THE DEATH PENALTY IN 2009: YEAR END REPORT

Death Penalty Information Center
December 2009

Fewest Death Sentences Since Death Penalty Reinstated in 1976

As Costs Rose in a Time of Economic Crisis, Eleven States Considered Abolishing Death Penalty

Death Penalty Statistics	2009	2008	1999
Executions*	52	37	98
New Inmates Under Death Sentence**	106	111	284
Death Row population (as of July 1)^	3,279	3,307	3,625
Percentage of executions by region:			
South (45 executions)	87%	95%	75%
Midwest (7)	13%	5%	12%
West (0)	0%	3%	12%
Northeast (0)	0%	0%	1%
TEXAS (24)	46%	49%	36%
States With Death Penalty	35	36	38
Exonerations	9	4	8
Since 1973	139		
Executions Since 1976	1,188		
Texas	447		
Virginia	105		
Oklahoma	91		

*As of Dec. 17, 2009, with no more executions scheduled this year.
**1999 and 2008-Bureau of Justice Statistics; 2009-DPIC research - through Dec. 16, 2009.
^NAACP Legal Defense Fund, "Death Row USA"

Death sentences continued to decline in 2009, with this year having the fewest death sentences since the death penalty was reinstated in 1976. Death sentences reached a high of 328 in 1994 and have dropped 63% in the past decade. The number of new death sentences for the year is projected to be 106, the seventh straight year of decline.

The drop in death sentences was particularly pronounced in Texas and Virginia, the two leading states in carrying out executions. During the 1990s, Texas averaged 34 death sentences per year and Virginia averaged 6. This year, Texas had 9 death sentences and Virginia one.

Eleven states considered legislative proposals to repeal the death penalty in 2009, a considerable increase from previous years. **New Mexico** became the 15th state to end the death penalty when Gov. Richardson signed the law in March. The **Connecticut** legislature voted to abolish the death penalty, but the governor

vetoed the bill. Legislation to end capital punishment passed one house of the legislature in **Colorado** and **Montana**, and came close to passage in **Maryland**.

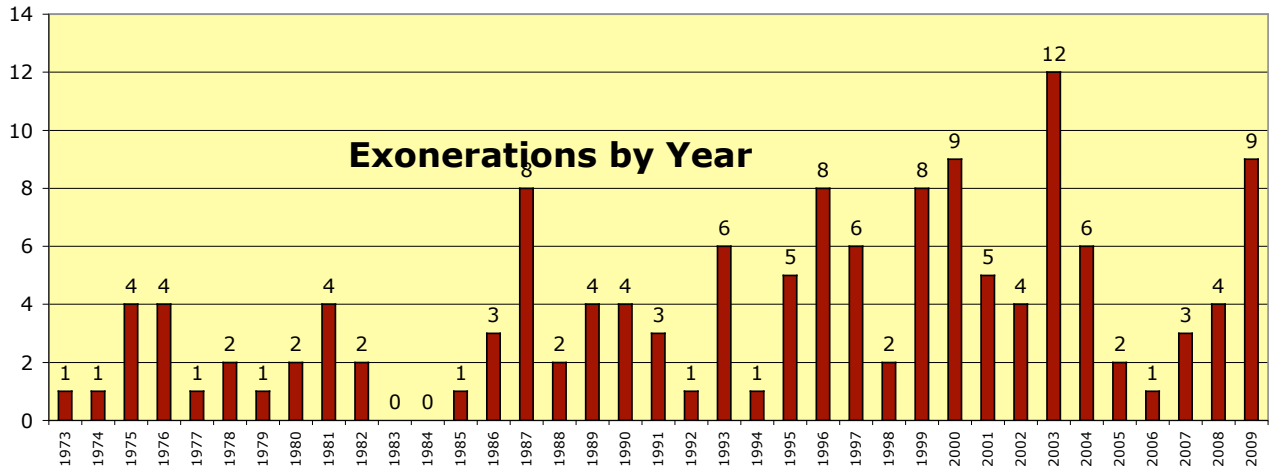
The costs of the death penalty became an increasingly important issue as states faced severe budget deficits. High expenses with no measurable benefits were frequently cited in legislative debates about the death penalty. The costs for pursuing even a single capital case caused some prosecutors to reconsider seeking the death penalty, and may have contributed to the decline in death sentences in 2009.

Executions by State	2009	2008
Texas	24	18
Alabama	6	0
Ohio	5	2
Virginia	3	4
Georgia	3	3
Oklahoma	3	2
South Carolina	2	3
Florida	2	2
Tennessee	2	0
Indiana	1	0
Missouri	1	0
Mississippi	0	2
Kentucky	0	1
TOTALS	52	37

Executions rose in 2009 compared to last year, partly because of the de facto moratorium on executions for 4 months of 2008 as the Supreme Court addressed the lethal injection controversy. There were 52 executions this year, with no more scheduled; last year there were 37. The number of executions this year was still 47% less than that recorded ten years ago. Only 11 of the 35 states with the death penalty carried out an execution in 2009. Eighty-seven percent of executions this year were in the south, and over half of those were in Texas.

Innocence Cases Remained Prominent

Nine men who had been sentenced to death were exonerated and freed in 2009, the second highest number of exonerations since the death penalty was reinstated. The inmates freed this year spent a combined 121 years between their death sentence and exoneration. Nathson Fields (IL), Daniel Moore (AL) and Herman Lindsey (FL) were acquitted at re-trials after their convictions were overturned. In the case of Herman Lindsey, a unanimous Florida Supreme Court held there was insufficient evidence to support his conviction: "[T]he State failed to produce any evidence in this case placing Lindsey at the scene of the crime at the time of the murder. . . . Indeed, we find that the evidence here is equally consistent with a reasonable hypothesis of innocence." Ronald Kitchen (IL), Paul House (TN), Michael Toney (TX), Yancy Douglas (OK), Peris Powell (OK), and Robert Springsteen (TX) had all charges dismissed after their convictions were overturned. (Michael Toney died in a car crash just one month after his release.) The total number of exonerations since 1973 is now 139.



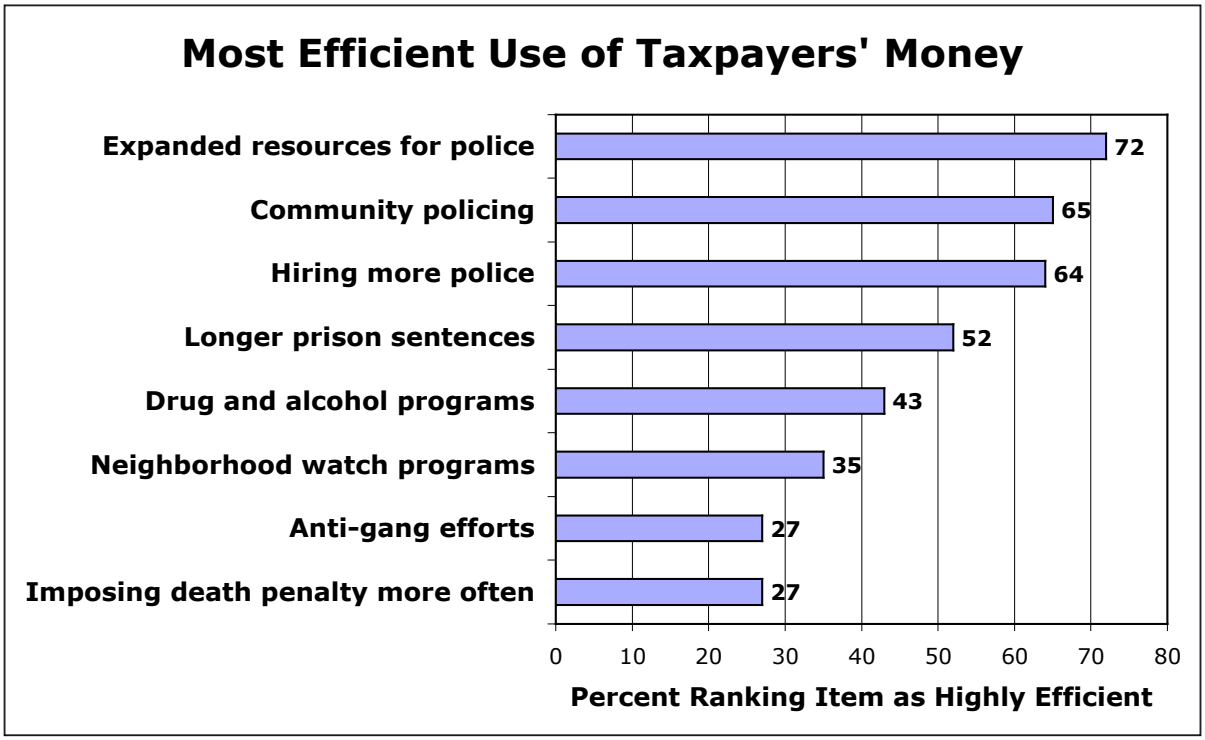
In an important development on the issue of innocence discussed below, the U.S. Supreme Court granted a stay of execution and an extraordinary evidentiary hearing to **Troy Davis** of Georgia. In Texas, a prominent forensic scientist commissioned by a state legislative panel reported

that arson evidence used to convict and sentence **Cameron Todd Willingham** to death failed to show any crime had been committed. Willingham was executed in 2004. The expert's report concurred with similar reports on the same case from leading forensic scientists commissioned by the *Chicago Tribune* and the Innocence Project in New York. As reported in an article in *The New Yorker* magazine, the jury at Willingham's trial was misled by faulty evidence to believe he had set the fire that resulted in the death of his three children. One day before the presentation of a report by forensic expert Craig Beyler to the Texas Forensic Science Commission, Governor Rick Perry replaced the chair and two other members of the Commission, and the investigation into the possible wrongful execution of Willingham has been put on hold.

High Cost of the Death Penalty Meets the Economic Recession

As the country faced an economic crisis this year, the death penalty was increasingly seen as an enormously expensive and wasteful program with no clear societal benefits. In a time of painful budget cutbacks resulting in furloughed workers, closed libraries and the early release of prisoners, states were pouring money into a badly flawed system rather than assisting law enforcement in areas that demonstrably increase safety. Many states considered whether maintaining such a costly system was really being smart on crime.

In a national poll released in 2009, the nation's police chiefs ranked the death penalty last in their priorities for effective crime reduction. The officers did not believe the death penalty acted as a deterrent to murder, and they rated it as one of most inefficient uses of taxpayer dollars in fighting crime (see chart below). Criminologists concurred that the death penalty does not reduce the number of murders.



Maintaining a system with nearly 3,300 people on death row while continuing to conduct expensive and unpredictable capital trials is becoming increasingly expensive and harder to justify. Many legislators this year concluded that money spent to preserve this failing system could better be directed to effective programs that make society safer.

California is spending an estimated $137 million per year on a death penalty system that its own state commission labeled "dysfunctional" and "broken." 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 will be $186 million, translating into a cost of $37 million per execution. Other states like New York and New Jersey spent well over $100 million on a system that produced no executions, and both recently abandoned the practice.

Decline in Death Sentences

According to DPIC's projections, the annual number of death sentences continued to drop in 2009. The Bureau of Justice Statistics recently released sentencing numbers for 2008 that showed a drop from the previous year. According to BJS, 119 people were sentenced to death in 2007 and 111 in 2008. DPIC's research indicates the number of new death sentences in 2009 will be 106.

The decline in death sentences has occurred in all four regions of the country, with close to a 50% drop in each region when the current decade is compared to the 1990s. Although California experienced an increase in death sentences this year, from 20 in 2008 to 29 in 2009, the sentences were restricted to only a handful of counties, with most regions in the state producing no death sentences in 2009. California has the largest death row in the country with approximately 690 inmates. The state is planning to build a new, expanded death row costing about $400,000,000.

Nationally, the size of death row continued to decline after increasing every year from 1976 until 1999. As of July 1, 2009, there were 3,279 inmates on death row. The federal system, however, grew between 2000 and 2009, particularly during the prior administration, tripling from 19 to 58.

Legislation in 2009

The high costs of death penalty prosecutions coupled with the absence of tangible benefits for the safety of society contributed to many states reconsidering the death penalty in 2009. **New Mexico** abolished the death penalty after considerable debate. Governor Bill Richardson said he would have vetoed such a bill a few years ago, but his views had shifted. "I'm struggling with my position, but I definitely have softened my view on the death penalty," he said shortly before signing the bill. He found the alternative of life in prison without parole "to be a strong punishment" and called the cost of the death penalty "a valid reason in this era of austerity and tight budgets."

In **Colorado**, a bill to end the state's death penalty and to use the resultant financial savings to investigate the state's more than 1,300 unsolved crimes passed the House but was defeated by one vote in the Senate. More than 500 residents who had lost friends and family to unsolved murders pushed for the bill, which was introduced by House Majority Leader Paul Weissman. It was estimated that 3 in 10 killers in the state have not been caught, and catching more killers would be a more effective deterrent than capital punishment and a better use of state funds. "Any other program that cost [so] much and was used so little would be the first to go," said Weissman. Howard Morton, of Families of Homicide Victims and Missing Persons, said, "Our position is very simple. Why talk about penalties when we haven't even caught [them]? Let's do first things first. These murderers are living in our neighborhoods."

Montana also passed an abolition bill in one house of the legislature. Republican Senator Roy Brown said his pro-life views would be at odds with supporting capital punishment. To the argument made by some that opposing abortion protects innocent life while capital punishment takes the life of a guilty person, Brown responded, "That is pretty simple, pretty concise and easy to understand--but . . . is it always a guilty life?" He added, "Yes, mistakes do happen."

DEATH ROW INMATES BY STATE (July 1, 2009)	
California	690
Florida	403
Texas	342
Pennsylvania	225
Alabama	200
Ohio	176
N. Carolina	169
Arizona	129
Georgia	108
Tennessee	92
Oklahoma	86
Louisiana	84
Nevada	78
S. Carolina	63
Mississippi	60
U. S. Government	58
Missouri	52
Arkansas	43
Kentucky	36
Oregon	33
Delaware	19
Idaho	18
Indiana	17
Virginia	16
Illinois	15
Nebraska	11
Connecticut	10
Kansas	10
Utah	10
Washington	9
U.S. Military	8
Maryland	5
Colorado	3
South Dakota	3
Montana	2
New Mexico*	2
New Hampshire	1
Wyoming	1
Total death row	**3,279**

(8 inmates in the national total received two death sentences in different states.)
*Abolished death penalty for future cases.

Maryland came close to abolishing the death penalty after a state legislative commission strongly recommended abolition and a cost study concluded the bill for the state's 5 executions would be $186 million. The legislature instead opted to drastically restrict the capital punishment law, making it very difficult to impose a death sentence. Casper Taylor, Jr., a long-time Maryland House of Delegates member and former supporter of the death penalty, concluded it was time to end the practice. "In 28 years in the Maryland House of Delegates, nine as speaker, I cast thousands of votes," wrote Taylor. "I have few regrets. But there is one vote I wish I could take back - my 1978 vote to reinstate the death penalty in Maryland. Today, that vote haunts me. Since reinstatement, Maryland's 30 years of experience with the death penalty have been a colossal failure. I now believe that life in prison without the possibility of parole is a better alternative. The majority of Marylanders agree."

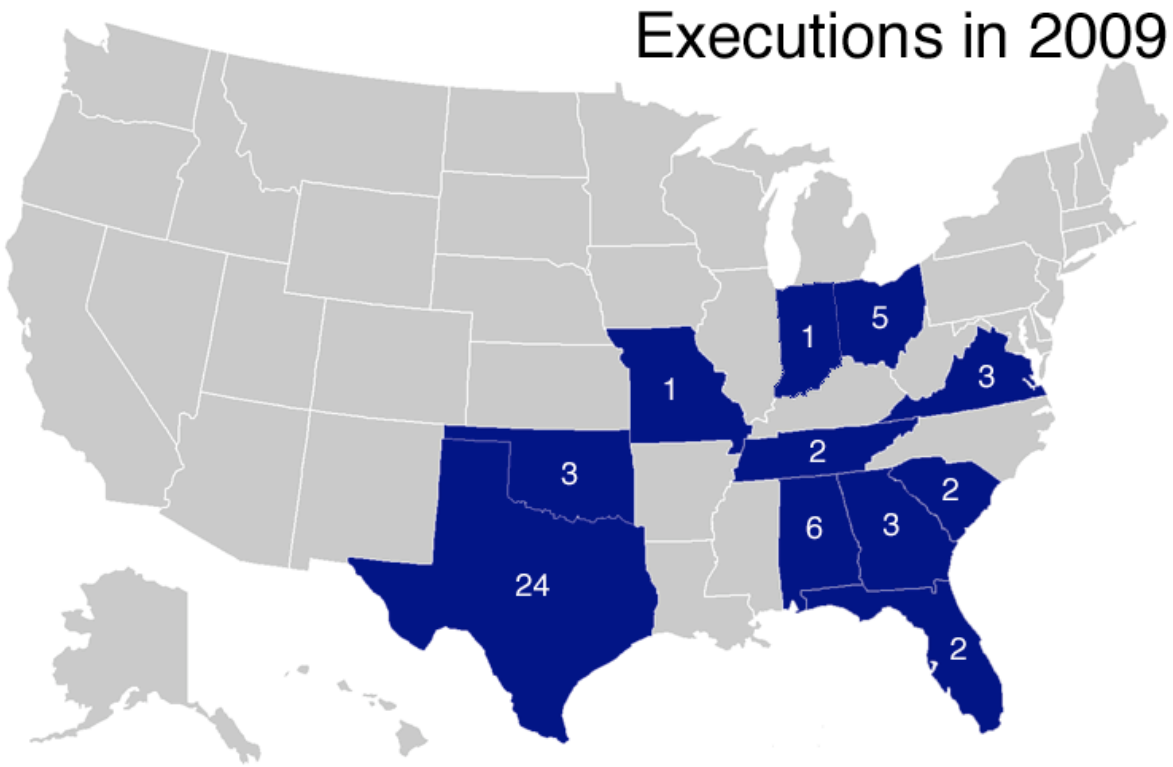
Kansas Republican Senator Carolyn McGinn sponsored a bill to replace the death penalty with a sentence of life without parole. She explained that in light of the state's budget deficit, Kansas was looking at ways to reduce government spending, "One policy change being considered is whether the death penalty is worth its higher cost to Kansas citizens, versus the alternative sentence of life in prison without parole we now have on the books." She added, "The estimated median cost of a case in which the death sentence was given was about 70% more than the median cost of a non-death penalty murder case." Her bill passed out of the Senate Judiciary Committee and will be considered in 2010.

Connecticut's Senate voted 19-17 to end capital punishment, after the House of Representatives approved the bill 90-56. However, the bill was vetoed by Gov. Jodi Rell. State Senate President Pro Tempore Donald Williams expressed hope that the governor would sign the bill, given the turn of events in the legislature, "History has been made in the state legislature. We have seen a sea change in the state House of Representatives and the state Senate, and I think it reflects something that's going on across the country. . . I think it's very important that we stress that what we're talking about now is a very certain sentence of life in prison, without the chance of parole. . . I would hope the governor would reflect upon the evidence."

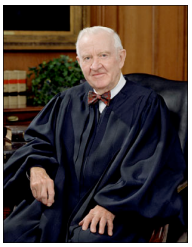
Lethal injection continued to be controversial in 2009. **Ohio** was forced to halt all executions after it failed to carry out the execution of Romell Broom in September. After jabbing Broom repeatedly for two hours with an IV-needle in an unsuccessful attempt to find a suitable vein, the warden asked the governor to stop the process. An attempt to put Broom back in the execution chamber a week later was quickly stopped by the courts, and his case remains in litigation. Ohio has since become the first state to switch to a one-drug protocol instead of the 3-drug protocol used by other states. Shortly after announcing this new procedure, Ohio executed Kenneth Biros on December 8.

Executions are on hold in **California**, **Maryland**, **Kentucky**, and in the **federal system** because of challenges to the 3-drug protocol and the lack of public review before its adoption. **North Carolina's** law remains unsettled. After abandoning electrocution as its method of execution, **Nebraska** adopted lethal injection, but the final protocols have not yet been approved.

The **American Law Institute** withdrew the part of its Model Penal Code concerned with capital punishment because of the "current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." ALI's recommendations for making the death penalty less arbitrary had been adopted in 1962 and were cited extensively by the U.S. Supreme Court in *Gregg v. Georgia* in 1976, the decision that allowed a revised death penalty to be reinstated. Many states mirrored ALI's model in their statutes. Now that legal framework is no longer supported by the very organization that proposed it because the guidelines have failed to produce the fairness it sought to ensure.



Supreme Court Cases Hint at Future Directions



Time on Death Row On March 9 the U.S. Supreme Court declined to review a challenge to the excessive time spent on death row by many inmates, but two Justices expressed concerns about the legal issue raised. William Thompson has been on death row in Florida for 32 years. He claimed this excessive time amounted to cruel and unusual punishment under the Eighth Amendment. Justice John Paul Stevens called the treatment of the defendant during his 32 years on death row "dehumanizing," noting that Thompson "has endured especially severe conditions of confinement, spending up to 23 hours per day in isolation in a 6- by 9-foot cell" and has experienced two stays of execution "only shortly before he was scheduled to be put to death." He added that neither retribution nor deterrence were served in such a case and "a punishment of death after significant delay is 'so totally without penological justification that it results in the gratuitous infliction of suffering.'" Justice Breyer separately dissented to the Court's inaction. (*Thompson v. McNeil*; see also *Johnson v. Bredesen,* similarly denying review on Dec. 2).

Innocence On August 17 the Court ordered a new evidentiary hearing for Georgia death row inmate Troy Davis, whose case has drawn worldwide attention because of new evidence of his possible innocence. For the first time in nearly 50 years, the Court favorably responded to a petition sent directly to them, rather than as an appeal from lower courts. With only two Justices writing in

dissent, the Court ordered a lower federal court to hear Davis's evidence: "The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."

Since Davis' initial conviction in 1991, at least seven eyewitnesses against him have recanted their testimony, and significant new evidence points to another suspect as the actual killer. Justice Stevens, with Justices Breyer and Ginsburg concurring, wrote, "The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. . . . [I]magine a petitioner in Davis's situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning." An amicus brief had been filed on Davis's behalf by former members of the judiciary and law enforcement officials, including former U.S. Attorney and Georgia Congressman Bob Barr and the former director of the FBI William S. Sessions. (*In re Troy Anthony Davis*).

Post-Traumatic Stress On November 30 the Court overturned the death sentence of George Porter, a Korean War veteran from Florida who had been convicted of murder in 1988. The Court found Porter's trial lawyer had failed to investigate and present ample mitigating evidence, including the fact that Porter's battle service in the war left him severely traumatized. Without dissent the Court stated, "Petitioner George Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man. His commanding officer's moving description of those two battles was only a fraction of the mitigating evidence that his counsel failed to discover or present during the penalty phase of his trial in 1988." (*Porter v. McCollum*).

New Voices

This year again, many people from areas of traditional death penalty support questioned the wisdom of this punishment. For some it was a moral choice as the dangers of executing the innocent became even more apparent. For others, the costs and burdens of the death penalty now outweigh any benefit it might produce:

Mark White, former governor of Texas and active death penalty supporter
"There is a very strong case to be made for a review of our death penalty statutes and even look at the possibility of having life without parole so we don't look up one day and determine that we as the State of Texas have executed someone who is in fact innocent."

Jason Nemes, former director of the Kentucky Administrative Office of the Courts
"We've got a system in Kentucky where there's not enough money for public advocates, for prosecutors, for drug courts, family courts, for juvenile services, for rehabilitation programs, and we're using the money we have in a way I think is unwise. Every dollar that goes to our ineffective capital punishment system is a dollar taken away from other needs. . . . The benefit to public safety is low. Are we really protecting the public?"

Richard A. Viguerie, leading conservative spokesman
"The fact is, I don't understand why more conservatives don't oppose the death penalty. . . [It] is, after all, a system set up under laws established by politicians (too many of whom lack principles); enforced by prosecutors (many of whom want to become politicians—perhaps a character flaw?—and who prefer wins over justice); and adjudicated by judges (too many of whom administer personal preference rather than the law). . . . Conservatives have

every reason to believe the death penalty system is no different from any politicized, costly, inefficient, bureaucratic, government-run operation, which we conservatives know are rife with injustice."

Rebecca Coleman, Chief of Police, Jackson, Mississippi

[I am] "not sure that the average criminal would consider the death penalty before they commit a crime. . . . I would look at more proactive means to serve as a deterrent to crime, as opposed to looking at it [reactively]. . . . [I would put] programs in place to educate our kids to know the benefits of good behavior as opposed to behavior . . . that ultimately would have them end up on death row."

James Fry, former Dallas County Assistant District Attorney

Fry changed his mind about the death penalty after learning that he had prosecuted and convicted an innocent man for rape. "For years, Texas has led the nation in the number of executions. Why don't we now strive to lead the nation in a new direction: reforming a justice system in urgent need of reform? . . . . For years I supported capital punishment, but I have come to believe that our criminal justice system is incapable of adequately distinguishing between the innocent and guilty. It is reprehensible and immoral to gamble with life and death."

Conclusions

The principal story of 2009 was the impact of the deep economic crisis facing the country. As states were forced to cut essential services, many leaders concluded the death penalty was a wasteful government program that should be considered for repeal. Eleven states debated bills to abolish the death penalty. New Mexico joined New Jersey and New York as states that recently ended the death penalty. Other states such as Maryland, Colorado, Montana, and Connecticut came close to the same choice this year.

The huge costs of the death penalty were mirrored by its lack of benefits. Death sentences continued to decline, having now dropped over 60% since 328 people were sentenced to death in 1994. The problem of innocence, which has been a catalyst for many of the changes surrounding the death penalty, remained prominent in 2009. Nine new exonerations brought the national total to 139 since 1973.

A poll of police chiefs, coupled with the opinions of prominent officials, revealed that the death penalty is under broad reconsideration by those with experience in law enforcement. The chiefs put the death penalty last on their list of priorities for a safer society. They and many leading citizens would rather see the millions spent on the death penalty directed to more reliable measures to fight crime. As the economic crisis continues in the year ahead, the death penalty will face heightened scrutiny.

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The Death Penalty Information Center is a non-profit organization serving the media and the public with analysis and information on capital punishment. The Center provides in-depth reports, conducts briefings for journalists, promotes informed discussion, and serves as a resource to those working on this issue. Richard Dieter, DPIC's Executive Director, wrote this report with assistance from DPIC staff. Further sources for facts and quotes in it are available upon request. The Center is funded through the generosity of individual donors and foundations, including the Roderick MacArthur Foundation, the Open Society Institute, and the European Commission. The views expressed in this report are those of DPIC and should not be taken to reflect the opinion of its donors.