local/Cost-of-capital-punishment-may-not-be-more-than-life-in-prison-134441243.html?m=y&smobile=y> (“I don’t think Oregon voters voted for it because they thought it would save them money,” said Clatsop County District Attorney Josh Marquis, a proponent of the death penalty.”).

³²⁶ See *Gregg v. Georgia*, 428 U.S. 153 (1976) (reinstating the death penalty by holding that the death penalty does not, under all circumstances, violate the Eighth and Fourteenth Amendments); see also *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (holding the death penalty, as then imposed, unconstitutional).

³²⁷ For a good discussion on how *Furman* “radically reshape[d] the economics of capital punishment” through “a course of constitutional regulation of the death penalty,” see Steiker & Steiker, *supra* note 239, at 668–96.

³²⁸ *Time on Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/time-death-row> (“[M]andatory sentencing reviews . . . and continual changes in laws and technology have necessitated reexamination of individual sentences.”). Proponents and opponents of the death penalty agree that appeals are lengthy because death is the ultimate punishment and there is no room for error. See, e.g., *Morning Edition*, *supra* note 114 (Clatsop County DA Joshua Marquis discussing the necessity of the lengthy appeals process); see also, e.g., Novotny, *supra* note 114 (Coos County DA Paul Frasier discussing the same).

³²⁹ See *infra* Part IV, Oregon’s Lengthy Death-Penalty System. This is also easily shown by how quickly and how often Texas applies its death penalty—Oregon and Texas use the same death-penalty statute, JUDICIAL COUNCIL OF THE NINTH CIRCUIT, CAPITAL PUNISHMENT HANDBOOK 166 (2006), available at <http://www3.ce9.uscourts.gov/web/sdocuments.nsf/Death%20Penalty%20View?OpenView> (follow “final2006handbook.pdf” hyperlink), yet Texas executed 474 people between 1976 and 2011, while Oregon has executed only two people. Simon Rogers, *Death Penalty Statistics from the U.S.: Which State Executes the Most People?*, GUARDIAN DATABLOG (Sept. 21, 2011), <http://www.guardian.co.uk/news/datablog/2011/sep/21/death-penalty-statistics-us>.

significant incalculable financial savings, as defendants are more likely to accept plea bargains, which avoid the cost of a trial.³³⁰ However, although it is too speculative to measure the cost analyses of capital punishment in all circumstances, those that have addressed plea-bargaining over the past 20 years have found the opposite was true.³³¹ For example, the Judicial Conference of the United States found that the average cost of representation in federal death-penalty cases that resulted in plea bargains was \$192,333 while the average cost of representation in cases that were eligible for the death penalty but where the death penalty was not pursued was only \$55,772,³³² indicating that it would be less expensive to pursue murder cases if the death penalty was off the table. Most recently, data from New Jersey (one year after abolition) indicates that prosecutors have found no difference in their ability to secure guilty pleas without the incentive to plea bargain.³³³ Moreover, states like Massachusetts, with no

³³⁰ Ashbel S. Green, *Plea Deals Put Capital Punishment on Trial*, OREGONIAN, Sept. 26, 2004, at A1 (“The only reason that Morris and Weaver pleaded guilty is because the death penalty hung over their heads,’ [Clatsop County District Attorney Joshua] Marquis said. ‘And they knew that both of the prosecutors were willing to seek it.’”); see also, Kent S. Scheidegger, *The Death Penalty and Plea Bargaining to Life Sentences* 13 (Criminal Justice Legal Found., Working Paper No. 09-01, Feb. 2009), available at <http://www.cjlf.org/publications/papers/wpaper09-01.pdf> (“[R]epeal of the death penalty would likely result in fewer pleas to life or long sentences, requiring that prosecutors either take more cases to trial at a substantial financial cost or accept bargains to lesser sentences at a substantial cost to public safety.”).

³³¹ See, e.g., PHILIP J. COOK ET AL., TERRY SANFORD INST. OF PUB. POLICY AT DUKE UNIV., *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 77–78* (1993), available at <http://www.deathpenaltyinfo.org/northcarolina.pdf> (concluding that North Carolina spent \$2.16 million extra per execution over the cost of a non-death-penalty system imposing a life sentence, including costs of the additional time spent by prosecutors, judges and others on death-penalty cases); Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. LAW & ECON. 498 (2009) (estimating that North Carolina is spending about \$11 million per year on the death penalty, excluding the extra costs to the prosecution and judicial system); *Costs of the Death Penalty: Financial Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/costs-death-penalty>; *The Cost of Seeking the Death Penalty in Indiana*, IND. PUB. DEFENDER COUNCIL, <http://www.in.gov/ipdc/general/DP-COST.pdf> (“Death Penalty cases that resulted in LWOP plea agreements averaged \$122,441, according to LSA, while LWOP cases that went to a full trial and resulted in LWOP sentences averaged only \$42,658.”).

³³² SUBCOMM. ON FED. DEATH PENALTY CASES, JUDICIAL CONFERENCE OF THE U.S., *FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION* (1998), available at <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/RecommendationsCostQuality.aspx> (explaining that prosecution costs in death cases were 67% higher than the defense costs, even before including law enforcement’s investigative costs).

³³³ See Rudy Larini, *A Year Later, State Assesses Justice Without Death Penalty*, STAR LEDGER (Newark, N.J.), Dec. 15, 2008, at 1, available at <http://www.nj.com/news/ledger/index.ssf?/base/news-14/1229319352223800.xml&coll=1>.

death penalty, have some of the highest rates of prisoners serving life without parole sentences in the country.³³⁴

Even without exact cost figures, there is little question that maintaining capital punishment is an expensive public-policy choice that takes money away from other programs, including criminal-justice needs, such as law-enforcement tools and public safety.³³⁵ Some of these funds could go directly to the victim's families,³³⁶ or they might be used to enhance law enforcement such as solving cold cases, improving forensic testing, and putting more police on the street. In a difficult economy, funds could help prevent cuts in law enforcement and provide basic criminal-justice services. The lack of funds, on the other hand, has had unfortunate consequences. States need to cut their budgets and continue to pay for their expensive death-penalty systems. Philadelphia, Pennsylvania, for example, left 200 police-officer positions unfilled;³³⁷ Atlanta, Georgia police imposed a 10% pay cut through four-hours-per-week furloughs;³³⁸ New Hampshire trials were suspended for a month to save money;³³⁹ legal services organizations have been forced to cut their staff in many states;³⁴⁰

³³⁴ In Massachusetts, 7.9% of its prison population is serving life without parole, the third highest percent in the country. Iowa is fourth, with 6.6% of prisoners serving life without parole, and West Virginia is fifth with 6.4%. None of those states had the threat of the death penalty to secure those sentences. MARC MAUER ET AL., SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 10, tbl.2 (2004), available at http://www.sentencingproject.org/doc/publications/inc_meaningoflife.pdf.

³³⁵ See *Bill to Abolish Death Penalty Presented to Lawmakers*, BALTIMORE SUN (Jan. 25, 2012, 2:03 PM), available at http://www.baltimoresun.com/news/kcpq-bill-to-abolish-death-penalty-presented-to-lawmakers-20120125_0786149.story; *The Death Penalty: Saving Lives and Money*, *supra* note 241, at 32.

³³⁶ In Illinois, New Mexico, and New Jersey's repeal legislation, part of the saving from the death penalty was given to services for the surviving victims' families. NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT, *supra* note 311, at 2 ("The Commission also recommends that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide."); Shari Silberstein, *Illinois Becomes the 16th State to Abandon the Death Penalty*, EQUAL JUST. USA (Mar. 9, 2011, 2:47 PM), <http://ejusa.org/newsline/article/2011/03/09/illinois-becomes-16th-state-abandon-death-penalty> ("Illinois . . . used the cost savings from repeal towards services for victims and training for law enforcement."); *The Win in New Mexico: Spotlight on Murder Victims' Families for Reconciliation*, EQUAL JUST. USA (April 1, 2009), <http://ejusa.org/newsline/article/2009/04/01/win-new-mexico-spotlight-murder-victims-families-reconciliation> ("[T]he New Mexico strategy focused on using the savings from ending the death penalty to increase services for victims' families.").

³³⁷ Carrie Johnson, *Double Blow For Police: Less Cash, More Crime*, WASH. POST, Feb. 8, 2009, at A03, available at 2009 WLNR 27048732.

³³⁸ *Id.*

³³⁹ Tresa Baldas, *Cost-cutting Hits Courts: Delayed Trials, Furloughs Disrupt Legal Practices*, NAT'L L.J., Feb. 16, 2009, available at <http://www.nhbar.org/uploads/pdf/BudgetCuts-NatlLawJournal030509.pdf>.

³⁴⁰ Steve Karnowski, *Poor Economy Hits Courts, Hurts Programs for Poor*, SEATTLE TIMES (Jan. 23, 2009, 3:30 PM), http://seattletimes.com/html/nationworld/2008663524_apmeltdownjusticeinperil.html.

and police in Oakland, California and Tulsa, Oklahoma have stopped responding to burglary, theft and fraud calls.³⁴¹ Moreover, a 2008 poll revealed that 39% of police departments have had to cut their budgets because of the economy and 43% reported that cuts had adversely affected their ability to provide basic police services.³⁴²

In Oregon, the economy is taking its toll on criminal-justice services as well.³⁴³ The Portland Police Bureau planned to cut at least 56 officers' positions after the mayor asked for a 4% cut of all city bureaus for the 2012–2013 fiscal year.³⁴⁴ In Lane County, the district attorney has been forced to close the medical examiner's office and cut back drastically on criminal investigations.³⁴⁵ Moreover, the County's recent budget included an elimination of 47 corrections positions, 131 jail beds, and 13 jobs in the district attorney's office.³⁴⁶ In Jackson County, the circuit court has recently cut staff including the court's last two bailiffs, the release-assistance department, and a court clerk position; it has also shortened its hours and days of operation.³⁴⁷ In Josephine County, prosecutors have been unable to handle nearly 130 drug possession, domestic disputes and burglary cases due to prison closures and attorney and investigator layoffs.³⁴⁸ Due to budget cuts, prisoners in Lane and Josephine Counties

³⁴¹ Kevin Johnson, *Cutbacks Force Police to Curtail Calls for Some Crimes*, USA TODAY (Aug. 24, 2010, 9:21 PM), http://www.usatoday.com/news/nation/2010-08-25-1Anresponsecps25_ST_N.htm.

³⁴² Kevin Bohn, *Police Face Cuts as Economy Falters*, CNN (Oct. 23, 2008), http://articles.cnn.com/2008-10-23/justice/police.economy_1_officer-jobs-police-chiefs-training-budget?s=PM:CRIME (citing poll conducted by Police Executive Research Forum).

³⁴³ Jeff Barnard, *Timber Counties Start Clear-Cutting Budgets*, BEND BULL. (Apr. 26, 2012, 4:00 AM), <http://www.bendbulletin.com/article/20120426/NEWS0107/204260400/>.

³⁴⁴ Maxine Bernstein, *Portland Police Chief Submits Budget Calling for 56 Officer Cuts, Plan to Reopen SE Precinct to Patrol*, OREGONLIVE (Feb. 2, 2012, 1:12 PM), http://www.oregonlive.com/portland/index.ssf/2012/02/portland_police_chief_submits_1.html. The adopted budget did not cut any current sworn officer positions, but allowed for only 50 new hires in the fiscal year, less than needed to keep pace with vacancies. 1 CITY OF PORTLAND, ORE., ADOPTED BUDGET: FISCAL YEAR 2012–13, at 152, 157 (2012), available at <http://www.portlandonline.com/omf/index.cfm?c=59150&a=405639>. The incoming mayor has called for 10% cuts from all city bureaus in the next year. *Mayor: 10% Budget Cuts for All City Bureaus*, KGW (Jan. 2, 2013, 5:08 PM), <http://www.kgw.com/news/Mayor-Elect-Hales-ready-to-take-reins-185342291.html>.

³⁴⁵ Rachael McDonald, *Budget Cuts Force DA to Close County Coroner's Office* (Northwest Public Radio broadcast Apr. 24, 2012, 3:49 PM), available at <http://nwpr.org/post/budget-cuts-force-da-close-county-coroners-office>.

³⁴⁶ Greg Bolt, *County Faces Severe Cuts*, REGISTER-GUARD (Eugene), Apr. 25, 2012, at A1, available at <http://projects.registerguard.com/web/newslocalnews/27966201-41/county-budget-corrections-cuts-cut.html.csp>.

³⁴⁷ Sanne Specht, *Trials of Their Own: Budget Cuts Have Court System Juggling to Serve Public Interest*, MAIL TRIB. (Apr. 27, 2012, 2:00 AM), <http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20120427/NEWS/204270322>.

³⁴⁸ Whitney Clark, *Budget Cuts Make it Impossible to Prosecute Criminals*, KTVL <http://www.southernoregoncw.com/template/cgi-bin/archived.pl?type=basic&file=/shared/news/top-stories/stories/archive/2012/06/OoGRIIdg.xml>.

were released without serving their sentences or posting bail.³⁴⁹ Oregon's death penalty certainly diverts state resources (and our attention) from alternatives that would actually substantially reduce the levels of violence and crime in the State, so while eliminating it would not solve all of Oregon's budget woes, redirecting some of the money currently paying for an ineffective and expensive capital-punishment system could be significant.

IV. OREGON'S LENGTHY DEATH-PENALTY SYSTEM

Oregon has paid millions of dollars to house death-row inmates and battle endlessly for and against them in court over many years, resulting in a de facto moratorium on the death penalty.³⁵⁰ A tragic side-effect during the years of appeals is the suffering caused to victims' families who must continuously relive their tragedies by participating in numerous court proceedings. All the while, prosecutors continue to add new death cases to the docket. From 1978 until today, capital trials in Oregon have resulted in 85 total death sentences (for 65 defendants), 49 (57.6%) of which were reversed, with only two (volunteers³⁵¹) executed.³⁵² These sta-

³⁴⁹ Jeff Barnard, *In Broke Josephine County, Inmates Walk Free*, REGISTER GUARD (Eugene), May 31, 2012, at A5, available at <http://special.registerguard.com/turin/2012/may/31/in-broke-josephine-county-inmates-walk-free/>; *Budget Crunch Frees Inmates from Lane County Jail*, KVAL.COM, June 26, 2012, <http://www.kval.com/news/local/Budget-crunch-frees-inmates-from-Lane-County-jail-160414885.html>; Chris McKee & Angela Brauer, *Nearly 400 Inmates Released from the Lane County Jail in One Month*, KMTR (July 26, 2012, 4:40 PM), <http://www.kmtr.com/news/local/story/Nearly-400-inmates-released-from-the-Lane-County/Tb8NaybDeU6TKTidqmpd8Q.csp.x>.

³⁵⁰ Jung, *supra* note 6; Press Release, John Kitzhaber, *supra* note 8.

³⁵¹ The fact that Oregon has maintained a costly, complicated and lengthy death-penalty system for almost 30 years but has only managed to execute two volunteers (who wanted to die) provides further support that capital punishment has not delivered its intended results. See William Yardley, *Oregon's Governor Says He Will Not Allow Executions*, N.Y. TIMES, Nov. 22, 2011, at A14. Since reinstatement of the death penalty in 1976, there are a number of states that maintain a death penalty but have rarely or never used it. *Jurisdictions with No Recent Executions*, *supra* note 245. Kansas and New Hampshire have performed no executions. *Id.* Three states have executed only "volunteers": Pennsylvania has executed three volunteers; Oregon, two; and South Dakota, three. John Hult, *The Volunteer State*, S.D. EXECUTION UPDATES (Oct. 30, 2012, 4:38 PM), <http://sdexecutions.tumblr.com/post/34657520900/the-volunteer-state>; *Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers"*, DEATH PENALTY INFO. CTR., (Nov. 22, 2011), <http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers>. Connecticut had only executed one volunteer since 1976 until its repeal of the death penalty in 2012. *Jurisdictions with No Recent Executions*, *supra* note 245. Until 2011, Idaho had only executed one person since 1957, a volunteer. See Betsy Z. Russell, *Triple Killer Rhoades Executed in Idaho*, SPOKESMAN-REVIEW (Spokane, Wash.), Nov. 18, 2011, available at 2011 WLNR 24147316. Of the 12 prisoners whom Nevada has executed since 1977, 11 wanted to die. Martha Bellisle, *Death Row Inmate Drops Appeals*, RENO GAZETTE-JOURNAL (Oct. 26, 2005, 5:48 AM), available at <http://ccadp.proboards.com/index.cgi?board=news&action=print&thread=2142>. Kentucky has executed three people since 1967, two of whom were volunteers. Press Release, Dep't

tistics reflect the number of voter initiatives and legislative changes to Oregon's death-penalty law as well as the complicated and often lengthy litigation interpreting the law. As a result, numerous defendants, who were originally sentenced to death, have had their sentences remanded, reduced and/or reversed.³⁵³ While there are just a handful of cases still litigating first-impression issues, there is little question that any changes to Oregon's death-penalty law or in death-penalty jurisprudence would have the same result and could extend some of the current 37 death-row defendants' and future defendants' cases for years, even decades to come. As Governor Kitzhaber stated, "the truth is courts (and society) continue to reinterpret when, how and under what circumstances it is acceptable for the state to kill someone. Over time, those options are narrowing. Courts are applying stricter standards and continually raising the bar for prosecuting death-penalty cases."³⁵⁴ This situation is and will continue to be true in Oregon where the State spends an exorbitant amount

of Pub. Advocacy, KY Public Advocate and Louisville Metro Chief Public Defender Endorse the Call for a Moratorium on Executions and the Expedient Implementation of the Reforms Recommended by the ABA Assessment of the Kentucky Death Penalty (Dec. 7, 2011), available at <http://dpa.ky.gov/NR/rdonlyres/1A0B7A72-B2EB-4BD4-8BD3-3DFB8B9C5497/0/ABAASSESSMENTPRESSRELEASE.pdf>. Montana has executed two prisoners against their will and one volunteer since 1976. Or. Just. Resource Ctr., *Executions (9th Circuit)*, DP9 BLOG, <http://dp9blog.wordpress.com/death-row/executions-9th-circuit/>. Colorado and Wyoming have each only executed one prisoner since 1976. Rogers, *supra* note 329. Oregon Governor Kitzhaber, now on his third term, allowed both volunteer executions (Douglas Franklin Wright was executed in 1996 and Harry Charles Moore in 1997) to go forward. Press Release, John Kitzhaber, *supra* note 8. In granting the temporary reprieve to Haugen, just days before his scheduled execution as a volunteer, he described those decisions as ones he deeply regretted. *Id.* In declaring a moratorium on the death penalty, Governor Kitzhaber stated, "It is a perversion of justice that the single best indicator of who will and will not be executed has nothing to do with the circumstances of a crime or the findings of a jury. The only factor that determines whether someone sentenced to death in Oregon is actually executed is that they volunteer." *Id.*

³⁵² OREGON JUSTICE RESOURCE CTR., *supra* note 18. It is interesting to note that 25 of the 49 reversals have resulted in sentences less than death. *Id.* Also, because Oregon does not keep any data regarding the death penalty, beyond these resentences, there is no data regarding how many death-penalty cases the State has actually prosecuted where the result was less than death.

³⁵³ The fact that no defendant has completed the first phase of habeas corpus review in federal court makes Oregon's death penalty uniquely dysfunctional. By comparison, Washington State (which uses the death penalty less than Oregon) has executed five people since *Furman v. Georgia*, and of the eight currently on its death row, several have already moved their cases through the final stages of habeas review in the Ninth Circuit. See WASH. STATE OFFICE OF THE ATTORNEY GEN., CAPITAL PUNISHMENT CASE STATUS REPORT (Aug. 6, 2012), available at http://atg.wa.gov/uploadedFiles/Another/Supporting_Law_Enforcement/Death_Penalty_Cases/Case_Status_Reports/CapitalLitReport-Jul12.pdf; *Persons Executed Since 1904 in Washington State*, WASH. STATE DEP'T OF CORR., <http://www.doc.wa.gov/offenderinfo/capitalpunishment/executedlist.asp>; see also *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

³⁵⁴ Press Release, John Kitzhaber, *supra* note 8.

of time, energy, and money on a system that is slow, dysfunctional, and ineffective.

A. *Oregon's Evolving Death Penalty Law*

The modern era of death penalty jurisprudence in Oregon demonstrates its susceptibility to challenges, litigation, and continued evolution. Oregon's 1984 death penalty law, modeled after Texas's statute, originally gave a jury the option of punishing a defendant, after finding him guilty of aggravated murder, with death or life without parole for thirty years ("ordinary life").³⁵⁵ The U.S. Supreme Court first upheld the Texas law in 1976 in *Jurek v. Texas*.³⁵⁶ While death penalty sentencing systems which permit juries to consider only aggravating (and no mitigating) circumstances are generally unconstitutional, because Texas juries could consider any evidence of mitigating circumstances, the *Jurek* Court allowed them to consider not only why the death penalty should be imposed, but also why it should not be imposed.³⁵⁷ The Texas statute at issue required the jury to consider three questions, the second involved future dangerousness.³⁵⁸ The Supreme Court found the Texas capital-sentencing statute constitutional because it allowed the defendant to provide the jury with mitigating circumstances before deciding the future-dangerousness question.³⁵⁹ However, 13 years later, considering the same

³⁵⁵ OR. REV. STAT. § 163.105(1) (1985). Between 1984 and June 1989, 22 men were sentenced to death under this statute. William R. Long, *A Tortured Mini-History: The Oregon Supreme Court's Death Penalty Jurisprudence in the 1990s*, 39 WILLAMETTE L. REV. 1, 2 (2003).

³⁵⁶ 428 U.S. 262 (1976).

³⁵⁷ *Id.* at 276.

³⁵⁸ The statute required that the jury answer three questions in a separate sentencing proceeding: "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) 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." *Id.* at 269 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (West Supp. 1975–1976)) (internal quotation marks omitted). If the jury found that the State had proved beyond a reasonable doubt that the answer to each of the three questions was affirmative, the death sentence was imposed; if it found that the answer to any question was negative, a sentence of life imprisonment resulted. *Id.*

³⁵⁹ *Id.* at 272–73 ("The second Texas statutory question asks the jury to determine 'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' if he were not sentenced to death. . . . [The Court of Criminal Appeals] indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show: 'In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record . . . the range and severity of his prior criminal conduct . . . the age of the defendant . . . duress . . . [or] mental or

Texas death-penalty law, the U.S. Supreme Court in *Penry v. Lynaugh*, invalidated a Texas death sentence because the law did not allow the jury to give adequate consideration or a “reasoned moral response” as a mitigating factor to the defendant’s mental retardation during his sentencing phase.³⁶⁰ The Court reasoned that the Eighth Amendment “requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”³⁶¹

At the end of its session in 1989, in accordance with the U.S. Supreme Court’s ruling in *Penry*, the Oregon Legislature passed “massive and hurried”³⁶² amendments to its capital-punishment law.³⁶³ Oregon’s response to *Penry* was to add a “fourth question” to the penalty provision of its death penalty statute that assured jury consideration of all mitigating circumstances.³⁶⁴ This fourth statutory question,³⁶⁵ which was upheld but required editing by the Oregon Supreme Court in 1990 due to imprecise grammar, resulted in an updated fourth question: “Should de-

emotional pressure” (quoting *Jurek v. State*, 522 S.W.2d. 934, 939–40 (Tex. Crim. App. 1975) (footnote omitted)).

³⁶⁰ *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989). Note that in 2002, the Supreme Court ruled that executing the mentally retarded violates the Eighth Amendment’s ban on cruel and unusual punishments. *Atkins v. Virginia*, 536 U.S. 304 (2002).

³⁶¹ *Penry*, 492 U.S. at 316 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion)) (internal quotation mark omitted).

³⁶² Long, *supra* note 355, at 2.

³⁶³ Act of July 24, 1989, ch. 790, sec. 135b, § 163.150, 1989 Or. Laws 1301, 1327–28; Act of July 19, 1989, ch. 720, sec. 2, § 163.150, 1989 Or. Laws 1126, 1126–27.

³⁶⁴ Act of July 24, 1989, sec. 135b, § 163.150(1)(b)(D), 1989 Or. Laws 1327; *see also* *State v. Wagner*, 786 P.2d. 93, 94–99 (Or. 1990) (clarifying the constitutional requirements of the 1989 amendment due to its imprecise grammar). The current Oregon death-penalty law reads: “Upon the conclusion of the presentation of the evidence, the court shall 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 of the deceased or another 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; (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; and (D) Whether the defendant should receive a death sentence.” OR. REV. STAT. § 163.150 (1)(b) (2011). It goes on to say that “(A) The court shall instruct the jury to consider, in determining the issues in paragraph (b) of this subsection, any mitigating circumstances offered in evidence, including but not limited to the defendants age, the extent and severity of the defendants prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed. (B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection ‘no’ if, after considering any aggravating evidence and any mitigating evidence concerning any aspect of the defendants character or background, or any circumstances of the offense and any victim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors believe that the defendant should not receive a death sentence.” *Id.* § 163.150 (1)(c).

³⁶⁵ *Wagner*, 786 P.2d at 99.

fendant receive a death sentence? You should answer this question 'no' if you find that there is any aspect of defendant's character or background, or any circumstances of the offense, that you believe would justify a sentence less than death."³⁶⁶ Beyond adding the fourth question to all potential death cases, the result was that 24 Oregon cases were resentenced: nine were given life imprisonment with a 30-year minimum ("ordinary life"), four were given life imprisonment without the possibility of parole ("true life" or "LWOP"), and eleven were again sentenced to death.³⁶⁷

Another substantial statutory amendment to the penalty provision made at the end of the 1989 legislative session was the addition of a true life/LWOP sentence when a jury returns a finding unresponsive of a death sentence.³⁶⁸ Previously, juries had a choice between two possible sentences for aggravated murder—(death or ordinary life).³⁶⁹ As has been discussed in detail by Dr. William Long, "the implications of the passage of a true life amendment to ORS 163.150 were so complex and ill-understood by the Oregon Supreme Court that it resulted in significant judicial missteps" that have led to years and years of delay for some death-row inmates.³⁷⁰ On its face, the new penalty provision required that juries in the penalty phases of capital-murder trials be given three sentencing options (death, ordinary life, or true life) if it found the defendant guilty of capital murder and if the trial started after July 19, 1989.³⁷¹ In addition, knowing that *Perry* remands were facing new penalty trials, the new penalty provision provided for these three sentencing options in remand capital cases as well.³⁷² In response, the state legislature declared that its provision of three sentencing options on remand was a procedural change, rather than a substantive one as a way to avoid potential *ex post facto* challenges to the new provision.³⁷³ While initially this decision

³⁶⁶ *Id.* at 101. "Consequently, the 1991 legislature rewrote the fourth question to simply ask the jury whether the defendant should receive a death sentence." JUDICIAL COUNCIL OF THE NINTH CIRCUIT, *supra* note 329, at 166.

³⁶⁷ OREGON JUST. RESOURCE CTR., *supra* note 17.

³⁶⁸ Act of July 19, 1989, ch. 720, sec. 1, § 163.105, 1989 Or. Laws 1126, 1126. Under the amended law, if the jury in a capital case does not answer all four questions in the penalty phase affirmatively, the defendant will be sentenced to true life unless ten or more members of the jury find sufficient mitigating factors to warrant ordinary life. *Id.* sec. 2, § 163.150(2)(a), 1989 Or. Laws 1127.

³⁶⁹ OR. REV. STAT. § 163.105(1) (1987), *amended by* Act of July 19, 1989, ch. 720, sec. 1, § 163.105, 1989 Or. Laws 1126.

³⁷⁰ Long, *supra* note 355, at 2.

³⁷¹ OR. REV. STAT. § 163.150(1)(a), (2)(a), (4) (1989).

³⁷² OR. REV. STAT. § 163.150(5) (1989).

³⁷³ *Id.* § 163.150(5)(c); *see also* Long, *supra* note 355, at 5. Article I, section 21, of the Oregon Constitution, provides, in part: "No *ex-post facto* law . . . shall ever be passed . . ." Article I, section 10, of the United States Constitution, provides, in part: "No state shall . . . pass any . . . *ex post facto* Law . . ." "Generally speaking, *ex post facto* laws punish acts that were legal at the time they occurred, change the punishment for those acts, or deprive the defendant of a defense for those acts." *State v. Gallant*, 764 P.2d 920, 921 (Or. 1988); *see* Long, *supra* note 355, at 5.

seemed effective,³⁷⁴ on a *Penry* remand in Randy Guzek's case, the trial court refused to instruct the jury to consider all three sentencing options under the new penalty provision without requiring the defendant to waive future ex post facto objections challenging the statute's constitutionality.³⁷⁵ Guzek refused and the jury was instructed "only on the two sentencing options available at the time of the crime."³⁷⁶ Beginning with Guzek's case, the issue of whether the jury should apply two or three sentencing options in capital remand cases became, according to Dr. Long, a "problem of mammoth proportions" for Oregon's Supreme Court.³⁷⁷

While a few lower courts were considering the sentencing and potential ex post facto issues in death-penalty-remand cases, the Oregon Supreme Court, in the summer of 1992, ruled in *State v. Isom* (not a *Penry*-remand case) on whether a change in the law that occurred subsequent to conviction should benefit the defendant,³⁷⁸ and stated that the "legislature intend[ed] that Oregon courts sentence criminal defendants under the statutory scheme in force when a particular criminal act was committed."³⁷⁹ Thus, it ruled that:

To permit defendant to be sentenced under the post-1989 amendment to the criminal code for a criminal act that occurred before the change in the law would have the effect of reducing the prescribed punishment. This would violate the legislative directive of ORS 161.035(4) that a criminal defendant face the same possible sentence that was in effect when the defendant committed the criminal acts for which the defendant is to be punished.³⁸⁰

³⁷⁴ Long, *supra* note 355, at 5 ("Although the line between what constitutes a substantive or a procedural change to law is murky, most procedural challenges to the implementation of a statute would not appear, at first glance, to be ex post facto changes. Thus, by calling the change to ORS 163.150 a procedural change, the legislature apparently was trying to ward off potential ex post facto challenges to ORS 163.150(5). . . . For a while, the implementation of the new true life statute seemed to work smoothly.")

³⁷⁵ *Id.* at 9.

³⁷⁶ *Id.* at 9–10.

³⁷⁷ *Id.* at 10.

³⁷⁸ If the defendant benefitted from the law it would change his aggravated murder conviction to murder and require that he be removed from death row. *State v. Isom*, 837 P.2d 491, 493–94 (Or. 1992).

³⁷⁹ *Id.*

³⁸⁰ *Id.* "The tension between the principle articulated in *Isom* in July 1992 and the true life statutory scheme passed by the 1989 legislature should be clear. The 1989 legislature required that aggravated murder trials commencing after July 19, 1989, have juries instructed in three sentencing options, [OR. REV. STAT. § 163.150(4) (1989),] while *Isom* would seem to hold that the sentencing scheme open to Wille, whose trial began *after* July 19, 1989, would have been that in place in February 1989—two sentencing options for the jury. The same would apply to death-penalty remand situations. [OR. REV. STAT. § 163.150(5) (1989).] The statute, amended in 1991 but not changed significantly, would require that juries in all death penalty remand cases be instructed in *three* options, [OR. REV. STAT. § 163.150(5) (1991),] while the principle articulated in *Isom*, if taken literally, would have required juries to

According to this decision, Isom, who was convicted of aggravated murder in 1987, could not benefit from the change of the law in 1989.³⁸¹ As a result of this ruling, in subsequent sentencing of death-penalty-remand cases in which judges were deciding whether to instruct juries on two or three sentencing options, defendants received sentences based on the law available at the time they committed their crimes. Therefore, if these remand defendants committed the crime prior to the addition of the new penalty provision on July 19, 1989, juries would not have the true life third option as an option but would be required to choose only between death and ordinary life.

When the Oregon Supreme Court ruled in *State v. Langley*, (a *Perry*-remand case), a couple of months later, additional complications occurred. The Court ignored the fact that ORS 163.150(5) was written to apply to remands, and stated that in “any new penalty phase proceeding, defendant will be sentenced under the statutory scheme in force in 1987 or 1988, when the crime was committed.”³⁸² The Court affirmed this statement on reconsideration,³⁸³ which led to numerous unsuccessful defense challenges questioning the Court’s application of the 1989 penalty-provision amendment at the trial level.³⁸⁴ Finally six years later,³⁸⁵ the Court made an about-face ruling by holding that under the statutory lan-

have only *two* sentencing options, if defendants committed their aggravated murders before July 19, 1989. [*Isom*, 837 P.2d at 494.]” Long, *supra* note 355, at 11–12.

³⁸¹ *Isom*, 837 P.2d at 495.

³⁸² *State v. Langley (Langley I)*, 839 P.2d 692, 697 n.5 (Or. 1992).

³⁸³ *State v. Langley (Langley II)*, 861 P.2d 1012, 1013 (Or. 1993) (applying *State v. Wille*, 858 P.2d 128 (Or. 1993), where the Court ruled the true life option unconstitutional as applied to Wille as it was a more onerous penalty: “Pursuant to *Wille*, defendant constitutionally could not have been sentenced under the life imprisonment without possibility of parole sentencing option, and the trial court incorrectly instructed the jury on that option . . . [D]efendant must be sentenced on remand under the sentencing provisions in force at the time that the murder was committed.”); see also *State v. Pinnell*, 877 P.2d 635 (Or. 1994) (ruling that because the crime took place before July 19, 1989, three sentencing options were not available to him).

³⁸⁴ See *State v. Langley (Langley III)*, 16 P.3d 489, 494–95 (Or. 2000) (rejecting defendant’s request for three sentencing options to be given to the jury and defendant’s arguments that true life option should not be considered an *ex post facto* law, but if so, defendant waived objection to it); see also *State v. Rogers*, 4 P.3d 1261 (Or. 2000); *State v. McDonnell*, 987 P.2d 486 (Or. 1999).

³⁸⁵ This issue was further postponed in part because in 1996, the Oregon Supreme Court suspended all death-penalty cases so it could consider how the recently passed Measure 40, a victim rights voter initiative, applied to capital cases. Measure 40 passed with 58.8% of the vote, but was overturned by the Oregon Supreme Court in 1998, on the grounds that it contained more than one amendment to the Oregon Constitution. Official Results, State Measure No. 40, November 5, 1996 General Election, OREGON SECRETARY OF STATE, available at <http://oregonvotes.org/pages/history/archive/nov596/results/m40.html>; see also *Armatta v. Kitzhaber*, 959 P.2d 49, 64 (Or. 1998) (ruling that a constitutional amendment cannot affect more than a single clause of the Constitution, even if multiple clauses affect the same subject); OR. CONST. art. IV, § 1(2)(d), art. XVII § 1.

guage of the 1989 penalty provision, the trial court was obligated “to submit to a new jury three sentencing options: death, true life, and ordinary life” applicable to any defendant.³⁸⁶ The combination of *Penry* remands beginning in 1989, the addition of true life to the penalty provision, and the inconsistencies in its application and interpretation have delayed some death penalty cases for years.³⁸⁷

Additional delays occurred in response to another legislative amendment to the death-penalty statute’s penalty provision. This time the legislature agreed to provide for the admission of victim-impact evidence during the penalty phase of aggravated-murder trials in consideration of the “fourth question.”³⁸⁸ Then, in 1999, the legislature proposed and Oregon voters approved an amendment to the state Constitution that stated “that the victim is entitled ‘to be heard at . . . sentencing’ and that that right applies to all proceedings ‘pending or commenced on or after’ the effective date and ‘supersedes any conflicting section of the Constitution.’”³⁸⁹ A series of cases examining the retroactive application of the new victim-impact evidence provision followed resulting in the Court of Appeals holding that neither federal nor state ex post facto clauses bar such evidence admitted in the penalty phase if the crime was committed prior to the law’s effective date.³⁹⁰ This issue was not resolved until the mid-2000s,³⁹¹ leaving even more years of uncertainty in the law.

The many changes to Oregon’s death-penalty law through legislation, constitutional amendment, and court interpretation have certainly contributed to the extensive delays of death-penalty cases as they have produced issues that required examination and clarification by the courts which in turn has led to more appeals, remands and resentences.

³⁸⁶ *McDonnell*, 987 P.2d at 491 (concluding that ORS 163.150(5) controlled remand death-penalty cases); *see also* *State v. Ramsey*, 173 P.3d 142, 147 (Or. App. 2007) (submission of four issues to jury for sentencing determination applies only where all three sentencing options are under consideration); Long, *supra* note 355, at 24 (“[T]he supreme court completely changed directions but nevertheless criticized *others* for ‘misreading’ their earlier decisions.”).

³⁸⁷ *See, e.g.*, the cases of Randy Lee Guzek, Robert Langley, Michael McDonnell, and Dayton Leroy Rogers, *supra* note 266.

³⁸⁸ Act of July 18, 1995, ch. 657, sec. 23, § 163.150(1)(a), 1995 Or. Laws 1890, 1896; *see also* *Hayward v. Belleque*, 273 P.3d 926, 937 (Or. App. 2012) (summarizing changing law with regard to victim-impact evidence and ex post facto provisions in sentencing phase under ORS 163.150). Note that prior to this amendment, admission of victim-impact evidence had been found reversible error, as it was irrelevant to the law’s four penalty-phase questions. *State v. Metz*, 887 P.2d 795, 802–03 (Or. App. 1994).

³⁸⁹ *Hayward*, 273 P.3d at 937 (quoting OR. CONST. art. I, § 42 (1999)).

³⁹⁰ *Id.*

³⁹¹ *Id.*

B. The Future of Oregon's Death Penalty Law

Even with most of these old issues seemingly settled, there is no way to predict what future death-penalty jurisprudence or future voter initiatives and/or legislative changes to Oregon's death-penalty law will bring. It is unlikely that Oregon will have too many quick and routine death-penalty cases. There will surely be intense penalty-phase disputes in many cases and new legal challenges as the law and the times change.

In fact, over the last few years, numerous bills have been introduced in Oregon's legislature relating to the death penalty. If any of them had passed, there would have been more litigation and more delays. For example, over the last five years, there were bills that would have expanded the death penalty to include aggravated murder of a witness in a juvenile proceeding and of a reserve officer,³⁹² made the prosecution of capital cases more uniform around the state in terms of aggravating factors and resources for the defense,³⁹³ created a procedure for considering the issue of whether a defendant who is eligible for a death sentence is a person with mental retardation,³⁹⁴ and even limited capital punishment by requiring the state to announce its intent to seek death within 180 days of charging a suspect with murder.³⁹⁵ Any one of these could have an effect on death-penalty cases just as past initiatives and legislation described above have done so over the last 20 years.

Moreover, as the times change, so do death penalty jurisprudence³⁹⁶ and the potential for new trends in, and challenges to, the law.³⁹⁷ In Oregon, for example, over the last couple of years a number of death sentences that were affirmed by the Oregon Supreme Court on direct appeal have been vacated and remanded by the Marion County Circuit Court on post-conviction relief (PCR) due to ineffective assistance of counsel with regard to the presentation of mitigation evidence at the penalty phase.³⁹⁸

³⁹² See H.B. 3211, 76th Legis. Assemb., Reg. Sess. (Or. 2011) (reserve office); H.B. 2738, 74th Legis. Assemb., Reg. Sess. (Or. 2007) (juror or witness in a criminal proceeding); S.B. 520, 74th Leg. Assemb., Reg. Sess. (Or. 2007) (reserve officer).

³⁹³ S.B. 809, 75th Leg. Assemb., Reg. Sess. (Or. 2009).

³⁹⁴ H.B. 2670, 75th Legis. Assemb., Reg. Sess. (Or. 2009); H.B. 2669, 75th Legis. Assemb., Reg. Sess. (Or. 2009); H.B. 2668, 75th Legis. Assemb., Reg. Sess. (Or. 2009); H.B. 3336, 74th Legis. Assemb., Reg. Sess. (Or. 2007).

³⁹⁵ S.B. 367, 76th Leg. Assemb., Reg. Sess. (Or. 2011); S.B. 366, 76th Leg. Assemb., Reg. Sess. (Or. 2011).

³⁹⁶ In the last ten years, the U.S. Supreme Court has narrowed who is eligible for the death penalty by excluding from execution the "mentally retarded" and juveniles. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

³⁹⁷ See Adam S. Goldstone, *The Death Penalty: How America's Highest Court is Narrowing its Application*, CRIM. L. BR., Summer 2009, at 23, 23; Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371 (2011); Linda Greenhouse, *Supreme Court Rejects Death Penalty for Child Rape*, N.Y. TIMES (June 26, 2008), <http://www.nytimes.com/2008/06/26/washington/26scotuscnd.html?pagewanted=all>.

³⁹⁸ See, e.g., *State v. Tiner*, 135 P.3d 305 (Or. 2006); *State v. Fanus*, 79 P.3d 847 (Or. 2003); Opinion and Order Regarding Post-Conviction Relief, *Tiner v. Belleque*,

For example, in 2011, in Jesse Fanus' case,³⁹⁹ the PCR court found the defense did not respond sufficiently and effectively in response to the "avalanche of evidence presenting petitioner as an extremely dangerous, untreatable psychopath,"⁴⁰⁰ that "[t]rial counsel had no coherent mitigation theory" and failed to argue why petitioner deserved life.⁴⁰¹ In conclusion, the court stated, "Petitioner deserved more than a lawyer who shot from the hip. Petitioner's mitigation case was ill-prepared and half-hearted. His own investigator and his sole expert admit as much."⁴⁰² While the court declared Fanus' attorney to be ineffective for failing to provide adequate mitigating evidence for a jury to consider a life sentence, it also provided important dicta as to what a sufficient mitigation defense

No. 07C-13469 (Marion Cnty. Cir. Ct. Oct. 19, 2011); Opinion and Order Regarding Post-Conviction Relief, *Gibson v. Belleque*, No. 06C10344 (Marion Cnty. Cir. Ct. n.d.); Letter from Pamela L. Abernethy, Senior Judge, Marion Cnty. Circuit Court, to Counsel (Dec. 15, 2011) (on file with author) (detailing findings in *Fanus v. Belleque*, No. 04C16466, and directing counsel to submit an appropriate order). In addition, in early 2011, Robert Acremant waived his right to post-conviction relief in exchange for the commutation of his death sentence to a sentence of life without the possibility of parole due to mental illness. Stipulation for Entry of True Life Sentences and Voluntary Dismissal of All Claims at 3–4, *State v. Acremant*, No. 05C20069 (Marion Cnty. Cir. Ct. Jan. 19, 2011) ("In light of the unresolved factual and legal questions revolving around petitioner's possible mental illness, the parties desire to obtain a final resolution of this case in order to avoid the risk, delay, and expense that will result from further litigation."). Interestingly, the court noted, prior to stipulation, that "[i]t has not yet been resolved under Oregon law whether it is necessary that a petitioner in a post-conviction proceeding be mentally competent in order for his case to proceed." *Id.* While the Ninth Circuit requires staying habeas proceedings when a defendant is not mentally competent, *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), and the Eighth Amendment requires some degree of mental competency to execute an inmate, *Ford v. Wainwright*, 477 U.S. 399 (1986), the post-conviction issue remains unresolved, and thus is open to future litigation. See Mark Freeman, *Deal Takes Acremant Off Death Row, For Now*, MAIL TRIB. (Feb. 18, 2011, 2:00 AM), <http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20110218/NEWS/102180326>.

³⁹⁹ The Oregon Supreme Court unanimously upheld Fanus' conviction and death sentence in 2003. *Fanus*, 79 P.3d at 864.

⁴⁰⁰ Letter from Pamela L. Abernethy to Counsel, *supra* note 398, at 40. The success of Fanus' PCR claim rested on the lack of preparation by his counsel with the witnesses testifying on Fanus' behalf: Paula Dodd "never spoke to counsel before her testimony. She did not provide information to [the] defense expert." *Id.* Linda Jane Fanus, half-sister of the accused, was similarly "not prepared to testify by the defense." *Id.* at 41. "Susan Liftin, mother, was not interviewed by counsel. She talked to the investigator once. She was not prepped prior to testifying." *Id.* "Travis Rogers . . . was not prepped to testify. Counsel said he would 'wing it.'" *Id.* at 42.

⁴⁰¹ *Id.* at 48. The court was concerned with the "lack of clarity about timeline and development." *Id.* at 42. The court also agreed with Fanus that counsel was deficient for failing to ask for a second chair and a mitigation specialist. *Id.* at 45–47. The expert testimony concerning future dangerousness and development was not adequately prepared. *Id.* at 50. And counsel failed to call witnesses that would have aided his mitigation theory. *Id.* at 58.

⁴⁰² *Id.* at 59.

should include (especially for a young person) in future death-penalty cases. The court stated:

Counsel failed to explain why petitioner behaved badly by presenting in graphic detail a vivid portrait of both mother and father. He failed to adequately prepare any expert witnesses on the questions of development and future violence. A 19 year old *who never had a chance to succeed in life, based on factors beyond his choice and control*, is quite different morally, than a man who made horrible choices and turned down all attempts at help by loving and well-meaning people.⁴⁰³

More recently, in 2012, the PCR court found that Jeffrey Sparks'⁴⁰⁴ defense lawyer provided ineffective assistance of counsel due to a lack of proper investigation into mitigating evidence. The court explained, "A mitigation investigation that in essence simply outlines a defendant's criminal history and school attendance, and says very little about the nature of a very traumatic upbringing or psychological history, is not sufficient to base a decision not to present mitigating evidence."⁴⁰⁵

In addition to enforcing ineffective assistance of counsel standards to deficient performances by defense attorneys, these cases also seem to demand a more robust mitigation defense which may indicate a movement in the Oregon courts (at least in Marion County where almost all death penalty PCR appeals are litigated⁴⁰⁶) to ensure only the most violent defendants are sentenced to death. These latest Oregon PCR court

⁴⁰³ *Id.* at 60. Also in 2011, Dale Tiner's lawyer was found ineffective by the Marion County Circuit Court, who reversed his death sentence. Opinion and Order Regarding Post-Conviction Relief, *Tiner v. Belleque*, No. 07C-13469, *supra* note 398. Similarly, the judge was particularly concerned with the lack of mitigation evidence, stating that counsel "showed an inability to grasp, much less communicate to the jurors, the concept of mitigation and [its] application to future dangerousness." *Id.* The Oregon Supreme Court upheld Tiner's conviction and death sentence in 2006. *State v. Tiner*, 135 P.3d 305, (Or. 2006). And in August 2012, Travis Gibson's death sentence was vacated by the Marion County court due to the ineffective assistance of his trial lawyer. See Opinion and Order Regarding Post-Conviction Relief, *Gibson v. Belleque*, No. 06C10344, *supra* note 398. The court explained petitioner's counsel "failed to prepare for and litigate the penalty phase from the beginning of his appointment. His work reflects a lack of enthusiasm for that phase of a capital case. He failed to hire a mitigation expert, failed to locate and interview witnesses helpful to petitioner's case, failed to pursue expert testimony, and generally appeared to surrender after the verdict of guilty. Mr. Kolego failed to demonstrate a true understanding of how to defend his client at the penalty phase." *Id.*

⁴⁰⁴ The Oregon Supreme Court upheld Sparks' conviction and death sentence in 2004. *State v. Sparks*, 83 P.3d 304 (Or. 2004).

⁴⁰⁵ Letter from Marshall Amiton, Senior Judge, Marion Cnty. Circuit Court, to Counsel (Feb. 27, 2012) (on file with author) (detailing findings in *Sparks v. Premo*, No. 07C11052, and directing counsel to submit an appropriate order).

⁴⁰⁶ Post conviction relief must be filed in the circuit court for the court in which the petitioner is incarcerated. OR. REV. STAT. § 138.560(1) (2011). Thus, those incarcerated on death row at the Oregon State Penitentiary in Salem must petition the Marion County circuit court for post-conviction relief. Venue may, if appropriate, be later transferred to the county of conviction. *Id.* § 138.560(4).

rulings are also in line with recent U.S. Supreme Court cases where the Court has been vocal about the importance of thorough capital-mitigation investigation.⁴⁰⁷

As the jury has essentially unlimited discretion to weigh any and all mitigating factors in death-penalty cases, including past criminal history, mental illness, low IQ, abusive childhood, poverty, etc.,⁴⁰⁸ a strong mitigation defense can make a difference of life or death for a defendant. With the issuance of these rulings, the courts are not only providing the defense bar with more information about what is required for a proper mitigation defense but also are warning the State to think twice about requesting the death penalty in cases where the defendant may have strong mitigation factors.

Beyond the litigation in pending death-penalty cases, additional death-penalty litigation is expected. As in Texas, there is potential litigation around the issue of “future danger” in Oregon’s death penalty statute, which requires juries in death-penalty cases to determine “[w]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”⁴⁰⁹ This “future dangerousness” question results in a much broader introduction of relevant evidence—anything that is probative of whether a defendant is likely to engage in dangerous criminal conduct in the future.⁴¹⁰ For ex-

⁴⁰⁷ See *Rompilla v. Beard*, 545 U.S. 374, 389–90 (2005) (finding ineffective assistance of counsel for failing to thoroughly investigate in capital mitigation); *Wiggins v. Smith*, 539 U.S. 510, 522–24 (2003); *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000). For a good discussion of these cases, see John H. Blume & Stacey D. Neumann, “*It’s Like Déjà Vu All Over Again*”: *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127 (2007).

⁴⁰⁸ Following a conviction, the “penalty phase,” a separate mini-trial before the same jury, determines whether the defendant should be sentenced to death. To make that determination, the Supreme Court, in *Gregg v. Georgia*, sought to ensure that these jurors follow a process known as “guided discretion,” which requires jurors to weigh “aggravating circumstances” and “mitigating circumstances.” *Gregg v. Georgia*, 428 U.S. 153, 196–98 (1976).

⁴⁰⁹ OR. REV. STAT. § 163.150(1)(b)(B). Only Texas and Oregon actually require the jury to predict future danger in their decision whether to grant life or death. See Adam Liptak, *Appealing a Death Sentence Based on Future Danger*, N.Y. TIMES, June 14, 2004, at A11. My esteemed colleague, Stephen Kanter, has rightfully argued for years that Oregon’s future dangerousness question is unconstitutional as “[t]he statute gives the illusion of applying our most rigorous burden of persuasion, proof beyond a reasonable doubt, to the state’s obligation to establish the crucial fact of the defendant’s dangerousness, which so often determines life or death. Unfortunately, the statute does far less by requiring only that a ‘probability’—rather than the actuality—of the defendant’s future criminal violence be established beyond a reasonable doubt.” Stephen Kanter, *Confronting Capital Punishment: A Fresh Perspective on the Constitutionality of the Death Penalty Statutes in Oregon*, 36 WILLAMETTE L. REV. 313, 317–18 (2000). This issue remains unresolved by Oregon’s Supreme Court.

⁴¹⁰ See *State v. Moen*, 786 P.2d 111, 128–29 (Or. 1990) (“Evidence of all of a defendant’s prior conduct, bad and good, is precisely the type of evidence that the jury needs to make this determination.”).

ample, legitimate evidence of future dangerousness has included, among other things, the testimony of psychiatric experts,⁴¹¹ a review of a defendant's entire criminal history, a presentation of any evidence of prior anti-social behavior or incidents demonstrating poor character (including evidence of forgery),⁴¹² a defendant's belief in white supremacy and Nazi ideology,⁴¹³ a defendant's failure to take responsibility for his past acts,⁴¹⁴ a defendant's attraction to teenage girls,⁴¹⁵ and prior parole and probationary conduct.⁴¹⁶ The Oregon Supreme Court has been reluctant to limit the types of evidence admitted. For example, in *State v. Brumwell*, the Court found that "evidence regarding satanism and death metal music was integrally related to the murder" because it spoke to motive.⁴¹⁷

In Oregon, the discussion of how to determine future dangerousness has evolved over time.⁴¹⁸ The general rule is that future dangerousness is measured by a threat to society, and "[s]ociety includes prison society, as well as society at large. When the jury considers the threat that the defendant might pose because of future violent crimes, it may consider the threat to prison society."⁴¹⁹ *Unless the evidence permits the jury to draw a distinction between prison society and 'outside' society, however, the jury may be distracted from its proper task, even by an instruction that correctly describes the law.*⁴²⁰ Such distinctions related to context are relevant to future-dangerousness questions, and what juries should be informed about in a particular case creates potential litigable issues. Arguably, the test should be tailored to the defendant; i.e., if the defendant will receive life without the possibility of parole in the absence of death, the jury should not consider whether the defendant would pose a threat to society outside of prison.⁴²¹

⁴¹¹ See, e.g., *Cunningham v. Thompson*, 71 P.3d 110 (Or. App. 2003).

⁴¹² See, e.g., *id.* at 117–19; *Moen*, 786 P.2d at 127–29.

⁴¹³ See, e.g., *State v. Fanus*, 79 P.3d 847, 863–64 (Or. 2003).

⁴¹⁴ See, e.g., *State v. McNeely*, 8 P.3d 212, 217 (Or. 2000).

⁴¹⁵ See, e.g., *State v. Moore*, 927 P.2d 1073, 1086 (Or. 1996).

⁴¹⁶ See, e.g., *State v. Montez*, 927 P.2d 64, 69–71 (Or. 1996).

⁴¹⁷ *State v. Brumwell*, 249 P.3d 965, 973–75 (Or. 2011).

⁴¹⁸ See *Montez v. Czerniak*, 239 P.3d 1023, 1042 (Or. App. 2010) (“[T]here were no experts in 1992 testifying about actuarial studies on future dangerousness. Hulteng also stated that he had not ‘come across any literature from that period taking the position advocated by Dr. Cunningham, namely that an expert should focus exclusively on the risk of violence within the prison or in old age upon parole.’”).

⁴¹⁹ *State v. Douglas*, 800 P.2d 288, 296 (Or. 1990). “[T]he task of the jury is to consider, not *where* the defendant would be dangerous, but *whether* the defendant would be dangerous. The evidence in a particular case could make an instruction on the possibility of release relevant to the jury’s assessment of future dangerousness.” *Id.*

⁴²⁰ *Id.* (emphasis added).

⁴²¹ See *Simmons v. South Carolina*, 512 U.S. 154, 161, 164 (1994) (“[T]he jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury’s deliberations, it had the effect of creating a false choice between sentencing petitioner to death and

A variety of future dangerousness challenges have been attempted in Oregon. In *Pinnell v. Palmateer*, the defendant brought three constitutional challenges: 1) that the future dangerousness inquiry violates the Fourteenth Amendment Due Process clause under *Ring v. Arizona*,⁴²² because it fails to meet the heightened reliability requirement by requiring a finding of future dangerousness by only the “beyond a reasonable doubt” standard; 2) that it is unconstitutional because it is overly permissive in the admission of evidence at capital trials; and 3) that it is unconstitutional because future dangerousness permits criminal punishment of future misconduct.⁴²³ The Court rejected the petitioner’s arguments without discussion, agreeing with the State that since the petitioner failed to raise the issues on direct appeal, he could not raise them for the first time in post-conviction relief.⁴²⁴

Variations of these arguments have surfaced in numerous Oregon cases.⁴²⁵ However, the general trend has been for the arguments to be summarily dismissed. The Court in *State v. Guzek*, for example, summarily upheld the *Wagner* Court’s decision that the Oregon statute was not impermissibly vague as a result of the future dangerousness question.⁴²⁶ However, the *Wagner* decision was based, in part, on the fact that, while

a large majority of psychiatrists and psychologists believe . . . predictions to be faulty at least two-thirds of the time . . . [t]here is no testimony in the record that those studies and their conclusions are valid. In answer, the state cites other studies and critiques of those cited by defendant to show that a sizeable body of thought exists among experts that such predictions can be made and that psychiatrists and psychologists are better versed than others in making such predictions.⁴²⁷

Further, because the future dangerousness studies in *Wagner* were not presented to the court,

[i]t would [have been] pure speculation . . . to consider that the studies and the opinions of those who rely on them would be impervious to vitiation by cross-examination or contrary evidence. All

sentencing him to a limited period of incarceration. . . . The trial court’s refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant’s future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.”).

⁴²² 536 U.S. 584 (2002).

⁴²³ *Pinnell v. Palmateer*, 114 P.3d 515, 524 (Or. App. 2005).

⁴²⁴ *Id.*

⁴²⁵ See, e.g., *State v. Longo*, 148 P.3d 892, 906 (Or. 2006) (arguing the future dangerousness question is unconstitutional because it allows a death sentence for a question proven by something less than beyond a reasonable doubt); *State v. Montez*, 789 P.2d 1352, 1380 (Or. 1990) (arguing the future dangerousness question cannot reliably be answered).

⁴²⁶ *State v. Guzek (Guzek I)*, 797 P.2d 1031, 1034 (Or. 1990); *State v. Wagner*, 752 P.2d 1136, 1160–61 (Or. 1988).

⁴²⁷ *Wagner*, 752 P.2d at 1160–61.

we know about this is from the briefs filed in this case, namely, that there is a difference of opinion as to the validity of those studies and the position of the American Psychiatric Association.⁴²⁸

Arguably, the data accumulated in Texas studies and others in the 13 years since *Wagner* is enough to change that holding today.⁴²⁹ Certainly the APA has now taken a stance on the issue of future-dangerousness predictions, leaving the door open for a challenge to the validity of such predictions.⁴³⁰ The U.S. Supreme Court, however, has upheld challenges to testimony from future-dangerousness experts because “[n]either petitioner nor the [American Psychiatric] Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of

⁴²⁸ *Id.* at 1161.

⁴²⁹ See, e.g., GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 280–81 (2d ed. 1997); JOHN MONAHAN, U.S. DEP’T OF HEALTH & HUMAN SERVS., *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47–49 (1981); TEX. DEFENDER SERV., *DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS* 21–24 (2004), available at www.texasdefender.org/publications; Mark D. Cunningham & Thomas J. Reidy, *Don’t Confuse Me with the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 CRIM. JUST. & BEHAV. 20, 25 (1999); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 110–11 (1984).

⁴³⁰ See Brief for Am. Psychiatric Ass’n as Amici Curiae Supporting Petitioner at 19, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080) (“The unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.”); see also Brief of Amicus Curiae Am. Psychological Ass’n in Support of Defendant-Appellant at 11, *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007) (No. 04-50393) (re-stating the same position); Brief for Amici Curiae Am. Psychological Ass’n et al. in Support of Petition for a Writ of Certiorari at 8, *Coble v. State, Texas*, 131 S. Ct. 3030 (No. 10-1271) (re-stating the same position); *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010), cert. denied, 131 S. Ct. 3030 (2011) (concluding that the State failed to show that Dr. Coons’ (the “expert psychiatrist”) testimony on future dangerousness met minimum standards of scientific reliability under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589–92 (1993)). Moreover, a 2011 large-scale study of Oregon prisoners “investigat[ed] the influence of prior violent crime arrests, types of prior violent crimes, and various violent crimes of conviction on serious and assaultive prison misconduct, controlling for the effects of inmate characteristics, general criminality, and custody level. . . . [T]he extent of prior violent community criminality, its recency, and the specific type of violent crime [were] expected to influence behaviors in prison.” Thomas J. Reidy et al., *Community Violence to Prison Assault: A Test of the Behavioral Continuity Hypothesis*, 36 LAW & HUM. BEHAV. 356, 358 (2012). “[T]he findings regarding the behavioral continuity from community to prison violence are neither simple nor intuitively obvious.” *Id.* at 360. “[T]he omnibus measure of prior violent arrest rate [was] completely unrelated to serious and assaultive [prison] rule violations.” *Id.* Further, “the type of violent criminality perpetrated in the community influence[d] the occurrence of prison misconduct. Assaults, both in terms of prior arrests and current convictions, were related to an increased likelihood of serious and assaultive [prison] rule infractions, whereas prior and current homicides were not significantly related to disciplinary outcomes.” *Id.*

the time.”⁴³¹ While this concern obviously speaks to the integrity of the criminal-justice system (and the proportionality of capital convictions), it also opens the door to increased litigation on the issue of future dangerousness. This is particularly true when considering *Barefoot v. Estelle*⁴³² in conjunction with the more recent *Daubert v. Merrill Dow Pharmaceuticals*, which sets forth a test for admitting expert testimony in civil cases.⁴³³ If *Daubert’s* reliability requirements extend to the capital-sentencing context, then a heightened scrutiny for reliability should exist in criminal matters, especially in the death-penalty context, and more challenges to expert testimony will occur. Certainly the Texas studies suggest that predictions of future dangerousness are unreliable, and can and should be challenged.

The future dangerousness question is also open to other types of defense challenges. For example, the validity of evidence supporting future dangerousness is a common defense challenge. “If the State relies on a previous act to establish that a person poses a danger to others, it must show that the act clearly forms the foundation for a prediction of future dangerousness.”⁴³⁴ In Oregon, an expert may offer his opinion on the future dangerousness of a defendant, so long as the standards for scientific evidence are met under *State v. Brown*⁴³⁵ and *State v. O’Key*.⁴³⁶ Oregon also requires that the state provide a defendant with the assistance of an independent psychiatrist as per due process when the prosecutor presents psychiatric evidence of future dangerousness.⁴³⁷ The defendant psychiatrist increases the cost of litigation, both in terms of his payment and in time needed for evaluations and testimony at trial. Hiring expert witnesses for future-dangerousness analysis also increases the cost of litigation beyond the trial itself as reliability of such an analysis is reviewed on a case-by-case basis.⁴³⁸ Maintaining capital punishment in Oregon will un-

⁴³¹ *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983). This issue was again recently litigated in *United States v. Berry*, 624 F.3d 1031, 1039–40 (9th Cir. 2010).

⁴³² 463 U.S. 880 (1983).

⁴³³ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

⁴³⁴ *State v. D.R.K.*, 171 P.3d 998, 999–1000 (Or. App. 2007) (citing *State v. R.H.*, 157 P.3d 1286, 1289 (Or. App. 2007)).

⁴³⁵ 687 P.2d 751, 767–76 (Or. 1984) (specifically discussing the admissibility of polygraph tests and their limited reliability/probative value).

⁴³⁶ 899 P.2d 663, 673 (Or. 1995) (holding that “trial courts have an obligation to ensure that proffered expert scientific testimony that a court finds possesses significantly increased potential to influence the trier of fact as ‘scientific’ assertions is scientifically valid. This is especially true in cases where the proffered expert scientific testimony is innovative, nontraditional, unconventional, controversial, or close to the frontier of understanding.”); see also *State v. Haugen*, 243 P.3d 31, 44 (Or. 2010) (holding that the issue of admissibility of experts’ opinions was not preserved for appeal).

⁴³⁷ See *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). This issue was more recently litigated in *Williams v. Ryan*, 623 F.3d 1258, 1268–270 (9th Cir. 2010).

⁴³⁸ The *Wagner* Court stated: “In *Bales v. SAIF*, 294 Or. 224, 656 P.2d 300 (1982), we made it clear that a decision as to which of two conflicting schools of medical

doubtedly ensure that the future-dangerousness question is revisited which will necessarily result in increased litigation and increased costs to taxpayers.⁴³⁹

In addition to future-dangerousness challenges, many states, including Oregon, are likely to see increased litigation and challenges to the law relating to the “unprecedented length of the interval between sentence and execution, as well as the increasingly harsh conditions of death row” known as “*Lackey* claims.”⁴⁴⁰ The length of time that death-row inmates across the U.S. spend on death row has increased substantially in recent years,⁴⁴¹ and raises questions about the constitutionality of this added punishment.⁴⁴² Although the U.S. Supreme Court has not addressed this issue directly, both Justices Stephen Breyer and John Paul Stevens have questioned the constitutionality of long delays on death row. In 1995 in *Lackey v. Texas*, a case involving a Texas inmate on death row for 17 years, Justice Stevens encouraged lower courts to examine whether executing inmates after prolonged periods on death row might

thought is correct is not a question of law; it is a question of fact to be decided by presenting in proper evidentiary form the various views to the finder of fact. The decision made in that case and on that record is not binding on the courts or the finders of fact in later cases that present the issue. *In other words, such a decision does not establish a rule of law.* We also observed that the opinion of an expert should not necessarily be given less weight by a finder of fact just because the witness espouses the view of a minority of his profession.” *State v. Wagner*, 752 P.2d 1136, 1161 (Or. 1988) (emphasis added).

⁴³⁹ Note that at least two states (California and Mississippi) refuse to consider future dangerousness in determining life or death. In California, the Court in *People v. Murtishaw* held that the admittance of psychiatric expert predictions on future dangerousness was reversible error because the testimony was highly unreliable, extraordinarily prejudicial, and of limited relevance. *People v. Murtishaw*, 631 P.2d 446, 466 (Cal. 1981). Because the evidence was highly prejudicial and “only marginally relevant,” the Court refused to allow it. *Id.* at 450. Similarly, in Mississippi, the Supreme Court of Mississippi held that aggravating circumstances are limited to the statutory factors, and the trial court erred by allowing the prosecutor to emphasize future dangerousness. *Balfour v. State*, 598 So. 2d 731, 747–48 (Miss. 1992).

⁴⁴⁰ *Steiker & Steiker*, *supra* note 239, at 678, 681. These *Lackey* claims refer to a prisoner’s legal claim asserting that imprisonment on death row for a prolonged period is cruel and unusual punishment. See *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995).

⁴⁴¹ Kevin Johnson, *Prisoners’ Time Spent on Death Row Doubles*, USA TODAY (July 23, 2008, 11:26 PM), http://usatoday30.usatoday.com/news/nation/2008-07-23-Death-row-time_N.htm; see also TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2007—STATISTICAL TABLES, at tbl.11 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/html/cp/2007/cp07st.pdf>. The average elapsed time from sentence to execution for all inmates was calculated at 153 months in 2007. *Id.* On average, Oregon’s inmates have been on death row for more than fifteen years, OREGON JUST. RESOURCE CTR., *supra* note 17, with Randy Lee Guzek there the longest, 24 years, see *Oregon Death Row*, *supra* note 254.

⁴⁴² See Foden-Vencil, *supra* note 252 (discussing Gary Haugen’s desire to be executed “to end his time on death row”).

violate the Eighth Amendment.⁴⁴³ And a few years later, in 1999, dissenting from the Court's decision to deny certiorari of two inmates' (who had each spent more than 20 years on death row) appeals, Justice Breyer wrote, "It is difficult to deny the suffering inherent in a prolonged wait for execution."⁴⁴⁴ More recently, in 2009, while the Court declined to review *Thompson v. McNeil*, where the inmate had been on death row for 32 years, Justice Stevens, called the treatment of the defendant "dehumanizing," noting that Thompson "has endured especially severe conditions of confinement, spending up to 23 hours per day in isolation in a 6- by 9-foot cell" and has experienced two stays of execution "only shortly before he was scheduled to be put to death."⁴⁴⁵ In his dissent, Justice Breyer stated, "The question here, however, is whether the Constitution permits [the] execution after a delay of 32 years—a delay for which the State was in significant part responsible."⁴⁴⁶ While to date such individual Eighth Amendment challenges have been ignored or unsuccessful,⁴⁴⁷ the issue will likely continue to come up in states where inmates have been on death row for 20 or more years (as in Oregon) until the Court issues a definitive ruling on the matter. Likewise, as these *Lackey* claims are ones that attack the administration of the death penalty, they are "a potent reminder" that the death penalty is not working and could eventually "provide a wedge for reconsideration of the death penalty's ultimate constitutionality."⁴⁴⁸

⁴⁴³ See *Lackey*, 514 U.S. at 1047.

⁴⁴⁴ *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting from denial of certiorari).

⁴⁴⁵ *Thompson v. McNeil*, 129 S. Ct. 1299, 1299 (2009) (Stevens, J., respecting denial of certiorari); see also Adam Liptak, *Justices Rule on Legal Effects of Slow-Moving Cases*, N.Y. TIMES, Mar. 10, 2009, at A17.

⁴⁴⁶ *Thompson*, 129 S. Ct. at 1304 (Breyer, J., dissenting from denial of certiorari).

⁴⁴⁷ See *Foster v. Florida*, 537 U.S. 990 (2002) (denying certiorari to hear a claim of an inmate on death row for 27 years); *Knight*, 528 U.S. 990 (denying certiorari to hear the claims of two inmates who spent more than 20 years on death row); *Elledge v. Florida*, 525 U.S. 944, 994 (1998) (denying certiorari to hear the claim of an inmate on death for 23 years); *Lackey*, 514 U.S. 1045 (denying certiorari to hear a claim of an inmate on death row for 17 years). To date, no state prohibits the execution of an inmate after a period of prolonged confinement. In fact, few states have actually considered the *Lackey* claim. Likewise, no federal court has found a violation of the Eighth Amendment to execute an inmate after a prolonged period of time on death row. See Appellant's Opening Brief at 380, *State v. Rogers*, 4 P.3d 1261 (2000) (No. S053466); Jeremy Root, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 304 (2001–2002).

⁴⁴⁸ See *Steiker & Steiker*, *supra* note 239, at 686 (listing the Court's limitations on the death penalty over the last 10 years such as eliminating it for juveniles and persons with mental retardation, and for non-homicidal offenses against persons along with its expressed concerns about its arbitrariness and the lack of safeguards to protect the innocent).

V. CONCLUSION

While capital punishment remains on the books in Oregon, it is carried out rarely and only for volunteers; it moves at a snail's pace and is absorbing millions of dollars. Oregon's death penalty is long overdue for an examination as a public policy; its problems and alleged benefits should be weighed. In 1978 and in 1984, Oregon voters decided whether the death penalty in theory was appropriate for the most horrible crimes, but the death penalty in practice (cost, effectiveness, time) is what needs to be reviewed and examined. Governor Kitzhaber's official moratorium on executions provides the citizens of Oregon an opportunity to consider whether Oregon should maintain or abolish the death penalty. In order for this discussion to take place, the Governor should designate a diverse non-partisan committee as many other states have done to study all aspects of the death penalty as administered in Oregon and report its findings and recommendations.⁴⁴⁹ If the Committee concludes that the death-penalty system is broken and dysfunctional, the Governor should commute the sentences of those on death row.

At a minimum, this committee should examine whether the current capital-punishment system meets its intended purpose of deterrence; whether selecting and trying capital defendants is a fair process and not arbitrary or discriminatory (from selection through sentencing); whether there are differences in the geography or crime facts of those selected for a death sentence versus those selected for a life-imprisonment sentence; whether all possible protections against the execution of an innocent person are in place;⁴⁵⁰ and whether alternatives to the death penalty exist that could ensure public safety and address the concerns of victims' fami-

⁴⁴⁹ For example, states, like California, Connecticut, Illinois, Indiana, and New Jersey created commissions to study the fairness, efficiency, cost-effectiveness, and appropriateness of the death penalty. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA I (2008), *available at* <http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>; IND. CRIMINAL LAW STUDY COMM'N, THE APPLICATION OF INDIANA'S CAPITAL SENTENCING LAW I (2002), *available at* http://www.in.gov/cji/files/law_book.pdf; NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT, *supra* note 311, at 1; REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT I (2002), *available at* https://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/complete_report.pdf; STATE OF CONN. COMM'N ON THE DEATH PENALTY, STUDY PURSUANT TO PUBLIC ACT NO. 01-151 OF THE IMPOSITION OF THE DEATH PENALTY IN CONNECTICUT I (2003), *available at* <http://cslib.cdmhost.com/cdm/compoundobject/collection/p128501coll2/id/79413/rec/19>.

⁴⁵⁰ With specific attention to evidence preservation, mistaken eyewitness identifications, false confessions, perjurious informant testimony, inaccurate scientific evidence, and prosecutorial and defense lawyer misconduct, as these are the most studied and proven causes of wrongful convictions. *See supra* Part II, Wrongful Convictions and the Death Penalty.

lies. In addition, the committee should conduct a detailed cost analysis⁴⁵¹ that compares the costs for aggravated murder cases, including capital cases, true life and ordinary-life cases. Such an analysis should include costs to local, state, and federal governmental entities, as well as to private individuals such as attorneys, experts, consultants, specialists and investigators. To be of value, the study must be comprehensive. It must cover all aspects of Oregon's death-penalty system and examine and track death cases through every stage in Oregon's adjudication process from 1984 until today.⁴⁵² Without a commitment to assess Oregon's death-penalty system that will provide the information necessary for the public to make informed decisions about this difficult issue, Governor Kitzhaber's courageousness in declaring a moratorium will be nothing more than an empty gesture.

⁴⁵¹ Even prior to the committee's study of costs, the legislature should immediately pass legislation to track the costs of the death penalty by making it statutorily required for PDS, DOJ and DOC to keep a record all of the costs associated with the administration of the death penalty.

⁴⁵² New Jersey is one of the only states to maintain detailed statistical evidence regarding defendants against whom the death penalty is sought and imposed. See Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 153-54 (1996). New Jersey's "sustained support for a reliable and comprehensive data-gathering and analysis project has not yet been matched by any other state high court." *Id.* at 184.