Smart on Crime:
Reconsidering the Death Penalty in a Time of Economic Crisis

National Poll of Police Chiefs Puts Capital Punishment at Bottom of Law Enforcement Priorities

A Report from the Death Penalty Information Center

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www.deathpenaltyinfo.org

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Executive Summary

"Smart on Crime" is a new report from the Death Penalty Information Center that explores the prospect of saving states hundreds of millions of dollars by ending the death penalty. The report also serves to release a national poll of police chiefs in which they rank the death penalty at the bottom of their priorities for achieving a safer society.

The death penalty in the U.S. is an enormously expensive and wasteful program with no clear benefits. All of the studies on the cost of capital punishment conclude it is much more expensive than a system with life sentences as the maximum penalty. In a time of painful budget cutbacks, states are pouring money into a system that results in a declining number of death sentences and executions that are almost exclusively carried out in just one area of the country. As many states face further deficits, it is an appropriate time to consider whether maintaining the costly death penalty system is being smart on crime.

The nation's police chiefs rank the death penalty last in their priorities for effective crime reduction. The officers do not believe the death penalty acts as a deterrent to murder, and they rate it as one of most inefficient uses of taxpayer dollars in fighting crime. Criminologists concur that the death penalty does not effectively reduce the number of murders.

Around the country, death sentences have declined 60% since 2000 and executions have declined almost as much. Yet maintaining a system with 3,300 people on death row and supporting new prosecutions for death sentences that likely will never be carried out is becoming increasingly expensive and harder to justify. The money spent to preserve this failing system could be directed to effective programs that make society safer.

California is spending an estimated $137 million per year on the death penalty and has not had an execution in three and a half years. Florida is spending approximately $51 million per year on the death penalty, amounting to a cost of $24 million for each execution it carries out. A recent study in Maryland found that the bill for the death penalty over a twenty-year period that produced five executions will be $186 million. Other states like New York and New Jersey spent well over $100 million on a system that produced no executions. Both recently abandoned the practice. This kind of wasteful expenditure makes little sense. The death penalty may serve some politicians as a rhetorical scare tactic, but it is not a wise use of scarce criminal justice funding.

In 2009, eleven state legislatures considered bills to end capital punishment and its high costs were part of these debates. New Mexico abolished the death penalty and the Connecticut legislature passed an abolition bill before the governor vetoed it. One house of the legislatures in Montana and Colorado voted to end the death penalty, and the Colorado bill would have directed the cost savings to solving cold cases. As the economic crisis continues, the trend of states reexamining the death penalty in light of its costs is expected to continue.

The report that follows analyzes the costs of the death penalty as measured in various state studies. It examines why the death penalty is so expensive and why it may be impossible to cut those costs without endangering fundamental rights. The report looks closely at the opinions of law enforcement experts and finds little support for continuing to spend enormous sums on an ineffective program when so many other areas of need are being short changed. Many states are looking at the death penalty in a new light because of the economic crisis, realizing that being smart on crime means investing in programs that really work.

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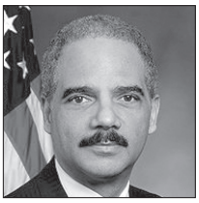


[W]e must move beyond the narrow parameters that have constrained our nation's debate about criminal justice policy over the last several decades. There is no doubt that we must be "tough on crime." But we must also commit ourselves to being "smart on crime."

-Attorney General Eric Holder[1]

photo by John Goodwin

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.

-Police Chief James Abbott, West Orange, NJ[2]

Local jurisdictions are likely to lose a significant amount of state funding this year because of the severe financial crisis. This funding helps cities and counties provide essential services in the areas of public safety, emergency services, and health and children's services. Without it, our communities will no doubt suffer dire consequences.

At the same time, we continue to waste hundreds of millions on the state's dysfunctional death penalty. If we replaced the death penalty with a sentence of permanent imprisonment, the state would save more than $125 million each year. We haven't had an execution in California for three years. Are we any less safe as a result? I don't think so.

-Police Chief Ray Samuels (ret.), Newark, CA[3]

Introduction

For many states the impact of the economic recession is likely to be felt for years to come. The unemployment rate may surpass 10%, and 2009 will probably be worse than 2008 in state income and in demands for services.[4] Most states are facing new budget shortfalls in the coming fiscal year, and further cuts in state spending are inevitable.[5]

Not surprisingly, the criminal justice system is feeling the consequences of this downturn along with other sectors of the economy. Police departments are cutting back, state employees are being furloughed, trials are being delayed as courts and public defenders run out of money, and prisoners are being released early. The justice system was already overburdened—now it is being pushed to the breaking point.

In every sector of the economy governments are trying to eliminate wasteful programs while preserving essential services. This report examines one reasonable step that could save hundreds of millions of dollars in the criminal justice system: **end the enormously expensive and wasteful death penalty that is draining state budgets.** Every cost study in the U.S. shows that the death penalty is far more expensive than a system where the maximum penalty is life in prison. The following evidence shows that many in the law enforcement community believe that replacing the death penalty with life without parole would actually advance the fundamental goals of the criminal justice system. The report also explains why the death penalty is so expensive and estimates the costs to the nation for retaining it.

The judgment that the death penalty is the last place that scarce criminal justice dollars should go is supported by a growing number of law enforcement officials and backed by **a national poll of police chiefs** that is being released in this report. The poll reveals that the death penalty is at the bottom of the chiefs' list when it comes to wise spending to fight crime.

The problem is not simply the high cost of capital punishment in a time of economic crisis. Indeed, some states like New York and New Jersey took action to end the financial drain caused by the death penalty even before the current downturn.

The death penalty has been a bloated government program for many decades. The death penalty is not just expensive, it is wasteful. In most places the money is being spent even as the core measures of the system—death sentences and executions—have declined precipitously.[6] It is as if a car manufacturer was keeping all of its factories and showrooms open even though it was producing only a handful of cars that hardly anyone was buying.

This is an appropriate time to examine the death penalty as a pragmatic issue—to ask, Is it working? Is it functioning as envisioned, and is it benefiting society? Whether any societal gain is derived from the death penalty will be discussed more below. But even at the most basic level of executions the death penalty is dysfunctional. In most states there were no executions last year and none on the horizon. Almost all recent executions have been in just one region of the country—the south—and most of those have been in one state—Texas.[7] The death penalty without executions is a very expensive form of life without parole.

photo by John Goodwin

I no longer believe that you can fix the death penalty. 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. . . 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.[i]

-Police Chief James Abbott (NJ)

The Views of Law Enforcement

Police Chief James Abbott of West Orange, New Jersey, quoted above, served on a legislative commission that reviewed that state's death penalty. The commission eventually overwhelmingly recommended abolition of the death penalty. Chief Abbott is part of a growing number of law enforcement officials who have concluded that there are much smarter ways to reduce crime than wasting money on the death penalty. A newly released **national poll of police chiefs** shows a high degree of skepticism about the death penalty and a strong desire to spend limited funds more productively elsewhere.

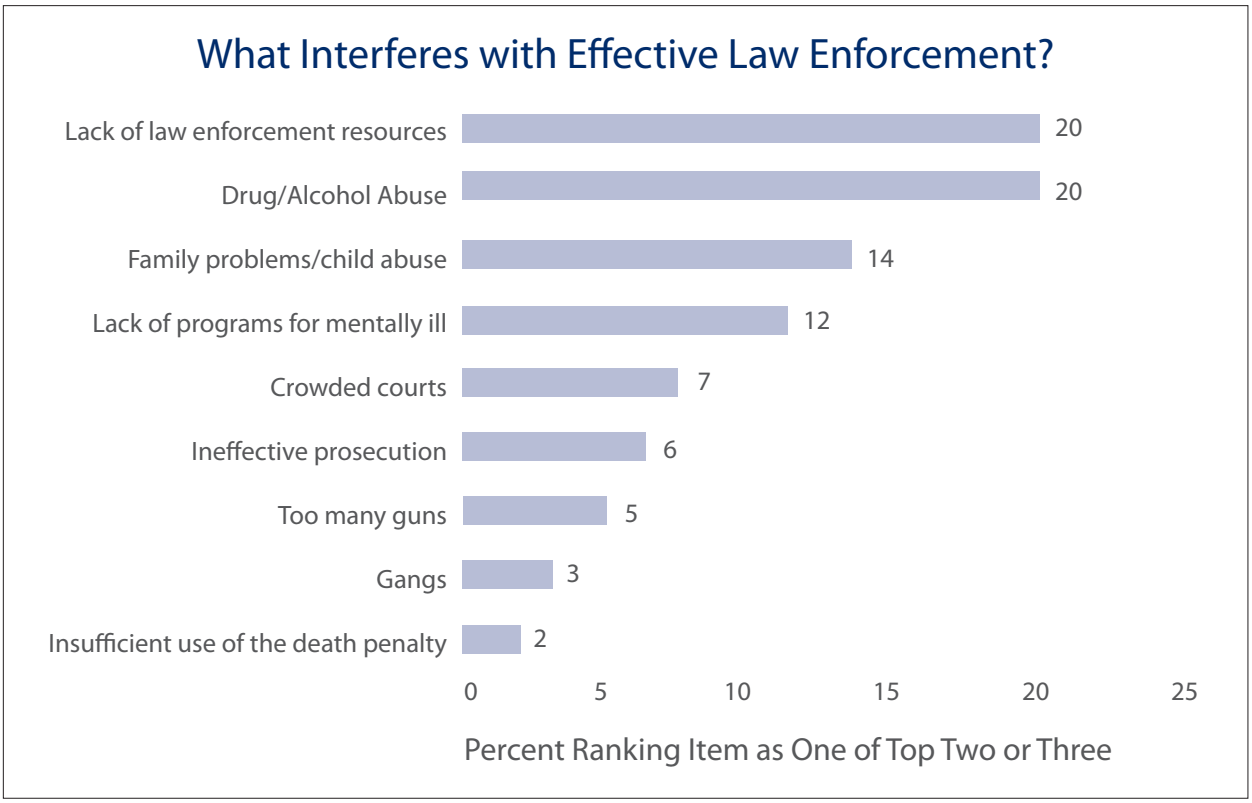
Police Chiefs Poll

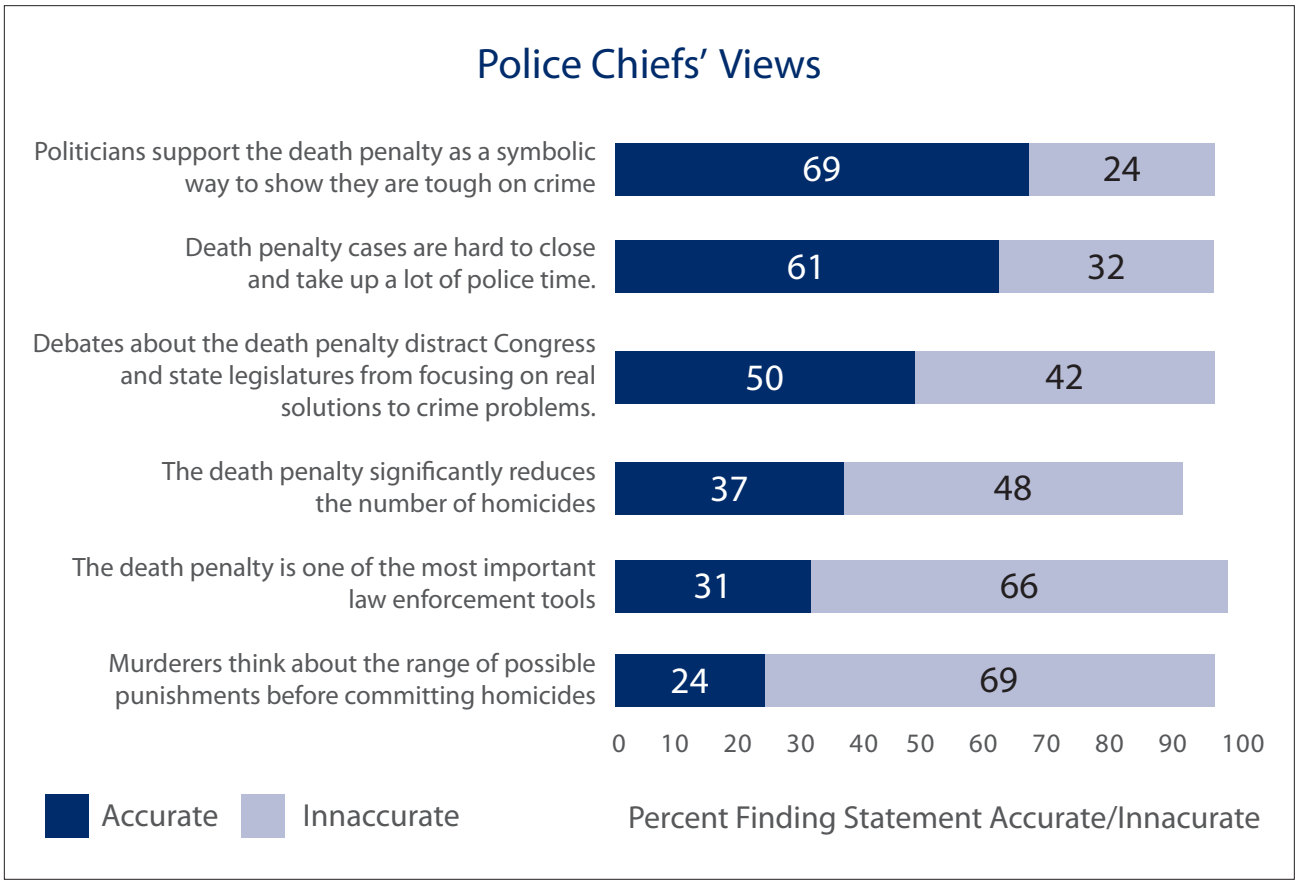
The poll was commissioned by the Death Penalty Information Center and conducted by R.T. Strategies of Washington, D.C., surveying a national sample of 500 randomly selected police chiefs in the United States.[8]

The police chiefs had the opportunity to identify what they believe is most effective in fighting crime. As leaders in law enforcement, they were asked where the death penalty fit in their priorities. The poll found:

• When asked to name one area as "most important for reducing violent crime," greater use of the death penalty ranked **last** among the police chiefs, with only 1% listing it as the best way to reduce violence. Instead, increasing the number of police officers, reducing drug abuse, and creating a better economy and more jobs all ranked much higher than the death penalty.[9]

• The death penalty was considered the **least efficient** use of taxpayers' money. Police chiefs ranked expanded training for police officers, community policing, programs to control drug and alcohol abuse, and neighborhood watch programs as more cost-effective ways to use taxpayers' money.[10]





• The police chiefs did not believe that criminals generally consider the consequences of their actions when engaged in violence. Fifty-seven percent (57%) said the death penalty does little to prevent violent crimes because **perpetrators rarely consider the consequences** when engaged in violence.[11]

• Although the police chiefs did not oppose the death penalty in principle, **less than half** (47%) supported it compared to a sentence of life imprisonment without parole combined with mandatory restitution by the defendant to the victim.[12]

• Barely a quarter of the police chiefs polled believed expanding the death penalty, which they viewed as slow and cumbersome, would alleviate crime.[13]

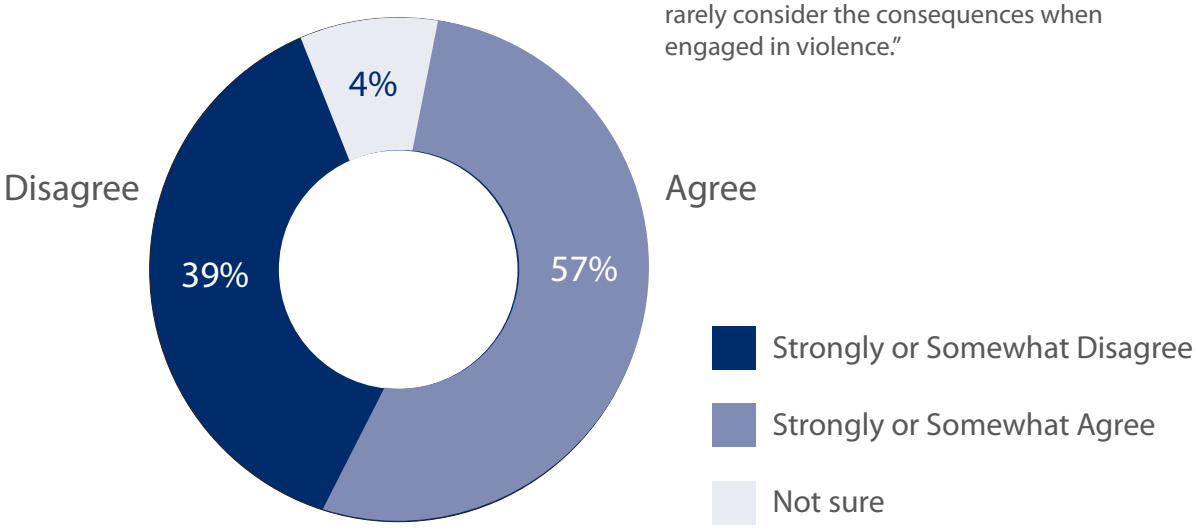
• Of various statements about the death penalty, the one with which the police chiefs most identified was: **"Philosophically, I support the death penalty, but I don't think it is an effective law enforcement tool in practice."**

The police chiefs rejected any suggestion that insufficient use of the death penalty interfered with their work. When asked about obstacles to effective law enforcement, the police chiefs ranked insufficient use of the death penalty last in a list of nine issues, with only 2% saying it was one of their top concerns.[15] Even in the south, only 3% of the police chiefs chose greater use of the death penalty as one of their top priorities. Instead, chiefs throughout the country identified lack of law enforcement resources, drug and alcohol abuse, family problems, and the lack of secure treatment for the mentally ill as their top problems.

The primary purpose of the criminal justice system is to make society safer. All aspects of this system—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 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. Thus money that the police desperately need for more effective law enforcement is wasted on the death penalty. It should be high on the list of programs to cut.

Police Chiefs Agree Death Penalty Does Not Work as a Deterrent

"The death penalty does little to prevent violent crimes because perpetrators rarely consider the consequences when engaged in violence."



The reality is that the death penalty is not, and never has been, a deterrent. Prison safety depends on proper staffing, equipment, resources and training. Certainly the money spent on trying to put someone to death for over 20 years could find better use in addressing those practical needs of our correctional system. . . [T]he best way to protect our correctional professionals is to recognize the need for a well-trained staff, for the commitment of adequate resources to operate the institutions safely, and for innovative management incentives that serve to reduce the opportunity for prison violence.[ii]

- John Connor, Chief Special Prosecutor in Montana for 21 years, prosecuting five prison-homicide cases

Police Reject Deterrence Theory

A significant reason why police chiefs do not favor use of the death penalty is that they do not believe it deters murders. Only 37% of those polled believed the death penalty significantly reduces the number of homicides.[16] Fifty-seven percent (57%) agreed: "The death penalty does little to prevent violent crimes because perpetrators rarely consider the consequences when engaged in violence."[17] Only 24% of the respondents believe murderers think about the range of possible punishments before committing homicides.[18]

Criminologists Concur

The leading criminologists in the country agree with the police chiefs about deterrence. A recent survey showed that 88% of the country's top criminologists do not believe the death penalty acts as a deterrent to homicide.[19]

Eighty-seven percent (87%) believe abolition of the death penalty would have no significant effect on murder rates. The authors concluded:

> Our survey indicates that the vast majority of the world's top criminologists believe that the empirical research has revealed the deterrence hypothesis for a myth … [T]he consensus among criminologists is that the death penalty does not add any significant deterrent effect above that of long-term imprisonment.[20]

Over many years, deterrence studies have been inconclusive, with most experts concluding that the relative rarity of executions and their concentration in a few states renders national conclusions about a deterrent effect to the death penalty unreliable.[21] If the goal is to deter homicides, the police chiefs have pointed to many ways of achieving it far more effectively than the death penalty.

With California facing its most severe fiscal crisis in recent memory -- with draconian cuts about to be imposed from Sacramento that will affect every resident of the state -- it would be crazy not to consider the fact that it will add as much as $1 billion over the next five years simply to keep the death penalty on the books. [iii]

- Former California Attorney General John Van de Kamp

The Crisis Facing State Criminal Justice Systems

On the state and federal level, efforts are being made to eliminate government programs that do not work and to address deficits through layoffs, shorter hours for governmental services, and higher fees. But so far the death penalty has largely escaped the budgetary scalpel. Capital punishment uses enormous resources on a few cases, with little to show for it. This was the principal reason Colorado's legislature came within one vote this year of passing a bill to abolish the death penalty and use the money saved to deal with unsolved cases, as victims' families had requested.[22]

The same states that are spending millions of dollars on the death penalty are facing severe cutbacks in other justice areas. Courts are open less, trials are delayed, and even police are being furloughed.

- In Florida, the courts have lost 10% of their funding, with another cut expected, as home foreclosures accelerated.[23]

- Philadelphia is leaving 200 police positions unfilled.[24]

- Police in Atlanta had a 10% pay cut through a furlough of 4 hours per week, even as the region experienced an increase in crime.[25]

• In New Hampshire, civil and criminal jury trials were halted for a month to save money; in one county, 77 criminal trials were delayed for up to six months.[26]

• Public defenders in Kentucky, Tennessee, and Florida are overburdened with caseloads of 400 felonies a year, even though national standards set a limit of 150.[27]

• Legal service organizations that provide help to indigent clients in civil matters depend on income from interest rates that are tied to the Federal Reserve's benchmark interest rate. When that rate fell nearly to zero, many legal service organizations were forced to cut staff 20%, just when their services were most needed.[28]

• The legal service agency in East Texas where thousands of people lost their homes in Hurricane Ike in 2008 experienced a budget drop from $16 million to $4 million.[29]

• A recent poll by the Police Executive Research Forum found that 39% of responding police departments said their operating budgets were being cut because of the economy, and 43% said the faltering economy had affected their ability to deliver services.[30]

Clearly, eliminating the death penalty cannot solve all of these problems, but the savings would be significant. Where studies have been done, the excess expenditures *per year* for the death penalty typically are close to $10 million per state.[31] If a new police officer (or teacher, or ambulance driver) is paid $40,000 per year, this death penalty money could be used to fund 250 additional workers in each state to secure a better community.

[W]hat of the tremendous cost of pursuing capital punishment? . . . [If] we were to replace the death penalty with life without parole, that $22.4 million could pay for 500 additional police officers or provide drug treatment for 10,000 of our addicted neighbors. Unlike the death penalty, these are investments that save lives and prevent violent crime. If we knew we could spare a member of our family from becoming a victim of violent crime by making this policy change, would we do it? [iv]

-Governor Martin O'Malley of Maryland

Costs Affect Capital Cases

The costs of capital punishment have forced some states into a crisis in administering the death penalty itself:

• 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 particular case. The attorney general's office concurred, halting the capital prosecution.[32] The state abolished the death penalty in 2009, with costs as a factor.[33]

• In Georgia, pursuing the death penalty in the Brian Nichols' case cost the state over $2 million in defense costs, and probably more for the prosecution. It resulted in a verdict of life imprisonment. There was no question of Nichols' guilt, but *seeking* the death penalty proved 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 his office could no longer fairly represent its clients. Many cases have ground to a halt.[34]

• In Florida, a budget crisis has led to a cut in funds for state prosecutors. Some prosecutors will be cutting back on use of the death penalty and perhaps other prosecutions. Florida State Attorney

Harry Shorstein recently explained how available funds affect the administration of justice: "There will be cases that can't be tried. . . . We are strained to the breaking point. . . . Instead of seeking the death penalty, maybe we'll seek something else."[35]

In 2009, eleven state legislatures (Colorado, Connecticut, Illinois, Kansas, Maryland, Montana, Nebraska, New Hampshire, New Mexico, Texas, and Washington) considered bills to abolish the death penalty. In many of the debates, cost was an important issue. New Mexico abolished the death penalty. Connecticut voted to abolish it, but the bill was vetoed by the governor. In Colorado and Montana, the abolition bill passed one house of the legislature before being defeated. With the economic crisis continuing, it is likely other states will address this issue.

How much does the death penalty cost?

There are many ways to approach the question of how much the death penalty costs. One could calculate the cost of each individual step in a death penalty case, such as the investigation, the trial, and the appeals, though this approach focuses only on the distinct minority of cases that go through the whole system. Another approach would be to measure the extra cost to the state of arriving at one death sentence or one execution, a cost that must include the many potential death penalty cases that failed to produce such a result. Finally, one could assess the total extra costs to the state for maintaining the death penalty system instead of a system in which life in prison was the maximum sentence, on a yearly or multi-year basis. In recent years, studies have been conducted not just to determine the bottom line in dollars and cents for this system, but as a way of evaluating whether the death penalty is justified in comparison to other pressing state needs.

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 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 per execution reflect the following reality: For a single death penalty trial, the state may pay $1 million more than for a non-death penalty trial.[36] But only one in every three capital trials may result in a death sentence,[37] 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.[38] 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.

Although arriving at the actual cost of the death penalty in a state is complicated, in some states $30 million per execution is 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.[39] 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.

• 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.[40] New Jersey spent $253 million over a 25-year period and also had no executions.[41] 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.[42] Based on the 5 executions carried out in the state, this translates to a cost of $37 million per execuion.

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.

I worked in corrections for 30 years. . . I came to believe that the death penalty should be replaced with life without the possibility of parole. I didn't reach that conclusion because I'm soft on crime. My No. 1 concern is public safety. I wish the public knew how much the death penalty affects their wallets.

California spends an additional $117 million each year pursuing the execution of those on death row. Just housing inmates on death row costs an additional $90,000 per prisoner per year above what it would cost to house them with the general prison population.[v]

-Jeanne Woodford, former Warden of San Quentin

Death Penalty Costs 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 the costs and rate of executions at that time.[43] 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.[44]

[T]he death penalty is inefficient and extravagantly expensive. . . . Spending scarce public resources on after-school programs, mental health care, drug and alcohol treatment, education, more crime labs and new technologies, or on hiring more police officers, would truly help create safer communities.[vi]

-Norm Stamper, 35-Year-Veteran Police Officer; Chief of Police (ret.), Seattle

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.[45] 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.**[46]

It is also telling 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.[47]

• The average cost for the **defense** at trial in a federal death case is $620,932, about 8 times that of a non-capital federal murder case.[48]

• 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.[49]

• In California, the cost of confining one inmate to death row is $90,000 per year more than the cost 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.[50] And a new death row is being planned, at a cost of about $400,000 per inmate.

It's hard to imagine that any of the 89 Kansas lawmakers who voted in 1994 to revive the death penalty for the "the worst of the worst" criminals anticipated it would still be unused come 2007. Each year sends more men to Kansas' death row, nine in all currently, but the legal challenges to their sentences continue at a glacial pace. Then there is the cost to taxpayers, averaging $1.2 million each by one tally. At some point, given the legal problems and the lack of executions, a death penalty stops making sense for Kansas.[vii]

-Editorial, (Kansas) Wichita Eagle

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 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.[51]

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.[52] 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,[53] Indiana,[54] Kansas,[55] and California,[56] 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.[57] 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.

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.[58] 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."[59]

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.[60]

During my career, which includes 10-plus years as a certified crime scene technician, I have experienced countless violent crime scenes where the perpetrators inflicted horrific injury, pain and suffering on their victims. Of the accused murderers my fellow officers and I have brought to justice, I do not believe any of them was deterred in the least by Nebraska's death penalty.

One facet of the issue that is rarely mentioned is the economic cost of capital punishment . . . [these] cases are the most expensive cases by far. . . with a cost as high as $7 million. . . . Removing the death penalty variable from the justice equation should reduce the overall cost.[viii]

-Jim Davidsaver, 20-Year Police Veteran, Lincoln, Nebraska

Approximating the National Costs

As noted above, it is not possible to say precisely how much the death penalty costs the nation as a whole. Many states have not even attempted an evaluation of their costs. Of the states where reliable estimates are available, the differing methodologies used, assumptions made, and applicable statutes make generalizations difficult. The cost per execution, for example, is dependent on the number of executions a state has carried out. Cost estimates of $20-$37 million per execution tend to come from states (such as Maryland) that have a fair number of trials, but relatively few executions. A conservative approach would be to use the North Carolina study, which measured actual costs from cases in a state that is sixth in the country in carrying out executions. Their estimate of $2.16 million per execution is probably very understated because the study was conducted in 1993 and costs have increased considerably since then.

Assuming that North Carolina's cost-per-execution is a representative figure, and using the 1,150 executions that have occurred nationally since the death penalty was reinstated in 1976, the country has spent about $2.5 billion beyond the costs that would have been incurred if life in prison was the most severe penalty. (This cost includes cases in which the death penalty was sought—making them more expensive—but no execution occurred.)

If recent costs per execution measured in Florida and Maryland are more representative of the true costs around the country, then the total bill for the death penalty is likely to be as much as ten times as high, or $25 billion.

Another approach to this same question is to use the extra costs *per death sentence* as the measure for the cost of the nation's death penalty. Again, the North Carolina study may be representative, although conservative. The extra costs attributable to each death sentence were about $300,000. Since 1973, there have been about 7,500 death sentences in the country. Hence, the total net costs for the death penalty have been $2.25 billion, very close to the figure computed from the execution data. Again, data from more recent studies indicate a higher cost per death sentence, implying a much higher national bill for having the death penalty.

Can the Costs of the Death Penalty Be Reduced?

An understandable reaction to the high costs of the death penalty is to ask whether there are ways it could be made less expensive, such as by 1) curtailing the appeals process, or 2) limiting trial expenses. However, the first interferes with a critical part of the death penalty process and could result in the execution of innocent defendants, and the second could end up costing more than the current system.

Although the appeals process is a tempting target for critics, it actually does not constitute most of the death penalty's costs. In the cost study conducted by Duke University, trial costs in North Carolina made up over 4 times the appeals costs for each death sentence imposed.[61] But cutting back on appeals presents another, more serious problem.

Since 1973, 138 people have been exonerated and freed from death row.[62] In many of these cases, the appeals process was critical in overturning an unfair conviction and allowing a new trial at which the defendant was acquitted. In other cases, even the appeals failed to find evidence of innocence or a constitutional flaw in the process that led to conviction, but the process at least allowed for the passage of time, during which exonerating DNA evidence was discovered and tested, or the person actually responsible for the crime was identified. The average time between sentencing and exoneration was 9.8 years. If the appeals process were truncated there might not have been time for the mistakes to be found or new evidence to emerge. Most of the innocent people who were sentenced to death would have been executed before they could demonstrate their conviction was a mistake.

The same can be said for attempts to shortchange the defense in capital trials. Good lawyers who are given adequate resources often can uncover the evidence that leads to the acquittal of an innocent defendant.

Good representation and thorough appeals are also necessary for guilty clients. It is impossible to know before the process has run its course who is guilty and who is innocent. In addition, the death penalty is supposed to be given to only the worst offenders. Qualified defense lawyers are needed to ensure that juries have all the information they need to make an informed sentencing decision. In 2003 the American Bar Association issued new guidelines for the appointment and performance of defense counsel in capital cases.[63] These guidelines were intended to establish a national standard of practice, and courts that ignore them risk reversal at a later time.

From a cost perspective, the reasons for providing a full defense are also compelling. In recent years the U.S. Supreme Court has overturned several death penalty cases because of inadequate representation.[64] The thrust of these decisions is that death penalty cases require defense attorneys to investigate every aspect of their client's history in order to prepare an adequate defense on penalty as well as guilt. This implies states should hire experienced attorneys who know how to conduct such investigations, and give them the resources to carry them out. If not, the case may have to be done over, requiring all the expenses of a death penalty trial a second time. Cost studies of the death penalty

indicate that 70% of the expenses occur at the trial level. Two trials greatly increase the cost of the death penalty, especially when the passage of time makes re-trial more difficult. If a new conviction or sentence is handed down, a second appeals process must also be conducted.

Families of Homicide Victims and Missing Persons *believes the death penalty—as it is practiced in Colorado—is a waste of taxpayers money. It is no deterrent to those who contemplate murder. We propose to eliminate the death penalty and use those funds to investigate our unsolved murders. The most effective deterrent is the certainty of apprehension. Too many people are getting away with murder.*[ix]

-Mission Statement, FOHVAMP 2009

Using the Death Penalty Less

Could states reduce the cost of the death penalty by seeking death sentences less frequently? Fewer trials and appeals, and fewer people on death row, would reduce the overall costs of the death penalty. However, in almost all states the decision whether to seek the death penalty is not centralized but is made by the District Attorney of each county. These prosecutors typically have wide discretion on whether to seek the death penalty. Although it is possible to write more restrictive capital punishment statutes, the tendency has been for states to *expand* their laws to make more crimes eligible for the death penalty.[65] If the murder of a police officer makes a defendant death-eligible, the high-profile murder of a fire fighter or teacher may well result in those crimes becoming death-eligible as well. Once enacted, such expansions are hard to rescind.

Nevertheless, even without changes in the law restricting the types of murder eligible for the death penalty, death sentences have dropped dramatically since 2000. In the 1990s, the annual number of death sentences averaged close to 300, but in recent years the number is down to 115, a 62% drop. Skeptical juries concerned about innocence[66] and the availability of life without parole sentences have played a part in this decline. The rising costs of the death penalty have caused some prosecutors not to seek the death penalty or to accept plea bargains.[67] The current economic climate could accelerate this trend.

Ironically, a death penalty that is rarely used raises its own concerns. Are the few people chosen for execution really the worst of the worst, or was their sentence just the unfortunate product of ineffective representation or their crime being committed in a high-death penalty county? Do the rationales of deterrence and retribution make sense in a system where only a tiny fraction of eligible criminals in only a few states receive the ultimate punishment?

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.[68] Katherine Baicker of Dartmouth concluded that capital cases have a "large negative shock" on county budgets, often requiring an increase in taxes. She estimated the extra expenses for counties to be $1.6 billion over a 15-year period.[69]

The net effect of this burden on counties is a widely disparate and highly 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 had to be repeated two or three times.[70]

Why Does the Death Penalty Cost So Much?

The principal reason why the death penalty is so expensive can be summed up in one phrase: "death is different."[71] Whenever the government seeks to execute a human being, the legal system is required by a long line of U.S. Supreme Court precedent, buttressed by American Bar Association guidelines, to apply a more methodical and reliable process. The older, less guided form of capital punishment was struck down as unconstitutional in 1972.[72]

The stakes in death penalty cases have always put more burdens on the state compared to other parts of the criminal justice system. Long before states were required to appoint counsel for indigent defendants in ordinary criminal cases, the appointment of counsel was deemed essential in death penalty cases.[73] Congress required the assignment of two attorneys "learned in the law" in federal capital cases as far back as the First Congress in 1790.[74]

The exposure of so many mistakes in death penalty cases in recent years has shown that the ideal of "heightened due process" in capital cases has often been ignored. It has become clear that a shoddy, less expensive death penalty risks innocent lives. It can also make the punishment of death depend on whether a state is willing to provide adequate representation. The choice today is between a very expensive death penalty and one that risks falling below constitutional standards.

Costs alone may not carry the day in deciding the future of an institution as entrenched as capital punishment. The costs of the death penalty must be compared to other ways of achieving a safer community. The money saved by giving up the death penalty is desperately needed elsewhere: for hiring and training police, solving more crimes, improving forensic labs and timely DNA testing, and crime prevention.

Stages of a Capital Case

Every stage of a capital case is more time-consuming and expensive than in a typical criminal case. If the defendant is found guilty of a capital crime, an entire separate trial is required, with new witnesses and new evidence, in which the jury must decide whether the penalty should be death or life imprisonment without the possibility of parole. Two attorneys are often appointed for the defense, so that issues of guilt and sentencing can be separately explored. The prosecution has to respond with equal or greater resources since they have the burden of proof.

Experts Needed

Experts are needed to examine the forensic evidence and to explore the mental health of the defendant. For every expert on one side, the other side needs a rebuttal. In a thoroughly defended case, mitigating and aggravating evidence is compiled and examined. Mitigation experts must probe aspects of the defendant's life from birth to the present. Relatives, co-workers, supervisors, teachers, and doctors are interviewed. The state matches this testimony with evidence of aggravating factors and expert testimony denigrating the defendant's past.

The mental health of the defendant at the time of the crime may become a major issue, with psychiatrists called to testify. If a defendant is mentally retarded, he cannot receive the death penalty, though that determination alone can result in considerable expense. If at any time he was mentally ill, that will be a mitigating factor to be presented to the jury. Most of the preparation for this presentation must be done in advance, whether or not a sentencing trial actually turns out to be necessary. (Of course, in states that are not so thorough, the costs will come later when verdicts are overturned and trials have to be done over.)

Jury Selection

Jury selection in a capital case can take weeks or even months.[75] Each person's position on the death penalty is explored in detail by the judge, the prosecutor and defense attorney. Such questioning about the eventual punishment of the defendant would not be allowed in a non-death penalty case, and it makes jury selection take much longer in capital cases. Potential jurors must be carefully questioned about their willingness to vote for the death penalty or life imprisonment; any prospective juror who cannot fairly consider both sentencing alternatives is excluded from serving.

Jurors may also be struck for no stated reason. Although race and gender are improper considerations in selecting a jury, they are statistically related to people's views on the death penalty. Hence, jury selection can involve lengthy disputes about whether a particular juror was struck legitimately because of her doubts about the death penalty or unfairly because of her race. With regard to costs, the end result is that jury selection costs much more in capital cases because it takes much longer.

Appeals

Death penalty trials often conclude with no death sentence. The defendant may be acquitted or sentenced to prison. However, the process of getting to that point is much more expensive because the case was prosecuted as a capital case. If a death sentence is imposed, there are mandatory appeals. Unlike in ordinary criminal cases where the main focus of an appeal is the conviction, capital defendants are entitled to full review of their death sentence as well. A reversal can mean a new sentencing trial with another jury, more witnesses, and another chance that no death sentence will be imposed. Additional appeals may look at constitutional challenges, such as the effectiveness of defense counsel or the withholding of any evidence that should have been turned over before trial. The entire appeal process can take 15 or 20 years before an execution. The average time between sentencing and execution in 2007 was 12.7 years, the longest of any year since the death penalty was reinstated.[76] In 2006, over 400 inmates around the country had been on death row for 20 years or more, with some cases going back to 1974. Despite the length of this process, however, it is the pre-trial and trial costs that make up the majority of death penalty expenses, not the appeal.

Time on Death Row

The time that inmates spend on death row also adds to the costs of the death penalty because of the extra security required compared to normal prisons. In California, a legislative commission concluded that it costs the state an *extra* $90,000 for each death row inmate per year compared to the costs of the same inmate housed in general population. With over 670 inmates on death row, that amounts to an additional yearly cost of $60 million solely attributable to the death penalty.[77]

Expensive Life Sentences

It is important to note that all of these expenses are incurred in the many death penalty cases that never result in an execution. Sentences or convictions can be reversed, defendants may die of natural causes or suicide, governors occasionally grant clemency, and entire statutes can be overturned by the courts. This often means that a life sentence is the end result, but only after a very expensive death penalty process. According to one comprehensive study, 68% of death penalty cases are reversed at some point in the appeals process. When these cases are retried without the defect that led to the reversal, 82% result in a sentence of life or less.[78]

This is an extremely wasteful process. The most prevalent cause for reversal on appeal is the inadequacy of the trial counsel. Frequently, this is the result of courts trying to cut costs by short-changing due process. States that appoint inexperienced lawyers at low fees, or which deny the experts and resources necessary for thorough representation, may end up paying for two trials, with the second one resulting in a life sentence. In most cases a life sentence could have been obtained at the outset of the case for a fraction of the cost. It is the *pursuit* of the death penalty that is so expensive.

The higher costs of the death penalty process—lengthy trials, complicated appeals with many reversals, the higher security of death row—are unavoidable and likely to increase. Death sentences and executions may continue to decline. The longer the death penalty is retained, the higher the bill will be for nebulous results. At the same time, programs with proven track records in reducing crime and improving society will go unfunded.

What is Society Receiving in Return?

Costs are only part of a cost-benefit analysis. If the death penalty has no clear and measurable benefits, then its high costs are even less defensible. As discussed above, neither police chiefs, nor criminologists, nor the American public believe that the death penalty serves as a better deterrent to murder than a sentence of life in prison.

The retribution that is imposed in the tiny fraction of cases that result in an execution compared to the number of murders renders this purpose meaningless as well. In reality, executions are rare and depend more on factors such as geography, a state's spending on capital defense, and other arbitrary factors than on the severity of the offense.

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.[79] Of the remaining 9 states, only 5 have averaged more than 2 executions per year and only 1 (Texas) averaged more than 3. By contrast, the average number of murders in the U.S. per year during this time was approximately 19,000.[80] Abstract justifications for the death penalty such as retribution and deterrence, which have been widely criticized on other grounds, have little meaning when a punishment is used so rarely and unpredictably.

Conclusion

It is doubtful in today's economic climate that any legislature would introduce the death penalty if faced with the reality that each execution would cost taxpayers $25 million, or that the state might spend more than $100 million over several years and produce few or no executions. Surely there are more pressing needs deserving funding, such as retaining police officers, rebuilding roads and bridges, creating jobs, providing health care for children, and keeping libraries open. Yet that is precisely the dilemma that many states with the death penalty now face.

Referring to the costs of the death penalty often evokes a response that money is irrelevant when it comes to justice and a safer society. But the death penalty is not essential to those goals, as the 15 states in the U.S. and the growing majority of countries in the world without the death penalty have demonstrated. Even states with the death penalty rarely use it. Justice can be achieved far more reliably and equitably without the death penalty. There are more efficient ways of making society safer.

By pursuing life without parole sentences instead of death, resources now spent on the death penalty prosecutions and appeals could be used to investigate unsolved homicides, modernize crime labs, and expand effective violence prevention programs.[81]

-Letter signed by 30 law enforcement officials to the California Commission on the Fair Administration of Justice

The economic crisis that began in 2008 continues, and its impact on states will be felt for years to come. There is no reason the death penalty should be immune from reconsideration, along with other wasteful, expensive programs that no longer make sense. The promised benefits from the death penalty have not materialized. Deterrence is not credible; vengeance in the name of a few victims in a handful of states is both divisive and debilitating. If more states choose to end the death penalty, it will hardly be missed, and the economic savings will be significant. The positive programs that can be funded once this economic burden is lifted will be readily apparent. Such an approach would be smart on crime.

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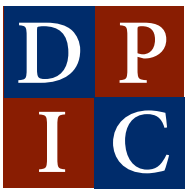

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