

LONG LIVE THE DEATH PENALTY? ONE PROGRESSIVE STATE’S EXPERIENCE

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I. INTRODUCTION

Capital punishment would seem to be on the ropes nationally. The number of executions nationwide peaked at 98 in 1999 – there were just 23 in 2017.¹ All of those executions occurred in just eight states, including Alabama.²

Polling shows a majority of Americans, 54%, support the death penalty, compared to 39% in opposition.³ This is up from plurality support (49%-42%) in 2016, but still lower than the 78% of Americans polled who supported the ultimate sanction in 1996.⁴ Support breaks along racial lines – whites generally support the death penalty, while African-Americans and Hispanics generally oppose it.⁵

Research has found that “the death penalty is mainly fueled by just a handful of counties - they’re known as ‘outlier’ counties and they’re scattered throughout states like Texas, Alabama, and Florida.”⁶ That research also “found that the counties that still actively pursue the death penalty tend to have several factors in common: overzealous prosecutors,

¹ Davis Masci, *5 facts about the death penalty*, PEW RES. CTR. (June 27, 2018), <http://www.pewresearch.org/fact-tank/2018/06/27/5-facts-about-the-death-penalty/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Jenny Cheng & Michelle Mark, *The death penalty is on the decline in the US — here are the states that still have the power to execute prisoners*, BUS. INSIDER (Mar. 21, 2018).

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inadequate defense attorneys, and racial bias.”⁷

Still, there is reason for death penalty opponents to be concerned. President Trump has called for the expansion of the death penalty to include the offense of drug dealing.⁸ In 1989, then-businessman Donald Trump took out full-page newspaper ads to call for the execution of five men wrongfully convicted of raping and beating a woman in Central Park in New York City – he never apologized.⁹ Trump has also expressed admiration for extrajudicial killings in other countries.¹⁰ This is not a moment for death penalty opponents to relent in their efforts.

The last state to abolish the death penalty legislatively was Maryland in 2013, and the Delaware Supreme Court ruled the state’s death penalty statute unconstitutional in 2016.¹¹

Two states in 2018 came close to legislatively abolishing the death penalty.

In New Hampshire, the Republican House and Senate voted to abolish the death penalty, only to have the bill vetoed by Republican Gov. Chris Sununu.¹² The small state had seemed a good candidate for death penalty abolishment, with only a single inmate on death row – to whose sentence the bill would not have applied retroactively.¹³ Yet a prior Democratic governor, current U.S. Sen. Jeanne Shaheen, had also vetoed

⁷ *Id.* A 2014 article noted, “Since 1976, Texas has carried out more executions than six other states combined — Alabama, Florida, Georgia, Missouri, Oklahoma and Virginia — all of which have some of the busiest death chambers.” Manny Fernandez & John Schwartz, *Confronted on Execution, Texas Proudly Says It Kills Efficiently*, N.Y. TIMES (May 12, 2014). Of Texas, one state representative writes,

We apply the death penalty too broadly and very inconsistently. Procedures vary wildly between the state’s 254 different counties, and many people face death who constitutionally shouldn’t — like those who were seriously mentally ill at the time of their offenses and those who had only minor roles in a crime. We’ve even let what we’ve later found to be junk science sway juries into handing down death sentences and then provided few ways to challenge those verdicts afterwards. Joe Moody, *It’s time to get rid of the death penalty in Texas*, TRIBTALK (July 11, 2018), <https://www.tribtalk.org/2018/07/11/its-time-to-get-rid-of-the-death-penalty-in-texas/>.

⁸ See Gregory Korte, *Trump pushes death penalty for drug dealers: ‘It’s not about being nice anymore’*, USA TODAY (Mar. 19, 2018).

⁹ See, e.g., Raymond Santana & Hannah Riley, *Trump Is Still The Same Man Who Wanted The Central Park Five Executed*, HUFFINGTON POST (June 20, 2018).

¹⁰ See Natasha Bach, *Trump’s Reported Stance on Executing Drug Dealers Is His Latest Nod to the Philippines’ Authoritarian Leader*, FORTUNE (Feb. 26, 2018). In meeting with Philippines’ President Rodrigo Duterte in 2017, and praising him effusively, Trump made no mention of the fact that Duterte “stands accused of acting with impunity over a brutal war on drugs that has left thousands dead.” Oliver Holmes, *Trump hails ‘great relationship’ with Philippines’ Duterte*, THE GUARDIAN (Nov. 13, 2017). There is actually no empirical evidence that utilization of the death penalty in other countries reduces drug trafficking. See Salvador Rizzo, *Fact Checker: President Trump’s claim that death sentences would stop drug trafficking*, WASH. POST (Apr. 25, 2018).

¹¹ See *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last accessed July 17, 2018).

¹² Holly Ramer, *As promised, Sununu vetoes death penalty repeal bill*, CONCORD MONITOR (June 21, 2018).

¹³ *Id.*

a bill to abolish the death penalty in 2000.¹⁴

The state of Washington seemed a more promising prospect, with a Democratic legislature and governor.

Most people would identify the state of Washington as progressive. Indeed, Washingtonians identify themselves that way. The Gallup Poll found that “more Washingtonians identified as liberal than conservative in 2017 — the first time that’s ever happened.”¹⁵

Yet efforts to abolish the death penalty in the state stalled legislatively, despite the fact that no execution has taken place in the state since 2010,¹⁶ and despite the current governor, Democrat Jay Inslee, having imposed a 2014 moratorium on the death penalty during his tenure in office.¹⁷

During the 2018 legislative session, a bill passed the Senate that would have abolished the death penalty.¹⁸ It had been introduced with bipartisan support, including Republican senators and the prior attorney general, a Republican, as well as the support of Inslee and the Democratic attorney general, Bob Ferguson.¹⁹ In praising its Senate passage, Inslee cited “the enormous costs of seeking this punishment and the uncertainty of closure for victims’ families.”²⁰

After it had passed the Senate, the bill passed the House Judiciary Committee, and then was denied a House floor vote.²¹ The *Seattle Times* editorially called upon the House speaker, Frank Chopp, to bring the bill to a vote, declaring a failure to do so “would be a major disappointment of the 2018 legislative session.”²² Earlier in that legislative session the

¹⁴ *Id.*

¹⁵ See Gene Balk, *Liberals outnumber conservatives for first time in Washington state, Gallup poll shows*, SEATTLE TIMES (Feb. 27, 2018).

¹⁶ See, e.g., Max Wasserman, *Efforts to ban the death penalty fizzle out in Legislature*, NEWS TRIBUNE (Mar. 8, 2018, 4:05 PM), <https://www.thenewstribune.com/news/politics-government/article204222859.html>.

¹⁷ Press Release, Office of Washington Gov. Jay Inslee, Gov. Jay Inslee announces capital punishment moratorium (Feb. 11, 2014) (on file with author), <https://www.governor.wa.gov/news-media/gov-jay-inslee-announces-capital-punishment-moratorium>.

¹⁸ See S.B. 6052, 65th Leg., Reg. Sess. (Wash. 2018).

¹⁹ *Republicans join Inslee, Ferguson in call to abolish Washington’s death penalty*, SEATTLE TIMES (Jan. 16, 2017, 1:19 PM), <https://www.seattletimes.com/seattle-news/bill-to-abolish-death-penalty-introduced-in-washington-legislature>.

²⁰ Press Release, Office of Washington Gov. Jay Inslee, *Inslee statement on passage of Senate bill to eliminate the death penalty* (Feb. 14, 2018), <https://www.governor.wa.gov/news-media/inslee-statement-passage-senate-bill-eliminate-death-penalty>.

²¹ Bill history, SB 6052 – 2017-18, Washington State Legislature, <http://apps2.leg.wa.gov/billsummary?BillNumber=6052&Year=2017&BillNumber=6052&Year=2017>

²² Editorial, *Speaker Frank Chopp should allow House to vote on death-penalty repeal*, SEATTLE TIMES (Mar. 5, 2018). That Chopp persistently fails to allow a floor vote on death penalty legislation, now even after Senate passage, belies a 2016 observation a *Seattle Times* columnist made: “Without a route to repeal in the Senate, Speaker of the House Frank Chopp, D-Seattle, quashed a repeal bill.” See Jonathan Martin, *The votes are there: Legislature can end the death*

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elected prosecutor for Washington’s largest county, King County, had written a column declaring that “the death penalty law in our state is broken and cannot be fixed. It no longer serves the interests of public safety, criminal justice, or the needs of victims.”²³

The prosecutor, Dan Satterberg, noted:

There are no innocent men among the eight on death row or among the five who have been killed since 1981. Horror stories from other parts of the country about abuses of the death penalty, unqualified defense counsel, and unfair leverage for plea bargaining are deeply concerning but are not our story.²⁴

Indeed, Washington has had a number of “volunteers” among those receiving the death penalty – men who never contested their guilt or stopped contesting it upon appeal.

And Satterberg was uniquely situated to see another argument against the death penalty – one he didn’t cite in coming out in opposition to it – play out. That argument, of special import in Washington, is proportionality. Satterberg had been chief of staff to his predecessor as King County prosecutor, Norm Maleng, who allowed the “Green River Killer,” Gary Ridgway, to serve a life sentence instead of facing the death penalty.²⁵ Ridgway has pled guilty to killing 49 women, although that might not be the full count as he claimed to have killed as many as 70.²⁶ Because he hid the bodies he was given a plea bargain under the terms of which he had to cooperate in locating the remains.²⁷

Noting the incongruity of this, in a 2006 decision the Washington Supreme Court all but invited the Legislature to abolish the death penalty. In *State v. Cross*, the defendant, Dayva Cross, faced the death penalty for murdering three people.²⁸ Cross argued the sanction was unconstitutional in light of Ridgway’s plea bargain.²⁹ As the majority wrote:

Since Cross’s trial, the Green River Killer, Gary Ridgway, was caught, prosecuted, and sentenced to life in prison. We cannot begin to

penalty, SEATTLE TIMES (Feb. 16, 2016) (emphasis added). Even after 2018 primary election results suggested Democrats might take a House supermajority, Chopp was noncommittal on the death penalty. See Joseph O’Sullivan, *Washington Democrats may win largest legislative majorities in a decade*, SEATTLE TIMES (Aug. 12, 2018) (“As for the death penalty, Chopp wouldn’t commit to a repeal, which many Democrats and even some Republicans have sought for years.”).

²³ Dan Satterberg, *King County’s prosecuting attorney: ‘We don’t need the death penalty’*, SEATTLE TIMES (Jan. 19, 2018).

²⁴ *Id.*

²⁵ See, e.g., Ray Rivera & Ian Ith, *Ridgway pleads guilty to 48 Green River murders*, SEATTLE TIMES (Nov. 6, 2003).

²⁶ Jennifer Sullivan, *Green River killer Ridgway pleads guilty to 49th murder*, SEATTLE TIMES (Feb. 18, 2011).

²⁷ *Id.*

²⁸ See *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80, 85 (2006).

²⁹ *Id.* at 99.

calculate the harm his abhorrent murders caused. The fact he will live out his life in prison instead of facing the death penalty has caused many in our community to seriously question whether the death penalty can, in fairness, be proportional when applied to any other defendant.

We do not minimize the importance of this moral question. But it is a question best left to the people and to their elected representatives in the legislature.³⁰

However, since then the Legislature has not acted, despite continuing efforts. As one legislator noted in 2008, “There is a randomness in how the death penalty is applied in our state. If you hide the bodies, like in the Green River case, you’ll get cut some kind of deal. If you burn a house down and all the bodies are found you will get charged with the death penalty.”³¹

This article examines the landscape of the death penalty in Washington, in light of past cases, changing public opinions, and a surprise court decision in late 2018.

II. THE “VOLUNTEERS”

In part, a sense of urgency may not have attached to death penalty abolition efforts in Washington given how seldom the penalty is applied and the unique fact that a number of condemned men, whose crimes were especially heinous, had not fought the sanction.

The list of these “volunteers” begins with Westley Allan Dodd. Dodd was a child murderer who committed his three murders in Clark County, Washington – which is on the border near Portland, Oregon.³² He was caught in 1989 in the failed abduction of a 6-year-old boy from a movie theater.³³ Dodd’s personal diary contained frightful details on how he would hunt boys, rape and torture them, and then kill them.³⁴ Of these details, it is best to quote words from the Washington Supreme Court decision with respect to one of the victims, “The torturous details of the rapes and murder are not relevant to reaching a decision in this case.”³⁵

After being determined by a doctor as competent to plead guilty, Dodd changed, at trial, his plea from innocent to guilty.³⁶ His attorneys

³⁰ *Id.*

³¹ Jennifer Sullivan, *Carnation killings: Defense vows fight to save suspect’s life*, SEATTLE TIMES (Oct. 17, 2008).

³² *See State v. Dodd*, 120 Wash.2d 1, 838 P.2d 86, 87 (1992).

³³ *Id.*

³⁴ *Id.* at 88-89.

³⁵ *Id.* at 89.

³⁶ *Id.*

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also deemed him competent to enter such a plea. And, “[a]fter consulting with counsel, Dodd chose not to present mitigating evidence and so instructed his attorneys.”³⁷ In July 1990 Dodd was sentenced to death by a jury.³⁸ He objected to “automatic review” of the sentence by the Washington Supreme Court, “and asked that the trial court accept his waiver of any appeal” – the trial court declined, and appointed appellate counsel.³⁹

Dodd went so far as to contact the Washington Supreme Court himself, writing that the trial court:

[W]ent out of its way to ensure I had a fair trial. The jury went out of its way in attempting to find a mitigating factor to merit leniency, but they found nothing and made the only possible decision according to the statutes of the state of Washington. There is no reason to waste time and money on what I firmly believe would be useless appeals. I again ask that I be allowed to waive all waivable rights to appeal and that the mandatory proportionality review be heard in a timely manner.⁴⁰

Dodd was on a fast-track to death. Consistently reaffirming his guilt, Dodd stated in a brief, “I waive my right to appeal. I plead guilty, again, to the rapes and murders. If this case is sent back to a trial court I will plead guilty again and physically and vocally demand my conviction and death sentence.”⁴¹

The court affirmed the death penalty, although finding a defendant could not waive statutory review of his or her sentence.⁴² Dodd was hung in 1993.⁴³

Dissenting, Justice Robert Utter wrote:

Mr. Dodd’s wishes, while entitled to some weight, are not determinative. Our death penalty statute requires us to review every death sentence on the record. In addition, there are several important policy reasons why allowing Dodd to waive his general appeals would be unwise. First, there is the possibility that Dodd may change his mind between now and the execution. Second, society has a significant interest in the nonarbitrary application of the death penalty. To give paramount weight to Mr. Dodd’s desires would, in effect, mean that the State is participating in Mr. Dodd’s suicide.⁴⁴

Presciently, Utter wrote, “we are likely to see many more cases in

³⁷ *Id.* at 90

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 100.

⁴² *Id.*

⁴³ See *Executions in Washington*, SEATTLE TIMES (Jan. 30, 2007).

⁴⁴ See Dodd, 838 P.2d at 101 (Utter, J., dissenting) (citations omitted).

which capital defendants seek execution.”⁴⁵

In 1995 Utter resigned in protest of the death penalty. As he would later describe in a newspaper column, on the cusp of the state’s last execution:

My original reasons for resignation still apply. I then stated: “I believe society has a right to protect itself by imposing life sentences without the possibility of parole. However, it became obvious that there were certain inherent contradictions that made unfairness and discrimination not merely uncontrollable accessories of the punishment of death, but its very essence.”⁴⁶

After Dodd’s 1993 hanging, the next Washington execution, in 1994, was of Charles Rodman Campbell, described in one article as “the ‘poster child’ for the death penalty’ after his 1982 murders.”⁴⁷ Campbell never stopped appealing his conviction, and, it was reported, “[o]ne surprise development in the days leading up to Campbell’s execution was the face-to-face meeting between Gov. Mike Lowry and Campbell at the penitentiary” – although then-Gov. Lowry declined to use his power to block the execution.⁴⁸

Fighting until the end, Campbell “had to be subdued with pepper spray and strapped to a board before he could be hanged for the murders of two women and an 8-year-old girl.”⁴⁹ As one article noted, “Outside the prison, those in favor of the execution outnumbered those opposed by about 4-1. At times, the mood among the larger group was almost giddy, with people whooping and cheering before television cameras as the execution neared.”⁵⁰

As Utter foresaw, the next execution was another “volunteer”: Jeremy Sagastegui. In 1995, he was asked by a female acquaintance to watch her two small children, including her three-year-old son Kievan, while she went out with a friend. Sagastegui would sexually abuse, beat, stab and then drown Kievan, before killing Kievan’s mother and her female friend upon their return to the mother’s home in Finley, Washington.⁵¹ He stated he was angry because the mother knew he was “nuts” but asked him to babysit anyway.⁵²

⁴⁵ *Id.* at 103.

⁴⁶ Robert Utter, *Washington state must abandon the death penalty*, SEATTLE TIMES (Mar. 11, 2009).

⁴⁷ *Charles Campbell, death row’s poster child, feared and loathed*, KITSAP SUN (May 8, 1994).

⁴⁸ Jack Broom, et al., *Campbell Hanged—Death Comes Quickly After Dozen Years Of Struggle*, SEATTLE TIMES (May 27, 1994).

⁴⁹ *Killer Struggles With Guards Before Hanging*, L.A. TIMES (May 28, 1994).

⁵⁰ Hal Spencer, *CAMPBELL EXECUTION: Triple killer fought to end to stay alive*, KITSAP SUN (May 27, 1994), https://products.kitsapsun.com/archive/1994/05-27/292898_campbell_execution_triple_kill.html.

⁵¹ See *State v. Sagastegui*, 135 Wash.2d 67, 954 P.2d 1311, 1314 (1998).

⁵² *Id.* at 1315.

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Sagastegui admitted his guilt to detectives, alleging that Kievan would have grown up to be a “molester” or a “murderer,” among other irrational statements.⁵³ Although he refused trial counsel, the trial judge appointed counsel for him – allowing him to represent himself with counsel acting as “stand-by” – although trying to dissuade Sagastegui from acting pro se.⁵⁴ In one such instance, the trial judge stated:

I must advise you that in my opinion, you would be far better defended by a trained lawyer than by yourself. I think it unwise of you to represent yourself. You are not familiar with the law; you are not familiar with court procedure; you are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.⁵⁵

After a 15-day evaluation at a mental hospital, Sagastegui was determined competent to stand trial.⁵⁶ After jury selection, he pled guilty to all three charges of aggravated first degree murder.⁵⁷ In the trial’s penalty phase, he stated he deserved execution, and had “liked” and “enjoyed” committing the murders.⁵⁸ Sagastegui waived any right of general appeal, and the right to have appellate counsel.⁵⁹ The Washington Supreme Court’s affirmed the death penalty imposed by the jury, stating, interestingly, “It may also be that his decision was motivated by his stated belief that living in a cell for the rest of his life would be worse punishment than the death penalty.”⁶⁰ In an unsolicited submission, Sagastegui had advised the court: “I got a thrill out of the killing. It gave me a great sense of power. I liked it. I’d like to do it again. I told this to the jury and now I am telling you I pled guilty because I am guilty. Pay attention. Don’t you get it, I killed, I loved it, I want to do some more.”⁶¹

Sagastegui was killed by lethal injection in 1998 – the first person in Washington to be executed by this means.⁶²

In 2001, James Homer Elledge became the fourth person executed since the state reinstated the death penalty in 1981 – and the third person executed who wanted to die.⁶³ According to an article, “Death penalty opponents said Elledge’s desire to die pushed a more common murder

⁵³ *Id.* at 1316.

⁵⁴ *Id.* at 1317.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1318.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1319.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1322-23.

⁶¹ *Id.* at 1326.

⁶² Nicholas K. Geranious, *Executions rare in Evergreen state*, SEATTLE TIMES (Sept. 4, 2010), <https://www.seattletimes.com/seattle-news/executions-rare-in-evergreen-state>.

⁶³ Rebekah Denn, David Fisher & Scott Sunde, *Killer Elledge is executed*, SEATTLE POST-INTELLIGENCER (Aug. 27, 2001), <https://www.seattlepi.com/local/article/Killer-Elledge-is-executed-1063961.php>.

case that wouldn't normally have resulted in execution over the edge."⁶⁴

Elledge abducted two women, and killed one of them, in a church basement in Lynwood, Washington, due to his anger over what he perceived as the murder victim's efforts to break up his relationship with his girlfriend.⁶⁵ Elledge admitted his guilt to law enforcement, and the trial court accepted his plea of guilty.⁶⁶ According to the Washington Supreme Court, following the state's presentation to the jury, "Elledge expressed remorse for the killing, but asked the jury to impose the death sentence asserting that 'this wicked part of me needs to die.'"⁶⁷ Both Elledge's attorney, and a clinical and forensic neuropsychologist, had attested to his competence to plead guilty.⁶⁸ Elledge was sentenced to death, and he waived his right of general appeal.⁶⁹

Elledge had a very significant criminal background, so it is unclear that his failure to offer any mitigating evidence could have changed the result.⁷⁰ The Washington Supreme Court affirmed his conviction and sentence.⁷¹

Another 2001 Washington Supreme Court decision involved Dwayne Anthony Woods, who killed two women in a trailer home in Spokane Valley, Washington in 1996, raping one, and attempting to kill another.⁷² According to the high court's decision, upon being found guilty:

As Woods was being escorted from the courtroom he informed some journalists that he would not challenge the death penalty. This occurred outside the hearing of the jury.

Over the ensuing weekend, Woods instructed his lawyers not to present any mitigating evidence at the penalty phase of the trial.⁷³

During the penalty phase, Woods offered the following statement before the jurors:

Well, ladies and gentlemen, you heard from [the prosecutor] and so you know that he's asking that you impose the death penalty. I just want to say that I have no objection. Also, I just want to remind you that a few weeks back during individual voir dire each of you was asked if you could, in fact, impose the death penalty. I believe at that time each of you said you could impose the death penalty providing

⁶⁴ *Id.*

⁶⁵ *State v. Elledge*, 26 P.3d 271, 274-75 (Wash. 2001).

⁶⁶ *Id.* at 276.

⁶⁷ *Id.*

⁶⁸ *Id.* at 277-78.

⁶⁹ *Id.* at 276.

⁷⁰ *Id.* at 280-81.

⁷¹ *Id.* at 285.

⁷² *See State v. Woods*, 23 P.3d 1046, 1053-54 (Wash. 2001).

⁷³ *Id.* at 1057.

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there's not sufficient mitigating circumstances.

So I am here to tell you there's absolutely none, not one. So I ask that each of you go back and return a vote to impose the death penalty. Thank you.⁷⁴

Woods appeared to be another volunteer. But he would change his mind, after being sentenced to death. His appeal was vigorously argued before the Washington Supreme Court, which affirmed his conviction and sentence.⁷⁵ He was never executed, and died of a heart attack in prison in 2017.⁷⁶

Just two death row inmates sentenced before the Ridgway plea bargain, and the extraordinary proportionality issues it raised, would die afterwards.

In 2006, Mitchell Rupe, who had avoided the death penalty for being deemed too overweight – at over 425 pounds – to hang, died in prison.⁷⁷ He had killed two bank tellers in Olympia, Washington in 1981, and at the time of his conviction hanging was the only means of carrying out the death penalty in Washington. His attorneys argued hanging would result in his decapitation.⁷⁸

In 2010 Cal Coburn Brown – who had raped, tortured, and killed, a Seattle-area woman in 1981 – was the last person executed in Washington.⁷⁹ In his last words, the Seattle Times reported that he complained about the disparity of his sentence relative to others, including Ridgway: “‘I only killed one victim,’ he said. ‘I cannot really see that there is true justice. Hopefully, sometime in the future that gets straightened out.’”⁸⁰

That hope would have to wait.

III. STATE VS. CROSS

State vs. Cross involved a defendant who had killed his wife and two of their daughters in King County, Washington.⁸¹ He offered an Alford plea at trial,⁸² the potential consequences of which were explained to him

⁷⁴ *Id.* at 1057-58.

⁷⁵ *Id.* at 1079.

⁷⁶ Chad Sokol, *Inmate on Death Row Dies at Hospital*, SPOKESMAN-REVIEW (Jan. 3, 2017).

⁷⁷ Nicholas K. Geranios, *Mitchell Rupe, Inmate Found Too Heavy to Hang, Dead at 51*, SEATTLE TIMES (Feb. 7, 2006).

⁷⁸ Rebecca J. Fowler, *Inmate ruled too heavy to be hanged*, WASH. POST (Sept. 21, 1994).

⁷⁹ Nicholas K. Geranios, *Wash. executes man convicted of woman's murder*, SPOKESMAN-REVIEW (Sept. 10, 2010).

⁸⁰ Jennifer Sullivan, *Killer on death row 16½ years is executed*, SEATTLE TIMES (Sept. 10, 2010).

⁸¹ *See* Cross, 26 P.3rd at 85.

⁸² *Id.* Under an *Alford* plea, one accepts the consequences of a crime without admitting

“time and time again” by the trial judge.⁸³ The jury sentenced him to death.⁸⁴ As discussed before, in a 5-4 decision the Washington Supreme Court affirmed that sentence,⁸⁵ effectively punting to the Legislature on the question of the death penalty’s proportionality. However, four justices were willing to declare the sanction unconstitutional.

And that dissent, by Justice Charles Johnson, pulled no punches: “The majority abandons any rational attempt to fulfill our statutory responsibility to conduct a proportionality review, effectively rendering the statutory duty meaningless.”⁸⁶ As he wrote: “When Gary Ridgway, the worst mass murderer in this state’s history, escapes the death penalty, serious flaws become apparent. The Ridgway case does not ‘stand alone,’ as characterized by the majority, but instead is symptomatic of a system where all mass murderers have, to date, escaped the death penalty.”⁸⁷ Citing cases similar to Ridgway’s, he stated, “They are symptoms of a system where statutory comparability defies rational explanation. The death penalty is like lightning, randomly striking some defendants and not others.”⁸⁸

The majority had even turned to what appeared to be clairvoyance in excusing away the court’s duty to examine proportionality: “Ridgway was spared because a highly respected, honorable, and thoughtful prosecutor made the decision to stay the hand of the executioner in return for information that would otherwise have died some midnight within the walls of the state penitentiary.”⁸⁹ How could they know that? And what did this have to do with proportionality? Concurring in the result, Chief Justice Alexander dismissed an approach that “lavishes praise” upon a prosecutor: “This court should refrain from commenting on the qualities of individual prosecutors, as that is a matter properly within the purview of the public and not justices.”⁹⁰

IV. LEGISLATIVE RESPONSE TO CROSS

Responding to the court’s challenge, a bill was introduced in the

committing it. *See North Carolina v. Alford*, 400 U.S. 25 (1970).

⁸³ Cross, 26 P.3rd at 95.

⁸⁴ *Id.* at 86.

⁸⁵ *Id.* at 109.

⁸⁶ *Id.* at 109 (Johnson C., J., dissenting).

⁸⁷ *Id.*

⁸⁸ *Id.* at 115.

⁸⁹ *Id.* at 100. More enigmatically, they stated, “Ridgway’s abhorrent killings, standing alone, do not render the death penalty unconstitutional or disproportionate. Our law is not so fragile. But his killings are not irrelevant to our analysis, and *will* be considered as part of our statutorily mandated review of every future death penalty case.” *Id.* at 101 (emphasis added). How would that be, precisely? The majority seemed to want to have its cake and eat it too.

⁹⁰ *Id.* at 109 (Alexander, C.J. concurring).

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Washington House in 2007 to create a death penalty task force, and stay all executions until the question of the death penalty's viability had been addressed.⁹¹ The intent section stated:

The legislature finds that historically most death sentences imposed in Washington have been reversed and rarely imposed.

The legislature further finds that it is in the state's interest to determine whether the state's capital punishment system is applied fairly and proportionally, and whether the continued allocation of substantial time, resources, and moneys spent on capital trials and appeals is warranted.⁹²

With 14 sponsors, the bill passed the House Judiciary Committee, but was denied a House Appropriations Committee hearing.⁹³ A similar bill, with 11 sponsors, passed the Senate Judiciary Committee, but was denied a hearing in the Senate Ways & Means Committee.⁹⁴

In 2009, a House bill was introduced, with 20 sponsors, entitled, "AN ACT Relating to reducing criminal justice expenses by eliminating the death penalty in favor of life incarceration."⁹⁵ The House Judiciary Committee, under a new chair, did not hear the bill.⁹⁶

Until 2018, no death penalty bill had passed either the House or Senate. In 2013, it was even news that the House, under Democratic control since 2002,⁹⁷ had finally, after the passage of six years, allowed a committee hearing for a death penalty repeal bill.⁹⁸

Finally, in October 2018, the Washington Supreme Court made it clear it was tired of waiting for the Legislature to respond to its 2006 call-

⁹¹ See H.R. 1518, 60th Leg., Reg. Sess. (Wash. 2007).

⁹² *Id.* at 2.

⁹³ See *H.B. 1518: Creating a Death Penalty Task Force*, DETAILED LEGIS. REP. – BILL SUMMARY, <http://apps2.leg.wa.gov/billsummary?BillNumber=1518&Year=2007&BillNumber=1518&Year=2007>.

⁹⁴ See *S.B. 5786: Creating a Death Penalty Task Force*, DETAILED LEGIS. REP. – BILL SUMMARY, <http://apps2.leg.wa.gov/billsummary?BillNumber=5786&Year=2007&BillNumber=5786&Year=2007>.

⁹⁵ See H.R. 1909, 61st Leg., Reg. Sess. (Wash. 2009). Among other things, the bill's intent section stated, "In light of the very substantial pressures that exist upon the criminal justice system, the legislature further finds that the continued allocation of substantial public resources to capital trials and appeals can no longer be sustained." See *id.* at §1(2).

⁹⁶ See *H.B. 1909, Reducing Criminal Justice Expenses by Eliminating the Death Penalty in Favor of Life Incarceration*, DETAILED LEGIS. REP. B, <http://apps2.leg.wa.gov/billsummary?BillNumber=1909&Year=2009&BillNumber=1909&Year=2009>.

⁹⁷ See *Political Division of the House and Senate*, WASH. ST. LEG., <http://leg.wa.gov/LIC/Documents/Historical/MembersofLeg.pdf>.

⁹⁸ Amelia Dickson, *Bill to Abolish Death Penalty Gets Hearing*, SEATTLE TIMES, Mar. 6, 2013, <http://www.seattletimes.com/seattle-news/bill-to-abolish-death-penalty-gets-hearing>.

to-action. In *State vs. Gregory*,⁹⁹ the court declared “[i]t is now apparent that Washington’s death penalty is administered in an arbitrary and racially biased manner. Given the evidence before us, we strike down Washington’s death penalty as unconstitutional [.]”¹⁰⁰ The court did not find the death penalty “per se unconstitutional” – a “moral judgment” it reserved for the Legislature – and it noted the Legislature could refashion the law into constitutional conformity.¹⁰¹

V. CONCLUSION

In an affidavit to the Washington Supreme Court, Jeremy Sagastegui stated, “Let’s go; lets entertain the people.”¹⁰²

Is this the sort of sick theater a just society should indulge?¹⁰³

Prior to *Gregory*, Washington still had eight men on death row.¹⁰⁴ The Democratic governors of Colorado, Oregon, and Pennsylvania have also used their executive powers to suspend the death penalty.¹⁰⁵ But executive fiat, however courageous or principled, cannot substitute for the failure of the people’s representatives to act.

The Walla Walla Union-Bulletin, serving the city in which the Washington State Penitentiary – and the state’s death row – is located,

⁹⁹ *State v. Gregory*, No. 88086-7, 2018 WL 4925588 (Wash. Oct. 11, 2018).

¹⁰⁰ *Id.* at 7.

¹⁰¹ *Id.* at 10.

¹⁰² See Sagastegui, 954 P.2d at 1320 n.12.

¹⁰³ Volunteers are prevalent elsewhere too. In Nevada, “Scott Dozier would rather be executed than live on death row.” Patrik Jonsson, *Outspoken Death-row Inmate Calls Nevada’s Bluff*, CHRISTIAN SCI. MONITOR (July 20, 2018) (“Partly because of his willingness to speak out, Dozier’s gambit has reinvigorated questions about volunteers: At what point does state-sponsored homicide become state-assisted suicide?”). In Texas in July 2018, “A Brazoria County man on death row for stomping his 3-month-old baby to death by the Galveston seawall filed a motion this week asking to waive his appeals and fire his attorneys, hoping to fast-track his path to the death chamber.” Keri Blakinger, *Death Row Inmate Who Stomped Baby’s Head in Galveston Asks to be Executed*, HOUSTON CHRON. (July 26, 2018). According to Robert Dunham of the Death Penalty Information Center, “Texas has had more volunteers than any other state which isn’t surprising given the sheer volume of executions in the state.” *Id.* One article suggests Nike’s slogan “Just Do It” was inspired by the final words of volunteer Gary Gilmore in 1977, the first person executed upon resumption of U.S. executions, before he faced a Utah firing squad: “Let’s do it.” Timothy Bella, *‘Just Do It’: The surprising and morbid origin story of Nike’s slogan*, WASH. POST (Sept. 4, 2018).

¹⁰⁴ Rick Anderson, *Washington state has eight people on death row — and no plans to ever execute them*, L.A. TIMES (Jan. 16, 2017, 5:00 AM), <http://www.latimes.com/nation/la-na-washington-death-penalty-2017-story.html>; see *Gregory*, *supra* note 99, at 15 (“All death sentences are hereby converted to life imprisonment.”).

¹⁰⁵ See Anderson, *supra* note 104. In December 2018, Colorado’s outgoing governor John Hickenlooper reflected on his decision to suspend the death penalty: “When you start studying, you realize that it costs a fortune, it doesn’t deter violent crime in any way. States that got rid of capital punishment 40 years ago have no higher incidence of murders or mass murders or anything. The families of victims are almost evenly divided.” Nic Garcia, *John Hickenlooper: “I made the hardest decision” on execution*, DENVER POST (Dec. 21, 2018).

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had called for the death penalty's abolition, noting, "Sentencing some to death is far more expensive than life in prison without the possibility of parole" and observing that some "arguments for retaining the death penalty are based on the emotion of seeing a brutal killer pay the ultimate price, rather than as a deterrent to crime, or even justice."¹⁰⁶ The city's Republican state senator is among the co-sponsors of the repeal effort, and one of her two Republican House seatmates has supported it too.¹⁰⁷

Progressive states have made a point of defying President Trump, on a range of issues including the environment,¹⁰⁸ immigration,¹⁰⁹ his tax cuts,¹¹⁰ and even Census questions.¹¹¹ But in Trump we also have a president who has expressed his admiration, before roaring crowds, for how authoritarian countries address drug dealing through use of the death penalty.¹¹² If even progressive states, like Washington, are unwilling to counter such barbarity by legislatively abolishing the death penalty,¹¹³ how can they serve as models for "red states" like Alabama, where a 2018 execution was horrifically botched,¹¹⁴ and states where evidence suggests

¹⁰⁶ Editorial, *Death penalty is no longer needed in Washington*, UNION-BULLETIN (Jan. 16, 2018), http://www.union-bulletin.com/opinion/editorials/death-penalty-is-no-longer-needed-in-washington/article_6f68cf54-fb15-11e7-ba93-0f3902a49cb7.html.

¹⁰⁷ See Joseph O'Sullivan, *Abolish Washington's death penalty? Deep divide remains*, SEATTLE TIMES (Jan. 25, 2017, 8:57 PM), <https://www.seattletimes.com/seattle-news/politics/abolish-washingtons-death-penalty-deep-divide-remains>.

¹⁰⁸ See Lisa Friedman & John Schwartz, *Borrowing G.O.P. Playbook, Democratic States Sue the Government and Rack Up Wins*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/climate/attorneys-general-trump-environment-lawsuits.html>.

¹⁰⁹ See, e.g., Larry Neumeister & Gene Johnson, *15 states, D.C. sue Trump over ending DACA*, CHICAGO TRIB. (Sept. 6, 2017).

¹¹⁰ See Joseph De Avila, *Democratic States Sue Trump Administration Over Tax Overhaul*, WALL ST. JOURNAL (July 17, 2018).

¹¹¹ See Reid Wilson, *Blue states sue Trump over census citizenship question*, THE HILL (Mar. 27, 2018).

¹¹² Michelle Mark, *Trump doubles down on executing drug dealers*, BUSINESS INSIDER (Mar. 10, 2018).

¹¹³ In California, perhaps the epicenter of Trump resistance, voters in 2016 rejected a ballot measure to abolish the death penalty, and actually approved one to speed up the appeals process in death penalty cases. See, e.g., Noah Redlick, *When Politics Turn Deadly: The Failure of California's Proposition 62*, HARVARD POL. REV. (Mar. 13, 2018) (citing "emotionally charged ads"). One 2018 *Los Angeles Times* editorial used the example of the recent exoneration of an inmate on death row for a quarter-century to argue that California's new "rush-to-execute" approach was wrong and the death penalty should be abolished. Editorial, *The latest California death row exoneration shows why we need to end the death penalty*, L.A. TIMES (Apr. 27, 2018).

¹¹⁴ A writer describes this state-perpetuated horror in chilling detail:

A man suffering from cancer strapped to a gurney after spending 30 years on death row in Alabama. An intravenous team probing him, jabbing him, for hours in an attempt to find a usable vein to administer the lethal, secret drug cocktail. Going into his groin a half-dozen times, puncturing his bladder, penetrating his femoral artery. Until, a little before the midnight deadline, they abandon the botched execution with its puncture-mark traces tattooed across the man's legs and groin.

Roger Cohen, *Death Penalty Madness in Alabama*, N.Y. TIMES (Feb. 27, 2018).

racial bias influences imposition of the death penalty?¹¹⁵ We cannot expect state courts to fortuitously do the work of timid legislators.

Federal redress for wrongful convictions would also appear to be increasingly unlikely, as President Trump, through July 2018, had appointed more appellate judges than any president in history up to that point of his presidency – making a point of choosing younger judges.¹¹⁶ The first vote cast by Justice Neil Gorsuch, Trump’s first Supreme Court nominee, was to side with four conservative justices and deny a death penalty appeal out of Arkansas – facilitating, in 2017, the first execution there since 2005.¹¹⁷ The case of Ledell Lee, the New York Times editorialized, “was a walking catalog of reasons the American death penalty is a travesty.”¹¹⁸ They noted:

Evidence that Mr. Lee was intellectually disabled and suffered from fetal alcohol syndrome was never introduced into court, mainly because he had egregiously bad representation. One of his lawyers was so drunk in court that a federal judge reviewing the case later said he could tell simply by reading the transcripts.¹¹⁹

These horrors will continue to occur, as states invent ways to continue to kill now that pharmaceutical companies will not allow the off-label use of their drugs for executions. *See, e.g.*, Erik Ekholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (Mar. 13, 2016). In Oklahoma, the governor’s own top attorney urged the use of the wrong drug for an execution that was, mercifully, called off. *Oklahoma officials backed use of wrong drug in botched execution – grand jury*, THE GUARDIAN (May 19, 2016). Not so fortunate was Clayton Lockett, whose 2014 execution in Oklahoma took 43 minutes and was described as “a bloody mess.” *See* Katie Fretland, *Scene at botched Oklahoma execution of Clayton Lockett was ‘a bloody mess’*, THE GUARDIAN (Dec. 13, 2014). The lethal drug mix for Lockett had been composed based on an *Internet search* by Oklahoma officials. *See id.* Arkansas has had to halt executions until it can change state law so as to be allowed to search *secretly* for lethal drugs. *See* Jessi Turnure & Mitch McCoy, *ADC: Search for Controversial Lethal Drug Used in Executions Temporarily Suspended*, KARK (Jul. 18, 2018).

¹¹⁵ In Missouri, for example, one professor’s study found that “[t]he percentage of homicides that resulted in executions was very low: 0.7 percent. That increases to 2.1 percent when the victim is white but decreases to 0.3 percent when the victim is black.” Jeremy Kohler, *Study points to race and gender disparity in Missouri executions*, ST. LOUIS POST-DISPATCH (Jul. 19, 2015).

¹¹⁶ *See* Matt Viser, *Conservative plan, years in the making, is occurring as Trump fills federal bench*, BOSTON GLOBE (July 21, 2018). Yet even the conservative columnist George Will now opposes the death penalty, for conservative reasons. *See* George Will, *Abolish the death penalty*, WASH. POST (Sept. 28, 2018) (“Conservatives have their own standards, including this one: The state — government — already is altogether too full of itself, and investing it with the power to inflict death on anyone exacerbates its sense of majesty and delusions of adequacy.”).

¹¹⁷ Editorial, *Neil Gorsuch and the State’s Power to Kill*, N.Y. TIMES (Apr. 21, 2017).

¹¹⁸ *Id.*

¹¹⁹ *Id.* Arkansas was in a hurry to kill Lee and other death row inmates “because the state’s old batch of midazolam was about to expire.” *Id.* Amidst a national opioid crisis, Nebraska became the first state to use the opioid fentanyl in an execution, in 2018. *See* Mark Berman, *Nebraska becomes the first state to use fentanyl in an execution*, WASH. POST (Aug. 14, 2018). The man executed sought to “dismiss his lawyers as part of his effort to allow it to take place.” *Id.* Nebraska legislators had actually been able to override a gubernatorial veto and abolish the death penalty in 2015 – voters restored it in 2016 after the state’s wealthy governor funded a ballot campaign. *Id.*

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Finally, beyond questions of morality or proportionality, at what price would states have vengeance? According to a study by four Seattle University professors reported in 2015, “the average cost of a death penalty case in Washington is \$3.07 million, compared to \$2.01 million (in 2010 dollars) for cases in which the prosecutor does not seek death. Adjusted to 2014 dollars, that difference is \$1.15 million.”¹²⁰

With government resources finite, the cost of pursuing the death penalty – even for the undeniably guilty – can only take resources away from vital programs serving the innocent.

¹²⁰ Press Release, Seattle University, Seattle University study finds Washington death penalty cases cost at least \$1 million more than when death not sought (Jan. 7, 2015), <https://law.seattleu.edu/newsroom/2015-news/seattle-university-study-finds-washington-death-penalty-cases-cost-at-least-1-million-more-than-when-death-not-sought>. And yet, even after the Washington Supreme Court’s dramatic decision to declare the death penalty unconstitutional as applied, the House Judiciary Committee chair “couldn’t guarantee that the House would pass a repeal bill in 2019, but she said unconstitutional laws should be taken off the books.” Joseph O’Sullivan, *Court ruling on death penalty could end the long debate in Olympia over capital punishment*, SEATTLE TIMES (Oct. 11, 2018).