



Does the Death Penalty Make Sense?

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Introduction

In the past few months New Mexicans have been shocked, angered, horrified and appalled by a series of terrible crimes.

Two law enforcement officers were killed in the line of duty—depriving their communities of individuals who dedicated their lives to protecting and serving the people and taking from their families their love and support.

Then in an act so vile and evil that it defies comprehension, an innocent 10-year old girl was horrifically raped, tortured and murdered under her mother's supervision.

How should we respond to these outrages?

What can we do to prevent them?

What does justice demand that we do?

The widespread feeling across New Mexico is that we have to do "something"—but what is the right something to do?

One response has come from Governor Martinez: Reinstate the death penalty. Abolished in this state in 2009, the death penalty as proposed by the Governor could be applied in the kinds of cases that have triggered the current sense of anger—killings of law enforcement personnel and prison guards, or murders of children.

Her proposal has prompted other reactions, in particular, from long-standing opponents of the death penalty.

This debate demands that we ask a number of questions:

- *What is the history of the death penalty in New Mexico?*
- *What is the history of the death penalty in the United States?*
- *Is the death penalty a proven deterrent to violent crime?*

- *Is the death penalty cost effective?*
- *How does the world see the death penalty?*
- *What alternatives to the death penalty are available as a way to make a statement about violent crime in New Mexico?*
- *How should such a serious issue be decided?*

How Should New Mexico Decide?

Before we take up the complicated elements that make up the debate over the death penalty, we should ask the last question first:

The question is not should New Mexico reinstate the death penalty; the question is how should New Mexico decide? How should we take up such a serious, complex, emotionally charged issue and render a decision that will stand careful scrutiny?

Right now the issue is in front of the State Legislature as part of a Special Session called by the Governor.

It will be put to a vote—up or down.

The question is: *Is that the right way to consider such a serious, complicated, difficult issue?*

Reviewing the literature from around the country on the death penalty makes the argument clear that an issue like this deserves much more careful consideration. It is literally a life-or-death issue.

A rush to judgment on capital punishment is as big a mistake as many of the judgments made in capital cases.

Around the country, governors of both parties have approached the issue with thoughtful consideration and careful analysis. The case of Illinois—included at the end of this paper as an appendix—is particularly instructive. There, different governors with different philosophies subjected the issue to careful consideration. A blue-ribbon commission looked at the issue dispassionately and thoughtfully and rendered a nuanced and knowledgeable report.

That seems to be a process used in states all over the country: Don't treat the death penalty as a political issue or a campaign issue. It involves deep and complicated factors. It must be evaluated on the merits: Does it prevent heinous crimes? Is it too expensive? Is it the best way to use scarce resources? Does it reflect our real moral values? Are there other, better ways to punish the worst criminals among us?

At a minimum, these and other questions deserve careful consideration.

This is too important an issue to be treated in a superficial, political fashion.

The answer to the question, "How should New Mexico decide?" is: *Thoughtfully, seriously, analytically and very carefully.*

What is the History of the Death Penalty in New Mexico?

In 2009 the State Legislature passed and then-Governor Richardson signed HB 285. The law did away with capital punishment in New Mexico and replaced it with life imprisonment and life imprisonment without the possibility of parole for the most grievous offenses and serious crimes.

HB 285 passed the House by a vote of 40-28 and the Senate by a vote of 24-18. Adoption of the law made New Mexico the 15th state to do away with the death penalty.

The Fiscal Impact Report filed with HB 285 describes some of the costs of utilizing the death penalty as a punishment. It cites the Public Defender Department as stating that *"abolishing the death penalty would save New Mexico millions of dollars."*

Cases that involve the possible application of the death penalty are particularly expensive for a number of reasons: They require heightened standards for defense counsel and at least two highly qualified defense lawyers at each stage of the legal proceedings; they involve extensive trials and legal appeals; they require a certified court reporter to transcribe all proceedings; they require special and respectful treatment of the victim's survivors; and jury selection is long and complicated.

According to a North Carolina study, death penalty cases cost \$2.6 million more than a system that imposes life sentences.

The Fiscal Impact Report goes on to conclude, *"New Mexico does not receive much return on its death penalty investment."* Fewer than 50% of death penalty cases actually result in a death sentence. In addition, 68% of the death penalty convictions are overturned on appeal—making New Mexico the state with the highest overturn rate in the country. Fewer than 25% of all death penalty cases actually result in the defendant going to death row. The actual execution rate, historically, is lower than the national rate of 12%.

Based on this record, the report notes that there is only a 4.5% chance that a prosecution that cost millions of dollars actually will end in an execution in New Mexico.

An additional expense noted in the report is the cost of assembling a jury. In death penalty cases, the court usually summons as many as 1,000 potential jurors. Jury and witness fee expenses for death penalty cases usually run from \$20,000 to \$25,000, compared to costs of \$7,000 to \$8,000 in non-death penalty murder cases.

The last person put to death in New Mexico was Terry Clark who was executed by lethal injection in 2001 for the murder of a child. Prior to his execution Clark dropped all legal defenses and asked to be executed. There are currently two men on death row in New Mexico whose crimes and trials pre-date the 2009 repeal of the death penalty: Robert Fry and Timothy Allen.

Is the Death Penalty Applied Equitably?

Since 1976, 1,437 people have been executed in the United States. The largest number of executions occurred in 1999, when 98 people were put to death. Since then the number of annual executions has declined; in 2016 there were 15 executions.

As the number of executions has gone down, the number of exonerations has gone up. Since 1973, 156 people have been released from death row as their innocence was established. From 1973 to 1999 exonerations averaged 3 per year; between 2000 and 2011 the average rate of exonerations increased to 5 per year. According to a 2014 study of death penalty convictions, at least 4% of all people who receive the death penalty are actually innocent of the crime.

New Mexico has direct experience with a wrongful conviction and death penalty: In 1974 four men, Thomas Gladish, Richard Greer, Ronald Keine and Clarence Smith were convicted of murder, kidnapping, sodomy and rape and sentenced to death.

The convictions were overturned after an in-depth investigation by the Detroit News uncovered lies by the prosecution's star witness, perjured testimony and poorly administered lie detector tests. After the four men were released, the murder weapon was traced to a drifter from South Carolina who confessed to the crime.

National statistics seem to suggest a correlation between race and the death penalty:

- Jurors in Washington State are three times more likely to recommend a death sentence for a black defendant than for a white defendant;
- In Louisiana the odds of a death sentence were 97% higher when the victim was white than when the victim was black; and
- A study in California found that those who killed a white person were three times more likely to be sentenced to death than those who killed a black person and more than four times more likely than those who killed a Latino person.

Is the Death Penalty a Proven Deterrent to Crime?

The simple answer to this question is, we don't know with any certainty whether the death penalty prevents violent crimes. That said, there are a number of useful and informative data points that are worth noting and studies that should be considered.

For example, according to a 2009 survey of police chiefs:

- 69% said they did not believe that murderers think about the range of possible punishments facing them before they commit homicide, compared with 24% who believe they did;
- 48% said the death penalty does not significantly reduce the number of homicides compared with 37% who said it does; and
- 66% said the death penalty is not one of the most important law enforcement tools compared with 31% who said it is.

The largest agreement—69%—came from chiefs who agreed with the statement that politicians support the death penalty as a symbolic way to show they are tough on crime.

Another survey, this one asking the views of experts from the American Society of Criminology, the Academy of Criminal Justice Sciences and the Law and Society Association, found that the overwhelming majority did not believe that the death penalty is a proven deterrent to homicide. More than 80% said that the existing research does not support the idea that the death penalty deters crime.

Other data seems to contradict the idea that the death penalty prevents murders: States without the death penalty actually have lower homicide rates than states with the death penalty. Over the last 20 years, homicide rates in states with the death penalty have been 48% to 101% higher than in states without the death penalty.

There is statistical evidence that suggests that applying the death penalty in cases where a police officer is murdered is not a deterrent: The FBI Uniform Crime Report shows that regions of the country that have most used the death penalty are the least safe for police officers. The three leading states where law enforcement officers were feloniously killed in 1998, for example, were California, the state with the highest death row population; Texas, the state with the most executions since 1976; and Florida, the state that is third highest in executions and death row populations.

The last word on whether the death penalty is a proven deterrent goes to a 2012 report issued by the National Research Council of the National Academies. After reviewing more than 30 years of studies that claimed that the death penalty is a deterrent to serious crime the 2012 report found those studies *"fundamentally flawed."*

The report concluded: *"The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide..."*

Criminologist Daniel Nagin of Carnegie Mellon, who chaired the panel of experts, said, *"Nothing is known about how potential murderers actually perceive their risk of punishment."*

Is the Death Penalty Cost Effective?

Here the data are far more conclusive: The costs associated with the death penalty far exceed those of life in prison without parole.

Some of the data have been included in an earlier section of this working paper, including the fiscal impact report filed at the time that New Mexico did away with the death penalty.

Since then, of course, New Mexico's financial situation has only worsened, with declining revenues to support basic services provided by the state. The question of whether it makes sense to reinstate the death penalty and incur greater criminal justice costs at a time of a serious financial shortfall—on top of the other doubts that plague the death penalty—is a real one.

Here are some of the studies and reports that support the finding that the death penalty imposes a financial burden on states:

- A report entitled *"Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis"* combines an analysis of the costs of the death penalty with a national poll of police chiefs who put capital punishment at the bottom of their law enforcement priorities. The suggestion is that the death penalty is both expensive and not a priority for knowledgeable criminal justice professionals.

- A study by Ernest Goss, founder of the conservative think tank Goss and Associates in Nebraska, stated that each death penalty prosecution in that state costs taxpayers about \$1.5 million more than a life sentence without parole; Nebraska spends about \$14.6 million per year to maintain its capital punishment system.
- A 2014 study commissioned by the Nevada legislature found that the average death penalty case cost \$500,000 more than a comparable case in which the death penalty is not sought.
- In Kansas, a judicial council study found that defending a death penalty case costs about four times as much as defending a case where the death penalty is not sought. After examining 34 cases between 2004 and 2011, the judicial council concluded that defense costs for death penalty trials averaged \$395,762 compared to \$98,963 where the death penalty is not sought. The study also examined jury time and expense. Jury trials in a death penalty case averaged 40.13 days; where the death penalty was not involved the cases averaged 16.79 days. Justices of the Kansas Supreme Court assigned to write opinions estimated they spent 20 times more hours on death penalty appeals and the Department of Corrections found that housing prisoners on death row costs more than twice as much per year as for prisoners in the general population.
- Other states that have conducted careful, comprehensive studies of the costs of the death penalty include Tennessee (48% higher costs for the death penalty than the cost of trials in which the penalty is life imprisonment); Maryland (3 times the cost of non-death penalty cases or \$3 million for a single case); and California (\$137 million for the current system with the death penalty compared to \$11.5 million for a system without the death penalty).

The financial issue is important not only when comparing the cost of the death penalty to life in prison without parole, but also in considering how the state's financial resources could be spent.

For example, a report from the Centers for Disease Control and Prevention (CDC) notes the connection between rates of violent childhood death and low funding for social programs, the economic stress of women participating in the workforce without supporting social programs, the divorce rate and social acceptability of violence.

The CDC report prompts the question, *"How should the State of New Mexico best use its scarce financial resources? Would more and better social programs, mental and behavioral health programs, counseling, and other wrap-around services do a better job of preventing horrific crimes than the re-instating of the death penalty?"*

If we consider the state budget a moral document that expresses our values and priorities, what should our state budget say on the subject of violent childhood death?

How Does the World See the Death Penalty?

Around the world, 141 nations have abolished the death penalty in practice or in law. In 2010 the vast majority of all recorded executions took place in just 5 countries: China, Iran, North Korea and the United States. A total of 58 nations still execute prisoners; the list includes Afghanistan, Bahrain, Belarus, Belize, Egypt, Iran, Iraq, Libya, Pakistan, Saudi Arabia, Somalia, Syria, Uganda, Yemen and Zimbabwe.

However, no Western democracy—other than the United States—continues to use the death penalty. Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, the Holy See, Iceland, Ireland, Italy, Netherlands, Norway, Poland, Spain, Switzerland, Sweden and the United Kingdom no longer employ capital punishment.

The web site of the United States Conference of Catholic Bishops reiterates the long-standing teaching of the Catholic Church with regard to the death penalty:

"Twenty-five years ago, our conference of bishops first called for an end to the death penalty. We renew this call to seize a new moment and a new momentum. This is a time to teach clearly, encourage reflection, and call for common action in the Catholic community to bring about an end to the use of the death penalty in our land."

Is There a Punishment Worse Than Death?

The argument for reinstating the death penalty in New Mexico seems to be based on the assumption that capital punishment is the ultimate penalty: Taking the life of a convicted murderer who has violated and outraged our legal and human standards is the best way society can mete out justice. There is no penalty worse than death.

But in a January 15, 2016 article in The Yale Law Journal Forum entitled *"Worse than Death,"* Alex Kozinski questions that fundamental assumption.

Kozinski writes, *"Solitary confinement is just as bad as the death penalty, if not worse. . . . Sending hardened criminals from death row to solitary confinement is no triumph. It merely swaps one type of death for another."*

To be clear, Kozinski, who is a judge on the United States Court of Appeals for the Ninth Circuit, is not advocating life in prison without parole and the frequent accompanying use of solitary confinement; in fact, just the opposite. He is suggesting that solitary confinement is even worse than the death penalty—and that we should do away with both.

But his argument should make even proponents of the death penalty pause and reflect: Is the death penalty too good for the people New Mexico seeks to punish for outrageous, inhumane acts of violence?

Kozinski quotes defense lawyers in the case of Dzhokar Tsarnaev, one of the Boston Marathon bombers who argued that the jury should send him to the super-maximum security prison at ADX Florence, where many inmates spend 23 hours per day alone in an 87-square foot cell. Tsarnaev's lawyers described life at ADX Florence this way: *"29 men vie for the privilege of cleaning the showers, and two get the job . . . This isn't a resort. A sentence of life [at ADX] is not a lesser sentence than death; it is a sentence other than death."*

Kozinski goes on to write in his paper, *"Given the conditions in solitary confinement and in supermax facilities more generally, it comes as no surprise that some prisoners prefer to die. Timothy McVeigh, who bombed the federal building in Oklahoma city, decided not to seek clemency. McVeigh's lawyer reported that '[h]aving nothing to look forward to but solitary confinement in a federal penitentiary does not appeal to him.'"*

This choice of death over life in prison without parole was also the case when Terry Clark was put to death in New Mexico in 2001. Clark simply wanted a fast way out, rather than a long life in prison without a chance of parole.

For New Mexicans who share the outrage over recent horrible killings and who want to do "something" to punish cold-blooded killers, Kozinski's article suggests that we have already done something—the right thing—in instituting life imprisonment without parole as an ultimate judgment.

Doing the right something makes more sense than doing the wrong something.

Appendix: The Case of Illinois

For anyone interested in a deeper look at how one state grappled with the death penalty, the case study of Illinois is both instructional and well documented. Scott Turow, lawyer and author who served on the 14-person commission appointed by Governor George Ryan to examine the death penalty and recommend reforms, has written extensively in *The New Yorker* ("*To Kill or Not to Kill*," January 6, 2003) and in a book that openly and honestly describes how he arrived at his decision to change his mind and ultimately voted to do away with the death penalty in Illinois.

Another serious paper by Rob Warden, Executive Director of the Center on Wrongful Convictions, called "*How and Why Illinois Abolished the Death Penalty*," describes the wrongful convictions, the nine exonerations of death row convicts, two deplorable scandals involving Chicago detectives who tortured suspects to obtain confessions and newspaper exposure of prosecutorial misconduct in capital cases that prompted then-Governor Ryan to put a moratorium on Illinois executions. Governor Ryan then appointed the 14-person commission to examine the death penalty, one member of which was Scott Turow.

The 207-page report filed by the Commission on Capital Punishment included sweeping recommendations for reforming the criminal justice system: As a safeguard against coerced confessions, it recommended that police interrogations be electronically recorded; that protections be put into place to prevent the police from coaching witnesses in the identification of suspects; that a statewide review committee be created to decide whether to seek a death sentence in any case; and a requirement that judges hold pre-trial hearings to determine the reliability of testimony by informants.

The report also confirmed other findings elsewhere that the death penalty is applied in a discriminatory manner in Illinois. Defendants in rural counties were more than twice as likely to be sentenced to death as those in urban counties; defendants convicted of killing white victims were three times as likely to be sentenced to death as defendants convicted of killing black victims in similar cases.

Shortly before leaving office, Governor Ryan granted blanket clemency to the 167 convicts on death row. In his statement, Governor Ryan said, "*Our capital system is haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death row inmates.*"

After Governor Ryan left office, two more high-profile cases in Illinois again raised the issue of wrongful convictions. Both cases involved horrible murders: In one case a father was arrested for the sexual assault and murder of his three-year old daughter; in another, a father was arrested for the murder of his eight-year old daughter and a nine-year old friend. Both men confessed and in both cases prosecutors announced they would seek the death penalty.

In both cases, DNA testing exonerated the fathers and identified the actual murderers.

One result of this building tide of evidence against the death penalty was an editorial by the Chicago Tribune, reversing a position it had taken in favor of the death penalty in 1869, 1952 and 1976.

The editorial stated, "*The evidence of mistakes, the evidence of arbitrary decisions, the sobering knowledge that government can't provide certainty that the innocent will not be put to death—all that prompts this call for an end to capital punishment. It is time to stop killing in the people's name.*"

The next step in the process of doing away with the death penalty in Illinois was a careful analysis of the costs involved with capital punishment. The study, published in 2010, concluded that if Illinois had done away with the death penalty in 2000, the state would have saved roughly \$200 million.

That report said, *"It is not just that this is a waste of taxpayer dollars at a time when Illinois needs every dollar for other services, but that the money has been spent foolishly, cynically, heedlessly, and without a discernible indication of responsibility to the state or the public..."*

Finally in 2011, with the preponderance of evidence demonstrating the dangerous flaws and high cost of the death penalty, the legislature passed a measure to do away with it in Illinois. After much soul-searching, populist Governor Pat Quinn, citing his religious faith and the teachings of the Bible, signed the bill into law, abolishing the death penalty.

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