

**Commonwealth of Massachusetts  
Joint Judiciary Committee**

*Innocence, Costs and National Death Penalty Trends*

Testimony of

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## INTRODUCTION

Good morning. I would like to thank the Chairs of the Judiciary Committees for this opportunity to appear before you and to offer my remarks on the proposed re-introduction of the death penalty in Massachusetts.

My name is Richard Dieter and I am the Executive Director of the Death Penalty Information Center in Washington, DC, a position I have held for the past 13 years. I am also an attorney and an adjunct professor at Catholic University Law School. The Death Penalty Information Center is a non-profit organization whose focus is research and analysis of capital punishment.

I would like to comment briefly on three aspects of the proposed bill based on my knowledge of death penalty laws and trends around the country:

1. The degree of risk that innocent people could be convicted and executed for capital crimes;
2. The costs that can be expected if the death penalty becomes law; and
3. The national recent trends away from the death penalty and how these trends are directly related to the first two issues of innocence and costs.

## THE RISKS OF EXECUTING THE INNOCENT

The American people now know that the problem of innocence is a lot more serious than was previously thought. When the death penalty was stopped in 1972 as result of the Supreme Court's decision in *Furman v. Georgia*, it was not because there were many proven instances of wrongful convictions or executions. Rather, it was because the death penalty was being arbitrarily applied, making it impossible to distinguish the relatively few cases that received capital punishment from the many cases that were eligible for the death penalty.

As the appeals process became more thorough, a great many cases were discovered where it was clear that innocent people had been sentenced to death. The awareness of this reached crisis proportions in the 1990s as DNA and other scientific developments demonstrated that, although our system usually convicted the guilty, it

made a relatively high number of mistakes in the cases that were most critical: death penalty cases.

Since 1973, 119 people in 25 states who were sentenced to death have now been freed after their convictions were reversed. 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.<sup>1</sup> In the few remaining cases, a governor granted a complete pardon based on innocence. For every 8 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.

The problem of innocence is not a remnant of the past that should no longer be a major concern. Most of the 119 people who have been freed were exonerated since the 1990s, not earlier in the 1970s or '80s. The largest number of inmates freed in a single year occurred in 2003.

It would not be correct to conclude that the reversals in these 119 cases prove that the system works. Unfortunately, the cases prove just the opposite. The 14 cases where people were freed as the result of post-conviction DNA testing are a stark reminder of the fallibility of our entire justice system. DNA testing evolved as a tool of science. If this technology had emerged ten years later, those 14 people may have been executed. It is important to remember that the typical DNA case resulted not only from a unanimous jury conviction and a unanimous death sentence, but was also affirmed at numerous levels of appeal.

Many of the other exonerations similarly 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 even were able to locate the actual murderer. The media played an important role in many of the cases, and in other cases, volunteer lawyers from major law firms revisited the evidence

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<sup>1</sup> . 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. A copy of the report has been provided for each member of the Committee.

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 accompanies it, is only applied to a few cases. Thousands of people on death row have not been given any special attention. In some instances, they do not even have an attorney for the entire appeals' process. 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.<sup>2</sup>

DNA cases say a lot more about the criminal justice system in general than they do about the relatively few actual reversals that they facilitated. These cases reveal that despite our best efforts of trials and appeals, we make mistakes and completely miss the answer to the most important question: Do we have the right person? Far too often in death penalty cases, the answer is simply no.

This problem is not solved by making DNA testing available *before* the trial starts. Even in the minority of cases where DNA or similar scientific evidence is available for testing, it may only prove an aggravating factor, such as who committed a rape, not necessarily who committed the underlying murder. Or the DNA evidence may show that a particular defendant was present at the crime scene. But to prove that person guilty, the state will have to rely on more traditional forms of evidence and these have been shown to be far from "foolproof."

Of course, even DNA evidence is not foolproof. DNA is a very valuable and precise scientific tool. But it is certainly not error-free and is dependent on three critical human interventions: the care of the police at the crime scene to correctly collect and preserve possible DNA evidence; the reliability of the state's crime laboratory in properly testing the evidence and ensuring that no contamination occurs; and finally, the expertise of those who interpret and testify about such evidence at trial.<sup>3</sup>

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<sup>2</sup>. See, e.g., T. Ganey, "Was the Wrong Man Executed," St. Louis Post-Dispatch, July 11, 2005, in which the state announced the re-opening of the case of Larry Griffin who was executed in 1995 in Missouri.

<sup>3</sup>. See, e.g., National Commission on the Future of DNA Evidence, "Postconviction DNA Testing: Recommendations for Handling Requests," U.S. Dept. of Justice (1999).

Reports from DNA testing centers in cities around the country have shown that caution is indeed in order before bestowing a mantle of infallibility on this new forensic tool. In Houston, Texas, the police crime lab there has been so fraught with problems that the data it has sent to the national databanks has been rejected. Multiple grand juries have been investigating the misconduct and the Texas Rangers have been brought in to help sort through 280 boxes of re-discovered evidence at the lab. Rainwater leaked into the lab areas. Experts lied about their credentials in courtroom testimony. According to national standards, *none* of the analysts who worked at the Houston Police DNA lab were qualified by education to do their jobs.<sup>4</sup>

Two men have already been released from prison after errors were discovered in their cases. The mayor and the police chief have called for a halt to all executions in cases from the county, but those entreaties were ignored. Chief of Police Harold Hurtt said, "I think it would be very prudent for us as a system, that is, a criminal justice system, to delay further executions until we've had an opportunity to reexamine evidence that played a particular role in the conviction of an individual that was sentenced to death."<sup>5</sup>

Prosecutors may be as blindsided by the incompetence of supposed "experts" as is the jury. Joe Owmbly, a prosecutor in Houston, expressed his dismay: "I could see somebody coming back and saying, 'The test we told you is conclusive is now inconclusive.' I could see that happening. What I did not envision, what I did not speculate could conceivably happen, is that they would say, 'We could tell it's not him.' I did not see how that could happen."<sup>6</sup>

### **Broader Problems in Forensic Labs**

The problems with errors in forensic evidence are not limited to one local crime lab or only to DNA testing. In 2003, the Fort Worth, Texas, police crime lab stopped conducting serology tests because of questions raised about contaminated evidence.<sup>7</sup>

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<sup>4</sup> . L. Olsen, "DNA Lab Analysts Unqualified," Houston Chronicle, Sept. 8, 2003.

<sup>5</sup> . S Moreno, "Police Lab's Troubles Grow," Washington Post, Oct. 2, 2004, at A3.

<sup>6</sup> . "Crime Lab Scandal Leaves Prosecutor Feeling Betrayed," Houston Chronicle, Mar. 15, 2003.

<sup>7</sup> . D. Boyd, "Doubts Increase About Crime Lab," Fort Worth Star-Telegram, Aug. 26, 2003.

Serious problems have been reported in labs in Florida (DNA lab worker admitted to falsifying DNA data), Arizona (technicians made errors analyzing DNA evidence in 9 criminal cases under review), Maryland (480 criminal cases under review), West Virginia (Fred Zain testified in dozens of cases about forensic tests he never conducted; he then moved to Texas and continued his misconduct until he was fired), Illinois (accusations of false forensic evidence led to 4 exonerations), Oklahoma (police chemist Joyce Gilchrist was fired for incompetence; a death row inmate was exonerated after allegations of Gilchrist's false testimony; 23 defendants were sentenced to death in cases that she worked on, 11 have already been executed).<sup>8</sup>

Sometimes these errors are caught when the results from one lab are reviewed by another lab. Recently, a defendant who spent 15 years for rape was released in Montana after the FBI checked the work of Arnold Melnikoff, who had been head of the state's crime lab. Melnikoff had testified in the case that the chances that either set of hairs found at the crime scene were not the defendant's were 1 in 100, and because pubic hairs look different from head hairs, there was a "multiplying effect" making it "1 chance in 10,000."<sup>9</sup> The FBI performed DNA testing on the hairs and neither were from the defendant. Walter Rowe, a professor of forensic science at George Washington University, commented on the original testimony: "The 1-in-100 estimate was without any scientific basis. The multiplying of probabilities was totally fallacious."<sup>10</sup>

Unfortunately, the FBI itself is not without error in this area. A 2004 report from the National Research Council found that the FBI's examiners sometimes overstated in court testimony the reliability of its method for comparing bullets and had played down the likelihood of false matches.<sup>11</sup> Senator Charles Grassley of Iowa stated that the study "raises serious questions about testimony given over the last 40 years. The FBI reached farther than the science supported."<sup>12</sup>

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<sup>8</sup> . T. Maier, "Inside the DNA Labs," *Insight Magazine*, Washington Times, June 10-23, 2003, at 18-22.

<sup>9</sup> . A Liptak, "2 States to Review Lab Work of Expert Who Erred on ID," *N.Y. Times*, Dec. 19, 2002.

<sup>10</sup> . *Id.*

<sup>11</sup> . E. Lichtblau, "Report Questions the Reliability of an FBI Ballistics Test," *N.Y. Times*, Feb. 11, 2004, at A17.

<sup>12</sup> . *Id.*

## THE RISING COSTS OF THE DEATH PENALTY

There are many controversial aspects to the death penalty debate and the question of costs often gets overlooked. Fiscal considerations, however, are both important in their own right and can have a critical impact on other issues such as the risks of executing the innocent and the quality of representation.

In broad terms, the death penalty is about a **search for justice and the safety of the community**. There are many ways to make the community safer, and most of these have costs associated with them. There is no bottomless source of government money to be spent on things that might help the community. The more you spend on one project, the less there is available for other worthwhile endeavors.

All of the studies regarding the cost of the death penalty have concluded that it amounts to a **net expense** to the state and the taxpayers. As a recent article on this subject in the *Wall Street Journal* predicted: “Nothing is certain except the death penalty and higher taxes.”<sup>13</sup> The extra money spent on the death penalty could be spent on other means of achieving justice and making the community safer: compensation for victims, better lighting in crime areas, more police on the streets, even longer periods of incarceration for certain offenders, or projects to reduce unemployment. Quite a few jurisdictions with the death penalty have recently had to cut back on other vital services. In some states, people are being released from prison early as a cost saving measure. Other states are closing libraries and other vital services.<sup>14</sup> The costs of the death penalty have a direct bearing on these issues.

A second reason why the costs of the death penalty are so central is that they play a key role in how the death penalty is implemented. Supporters and opponents of the death penalty agree that the capital punishment system should not take

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<sup>13</sup> . R. Gold, “Counties Struggle with High Cost of Prosecuting Death-Penalty Cases,” *Wall St. Journal*, Jan. 9, 2002.

<sup>14</sup> . See, e.g., F. Butterfield, “As Cities Struggle, Police Get By With Less,” *N.Y. Times*, July 27, 2004 (cities with budget shortfalls are closing innovative law enforcement units that helped reduce crime). Cleveland laid off 250 police officers. Meanwhile, Ohio has 206 people on death row.

unnecessary risks with innocent lives and should be applied with a strict fairness. As with many things, the death penalty on the cheap is really no bargain. There is no abstract dollar figure for the cost of the death penalty--it depends on the quality of the system you demand. In Illinois, their system was fraught with error. Over a 20-year period, they freed more innocent people from death row than they executed. As a result, a blue-ribbon commission there recommended 85 changes to make the death penalty more reliable; most of these changes will now cost the state even more money.<sup>15</sup>

There is little dispute that the death penalty is expensive. Of course, sentencing someone to life in prison is also very expensive. But death penalty costs are accrued upfront, especially at trial and for the early appeals, while life-in-prison costs are spread out over many decades. A million dollars spent today is a lot more costly to the state than a million dollars that can be paid gradually over 40 years.

But the most expensive system is one that combines the costliest parts of both punishments: lengthy and complicated death penalty trials followed by incarceration for life. Surprisingly, research has shown that that is exactly what you can expect from the death penalty. In most cases where the prosecution announces that the death penalty will be sought, it is never imposed. And even when it is imposed, it is rarely carried out.

Death penalty cases are clearly more expensive at every stage of the judicial process than similar non-death cases. Everything that is needed for an ordinary trial is needed for a death penalty case, only more so:

- more pre-trial time will be needed to prepare: cases typically take a year to come to trial
- more pre-trial motions will be filed and answered
- more experts will be hired
- twice as many attorneys will be appointed for the defense, and a comparable team for the prosecution

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<sup>15</sup> . Report of the Governor's Commission on Capital Punishment (Illinois, released April 15, 2002).



- jurors will have to be individually quizzed on their views about the death penalty
- they are more likely to be sequestered
- two trials instead of one will be conducted: one for guilt and one for punishment
- the trial will be longer: a cost study at Duke University estimated that death penalty trials take 3 to 5 times longer than typical murder trials
- and then will come a series of appeals during which the inmates are held in the high security of death row.

These individual expenses result in a substantial net cost to the taxpayer to maintain a death penalty system as compared to a system with a life sentence as the most severe punishment. It is certainly true that after an execution the death row inmate no longer has to be incarcerated while the life-sentenced prisoner remains under state care. But that partial saving is overwhelmed by the earlier death penalty costs, especially because relatively few cases result in an execution, and, even those that do occur, happen many years after the sentence is pronounced.<sup>16</sup>

A recent study by Professor James Liebman of 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 between 1973 and 1995 were overturned on appeal.<sup>17</sup> The serious errors that were discovered required that at least the sentencing phase be done over if the state wished to pursue the death penalty. When these cases were re-tried, approximately 82% result in a life sentence. Thus, the typical death penalty case has all the expenses of its early stages and appeals; it is then overturned, and a life sentence is imposed, resulting in all the costs of a lifetime of

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<sup>16</sup> . Some commentators have suggested that the existing cost studies ignore the possible financial savings from the theory that the threat of the death penalty results in more plea bargains. However, some of the studies cited below do mention this plea bargain factor: see note 22 (North Carolina), note 27 (Indiana), and note 28 (Kansas) below. These studies did consider the possible increases in plea bargains to be speculative or that such pleas were restricted by state law. Moreover, if enticing plea bargains was the avowed purpose of the death penalty, it is probable that courts would find such an intentional interference with the right to trial to be unconstitutional. Indeed, using the threat of death to obtain a guilty plea is a form of torture.

<sup>17</sup> . James S. Liebman, "A Broken System: Error Rates in Capital Cases," (Columbia Univ. June, 2000) (executive summary).

incarceration. Nationally, only about 12% of people who have been sentenced to death have been executed.<sup>18</sup>

Theoretically, Massachusetts might fashion a more efficient death penalty system. Texas, for example, has executed about one-third of the people it has sentenced to death. Even at that rate, it has been estimated that the **extra** costs of the death penalty in Texas are about \$2.3 million per case.<sup>19</sup> But I am not sure that Massachusetts would want to emulate Texas' record of sleeping lawyers, prosecutorial misconduct, racial bias, and sharp reprimands from the U. S. Supreme Court.

A more likely model of what Massachusetts' death penalty might look like could be found in New York.<sup>20</sup> In ten years, New York spent over \$160 million<sup>21</sup> with no executions. After this enormous outlay of precious resources with nothing to show for it but a broken, unconstitutional statute, the Assembly elected not to reinstate capital punishment this year.

The death penalty without executions is just another name for life-without-parole. Even if Massachusetts adopted the death penalty today, based on the experience of other states it would not have an execution for at least 10 or maybe 15 years. Assuming its statute was upheld by state and federal courts, it might have one execution per year at a cost of hundreds of millions of dollars. The vast majority of murders in Massachusetts would result in the same life sentence they receive today, but at a much higher net cost. The most expensive form of life-without-parole is one obtained after the high costs of death penalty trials.

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<sup>18</sup> . See U.S. Dept. of Justice, Bureau of Justice Statistics, "Capital Punishment 2003," appendix Table 4 (2004).

<sup>19</sup> . C. Hoppe, "Executions Cost Texas Millions," Dallas Morning News, March 8, 1992, at 1A.

<sup>20</sup> . See, e.g., D. Wise, "Capital Punishment Proves to Be Expensive," New York Law Journal, April 30, 2002, at p.1.

<sup>21</sup> . "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).

## COST STUDIES IN OTHER STATES

It is difficult to put a precise figure on the cost of the death penalty, and most states have not conducted in-depth studies of the expenses. Despite the fact that it has been almost 30 years since the death penalty was reinstated, only a handful of states have averaged more than one execution per year in this time. Until an execution occurs, the full costs of capital punishment can only be projected. Nevertheless, there have been studies by government agencies, the media, and independent researchers that create a clearer picture.

The studies differ widely in the states they cover, in their level of sophistication and in the assumptions they make. However, they have all come to a similar conclusion: the death penalty represents a significant net cost to the taxpayer

## COMMON ELEMENTS OF THE STUDIES

Most of these studies do not look solely at the costs of an isolated case. Rather the best analyses compare a **system** in which the death penalty is employed to a system dealing with similar crimes in which a life sentence is the most severe punishment allowed. At every step of the analysis, the question is asked: how much more, or less, does the system with the death penalty cost compared to the other system?

One important point about the better cost studies: the costs of the death penalty usually do not appear as line items in the budget. It is not accurate to say that there is no expense attributable to the prosecution or judges because they would be paid the same regardless of whether or not they are doing death penalty cases. This ignores what the studies call “opportunity costs.” Time is money. If a prosecutor or judge works longer on a case because it is a death penalty case, then those hours are not available for other work. If death penalty cases take more time, then that time difference is a net cost measured in the hours of all the participants. The state will either have to hire more judges and prosecutors or abandon some of the other work they were doing. The same can be said for government-funded public defender offices.

## HOW MUCH DOES THE DEATH PENALTY COST?

The major cost studies on the death penalty all indicate that it is much more expensive than a system where the most severe sentence is life in prison:

- ⇒ The most comprehensive study conducted in this country found 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.<sup>22</sup> These findings are sensitive to the number of executions the state carries out. However, the authors noted that even if the death penalty were 100% efficient, i.e., if **every** death sentence resulted in an execution, the **extra** costs to the taxpayers would still be \$216,000 per execution.
  
- ⇒ Some years ago, the *Miami Herald* estimated that the costs of the death penalty in Florida were \$3.2 million per execution, based on the rate of executions at that time.<sup>23</sup> Florida's death penalty system bogged down for a number of reasons, including a controversy over the electric chair. As a result, a more recent estimate of the costs in Florida by the *Palm Beach Post* found a much higher cost per execution: Florida spends \$51 million a year above and beyond what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out from 1976 to 2000, that amounts to a cost of \$24 million for each execution.<sup>24</sup>
  
- ⇒ In Texas, the *Dallas Morning News* concluded that a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years.<sup>25</sup>
  
- ⇒ The *Sacramento Bee* found that the death penalty costs California \$90 million annually beyond the ordinary costs of the justice system - \$78 million of that total is

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<sup>22</sup>. P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993).

<sup>23</sup>. D. Von Drehle, "Bottom Line: Life in Prison One-sixth as Expensive," *The Miami Herald*, July 10, 1988, at 12A.

<sup>24</sup>. S. V. Date, "The High Price of Killing Killers," *Palm Beach Post*, Jan. 4, 2000, at 1A.

<sup>25</sup>. C. Hoppe, "Executions Cost Texas Millions," *Dallas Morning News*, March 8, 1992, at 1A.

incurred at the trial level.<sup>26</sup> Since California has averaged much less than one execution per year, the costs per execution are astronomical, exceeding \$100 million per execution. Recently, the governor of California requested an additional \$220 million from the legislature to construct a new death row.

⇒ A recent study by Indiana's Criminal Law Study Commission found that the total costs of the death penalty projected into the future for the state's current capital cases would be about \$51 million, exceeding the future costs of life without parole sentences by about 38%.<sup>27</sup>

⇒ In its review of death penalty expenses, the State of Kansas concluded that capital cases are 70% more expensive than comparable non-death penalty cases. The study projected death penalty case costs through to execution (though none has occurred) and found that the median death penalty case costs \$1.26 million. Non-death penalty cases were counted through to the end of incarceration and were found to have a median cost of \$740,000. 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.<sup>28</sup>

In a report from the Judicial Conference of the United States on the costs of the **federal death penalty**, it was reported that defense costs were about 4 times higher in cases where death was sought than in comparable cases where death was not sought. Moreover, the **prosecution** costs in death cases were 67% higher than the defense costs, even before including the investigative costs of law enforcement agencies.<sup>29</sup>

A recent 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

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<sup>26</sup> . S. Maganini, "Closing Death Row Would Save State \$90 Million a Year," *Sacramento Bee*, March 28, 1988, at 1.

<sup>27</sup> . Indiana Criminal Law Study Commission, January 10, 2002 (assuming that only a modest 20% of death sentences are overturned and resentenced to life).

<sup>28</sup> . Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, State of Kansas, December 2003.

<sup>29</sup> . See, "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation," Judicial Conference of the United States (May 1998).

burden on local budgets comparable to that caused by a natural disaster.<sup>30</sup> 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 on counties to be \$1.6 billion over a 15-year period.<sup>31</sup>

The net effect of this burden on counties is a widely disparate and somewhat 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 at all, 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.<sup>32</sup>

Many of the costs of the death penalty are inescapable and have likely increased even since the studies mentioned here were conducted, as the demands for a more reliable and fairer system are heard. The appeals process is now longer, the defense attorneys, prosecutors and judges all are paid more, re-trials are long and more expensive. The majority of the costs occur at the trial level, and cannot easily be streamlined or reduced. Just recently, the U.S. Supreme Court placed higher demands on state-provided representation when it overturned a death sentence because the attorneys had not employed a mitigation specialist to thoroughly explore their client's background.<sup>33</sup>

## NATIONAL TRENDS

It is not my role to advocate any particular legislation in response to these facts. Nevertheless, I believe it is appropriate to say that Massachusetts has an opportunity to learn from what many states are increasingly finding to be a cumbersome and

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<sup>30</sup>. R. Gold, "Counties Struggle with High Cost of Prosecuting Death-Penalty Cases," Wall St. Journal, Jan. 9, 2002.

<sup>31</sup>. K. Baicker, "The Budgetary Repercussions of Capital Convictions," National Bureau of Economic Research, Working Paper 8382, July 2001.

<sup>32</sup>. See generally, R. Dieter, "Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty," (revised edit., 1994) (available from the Death Penalty Information Center).

<sup>33</sup>. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); see also *Rompilla v. Beard* (2005).

expensive burden. The clear national trend is away from a broad use of the death penalty: in the past 5 years there has been a 50% drop in death sentences, a 40% decline in executions, and a decrease in the size of death row. Public support has also dropped since its high point in the early 1990s.<sup>34</sup> In public opinion polls, there has been a clear upward trend in support for life-without-parole sentences as a substitute for the death penalty.

This sharp decline in the use of capital punishment has coincided with the awareness of so many mistakes in capital cases. Executions, the size of death row and public support for the death penalty were all on the rise in the early 1990s. But DNA advances and images of death row inmates walking out of prison and into the arms of their attorneys and journalism students have reversed this trend. Today, states are studying the death penalty, courts (including the U.S. Supreme Court) are finding more reasons to be skeptical of the confident claims of guilt and fairness offered by the prosecution. Reforms of the death penalty will likely result in increased costs for those states that choose to retain it. Four states have formal bans on executions.<sup>35</sup> Last year, 85% of the executions occurred in just one region of the country—the south.

Moreover, the states without the death penalty not only have lower murder rates than states with the death penalty, they have also done better in *reducing* their murder rates than states with the death penalty.<sup>36</sup> The death penalty will result in a tremendous expenditure of time and resources with no assurance that it will contribute anything to the welfare of the people. It is true that you cannot put a price on justice. But you can put a price on programs with a proven track record in improving the safety of the community. A state has to choose where to put its limited resources.

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<sup>34</sup> . See, e.g., Editorial, “The Year in Death,” Washington Post, Jan. 2, 2005; see also “The Death Penalty in 2004: Year End Report,” Death Penalty Information Center (2004), copies of which are provided to members of the Committees.

<sup>35</sup> . Illinois has had a moratorium on executions since 2000. An appellate court in New Jersey halted all executions because of a challenge to the lethal injection process. New York’s and Kansas’ death penalty statutes were found unconstitutional in 2004 and neither statute has been re-instated through legislation.

<sup>36</sup> . See “Deterrence” section of Death Penalty Information Center’s Web site: <http://www.deathpenaltyinfo.org>.

The death penalty concentrates millions of dollars on a few people with almost no control over the ultimate outcome. Despite protections, it remains an inherently fallible system, subject to human error. In such a system, there is a distinct risk that innocent people could be convicted and executed. For these reasons, states around the country are pulling back from their use of the death penalty, studies are being conducted, courts are revisiting the issue, and in some instances, the process is being stopped all together.

Thank you for this opportunity to offer my testimony. I would welcome any questions the Committee may have.