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## Costs of Capital Punishment in California: Will Voters Choose Reform this November?

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## **COSTS OF CAPITAL PUNISHMENT IN CALIFORNIA: WILL VOTERS CHOOSE REFORM THIS NOVEMBER?**

*Judge Arthur L. Alarcón & Paula M. Mitchell\**

*In a 2011 study, the authors examined the history of California's death-penalty system to inform voters of the reasons for its extraordinary delays. There, they set forth suggestions that could be adopted by the legislature or through the initiative process that would reduce delays in executing death-penalty judgments. The study revealed that, since 1978, California's current system has cost the state's taxpayers \$4 billion more than a system that has life in prison without the possibility of parole ("LWOP") as its most severe penalty. In this article, the authors update voters on the findings presented in their 2011 study. Recent studies reveal that if the current system is maintained, Californians will spend an additional \$5 billion to \$7 billion over the cost of LWOP to fund the broken system between now and 2050. In that time, roughly 740 more inmates will be added to death row, an additional fourteen executions will be carried out, and more than five hundred death-row inmates will die of old age or other causes before the state executes them. Proposition 34, on the November 2012 ballot, will give voters the opportunity to determine whether they wish to retain the present broken death-penalty system—despite its cost and ineffectiveness—or whether the appropriate punishment for murder with special circumstances should be life in prison without the possibility of parole.*

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## I. INTRODUCTION

On November 6, 2012, California voters will decide whether to replace the death penalty with the sentence of life in prison without the possibility of parole (“LWOP”) as the state’s most severe punishment by way of a ballot initiative entitled the Savings, Accountability, and Full Enforcement (SAFE) California Act, officially designated Proposition 34.<sup>1</sup> In view of the SAFE California Act initiative and recent studies further assessing the true costs borne by taxpayers to fund California’s broken death-penalty system, we write here to update voters on the findings presented in our article, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature’s Multi-Billion Dollar Death Penalty Debacle* (“Article”), published last year.<sup>2</sup> Our updated analysis reveals that maintaining the current dysfunctional death-penalty system in California from now until 2050 will cost taxpayers a minimum of an additional \$5.4 billion, and possibly as much as an additional \$7.7 billion, over the cost of LWOP.<sup>3</sup> During that time, approximately

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1. *Qualified Statewide Ballot Measures*, CAL. SECRETARY OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm> (last visited Aug. 13, 2012). The Attorney General of California has prepared the following title and summary of the chief purpose and points of the proposed measure:

## DEATH PENALTY REPEAL. INITIATIVE STATUTE.

Repeals death penalty as maximum punishment for persons found guilty of murder and replaces it with life imprisonment without possibility of parole. Applies retroactively to persons already sentenced to death. Requires persons found guilty of murder to work while in prison, with their wages to be applied to any victim restitution fines or orders against them. Creates \$100 million fund to be distributed to law enforcement agencies to help solve more homicide and rape cases.

*Id.*

2. 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 (2011) [hereinafter *Executing the Will of the Voters?*].

3. The conservative estimate is based on the assumption that it costs \$40,000 more per year, per inmate, to house an inmate on death row than the annual cost to house an LWOP inmate, as calculated in a recent study by Trisha McMahon and Tim Gage that was commissioned by Death Penalty Focus. Trisha McMahon & Tim Gage, *Replacing the Death Penalty Without Parole: The Impact of California Prison Costs* 10 (June 14, 2012) (unpublished study) (on file with authors). Gage is the former director of the California Department of Finance and served as the fiscal advisor to both houses of the California legislature; he has more than twenty years’ experience in California budgeting and fiscal analysis. *Tim Gage*, BLUE SKY CONSULTING GROUP, <http://www.blueskyconsultinggroup.com/tim-gage/> (last visited Aug. 13, 2012). McMahon has her master’s degree from U.C. Berkeley’s Goldman School of Public Policy and has experience as a research analyst for the Democratic Party of Georgia. *Trisha McMahon*, BLUE SKY CONSULTING GROUP, <http://www.blueskyconsultinggroup.com/trisha-mcmahon> (last

740 more inmates will be added to death row and an additional fourteen executions will be carried out (at the State's current rate of execution), while more than five hundred of those inmates will die on death row of natural causes or suicide before the state executes them.<sup>4</sup>

## II. LEGISLATIVE RESPONSE:

### CALIFORNIA SENATE BILL (SB) 490—STALLED IN COMMITTEE

In our Article, we pointed out that California's costly and ineffective death-penalty system was created largely by the state legislature's failure to take any steps over the last three decades to eliminate unnecessary and wasteful delay and to reform the system. Our research revealed that the death penalty had cost California taxpayers \$4 billion since 1978 and resulted in only thirteen executions.<sup>5</sup> The only legislator who responded to our criticisms about the lack of legislative leadership on this issue was Senator Loni Hancock (D-Oakland), Chair of the Senate Public Safety Committee and the Senate Budget and Fiscal Review Subcommittee,<sup>6</sup> which oversees all funding for the prison system.

On June 20, 2011, Senator Hancock announced that she was introducing legislation to replace the death penalty in California with

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visited Aug. 14, 2012). The high-end figure assumes that the housing costs are as stated in our Article and calculates the death row population from 2013 to 2050 based on the mortality rate schedules supporting McMahon and Gage's research. See *Executing the Will of the Voters?*, *supra* note 2, at S105; McMahon & Gage, *supra*, at 3. The estimates of \$5.4 billion to \$7.7 billion do not take into account any rate of inflation.

4. McMahon and Gage's mortality tables estimate that by 2050 there will be 813 inmates on death row, and that over that time, 615 prisoners will die on death row before their sentences are carried out. See Trisha McMahon & Tim Gage, *Death Row Model* (June 2012) (unpublished statistical model) (on file with authors), *analyzed in* McMahon & Gage, *supra* note 3. Their model, however, does not account for those inmates who will leave death row due to meritorious claims on appeal. Because there have been approximately one hundred such successful appeals resulting in prisoners being removed from death row over the last thirty-four years, we estimate that there will be one hundred similarly successful appeals over the next thirty-seven years (2013–2050). See *Executing the Will of the Voters?*, *supra* note 2, at S53, S55. 724 (current population) + 740 (added between now and 2050) = 1,464. 1,464 – 14 (executions) = 1,450. 1,450 – 100 (successful appeals) = 1,350. 1,350 – 813 (number of inmates on death row in 2050) = 537 (number of death-row inmates who will die of natural causes or suicide before being executed). See *id.*; McMahon & Gage, *Death Row Model*, *supra*.

5. *Executing the Will of the Voters?*, *supra* note 2, at S51.

6. See *Senator Hancock's Committee Membership*, SENATOR LONI HANCOCK, <http://sd09.senate.ca.gov/committees> (last visited Aug. 26, 2012).

LWOP.<sup>7</sup> Senator Hancock stated, “Capital punishment is an expensive failure and an example of the dysfunction of our prisons . . . . California’s death row is the largest and most costly in the United States. It is not helping to protect our state; it is helping to bankrupt us.”<sup>8</sup> She argued that “[t]oday we’re not tough on crime; we’re tough on the taxpayer. Every time we spend money on failed policies like the death penalty, we drain money from having more police officers on the street, more job training, more education, more of the things that would truly make for safer communities.”<sup>9</sup>

On July 7, 2011, Senator Hancock presented to the Assembly Public Safety Committee SB 490, a bill to place a measure on the November 2012 ballot asking voters whether the death penalty should be replaced with LWOP.<sup>10</sup> Section 1 of that bill provided that:

(a) It is the intent of the Legislature to replace the death penalty with permanent imprisonment.

(b) The death penalty costs three times as much as permanent imprisonment.

(c) A recent study published in the *Loyola of Los Angeles Law Review* found that California spends \$184 million a year on the death penalty.

(d) The same study found that Californians have spent more than \$4 billion on capital punishment since it was reinstated in 1978, or about \$308 million for each of the 13 executions carried out since reinstatement.

(e) The millions of dollars spent on the death penalty could be used to make our communities safer by funding other public safety programs.<sup>11</sup>

The committee heard testimony in support of SB 490 from Jeanne Woodford, former warden of San Quentin, former undersecretary and director of the California Department of

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7. Press Release, Senator Loni Hancock, Hancock to Introduce Legislation to Ban Death Penalty (June 21, 2011), <http://sd09.senate.ca.gov/news/2011-06-21-hancock-introduce-legislation-ban-death-penalty>.

8. *Id.*

9. *Id.*

10. *Death Penalty: July 7, 2011 Hearing on SB 490 Before the Assemb. Pub. Safety Comm.*, 2011 Leg., 2011–12 Sess. (Cal. 2011) (statement of Sen. Loni Hancock) (video available at [www.calchannel.com](http://www.calchannel.com)).

11. SB 490, 2011–12 Sess. (Cal. 2011) (italics added).

Corrections and Rehabilitation (CDCR), and current executive director of Death Penalty Focus, a national nonprofit organization; Donald Heller, one of the authors of California's death penalty law in 1978 and current supporter of replacing the law; and Judy Kerr, spokesperson for California Crime Victims for Alternatives to the Death Penalty.<sup>12</sup> On July 11, 2011, the Assembly Public Safety Committee passed the bill by a vote of five to two and sent it to the Assembly Appropriations Committee.<sup>13</sup>

On August 17, 2011, the Assembly Appropriations Committee held a public hearing on SB 490.<sup>14</sup> "If the [Appropriations Committee] approves a bill, it usually moves to the Floor."<sup>15</sup> The briefing prepared for the committee included a detailed accounting of the potential savings associated with eliminating the death penalty.<sup>16</sup> The committee heard testimony in support of the bill from former two-term Attorney General John Van de Kamp, who also served two terms as Los Angeles County District Attorney and served as the Chair of the California Commission of the Fair Administration of Justice (CCFAJ), which the State Senate appointed to investigate California's death penalty.<sup>17</sup> Van de Kamp testified about the findings in a report issued by the CCFAJ ("Final Report")<sup>18</sup> that

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12. *Id.* Registered supporters of the bill include American Civil Liberties Union, California Catholic Conference, California Public Defenders Association, Conference of California Bar Associations, Friends Committee on Legislation of California, Cedilla Community Synagogue, and one private individual. CAL. ASSEMB. COMM. PUB. SAFETY, ANALYSIS OF SB 490, SB 490, 2011–12 Sess., at 11 (July 5, 2011), [http://info.sen.ca.gov/pub/11-12/bill/sen/sb\\_0451-0500/sb\\_490\\_cfa\\_20110706\\_100026\\_asm\\_comm.html](http://info.sen.ca.gov/pub/11-12/bill/sen/sb_0451-0500/sb_490_cfa_20110706_100026_asm_comm.html).

13. Press Release, Senator Loni Hancock, Death Penalty Ban Passes First Legislative Test; Approved by Assembly Committee (July 7, 2011), <http://sd09.senate.ca.gov/news/2011-07-07-death-penalty-ban-passes-first-legislative-test-approved-assembly-committee>.

14. Press Release, Senator Loni Hancock, SB 490 (Death Penalty) Withdrawn from Consideration (Aug. 25, 2011), <http://sd09.senate.ca.gov/news/2011-08-25-sb-490-death-penalty-withdrawn-consideration>.

15. *Glossary of Legislative Terms*, CAL. STATE ASSEMBLY, OFFICE OF THE CHIEF CLERK, <http://clerk.assembly.ca.gov/clerk/BILLSLEGISLATURE/glossary.asp?alist=F&Valid=0&Target=1> (last visited Aug. 9, 2012).

16. CAL. ASSEMB. COMM. ON APPROPRIATIONS, ANALYSIS OF SB 490, SB 490, 2011–12 Sess., at 1 (Aug. 15, 2011), [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0451-0500/sb\\_490\\_cfa\\_20110816\\_164640\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0451-0500/sb_490_cfa_20110816_164640_asm_comm.html).

17. *Death Penalty: Hearing on SB 490 Before the Assemb. Appropriations Comm.*, 2011 Leg., 2011–12 Sess. (Cal. 2011) [hereinafter *Appropriations Committee Hearing*] (statement of John Van de Kamp) (video available at [www.calchannel.com](http://www.calchannel.com)).

18. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 80–81



chronicled in detail the numerous flaws in the administration of California's death penalty and described how those defects have created the current dysfunctional system.<sup>19</sup> Professor Laurie Levenson, the William M. Rains Fellow and David W. Burcham Chair in Ethical Advocacy at Loyola Law School, also testified in support of the bill.<sup>20</sup> She urged the committee to approve the bill because the current system is not working and is too costly.<sup>21</sup> Additionally, numerous local, regional, national, and international supporters of SB 490 attended the hearing to voice their support for the bill.<sup>22</sup> Fewer people appeared before the committee to voice their opposition.<sup>23</sup> One opponent, Cory Salzillo, the director of legislation for California District Attorneys Association, testified that eliminating the death penalty would result in added costs because, unless prosecutors can use the threat of the death penalty to secure guilty pleas from defendants, no defendant will ever plead guilty to

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(Gerald Uelmen ed., 2008) [hereinafter FINAL REPORT], available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

19. *Id.*

20. *Id.* (statement of Laurie L. Levenson).

21. *Id.*

22. *Appropriations Committee Hearing*, *supra* note 17. Supporters included Connie Carmona, mother of Arthur Carmona, wrongfully convicted; Gloria Killian, exoneree; the NAACP; Franky Carrillo, exoneree on behalf of himself and the Loyola Law School Center for Restorative Justice; Mothers to Prevent Violence; Denise Foderaro Quattrone, wife of exoneree; the ACLU; Jeanne Woodford, former warden of San Quentin; Michael Mitchell, retired prison warden; California Crime Victims Assistance Association; the National Association of Social Workers, California Chapter; California Catholic Conference; Friends Committee on Legislation in California; California Crime Victims for Alternatives to the Death Penalty; California Public Defenders Association; Lutheran Office of Public Policy; Conference of California Bar Associations; Al Baker Center for Human Rights; Death Penalty Focus; Amnesty International & World Coalition Against the Death Penalty; California Attorneys for Criminal Justice; and the City of Berkeley. *Id.*; see also CAL. ASSEMB. COMM. ON APPROPRIATIONS, *supra* note 16, at 12 (noting selected supporters of the bill).

23. Registered opponents of the bill included Anaheim Police Association; Association for Los Angeles Deputy Sheriffs; Association of Orange County Deputy Sheriffs; California Association of Highway Patrolmen; California District Attorneys Association; California Fraternal Order of Police; California Peace Officers' Association; Chico Police Officers' Association; Crime Victims United of California; Cypress Police Officers' Association; Imperial County Deputy Sheriff's Association; La Habra Police Association; Laguna Beach Police Employees' Association; Long Beach Police Officers Association; Los Angeles South Chapter of the Peace Officers Research Association of California; Orange County Chapter of the Peace Officers Research Association of California; Peace Officers Research Association of California; Riverside Sheriffs' Association; Sacramento County Deputy Sheriffs Association; Santa Ana Police Officers Association; and three private individuals. *Appropriations Committee Hearing*, *supra* note 17; CAL. ASSEMB. COMM. PUB. SAFETY, *supra* note 12, at 12–13 (noting selected opponents of the bill).

murder but will instead insist on going to trial, which Salzillo claimed would be costly to the state.<sup>24</sup>

We accepted an invitation by Senator Hancock to discuss the findings in our Article before the Senate Public Safety Committee at an informational hearing on August 23, 2011.<sup>25</sup> On August 25, 2011, Senator Hancock withdrew SB 490 from consideration before a vote was held “when she didn’t have the votes to get it out of the Assembly Appropriations Committee.”<sup>26</sup> Once again, the state legislature has failed to address this ongoing crisis or offer any explanation for its continued intransigence on reforming this state’s dysfunctional death-penalty system. Even with the information revealed in our Article about the true costs of the state’s death-penalty system—information that state authorities had claimed was incapable of being calculated—the legislature still refuses to stop the wasteful spending of the state’s limited resources on a death-penalty system that appears to be broken beyond repair. The legislature’s refusal to act makes it clearer than ever that the voters will have to change the law through the initiative process if they wish to remedy the state’s broken system.

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24. *Appropriations Committee Hearing, supra* note 17 (statement of Cory Salzillo). Salzillo stated that

there are numerous reasons that there will be slippage in the cost savings. The most significant of which is probably the fact that we lose the plea bargain effect. If there’s no death penalty, there’s no reason anybody pleads guilty to murder. . . . The minute this bill . . . pass[es], . . . nary a single person will ever plea to LWOP again because why would you?

*Id.* Other opponents who voiced opposition to SB 490 at the hearing included the Crime Victims Association; the Police Chiefs’ Association; Phyllis Loya, mother of a murdered police officer; the California Correctional Peace Officers Association; Curtis Hill, on behalf of the California State Sheriffs’ Association; and, a representative who spoke on behalf of the Association for Los Angeles Deputy Sheriffs Association, the Los Angeles Police Department, the Riverside Sheriffs’ Association, the Long Beach Police Officers’ Association, the Santa Ana Police Officers Association, the Orange County Deputy Sheriffs’ Association, Los Angeles Professional Police Officers, the Sacramento County Deputy Sheriffs’ Association, the California Fraternal Order of Police, and the California Coalition of Law Enforcement Agencies. *Id.*

25. *See Death Penalty: Aug. 23, 2011 Hearing on SB 490 Before the Senate Pub. Safety Comm.*, 2011 Leg., 2011–12 Sess. (Cal. 2011) (statements of Hon. Arthur L. Alarcón and Paula M. Mitchell) (video available at [www.calchannel.com](http://www.calchannel.com)); Press Release, Senator Loni Hancock, The True Costs of the Death Penalty: Authors of Landmark Report to Appear Before the Public Safety Committee (Aug. 22, 2011), <http://sd09.senate.ca.gov/news/2011-08-22-true-costs-death-penaltyauthors-landmark-report-appear-senate-public-safety-committee>.

26. Micaela Massimino, *AM Alert: Death Penalty Opponents Launch Ballot Initiative*, SACRAMENTO BEE CAPITOL ALERT (Aug. 29, 2011, 6:00 AM), <http://blogs.sacbee.com/capitolalert/latest/2011/08/am-alert-death-penalty-ballot-initiative-california.html>.

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### III. DIRECT DEMOCRACY IN ACTION: THE SAFE CALIFORNIA ACT BALLOT INITIATIVE

Immediately after SB 490 was shelved, supporters of the bill launched a ballot initiative of their own. On August 29, 2011, a group called California Taxpayers for Justice unveiled the SAFE California Act, an initiative that would replace capital punishment with LWOP.<sup>27</sup> The initiative's supporters include Jeanne Woodford, the former warden of San Quentin State Prison who oversaw four executions and is now the executive director of Death Penalty Focus; Gil Garcetti, the former Los Angeles District Attorney who has prosecuted dozens of death penalty cases; Gloria Killian, who spent sixteen years in prison for a murder for which she was later exonerated; and victim family member Judy Kerr, whose brother's killer is still at large.<sup>28</sup>

Gil Garcetti commented that “[t]he death penalty in California is broken, and it is unfixable. . . . How many of our citizens know that 46 percent of all murders and 56 percent of all rapes in the average year in our state go unsolved? . . . The SAFE California Act will prevent crimes . . . [and] will keep our families safer today.”<sup>29</sup> “Proponents of the initiative say that replacing the death penalty with [LWOP] will free up money for local law enforcement, victim compensation, and schools.”<sup>30</sup>

Unsolved homicide statistics published by the California Attorney General's office indicate that 46 percent of homicide cases in California are never resolved.<sup>31</sup> That means that over ten thousand homicides that took place in California between 2000 and 2009 remain unsolved—about one thousand per year.<sup>32</sup> The rate for unsolved reported rapes is higher at 56 percent.<sup>33</sup> The SAFE

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27. *Id.*

28. *Id.*

29. Gil Garcetti, Press Conference by the SAFE California Campaign (Aug. 29, 2011) (video available at <http://www.youtube.com/watch?v=S5WJw6yi614>).

30. Massimino, *supra* note 26.

31. See KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, HOMICIDE IN CALIFORNIA 2010, at 34 (2010), available at <http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/homicide/hm10/preface.pdf>; see also *Statistics by City and County*, CAL. ATTORNEY GEN., <http://ag.ca.gov/cjsc/datatabs.php> (making available state crime statistics) (last visited Aug. 26, 2012).

32. See HARRIS, *supra* note 31, at 34.

33. *Unsolved Rapes & Murders*, SAFE CALIFORNIA, <http://www.safecalifornia.org/facts/unsolved> (last visited Aug. 9, 2012); see also *Statistics by City and County*, *supra* note 31.

California Act proposes to “use our scarce law enforcement resources to bring more killers to justice and to protect our families . . . [by setting] aside \$30 million per year for three years to solve open murder and rape cases, using the money saved from replacing the death penalty to keep our families safe.”<sup>34</sup>

*A. Signatures Gathered, Initiative Qualified,  
Challenge Denied*

On March 1, 2012, the SAFE California Act campaign announced that it had gathered and filed eight hundred thousand petition signatures, more than enough to qualify for the November ballot the first-ever statewide initiative to replace the death penalty with LWOP.<sup>35</sup> On April 23, 2012, Secretary of State Debra Bowen’s office confirmed that supporters of the campaign had submitted petition signatures sufficient to qualify the measure for the November ballot.<sup>36</sup> On May 14, 2012, an emergency petition<sup>37</sup> challenging the initiative was filed in the California Court of Appeal for the Third District by Phyllis Loya, the mother of police officer Larry Lasater, who was killed in the line of duty in April 2005 and whose killer is currently on death row, and Michael Rushford, the founder, president, and chief executive officer of Criminal Justice Legal Foundation (CJLF), a pro-death-penalty organization.<sup>38</sup> The emergency petition sought a peremptory writ of mandate directing Secretary of State Bowen to remove the SAFE California Act from the 2012 general election ballot and to award petitioners their costs and attorney fees.<sup>39</sup> The petitioners, represented by the CJLF,<sup>40</sup>

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34. *Unsolved Rapes and Murders*, *supra* note 33.

35. Press Release, SAFE Cal. Campaign, SAFE California Campaign to Replace Death Penalty Submits 800,000 Signatures to Qualify for November Ballot (Mar. 1, 2012), <http://www.safecalifornia.org/downloads/Signatures-Filing-PR-SAFE-CA-Campaign.pdf>.

36. Bob Egelko, *Death Penalty Initiative Makes November Ballot*, SF GATE (Apr. 24, 2012 4:00 AM), <http://www.sfgate.com/politics/article/Death-penalty-initiative-makes-November-ballot-3504431.php>; Jeanne Woodford, *Epic Win: SAFE California Act to Replace the Death Penalty Will Be on the November Ballot*, SAFE CALIFORNIA (Apr. 23, 2012), <http://www.safecalifornia.org/news/blog/epic-win-safe-california-act-to-replace-the-death-penalty-will-be-on-the-november-ballot>.

37. Petition for Writ of Mandate, *Loya v. Bowen*, No. DCA3-C071040 (Cal. Ct. App. May 14, 2012).

38. *Biography of Michael D. Rushford*, CRIM. JUST. LEGAL FOUND., <http://www.cjlf.org/about/bioMDR.htm> (last visited Aug. 18, 2012).

39. Petition for Writ of Mandate, *supra* note 37, at 3.

claimed that the SAFE California Act violates the “single subject” rule of the California Constitution, which requires that provisions of an initiative be reasonably germane to one another and to the initiative’s general purpose.<sup>41</sup> On May 30, 2012, the California Court of Appeal for the Third District summarily denied the petition without comment.<sup>42</sup>

*B. Early Endorsements for  
the SAFE California Act*

1. *Los Angeles Times* Endorsement

On May 21, 2012, the editorial board of the *Los Angeles Times* publically endorsed the SAFE California Act and urged voters to pass the initiative. The *Times* highlighted the case of Carlos DeLuna, an inmate who many believed to be innocent and who was, “in all likelihood, murdered by the State of Texas.”<sup>43</sup> “This should never happen in California. In November, voters will have a chance to ensure that it doesn’t,” the *Times* wrote.<sup>44</sup>

The *Times* explained that “[o]rdinarily, this [editorial] page doesn’t endorse ballot initiatives until shortly before an election, but the SAFE California Act isn’t an ordinary ballot measure.”<sup>45</sup> As it further elaborated:

It is the culmination of a movement that has been building for many years to replace the death penalty with a sentence of life without the possibility of parole. With one vote, Californians can solve a host of problems bedeviling its law enforcement system: the spiraling costs of incarceration and appeals for death row inmates, the legal tangles over methodology that have stalled executions in this state since

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40. Elisabeth Semel & Charles Sevilla, *Is the SAFE Initiative Vote Safe?*, DAILY J., June 5, 2012, at 6.

41. Petition for Writ of Mandate, *supra* note 37, at 9–27.

42. Order Denying Petition for Writ of Mandate, *Loya v. Bowen*, DCA3-C071040 (Cal. App. Ct. May 30, 2012).

43. Editorial, *Yes on the SAFE California Act*, L.A. TIMES (May 21, 2012), <http://articles.latimes.com/2012/may/21/opinion/la-ed-death-penalty-california-20120521>. The *Times* cited to an exhaustive analysis of the DeLuna case that was published online by the *Columbia Human Rights Law Review*. *Id.* (citing James S. Liebman et al., *Los Tocayos Carlos*, COLUM. HUM. RTS. L. REV., <http://www3.law.columbia.edu/hrlr/lrc/> (last visited Aug. 30, 2012)).

44. *Id.*

45. *Id.*

2006, and the unfairness built into a system in which convicts are more likely to be sentenced to death if their victims were white. And, more important, eliminating the death penalty would end the risk that the hands of all Californians will be stained with the blood of an innocent.<sup>46</sup>

## 2. Other Early Endorsements

As of this writing, Proposition 34 has also received endorsements from other media outlets, including the *Contra Costa Times*, *Daily Democrat*, *Desert Sun*, *Oakland Tribune*, *Paradise Post*, *Pasadena Star-News*, *San Francisco Examiner*, *San Jose Mercury News*, *San Mateo Times*, *Stockton Record*, and *Vallejo Times-Herald*.<sup>47</sup> Other supporters of Proposition 34 include 139 current and former law enforcement officers and agencies; 436 murder victims' family members; 94 organizations and unions; 53 government bodies, elected officials, and candidates; 91 faith and religious organizations, including the Catholic Bishops of California, the Board of Rabbis of Northern California, the Islamic Shura Council of Southern California, and the Episcopal Diocese of California; 340 faith and community leaders; and 14 wrongfully convicted men and women who have been released from prison after serving sentences for crimes they did not commit.<sup>48</sup>

## IV. THE NATIONAL REGISTRY OF EXONERATIONS

On May 21, 2012, the same day that the *Los Angeles Times*' editorial board endorsed the SAFE California Act, the University of Michigan Law School and the Center on Wrongful Convictions from Northwestern University launched a comprehensive database that collects nationwide data about people who have been wrongfully convicted of criminal conduct and later exonerated.<sup>49</sup> The National

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46. *Id.*

47. *Endorsements*, SAFE CALIFORNIA, <http://www.safecalifornia.org/about/endorsements> (last visited Sept. 5, 2012).

48. *Id.*

49. *See About the Registry*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Aug. 23, 2012). One hundred forty death-row inmates nationwide have been exonerated since 1973 while awaiting execution. *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last updated Jan. 23, 2012).

Registry of Exonerations is the most comprehensive database of its kind.<sup>50</sup> It provides detailed information about wrongful convictions throughout the United States. The data documents 945 exonerations since 1989.<sup>51</sup> It reveals that California is ranked second in the nation with ninety-seven wrongful convictions (tied with Texas, also with ninety-seven documented wrongful convictions), after Illinois, which has 107 documented wrongful convictions.<sup>52</sup> Illinois replaced the death penalty in 2011.<sup>53</sup>

Since 1989, California has sentenced two men to death who were later exonerated and released from prison: Troy Lee Jones, who was exonerated in 1996 after spending fourteen years on death row, and Oscar Morris, who was exonerated in 2000, after spending seventeen years on death row.<sup>54</sup> In 2011 and 2012 alone, five California men who were wrongfully convicted of murder were exonerated and released from prison: Obie Anthony (sentenced to LWOP), in prison from 1995 to 2011; Maurice Caldwell (sentenced to twenty-seven years to life), in prison from 1991 to 2011; Francisco Carrillo (sentenced to life), in prison from 1992 to 2011; Caramad Conley (sentenced to LWOP), in prison from 1994 to 2011; and Frank O'Connell (sentenced to twenty-five years), in prison 1985 to 2012.<sup>55</sup> These seven men spent a combined total of 130 years in prison for crimes for which they were later exonerated. What these exonerations reveal, in dramatic fashion, is that our system of criminal justice is not infallible and is indeed capable of grave injustices.

## V. COSTS UPDATE

### A. *Costly Delays*

Since publication of our Article last year, six more inmates have died on California's death row (three of natural causes and three by

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50. *National Registry of Exonerations Released Today*, NEW ENGLAND INNOCENCE PROJECT (May 21, 2012), <http://www.newenglandinnocence.org/2012/national-registry-of-exonerations-released-today/>.

51. *Exoneration Detail List*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Aug. 23, 2012).

52. *Id.*

53. 725 ILL. COMP. STAT. 5/119-1 (2011).

54. *Exoneration Detail List*, *supra* note 51.

55. *Id.*

suicide), bringing the total number of deaths by means other than execution to eighty-four since 1978.<sup>56</sup> Examining the cases of David Murtishaw, Dennis Lawley, and Ralph International Thomas provides a graphic snapshot of some of the most serious flaws in California's death-penalty system, of why the appeals process takes so long, and of what those long delays cost in terms of taxpayer dollars and in compromising the integrity of our criminal justice system.

1. David Murtishaw:  
Thirty-Two Years on Death Row,  
Died of a Heart Attack on November 22, 2011

On November 22, 2011, David Murtishaw died of a heart attack after serving thirty-two years on California's death row.<sup>57</sup> Murtishaw was convicted and sentenced to death on April 27, 1979, for three counts of first-degree murder and one count of assault with attempt to commit murder.<sup>58</sup> Two years later, the California Supreme Court reversed the death sentence on his direct appeal.<sup>59</sup> A second penalty-phase trial was held in 1983, and Murtishaw was again sentenced to death.<sup>60</sup> In 1989, the California Supreme Court upheld the death sentence in Murtishaw's second direct appeal.<sup>61</sup> Murtishaw filed petitions for a writ of habeas corpus in state and federal courts.<sup>62</sup>

On June 26, 2001, the Ninth Circuit Court of Appeals determined that there were federal constitutional errors in Murtishaw's second penalty-phase trial because "a 1978 statute was improperly applied during Murtishaw's penalty retrial resulting in an

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56. Brandon Wilson, November 17, 2011 (suicide); David Murtishaw, November 22, 2011 (natural causes); Dennis H. Lawley, March 11, 2012 (natural causes); Frank Abilez, April 3, 2012 (natural causes); James Lee Crummel, May 27, 2012 (suicide); Kenneth Friedman, August 26, 2012 (suicide). CAL. DEP'T OF CORR. & REHAB., CONDEMNED INMATES WHO HAVE DIED SINCE 1978 (2012), available at [http://www.cdcr.ca.gov/Capital\\_Punishment/docs/CONDEMNED\\_INMATESWHOHAVEDIEDSINCE1978.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNED_INMATESWHOHAVEDIEDSINCE1978.pdf). Since 1978, fifty-seven inmates have died of natural causes on California's death row and twenty-one have committed suicide. *Id.* Six have died from other causes, bringing the total number of nonexecution deaths to eighty-four. *Id.*

57. Andrew Blankstein, *Killer of 3 USC Film Students Dies on Death Row*, L.A. TIMES (Nov. 24, 2011), <http://articles.latimes.com/2011/nov/24/local/la-me-inmate-death-20111124>.

58. *Murtishaw v. Woodford*, 255 F.3d 926, 938 (9th Cir. 2001).

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.*



ex post facto violation and erroneous jury instructions that constituted constitutional error that cannot be deemed harmless.”<sup>63</sup> The court reversed Murtishaw’s death sentence and “remand[ed] the case to the district court with instructions to grant the writ to the extent that the death penalty sentence is vacated and a sentence of life imprisonment without parole is substituted unless the State resentences him within a reasonable time.”<sup>64</sup> The prosecution sought the death penalty in a third trial, and on October 4, 2002, Murtishaw was again sentenced to death.<sup>65</sup> His conviction was affirmed on appeal by the California Supreme Court on February 22, 2011.<sup>66</sup> Murtishaw’s petition for a writ of habeas corpus was pending in the California Supreme Court when he died last November.<sup>67</sup>

Supporters of California’s death penalty frequently argue that blame for the long delays in capital cases lies at the feet of attorneys, who file “frivolous appeals.”<sup>68</sup> A frivolous appeal is one that it is “clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the [adversary].”<sup>69</sup> It can hardly be said that Murtishaw’s appeals were “frivolous,” given that he prevailed not once but twice, both times resulting in the reversal of his death sentence, once by the state court, and once by the federal court.

What Murtishaw’s case illustrates is that when a state has sentenced someone to death, courts look carefully at the conviction and the sentence to ensure that neither violate state or federal law. And in a state like California, where the legislature has never taken

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63. *Id.* at 974.

64. *Id.*

65. *People v. Murtishaw*, 247 P.3d 941, 943 (Cal. 2011); Appellant’s Opening Brief at 2, *People v. Murtishaw*, 247 P.3d 941 (Cal. 2011) (No. S110541), 2007 WL 2958717, at \*2.

66. *Murtishaw*, 247 P.3d at 943.

67. Order Dismissing Case as Moot, *People v. Murtishaw*, No. S196099 (Cal. Jan. 18, 2012); see also *Appellate Court Case Information for People v. Murtishaw*, CAL. COURTS, [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc\\_id=1990328&doc\\_no=S196099](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1990328&doc_no=S196099) (last visited Aug. 24, 2012) (noting that the case was dismissed as moot).

68. *California Death Penalty Ban Qualifies to Be Voter Initiative Placed on November Ballot*, CBS NEWS (Apr. 24, 2012), [http://www.cbsnews.com/8301-505103\\_162-57419637/california-death-penalty-ban-qualifies-to-be-voter-initiative-placed-on-november-ballot/](http://www.cbsnews.com/8301-505103_162-57419637/california-death-penalty-ban-qualifies-to-be-voter-initiative-placed-on-november-ballot/) (“Opponents of the measure, such as former Sacramento U.S. Attorney McGregor Scott, argue that lawyers filing ‘frivolous appeals’ are the problem, not the death penalty law.”).

69. BLACK’S LAW DICTIONARY 668 (6th ed. 1990).

steps to reform the administration of the death penalty—which has therefore become bloated and at risk of “fall[ing] of its own weight”<sup>70</sup>—this appellate process now takes close to three decades to complete. In Murtishaw’s case, the price tag associated with the state’s three death penalty prosecutions, the expense to incarcerate him on death row over thirty-two years as he pursued his appeals, and the costs for his counsel, investigators, and experts on appeal is conservatively estimated at \$6.8 million over what a sentence of LWOP would have cost.<sup>71</sup>

2. Dennis Lawley:

Twenty-Three Years on Death Row,  
Died of Natural Causes on March 11, 2012

Dennis Lawley died in his cell of natural causes after spending twenty-three years on death row for a 1989 contract killing in which he at all times maintained he had no involvement.<sup>72</sup> The prosecution’s theory of the case was that Lawley hired Brian Seabourn to kill Kenneth Stewart, a convicted felon who had robbed and beaten Lawley. “Two criminalists said that the bullet that killed the victim matched a revolver found in Lawley’s home, a .357-caliber Ruger.”<sup>73</sup> Seabourn was convicted of second-degree murder and later admitted that he killed Stewart, “but insisted the order came [not from Lawley but] from the Aryan Brotherhood, a violent prison gang.”<sup>74</sup>

Seabourn said he used a .357-caliber Smith & Wesson revolver [to kill Stewart] . . . and buried it in a Modesto field.

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70. Chief Justice Ronald M. George, Testimony Before the Commission on the Fair Administration of Justice 43 (Jan. 10, 2008), available at <http://www.ccfaj.org/documents/reports/dp/expert/Chief's%20Testimony.pdf>.

71. Three capital trials at \$1 million each (\$3 million) + three direct appeals at \$100,000 each (\$300,000) + one state habeas corpus proceeding (\$200,000) + one federal habeas proceeding (\$1 million) + \$2.3 million in additional housing expenses associated with housing a prisoner on death row = \$6.8 million. See *Executing the Will of the Voters?*, *supra* note 2, at S75, S84, S93–94, S103–06.

72. Maura Dolan, *Death Row Inmate Trying to Overturn Verdict Dies in Cell*, L.A. TIMES, Mar. 14, 2012, at AA4.

73. *Id.*

74. *Id.*

In 2007, a lawyer for Lawley received state funds to search the field where Seabourn said he hid his weapon. A rusty .357-caliber Smith & Wesson was discovered, but the revolver was so degraded that authorities were unable to compare its barrel markings with those on the bullet that killed the victim.<sup>75</sup>

Lawley's attorney of nineteen years, Scott F. Kauffman, maintains that his client was innocent of the 1989 murder-for-hire that sent him to San Quentin and is seeking a posthumous ruling on his client's habeas petition.<sup>76</sup> "Lawley deserves a ruling on his claims, even if the outcome will have no practical consequence. Mr. Lawley's death does not erase the injustice of his conviction and sentence," Kauffman told the court in a written motion.<sup>77</sup> The delays in California's system prevented the court from addressing Lawley's claim—filed in 2008—so his petition for a writ of habeas corpus based on actual innocence was still pending when he died.<sup>78</sup> Lawley's petition was dismissed by the federal court on May 18, 2012, "[i]n light of Lawley's death."<sup>79</sup>

As the deaths of Murtishaw and Lawley demonstrate—along with the eighty other death-row inmates who have died in California's prison—there is absolutely no support for the contention, advanced by some pro-death-penalty organizations,<sup>80</sup> that replacing the death penalty with LWOP will increase housing or medical care costs for the state. Death-row inmates grow old and need costly medical care, just as LWOP inmates do. Indeed, death-row inmates receive the same medical care that LWOP inmates receive, but it is provided at a premium due to logistical problems and security concerns that are endemic to providing healthcare to

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75. *Id.*

76. Maura Dolan, *Client Dies in Prison, but Lawyer Still Seeks to Prove Innocence*, L.A. TIMES (May 8, 2012), <http://articles.latimes.com/2012/may/08/local/la-me-death-appeal-20120509>.

77. *Id.*

78. *Id.*

79. Order Dismissing Action at 2, *Lawley v. Wong*, No. 08-cv-01425 (E.D. Cal. May 18, 2012), ECF No. 66.

80. *E.g.*, *Quick Facts: Vote No on Prop 34*, WAITING FOR JUSTICE, <http://waitingforjustice.net/the-truth-about-the-costs/> (last visited Sept. 2, 2012).

aging inmates on San Quentin's death row.<sup>81</sup> The vast majority of death-row prisoners who have died in California have lived out the remainder of their natural lives in state prison, just as LWOP inmates do.<sup>82</sup> This is because most death-row inmates die in prison of natural causes.<sup>83</sup> They just do so in a much more costly manner than do LWOP inmates.<sup>84</sup>

### 3. Ralph International Thomas: Conviction and Sentence of Death Overturned After Twenty-Six Years on Death Row

On May 10, 2012, the Ninth Circuit Court of Appeals upheld a district court's order granting Ralph International Thomas's petition for a writ of habeas corpus and overturning his conviction and death sentence, which had been imposed on him for two murders committed in 1985.<sup>85</sup> As we noted in our Article, Thomas has steadfastly maintained his innocence.<sup>86</sup> His conviction was based entirely on circumstantial evidence.<sup>87</sup> Nevertheless, Thomas remains on death row.<sup>88</sup> In a recent court filing, his attorney described his situation as follows:

Ralph International Thomas has been held by the State under sentence of death for almost 26 years—including several years in which his case languished, awaiting action by the California Supreme Court. During that time, his health has been destroyed. While in the care of the State's prison medical system—which this Court held to be constitutionally inadequate—he suffered a series of strokes and is in the grip of a variety of other chronic, life-

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81. See CAL. STATE AUDITOR, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION: INMATES SENTENCED UNDER THE THREE STRIKES LAW AND A SMALL NUMBER OF INMATES RECEIVING SPECIALTY HEALTH CARE REPRESENT SIGNIFICANT COSTS 53 (2010), available at <http://www.bsa.ca.gov/pdfs/reports/2009-107.2.pdf> (stating that San Quentin inmates require more correctional officers to guard them while in hospitals).

82. *Executing the Will of the Voters?*, *supra* note 2, at S51, S53.

83. *Id.*

84. *Id.* at S104.

85. *Thomas v. Chappell*, 678 F.3d 1086, 1087–88 (9th Cir. 2012).

86. *Executing the Will of the Voters?*, *supra* note 2, at S179.

87. *Thomas*, 678 F.3d at 1090.

88. DIV. OF ADULT OPERATIONS, CAL. DEP'T OF CORR. & REHAB., CONDEMNED INMATE LIST (Aug. 3, 2012), available at [http://www.cdcr.ca.gov/Capital\\_Punishment/docs/CondemnedInmateListSecure.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf).

threatening illnesses. According to the State's medical staff, for the last four years Mr. Thomas has been unable to perform the most basic "activities of daily life," such as dressing himself or keeping himself clean.

This Court has concluded that Mr. Thomas never received a fair, constitutionally adequate trial. Moreover, in reaching that conclusion, the Court reviewed a substantial quantity of evidence strongly pointing to the conclusion that Mr. Thomas in fact did not commit the murders for which he has already suffered such devastating punishment—that they were likely the crimes of another.

There is a grave likelihood that Mr. Thomas will soon die in prison without ever again knowing freedom or receiving the fair trial that is his constitutional due, and that he and his family—mother, siblings, daughter and grandchildren who have remained devoted to him—will spend those last days without any meaningful comfort or contact.<sup>89</sup>

The cases of Lawley and Thomas both raise serious questions about the infallibility of our criminal justice system. Despite the considerable procedural protections provided to these capital defendants and inmates, Lawley and Thomas have spent nearly five decades on death row. In deciding whether to replace the death penalty with LWOP, voters should carefully consider the issues raised in these cases against the backdrop of the recent data compiled by the National Registry of Exonerates, which shows California to be second in the nation in the number of wrongful convictions.

*B. New Projections:  
Death Penalty Will Cost \$5 Billion to \$8 Billion  
More Than LWOP (2013–2050)*

A few recent studies examining the various costs incurred in administering the death penalty in California inform and add precision to some of the estimates in our Article.

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89. Appellee's Opposition to Motion to Stay Mandate at 4–5, *Thomas v. Chappell*, 678 F.3d 1086 (9th Cir. 2012) (No. 09-99024) (footnote omitted).

### 1. Pretrial Investigation Costs & Trial Costs

In a recent study, Nicholas Petersen and Mona Lynch reviewed records from the Office of the District Attorney for Los Angeles County, which has prosecuted “[n]early 30 percent of defendants on California’s death row.”<sup>90</sup> They found that only 42 percent of the death penalty trials held in Los Angeles County between 1996 and 2006 resulted in a death sentence.<sup>91</sup> As a result, “valuable resources were spent preparing the other 58 percent of death penalty cases for capital-litigation that . . . result[ed] [in a sentence of life imprisonment without possibility of parole].”<sup>92</sup> The report concluded that during that time period, Los Angeles County spent upwards of \$338 million prosecuting capital cases (\$1.2 million per death penalty case multiplied by 282 death-penalty cases).<sup>93</sup> Of that, \$200 million was spent on death-penalty trials that resulted in sentences of LWOP.<sup>94</sup> Thus, the findings in the Petersen and Lynch study support our estimate that capital trials cost taxpayers an average of \$1 million more per trial than other noncapital first-degree-murder trials.<sup>95</sup> Their

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90. Nicholas Petersen & Mona Lynch, *Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, 102 J. CRIM. L. & CRIMINOLOGY (forthcoming 2012) (manuscript at 35) (on file with author). Petersen and Lynch found that Los Angeles County is a reliable cost indicator because of the number of prisoners the county sends to death row.

In 2009, Los Angeles County distinguished itself by sentencing the most defendants to death in the nation, sending 13 people to death row. Not only did it beat out other county level jurisdictions nationally, there was not a single state other than California that produced double-digit death sentences for the year. Moreover, Los Angeles County accounted for 12 percent of the nation’s death sentences that year.

*Id.* (citation omitted) (manuscript at 35–36).

91. *Id.* (manuscript at 28–29).

92. *Id.* (manuscript at 28).

93. *Id.*

94. *Id.* (manuscript at 28–29).

95. In estimating that capital trials cost \$1 million more on average, we did not provide a breakdown as to what costs are for defense counsel, or what the costs are to the court system. Petersen and Lynch, however, calculated that “[t]he complexity of capital cases requires the appointment of specialized defense attorneys at a rate of about \$324,665 per case compared to a rate of \$78,273 per non-capital case.” *Id.* (manuscript at 14). They also calculated that “[t]he number of days spent in court represents the next source of disparity. On average, death penalty cases involve 120 more court days than non-capital cases, at a rate of \$3,589 per court day. [120 x \$3589 = \$430,680 per case].” *Id.* Thus, Petersen and Lynch estimate that the cost of defense counsel and court time alone in capital cases averages \$675,000 more than in other noncapital first-degree-murder trials. When the other pretrial and trial costs that are unique to capital cases are added to that figure (e.g., investigators, expert witnesses for both sides, daily copy for transcripts), the data in Petersen and Lynch’s analysis supports our conclusion that California taxpayers are currently spending at a minimum about \$40 million per year on death-penalty trials.

findings also demonstrate that \$200 million have been spent on cases in Los Angeles County where the prosecutor either contemplated seeking or sought the death penalty, but where no conviction or sentence of death was ever returned by a jury and the defendants were instead sentenced to LWOP.

## 2. Plea Bargaining

There is no credible evidence that replacing the death penalty with LWOP will result in significant added trial costs to the state due to defendants refusing to plead guilty and forcing prosecutors to meet their burdens at trial.<sup>96</sup> The few studies that have been done support the proposition that *the threat of the death penalty does not increase plea bargain rates*.<sup>97</sup>

In one study, which looked at murders committed in large urban counties in 1988, the data showed that the number of defendants pleading guilty to lengthy sentences in the five largest California counties that year was 5 to 6 percent.<sup>98</sup> This rate is consistent with the findings in the Final Report of the CCFAJ, which concluded that fewer than 5 percent of the 120 murder prosecutions that take place every year in California and result in an LWOP sentence are the products of plea bargains.<sup>99</sup> The CCFAJ concluded that if all of these prosecutions went to trial as regular murder cases, without the death penalty, the additional costs would be far less than the costs of California's death-penalty system.<sup>100</sup>

Similarly, Petersen and Lynch point out that funding future first-degree LWOP murder trials—which would not have taken place, purportedly, but for the removal of the threat of the death penalty—would be significantly less costly than the current system wherein

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96. Kent S. Scheidegger, *The Death Penalty and Plea Bargaining to Life Sentences*, CRIM. JUST. LEGAL FOUND., Feb. 2009, at 10. The CJLF study found that there was no statistical difference between the rate of plea bargaining in counties with the death penalty and counties without the death penalty, based on data from 1988. *Id.* The study showed that, nationally, counties with the death penalty have a higher rate of people pleading guilty to longer sentences but not a higher rate of people pleading guilty. *Id.* What this demonstrates is that using the death penalty to plea bargain does not save money since the same number of cases would be resolved through a plea bargain without the death penalty. *Id.* at 11–12.

97. *Id.* at 2–3.

98. *Id.* at 11. The percentage of people pleading guilty to lengthy sentences in those counties ranged from 2.8–6.3 percent. *Id.*

99. FINAL REPORT, *supra* note 18.

100. *Id.* at 69–70.

prosecutors frequently charge special circumstances, triggering the mounting of a vigorous, costly, publicly-funded capital defense team, in cases that are not ultimately tried as death penalty cases.<sup>101</sup>

### 3. Costs of Incarceration

We have renewed our request to the California Department of Corrections and Rehabilitation for information that will shed light on how much more it costs to house death-row inmates. As of June 23, 2012, the CDCR continues to maintain that “[n]o information is currently available for per capita housing of a condemned inmate.”<sup>102</sup>

There is no real dispute that it costs significantly more to house death-row inmates than other prisoners. Unlike other prisoners, they are housed in single cells, so more physical space is required to house them.<sup>103</sup> Additional security also is required for supervising and escorting death-row inmates because (1) death-row inmates are allowed scheduled visits seven days a week to meet with their attorneys; (2) most death-row inmates are allowed yard access seven days a week; (3) escort costs for medical visits are higher for death-row inmates due to the physical layout of the prison at San Quentin; (4) most death-row inmates have access to canteen goods, group religious services, and other activities; and (5) most death-row inmates require more legal mail processing and records management due to the ongoing and lengthy nature of the legal process.<sup>104</sup>

A recent study by Trisha McMahan and Tim Gage, designed to determine what the precise savings to taxpayers would be should voters pass the SAFE California Act, concluded that based on current mortality rates of death-row inmates, it will cost the state an estimated \$1,134,800,000 *more* to house inmates on death row between 2013 and 2050 than it would to house the same number of inmates in LWOP housing.<sup>105</sup> We believe that this cost estimate is

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101. See Petersen & Lynch, *supra* note 90 (manuscript at 8).

102. Letter from Lee Seale, Dir., Div. of Internal Oversight & Research, to Senior Ninth Circuit Judge Arthur L. Alarcón, (June 23, 2012) [hereinafter Letter From Lee Seale to Senior Ninth Circuit Judge Arthur L. Alarcón] (on file with author).

103. CAL. LEGISLATIVE ANALYST’S OFFICE, LAO ANALYSIS OF PROPOSITION 34 (July 18, 2012), available at [http://www.lao.ca.gov/ballot/2012/34\\_11\\_2012.pdf](http://www.lao.ca.gov/ballot/2012/34_11_2012.pdf).

104. McMahan & Gage, *supra* note 3, at 4.

105. *Id.* at 9.



low and that it understates the future savings should the death penalty be replaced with LWOP.<sup>106</sup>

Nevertheless, the analysis prepared by McMahon and Gage provides a useful conservative estimate. Because the report's mortality schedules estimate the rate at which death-row inmates will die between 2013 and 2050 before being executed, we are able to calculate more precisely the possible range of cost savings associated with eliminating death-row housing and replacing the death penalty with LWOP.<sup>107</sup> Incorporating the projected death-row population established by McMahon and Gage, based on twenty new inmates added annually, we calculate that at the cost figure we relied upon in our Article,<sup>108</sup> which has not been disavowed by the CDCR, death-row housing costs between 2013 and 2050 could be as high as \$3.4 billion more than LWOP housing costs between 2013 and 2050. This cost may be even higher if California constructs its proposed new death-row housing unit, called the Condemned Inmate Complex (CIC).<sup>109</sup>

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106. McMahon and Gage concluded that the cost to house an inmate on death row is \$85,000 per inmate, per year, which is—according to their calculations—\$40,000 more than the \$45,000 it costs to house an LWOP inmate per year. *Id.* at 3–4. We believe that this figure is too low because it is not supported by the CDCR's published data, which states that its overall per capita cost for inmates throughout the system is \$52,363. Letter From Lee Seale to Senior Ninth Circuit Judge Arthur L. Alarcón, *supra* note 102. Given the nature of the violent crimes which result in a sentence of LWOP, it does not seem likely that LWOP inmates are housed less expensively than less violent inmates. The high-end figure assumes that the housing costs are as stated in our Article, and calculates the death row population from 2013 to 2050 based on the mortality rate schedules supporting McMahon and Gage's research. *See McMahon & Gage, supra* note 3, at 6–9. The estimate of \$4 billion to \$9 billion does not take into account any rate of inflation.

107. McMahon & Gage, *supra* note 3, at 6–9.

108. This figure is \$90,000 per inmate, per year as of 2005, adjusted for inflation to \$105,905 per inmate as of 2012. *See Executing the Will of the Voters?*, *supra* note 2, at S106.

109. *See CAL. STATE AUDITOR, ALTHOUGH BUILDING A CONDEMNED INMATE COMPLEX AT SAN QUENTIN MAY COST MORE THAN EXPECTED, THE COSTS OF OTHER ALTERNATIVES FOR HOUSING CONDEMNED INMATES ARE LIKELY TO BE EVEN HIGHER 17* (2008), available at <http://www.bsa.ca.gov/pdfs/reports/2007-120.2.pdf>. It is unclear whether the estimated cost of \$5.8 million per year to operate the new facility replaces or supplements current costs. *See id.*

#### 4. Costs of Lethal Injection Litigation: More Money Wasted

##### *a. California federal court: Lethal injection litigation*

Since 2004, the State of California has been defending against challenges to the constitutionality of its lethal injection protocols in the federal courts.<sup>110</sup> Prior to 2005, federal courts had denied California death-row inmates' challenges to the state's lethal injection procedures.<sup>111</sup> But in April 2005, the *Lancet*, a British medical journal, published a study that analyzed the toxicology reports of forty-nine inmates who had been executed by lethal injection.<sup>112</sup> The study revealed that 43 percent of these inmates had concentrations of sodium thiopental in their blood that were consistent with awareness.<sup>113</sup> This finding "apparently lend[s] at least some credence to the questions about the three-drug combination that had been raised by [inmates] in California and by others in similar cases around the country."<sup>114</sup>

Michael Morales, who was scheduled to be executed in 2006 after nearly twenty-three years on death row, filed suit in federal court that February against the CDCR challenging the state's lethal injection procedures and protocols.<sup>115</sup> The district court in that case issued a memorandum of findings—including a finding that "California's implementation of its lethal-injection protocol was deficient"<sup>116</sup>—and asked the state to respond.<sup>117</sup> The district court judge who presided over the case commented:

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110. *Cooper v. Rimmer*, No. C 04-436, 2004 WL 231325 (N.D. Cal. Feb. 6, 2004).

111. *See, e.g., Cooper v. Rimmer*, 379 F.3d 1029, 1030 (9th Cir. 2004).

112. Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412 (2005).

113. *Id.*

114. Jeremy Fogel, *In the Eye of the Storm: A Judge's Experience in Lethal-Injection Litigation*, 35 FORDHAM URB. L.J. 735, 739 (2008).

115. *Morales v. Cate*, 757 F. Supp. 2d 961, 965 (N.D. Cal. 2010).

116. Fogel, *supra* note 114, at 746.

117. *Id.* The *Los Angeles Times* reports that Judge Fogel concluded in December 2006 that there was "more than adequate" evidence that the state was violating the U.S. Constitution after hearing testimony that lethal injection procedures were performed in a dark, cramped room by men and women who knew little about the drugs they administered. Medical experts in the case testified before U.S. District Judge Jeremy Fogel in San Jose that they could not rule out the possibility that one or more inmates

On March 5, 2007, without notice to the state legislature or apparently even to the Governor's Office, the Department of Corrections and Rehabilitation began construction of a new lethal injection chamber at San Quentin. The project became a matter of general public knowledge only after the cost exceeded the amount California state agencies may spend without prior legislative approval. When asked by a legislative oversight committee why the construction had commenced without its knowledge, a corrections official responded on behalf of San Quentin's warden that the Court had ordered that a new chamber be built. When it was pointed out that the Memorandum contained no such requirement, the warden (a named party in *Morales*) admitted that he had not read the memorandum. The Governor subsequently suspended construction of the new chamber pending legislative authorization, which ultimately was given in August 2007.<sup>118</sup>

Reports put the cost to build the new lethal injection chamber at \$800,000.<sup>119</sup> It has never been used. Executions in California have been halted since early 2006 pending the outcome of the federal suit challenging the state's procedures.<sup>120</sup> The CDCR spent four years devising new lethal injection protocols, and, in August 2010, California regulators in the Office of Administrative Law "approved [the] revised lethal injection procedures ordered by a federal judge, who halted capital punishment in the state until prison officials improved the execution process. The new regulations . . . included detailed instructions on how prison officials should administer the

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had been conscious and experienced an excruciating sensation of drowning or strangulation before death.

Henry Weinstein, *High Court Takes Up Lethal Injection*, L.A. TIMES (Jan. 7, 2008), <http://articles.latimes.com/2008/jan/07/local/me-secrecy7>.

118. Fogel, *supra* note 114, at 747 (citing CAL. S. PUB. SAFETY COMM., FINDINGS OF S. PUB. SAFETY COMM. INFORMATIONAL HEARING ON SAN QUENTIN DEATH CHAMBER, 2007-08 Sess. (Cal. 2007)).

119. Paul Elias, *Judge Clears Way for First Execution Since 2006*, HUFFINGTON POST (Sept. 25, 2010), [http://www.huffingtonpost.com/2010/09/24/albert-greenwood-brown-or\\_n\\_738682.html](http://www.huffingtonpost.com/2010/09/24/albert-greenwood-brown-or_n_738682.html); Rina Palta, *Exit Interview: Prison Official Talks Death Penalty, Hunger Strike, More*, THE INFORMANT (Oct. 26, 2011), <http://informant.kalwnews.org/2011/10/outgoing-prison-official-scott-kernan-talks-death-penalty-hunger-strike-and-growing-up-at-san-quentin/>.

120. *Calif Regulators OK New Lethal Injection Methods*, KSBY (Aug. 2, 2010), <http://www.ksby.com/news/calif-regulators-ok-new-lethal-injection-methods/>.

lethal three-drug cocktail to condemned inmates.”<sup>121</sup> On Friday, December 16, 2011, Marin County Superior Court Judge Faye D’Opal “threw out California’s new lethal injection protocols, which [had] been five years in the making, because corrections officials failed to consider a one-drug execution method now in practice in other death penalty states.”<sup>122</sup> “In ruling that the new protocols were ‘invalid,’ Judge D’Opal noted that one of the state’s own experts recommended the single injection method as being superior to the three-drug sequence approved last year.”<sup>123</sup>

*b. California Court of Appeal:  
Petition seeking immediate executions*

On April 19, 2012, the CJLF filed another petition for a writ of mandate in the California Court of Appeal for the Third District, this time seeking the immediate execution of fourteen inmates on death row, including Michael Morales, “whose sentences have been fully reviewed and who are ready for execution.”<sup>124</sup> The petition was filed on behalf of Bradley Winchell, brother of Terri Winchell, whom Michael Morales was convicted of murdering in 1981.<sup>125</sup> The Court of Appeal dismissed the petition, and on June 25, 2012, the CJLF filed a request for review in the California Supreme Court.<sup>126</sup> On August 8, 2012, the California Supreme Court denied the petition for review.<sup>127</sup>

*c. District of Columbia federal court:  
FDA lethal injection drug litigation*

In another lawsuit, filed in the District of Columbia district court, a group of death-row inmates incarcerated in Arizona,

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121. *Id.*

122. Carol J. Williams, *California’s New Lethal Injection Protocol Tossed by Judge*, L.A. TIMES (Dec. 17, 2011), <http://articles.latimes.com/2011/dec/17/local/la-me-executions-20111217>.

123. *Id.*

124. Petition for Writ of Mandate at 1–2, *Winchell v. Cate (Morales)*, No. C070851 (Cal. Ct. App. Apr. 19, 2012).

125. *Id.* at 2.

126. Petition for Review, *Winchell v. Cate (Morales)*, No. S203526 (Cal. June 25, 2012).

127. Order Denying Petition for Review, *Winchell v. Cate (Morales)*, No. S203526 (Cal. Aug. 8, 2012); *see also Appellate Court Case Information for Winchell v. Cate (Morales)*, CAL. COURTS, [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc\\_id=2017855&doc\\_no=S203526](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2017855&doc_no=S203526) (last visited Aug. 24, 2012) (listing the petition for review as denied).

California, and Tennessee has sued the Food and Drug Administration (FDA) for “improperly allowing shipments of a misbranded and unapproved new drug to enter the United States for use in state lethal injection protocols, which will be used during plaintiffs’ executions.”<sup>128</sup> Three drugs are typically used in lethal injections, including sodium thiopental, which puts the inmate to sleep before fatal doses of the other two drugs are administered.<sup>129</sup> The sole manufacturer of sodium thiopental in the United States ceased production of the drug in 2009.<sup>130</sup> Since that time, California and other states have been purchasing the drug overseas.<sup>131</sup>

In March 2012, U.S. District Judge Richard Leon ruled that the FDA erred in allowing state prisons to import the foreign-made drug because the FDA had not approved it for “safety and effectiveness,” as required for imports.<sup>132</sup> The district court ordered the FDA to “immediately notify any and all state correctional departments which it has reasons to believe are still in possession of any foreign manufactured thiopental that the use of such drug is prohibited by law and that, that thiopental must be returned immediately to the FDA.”<sup>133</sup> The FDA’s position was that reviewing such a drug designed for death “clearly falls outside of F.D.A.’s explicit public health role.”<sup>134</sup> The FDA sent demand letters to state prisons, but “more than a dozen states have refused to comply with the [court’s] order.”<sup>135</sup> On May 25, 2012, California defied the FDA’s request to turn over its supply of sodium thiopental.<sup>136</sup> The CDCR contends that it is not bound by the ruling made by a federal judge in

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128. *Beaty v. FDA*, No. 11-289, 2012 WL 1021048, at \*1 (D.D.C. Mar. 27, 2012).

129. *Id.* at \*2.

130. *Id.*

131. *Id.*

132. *Id.* at \*8–10.

133. Order on Summary Judgment at 2, *Beaty v. FDA*, No. 1:11-cv-00289-RJL (D.D.C. Mar. 27, 2012), EFC No. 24; *see also* Letter from Domenic J. Veneziano, Dir., Div. of Import Operations and Policy, Dep’t of Health and Human Servs., to James D. Smith, Chief of Criminal Appeals, Office of the Attorney Gen. (Apr. 2012), *available at* [http://www.ago.ne.gov/resources/dyn/files/772439zea71da6c/\\_fn/042012+LetterFromFDA,Thiopental.pdf](http://www.ago.ne.gov/resources/dyn/files/772439zea71da6c/_fn/042012+LetterFromFDA,Thiopental.pdf).

134. *Beaty*, 2012 WL 1021048, at \*3.

135. *Calif. Defies Order to Turn Over Execution Drug*, RECORDNET.COM (May 25, 2012), [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20120525/A\\_NEWS/120529900](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20120525/A_NEWS/120529900).

136. *Id.*

Washington, D.C.<sup>137</sup> The FDA is appealing the district court's ruling in the United States Court of Appeals for the District of Columbia.<sup>138</sup>

*d. Los Angeles County: Motions seeking immediate executions with one-drug injection*

On May 2, 2012, the Los Angeles District Attorney's Office filed motions in Los Angeles Superior Court asking the judge to order that the warden of San Quentin State Prison use a single-drug lethal injection method to put convicted murderers Mitchell Carleton Sims and Tiequon Cox to death or show cause why the executions cannot proceed.<sup>139</sup> "Cooley, who is retiring after three terms, is the first district attorney in California to make the request and his attempt comes just months before voters decide whether to abolish capital punishment."<sup>140</sup>

On June 5, 2012, the *Los Angeles Times* editorial board published an article calling on the Los Angeles District Attorney's Office and other prosecutors to stop pursuing capital murder cases until voters have had a chance to vote on the SAFE California Act, Proposition 34, on November's ballot.<sup>141</sup> According to the *Times*, "[p]ublic support for capital punishment has been plummeting in recent years, and for reasons of cost, morality and effectiveness, voters may finally be willing to pursue a better course."<sup>142</sup> The *Times* urged prosecutors to "give [voters] their chance to weigh in before continuing with a penalty that is no more protective of society than life without parole."<sup>143</sup>

The Los Angeles District Attorney's Office, however, has refused to stop pursuing capital case litigation until after the voters have had the opportunity to decide whether they would like to

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137. *Id.*

138. Statement of Issues at 1, *Cook v. FDA*, No. 12-5176 (D.C. Cir. July 2, 2012), ECF No. 1381431.

139. Dan Whitcomb, *Prosecutors Seek to Resume California Executions After 6-year Ban*, REUTERS (May 3, 2012), <http://www.reuters.com/article/2012/05/03/us-usa-california-executions-idUSBRE84206820120503> ("Los Angeles prosecutors said in court papers that the one-drug protocol, which was being used in Ohio, Washington and Arizona for lethal injections, had been upheld by courts as constitutional.").

140. *Calif. Defies Order to Turn Over Execution Drug*, *supra* note 135.

141. Editorial, *Don't Seek the Death Penalty: Until Voters Decide on Its Future*, *L.A.'s D.A. and Other Prosecutors Shouldn't Pursue Capital Cases*, L.A. TIMES, June 5, 2012, at A12.

142. *Id.*

143. *Id.*

“pursue a better course.”<sup>144</sup> Los Angeles Superior Court Judge Larry Fidler heard the District Attorney’s motions on July 13, 2012.<sup>145</sup> Michael Laurence, executive director of the Habeas Corpus Resource Center, argued that the court lacks jurisdiction to order that the executions of Sims and Cox be carried out on several grounds.<sup>146</sup> Judge Fidler stated that he had “concerns whether [he has] the authority to do what the district attorney wants [him] to do,” but he ordered the parties to continue with discovery and to return to court on September 10, 2012, for another hearing.<sup>147</sup>

In addition to the costs outlined in our Article, California taxpayers have been shouldering significant costs to finance the ongoing lethal injection litigations and related expenditures, including: (1) the construction of a new lethal injection chamber in 2006, which has never been used;<sup>148</sup> (2) the years-long process of drafting new lethal injection protocols which were thrown out by a federal judge in December 2011;<sup>149</sup> and (3) almost a decade of lethal injection litigation in the state and federal courts.<sup>150</sup> None of the cost figures in our Article, nor any of the cost projections calculated below, include any of the expenses incurred defending against challenges to the state’s lethal injection protocols in the state or federal courts, the costs of the regulatory process, or other costs such as the construction of the new execution facility.

### C. Total Costs: Updated

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144. *See id.*

145. *People v. Cox*, No. A758447 (L.A. Super. Ct. filed Jan. 17, 1985); *People v. Sims*, No. A591707 (L.A. Super. Ct. filed May 15, 1986).

146. *Cox*, No. A758447; *Sims*, No. A591707.

147. Linda Deutsch, *Judge Hears Testimony on One-Drug Executions*, SFGATE (July 13, 2012), <http://www.sfgate.com/news/article/Judge-hears-testimony-on-one-drug-executions-3706073.php>.

148. *See supra* notes 118–120 and accompanying text.

149. *See supra* notes 121–123 and accompanying text.

150. The first lethal injection challenge in federal court in California was filed by Kevin Cooper in 2004, followed by a second suit filed by Donald Beardslee. Morales’s suit was the third, filed in February 2006. Fogel, *supra* note 114, at 736–40 (surveying lethal injection litigation in California).

Expense	Annual Cost in 2009 (as calculated in the Article)	Updated Cost Projections 2013– 2050 <sup>151</sup>	With McMahon & Gage Projected (Lower) Housing Costs 2013–2015
Pretrial Investigation and Trial Costs	\$40 million	\$1.4 billion	\$1.4 billion
Direct Appeal and State Habeas	\$58.5 million	\$2.33 billion	\$2.33 billion
Federal Habeas	\$14 million	\$555 million	\$555 million
Cost of Incarceration	\$71.7 million	\$3.4 billion	\$1.1 billion
Construction and Operation of a New Death Row Facility <sup>152</sup>		\$2.6 billion	\$2.6 billion
<b>TOTAL</b>	\$184.2 million	\$7.7 billion (or \$6.9 billion if new CIC is built)	\$5.4 billion (or \$6.9 billion if new CIC is built)

Since publication of our Article last year, no county, state, or federal agency has come forward to challenge the accuracy of our cost estimates with any specific data, or any other information.

VI. PROPOSITION 34, THE SAFE CALIFORNIA ACT,  
ON THE NOVEMBER 6, 2012 BALLOT

*A. Legislative Analyst's Office  
Preliminary Analysis, October 2011*

Before an initiative can qualify for the ballot, the Legislative Analyst's Office (LAO) must prepare a preliminary analysis of the

151. This column uses the same cost bases as those used in the Article, however the figures in this column have been updated to account for inflation through 2012 and incorporate the death-row population projections included in McMahon and Gage's report.

152. This figure includes \$395.5 million (construction) + \$7.3 million (activation) + \$2.2 billion (operation of new facility from 2013 to 2050—\$58.8 million per year multiplied by thirty-seven years). CAL. STATE AUDITOR, *supra* note 109, at 1. It is unclear from the State Auditor's Report whether the projected costs to construct and annually operate the proposed new CIC facility are inclusive of or in addition to the current costs associated with housing inmates on death row. *See id.* We assume for purposes of this estimate that the projected annual operating costs are the total costs for housing death-row inmates in the proposed new facility, rather than in addition to the current costs.



proposed initiative's fiscal impact.<sup>153</sup> The LAO's "mission is to provide analysis and nonpartisan advice to the Legislature on fiscal and policy issues."<sup>154</sup> On September 19, 2011, the CJLF wrote to the LAO "to assist" in the preparation of the LAO's preliminary fiscal analysis of the SAFE California Act.<sup>155</sup> The CJLF informed the LAO that our Article was "not a reliable source" and agreed with the LAO's past conclusions that the costs of administering the death penalty in California are "unknown" and "indeterminable."<sup>156</sup> The CJLF also urged the LAO to focus on how much it would cost the state to prosecute cases if "the death penalty [is] eliminated [as] an incentive for some offenders to reach plea agreements."<sup>157</sup>

On October 4, 2011, the LAO published its preliminary analysis of the SAFE California Act.<sup>158</sup> Despite the growing body of evidence supporting the conclusion that the death penalty is costing taxpayers almost \$200 million more than LWOP per year, the LAO's preliminary analysis reported that Proposition 34 would save taxpayers less than \$100 million per year.<sup>159</sup> In other words, although the LAO acknowledged for the first time that the death penalty is

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153. Pursuant to Elections Code section 9005, the LAO reviews proposed statutory initiatives to provide an analysis of their fiscal impacts. CAL. ELEC. CODE § 9005 (West 2012).

154. *LAO Career Frequently Asked Questions*, CAL. LEGIS. ANALYST'S OFFICE, [http://www.lao.ca.gov/laoapp/careers/lao\\_career\\_faq.aspx](http://www.lao.ca.gov/laoapp/careers/lao_career_faq.aspx) (click "What does nonpartisan mean?") (last visited Aug. 15, 2012).

155. Letter from Kent S. Scheidegger, Legal Dir. & Gen. Counsel, Criminal Justice Legal Found., to Drew Soderborg, Senior Fiscal & Policy Analyst, Cal. Legislative Analyst's Office (Sept. 19, 2011) (on file with author).

156. *Id.*

157. *Id.* (quoting Letter from Elizabeth G. Hill, Legislative Analyst, Cal. Legislative Analyst's Office, and B. Timothy Gage, Dir. of Fin., Cal. Legislative Analyst's Office, to Bill Lockyer, Cal. Attorney Gen. (Sept. 9, 1999), available at [http://www.lao.ca.gov/ballot/1999/990670\\_INT.html](http://www.lao.ca.gov/ballot/1999/990670_INT.html)).

158. Letter from Mac Taylor, Legislative Analyst, Cal. Legislative Analyst's Office, & Ana J. Matosantos, Dir. of Fin., Cal. Legislative Analyst's Office, to Kamala D. Harris, Cal. Attorney Gen. (Oct. 4, 2011), available at <http://www.lao.ca.gov/ballot/2011/110600.pdf> (describing the results of the LAO's preliminary analysis).

159. *Id.* Specifically, the analysis states:

We estimate that this measure would have the following major fiscal effects:

- Net savings to the state and counties that could amount to the high tens of millions of dollars annually on a statewide basis due to the elimination of the death penalty.
- One-time state costs totaling \$100 million from 2012–13 through 2015–16 to provide funding to local law enforcement agencies.

*Id.*

more expensive than LWOP, it estimated that the death penalty is half as expensive as the data shows.

*B. LAO's Final Analysis, July 2012*

On July 18, 2012, the LAO issued its final analysis, which will be included in the voter ballot pamphlet for the November election.<sup>160</sup> The LAO determined that Proposition 34 would result in savings of “\$100 million annually in the first few years, growing to about \$130 million annually thereafter.”<sup>161</sup> The LAO’s analysis includes a section informing voters generally of the background of the death penalty in California, but it does not inform the voters that taxpayers have spent billions of dollars over the last thirty-four years to fund the state’s broken system, which has resulted in only thirteen executions.<sup>162</sup>

The LAO also declined to inform voters that if California replaces the death penalty with LWOP, taxpayers will be spared the burden of constructing the proposed CIC, California’s costly new death-row housing unit, which has been estimated by the state auditor to cost nearly \$400 million to build and \$1.2 billion to operate over the first twenty years.<sup>163</sup> Equally alarming, in our view, is the LAO’s statement that “if the rate of executions . . . increase[s], the future cost of housing inmates who have been sentenced to death would be reduced.”<sup>164</sup> In other words, if the state starts carrying out executions more quickly, the death penalty will not be as costly to taxpayers. That statement suggests that speeding up the appellate process for capital appeals and habeas corpus petitions in California is something that could somehow just magically happen. The LAO does not help voters when it suggests to them that executions could somehow spontaneously start taking place in fewer than twenty-five years from the date of conviction and sentence—the current average delay in California.<sup>165</sup>

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160. LAO ANALYSIS OF PROPOSITION 34, *supra* note 103.

161. *Id.*

162. *See id.*

163. *Executing the Will of the Voters?*, *supra* note 2, at S100.

164. LAO ANALYSIS OF PROPOSITION 34, *supra* note 103.

165. *Death Row Inmates by State*, DEATH PENALTY INFO. CTR. (Apr. 1, 2012), <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>.

The LAO is misleading voters again by implying that the cost savings of replacing the death penalty with LWOP could be offset in the future by an increase in the rate of future executions in California. There is no credible evidence that the rate of executions in California is poised to increase. Instead, the trend in California, and nationwide, is for death-penalty appeals to take longer and longer. Additionally, in California, it is simply not possible to speed up the rate of direct appeals under this State's constitution because all appeals must go directly to the California Supreme Court, which is comprised of only seven justices.<sup>166</sup> There are currently 729 prisoners on death row.<sup>167</sup> The California Supreme Court must review the direct appeal in each and every case.<sup>168</sup> Despite numerous calls for the system to be changed to allow direct appeals in capital cases to be heard by intermediate appellate courts instead of the California Supreme Court, the legislature has not acted to promote such a change. Finally, if the LAO is going to assert that the death-penalty costs will be reduced once executions are expedited, the voters should also be informed that the reforms needed to increase the pace of review—if such changes could be made—*will cost taxpayers an additional \$95 million per year.*<sup>169</sup>

## VII. CONCLUSION

Over the last thirty-four years, more than eighty death-row inmates have died in prison before the state carried out their death sentences—essentially a term of life imprisonment without parole—while only thirteen have been executed. If the system remains on its current course, over 500 more inmates will die on death row of natural causes by 2050. Thus, our current death-penalty scheme essentially *already is an LWOP scheme*, but—according to our calculations—it costs taxpayers roughly an additional \$200 million

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166 See *Justices*, CAL. COURTS, <http://www.courts.ca.gov/3014.htm> (last visited Aug 29, 2012).

167 DIV. OF ADULT OPERATIONS, CAL. DEP'T OF CORR. & REHAB., CONDEMNED INMATE SUMMARY LIST (2012), available at [http://www.cdcr.ca.gov/Capital\\_Punishment/docs/CondemnedInmateSummary.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf).

168. Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 712 (2007).

169. FINAL REPORT, *supra* note 18 (concluding that the State of California will need to spend an additional \$95 million per year on the administration of its death penalty if the state intends to maintain a system that complies with federal constitutional standards).

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per year to maintain the illusion that California has a functioning death penalty.

Despite disputes over what the *precise* figures may be, it is now beyond dispute that maintaining the current death-penalty laws in California is taking a staggering toll on taxpayers and that replacing the death penalty with life in prison without parole will result in significant short- and long-term savings. In November 2012, for the first time in over three decades, voters will have an opportunity to weigh in at the ballot box and decide whether our current broken system makes sense, or whether California can do better.

