Testimony Submitted to the Nebraska Legislature

Judiciary Committee

Hearings on the Death Penalty

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Introduction

Mr. Chairman, Members of the Committee: I want to thank you for the opportunity to submit this testimony to you regarding the costs of the death penalty in the United States and related issues.

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 U.S. I am also an attorney and an adjunct professor at the Catholic University Law School in Washington.

The Center's role is not to advocate for particular legislation. We focus our research on developments in the death penalty, identifying problems and pointing to possible remedies. In my testimony, I hope to give you a national perspective on some of the dramatic changes occurring in capital punishment around the country, and explain why these changes affect the issue of costs. I would be happy to answer any questions that members may have, either by correspondence or in person.

Measuring The Costs Of The Death Penalty

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 prosecutor, defense attorney, and judge knows, the costs of a capital case begin long before the sentence is carried out. Experienced prosecutors and defense attorneys must be assigned and begin 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.

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 when it comes to punishment, "death is different."[2]

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[2] . See, e.g., Kennedy v. Louisiana, 554 U.S. 407 (2008) ("When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.").

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. The end result is that very few 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 to arrive at the true cost of the death penalty.

The cost of our country's going to the moon cannot be restricted to the expense 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 complicated 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. Nebraska is a good example. According to an article in the *Omaha World-Herald*, during a period of almost 35 years after the death penalty was reinstated in 1973, 205 murder cases were eligible for the death penalty; 31 of those resulted in death sentences; and just 3 resulted in executions, though none since 1997.[3] The extra costs of the death penalty were present in all of the cases where the prospect of the death penalty was raised, even in cases in which the death penalty was sought but a life sentence was given. Across the country, only about 15% of those who have been sentenced to death have been executed.[4]

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

[3] . "Death penalty pits costs vs. closure," Omaha World-Herald, May 3, 2009.
[4] . See, e.g., Bureau of Justice Statistics Annual Report on Capital Punishment, at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2236 (including data on 2010 and preliminary data on 2011).

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.*

Some recent cost studies provide an example of how much the death penalty can cost over the years that the policy is in existence:

- In Maryland, a comprehensive cost study by the Urban Institute in 2008 estimated the extra costs to taxpayers for death penalty cases prosecuted between 1978 and 1999 to be $186 million.[5] Based on the 5 executions carried out in the state, this translates to a cost of $37 million per execution. The complete cost of a death sentence (trial, appeals, incarceration on death row) was estimated to be $3 million. The cost for a comparable case in which death was not sought was $1.1 million (including life-time incarceration). (The state is on the verge of abolishing the death penalty.)

- In New York and New Jersey, the high costs of capital punishment were one factor in those states' decisions to abandon the death penalty. New York spent about $170 million over 9 years and had no executions.[6] New Jersey spent $253 million over a 25-year period and also had no executions.[7] 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 2008, the California Commission on the Fair Administration of Justice released an exhaustive report on the state's capital punishment system. 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.[8] 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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[5] . 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. To see the original study, go to http://www.deathpenaltyinfo.org/CostsDPMaryland.pdf.

[6] . 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).

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

[8] . See California Commission on the Fair Administration of Justice, http://www.ccfaj.org/rr-dp-official.html, June 30, 2008 [hereinafter *California Commission*]. See also 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 debacle," 44 Loyola of Los Angeles Law Review S41, Special Issue (2011).

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.

Death Penalty Costs Are Increasing

The costs of the death penalty when measured 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 the costs and rate of executions at that time.[9] 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.[10]

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.[11] But the costs have increased sharply since then. As noted above, the costs now are estimated at $137 million per year.[12]

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

- 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.[13]

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[9]. D. Von Drehle, "Bottom Line: Life in Prison One-sixth as Expensive," Miami Herald, July 10, 1988, at 12A.
[10]. S. V. Date, "The High Price of Killing Killers," Palm Beach Post, Jan. 4, 2000, at 1A.
[11] . S. Maganini, "Closing Death Row Would Save State $90 Million a Year," Sacramento Bee, March 28, 1988, at 1.
[12] . See note 8, above; see also Los Angeles Times, March 6, 2005 (California has now had 13 executions).
[13] . J. McMenamin, see note 5 above.

- 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.[14]

- 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.[15]

- 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 over 700, that amounts to at least $63 million annually.[16]

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 a study would be incomplete if it did not 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, perhaps to pursue cold cases, or choose to keep fewer employees. There is a financial

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[14] . 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.
[15] . Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, Kansas (2003).
[16] . *California Commission*, see note 8 above, at 70.

dimension to all aspects of death penalty cases, and proper cost studies take these "opportunity costs" into account.[17]

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.[18] 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.

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,[19] Indiana,[20] Kansas,[21] and California,[22] 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.[23] This indicates that *seeking* the death penalty raises costs, even when the case results in a plea

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[17] . 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.

[18] . 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.").

[19] . See P. Cook, note 17 above.

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

[21] . See note 15 above.

[22] . See *California Commission,* note 8 above.

[23] . 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.

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.

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.[24] 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."[25]

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, including in Nebraska.[26]

Putting A Price On Justice

Some have argued that a consideration of costs has no place in our pursuit of justice. However, it is not just the price tag of the death penalty that has drawn concern, but rather what is society getting back from capital punishment for all the millions of dollars invested? And where else could that money be spent that might produce a greater benefit? The primary purpose of the criminal justice system is to make society safer. All aspects of this system—preventing crime, apprehending offenders, trials, and punishment—have costs. Cutbacks in any part of the criminal justice system can potentially result in a less safe society. Choices have to be made. The death penalty is

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

[25] . 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.

[26] . 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 most expensive part of the system on a per-offender basis. Millions are spent seeking to achieve a single death sentence that, even if imposed is unlikely to be carried out. Money the police desperately need for more effective law enforcement is wasted on the death penalty.

The Declining Use Of The Death Penalty

If anything, the death penalty is becoming a less efficient system as concerns about mistakes have increased. Twenty years ago, the use of the death penalty was expanding. Executions, the size of death row and public support for the death penalty were all on the rise in the early 1990s. New states were adopting the death penalty and the federal death penalty was greatly expanded. By the end of the 1990s, executions in the U.S. had climbed to almost 100 per year. The number of death sentences was near 300 per year, and many states were seeking ways to speed up the death penalty.

But beginning around the year 2000, there has been a clear and steady national trend away from the use of the death penalty. Death sentences have dropped by 75% since the mid-1990s, executions have declined 56%, and death row has decreased in size.[27] Public support has dropped from a high of 80% support in 1994 to 63% in the most recent Gallup Poll.[28] Moreover, when the public is given a choice between a sentence of life-without-parole for murder and the death penalty, the country is about evenly split. The sentence of life without parole is now available in virtually every state in the country.[29]

Every region of the country has seen a decline in the annual number of death sentences between the 1990s and the current decade.[30] Almost all of the states with the death penalty have averaged less than one execution per year over the past 30 years.

The executions that have been carried out have predominantly been restricted to just one area of the country–the south. In 2012, there were 43 executions—79% were in

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[27] . See, e.g., Bureau of Justice Statistics Annual Report on Capital Punishment, at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2236 (including data on 2010 and preliminary data on 2011).

[28] . See Gallup Poll, http://www.gallup.com/poll/1606/Death-Penalty.aspx (March 2013). See also, Lake Research Partners Poll released by DPIC, Nov. 16, 2010, showing majority support for alternatives to the death penalty. http://www.deathpenaltyinfo.org/pollresults.

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

[30] . See Death Penalty Information Center, "Sentencing," at http://www.deathpenaltyinfo.org/death-penalty-sentences-have-dropped-considerably-current-decade.

in just four states—Texas, Oklahoma, Mississippi, and Arizona. Most states with the death penalty had no executions in 2012 and none in 2011.

Recently, five states have taken conclusive action in response to the evidence that the death penalty system is broken. New York, New Jersey, New Mexico, Illinois and most recently Connecticut have abolished the death penalty completely. Other states are coming close to the same action: the Maryland legislature will likely complete its vote to end the death penalty today and the governor has pledged to sign the bill into law. Colorado and Delaware may also vote to repeal the death penalty this year. Other states such as New Hampshire, Montana, Kansas and Kentucky are considering similar bills.

A number of reasons have been put forward for the decline in the use of the death penalty. Probably the most compelling reason for this turnaround has been the emergence of the innocence issue, strengthened by the advent of DNA testing.[31] The images of death row inmates walking out of prison greeted by their attorneys and the journalism students who helped free them have had a profound impact on the use of the death penalty. Other factors have also contributed, including the availability of life-without-parole sentences, and a sense that the death penalty is being applied in an arbitrary and unfair manner.

The Innocence Issue

The decline in the use of the death penalty has correlated directly with the rise in importance of the innocence issue. The American people now know that the problem of innocence is a lot more serious than was previously thought. Since 1973, 142 people who were sentenced to death in 26 states have been freed after their convictions were reversed. On average, it took about 9.5 years between the defendant's sentencing and his or her exoneration.

In the vast majority of these cases, the defendants were acquitted of all charges at a retrial or the prosecution decided to drop all charges.[32] In the few remaining cases, a

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[31] . See Frank Baumgartner et al., *The Decline of the Death Penalty and the Discovery of Innocence* (2008) (Cambridge Press).

[32] . 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.

governor granted a complete pardon based on innocence. For every 9 people who have been executed since 1973, there has been one person slated for execution who was innocent and fortunately freed from death row. That represents a substantial risk when human lives are at stake.

This problem of innocence has not been restricted to the earlier years of the death penalty. Most of the 142 people who have been freed were exonerated since 1995. Three people were exonerated in 2012.

The reversals in these 142 cases do not prove that the system works. Many of the cases indicate just the opposite. The 18 cases where people were freed as the result of post-conviction DNA testing are a stark reminder of the fallibility of our justice system. DNA testing evolved as a tool of science. If this technology had emerged ten years later, many of those 18 people may have been executed. It is important to note that the typical case that ended with a DNA exoneration began with a unanimous-jury conviction and a unanimous vote for a death sentence, both of which were affirmed at numerous levels of appeal.

Many of the non-DNA exonerations also occurred because of fortuitous circumstances outside of the normal justice system. In some instances, journalism students were able to uncover glaring flaws in the original evidence, and were even able to locate the actual murderer. The media played an important role in many of the cases, and in others, volunteer lawyers from major law firms revisited the evidence and trial records. They donated thousands of free hours resulting in the freeing of death row inmates. But that kind of attention, and the millions of dollars for appeals that accompany it, is only applied to a few cases. Many people have been executed where there was considerable evidence that they may have been innocent, but there was neither the time nor the resources to thoroughly examine their cases.[33]

Capital Cases Are Time Consuming

In addition to contributing to the declining use of the death penalty, the innocence issue has also affected the pace of capital cases and increased their costs. Much of the delay in carrying out the death penalty is a healthy caution resulting from

[33] . See, e.g., T. Ganey, "Was the Wrong Man Executed, "St. Louis Post-Dispatch, July 11, 2005, regarding the case of Larry Griffin who was executed in 1995 in Missouri. For a list of other such cases, see DPIC http://www.deathpenaltyinfo.org/article.php?&did=2238.

the near executions of innocent people. It is also the result of years of a very broad use of capital punishment, which created large death rows and a backlog of cases in the appellate courts.

For executions carried out in 2010, the average time between sentencing and execution was 15 years, the longest time for any year since the death penalty was reinstated in 1976.[34] Even in Texas, the time between sentencing and execution is ten years. In some states, inmates are on death row for 20 or even 30 years awaiting execution. About 275 inmates have been on death row for 24 years or more.[35]

This extensive delay results in the imposition of two sentences on the defendant: a life sentence in highly restricted confinement, *and* a death sentence. Of the capital cases that have been concluded, only about one-quarter of those sentenced to death were executed.[36] Three-quarters of the defendants were permanently removed from death row for other reasons.

Such a system is enormously expensive for the state and a source of frustration for many. Death penalty cases are very costly to prosecute and defend compared to similar cases without the death penalty. When a death sentence is handed down, there will be years of expensive appeals and a form of incarceration that is much more expensive than the costs in general population. And at the end of the process, most defendants will end up with a life sentence anyhow—though one achieved through the most expensive process in the criminal justice system—the death penalty.[37] Those left with a death sentence will probably not be the worst offenders, but rather an unfortunate few determined by arbitrary factors. Even for many supporters of capital punishment, this system makes little sense.

It has also created skepticism among the public regarding the value of such a nebulous form of justice. Indeed, some family members have remarked that, given the extensive time, the unpredictability of the outcome, and the painful re-living of the

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[34] . See Bureau of Justice Statistics, note 27 above (latest data available).
[35] . See Bureau of Justice Statistics, Capital Punishment, 2005 (2006), appendix Table 3.
[36] . See Bureau of Justice Statistics, note 27 above.
[37] . 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. The serious errors that were discovered 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. James S. Liebman, "A Broken System: Error Rates in Capital Cases," (Columbia Univ. June, 2000) (executive summary).

tragedy that inevitably accompanies this process, it would have been better if a life sentence had been imposed in the first place.[38]

Relationship Between Costs And Innocence

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, a blue-ribbon commission recommended 85 changes to make the death penalty more reliable; those changes were essential to a fair and reliable system, but many would also be expensive.[39] Ultimately, the state elected to abolish the death penalty completely.

Theoretically, Nebraska might fashion a more efficient death penalty system. Texas, for example, has executed about 45% 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.[40] And Texas's "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.[41]

The increasing costs of the death penalty can have 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 the capital prosecution.[42] The death penalty was then abolished in 2009.

- In Georgia, the death penalty prosecution in one death penalty case (Brian Nichols) cost the state over $2 million and resulted in a jury verdict for life. There was no question of Nichols' guilt, but seeking the death penalty proved

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[38]. 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.

[39] . Report of the Governor's Commission on Capital Punishment (Illinois, released April 15, 2002).

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

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

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

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.[43]

- 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."[44]

- 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.[45]

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.[46] 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.

An article in the *Wall Street Journal* noted that in states where counties are chiefly responsible for prosecuting capital cases, the expenses can put an extraordinary burden on local budgets comparable to that caused by a natural disaster.[47] Katherine Baicker of

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[43] . Shannon McCaffrey, "Georgia Senate slashes money for public defenders," Macon Telegraph, February 20, 2008; see also New York Times, September 7, 2007.
[44] . James Abbott, "Less money, more pain and injustice," Fort Worth Star-Telegram, January 20, 2008.
[45] . Jacksonville Daily Record, September 13, 2007.
[46] . 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).
[47]. R. Gold, "Counties Struggle with High Cost of Prosecuting Death-Penalty Cases," Wall St. Journal, Jan. 9, 2002.

Dartmouth concluded that capital cases have a "large negative shock" on county budgets, often requiring an increase in taxes. She estimated the extra expenses on counties to be $1.6 billion over a 15-year period.[48]

The net effect of this burden on counties is a widely disparate and arbitrary use of the death penalty. "Rich" counties that can afford the high costs of the death penalty may seek this punishment often, while poorer counties may never seek it, settling for life sentences instead. In some areas, this geographical disparity can have racial effects, as well, depending on the geographical location of racial minorities within the state. Some counties have approached the brink of bankruptcy because of one death penalty case that has to be done over a second or third time.[49]

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 cost of death penalty cases has 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 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 body with more extensive information on any of the matters addressed.

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[48]. K. Baicker, "The Budgetary Repercussions of Capital Convictions," National Bureau of Economic Research, Working Paper 8382, July 2001.

[49] . See generally, R. Dieter, "Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty," (revised edit., 1994) and "Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis" (2009) (available from the Death Penalty Information Center).