Testimony before the Commission to Study the Death Penalty in New Hampshire

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INTRODUCTON

Good morning, your honor, Members of the Commission. I would like to thank you for the invitation to testify before this important gathering.

My name is Richard Dieter. Since 1992, I have been the Executive Director of the Death Penalty Information Center[1] in Washington, DC. The Center is a non-profit organization that conducts research and publishes reports on issues related to capital punishment in the United States. I am an attorney and also an adjunct professor at the Catholic University Law School in Washington.

The Center's role is not to advocate for particular pieces of legislation but to focus on research and trends in the death penalty, identifying problems and pointing to possible remedies. In my presentation today, I hope to give the Commission a national perspective on the costs of capital punishment and to briefly address the corollary question of whether the benefits of this system justify the costs. What I will not be able to offer is a detailed account of what the death penalty is costing the state of New Hampshire. That is an important, but by no means simple, research project of its own. I would be more than happy to answer any questions that members of the Commission may have at any time.

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MEASURING THE COSTS OF THE DEATH PENALTY

Probably one of the most common misperceptions about the death penalty is the notion that the death penalty saves money because executed defendants no longer have to be cared for at the state's expense. If the costs of the death penalty were to be measured at the time of an execution, that might indeed be true. But as every legislator, county commissioner, and judge knows, the costs of a criminal case begin long before the sentence is carried out. Prosecutors and defense attorneys must be assigned and undertake a long period of investigation and pre-trial hearings. Jury selection, the trial itself, and initial appeals will consume years of time and enormous amounts of money before an execution is on the horizon.

But even counting all of those steps would still miss the major contributor to the high cost of capital punishment. The death penalty is an exceedingly expensive part of the criminal justice system because it is necessarily very inefficient. I say "necessarily" because, as the U.S. Supreme Court has repeatedly said, "death is different." This means that the ordinary system of due process is insufficient in capital cases. Virtually every step in the criminal justice process will take longer in a death penalty case and be more complicated. In terms of costs, it means that whatever expenses there are in an ordinary criminal case, they will be much higher in a capital case. More experienced lawyers will be needed, more experts will be employed, more questions will be asked of potential jurors, more time will be taken for the trial and appeals. And the end result will be that very few (if any) of the people selected for death penalty prosecution will ever be executed. And yet, the costs of every one of those potential cases must be counted in the costs of the death penalty.

The cost of our country's going to the moon cannot be restricted to the costs of a single rocket and lander. We have to include all the experimental flights, all the research, all the failures and partial successes that necessarily precede such a bold venture. The same is true for the death penalty. A typical state has hundreds of cases that are eligible for the death penalty. A formal capital prosecution will be undertaken in less than half of these cases; much fewer will go to trial; only some will be sentenced to death; and very, very few will survive appeals and result in an execution. Last year there were 37 executions in the entire country, 95% of them were in the south. Most of the country had no executions, and that is typical. Since the death penalty was reinstated in 1976, 41 of the 50 states have had either no executions or an average of less than 1 execution per year.[2] Only 1 state (Texas) has averaged more than 3 executions per year. By contrast, the average number of murders in the U.S. per year during this time was approximately 19,000.[3] If you think of the death penalty only in terms of executions, then you will be missing almost all of this vast system, and you will count only a tiny fraction of its costs.

How much does the death penalty cost?

There is no national figure for the cost of the death penalty. Every state study is dependent on that state's laws, pay scales, and the extent to which it uses the death penalty. Studies have been conducted by research organizations, public defender offices, legislative committees, and the media. Researchers have employed different

[2] . See DPIC, http://www.deathpenaltyinfo.org/executions-united-states, (June 2009).

[3] . See U.S. Dept. of Justice, FBI Yearly Uniform Crime Reports, <http://www.fbi.gov/ucr/ucr.htm> (2009).

approaches, using different assumptions. However, *all of the studies conclude that the death penalty system is far more expensive than an alternative system in which the maximum sentence is life in prison.*

The high costs to the state reflect the following reality: For a single death penalty trial, the state may pay $1 million more than for a non-death penalty trial.[4] But only one in every three capital trials may result in a death sentence,[5] so the true cost of that death sentence is $3 million. Further down the road, only one in ten of the death sentences handed down may result in an execution.[6] Hence, *the cost to the state to reach that one execution is $30 million*. Sums like these are causing officials to rethink the wisdom of such expenditures.

In some states $30 million per execution is actually a very conservative estimate:

- In 2008, the California Commission on the Fair Administration of Justice released an exhaustive report on the state's capital punishment system, concluding that it was "dysfunctional" and "broken." The report found that the state was spending $137 million per year on the death penalty. The Commission estimated a comparable system that sentenced the same inmates to a maximum punishment of life without parole would cost only $11.5 million per year.[7] Since the number of executions in California has averaged less than one every two years since the death penalty was reinstated in 1977, the cost *for each execution* is over $250 million. The state has also indicated it needs another $400 million to construct a new death row.

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[4] . In one of the most recent cost studies, The Urban Institute estimated the additional cost of a death penalty trial in Maryland to be $1.9 million. J. Roman et al., "The Cost of the Death Penalty in Maryland," The Urban Institute (March 2008), at 2.

[5] . In the Maryland study, 56 death sentences were handed down out of 162 cases in which the death penalty was sought. *Id*. at 3. This does not even account for the many cases in which the death penalty was originally sought, incurring many additional expenses, but then settle without a trial or death sentence being imposed.

[6] . Of the 56 death sentences in Maryland, five have resulted in executions.

[7] . See California Commission on the Fair Administration of Justice, http://www.ccfaj.org/rr-dp-official.html, June 30, 2008 [hereinafter *California Commission*].

- In New York and New Jersey, the high costs of capital punishment were one factor in those states' recent decisions to abandon the death penalty. New York spent about $170 million over 9 years and had no executions.[8] New Jersey spent $253 million over a 25-year period and also had no executions.[9] In such states the cost per execution obviously cannot be calculated, but even assuming they eventually reached one execution every other year, and continued the annual expenditures indicated in their studies, the cost per execution would be in the $20-to-$40 million range.

- In Maryland, where a legislative commission recently recommended abolishing the death penalty, a comprehensive cost study by the Urban Institute estimated the extra costs to taxpayers for death penalty cases prosecuted between 1978 and 1999 to be $186 million.[10] Based on the 5 executions carried out in the state, this translates to a cost of $37 million per execution.

It is important to emphasize the high costs per execution do not mean that executions themselves are expensive, or that pursuing one execution will cost tens of millions of dollars. Rather, these costs reflect the reality that most capital prosecutions never result in a death sentence, and most death sentences do not result in an execution. The extra expenses begin mounting as soon as counsel are appointed in a potential death penalty case.

Death Penalty Costs Are Increasing

Moreover, the costs per execution are rising. In 1988, the *Miami Herald* estimated that the costs of the death penalty in Florida were $3.2 million per execution, based on

[8] . See, e.g., D. Wise, "Capital Punishment Proves to Be Expensive," New York Law Journal, April 30, 2002, at p.1; see also "Costly Price of Capital Punishment—Case Shows Effort Expended Before the State takes a Life," Albany Times-Union, Sept. 22, 2003 (over $160 million spent in 7 years); N.Y. Times, Feb. 28, 2005 (citing costs of $170 million).

[9] . See Newsday, Nov. 21, 2005.

[10] . See J. McMenamin, "Death penalty costs Md. more than life term," Baltimore Sun, March 6, 2008. The study included projected future costs since many of the cases prosecuted during that time are still not complete and are incurring additional expenditures.

the costs and rate of executions at that time.[11] But today there are more people on death row, fewer executions per year, and higher overall costs, all contributing to a significantly *higher cost per execution*. A recent estimate by the *Palm Beach Post* found a much higher cost per execution: Florida now spends $51 million a year over what it would spend to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida carried out from 1976 to 2000, that amounts to a cost of $24 million for each execution, a significant rise from earlier projections.[12]

A similar increase appears in California. In 1988, the *Sacramento Bee* found that the death penalty cost California $90 million annually beyond the ordinary expenses of the justice system, of which $78 million was incurred at the trial level.[13] But the costs have increased sharply since then. According to the *Los Angeles Times* in 2005, maintaining the death penalty system now costs taxpayers more than $114 million a year beyond the cost of simply keeping the convicts locked up for life. This figure does not count the millions more spent on court costs to prosecute capital cases. The *Times* concluded that Californians and federal taxpayers are paying more than *$250 million for each execution.*[14]

It is also telling to examine the costs of specific features of the death penalty system, as revealed through state and federal studies:

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[11] . D. Von Drehle, "Bottom Line: Life in Prison One-sixth as Expensive," Miami Herald, July 10, 1988, at 12A.

[12] . S. V. Date, "The High Price of Killing Killers," Palm Beach Post, Jan. 4, 2000, at 1A.

[13] . S. Maganini, "Closing Death Row Would Save State $90 Million a Year," Sacramento Bee, March 28, 1988, at 1.

[14] . Los Angeles Times, March 6, 2005 (California has now had 13 executions).

- In Maryland, the 106 cases in which a death sentence was sought but *not imposed* will cost the state $71 million. This extra cost is solely due to the fact that the death penalty was pursued, even though the ultimate outcome was a life or long-term prison sentence.[15]

- The average cost for just the *defense* at trial in a federal death case is $620,932, about 8 times that of a non-capital federal murder case.[16]

- In Kansas, the *trial costs* for death cases were about 16 times greater than for non-death cases ($508,000 for death case; $32,000 for non-death case). The appeal costs for death cases were 21 times greater.[17]

- In California, the *cost of confining one inmate to death row* is $90,000 per year more than the costs of incarcerating the same inmate in a maximum-security prison. Death row inmates require higher security, often in single cells, where meals and other essentials are brought to them daily. This is a very inefficient means of confinement. With California's current death row population of 670, that amounts to over $60 million annually.[18] And a new death row is being planned, at a cost of about $400,000 per inmate.

Opportunity Costs

Generally, offices involved in the prosecution or defense of criminal cases expand or contract according to the work that must be done. The extra time required by death penalty cases typically has caused the size and budgets of such offices to increase, but not every cost associated with the death penalty appears as a line item in the state budget. Prosecutors, who are not paid by the hour, have been reluctant to divulge the time and related expenses reflecting their part in capital cases. Judges and public defenders are usually salaried employees who will be paid the same amount whether assigned to death penalty cases or other work. But it would be misguided not to

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. J. McMenamin, see note 10 above.

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. Office of Defender Services of the Administrative Office of the U.S. Courts, "Update on Cost, Quality, and Availability of Defense Representation in Federal Death Penalty Cases," June 2008; prepared by Jon Gould and Lisa Greenman.

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. Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, Kansas (2003).

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. *California Commission*, see note 7 above, at 70.

include the extra time that pursuing the death penalty takes compared to cases prosecuted without the death penalty in calculating costs.

If it takes 1,000 hours of state-salaried work to arrive at a death sentence and only 100 hours to have the same person sentenced to life without parole, the 900 hours difference is a state asset. If the death penalty is eliminated, the county or the state can decide whether to direct those employee-hours to other work that had been left undone, or choose to keep fewer employees. There is a financial dimension to all aspects of death penalty cases, and proper cost studies take these "opportunity costs" into account.[19]

The Effect of Plea Bargaining

One asserted refutation that has been offered to the high cost of the death penalty is that the threat of this punishment produces financial savings because defendants are more likely to accept plea bargains, thus avoiding the cost of a trial.[20] However, whatever savings are produced through this ethically questionable practice are overwhelmed by the costs of preparing for a death penalty prosecution even if it never goes to trial.

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[19] . See, e.g., P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993). This is one of the most comprehensive cost studies conducted in the country. It included the costs of the extra time spent by prosecutors, judges, and other personnel on death penalty cases and concluded that the death penalty costs North Carolina $2.16 million per execution over the costs of a non-death penalty system imposing a maximum sentence of imprisonment for life.

[20] . See, e.g., K. Scheidegger, "The Death Penalty and Plea Bargaining to Life Sentences," Working paper 09-01, at 13, Criminal Justice Legal Foundation (Feb. 2009) ("repeal of the death penalty would likely result in fewer pleas to life or long sentences, requiring that prosecutors either take more cases to trial at a substantial financial cost or accept bargains to lesser sentences at a substantial cost to public safety.").

Some of the most thorough cost analyses conducted over the past 15 years specifically address plea bargaining as an area that could affect the costs of the death penalty, including those in North Carolina,[21] Indiana,[22] Kansas,[23] and California,[24] though some considered it too speculative to measure. These studies nevertheless concluded that the death penalty added significantly to the costs of the criminal justice system.

The dubiousness of any savings from this practice is underscored by a federal death penalty cost study. The Judicial Conference of United States concluded that the average cost of representation in federal death penalty cases *that resulted in plea bargains* was $192,333. The average cost of representation in cases that were eligible for the death penalty but in which the death penalty was not sought was only $55,772.[25] This indicates that *seeking* the death penalty raises costs, even when the case results in a plea bargain. It would be far cheaper to pursue murder cases if the death penalty were never on the table, even taking some non-capital cases to trial, than to threaten the use of the death penalty to induce a plea bargain because the legal costs of preparing for a death penalty case far exceed the costs of a non-death penalty trial.

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[21] . See P. Cook, note 19 above.

[22] . Indiana Criminal Law Study Commission, January 10, 2002.

[23] . See note 17 above.

[24] . See *California Commission*, note 7 above.

[25] . See, "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation," Judicial Conference of the United States (May 1998). The *prosecution* costs in death cases were 67% higher than the defense costs, even before including the investigative costs of law enforcement agencies.

Moreover, data from some states refute the notion that the death penalty increases the incentive to plea bargain. Prosecutors in New Jersey said that abolition of the death penalty there in 2007 has made no difference in their ability to secure guilty pleas.[26] In Alaska, where plea bargaining was abolished in 1975, a study by the National Institute of Justice found that since the end of plea bargaining, "guilty pleas continued to flow in at nearly undiminished rates. Most defendants pled guilty even when the state offered them nothing in exchange for their cooperation."[27]

In addition, the practice of charging the death penalty for the purpose of obtaining plea bargains is an unethical and unconstitutional interference with a defendant's Sixth Amendment right to trial. It risks convicting innocent defendants who plead guilty solely to avoid the possibility of a death sentence—which has occurred on numerous occasions.[28]

The Effect of Costs on the Administration of Justice

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[26] . R. Lardini, "A year later, state assesses justice without death penalty," *New Jersey Star Ledger,* December 15, 2008.

[27] . R. Fine, "Plea Bargaining: An Unnecessary Evil," in *Criminal Justice?,* Robert Bidinotto, ed. Irving-on-Hudson: Foundation for Economic Education, 1996; cited in "Plea Bargaining: Economic Costs and Benefits," undergraduate paper for *The Economics of the Law,* Washington University in St. Louis, December 5, 1996; www.dianahsieh.com/undergrad/pb.html.

[28] . See, e.g., P. Hammel, "Pardons granted to five in murder they didn't commit," Omaha World-Herald, January 27, 2009. The defendants who were pardoned had confessed to the crime to escape the threat of the death penalty. "We were all scared of it. They were all threatening us with it," said James Dean, one of the five who was exonerated. Ada Joann Taylor, another defendant, said, "They told me they wanted to make me the first female on death row." *Id*.

The increasing costs of the death penalty are having a direct and negative impact on the administration of justice:

- In New Mexico, the state Supreme Court held that more resources had to be made available for indigent defendants facing capital punishment. The legislature declined and adjourned for the year. A trial judge then ruled that the state could not pursue the death penalty in a prosecution and the attorney general's office concurred, thus halting capital prosecutions in that state.[29]

- In Georgia, the death penalty prosecution in one case (Brian Nichols) has already cost the state close to $2 million and the case has not yet gone to trial. There is no question of Nichols' guilt, but seeking the death penalty has proven enormously expensive. The case has resulted in a crisis in indigent funding across the state. The head of the death penalty unit of the public defender's office resigned because he said his office could no longer fairly represent its clients and many cases have ground to a halt.[30]

- In New Jersey, police chief James Abbott served on the commission that reviewed that state's death penalty law. He concluded that the money spent on the death penalty was wasteful and that there were better ways to reduce crime. He wrote: "I no longer believe that you can fix the death penalty. Six months of study opened my eyes to its shocking reality. I learned that the death penalty throws millions of dollars down the drain -- money that I could be putting directly to work fighting crime every day -- while dragging victims' families through a long and torturous process that only exacerbates their pain. . . As a police chief, I find this use of state resources offensive. . . . Give a law enforcement professional like me that $250 million, and I'll show you how to reduce crime. The death penalty isn't anywhere on my list."[31]

- In Florida, a budget crisis has led to a cut in funds for state prosecutors' offices. As a result, some prosecutors will be cutting back on use of the death penalty because it is so costly. Florida State Attorney Harry Shorstein recently said that cuts to his budget might mean abandoning expensive death penalty cases. "There will be cases that can't be tried. Will it mean we can't get to the trials? Will it take longer? Will it, will it clog the criminal justice system? Yes. . . . We are strained to the breaking point. . . . Instead of seeking the death penalty, maybe we'll seek something else," he said.[32]

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[29] . Scott Sandlin, "Death Penalty Out in Guard Killing," Albuquerque Journal, April 4, 2008.

[30] . Shannon McCaffrey, "Georgia Senate slashes money for public defenders," Macon Telegraph, February 20, 2008; see also New York Times, September 7, 2007.

[31] . James Abbott, "Less money, more pain and injustice," Fort Worth Star-Telegram, January 20, 2008.

[32] . Jacksonville Daily Record, September 13, 2007.

Economic downturns in the past have meant that states have had to make drastic cuts in law enforcement and other services such as reducing the number of police officers, closing libraries, laying off prison guards and nurses, and neglecting to repair essential vehicles.[33] The death penalty is not responsible for these budget crises, but it does force legislators to choose among programs that can make a difference in people's lives.

Many of the costs of the death penalty are inescapable and have likely increased as the demands for a more reliable and fairer system have been heard.[34] The appeals process now takes longer, the defense attorneys, prosecutors and judges all are paid more, re-trials are long and more expensive. The majority of the costs occur at the trial level, and cannot easily be streamlined or reduced.

Costs Should Be Measured Against Potential Benefits

If there is a tangible benefit from the death penalty, it is not one that states across the country are embracing. There has been a clear national trend away from the use of the death penalty in the United States in recent years. Since 1999, there has been a 60% drop in death sentences, a 50% decline in executions, and a decrease in the size of death row.[35] Public support has dropped from a high of 80% support in 1994 to 65% in the

[33] . See, e.g., New York Times, June 7, 2003 (cuts in prison guards and police forces; Lakeland (Florida) Ledger, December 14, 2003 (cuts in libraries); Associated Press, April 2, 1999 (not replacing nurses or fixing vehicles).

[34] . The U.S. Supreme Court placed higher demands on state-provided representation when it overturned a death sentence because the attorneys had not employed a mitigation specialist to thoroughly explore their client's background. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003).

[35] . See, e.g., Bureau of Justice Statistics Annual Report on Capital Punishment, at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/cp06st.htm> (including data on 2006 and preliminary data on 2007).

most recent Gallup Poll.[36] Moreover, when the public is given a choice between a sentence of life-without-parole for murder and the death penalty, more people would prefer the life sentence.[37] The sentence of life without parole is now available in virtually every state in the country.[38]

The experts in law enforcement agree that the death penalty offers little to society in terms of safety. In a national poll released in 2009, the nation's police chiefs ranked the death penalty *last* in their priorities for effective crime reduction. The officers *did not believe the death penalty acted as a deterrent* to murder, and they rated it as one of *most inefficient* uses of taxpayer dollars in fighting crime. Criminologists concurred that the death penalty does not effectively reduce the number of murders.[39]

The growing skepticism about the death penalty and its declining use has led some states to take concrete actions away from this punishment. New Jersey voted to abolish the death penalty in 2007, and New York has also abandoned capital punishment, despite having reinstated it in 1995. Illinois has had a moratorium on executions since 2000 that remains in effect. New Mexico abolished the death penalty in 2009, and other states came close to doing so. Finally, the U.S. Supreme Court has decided a series of cases that further restricts the use of the death penalty in a number of areas.[40]

[36] . See Gallup Poll, http://www.deathpenaltyinfo.org/national-polls-and-studies.

[37] . See Gallup Poll, < http://www.gallup.com/poll/23548/Support-Death-Penalty-Years-After-Supreme-Court-Ruling.aspx>.

[38] . Only Alaska does not use a sentence of life without parole.

[39] . See generally R. Dieter, "Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis," DPIC (2009) (results of national police chiefs poll).

[40] . See *Atkins v. Virginia* (2002) (excluding the mentally retarded), *Roper v. Simmons* (2005) (excluding juvenile offenders), *Kennedy v. Louisiana* (2008) (excluding crimes against a person where no death

TIME BETWEEN SENTENCING AND EXECUTION

The decline in the use of the death penalty has correlated with an increase in the time between sentencing and execution. For executions carried out in 2007 alone (the last year for which full data is available), the average time was almost 13 years. About 275 inmates have been on death row for 24 years or more.[41] This delay has been a source of dissatisfaction with the death penalty on the part of many victims' family members and with the public generally. However, much of the delay is the result of years of widespread use of capital punishment, which created large death rows and a backlog of cases in the appellate courts. The other reason for the delay is a healthy caution resulting from the near executions of innocent people.

This extensive delay results in the imposition of two sentences on the defendant: a life sentence in solitary-like confinement, *and* a death sentence that may never be carried out. Such a system is enormously expensive for the state and a source of frustration for many victims' families. Indeed, some family members have remarked that, given the extensive time, the unpredictability of the outcome, and the painful reliving of the tragedy that inevitably accompanies this process, it would have been better if a life sentence had been imposed in the first place.[42]

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resulted), and *Wiggins v. Smith* (2003) (requiring more thorough mitigation investigations).

[41] . See Bureau of Justice Statistics, Capital Punishment, 2005 (2006), appendix Table 3.

[42]. James O'Brien's daughter Deidre was murdered in 1982, and the capital trials and appeals for the man convicted of the crime lasted many years. O'Brien stated, "I've lived through the state's process of trying to kill [a murderer], and I can say without hesitation that it is not worth the anguish that it puts survivors through…." Because of the "horrendous toll" the process took on his family and the little closure it gave them, O'Brien, a resident of St. Michael's, Maryland, called for abolition of the death penalty. Regarding closure for the family, he said, "the death penalty forces that closure further away than any other punishment on the books." J. O'Brien, "Death Penalty Punishes Victims' Families, Too," The Daily Record, Nov. 25, 2007.

INNOCENCE AND COSTS

As indicated above, the delay between sentencing and execution does not occur in a vacuum, but is closely related to other important death penalty issues, especially innocence and costs. Indeed, delay may be the most appropriate response in the face of evidence indicating a risk that innocent lives could be taken.

The American people now know that the problem of innocence is a lot more serious than was previously thought. Since 1973, 139 people who were sentenced to death in 26 states have been freed after their convictions were reversed. Most of the 139 people who have been freed were exonerated since 1995, and 55 were freed since the beginning of 2000. Nine people have already been exonerated in 2009. On average, it took about 9.8 years between the defendant's sentencing and his or her exoneration.[43]

[43] . See R. Dieter, *Innocence and the Crisis in the American Death Penalty,* Death Penalty Information Center (2004), listing the first 116 cases and discussing the problem generally. See also DPIC's Web site http://www.deathpenaltyinfo.org under "Innocence" for a complete list of all cases and the criteria for inclusion on the list.

REFORMS AND COSTS

Preventing the errors that led to these wrongful convictions should be one of the highest priorities of our justice system. But typical reforms such as providing better representation to defendants, videotaping interrogations, and allowing for the introduction of new evidence, can raise the costs of the death penalty and even increase the initial time required (though in the long run they might avoid lengthy re-trials).

The death penalty on the cheap is really no bargain. There is no abstract dollar figure for the cost of the death penalty--it ultimately depends on the quality of the system a state demands. In Illinois, their system was fraught with error. Over a 20-year period, they freed more innocent people from death row than they executed. As a result, a blue-ribbon commission there recommended 85 changes to make the death penalty more reliable; most of these changes, if implemented, will cost the state even more money.[44]

LIKELIHOOD OF EXECUTIONS

If there are benefits from the death penalty, they occur from either executions or the threat of executions. A death penalty without executions is just a very expensive form of life without parole. Surprisingly, that is the system that most states employ.

A study at Columbia University Law School demonstrated how few capital cases actually result in an execution: the study found that 68% of death penalty sentences or convictions are overturned on appeal.[45] The serious errors that were discovered

[44] . Report of the Governor's Commission on Capital Punishment (Illinois, released April 15, 2002).
[45] . James S. Liebman, "A Broken System: Error Rates in Capital Cases," (Columbia Univ. June, 2000) (executive summary).

required at least the sentencing phase to be done over. When these death penalty cases were re-tried, approximately 82% resulted in a life sentence. Thus, the typical death penalty case has all the expenses of its early stages and appeal; it is then overturned, and a life sentence is imposed, resulting in all the costs of a lifetime of incarceration. Nationally, only about 14.6% of people who have been sentenced to death have been executed.[46]

Theoretically, New Hampshire might fashion a more efficient death penalty system. Texas, for example, has executed about one-third of the people it has sentenced to death. Even at that rate, it has been estimated that the **extra** costs of the death penalty in Texas are about $2.3 million per case.[47] And Texas' "efficient" death penalty system has also been accompanied by a record of sleeping lawyers, prosecutorial misconduct, and sharp reprimands from the U. S. Supreme Court.[48]

CONCLUSION

The death penalty in the United States has become unwieldy. In most states, executions are rare, the delay between sentencing and executions has lengthened, and the costs of the death penalty system have grown considerably. Yet for all this additional effort, death penalty cases are still prone to error and the risk of executing an innocent person remains. The public and the families of victims have a right to be frustrated with this system. But there is no simple way to reduce delays and costs while ensuring that innocent lives are protected and that the system works fairly. This

[46] . See U.S. Dept. of Justice, Bureau of Justice Statistics, "Capital Punishment 2007," Table 10 (2008).

[47]. C. Hoppe, "Executions Cost Texas Millions," Dallas Morning News, March 8, 1992, at 1A.

[48] . See, e.g., Miller-El v. Dretke, 125 S. Ct. 2317 (2005) (race bias in jury selection).

dilemma is one of the principal reasons that the use of the death penalty has declined so dramatically in recent years.

I would be happy to provide this committee with more extensive information on the points I have raised. I would also be pleased to answer any questions you may have.