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Proposition 62:
Death Penalty.
“The Justice That Works Act of 2016”

Initiative Statute

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I. EXECUTIVE SUMMARY

A. Summary of the Proposition

Proposition 62, *The Justice That Works Act of 2016*, will repeal California's death penalty for first degree murder and replace it with life in prison without the possibility of parole.¹ Proposition 62 will also require death row inmates to work while in prison and pay up to 60 percent of their wages to restitution fines or orders against them.²

A "yes" vote on Proposition 62 aims to repeal the death penalty in California, institute life imprisonment without the possibility of parole as the maximum punishment for first degree murder, and deduct up to 60 percent of an inmate's wages for restitution.³

A "no" vote aims to keep California's death penalty as the maximum punishment for first degree murder and retains the current rate of 50 percent withdrawal from inmate wages for restitution.⁴

B. Ballot Qualification

Mike Farrell requested title and summary on September 15, 2015.⁵ The California Attorney General's office issued the title and summary on November 19, 2015, and the Secretary of State's office required 365,880 signatures for qualification.⁶ Proponents spent a total of 3,192,775.30 dollars to gather the required signatures and submitted the signatures for qualification on May 2, 2016.⁷

II. THE LAW

¹ Cal. Proposition 62, § 4 (2016). Proposition 62 does not repeal the federal death penalty nor remove the possibility that Californians will be sentenced under it. Currently 62 people are sentenced to death federally, one of whom is from California. See *Federal Death Row Prisoners: List of Death Row Prisoners*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/federal-death-row-prisoners - list> (last visited Sept. 17, 2016) (on file with the *California Initiative Review*).

² Cal. Proposition 62, § 4 (2016).

³ Cal. Proposition 62 (2016).

⁴ CAL. PENAL CODE § 190(a) (2016).

⁵ Mike Farrell, *Request for Title and Summary for The Justice That Works Act of 2016*, September 15, 2016, available at [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0066 \(Death Penalty\).pdf?](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0066 (Death Penalty).pdf?) (on file with the *California Initiative Review*). Mike Farrell is a former M*A*S*H actor and movie producer. He works with several non-profits, including Human Rights Watch and various anti-war efforts.

⁶ *California Proposition 62, Repeal of the Death Penalty 2016*, BALLOTEDIA, [https://ballotpedia.org/California Proposition 62, Repeal of the Death Penalty \(2016\)](https://ballotpedia.org/California Proposition 62, Repeal of the Death Penalty (2016)) (last visited Sept. 15, 2016) (on file with the *California Initiative Review*).

⁷ *Id.*

A. Background on California's Death Penalty

California is one of thirty states to permit the death penalty as a criminal sentence.⁸ Twenty states and the District of Columbia prohibit the death penalty.⁹

1. Historical Timeline

The history of capital punishment in California began in 1851 with the Criminal Practices Act authorizing legal executions.¹⁰ In 1871, the Legislature incorporated capital punishment into California's Penal Code, and in 1891, state executions began in San Quentin and Folsom prisons.¹¹ In 1937, California replaced hanging with lethal gas as the form of execution.¹² The law was not retroactive, so all inmates previously sentenced to hanging were still hung.¹³ The last hanging took place in 1942.¹⁴

The State then stayed executions for twenty-five years, due to different California and United States Supreme Court decisions.¹⁵ In a landmark case decided in 1972, *People v. Anderson*,¹⁶ the California Supreme Court found the death penalty constituted "cruel and unusual" punishment under the State Constitution.¹⁷ One hundred seven inmates were then removed from death row and resented to life in prison without the possibility of parole.¹⁸

That same year, Proposition 17 (1972) attempted unsuccessfully to overturn the decision in *Anderson*, but it was not until 1977 that the California Legislature reinstated capital

⁸ *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Aug. 18, 2016) (on file with the *California Initiative Review*).

⁹ *Id.* These include Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and D.C. *Id.*

¹⁰ *The History of Capital Punishment in California*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html (last visited Sept. 20, 2016) (on file with the *California Initiative Seminar*).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *People v. Anderson*, 6 Cal. 3d 628 (1972).

¹⁷ *Id.* at 654. Governor Jerry Brown appointed Chief Justice Rose Bird to the California Supreme Court, where she served as the first woman member of the Court. Chief Justice Bird regularly voted against upholding death penalty convictions and, under her leadership, the Court held the death penalty unconstitutional. Chief Justice Bird lost an affirmation election in 1986 due to death penalty ruling controversy. John H. Culver, *The Transformation of the California Supreme Court*, 61 ALB. L. REV. 1461, 1465–67 (1998).

¹⁸ *Anderson*, 6 Cal. 3d at 657.

punishment.¹⁹ The new death penalty statute allowed evidence during mitigation and reinstated the death penalty in cases of first degree murder under certain conditions.²⁰ These certain conditions include murder for financial gain, murder by a person previously convicted of murder, murder of multiple victims, murder with torture, murder of a peace officer, and murder of a witness to prevent testimony in a case.²¹ In 1978, voters approved Proposition 7, California's current death penalty law.²²

2. Lethal Injection Administration

Lethal injection administration began in California in 1993, when the State gave death row inmates a choice between lethal gas and lethal injection for execution.²³ In 1994, the United States District Court for the Northern District of California in San Francisco decided that cyanide gas constituted "cruel and unusual" punishment, temporarily banning the use of lethal gas in California.²⁴ The United States Ninth Circuit Court of Appeals upheld the ban, resulting in lethal injection as the only method of execution available in California.²⁵ In 2006, death row inmate Michael Morales claimed his Eighth Amendment rights would be violated by execution of his sentence because the lethal injection would subject him to "unnecessary risk of excessive pain."²⁶ The United States District Court agreed and held that California's lethal injection protocol in place at the time did in fact create undue and unnecessary risk of pain.²⁷ The Governor responded by directing the California Department of Corrections and Rehabilitation (CDCR) to undertake review of its lethal injection administration process.²⁸

In 2007, a California Superior Court held that the Administrative Procedures Act (APA) required the CDCR to promulgate its lethal injection protocol as a regulation.²⁹ In 2012, the Marin County Superior Court held that the CDCR still failed to comply with the APA when it promulgated the regulations and the First District Court of Appeal affirmed this in 2013.³⁰ The CDCR proposed new lethal injection regulations to the Office of Administrative Law (OAL) in

¹⁹ *History of Initiatives*, CALIFORNIA SECRETARY OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/resources-and-historical-information/history-california-initiatives/> (last visited Sept. 20, 2016) (on file with the *California Initiative Seminar*).

²⁰ *Id.*

²¹ *Id.*

²² *The History of Capital Punishment in California*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html (last visited Sept. 20, 2016) (on file with the *California Initiative Seminar*).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Morales v. Cal Dep't of Corr. and Rehab.*, 465 F. Supp. 2d 972 (N.D. Cal. 2006).

²⁷ *Id.* at 984.

²⁸ *The History of Capital Punishment in California*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html (last visited Sept. 20, 2016) (on file with the *California Initiative Seminar*).

²⁹ *Id.*

³⁰ *Sims v. Dep't of Corr. and Rehab.*, 216 Cal. App. 4th 1059 (1st Dist. 2013).

October 2015, and OAL published the proposal in its register on November 2016.³¹ The process is lengthy—from the time the CDCR submits its new proposals of the lethal injections regulation to OAL, to re-submitting a modification, to public hearings, to possibilities of being disapproved by OAL—the process to get approved by OAL can take over a year.³²

B. Existing Law

Currently, 748 inmates sit on California’s death row, 21 of whom are female.³³ In California, the death penalty is permitted as the maximum punishment for six crimes: (1) intentionally and maliciously interfering with property of the United States or any state in an attempt to delay preparation for war³⁴; (2) “treason against the state”³⁵; (3) willful perjury causing the conviction and execution of an innocent person³⁶; (4) first degree murder with special circumstances³⁷; (5) assault by a prisoner that leads to death of another prisoner³⁸; and (6) intentionally causing a train wreck that, intentionally or unintentionally, kills another person.³⁹ Each death penalty-eligible crime statutorily requires the penalty to be determined pursuant to Sections 190.3–190.4 of the California Penal Code.⁴⁰

It is unknown how many convictions on California’s death row are for crimes other than first degree murder, but the Los Angeles County District Attorney did file capital murder charges against Juan Manuel Alvarez for train wrecking in 2005.⁴¹

Most, if not all, individuals on death row were found guilty of first degree murder, punishable “by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life.”⁴² In order to be punishable by

³¹ *The History of Capital Punishment in California*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html (last visited Sept. 20, 2016) (on file with the *California Initiative Seminar*).

³² *Id.*

³³ Division of Adult Operations, *Death Row Tracking System, Condemned Inmate List (Secure)*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf (last visited Sept. 6, 2016) (on file with the *California Initiative Review*); Division of Adult Operations, *Death Row Tracking System, Condemned Inmate Summary List*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf?pdf=Condemned-Inmates (last visited Sept. 6, 2016) (on file with the *California Initiative Review*).

³⁴ CAL. MIL. & VET. CODE § 1670–72 (2016).

³⁵ CAL. PENAL CODE § 37(a) (2016).

³⁶ *Id.* at § 128.

³⁷ *Id.* at § 190.2(a)(1)–(17).

³⁸ *Id.* at § 4500.

³⁹ *Id.* at § 219 (The train wreck must be intentional, but the death of others may be unintentional).

⁴⁰ CAL. MIL. & VET. CODE § 1670–72 (2016); CAL. PENAL CODE § 37, 1128, 190.2(a)(1)–(17), 219, 4500 (2016).

⁴¹ Ann M. Simmons & Jack Leonard, *Jury Spares Killer’s Life In Rail Crash*, L.A. TIMES, July 16, 2008, available at <http://articles.latimes.com/2008/jul/16/local/me-metrolink16>. Alvarez’s intentional train wrecking killed 11 individuals. Ultimately, in 2008, the jury found him guilty of murder and sentenced him to life in prison without the possibility of parole. *Id.*

⁴² Cal. Proposition 62, § 4, *amending* CAL. PENAL CODE § 190(a) (2016).

death or imprisoned without the possibility of parole for first degree murder, the state must prove one of 17 special circumstances, as outlined in § 190.2(a)(1)–(17), including intentional murder carried out for financial gain, more than one murder committed at the same time and “the defendant was previously convicted of murder, the defendant committed the murder by bomb or explosion, or the defendant murdered a police officer or firefighter engaged in the line of duty.”⁴³

When a defendant is sentenced to death, the California Supreme Court automatically reviews the case in what is called a direct appeal.⁴⁴ There are three possible legal outcomes in a direct appeal for the petitioner: (1) affirm the conviction and death sentence; (2) affirm the conviction, but reverse the death sentence; or (3) reverse the conviction and order a new trial.⁴⁵ Under a direct appeal, attorneys will argue about violations to the state or federal Constitutions and whether evidence was improperly included or excluded by the trial court.⁴⁶ If the conviction and death sentence is affirmed by the California Supreme Court, the case may be appealed directly to the United States Supreme Court.⁴⁷ Additionally, a death penalty case raising federal issues may be brought in federal court.

Death row inmates can also challenge a case through a habeas corpus petition.⁴⁸ Like direct appeals, these petitions are filed directly to the California Supreme Court; however, they raise claims based on facts outside the trial record.⁴⁹ If all habeas state claims are exhausted, the petitioner can appeal federal issues to the U.S. District Court, then the Ninth Circuit Court of Appeals, and finally, the U.S. Supreme Court.⁵⁰

The process of appeal is lengthy, taking as long as two decades to complete.⁵¹ Since April 2006, only 15 death row inmates have been executed; as mentioned above, 748 currently sit on death row.⁵²

⁴³ Cal. Proposition 62, § 6, *amending* CAL. PENAL CODE § 190.2(a)(1)–(17) (2016).

⁴⁴ Interview with Dennis Cusick, Death Penalty Appellate Attorney (Sept. 5, 2016) (notes on file with the *California Initiative Review*). See also Office of Victims’ Services, *A Victim’s Guide to the Capital Case Process*, CALIFORNIA ATTORNEY GENERAL’S OFFICE, available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf> (on file with the *California Initiative Review*).

⁴⁵ Interview with Dennis Cusick, *supra* note 44; See also Office of Victims’ Services, *supra* note 44.

⁴⁶ *Id.*

⁴⁷ *Id.*

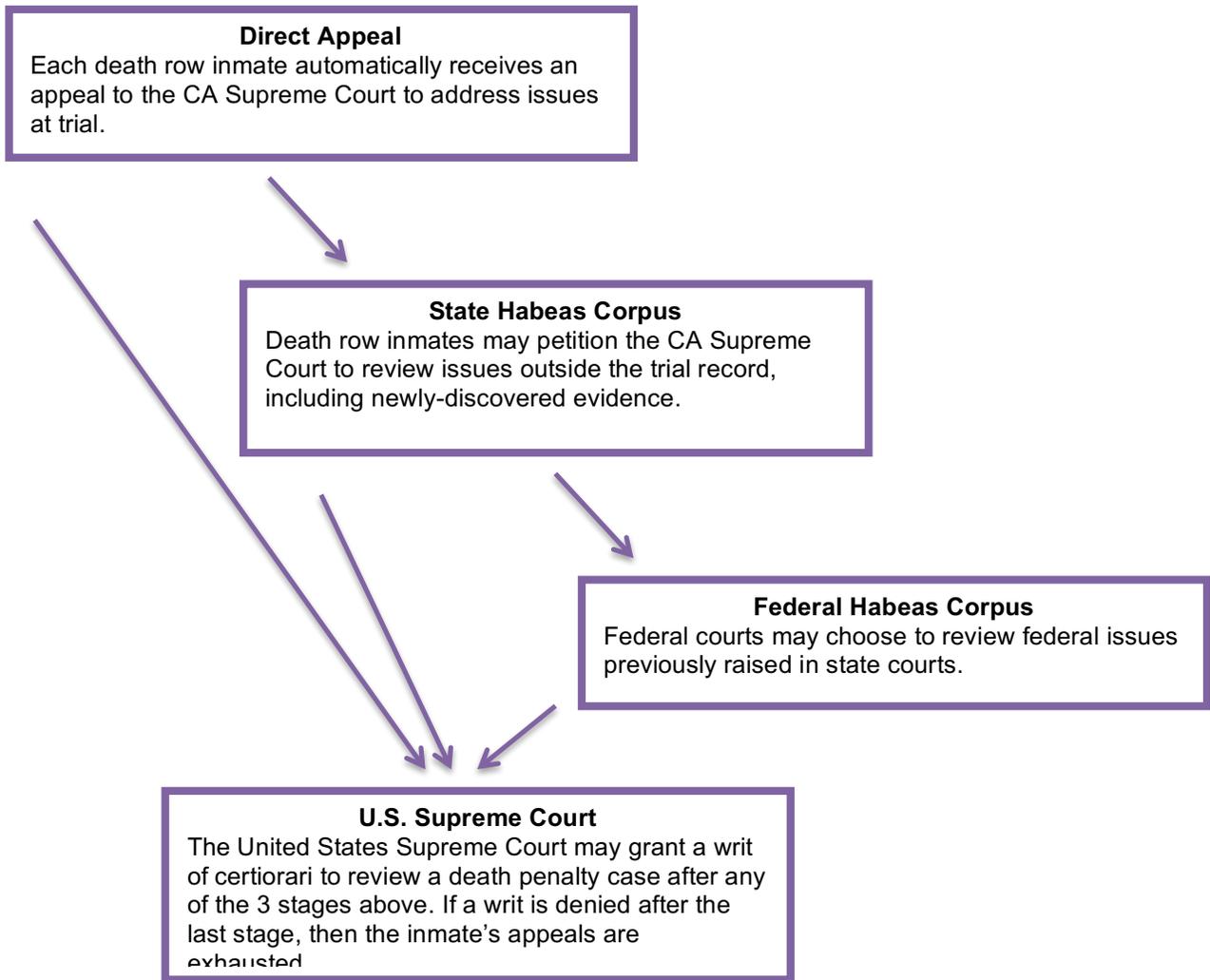
⁴⁸ *Id.*

⁴⁹ Office of Victims’ Services, *supra* note 44.

⁵⁰ *Id.*

⁵¹ Judge Arthur L. Alarcon & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature’s Multi-billion Dollar Death Penalty*, 44 LOY. L.A. L. REV. S41 (2011).

⁵² *Id.* Following graphic also based on: Judge Arthur L. Alarcon & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature’s Multi-billion Dollar Death Penalty*, 44 LOY. L.A. L. REV. S41 (2011).



C. Proposed Changes

If approved, Proposition 62 will repeal the death penalty as a punishment for individuals found guilty of first degree murder with special circumstances and instead permit life imprisonment without the possibility of parole as the maximum punishment.⁵³ Proposition 62 contains a retroactivity clause, converting all death penalty sentences to “imprisonment in the state prison for life without the possibility of parole under the terms and conditions of the proposition.”⁵⁴

Inmates found guilty of murder and sentenced to “life imprisonment without the possibility of parole [...] shall be required to work within a high-security prison as many hours of faithful labor in each day and every day during his or her term of imprisonment.”⁵⁵ The CDCR

⁵³ Cal. Proposition 62 (2016).

⁵⁴ *Id.* at § 10(a)–(c).

⁵⁵ *Id.* at § 4, amending CAL. PENAL CODE § 190(f).

is enabled to set rules and regulations for the inmate's work.⁵⁶ Current law requires inmates to work while in prison and requires up to 50 percent of wages to be taken for restitution.⁵⁷ Proposition 62 requires the Secretary of the CDCR to deduct up to 60 percent of an inmate's earned wages or trust account deposits and "transfer those funds to the California Victim Compensation and Government Claims Board (Board) when an inmate owes a restitution fine or restitution order."⁵⁸ The amount deducted will be credited against the restitution owed.⁵⁹

D. Fiscal Impact

The Legislative Analyst Office (LAO) predicts that repealing the death penalty will save California 150 million dollars annually.⁶⁰ The total cost for appeals, prisoner housing, and execution of a death row inmate is estimated to be over 300 million per inmate over his or her lifetime.⁶¹ The LAO also estimates the State and counties spend 55 million dollars annually on death penalty legal challenges alone.⁶² Death penalty cases take longer and cost more than non-death penalty cases for several reasons: sometimes dual counsel is assigned;⁶³ the condemned inmate's right to several appeals;⁶⁴ and the solitary housing death row inmates are held in.⁶⁵

I. Impacts on Courts

The extended length of capital trials overwhelms the state criminal court system.⁶⁶ There is a documented shortage of available criminal court judges.⁶⁷ The California Supreme Court

⁵⁶ *Id.*

⁵⁷ CAL. PENAL CODE § 2085.5 (2016).

⁵⁸ *Id.* at § 9, amending CAL. PENAL CODE § 2085.5(a)(2). The Board must deduct a minimum of 20 percent, and may deduct a maximum of 60 percent from an inmate's wages or 50 percent from the trust account deposits of the prisoner. *Id.* Inmates guilty of violent felonies are not eligible for transfer to state restitution centers. CAL. PENAL CODE § 6228 (2016).

⁵⁹ Cal. Proposition 62, § 9, amending CAL. PENAL CODE § 2085.5(a)(2) (2016).

⁶⁰ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 8, 2016, at 13, available at <http://voterguide.sos.ca.gov/pdf/complete-vig.pdf> ["NOVEMBER 2016 VOTER GUIDE"].

⁶¹ Carol J. Williams, *Death Penalty Costs California \$184 Million a Year, Study Says*, L.A. TIMES, June 20, 2011, available at <http://articles.latimes.com/2011/jun/20/local/la-me-adv-death-penalty-costs-20110620> (on file with the *California Initiative Review*). Dennis Cusick, an appellate attorney who works on appealing death row cases, estimates the cost per appeal per inmate to be \$250 million per execution. Cusick, *supra* note 44. Ron Briggs, former El Dorado County supervisor, stated that over 384 million is spent on every death row execution, including appeals, prison costs, and the execution costs. Ron Briggs, *Yes on Proposition 62, No on Proposition 66*, California Public Radio Initiative Forum, Sept. 8, 2016 (notes on file with the *California Initiative Review*). However, there is no state or federal government published data detailing the exact cost to prosecute a death penalty case.

⁶² NOVEMBER 2016 VOTER GUIDE, *supra* note 60.

⁶³ *Keenan v. Superior Court*, 31 Cal. 3d 424 (1982); CAL. PENAL CODE 987(d) (2016). The option of appointment of co-counsel in death-penalty cases was authorized by *Keenan v. Superior Court* in 1982 and subsequently was codified under Penal Code section 987, subdivision (d). *Id.*

⁶⁴ ALARCON & MITCHELL, *supra* note 51.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

upheld dismissals of 18 criminal cases in Riverside County because of the state's failure, over a significant amount of time, to provide an adequate number of judges to meet the needs of the county.⁶⁸ Death penalty trials also require hiring multiple investigators and experts on both sides.⁶⁹ The jury selection process is longer because many jurors do not want to impose the death penalty.⁷⁰ Further, Section 190.9 of the Penal Code requires death penalty cases to have transcripts.⁷¹ These are very expensive to begin with, but what makes these transcripts so costly is that the average transcript for a day is approximately 9000 pages.⁷²

Under the proposition, both state and county courts would save money from costs associated with death penalty cases. Death penalty cases would be less expensive for several reasons: (1) the duration of trials will be shortened due to the elimination of the sentencing phase that determines if special circumstances are met to impose the death penalty; (2) jury selection would be shorter because jurors would not be questioned by attorneys concerning their position on imposing the death penalty; (3) county courts will no longer incur costs for prosecution and defense attorneys for death penalty cases and appeals; (4) there will be no more costs related to hiring investigators for death penalty cases; and (5) state courts and federal courts would no longer incur costs for death penalty direct appeals and habeas corpus petitions.⁷³

However, many offenders plead guilty in exchange for not getting the death penalty as punishment.⁷⁴ If their cases go to trial instead of reaching a plea agreement, then the states and counties would again experience an increase in costs for courts and prisons for these inmates.⁷⁵

2. *Impacts on Jails*

Death row in state prison is very costly.⁷⁶ Inmates are assigned more supervision than non-death row inmates⁷⁷ and live in separate cells. In addition, death row inmates are escorted at all times by at least one officer.⁷⁸ Since executions are rare, most inmates die in prison.⁷⁹

3. *Resentencing Inmates and Unknown Factors*

If passed, Proposition 62 will apply retroactively to inmates already on death row.⁸⁰ This means current death row sentences would be converted to life imprisonment without the

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ CAL. PENAL CODE § 190.9 (2016).

⁷² ALARCON & MITCHELL, *supra* note 51.

⁷³ NOVEMBER 2016 VOTER GUIDE, *supra* note 60.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ ALARCON & MITCHELL, *supra* note 51.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ NOVEMBER 2016 VOTER GUIDE, *supra* note 60.

⁸⁰ Cal. Proposition 62 § 10(a) (2016).

possibility of parole.⁸¹ The California Supreme Court would transfer all the death penalty cases to the state Courts of Appeal or superior courts to convert and resolve.⁸² However, the cost to convert all of the inmates on death row to life imprisonment without parole and potentially transfer them to prisons is unknown. It is also unknown if there will be further hearings on the merits or appeals.

E. Proposition 34 (2012)

Like Proposition 62, Proposition 34 (2012) sought to repeal the death penalty for first degree murder and replace it with life imprisonment without the possibility of parole. Proposition 34 also would have applied retroactively and would have required inmates to work and pay restitution.⁸³ In addition, Proposition 34 sought to direct 100 million dollars to law enforcement agencies for homicide and rape case investigations, known as the SAFE fund.⁸⁴ The Legislative Analyst's Office predicted a savings of 100–130 million annually if Proposition 34 had passed.⁸⁵ However, only 48 percent of California voters voted for Proposition 34 in 2012.⁸⁶

III. DRAFTING ISSUES

While the constitutional framework is vested in the legislature, “the people reserve to themselves the powers of initiative and referendum.”⁸⁷ Courts have interpreted this to mean “the power of the initiative must be liberally construed to promote the democratic process.”⁸⁸ When interpreting a ballot initiative, courts must follow the same rules of statutory construction as for legislation.⁸⁹ This means a court first looks to the language of the proposition, giving the words their ordinary and usual meaning.⁹⁰ If the text is ambiguous, the courts then look to the people’s intent.⁹¹

Proposition 62 does not contain a provision to permit repeal or amendment by the State Legislature.⁹² Thus, pursuant to Section 10(c) of Article II of the California Constitution, the

⁸¹ *Id.* at § 10(b).

⁸² *Id.* at § 10(c); NOVEMBER 2016 VOTER GUIDE, *supra* note 60.

⁸³ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 6, 2012, at 37, available at <http://voterguide.sos.ca.gov/pdf/complete-vig.pdf> [“NOVEMBER 2012 VOTER GUIDE”]

⁸⁴ *Id.* SAFE is not an acronym.

⁸⁵ *Id.* at 37–39.

⁸⁶ *California Proposition 34, The End the Death Penalty Initiative (2012)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_34,_the_End_the_Death_Penalty_Initiative_\(2012\)](https://ballotpedia.org/California_Proposition_34,_the_End_the_Death_Penalty_Initiative_(2012)) (last visited Sept. 15, 2016) (on file with the *California Initiative Review*).

⁸⁷ CAL. CONST. art. IV, § I.

⁸⁸ *People v. Park*, 56 Cal. 4th at 795–98; *Raven v. Deukmejian*, 52 Cal. 3d 336, 341 (1990). See also *Amador Valley Joint Union High School Dist. v. Joseph E. Tinney*, 22 Cal. 3d 208, 219–20 (1978); *Brosnahan v. Brown*, 32 Cal. 3d 236 (1982).

⁸⁹ *Park*, 56 Cal. at 795–98.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Cal. Proposition 62 (2016) (failing to grant amendment or repeal authority to the legislature).

Legislature can only amend or repeal Proposition 62 by passing a statute through majority vote that is then put on the ballot for majority approval of the electorate.⁹³

A. Entirely Abolish the Death Penalty, or Only For First Degree Murder?

California permits the death penalty as the maximum punishment for six crimes: intentionally and maliciously interfering with property of the United States or any state in an attempt to delay preparation for war⁹⁴; “treason against the state”⁹⁵; willful perjury causing the conviction and execution of an innocent person⁹⁶; first degree murder with special circumstances⁹⁷; assault by a prisoner that leads to death of another prisoner⁹⁸; and intentionally causing a train wreck that, intentionally or unintentionally, kills another person.⁹⁹

By its plain meaning, Proposition 62 only applies to first degree murder, not the other five death penalty eligible crimes.¹⁰⁰ Proposition 62 does not mention or address any death penalty statutes beyond first degree murder.¹⁰¹ When intent is considered, almost every finding and declaration subsection or purpose and intent subsection in Proposition 62 discusses first degree murder or murder generally, along with the death penalty.¹⁰² The exception to this is subsection (3) of Section 3, stating that a purpose and intent of Proposition 62 is to “eliminate the risk of executing an innocent person.”¹⁰³ Since this is a statutory intent question rather than a constitutional question, the California State Courts’ power to reform a statute to be read constitutionally and consistent with voter intent is irrelevant.¹⁰⁴ Therefore, the Courts will likely find that both the plain meaning the intent of the Proposition is only to repeal capital punishment for first degree murder.

B. Removing the Cross-Reference for other Death Penalty Statutes?

Currently, each death penalty-eligible crime statutorily requires the penalty to be determined pursuant to Sections 190.3–190.4 of the California Penal Code.¹⁰⁵ Proposition 62, if

⁹³ CAL. CONST. art. II, § 10(c).

⁹⁴ CAL. MIL. & VET. CODE § 1670–72 (2016).

⁹⁵ CAL. PENAL CODE § 37(a) (2016).

⁹⁶ *Id.* at § 128.

⁹⁷ *Id.* at § 190.2(a)(1)–(17).

⁹⁸ *Id.* at § 4500.

⁹⁹ *Id.* at § 219. (stating the train wreck must be intentional, but the death of others may be unintentional).

¹⁰⁰ *See* Cal. Proposition 62 (2016) (failing to mention CAL. MIL. & VET. CODE § 1670–72, CAL. PENAL CODE §37(a), 128, 219, 4500, but mentioning CAL. PENAL CODE § 190.2(a)).

¹⁰¹ *See Id.*

¹⁰² *See* Cal. Proposition 62, § 2–3 (2016).

¹⁰³ *See Id.* at § 3(3).

¹⁰⁴ *See Kopp v. Fair Political Practices Comm’n.*, 11 Cal. 4th 607 (1995) (A California State Court may rewrite a statute to avoid a constitutional violation).

¹⁰⁵ CAL. MIL. & VET. CODE § 1670–72 (2016); CAL. PENAL CODE §37(a), 128, 219, 4500 (2016).

enacted, would repeal Section 190.3 of the Penal Code entirely and amend Section 190.4.¹⁰⁶ Sections 190.3 and 109.4 outline evidence allowed and factors considered by a jury when determining whether to sentence a defendant to death.¹⁰⁷ While Proposition 62 removes Section 190.3 from the Penal Code and amends Section 190.4, it does not alter the cross-references for the other death penalty statutes that refer to Sections 190.3 and 190.4, nor does it provide alternative factors and instructions for death penalty sentencing for the other five death penalty eligible crimes.¹⁰⁸

While the question could be irrelevant in practice—most, if not all, death row inmates were convicted of first degree murder—other capital punishment qualifying crimes still exist, still cross reference Sections 190.3 and 190.4, and are still used by district attorneys.¹⁰⁹ If enacted, the State Legislature cannot repeal or amend Proposition 62 to fix the cross references.¹¹⁰ However, the legislature can amend the other capital punishment statutes to enact provisions similar to 190.3 and 190.4 or use case law precedent to ensure the necessary evidence and jury procedures.

C. Resentencing, Converting, or both?

Proposition 62 contains a retroactivity clause specifically stating: “The sentence shall automatically be *converted* to imprisonment in the state prison for life without the possibility of parole under the terms and conditions of this act.”¹¹¹ However, Sections 2085.5(a)(2) and 2085.5(c)(2) of the Penal Code, amended by Proposition 62, outline the wage and trust account removal requirements and apply to “a prisoner *sentenced or resentenced* on or after the effective date of this act.”¹¹² The terms are inconsistent: current defendants and inmates sentenced to death will be *converted* to life imprisonment without the possibility of parole, yet the restitution requirements apply only to inmates *resentenced*, not converted.¹¹³

While the plain meaning is clear—converted does not mean resentenced—and the rule of surplusage applies, the courts will still liberally construe the proponent's intent and give that intent high deference.¹¹⁴ Proposition 62 clearly states its intent to eliminate the death penalty,

¹⁰⁶ Cal. Proposition 62, § 7, *repealing* CAL. PENAL CODE § 190.3.

¹⁰⁷ See CAL. PENAL CODE § 190.3 (outlining the factors that can be considered when determining whether or not a defendant is sentenced to death).

¹⁰⁸ See Cal. Proposition 62, § 7 (repealing Section 190.3 and failing alter the cross references for CAL. MIL. & VET. CODE § 1670–72, Cal. Penal Code § 37, 1128, 190.2(a)(1)–(17), 219, and 4500, nor providing alternative instructions).

¹⁰⁹ See SIMMONS & LEONARD, *supra* note 41 (the Los Angeles District Attorney's Office filed capital murder charges against Juan Manuel Alvarez for training wrecking in 2005).

¹¹⁰ See Cal. Proposition 62 (2016) (failing to grant amendment or repeal authority to the legislature).

¹¹¹ Emphasis added. Cal. Proposition 62, § 10(a)–(c) (2016).

¹¹² Emphasis added. Cal. Proposition 62, § 9, *amending* CAL. PENAL CODE § 2085.5(a)(2), 2085.5(c)(2) (2016).

¹¹³ Compare Cal. Proposition 62 § 10(a)–(c) (using “converting”), with Cal. Proposition 62, § 9, amending CAL. PENAL CODE § 2085.5(a)(2), 2085.5(c)(2) (using “resentenced”).

¹¹⁴ The rule of surplusage requires that “provisions should be read together; an interpretation which would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning.” *City and Cnty. of S.F. v. Farrell*, 32 Cal.3d 47, 54 (1982). See also *People v. Park*, 56 Cal. 4th 782 (2013) (stating that courts should construe propositions liberally to give high deference to voter intent).

replace it with life imprisonment without the possibility of parole,¹¹⁵ and require restitution from inmates convicted of first degree murder and sentenced to life in prison.¹¹⁶ The Voter Guide conflates the terms, stating that “offenders who are currently under a sentence of death would be *resentenced* to life without the possibility of parole.”¹¹⁷ If challenged in Court, the court will likely give the voter’s intent high weight and liberally construe the initiative¹¹⁸ to interpret “converted” and “resentenced” the same, requiring all inmate sentences converted to life in prison without the possibility of parole to complete the same wage and trust account requirements.

D. Sixty Percent to Restitution for Every Person Sentenced to Life Without the Possibility of Parole, Or Only First Degree Murder?

Proposition 62 adds subsection (f) to Section 190 of the California Penal Code, requiring “every person found guilty of murder and sentenced or resentenced” to life in prison without the possibility of parole to be required to work and have his or her wages or trust deposits deducted for restitution fines or orders.¹¹⁹ However, defendants can be sentenced to life imprisonment without the possibility of parole in two situations: (1) he or she is found guilty of first degree murder¹²⁰ or (2) he or she is found guilty of second degree murder and knew or should have known the victim was a police officer acting in the line of duty.¹²¹ This raises the question of whether every person sentenced to life without the possibility of parole—for first or second degree murder—must work and pay up to 60 percent of wages to restitution or whether §190(f) only applies to first degree murder.

Looking first to the plain meaning¹²² of Section 190(f)’s language, the statute clearly states that “*every person*” found guilty of *murder* and sentenced or resentenced to life in prison without the possibility of parole must work and pay up to 60 percent of his wages to restitution.¹²³ Section 190(f) is not ambiguous or unclear; it clearly addresses “every person”¹²⁴ and broadly states, “found guilty of murder,” instead of specifying only first degree murder.¹²⁵ Additionally, it is listed as a separate subsection section, (f), at the end of §190, instead of within the first degree murder-specific subsection.¹²⁶ Based on ordinary meaning, a court will likely find that Section 190(f) also applies to individuals convicted of second degree murder and sentenced to life without the possibility of parole under Section 190(c).

¹¹⁵ See, e.g. Cal. Proposition 62 § 3(1) (stating that the death penalty is ineffective and should be replaced with life in prison without the possibility of parole).

¹¹⁶ See Cal. Proposition 62 § 3(2) (2016).

¹¹⁷ NOVEMBER 2016 VOTER GUIDE, *supra* note 60.

¹¹⁸ *Park*, 56 Cal at 795–98.

¹¹⁹ CAL. PENAL CODE § 190(f) (2016).

¹²⁰ *Id.* at § 190(a).

¹²¹ *Id.* at § 190(c).

¹²² *Park*, 56 Cal. 4th at 795–98.

¹²³ Cal. Proposition 62, § 4, *amending* CAL. PENAL CODE § 190(f) (2016).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

However, if the court also looks to intent, the plain meaning will then be liberally construed.¹²⁷ Section 2, titled Findings and Declarations, primarily discusses first degree murder and the death penalty.¹²⁸ Additionally, each subsection of Section 3, titled Purpose and Intent, discusses either the death penalty or first degree murder; no mention is made of second degree murder and life imprisonment without the possibility of parole.¹²⁹ Subsection 2 of the Section 2 explicitly says that Proposition 62’s purpose and intent is “to require everyone convicted of first degree murder *and* sentenced to life imprisonment without the possibility of parole” to work and pay wages towards restitution.¹³⁰ However, courts regularly interpret “and” to be disjunctive, similar to “or.”¹³¹ Thus, the findings and declarations clause contradicts the purpose and intent clause by explicitly stating that “*All* convicted murderers sentenced to life imprisonment without the possibility of parole.”¹³² Furthermore, the title “The Justice That Works Act of 2016,” is broader than just the death penalty, focusing on “justice” instead of the “death penalty.”¹³³

Ultimately, if the proponent’s intent is liberally interpreted, the broad title and discussion in the findings beyond only first degree murder, in addition to the unambiguous language of §190(f) itself, leads to the interpretation that § 190(f) is applied to both first and second degree murder sentences of life imprisonment without the possibility of parole.

Additionally, this requires the CDCR to maintain two separate systems for restitution collection: inmates sentenced to life imprisonment without the possibility of parole for murder can have up to 60 percent of their wages removed for restitution while other inmates can only have up to 50 percent of their wages removed for restitution.¹³⁴

E. What About Those Sentenced to 25 Years to Life?

Both existing law and Proposition 62 permit individuals convicted of first degree murder to be punished by either (1) “imprisonment in the state prison for life without the possibility of parole” or (2) “imprisonment in the state prison for a term of 25 years to life.”¹³⁵ However, Proposition 62 only requires that individuals who are convicted of first degree murder and sentenced to life in prison without the possibility of parole to be subject to § 190(f), requiring inmates work “as many hours of faithful labor in each day and every day” possible and

¹²⁷ *Raven v. Deukmejian*, 52 Cal. 3d 336, 341 (1990). See also *Amador Valley Joint Union High School Dist. v. Joseph E. Tinney*, 22 Cal. 3d 208, 219–20 (1978); *Brosnahan v. Brown*, 32 Cal. 3d 236 (1982).

¹²⁸ See Cal. Proposition 62, § 2 (2016) (11 findings and declarations, eight of which focus on the death penalty).

¹²⁹ See Cal. Proposition 62, § 3 (2016) (The death penalty or first degree murder in each subsection while failing to mention second degree murder, all convictions of life imprisonment without the possibility of parole, or CAL. PENAL CODE § 190 (c)).

¹³⁰ Cal. Proposition 62, § 3(2) (2016).

¹³¹ *U.S. v. Fisk*, 70 U.S. 445, 447 (1866) (“courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or'”).

¹³² Cal. Proposition 62, § 2(6) (2016).

¹³³ See Cal. Proposition 62 (2016) (entitled “The Justice That Works Act of 2016”).

¹³⁴ Compare CAL. PENAL CODE § 2085.5 (2016), with Cal. Proposition 62, § 9, amending CAL. PENAL CODE § 2085.5 (2016).

¹³⁵ CAL. PENAL CODE §190(a); Cal. Proposition 62, § 4, amending CAL. PENAL CODE §190(a).

permitting the CDCR to deduct money earned by the inmate's work.¹³⁶ Thus, it is unclear if individuals' sentenced to "imprisonment in the state prison for a term of 25 years to life" for first degree murder will also be subject to Section 190(f).¹³⁷

Neither the Findings and Declarations nor the Purpose and Intent sections within the proposition mention "imprisonment in the state prison for a term of 25 years to life."¹³⁸ Section §190(f) states that it only applies to "imprisonment in the state prison for life without the possibility of parole."¹³⁹ The text is unambiguous and is repeatedly used throughout California's Penal Code, including in §190(a).¹⁴⁰ The text is also repeated consistently throughout the proposition.¹⁴¹ Additionally, interpreting Proposition 62 liberally to the full intent of the proponents,¹⁴² the Finding and Declaration section states the intent as requiring "everyone convicted of first degree murder and sentenced to life imprisonment without the possibility of parole to work while in prison" and pay 60 percent of his or her wages for as restitution owed.¹⁴³

Based on both the plain meaning and the intent sections, Proposition 62 likely only requires §190(f) to apply to individuals sentenced to life in prison without the possibility of parole and not those sentenced to 25 years to life for first degree murder.

F. Conflicting Initiatives: Proposition 66 (2016)

Proposition 66 (2016) is another measure this November's ballot.¹⁴⁴ It aims to decrease the time an inmate is on death row by changing the procedures for death penalty appeals and petitions.¹⁴⁵ Proposition 66 designates the superior courts of each county for death penalty petitions, instead of the California Supreme Court, consolidates successive petitions, requires appellate attorneys to take death penalty appeals, requires 70 percent of inmates' wages to go to restitution, and exempts the California Department of Corrections from public comment on lethal injection regulations.¹⁴⁶

Section 10(b) of Article II of the California Constitution states that if two or more measures approved in the election conflict, the measure with the highest affirmative vote

¹³⁶ Cal. Proposition 62, § 4, *adding* CAL. PENAL CODE §190(f) (2016).

¹³⁷ *Compare* Cal. Proposition 62, *adding* CAL. PENAL CODE §190(f) (2016) (naming only "imprisonment in the state prison for life without the possibility of parole"), *with* CAL. PENAL CODE § 190 (permitting punishment as either (1) "imprisonment in the state prison for life without the possibility of parole" or (2) "imprisonment in the state prison for a term of 25 years to life").

¹³⁸ *See Id.* at § 3 (failing to mention "imprisonment in the state prison for a term of 25 years to life"); CAL. PENAL CODE § 190 (permitting punishment as either (1) "imprisonment in the state prison for life without the possibility of parole" or (2) "imprisonment in the state prison for a term of 25 years to life").

¹³⁹ Cal. Proposition 62, §4, *adding* CAL. PENAL CODE §190(f) (2016).

¹⁴⁰ *See e.g.*, CAL. PENAL CODE §§ 190(f), 2085.5(a)(2), 2085.5(d) (2016).

¹⁴¹ *See e.g.*, Cal. Proposition 62, §§ 4, 9, *adding and amending* §190(f), 2085.5(a)(2), 2085.5(d) (2016).

¹⁴² *People v. Park*, 56 Cal. 4th 782, 795–98 (2013).

¹⁴³ Cal. Proposition 62, § 3(2).

¹⁴⁴ Cal. Proposition 66 (2016).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

prevails.¹⁴⁷ The California Supreme Court confirmed this in *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*,¹⁴⁸ holding that expressly competing initiatives or initiatives that create comprehensive regulatory schemes on the same subject fall under Section 10(b), and that Section 10(b) only applies to the conflicting provisions, not necessarily the entire proposition.¹⁴⁹ In addition, Proposition 66 contains a clause stating that any other related death penalty measure on the ballot—referring to Proposition 62—is void if Proposition 66 receives majority of the votes.¹⁵⁰ Proposition 62 contains no such clause.¹⁵¹ Proposition 66 and Proposition 62 sponsors both believe that if both measures get majority of the votes, whichever proposition gets the most votes will fully become law, invalidating the other provision.¹⁵²

The void clause in Proposition 66 is new to the initiative process and courts have yet to determine whether a similar clause is valid. Courts do read voter intent into decisions, and thus it is likely a court will read Proposition 66's conflict voiding clause as the intent of Proposition 66 voters.¹⁵³ Proposition 62 does not contain the same clause, though.¹⁵⁴ Thus, if Proposition 62 gets more votes than Proposition 66, it is possible that Proposition 66's death penalty amendments could be applied to non-first degree murder capital punishment cases.

Proposition 62 and Proposition 66 are not compatible measures. This means that if both are approved by a majority of voters, then the one with the most "yes" votes would supersede the other.¹⁵⁵ Most sections of Proposition 62 directly conflict with Proposition 66 or the ability to continue capital punishment in California, the goal of Proposition 66.¹⁵⁶ However, Proposition 62 does add subsection (f) to Section 190 of the Penal Code.¹⁵⁷ Subsection (f) requires that all inmates sentenced to life in prison without the possibility of parole to pay up to 60 percent of wages for restitution, compared to the former 50 percent taken for restitution.¹⁵⁸ Proposition 66 does not address restitution rates for those sentenced to life in prison without the possibility of

¹⁴⁷ CAL. CONST. art. II, § 10(b).

¹⁴⁸ *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n.*, 51 Cal. 3d 744 (1990).

¹⁴⁹ *Id.*

¹⁵⁰ NOVEMBER 2012 VOTER GUIDE, *supra* note 83.

¹⁵¹ See Cal. Proposition 62 (2016) (containing no majority vote clause as contained in Proposition 66).

¹⁵² California Public Radio Initiative Forum, Sept. 8, 2016 (notes on file with the *California Initiative Review*).

¹⁵³ See *People v. Park*, 56 Cal. 4th 782, 795–98 (2013) (interpreting CAL. CONST. art. IV, § I to mean that “the power of the initiative must be liberally construed to promote the democratic process”). See also *Raven v. Deukmejian*, 52 Cal. 3d 336, 341 (1990); *Amador Valley Joint Union High School Dist. v. Joseph E. Tinney*, 22 Cal. 3d 208, 219–20 (1978); *Brosnahan v. Brown*, 32 Cal. 3d 236 (1982).

¹⁵⁴ See Cal. Proposition 62 (2016) (containing no majority vote clause as contained in Proposition 66).

¹⁵⁵ *California Proposition 62, Repeal of the Death Penalty 2016*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_\(2016\)](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)) (last visited Sept. 15, 2016) (on file with the *California Initiative Review*).

¹⁵⁶ Compare Cal. Proposition 66 (2016) (retaining the death penalty, speeding up the appeals process for death penalty cases, authorizing death row inmate transfers between prisons, and requiring up to 70 percent of wages to go towards restitution), with Cal. Proposition 62 (2016) (repealing the death penalty, removing penal code sections facilitating the death penalty, converting all current death row sentences to life imprisonment without the possibility of parole, and requiring 60 percent of wages to go towards restitution).

¹⁵⁷ Cal. Proposition 62, *amending* CAL. PENAL CODE 190(f) (2016).

¹⁵⁸ *Id.*

parole.¹⁵⁹ Because of this, a court could find that Proposition 62 and 66 do not conflict on this point.

Yet, the courts would still need to find that Proposition 62 can be severed. Proposition 62 does contain a severability clause¹⁶⁰ allowing Proposition 62 to be severable if any section of the initiative is held unconstitutional or invalid.¹⁶¹ To determine if an initiative is severable, courts look to three factors to see if the initiative is mechanically severable, capable of independent application, and that the “remainder [must not only be] complete in itself [but] would have been adopted by the legislative body had [it] foreseen the partial invalidation of the statute.”¹⁶² Proposition 62 is likely mechanically severable because the restitution clause is a separate subdivision from the rest of the initiative, allowing subdivision (f) to be grammatically separated from the death penalty repeal.¹⁶³

The provisions must also be capable of independent application.¹⁶⁴ Courts look to the presence of a severability clause to establish presumption for severance, but the clause does not require that valid provisions not intended to be independently operable be retained.¹⁶⁵ Because subdivision (f) discusses only restitution, it can function unaided by the rest of the act repealing the death penalty. Unlike most of Proposition 62, it applies to all inmates sentenced to life imprisonment without the possibility of parole for murder, not only first degree murder.

The last factor of the severability test looks to “whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions.”¹⁶⁶ The restitution fund increase to 60 percent for inmates sentenced to life in prison without the possibility of parole is stated as a separate finding and declaration in Section 2 and as a purpose and intent of Proposition 62 in Section 3.¹⁶⁷ Including the restitution increase in the findings and declarations as well as the purpose and intent of Proposition 62 alone is likely enough to establish that voters would have separately adopted it if considered alone.¹⁶⁸ Therefore, the courts may hold that if both Propositions 62 and 66 get majority votes, but Proposition 66 gets more votes, Section 190(f) of Proposition 62 may be severed and still applicable to inmates sentenced to life imprisonment without the possibility of parole for murder charges.

¹⁵⁹ See Proposition 66 (only discussing restitution requirements for death row inmates).

¹⁶⁰ Cal. Proposition 62 § 12 (2016).

¹⁶¹ See *California Redevelopment Association v. Matosantos*, 53 Cal. 4th 231, 271 (2011).

¹⁶² *People's Advocate, Inc. v. Super. Ct.*, 181 Cal. App. 3d 316, 330–32 (3d Dist. 1986).

¹⁶³ See *Id.* at 330 (“If a grammatical cut is not possible, if the language ‘is incapable of mechanical severance it must survive, if at all, as a wholly integrated enactment.’”).

¹⁶⁴ *People's Advocate*, 181 Cal. App. 3d at 331.

¹⁶⁵ *Id.* at 332.

¹⁶⁶ *Id.* at 333.

¹⁶⁷ Cal. Proposition 62 § 2 (2016).

¹⁶⁸ See *People's Advocate, Inc.*, 181 Cal. App. 3d at 333 (holding that the electorate would have adopted the government secrecy provisions independently because the Act stated the government secrecy sections in the Act's purpose clause and in the subdivision's purpose statement).

IV. CONSTITUTIONAL AND STATUTORY ISSUES

A. Can Prisoners Be Forced to Work in Prisons?

The United States Constitution prohibits all slavery, and acts similar to slavery, in the United States unless it is punishment for a crime.¹⁶⁹ Federal prisons delegate prison labor management to the Federal Prison Industries, Inc., commonly known as FPI or UNICOR.¹⁷⁰ States are required to meet constitutional minimums in the Thirteenth Amendment, but may otherwise run their correctional systems how they choose.¹⁷¹ So, the provision of Proposition 62 requiring inmates sentenced to life imprisonment to work should not pose a federal constitutional issue.

B. Can States Force Wages to go to Restitution?

Restitution is given to victims of a crime who incur economic loss as a result of the crime and is statutorily based.¹⁷² Restitution fines are constitutional, set at the discretion of the court, and depend on the seriousness of the crime.¹⁷³ Prisoners are not guaranteed minimum wage because they are not considered employees under the Fair Labor Standards Act.¹⁷⁴ Therefore, the requirement that inmates pay up to 60 percent of wages for restitution should not pose a federal constitutional issue.

V. PUBLIC POLICY ISSUES

A. Proponents Arguments (Yes on 62)

Proponents argue that the death penalty in California is broken and flawed: it is a failed promise for restitution and deterrence, it costs too much, it fails to provide closure to victim's families, and innocent individuals face potential execution.¹⁷⁵ Supporters of Proposition 62 include Lieutenant Governor Gavin Newsom, local, county, state, and federal elected officials,

¹⁶⁹ U.S. CONST. art. XIII, § 1 (requiring that “neither slavery nor involuntary servitude, *except as punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”)

¹⁷⁰ Kerry L. Pyle, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. Rev. 151, 161 (1997).

¹⁷¹ *Id.*

¹⁷² CAL. PENAL CODE § 1202.4(a)(1).

¹⁷³ *Id.* at § 1202.4(b)(1).

¹⁷⁴ *See, e.g., Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993) (finding FLSA does not cover inmates engaged in prison labor programs); *Vanskike v. Peters*, 974 F.2d 806, 809–12 (7th Cir. 1992) (holding inmates not entitled to minimum wage under FLSA because they are not “employees” under the Act); *Miller v. Dukakis*, 961 F.2d 7, 8–9 (1st Cir. 1992) (holding prisoners not “employees” under FLSA); cf. *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1325–26 (9th Cir. 1991) (holding the Arizona Department of Corrections not an “employer” of inmates under FLSA).

¹⁷⁵ *A Failed System*, YES ON PROP 62 (Sept. 15, 2016), <http://yeson62.com/about-yes-on-62/failed-system/> (on file with the *California Initiative Seminar*); Nancy Haydt, *Yes on Proposition 62, No on Proposition 66*, California Public Radio Initiative Forum, Sept. 8, 2016.

the California Democratic and Libertarian parties, several non-profit, religious, and union groups, and individuals including district attorneys and former wardens.¹⁷⁶

1. *The Death Penalty Takes Too Long and Costs Too Much*

Repealing the death penalty saves money at the local, county, and state level.¹⁷⁷ Counties spend about 3 million dollars per death row case and the state spends over 300 million dollars total per death row inmate.¹⁷⁸ Proponents also argue that the high death penalty costs simply support the lawyers from the District Attorney's office who seek to uphold the death penalty.¹⁷⁹ Additionally, San Bernardino County District Attorney Mike Ramos encounters victim's families that do not seek the death penalty only because they do not want to be "dragged" through its lengthy process of appeals.¹⁸⁰

2. *Innocent and Mentally Ill Individuals Still Face Execution*

California courts have exonerated three individuals sentenced to death.¹⁸¹ Nationally, 150 individuals have been exonerated since 1976, with half of those exonerations occurring since 2000 due to scientific technique developments.¹⁸²

The Eighth Amendment limits the death penalty to offenders with a 'more depraved consciousness' than a regular person.¹⁸³ The United States Supreme Court held in *Roper v. Simmons*¹⁸⁴ and *Atkins v. Virginia*¹⁸⁵ that the death penalty is prohibited for juvenile and intellectually disabled individuals.¹⁸⁶ Dennis Cusick, an appellate attorney for Sacramento County who takes on death penalty cases, has seen several cases of mental illness in defendants. He mentions two cases he worked on where defendants with severe mental illness were put on death row:

¹⁷⁶ *California Proposition 62, Repeal of the Death Penalty 2016*, BALLOTPEDIA (September 15, 2016), [https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_\(2016\)](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)) (on file with the *California Initiative Seminar*).

¹⁷⁷ *About Prop 62*, YES ON PROP 62 (Sept. 15, 2016), <http://yeson62.com/about-yes-on-62/> (on file with the *California Initiative Review*).

¹⁷⁸ WILLIAMS, *supra* note 61; Ron Briggs, *Yes on Proposition 62, No on Proposition 66*, California Public Radio Initiative Forum, Sept. 8, 2016 (notes on file with the *California Initiative Review*).

¹⁷⁹ NOVEMBER 2016 VOTER GUIDE, *supra* note 60.

¹⁸⁰ Alexei Koseff, *Sentenced to Die? Depends on the county in California*, THE SACRAMENTO BEE, Sept. 21, 2016, available at <http://www.sacbee.com/news/politics-government/capitol-alert/article102344842.html> (on file with the *California Initiative Forum*).

¹⁸¹ Ron Briggs, *Yes on Proposition 62, No on Proposition 66*, California Public Radio Initiative Forum, Sept. 8, 2016 (notes on file with the *California Initiative Review*).

¹⁸² FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX: PART I: AN IN-DEPTH LOOK AT AMERICA'S OUTLIER DEATH PENALTY COUNTIES, HARVARD LAW SCHOOL 5-6 (August 23, 2016), available at <http://fairpunishment.org> (on file with the *California Initiative Review*).

¹⁸³ Robert J. Smith et al, *The Failure of Mitigation*, 65 HASTINGS L.J. 1221, 1222 (2014).

¹⁸⁴ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁸⁵ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁸⁶ *Roper*, 543 U.S. at 569-71; *Atkins*, 536 U.S. at 320-21.

I was involved in the Jeff Jones and Herbert Koontz cases in the Federal Defender's Office. Jeff Jones is still on death row for a series of hammer killings at Sutter's Fort and UC Davis Medical Center in the 1980s. He is profoundly mentally ill. Herbert Koontz was a schizophrenic ex-con who shot his roommate in an apartment complex for ex-homeless people. He was allowed to defend himself at trial, which was a complete travesty. He never would have gotten the death penalty if he had proper representation. He died of natural causes at the prison hospital at Corcoran.¹⁸⁷

Kern and Riverside Counties, the California counties with the highest capital punishment cases in the state, also show a significant percentage of mental illness in defendants, as well as a significant percentage of very young defendants. In Riverside County, one quarter of death penalty cases involved defendants with intellectual impairment or severe mental illness and 23 percent of cases involved defendants under the age of 21 years old.¹⁸⁸ In Kern County, half of the death penalty cases involved defendants with mental illness and 13 percent of their death penalty cases also involved defendants that were under the age of 21.¹⁸⁹

3. *The Death Penalty Racially Discriminates*

Lieutenant Governor Gavin Newsom stated that the death penalty system needs to be abolished because it is a system “that is administered with troubling racial disparities.”¹⁹⁰ David C. Baldus, a University of Iowa law professor, and his colleagues studied over 2,000 homicides in Georgia in the 1970’s and 1980’s for evidence of racial bias.¹⁹¹ This study, known as the Baldus Study, found that black defendants were 1.7 times more likely to receive the death penalty than white defendants and that murderers of white victims were 4.3 times more likely to be sentenced to death than murders of black individuals.¹⁹² Baldus conducted another study on 667 homicides in Philadelphia between 1983 and 1993 and found that the black offenders there “were nearly four times likelier than white offenders to receive a death sentence for the same crimes.”¹⁹³ Despite homicide being an intra-racial crime, death-row statistics do not reflect those rates.¹⁹⁴ In fact, federal statistics indicate that between 1980 and 2008, 84 percent of the white

¹⁸⁷ Interview with Dennis Cusick, Death Penalty Appellate Attorney (Oct. 4, 2016) (notes on file with the *California Initiative Review*).

¹⁸⁸ FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX, *supra* note 182, at 35.

¹⁸⁹ *Id.* at 41–42.

¹⁹⁰ Jazmine Ulloa, *Lt. Gov. Gavin Newsom Endorses Proposition to Abolish the Death Penalty in California*, L.A. TIMES, July 30, 2016, available at <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-newsom-endorses-proposition-to-abolish-1468966153-htmlstory.html> (on file with the *California Initiative Review*).

¹⁹¹ David C. Baldus et al., *Racial Discrimination And The Death Penalty In The Post-Furman Era: An Empirical And Legal Overview, With Recent Findings From Philadelphia* 83 CORNELL L. REV. 1638 (1998), available at Study <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/baldus.pdf> (on file with the *California Initiative Review*).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Matt Ford, *Racism and the Execution Chamber*, THE ATLANTIC, June 23, 2014, available at <http://www.theatlantic.com/politics/archive/2014/06/race-and-the-death-penalty/373081/> (on file with the *California Initiative Review*).

victims and 93 percent of the black victims, were murdered by someone of the same race.¹⁹⁵ However, “although roughly half of all U.S. homicide victims are black, more than three-quarters of victims of death-row defendants executed since 1976 were white.”¹⁹⁶

The Baldus Study was referenced in the 1987 United States Supreme Court case *McCleskey v Kemp*.¹⁹⁷ Warren McCleskey, a black defendant who was sentenced to death for killing a white police officer in Atlanta, used the Baldus Study as a defense to argue that his death sentence was marred by racial bias.¹⁹⁸ He claimed that Georgia’s discriminatory capital punishment system violated his Eighth and Fourteenth Amendment rights.¹⁹⁹ The court decided in a majority 5-to-4 decision that a general study of discrimination did not specifically prove discrimination in his particular case.²⁰⁰

Another study conducted in 2011, by University of California Professors Mona Lynch and Craig Haney, addressed the nature of racial bias among jurors in death penalty cases.²⁰¹ Their statistical study consisted of having simulated capital trials, where participants acted as jurors.²⁰² The participants were shown one of four simulated trial videotapes.²⁰³ In the video showing the black defendant and white victim, participants were more likely to sentence the defendant to death.²⁰⁴ The authors of the study observed that racial disparities in death penalty cases occurred because of the “unwillingness of white jurors to empathize with a defendant that was a different race.”²⁰⁵ The authors concluded that the capital punishment administration would have to come up with a creative solution to bias in jury selection in death penalty cases.²⁰⁶ Because the bias does not appear to be “conscious” where jurors are willfully engaging in discrimination, but rather the racial bias appears to be subconscious in nature.²⁰⁷

Harvard Law School researchers recently released a report in August 2016 titled *Fair Punishment Project* which found that only 16 counties in the United States imposed 5 or more sentences between 2010 and 2015.²⁰⁸ Of those 16 counties, 5 of them are California counties: Los Angeles, Riverside, Kern, Orange, and San Bernardino.²⁰⁹ In these same counties with higher rates of death penalty cases, researchers found systematic deficiencies that undermine the

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ M. Lynch and C. Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573 (2011).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ FAIR PUNISHMENT PROJECT, NEW REPORT FINDS COUNTIES THAT USE DEATH PENALTY THE MOST ARE PLAGUED BY PROSECUTORIAL MISCONDUCT, BAD LAWYERS, AND RACIAL BIAS, HARVARD LAW SCHOOL 1–5 (August 23, 2016), available at <http://fairpunishment.org> (on file with the *California Initiative Review*).

²⁰⁹ *Id.*

fairness of the death penalty: a history of overzealous prosecutors; inadequate defense lawyering; and racial disparity in sentencing.²¹⁰ For example, in Riverside County, 76 percent of defendants convicted and sentenced to death between 2010 and 2015 were people of color.²¹¹ African-Americans make up only 7 percent of Riverside's population, yet they constituted 24 percent of those sentenced to death in this same time frame.²¹²

Project researchers believe racial bias affected every aspect of death penalty cases, from jury selection to sentencing. According to the study, geographic bias in these counties can be attributed to a small particular group of prosecutors who are determined to obtain the death penalty in trial cases. For example, the District Attorney of Riverside County, Michael Hestrin, is said to be aggressive in pursuing the death penalty and Riverside County is known as the nation's leading producer of death sentences.²¹³ Former Kern County District Attorney Ed Jagels, 1983 to 2009, was known for aggressively pursuing criminal convictions that were later found to be wrongful.²¹⁴ He also led a voter campaign to remove three justices from California's Supreme Court, including then Chief Justice Rose Bird, because of how they voted in death penalty cases.²¹⁵

4. *Inadequate Defense Counsel*

Inadequate defense is another deficiency that presents factors of fairness in the death penalty. Even the American Bar Association finds the Guidelines for the Appointment and Performance of Counsel in Death Penalty cases to be "inappropriate."²¹⁶ The problem lies in the low wages that court-appointed defense attorneys are paid, which does not incentivize them to seek the most favorable resolution for their clients or enable adequate time to prepare the case. Low wages also do not encourage defense counsel to spend more hours in the early mitigation investigative phase, which is when prosecutors will consider whether they want to seek the death penalty. In Riverside County, for example, court-appointed defense attorneys are paid according to whether a murder case is charged as a capital case and whether it goes to trial.²¹⁷ If the prosecution decides not to seek the death penalty, the fees for the defense attorneys are reduced by half.²¹⁸ If the case is resolved with a plea before it goes to trial, the fees are further reduced to just one-quarter of the initial fee.²¹⁹ If an original capital murder case is not reduced, but the client still seeks a plea, the court-appointed defense attorney still only receives 30 percent of their total fee.²²⁰ Riverside County death sentences' direct appeal records from 2006–2015

²¹⁰ *Id.*

²¹¹ FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX, *supra* note 182, at 35.

²¹² *Id.* at 31–36.

²¹³ *Id.*

²¹⁴ *Id.* at 37.

²¹⁵ *Id.*

²¹⁶ ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 981–82 (rev. ed. 2003), available at <http://www.americanbar.org> (on file with the *California Initiative Review*).

²¹⁷ FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX, *supra* note 182, at 37.

²¹⁸ *Id.* at 33.

²¹⁹ *Id.*

²²⁰ *Id.*

showed that defense spent, on average, only 7 hours on mitigation evidence.²²¹ In Kern County, the average time spent on the mitigation evidence phase during direct appeal between 2006–2015 was anywhere from one day to one week.²²²

In Sacramento County, appellate attorney Dennis Cusick observed how an inadequate defense in the early phase of capital punishment cases affects defendants:

Larry Webster is a Vietnam War hero (Bronze Star winner) whose trial attorney didn't bother to do a penalty phase investigation, then got off the case for health reasons after the guilt phase, leaving another attorney to pick up the penalty phase without proper preparation. Judge Karlton's last act as a federal judge was to overturn his sentence in federal habeas, more than 30 years after his conviction.²²³

5. *Oppose Proposition 66*

Proponents of Proposition 62 oppose Proposition 66 because it complicates the appeals process by moving cases to the lower courts which are already subject to high caseloads, places costs on local counties, and exempts the CDCR from public oversight. Proposition 66 also maintains the key problems with the death penalty today: the high costs, lack of closure, and potential to execute innocent people.²²⁴

B. Opponents Arguments (No on 62)

Opponents agree with proponents that the death penalty “is broken and needs to be fixed,” citing that the appeals are inefficient, lengthy, and costly.²²⁵ Opponents include local, county, state, and federal elected officials, the California Republican Party, numerous Police, Sheriff, and District Attorney Associations, and individuals including district attorneys and former wardens.²²⁶

1. *Juries Should Get A Choice In Punishment For Society's Worst Criminals*

Opponents argue that Proposition 62 allows “the worst of the worst murderers” the same sentence as other criminals.²²⁷ There are nearly 2,000 murders in California annually, but only 15

²²¹ *Id.* at 34.

²²² *Id.* at 38–39.

²²³ CUSICK, *supra* note 188.

²²⁴ *The Prop 66 Deception*, YES ON PROP 62 (Sept. 15, 2016), <http://yeson62.com/about-yes-on-62/prop-66/> (on file with the *California Initiative Seminar*)

²²⁵ Anne Marie Schubert, Sacramento District Attorney, *Yes on Proposition 66, No on Proposition 62*, California Public Radio Initiative Forum, Sept. 8, 2016 (notes on file with the *California Initiative Forum*).

²²⁶ *California Proposition 62, Repeal of the Death Penalty 2016*, BALLOTPEDIA, (September 15, 2016), [https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_\(2016\)](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)) (on file with the *California Initiative Forum*).

²²⁷ Michele Hanisee, *Yes on Proposition 66, No on Proposition 62*, California Public Radio Initiative Forum, Sept. 8, 2016 (notes on file with the *California Initiative Forum*); *Get the Facts: Ballot Arguments*, NO ON PROPOSITION 62,

of those are given the death penalty.²²⁸ Opponents argue that these are the worst crimes and the worst murderers who deserve the strongest punishment.²²⁹

When discussing California’s serial murderers, Sacramento County District Attorney Anne Marie Schubert notes that “once you execute an inmate on death row, they can never kill again. That person cannot commit more crimes.”²³⁰ The threat of death deters criminals from committing those same crimes and prohibits that individual from committing further crimes.²³¹ As the Sacramento County District Attorney states, “As a matter of public policy, people on death row earned their sentences.”²³² The decision to sentence someone to death is a choice “made by a jury of someone’s peers, not by one person.”²³³ The jury should have that choice.²³⁴

2. *The Death Penalty Provides Victims Closure*

Opponents argue that the death penalty is about victims as well. California’s death row inmates have left over 1,000 victims in their wake, 226 of whom were children and 294 of whom were raped or tortured.²³⁵ Opponents include: the father of 12-year old murder victim Polly Klaas; Phyllis Loya, whose son, a police officer, was murdered by two bank robbers fleeing their crime; and Kermit Alexander, whose mother, sister, and two nephews were murdered by a hit man who entered the wrong house.²³⁶ All three murderers still sit on death row, appealing their cases.²³⁷

3. *Prison Costs Should Not Be Put On Taxpayers*

Opponents argue that Proposition 62 puts the prison costs of housing inmates for life on taxpayers.²³⁸ These taxpayers will have to pay those inmates’ food, housing, guard costs, and

YES ON PROPOSITION 66, <http://noprop62yesprop66.com/get-the-facts/ballot-arguments/> (Sept. 15, 2016) (on file with the *California Initiative Forum*).

²²⁸ *Get the Facts: Ballot Arguments*, NO ON PROPOSITION 62, YES ON PROPOSITION 66, <http://noprop62yesprop66.com/get-the-facts/ballot-arguments/> (Sept. 15, 2016) (on file with the *California Initiative Forum*).

²²⁹ *Id.*

²³⁰ Anne Marie Schubert, Sacramento District Attorney, *Yes on Proposition 66, No on Proposition 62*, California Public Radio Initiative Forum, Sept. 8, 2016 (notes on file with the *California Initiative Review*).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Victims’ Stories*, NO ON PROPOSITION 62, YES ON PROPOSITION 66, <http://noprop62yesprop66.com/> (Sept. 15, 2016) (on file with the *California Initiative Review*).

²³⁶ *Id.*

²³⁷ NO ON PROPOSITION 62, YES ON PROPOSITION 66, <http://noprop62yesprop66.com/> (Sept. 15, 2016) (on file with the *California Initiative Review*).

²³⁸ Michele Hanisee, *Yes on Proposition 66, No on Proposition 62*, California Public Radio Initiative Forum, Sept. 8, 2016; *Get the Facts: Ballot Arguments*, NO ON PROPOSITION 62, YES ON PROPOSITION 66, <http://noprop62yesprop66.com/get-the-facts/ballot-arguments/> (Sept. 15, 2016) (on file with the *California Initiative Forum*).

healthcare.²³⁹ The solution to save costs is not to repeal the death penalty but instead to speed up the appeals process, as Proposition 66 proposes.²⁴⁰

4. *Support Proposition 66*

Opponents of Proposition 62 support Proposition 66, which seeks to reform the death penalty, not repeal it.²⁴¹ Proposition 66 expands the pool of available defense attorneys, saves tens of millions of dollars each year by eliminating single cell housing, requires death row inmates to work and pay 70 percent of wages for restitution, and consolidates the appeals process.²⁴² Proposition 66 will “protect California, provide closure to victims, and save taxpayers millions.”²⁴³

C. **Death Row Inmates Disagree On Whether To Repeal The Death Penalty**

Although disenfranchised from voting, death row inmates themselves are split on whether to repeal or speed up the death penalty.²⁴⁴ Inmates expressed concern about violence if transferred into the general prison population, which is already over-crowded.²⁴⁵ Currently, death row inmates are kept in individual cells and only allowed outside five hours per day.²⁴⁶ Transferring to the general population would mean a cellmate, increased interaction with other prisoners, and an end to many of the, arguable, benefits of death row over general population: extensive legal representation, additional psychiatric care, and support of the anti-death penalty community.²⁴⁷ Because of this, many current death row inmates prefer death row over the general population alternative.²⁴⁸ During the Proposition 34 vote in 2012, tensions over the death penalty’s future ran so high that San Quentin placed all death row inmates on suicide watch.²⁴⁹

D. **Changing Trends in the Public’s View of the Death Penalty**

²³⁹ *Get the Facts: Ballot Arguments*, NO ON PROPOSITION 62, YES ON PROPOSITION 66, <http://noprop62yesprop66.com/get-the-facts/ballot-arguments/> (Sept. 15, 2016) (on file with the *California Initiative Forum*).

²⁴⁰ Michele Hanisee, *Yes on Proposition 66, No on Proposition 62*, California Public Radio Initiative Forum, Sept. 8, 2016.

²⁴¹ *California Proposition 62, Repeal of the Death Penalty 2016*, BALLOTPEDIA, (Sept. 15, 2016), [https://ballotpedia.org/California Proposition 62, Repeal of the Death Penalty](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty) (on file with the *California Initiative Forum*).

²⁴² NO ON PROPOSITION 62, YES ON PROPOSITION 66, <http://noprop62yesprop66.com/> (Sept. 15, 2016) (on file with the *California Initiative Forum*).

²⁴³ *Id.*

²⁴⁴ Paige St. John, *Death Row Inmates’ Surprising Views on Death Penalty Vote: ‘If you are going to Execute Me, Execute Me’*, L.A. TIMES, Sept. 7, 2016, available at <http://www.latimes.com/local/lanow/la-me-death-row-death-penalty-20160901-snap-story.html> (on file with the *California Initiative Forum*).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

In 1972, 41 states had statutes that allowed the death penalty.²⁵⁰ Today, only 30 states permit the death penalty, while some states are actively in the process of abolishing it.²⁵¹ The Sacramento Bee newspaper recently conducted an analysis of death sentences in California's 58 counties since 2011.²⁵² Of those 58 counties, only 14 counties sought death penalty sentences, as opposed to 22 counties three decades ago.²⁵³ Between 2011 and 2015, there were 73 death penalty sentences, down from 112 between 2006 and 2010.²⁵⁴

Reasons for the decline in death sentences will vary depending on whom you ask.²⁵⁵ Some prosecutors attribute the change in pursuing the death penalty to costs associated with the court trials.²⁵⁶ Other defense attorneys attribute the changes to a shift in trends and constituents that no longer see the death penalty as 'fair' or even 'moral.'²⁵⁷ Rob Smith, a senior research fellow from Harvard Law School, suggests that the recent lack of use of death sentences means that the public is seeing it as an 'excessive punishment.'²⁵⁸ He also adds that if capital punishment were indeed serving a purpose, it would be used more frequently.²⁵⁹

Polling data shows that 52 percent of Californians support life without the possibility of parole instead of the death penalty;²⁶⁰ however, the most recent polls show 52 percent of Californians oppose Proposition 62.²⁶¹

VI. CONCLUSION

Propositions 62 and 66 require voters to decide whether to repeal the death penalty for first degree murder or whether to reform and speed-up the process.

A "yes" vote on Proposition 62 repeals the death penalty for first degree murder and replaces it with life in prison without possibility of parole. It also requires inmates sentenced to

²⁵⁰ *People v. Anderson*, 6 Cal. 3d 628, 648 (1972).

²⁵¹ *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Aug. 18, 2016) (on file with the *California Initiative Review*).

²⁵² KOSEFF, *supra* note 180.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Cusick, *supra* note 44.

²⁵⁸ FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX, *supra* note 182, at 35; Koseff, *supra* note 180.

²⁵⁹ KOSEFF, *supra* note 180.

²⁶⁰ ALARCON & MITCHELL, *supra* note 51. Nationally, 61 percent of voters prefer punishment over the death penalty for murder. *Facts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Aug. 30, 2016) (on file with the *California Initiative Review*).

²⁶¹ *SurveyUSA Election Poll #23139*, SURVEYUSA (September 15, 2016), <http://www.surveyusa.com/client/PollReport.aspx?g=be4ba04e-e65c-4fbc-9d1c-bf87874ec85d> (on file with the *California Initiative Forum*).

life in prison without the possibility of parole to work and give up to sixty percent of their wages to restitution.

A “no” vote on Proposition 62 keeps the death penalty as is: individuals can be sentenced to death for first degree murder, and inmates sentenced to life in prison without the possibility of parole are required to work with up to 50 percent of their wages going to restitution.