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ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2017.499
<http://lawreview.law.pitt.edu>



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COSTS VERSUS BENEFITS: THE FISCAL REALITIES OF THE DEATH PENALTY IN PENNSYLVANIA

Marla D. Tortorice*

INTRODUCTION

The death penalty has long been the subject of fervent debate. Much of this debate centers around normative judgments. Is it morally acceptable to “tinker with the machinery of death”?¹ Does capital punishment violate the Eighth Amendment given our nation’s “evolving standards of decency”?² This Note does not seek to address these questions, nor whether the death penalty is arbitrarily imposed or racially disparate. Rather, the goal of this Note is to focus on the death penalty’s utility, solely seeking to bring cognizance to the financial realities of a capital punishment system, particularly within Pennsylvania.

It should be said at the offset that this Note does not suggest that the solution to the death penalty’s high cost is to find budget cuts in the current system. It is true that the current system has financially burdensome regulations so as to not run afoul of due process, but simply doing away with those regulations would only lead to more costly mistakes.³ Fixing the broken death penalty system in Pennsylvania would mean major reform, requiring more money than we spend now.⁴ Retentionists are often of the view that money should not be a concern when it comes to protecting

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¹ See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

² See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

³ See *infra* Part II.B.

⁴ See *infra* notes 190–91, 194 and accompanying text.

society from the “worst of the worst.”⁵ However, the system may not even be doing that,⁶ and that money could be spent on more beneficial and efficient uses.⁷

As this Note will investigate further, Pennsylvania’s capital punishment system remains remarkably expensive, despite few executions. Pennsylvania’s capital punishment cases rarely reach fruition. Since Pennsylvania reinstated the death penalty in 1978, 352 people have been sentenced to death.⁸ However, only three of those people have been executed, and each of those three people had waived their right to appeal.⁹

In 2011, the General Assembly of Pennsylvania passed a Senate Resolution that directed the Joint State Government Commission to establish a bipartisan task force and an advisory committee to conduct a study of capital punishment within the state.¹⁰ Among other things, the task force and advisory committee were to determine exactly how much Pennsylvania’s capital punishment system was costing taxpayers.¹¹ The report was due back to the Senate by 2013,¹² but no such report has been published.

Many other states have completed similar studies to help frame their debates.¹³ A cost-benefit analysis needs to be a part of the discussion of whether to continue to have the death penalty in Pennsylvania.¹⁴ Leaving all other arguments aside, when comparing the results of these other studies, there is a significant probability that having a death penalty system is costing taxpayers millions of additional dollars a year while providing our society with benefits that a sentence of life imprisonment without the possibility of parole could provide just as effectively.

Pennsylvania’s cost study needs to be completed and published in order to have the kind of concrete debate from which we can move forward. While recognizing the

⁵ See *infra* notes 107, 209.

⁶ See *infra* Part III.A.

⁷ See *infra* Part III.

⁸ S. Res. 6, 195th Leg., Reg. Sess., at 1 (Pa. 2011) [hereinafter 2011 Senate Resolution].

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *Id.* at 6.

¹³ See *infra* Part II.D.

¹⁴ See *infra* notes 254–59 and accompanying text for a discussion on why the cost argument has become more prevalent in today’s capital punishment debate.

importance of constitutional and moral arguments, such factors are inherently difficult to measure. Cost and utility can more easily be translated into literal numbers, and this aspect of the argument may resonate with some supporters “of the death penalty” in a way that previous arguments have not.

This Note aims to analyze the cost and utility of the death penalty and illustrate how Pennsylvania can reallocate now-wasted resources to common goals, such as crime deterrence. This Note ultimately concludes that the only viable solution is to abolish the death penalty and replace it with a sentence of life in prison without the possibility of parole.

Part I provides the background of the relevant death penalty jurisprudence in the United States and outlines the structure of Pennsylvania’s statutes. Part II discusses the costs of capital punishment, including the features of the law that make it an expensive process, why doing away with these features would be both constitutionally infringing and impractical, approximations of the cost of Pennsylvania’s capital punishment system, and a comparison of other states’ capital punishment systems that are similar to Pennsylvania’s. Part III discusses the benefits of the death penalty, primarily deterrence and retribution, and ultimately concludes that the costs outweigh the benefits.

I. HISTORICAL BACKGROUND AND STRUCTURE OF THE LAW IN PENNSYLVANIA

The Supreme Court’s decision in *Furman v. Georgia* changed the landscape for the death penalty across the United States, including in Pennsylvania. In 1972, the *Furman* Court held that the death penalty, as then applied, violated the Eighth and Fourteenth Amendments by constituting cruel and unusual punishment.¹⁵ Each of the nine justices wrote his own opinion, five concurring and four dissenting.¹⁶ The five concurring justices expressed varying critiques of the death penalty, including the challenges of the distribution of the death penalty, the evidence of declining contemporary support for the punishment, and the failure of the death penalty to yield any tangible benefits given its rare imposition.¹⁷

¹⁵ *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam); see Sandra Schultz Newman et al., *Capital Sentencing: The Effect of Adding Aggravators to Death Penalty Statutes in Pennsylvania*, 65 U. PITT. L. REV. 457, 469–70 (2004).

¹⁶ *Furman*, 408 U.S. at 238.

¹⁷ See *id.* Incidentally, at this time, cost was not center to any of the arguments; the only mention of cost was given by Justice Marshall to rebut the claim that the death penalty provides a cheaper alternative to life in prison. *Id.* at 357 (Marshall, J., concurring) (“As for the argument that it is cheaper to execute a

On the same day *Furman* was announced, the Supreme Court vacated several death penalty sentences imposed in Pennsylvania pursuant to the Act of 1939, implying that the Pennsylvania statutory scheme was unlawful.¹⁸ And later in 1972, in a case titled *Commonwealth v. Bradley*, the Supreme Court of Pennsylvania found that the death penalty provisions of the Act of 1939 were unconstitutional in light of *Furman*.¹⁹

In response to the lack of a capital punishment option, the Pennsylvania Legislature first enacted Section 1102 of the Crimes Code, which provided that “[a] person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment.”²⁰ Meanwhile, in 1973, the Pennsylvania Governor initiated a commission whose purpose was to conduct a comprehensive study on capital punishment in Pennsylvania.²¹ Two reports were written at the conclusion of the study.²² The majority report concluded that “the death penalty [wa]s not needed, [wa]s undesirable, [wa]s offensive to a significant segment of our population, and its existence would do more harm than good.”²³ The minority report recommended the continued use of capital punishment in “only the most outrageous cases of murder.”²⁴

Despite the commission’s findings, the Pennsylvania Legislature sought to comply with *Furman* and *Bradley* by enacting another provision—Section 1311 of

capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect.”).

¹⁸ Newman et al., *supra* note 15, at 470.

¹⁹ See *Commonwealth v. Bradley*, 295 A.2d 842 (Pa. 1978); see Newman et al., *supra* note 15, at 470.

²⁰ 18 PA. CONS. STAT. ANN. § 1102 (West 1972); see Newman et al., *supra* note 15, at 470.

²¹ Report of the Governor’s Study Commission on Capital Punishment 1 (1973); see Newman et al., *supra* note 15, at 471.

²² Report of the Governor’s Study Commission on Capital Punishment 27 (1973); see Newman et al., *supra* note 15, at 471.

²³ Report of the Governor’s Study Commission on Capital Punishment 27 (1973); see Newman et al., *supra* note 15, at 471.

²⁴ Report of the Governor’s Study Commission on Capital Punishment 27 (1973); see Newman et al., *supra* note 15, at 471.

the Sentencing Code²⁵—over the governor’s veto. However, both Section 1102 and Section 1311 were later declared to be unconstitutional by the judiciary.²⁶

Four years after *Furman*, the Supreme Court decided *Gregg v. Georgia*, which held that “guided discretion schemes for imposing the death penalty were constitutional.”²⁷ The plurality opinion endorsed bifurcated proceedings and the feasibility of developing standards to guide capital sentencing. In reviewing the Georgia Legislature’s procedural protections in response to *Furman*—including a narrower scope of eligibility for capital punishment through ten aggravating factors, authorization for jurors to consider mitigating factors and return a non-death verdict based on such considerations, and its provision for automatic appeal to the state supreme court—*Gregg* held that Georgia’s scheme met constitutional standards.²⁸

Guided by the *Gregg* analysis,²⁹ the Pennsylvania Legislature amended Section 1311 and enacted what is now Section 9711 in 1978—again over the veto of the governor.³⁰ Section 9711 provides for a split-verdict procedure when rendering a death penalty.³¹ This means that first a defendant must be found guilty of first-degree murder.³² If such a verdict is returned, then a second, separate sentencing hearing is conducted before the same jury.³³ Likewise, if a defendant has pled guilty or waived

²⁵ 18 PA. CONS. STAT. ANN. § 1311 (West 1974); see Newman et al., *supra* note 15, at 472.

²⁶ Section 1102 was struck down in *Commonwealth v. McKenna*, 383 A.2d 174, 178 (Pa. 1978) (holding that “[this] section, stark in its brevity, was distinguished by a complete lack of direction as to the circumstances that would warrant imposition of the death penalty”). Section 1311 was struck down in *Commonwealth v. Moody*, 382 A.2d 442, 447 (Pa. 1977), *cert. denied*, 438 U.S. 914 (1978) (holding that statute “so narrowly limit[ed] the circumstances which the jury may consider mitigating that it preclud[ed] the jury from a constitutionally adequate consideration of the character and record of the defendant”).

²⁷ See *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); see Newman et al., *supra* note 15, at 473.

²⁸ *Gregg*, 428 U.S. at 190–91, 193, 198; see Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 137–38 (2010).

²⁹ See *Gregg*, 428 U.S. at 153.

³⁰ 42 PA. CONS. STAT. § 9711 (2003); see Newman et al., *supra* note 15, at 473.

³¹ § 9711(a)(1); see Newman et al., *supra* note 15, at 473.

³² § 9711(d)(1); see Newman et al., *supra* note 15, at 473.

³³ § 9711(a)(1); see Newman et al., *supra* note 15, at 473.

his right to a jury trial, the trial court would impanel a jury for the sole purpose of carrying out this sentencing hearing.³⁴

During the sentencing hearing, the prosecution and defense would present additional evidence concerning the circumstances of the homicide, the victim impact, and the history and character of the defendant.³⁵ The trial court would then give the jury instructions concerning the aggravating circumstances, mitigating circumstances, and their respective burdens of proof.³⁶ Aggravating circumstances are factors that, in the judgment of the legislature, tend to intensify the defendant's moral culpability.³⁷ In contrast, mitigating circumstances are factors that may be considered to weigh against the imposition of a death sentence.³⁸

Section 9711 *mandates* a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances or if the jury unanimously finds one or more aggravating circumstances, which outweigh any mitigating circumstances.³⁹ Otherwise, the sentence must be life in prison.⁴⁰ Lastly, Section 9711 provides for the automatic appellate review of the death sentence by the Supreme Court of Pennsylvania.⁴¹

Section 9711 faced multiple constitutional challenges in the courts, but in *Commonwealth v. Zettlemoyer*, by a bare majority, the Supreme Court of Pennsylvania held that the statute satisfied state and federal constitutional

³⁴ § 9711(b); *see* Newman et al., *supra* note 15, at 473.

³⁵ *See* Newman et al., *supra* note 15, at 473.

³⁶ *Id.*

³⁷ *See* § 9711(d) (listing circumstances such as the victim was a public servant, the defendant was paid, ransom, felony murder, torture, prior convictions, sale of controlled substances, being an informant, the victim was a child under twelve, or the victim was pregnant as "aggravating").

³⁸ *See* § 9711(e) (2003) (listing circumstances such as no significant history of prior criminal convictions, being under the influence of extreme mental or emotional disturbance, mental capacity to understand the crime, the age of defendant, acting under extreme duress, the victim was a participant in the defendant's homicidal conduct, or the defendant's participation in the homicidal act was minor as "mitigating").

³⁹ § 9711(c)(iv) (emphasis added).

⁴⁰ § 9711(c)(iv).

⁴¹ § 9711(h).

mandates,⁴² and in 1990, the Supreme Court ruled that Pennsylvania's scheme for capital sentencing satisfied constitutional requirements.⁴³

II. COSTS

A. *Why Every Death Penalty is Expensive*

*Furman, Gregg, and Woodson v. North Carolina*⁴⁴—by constitutionally regulating capital punishment—significantly increased the cost of capital litigation over the next few decades. The average time between a death sentence and an execution dramatically increased post-*Furman*. The relative cost of the death penalty was no longer captured by a simple comparison of the cost of a capital trial⁴⁵ and execution versus the cost of a noncapital trial⁴⁶ and lengthy imprisonment. Instead, the comparison became between “the cost of multiple capital trials, lengthy death row imprisonment and, in the rare case, execution itself, versus the cost of a single noncapital trial and lengthy non-death row imprisonment.”⁴⁷

To be more specific, once it is determined that the prosecution will be seeking the death penalty, the costs that a capital punishment system incurs can be broken down into the four basic stages of the process: 1) investigation and trial preparation; 2) trial; 3) post-trial appeals; and 4) death row. Of course, these basic stages are also present in noncapital trials—where the prosecution is not seeking the death penalty—with the exception of death row replaced by life imprisonment with or without parole. However, as will be indicated, putting death on the table alters the precautions that need to be taken.

1. Investigation and Trial Preparation

First, prompted by the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, expectations

⁴² Commonwealth v. Zettlemoyer, 454 A.2d 937, 937 (Pa. 1982); see Newman et al., *supra* note 15, at 475.

⁴³ See Blystone v. Pennsylvania, 494 U.S. 299, 301 (1990); see Newman et al., *supra* note 15, at 475.

⁴⁴ 428 U.S. 280, 303–04 (1976) (rejecting the mandatory death penalty and endorsing a foundational principle that “death is a punishment different from all other sanctions in kind rather than in degree”).

⁴⁵ A case in which the prosecution is pursuing the death penalty.

⁴⁶ In this context, a case in which the prosecution is pursuing a judgment of life in prison without the possibility of parole.

⁴⁷ Steiker & Steiker, *supra* note 28, at 145.

surrounding capital trial investigation and preparation substantially changed.⁴⁸ These expectations now include, among other things, appropriate client contact, mitigation investigation, retaining experts for both guilt and punishment phase issues, extensive motions practice, and voir dire strategy.⁴⁹

Two attorneys are usually appointed as defense counsel—by the state if the defendant is indigent—so that the issues of guilt and sentencing can be separately examined, whereas a noncapital indigent defendant would only be appointed one attorney.⁵⁰ The prosecution has to respond with equal or greater resources, since they have the burden of proof.⁵¹ Because the defense and state must prepare for both the guilt phase and penalty phase, capital case investigations take about three to five times longer than noncapital case investigations.⁵²

A capital trial involves more than determining whether the defendant committed the crime.⁵³ The prosecution must establish sufficient evidence to prove the aggravating factors necessary for imposing the death penalty.⁵⁴ Conversely, the defense presents mitigating evidence aimed at convincing a jury not to impose the death penalty.⁵⁵ Mitigation experts, for example, must review aspects of the defendant's entire life, including interviewing relatives, co-workers, supervisors, teachers, and doctors.⁵⁶ The state matches this testimony with evidence of

⁴⁸ See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, ABA (Feb. 2003), <http://www.abanet.org/deathpenalty/resrouces/docs/2003Guidelines.pdf> [hereinafter *ABA Guidelines*]. While the ABA Guidelines are not mandatory across the United States, they have “nonetheless been influential in changing the expectations for capital defense both in terms of attorney performance and state financial support for capital defense. Moreover, the Supreme Court’s invocation of the Guidelines in several cases finding attorney performance constitutionally deficient has certainly reinforced such expectations . . .” Steiker & Steiker, *supra* note 28, at 141 (citing *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005)).

⁴⁹ *ABA Guidelines*, *supra* note 48; see Steiker & Steiker, *supra* note 28, at 139–40.

⁵⁰ Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, DEATH PENALTY INFO. CTR. 20 (Oct. 2009), <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf> [hereinafter *Smart on Crime*].

⁵¹ *Id.*

⁵² Robert L. Spangenburg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment—Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 49 (1989).

⁵³ See Steiker & Steiker, *supra* note 28, at 138–40.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ *Smart on Crime*, *supra* note 50, at 20.

aggravating factors from its own experts.⁵⁷ The mental health of the defendant is often an extensively investigated mitigating factor—because if a defendant is found intellectually disabled, he or she cannot receive the death penalty.⁵⁸ That determination alone can result in a considerable expense before the trial even begins and is separate from the cost of in-court expert testimony during trial.⁵⁹

Next, pretrial motions in capital cases tend to be longer, more complex, and raise evidentiary issues unique to the capital process.⁶⁰ Voir dire, or jury selection, is also much longer in a case seeking the death penalty, as each potential juror must be questioned extensively on his or her position regarding the death penalty.⁶¹ If jurors are not able to fairly consider both sentencing alternatives they are excluded from serving.⁶² Likewise, defendant's counsel has an interest in "identifying the jurors who are the most willing to consider mitigating evidence."⁶³ This tension has transformed voir dire from a relatively short process with the initial goal of rejecting the most extreme potential jurors to an "extraordinarily intricate, strategic, time-consuming process."⁶⁴ In some jurisdictions, voir dire consumes as much time and as many resources as the trial itself.⁶⁵

⁵⁷ *Id.*

⁵⁸ See *Atkins v. Virginia*, 536 U.S. 304, 304 (2002). This is not to say that the mental health of the defendant is never investigated during a noncapital trial. Rather, the presence of aggravating and mitigating factors—of which mental health is a prominent one—makes the total investigation in a capital trial more extensive, therefore more time-consuming and costly. Reasonably so, as the life of the defendant is on the line.

⁵⁹ Spangenburg & Walsh, *supra* note 52, at 49.

⁶⁰ *Id.* at 50. The Southern Poverty Law Center estimates ten to twenty-five pre-trial motions in a capital case and five to seven pre-trial motions in a noncapital case. Mary E. Forsberg, *Money for Nothing? The Financial Cost of New Jersey's Death Penalty*, NEW JERSEY POLICY PERSPECTIVE 8 (Nov. 2005), <http://www.sentencing.nj.gov/downloads/pdf/articles/death3.pdf>.

⁶¹ *Smart on Crime*, *supra* note 50, at 21.

⁶² *Id.*

⁶³ See Steiker & Steiker, *supra* note 28, at 141.

⁶⁴ *Id.*

⁶⁵ *Id.*; see also Spangenburg & Walsh, *supra* note 52, at 52 ("Voir dire has been estimated to take 5.3 times longer in a capital case than in a noncapital case.").

2. Trial

Second, many of these costs advance to the capital trial.⁶⁶ Capital trials are almost always bifurcated proceedings: if the defendant is found guilty of a capital crime (the guilt phase), a second, separate trial is required to determine punishment (the penalty or sentencing phase).⁶⁷ Both of these proceedings require the introduction of evidence and testimony of witnesses.⁶⁸ If the defendant is found guilty, both the state's and the defense's expenses—including "attorney hours, expert assistance . . . investigation costs, and court costs"—can be duplicated during the penalty phase.⁶⁹ During the penalty phase, the jury decides whether to impose a sentence of death or life imprisonment without the possibility of parole.⁷⁰ This bifurcated proceeding, and its additional cost, is not present in a noncapital case.

3. Post-Trial Appeals

Third, the post-trial costs in capital cases are significantly higher than those in noncapital cases because death penalty jurisdictions, including Pennsylvania, typically provide for automatic appellate review in the highest state criminal court.⁷¹ In many states, such review is discretionary in noncapital cases.⁷² The direct appeal process often consumes several years.⁷³

After this, state and federal habeas proceedings likewise consume significant time and resources.⁷⁴ In almost all states, indigent inmates sentenced to prison are not entitled to state-compensated counsel on state habeas; thus, the majority of *noncapital* state habeas applications are filed pro se and are accorded summary review.⁷⁵ However, capital inmates are provided counsel for state habeas litigation, which similarly requires extensive investigation—some of which is in addition to the

⁶⁶ See Steiker & Steiker, *supra* note 28, at 141.

⁶⁷ *Id.* at 138–39.

⁶⁸ Spangenburg & Walsh, *supra* note 52, at 52.

⁶⁹ *Id.*

⁷⁰ *Smart on Crime*, *supra* note 50, at 20.

⁷¹ See Steiker & Steiker, *supra* note 28, at 143.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (emphasis added).

first investigation, such as the effectiveness of trial counsel and the compliance of prosecutors with their duty to disclose exculpatory evidence.⁷⁶ Indigent capital inmates have a right to counsel in federal habeas proceedings, as well—unlike their noncapital counterparts—where threshold procedural questions take up much of the time.⁷⁷

4. Death Row

Lastly, the time that inmates spend on death row also adds to the comparative cost of the death penalty. This is especially true in states where the interval between sentencing and execution remains high and the death row population is substantial, which includes Pennsylvania.⁷⁸ One of the reasons for the increase in cost is the extra security required compared to normal prisons.⁷⁹ Additionally, death row inmates cannot hold a prison job and pay back the state for the costs of their incarcerations.⁸⁰ According to the Pennsylvania Department of Corrections, “it costs the state about \$35,000 a year to house an inmate sentenced to life in prison, compared to about \$45,000 per year for an inmate on death row.”⁸¹ Individuals on Pennsylvania’s death row are housed in maximum-security facilities, in solitary confinement, apart from all other inmates and are under constant direct supervision by corrections officers.⁸²

B. *Why a “Cheaper” Death Penalty Is Not the Answer*

One of the Court’s goals beginning with *Furman* in overseeing the administration of the death penalty was to ensure that it was not “so wantonly and so freakishly imposed.”⁸³ Neither retentionists nor abolitionists have been wholly

⁷⁶ *Id.*

⁷⁷ *Id.* at 144.

⁷⁸ *Id.* at 150. Pennsylvania currently has 173 prisoners on death row, but has only executed three since 1974. *Persons Sentenced to Execution in Pennsylvania as of February 1, 2017*, PA. DEP’T CORRECTIONS 9 (Feb. 1, 2017), <http://www.cor.pa.gov/GeneralInformation/Documents/DeathPenalty/CurrentExecutionList.pdf>; *State by State Database*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state_by_state (last visited Feb. 28, 2017).

⁷⁹ *Smart on Crime*, *supra* note 50, at 21.

⁸⁰ Spangenburg & Walsh, *supra* note 52, at 56.

⁸¹ Michael Hyland, *The Cost of Capital Punishment in Pennsylvania*, FOX43 (Nov. 18, 2014), <http://fox43.com/2014/11/18/the-cost-of-capital-punishment-in-pennsylvania/>.

⁸² *Question and Answers about the Death Penalty*, PA. DEP’T CORRECTIONS (Sept. 2012), <http://www.cor.pa.gov/GeneralInformation/Pages/DeathPenalty.aspx#.WJD4vrYrKt8>.

⁸³ *Furman v. Georgia*, 408 U.S. 238, 310 (Stewart, J., concurring).

satisfied with the Court's post-*Furman* regulatory efforts, though not for the same reasons. Supporters of the death penalty believe that the Court's efforts have burdened the administration of capital punishment with an overly complex and esoteric body of constitutional law that defeats its basic purpose.⁸⁴ They point to the high volume of death penalty litigation, the convoluted nature of these doctrines, and the lengthy delays that occur between the initial death sentences and a prisoner's ultimate execution.⁸⁵

Opponents, on the other hand, "believe that the Court's regulatory framework has been insufficient in remedying the arbitrary and discriminatory imposition of the death penalty that prompted the Court to first get involved . . ."⁸⁶ Opponents claim that capital punishment is not only reserved for the "worst of the worst" as it is disproportionately imposed according to race and those with poor representation.⁸⁷

However, neither side can deny that these regulations do cost a substantial sum of money. Returning to pre-*Furman* standards would require overturning decades of Supreme Court jurisprudence, which is not only extremely unrealistic but also simply unconstitutional. As the Supreme Court acknowledged in *Gregg*, "penalty of death is different in kind from any other punishment."⁸⁸ Seeking the death penalty is the most intrusive form of punishment, and when the government seeks to execute a human life, the legal system is required by this Supreme Court precedent—and supplemented by American Bar Association guidelines—to apply a more methodical and reliable process.⁸⁹ The less reliable process was struck down as unconstitutional in *Furman*.⁹⁰ And to be more methodical and reliable requires more steps and actors in the process, which necessarily translates into more time and money. Thus, the solution is not as simple as cutting the costs associated with our capital punishment

⁸⁴ CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 154–55 (2016).

⁸⁵ *Id.* at 155.

⁸⁶ *Id.*

⁸⁷ *Id.* For a discussion on the substantive content of the constitutional regulation, see *id.* at 156–76.

⁸⁸ *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

⁸⁹ Richard C. Dieter, *Testimony Before the Pennsylvania Senate Government Management and Cost Study Commission*, DEATH PENALTY INFO. CTR. 6 (June 7, 2010), <http://www.deathpenaltyinfo.org/documents/PACostTestimony.pdf> [hereinafter *Testimony Before the PA Senate*].

⁹⁰ See *Furman v. Georgia*, 408 U.S. 238 (1972).

system and timely executing more death row defendants, as this may risk innocent lives.

Justice Breyer recently expressed similar concerns in his dissent in *Glossip v. Gross*,⁹¹ which was joined by Justice Ginsburg. Arguing that the death penalty lacks reliability, Justice Breyer wrote that “despite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed.”⁹² Justice Breyer cited to social science reports throughout his opinion that demonstrate how a cheaper death penalty can lead to wrongful executions or convictions.⁹³ Since 2002, the number of exonerations in capital cases has risen to 115.⁹⁴ In Pennsylvania alone, six people have been freed from death row.⁹⁵ In fact, courts are nine times more likely to exonerate a defendant where a capital murder, rather than a noncapital murder, is at issue.⁹⁶ And while it is true that the law that governs capital cases is more complex and courts scrutinize capital cases more closely, Justice Breyer also attributed the higher exoneration rate to a greater likelihood of an initial wrongful conviction.⁹⁷ The crimes involved in capital cases are “typically horrendous murders, and thus accompanied by intense community pressure on police, prosecutors, and jurors to secure a conviction[,] . . . [and] [t]his pressure creates a greater likelihood of convicting the wrong person.”⁹⁸

⁹¹ 135 S. Ct. 2726 (2015).

⁹² *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting) (citing Liebman, *Fatal Injustice: Carlos DeLuna’s Execution Shows that a Faster, Cheaper Death Penalty is a Dangerous Idea*, L.A. TIMES, June 1, 2012, at A19; Grann, *Trial by Fire: Did Texas Execute An Innocent Man?*, NEW YORKER, Sept. 7, 2009, at 42; Press Release, Governor Ritter Grants Posthumous Pardon in Case Dating Back to 1930s (Jan. 7, 2011); R. WARDEN, WILKIE COLLINS’S THE DEAD ALIVE: THE NOVEL, THE CASE, AND WRONGFUL CONVICTIONS 157–58 (2005)).

⁹³ *See id.*

⁹⁴ *Id.* at 2757 (Breyer, J., dissenting) (citing NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 6–7 (2012); DEATH PENALTY INFO. CTR., INNOCENCE: LIST OF THOSE FREED FROM DEATH ROW, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (calculating, under a slightly different definition of exoneration, the number of exonerations since 1973 as 154)).

⁹⁵ *State by State Database*, *supra* note 78.

⁹⁶ *Glossip*, 135 S. Ct. at 2757 (Breyer, J., dissenting) (citing NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 15–16 & nn.24–26 (2012)).

⁹⁷ *Glossip*, 135 S. Ct. at 2757.

⁹⁸ *Glossip*, 135 S. Ct. at 2757–58 (Breyer, J., dissenting) (citing Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & C. 523, 531–33 (2005);

Some supporters of the death penalty have acknowledged that there is risk of executing an innocent person but that this risk is “exceedingly rare.”⁹⁹ However rare, is it not worth saving one innocent person’s life? The same supporters additionally claim that “all punishment, once it is meted out, is to that degree final—no one can give back the twenty years someone has wrongfully spent behind bars.”¹⁰⁰ But since both punishments are final, perhaps the better comparison is the ultimate effect the punishments have on the wrongfully convicted prisoner’s life. Twenty years in prison unquestionably adversely affects that life, but executing ends that life.

Richard Dieter, former Executive director of the Death Penalty Information Center (“DPIC”),¹⁰¹ stated while testifying before the Pennsylvania Senate: “Accordingly, a capital punishment system needs to be careful and detailed, or mistakes will undoubtedly occur. This costs money. Even with the heightened standard for capital cases seeking the death penalty, many mistakes have been exposed in recent years.”¹⁰² One potential reason for this could be that the American Bar Association guidelines are simply not being followed.¹⁰³ But whether that is the case, it is clear that a less expensive death penalty risks innocent lives.¹⁰⁴ “The choice today is between a very expensive death penalty and one that risks falling below constitutional standards.”¹⁰⁵

Justice Breyer acknowledged in his *Glossip* dissent that the research and figures he cited are likely “controversial.”¹⁰⁶ Perfectly accurate or not, they do, at the very

Gross & Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL L. STUDIES 927, 956–57 (2008)).

⁹⁹ See Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 21 (1995).

¹⁰⁰ *Id.* at 2.

¹⁰¹ DPIC is a national non-profit organization that serves the media and the public with analysis and information on issues concerning capital punishment. For more information on the organization, see *About DPIC*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/about-dpic> (last visited Apr. 8, 2017).

¹⁰² *Testimony Before the PA Senate*, *supra* note 89, at 7.

¹⁰³ Robert Brett Dunham, *Testimony Concerning the Pennsylvania Death Penalty*, DEATH PENALTY INFO. CTR. 14 (June 11, 2015), http://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2015_0113_0013_TSTMNY.pdf.

¹⁰⁴ *Testimony Before the PA Senate*, *supra* note 89, at 7.

¹⁰⁵ *Id.*

¹⁰⁶ *Glossip v. Gross*, 135 S. Ct. 2726, 2759 (2015).

least, suggest a reliability problem with our capital punishment system—one that would only be exacerbated if funding were withdrawn from the process and the steps outlined in Part II.A. were taken away.

One solution offered by retentionists has been simply to say that costs do not matter. No matter the price, it is deemed worth it to bring an offender to justice.¹⁰⁷ But as the public becomes more aware of the growing costs incurred by the death penalty, while its use continues to decline, that is likely a position that will be accepted by few.

Alternatively, perhaps the more popular argument among retentionists today is to say that there are constitutional ways that the expenses of the process can be reduced. A few examples of how to do this are to “streamline” the death penalty, to transfer the power to enforce the death penalty from localities to the state, or to limit the appeals process to a fixed number of years.

Acknowledging that the balance is likely to continue to shift further toward the costs of the death penalty and away from its benefits, one conservative judge, Alex Kozinski, suggests that there are only two solutions for keeping the death penalty as it stands.¹⁰⁸ Recognizing that the Constitution calls for an extraordinary measure of caution before the state may take human life, the first solution would be a judicial one, and it would require a “wholesale replication of the Eighth Amendment case law development by the Supreme Court over the last quarter century.”¹⁰⁹ As mentioned earlier in this Note, and as Kozinski agrees, this is likely impossible.¹¹⁰ Even conservative justices are reluctant to revisit major constitutional judgments reached by earlier Courts.¹¹¹

The second solution Kozinski posits would be a political one—essentially “streamlining” the death penalty.¹¹² This would require death penalty proponents to accept that only thirty to fifty executions are feasible per year and to be able to

¹⁰⁷ See Stephen F. Smith, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105, 113–14 (2011) (refuting the notion that “the death penalty is prohibitively expensive for most localities to enforce” by listing anecdotes of small, poorer localities that agreed to fund capital prosecutions despite the damage they would do to the counties’ annual budgets because the sacrifices were “worth” it).

¹⁰⁸ Kozinski & Gallagher, *supra* note 99, at 28.

¹⁰⁹ *Id.* at 28–29.

¹¹⁰ *Id.* at 29.

¹¹¹ *Id.*

¹¹² *Id.* at 29–31.

identify where capital punishment resources should be devoted.¹¹³ This would ensure that “in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute.”¹¹⁴ In other words, those who suffer the death penalty truly would be the “worst of the worst.”¹¹⁵

However, Kozinski defeats his own argument when he acknowledges that the Supreme Court already requires the states and the federal government to differentiate between murderers who deserve the death penalty and murderers who do not, and that directive has proven difficult to implement.¹¹⁶ His recommendation—“some painful soul-searching about the nature of human evil”¹¹⁷—provides no more direction than the government already has.

Professor Adam Gershowitz has a different proposal. Unlike the usual complaints about the high cost of capital punishment which seek only to make executions cheaper and more efficient—no matter the impact on the accuracy and reliability of the process—a proposal to shift all capital cases to be under state control is designed to *improve* the enforcement of the death penalty.¹¹⁸ Gershowitz proposes transferring from localities to states the power to enforce the death penalty as states are better equipped to bear the high cost of prosecuting capital cases.¹¹⁹ The result would be a more evenhandedly applied death penalty with the state’s most qualified prosecutors, defense attorneys, and judges.¹²⁰ This proposition may result in a more equitable approach, but unfortunately would not do much to reduce the ever-rising cost—it only transfers the cost from the municipalities to the state.¹²¹

¹¹³ *Id.* at 30.

¹¹⁴ *Id.* at 31.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 30.

¹¹⁷ *Id.*

¹¹⁸ See Adam Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010).

¹¹⁹ *Id.* at 311.

¹²⁰ *Id.*

¹²¹ Gershowitz’s proposal also potentially ignores some of the benefits of localism in the death penalty: “By focusing so heavily on resource differentials as the source of arbitrariness in capital charging decisions across localities, Professor Gershowitz misses what may be the most important benefit of

One last example of an attempt to curtail the costs of the present capital punishment system comes from California Proposition 66, which was approved on November 8, 2016, by 51.13% of California's population.¹²² Proposition 66, or the Death Penalty Procedures Initiative, was designed to shorten the time that legal challenges to death sentences take to a maximum of five years by putting trial courts in charge of initial petitions instead of the California Supreme Court.¹²³ It also required appointed attorneys to work on death penalty cases.¹²⁴ In addition, it authorized the state to house death row inmates in any prison, rather than a separate death row prison for men and women.¹²⁵ The fiscal impact was estimated to be “near-term increases in state court costs—potentially in tens of millions of dollars annually—due to an acceleration of spending to address new time lines on legal challenges to death sentences” and “[s]avings of similar amounts in future years.”¹²⁶ Further, “potential state prison savings [could be] in the tens of millions of dollars annually.”¹²⁷

However, the California Supreme Court stayed the implementation of Proposition 66 on December 20, 2016, after litigation had been filed claiming that Proposition 66 was unconstitutional.¹²⁸ The plaintiffs' attorneys in the case stated that “Proposition 66 violates the [C]onstitution by keeping the [state] Supreme Court and the appeals court out of the system”¹²⁹ Specifically, it would set “an inordinately short timeline for the courts to review those complex cases and incentivize lawyers to cut corners in their investigations and representation.”¹³⁰

localism in criminal justice—namely, its tendency to make the enforcement of criminal law more responsive to the values, priorities, and felt needs of local communities.” Smith, *supra* note 107, at 110.

¹²² *California Proposition 66, Death Penalty Procedures (2016)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_66_Death_Penalty_Procedures_\(2016\)](https://ballotpedia.org/California_Proposition_66_Death_Penalty_Procedures_(2016)).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* On February 1, 2017 the California Supreme Court agreed to hear the case and schedule briefings through April 6, 2017. *See id.*

It may be the case that are no cost-cutting initiatives that are both sufficient in reducing the amount of money necessary to save budgets while at the same time ensuring that constitutional requirements are met and the risk of wrongful convictions and executions are appropriately diminished.

C. *The Cost of Pennsylvania's Death Penalty System*

After discussing the reasons why capital punishment systems in general are so costly and why it is likely that they must remain that way, an obvious question is: just how costly? This Note stated in the Introduction that utility arguments might appeal to a different group because cost was something that could be measured in hard numbers. Well, that is not the case in Pennsylvania—at least not yet. It cannot presently be said with any degree of certainty exactly how much Pennsylvania's death penalty system is costing its taxpayers. There have been attempts to determine the precise cost of this system, but these did not yield any definitive results. For example, in 1990, a joint task force's effort was inconclusive.¹³¹ The state supreme court was unsuccessful in 2003, and so was the American Bar Association in 2007.¹³²

Since then, many other organizations have attempted to estimate the cost of the death penalty in Pennsylvania, and while each of these numbers are only estimates, they are what we have to work with internal to our state. Using data from a 2008 study by the Urban Institute in Maryland, an analysis done by the Reading Eagle¹³³ estimates that “the average capital-eligible case in which prosecutors did not seek the death penalty costs roughly \$1.1 million.”¹³⁴ Meanwhile, their full-cost estimate “for a single death sentence in Pennsylvania is about \$3.1 million.”¹³⁵

The Washington D.C.-based Death Penalty Information Center (“DPIC”), an organization that serves as the clearinghouse for news and developments concerning the American death penalty, had estimated in 2010 that the state spends \$46 million per year for prosecution, mitigation, and appeal of death penalty cases.¹³⁶ Despite

¹³¹ Sara Ganim, *How much is Pennsylvania's death penalty costing taxpayers?*, PENNLIVE (Oct. 26, 2011), http://www.pennlive.com/midstate/index.ssf/2011/10/how_much_is_pennsylvanias_deat.html.

¹³² *Id.*

¹³³ The Reading Eagle is a major daily newspaper in Reading, Pennsylvania.

¹³⁴ Nicole C. Brambila & Liam Migdail-Smith, *Executing Justice: A look at the cost of Pennsylvania's death penalty*, READING EAGLE (June 19, 2016), <http://www.readingeagle.com/news/article/executing-justice-a-look-at-the-cost-of-pennsylvanias-death-penalty>.

¹³⁵ *Id.*

¹³⁶ *Testimony Before the PA Senate*, *supra* note 89, at 6.

not having a definitive number, one thing nearly all people can agree on is this: there is an astronomical cost difference between the average capital case and non-capital case.¹³⁷

In 2011, the Pennsylvania Legislature decided it was time to obtain conclusive information on the death penalty. The General Assembly of Pennsylvania passed a Senate Resolution directing the Joint State Government Commission to establish a bipartisan task force and an advisory committee to conduct a study of capital punishment within the state.¹³⁸ A number of considerations prompted the need for this report, including: frequent questions regarding costs; deterrent effect; appropriateness of capital punishment; racial, ethnic, and gender biases; and the existence of wrongful convictions.¹³⁹ These considerations were in addition to the American Bar Association's report that identified several areas in which Pennsylvania's death penalty system faltered in guaranteeing each capital defendant fairness and accuracy in all proceedings.¹⁴⁰

The task force was issued to conduct a study on a total of seventeen subjects regarding capital punishment, the first of which was cost.¹⁴¹ Specifically, they were to determine whether there was a significant difference between the cost of the death penalty from indictment to execution and the cost of life in prison without parole.¹⁴² And when considering the overall cost of the death penalty in Pennsylvania, the task force was to factor in the cost of all the capital trials that result in life sentences as well as death sentences that are reversed on appeal.¹⁴³ The Resolution also stated that the findings were due back to the Senate no later than two years after the date it was

¹³⁷ See, e.g., *Costs of the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/costs-death-penalty> (last visited Feb. 6, 2017); see also *supra* Part II.A.

¹³⁸ 2011 Senate Resolution, *supra* note 8.

¹³⁹ *Id.* at 1–2.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 3.

¹⁴² *Id.*

¹⁴³ *Id.* Among the other subjects the task force was researching were bias and unfairness, proportionality (whether there is a significant difference in the crimes of those selected for the punishment of death), impact on and services for family members, mental illness, reliability of juries, identification of error in state appeals and postconvictions, alternatives besides capital punishment that would sufficiently ensure public safety, quality of counsel, and public opinion. *Id.* at 3–6.

adopted.¹⁴⁴ The original deadline would have been in 2013. However, the report has yet to be published.¹⁴⁵

In spite of not having the finished report, the previously mentioned estimates and the DPIC testimony that prompted the 2011 Senate Resolution are illustrative of the larger cost debate. On June 7, 2010, Richard Deiter, the former Executive Director of the DPIC, presented testimony before the Pennsylvania Senate Government Management and Cost Study Commission. The purpose of this testimony was to give the Commission a national perspective on the costs of capital punishment and to briefly address the corollary question of whether the benefits of this system justify the costs.¹⁴⁶ As could be expected, Deiter stated that without a sophisticated cost study, it would be impossible to know how much the death penalty is actually costing Pennsylvania.¹⁴⁷ However, Pennsylvania can learn from other states that have conducted similar studies.¹⁴⁸

D. *Lessons from Other States' Cost Studies*

More than a dozen states have conducted cost studies on the death penalty and have found that death penalty cases are up to ten times more expensive than comparable non-death penalty cases.¹⁴⁹ To help inform our debate, looking to other, similar states can give Pennsylvania an idea of how much our death penalty is costing and can also demonstrate the general effectiveness of the cost argument. Ultimately, what we may learn is that while capital punishment is costing a lot of money in Pennsylvania—with little to show for it—this has been a similar problem for other states, as well. Most of those other states in similar quandaries have decided to

¹⁴⁴ *Id.* at 6.

¹⁴⁵ The delay has been attributed to the complexity and scope of the research, but the Executive Director for the Commission, Glenn Pasewicz, has said that it would be finished in 2017. See Ford Turner, Mike Urban & Nicole C. Brambila, *Pennsylvania Death Penalty Report Late Again*, READING EAGLE, Dec. 14, 2016, <http://www.readingeagle.com/news/article/pennsylvania-death-penalty-report-late-again&template=mobileart>. Additionally, Governor Tom Wolf placed a moratorium on the death penalty in Pennsylvania in February of 2015—halting any executions in the state until the study was completed and Governor Wolf had time to review it. See *id.*

¹⁴⁶ *Testimony Before the PA Senate*, *supra* note 89, at 2.

¹⁴⁷ *Id.* at 5.

¹⁴⁸ *Id.*

¹⁴⁹ See *Wasteful and Inefficient: The Alarming Cost of the Death Penalty*, EQUAL JUSTICE USA, <http://ejusa.org/learn/cost/> (last visited Mar. 9, 2016).

abolish their death penalty, and the cost argument played a role on the road to abolition.

States such as New Jersey, New York, and Maryland, among others, infrequently used the death penalty before abolishing it.¹⁵⁰ To clarify, they would sentence offenders to death row but would rarely execute them.¹⁵¹ Pennsylvania is similarly situated, which is why they provide a useful comparison.

In 2007, New Jersey became the first state since 1965 to abolish the death penalty.¹⁵² The Act, signed by New Jersey Governor Jon Corzine, replaced the death penalty with life in prison without parole.¹⁵³ One of the most important factors leading to this decision was the infrequency of executions in New Jersey.¹⁵⁴ In fact, New Jersey had not executed anyone on death row for forty-four years.¹⁵⁵ This factor allowed death penalty opponents to argue that the “death penalty’s potential benefits of retribution, deterrence, and closure were significantly outweighed by the effects of the state’s protracted death penalty process.”¹⁵⁶ The state assigned the New Jersey Death Penalty Study Commission to weigh the costs and benefits of the death penalty and concluded that it was more beneficial for the state to have life without parole as its most severe penalty.¹⁵⁷

In regard to specific costs, the New Jersey Commission found that it was not possible to measure the costs of the death penalty with “any degree of precision.”¹⁵⁸ However, the Commission concluded that these costs were greater than the costs of life in prison without parole, and this factor, among others, led to the

¹⁵⁰ See *infra* notes 174–78 and accompanying text.

¹⁵¹ *Id.*

¹⁵² Act of Dec. 17, 2007, ch. 204, 2007 N.J. LAWS (codified as amended in scattered sections of N.J. STAT. ANN. § 2C (West 2008)) (eliminating the death penalty and allowing for life imprisonment, amending portions of the New Jersey Criminal Code).

¹⁵³ *Id.*

¹⁵⁴ Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation’s “Evolving Standards of Decency,”* 15 MICH. J. RACE & L. 223, 227 (2009).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 227–28. See also N.J. DEATH PENALTY STUDY COMMISSION, *New Jersey Death Penalty Study Commission Report 2* (2007), http://www.njleg.state.nj.us/committees/dpsc_final.pdf [hereinafter *N.J. Commission Report*].

¹⁵⁸ *N.J. Commission Report*, *supra* note 157, at 1.

recommendation of abolition.¹⁵⁹ An earlier, outside study had found that New Jersey spent \$253 million on the death penalty since 1982¹⁶⁰—roughly \$11 million per year. To compare, the Pennsylvania estimates range conservatively from \$350 million since 1978¹⁶¹—roughly \$9 million a year—to \$46 million a year.¹⁶²

The New Jersey bill that created the New Jersey Death Penalty Study Commission was passed in 2006 alongside a moratorium on the death penalty until the state could answer such questions as whether the death penalty served a rational, penological interest; whether there were disparities in the system; whether there would be a significant cost difference if the state were to abolish the death penalty; and whether alternatives existed that would ensure public safety.¹⁶³ In the same vein, Pennsylvania governor Tom Wolf has imposed a moratorium on death penalty until Pennsylvania's task force issued to do a similar study on the death penalty publishes its results.¹⁶⁴ More specifically, Governor Wolf has stated that until the pending recommendations of the task force and advisory committee were received and addressed, he would grant a reprieve in each case in which an execution was scheduled.¹⁶⁵

This moratorium—upheld as constitutional by the Pennsylvania Supreme Court¹⁶⁶—follows a similar path as the New Jersey State Legislature's. To quote New Jersey Senator Richard Codey in support of the abolition of the death penalty in his state:

¹⁵⁹ *Id.*

¹⁶⁰ Forsberg, *supra* note 60.

¹⁶¹ *Pennsylvania Death Penalty Costs Estimated at \$350 Million*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5988> (last visited Feb. 28, 2017).

¹⁶² *Testimony Before the PA Senate*, *supra* note 89, at 6.

¹⁶³ Scherzer, *supra* note 154, at 248.

¹⁶⁴ Karen Langley, *Pennsylvania Supreme Court Hears Death Penalty Arguments*, PITTSBURGH POST-GAZETTE, Sept. 10, 2015, <http://www.post-gazette.com/news/state/2015/09/10/Tom-Wolf-death-penalty-moratorium-goes-before-Pennsylvania-Supreme-Court/stories/201509100186>.

¹⁶⁵ *Id.* (citing, among others, questions about the “fundamental fairness” of capital sentencing in Pennsylvania).

¹⁶⁶ Matthew Santoni, *Pa. Supreme Court Upholds Gov. Wolf's Death Penalty Moratorium*, TRIBLIVE, Dec. 21, 2015, <http://triblive.com/news/adminpage/9672521-74/wolf-pennsylvania-court>. In a unanimous decision, the Court wrote that “[w]e find no limitation on the executive reprieve power relating to the duration of the reprieve, so long as it is temporary in nature and operates only for an interval of time.” *Id.*

The best thing for us as a society to do is to be honest with [the murder victims' families]. Don't tell someone that we're going to execute somebody when the reality is it's not going to happen—at least here in the state of New Jersey. Maybe in Texas. Maybe in other states. But it's not going to happen here in New Jersey and we've got to accept that.¹⁶⁷

The same could be said about Pennsylvania, which has executed only three inmates in thirty-eight years, the last of which took place in 1999.¹⁶⁸

There are presently nine states total that still have the death penalty but have executed three or fewer people since 1976,¹⁶⁹ and Pennsylvania is one of them.¹⁷⁰ New Jersey sets a compelling example for these states. Many of the arguments made by the New Jersey Death Penalty Study Commission are persuasive in Pennsylvania, as well, because of how the infrequency of executions questions the rationality of the system.¹⁷¹ This argument carries even more force in Pennsylvania, because while most of the other nine states have few death row inmates, Pennsylvania has 173 inmates on death row.¹⁷² In Pennsylvania, a death sentence is more common, but executions are still very rare. Moreover, the three executions that did take place in Pennsylvania after the death penalty was reinstated occurred only after the defendants voluntarily dropped their appeals.¹⁷³ Pennsylvania is spending even more money to maintain this number of people on death row, while rarely executing any of them.

¹⁶⁷ Scherzer, *supra* note 154, at 225 (citing Jeremy W. Peters, *New Jersey Nears Repeal of Death Penalty*, N.Y. TIMES, Dec. 11, 2007, at B1).

¹⁶⁸ 2011 Senate Resolution, *supra* note 8, at 1.

¹⁶⁹ *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (June 9, 2017), <http://deathpenaltyinfo.org/documents/FactSheet.pdf> [hereinafter *Facts About the Death Penalty*] (Pennsylvania (3), Kentucky (3), Montana (3), Nebraska (3), Idaho (3), South Dakota (3), Oregon (2), Colorado (1), Wyoming (1); Pennsylvania (2015) and Colorado (2013) are in moratoriums); *State by State Database*, *supra* note 78.

¹⁷⁰ *Facts About the Death Penalty*, *supra* note 169.

¹⁷¹ Scherzer, *supra* note 154, at 228.

¹⁷² *Persons Sentenced to Execution in Pennsylvania as of February 1, 2017*, *supra* note 78.

¹⁷³ 2011 Senate Resolution, *supra* note 8, at 1.

Ultimately, states with smaller death penalty systems than ours—New Jersey,¹⁷⁴ New York,¹⁷⁵ Maryland,¹⁷⁶ Illinois,¹⁷⁷ New Mexico¹⁷⁸—were spending \$10–20 million every year to keep those systems “with little or nothing to show in return.”¹⁷⁹ Pennsylvania, similarly, has little or nothing to show in return for its death penalty system but spends much more money because of the larger number of people on death row—perhaps as much as \$46 million a year.¹⁸⁰

This cost versus benefit argument does assume a framework where a legitimate return on investment is assessed on the percentage of those on death row who are actually executed. As this Note will later discuss, there are those who argue that the current capital punishment system remains legitimate because of its value in

¹⁷⁴ See *supra* notes 152–60 and accompanying text.

¹⁷⁵ New York, before it abolished the death penalty, was estimated to have spent \$20 million per year. See *Testimony Before the PA Senate*, *supra* note 89, at 6. New York’s death penalty was active for nine years after *Furman v. Georgia* during which the state had seven death sentences. *Id.* Pennsylvania, by comparison, has a much larger death penalty system, with more than fifty times as many death sentences as New York. *Id.*

¹⁷⁶ As of 2010, Maryland had five people on death row and has conducted five executions in those twenty years. See *Testimony Before the PA Senate*, *supra* note 89, at 6. The Maryland Commission on Capital Punishment completed a cost study in 2008 and found that its twenty-one years of the death penalty cost \$186 million—roughly, \$8.86 million per year. See John Roman et al., *The Cost of the Death Penalty in Maryland* 3 (2008), www.urban.org/UploadedPDF/411625_md_death_penalty.pdf. The commission recommended that capital punishment be abolished. See *id.* Maryland abolished the death penalty in 2013. See *States with and without the Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 9, 2016), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

¹⁷⁷ After ten years of Governor issued moratoriums, the Illinois Legislature voted to abolish the death penalty in 2011. See Judge Arthur L. Alarcon & Paula M. Mitchell, *Rethinking the Death Penalty in California: Executing the Will of the Voters?; A Roadmap to Mend or End the California Legislature’s Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. 41, 211 (2010–2011). This vote came after a study that concluded that there could never be a system that could guarantee an innocent person was never again sentenced to death. *Id.* at 211 n.506. Illinois spent roughly \$14.3 million per year on the death penalty. See Jolie McLaughlin, *The Price of Justice: Interest-Convergence, Cost, and the Anti-Death Penalty Movement*, 108 NW. U. L. REV. 675, 699 (2014) (\$100 million had been spent on Illinois’s death penalty between 2003 and 2010).

¹⁷⁸ New Mexico, following New Jersey’s lead, became the second state to abolish the death penalty legislatively in 2009. See Dan Boyd, *Richardson Signs Bill Abolishing Death Penalty in N.M.*, ALBUQUERQUE J., Mar. 19, 2009, <https://www.abqjournal.com/news/state/191028406892newsstate03-19-09.htm>. Death penalty opponents argued that it had cost New Mexico between \$3–4 million a year to implement the death penalty, despite the fact that there had only been one execution in the state since 1960. See Alarcon & Mitchell, *supra* note 177, at 208.

¹⁷⁹ *Testimony Before the PA Senate*, *supra* note 89, at 6.

¹⁸⁰ *Id.*

deterrence and retribution.¹⁸¹ Additionally, for the present discussion, the death penalty system in states such as Pennsylvania, which executes few, still may have “symbolic value,” in the sense that it is a way for the state to indicate that certain criminal behavior is entirely beyond the limits.

Despite these benefits, after weighing the effect of infrequency on their respective death penalty systems, the previously discussed states abolished their death penalties by law.¹⁸² They achieved this through the aid of the cost argument.¹⁸³ However, what distinguishes Pennsylvania from states like New Jersey, New York, and Maryland is that Pennsylvania remains a “symbolic state.”¹⁸⁴ A symbolic state is a state that has a significant number of death sentences but very few executions.¹⁸⁵ Effectively, it is as if Pennsylvanian lawmakers only want to make a statement by continuing to have the death penalty, while knowing that the executions will not come to fruition.

California is another symbolic state—with the largest death row in the country—but, it has not had an execution since 2006.¹⁸⁶ California has completed a significant cost study but is among the states still debating whether this information merits the repeal of capital punishment.¹⁸⁷ Since reinstating the death penalty in 1978, a commission found that California taxpayers have spent approximately \$4 billion to fund their death penalty system.¹⁸⁸ This translates to \$137 million per year, where the same system in which the same defendants were sentenced to life without

¹⁸¹ See Part III.

¹⁸² See *infra* notes 174–78 and accompanying text.

¹⁸³ *Id.*

¹⁸⁴ STEIKER & STEIKER, *supra* note 84, at 118 (categorizing four capital punishment jurisdictions in the United States: 1) “abolitionist states,” 2) “de facto states,” 3) “symbolic states” (such as California and Pennsylvania), and 4) “executing states” (such as Texas)).

¹⁸⁵ *Id.*

¹⁸⁶ *COSTS: New Study Reveals California Has Spent \$4 Billion on the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/costs-new-study-reveals-california-has-spent-4-billion-death-penalty> (last visited Feb. 28, 2017) [hereinafter *California Costs*].

¹⁸⁷ Most states have abolished by state legislature, but California requires it to be by ballot. The authors of the study suggest that given this information “voters can elect to end the death penalty based on cost considerations alone, regardless of their views on whether the death penalty is an effective or morally acceptable means of punishment” See Alarcon & Mitchell, *supra* note 177, at 221–22.

¹⁸⁸ See, e.g., *California Costs*, *supra* note 186; see Alarcon & Mitchell, *supra* note 177, at 46.

parole would have cost \$11.5 million per year.¹⁸⁹ Based on the fact that Pennsylvania's population is roughly one-third the size of California's, Pennsylvania's death row is about one-third the size of California's, and the number of executions in the past thirty years is proportionately comparable (California has had thirteen executions to Pennsylvania's three), it is reasonable to conclude that the one-third ratio would hold true for costs, as well.¹⁹⁰ If that is the case, then Pennsylvania may be spending as much as \$46 million a year on the death penalty.¹⁹¹

California has recognized that their capital punishment system needs fixed, but has not yet decided the solution. The California Commission suggested legislative reforms, but that would require further budget increases¹⁹² of \$95 million per year.¹⁹³ Similar reforms could cost Pennsylvania a proportionally comparable amount.¹⁹⁴ The high price tag has prompted the discussion on what is the next move for California¹⁹⁵ and should prompt the discussion on what is the next move for Pennsylvania, as well.

A reasonable question at this juncture is why do states like Pennsylvania and California invest the enormous number of resources necessary to procure death sentences but then fail to follow through with executions? Carol Steiker and Jordan Steiker, law professors who have written much on the subject, offer a political explanation.¹⁹⁶ Steiker and Steiker realized that almost all symbolic states are democratically "blue."¹⁹⁷ Death sentences are returned in both red and blue states, but executions only occur regularly in red ones.¹⁹⁸ They attribute this to the

¹⁸⁹ See California Commission on the Fair Administration of Justice Final Report, 146–47 (June 2008), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs> [hereinafter *California Commission*] (estimating the cost of maintaining the system in place); see also *Testimony Before the PA Senate*, *supra* note 89, at 5–6.

¹⁹⁰ *Testimony Before the PA Senate*, *supra* note 89, at 5–6.

¹⁹¹ *Id.* at 6.

¹⁹² See *California Commission*, *supra* note 189, at 147 (June 2008), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs> (noting increasing costs).

¹⁹³ John Van de Kamp, *California Can't Afford the Death Penalty*, L.A. TIMES, June 10, 2009, <http://articles.latimes.com/2009/jun/10/opinion/oe-vandekamp10>.

¹⁹⁴ Keeping with the one-third ratio, reforms could cost Pennsylvania \$31.6 million.

¹⁹⁵ Van de Kamp, *supra* note 193.

¹⁹⁶ STEIKER & STEIKER, *supra* note 84, at 144.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 145.

“potentially higher costs and predictably lower benefits of proceeding with executions in blue states.”¹⁹⁹ In blue states, there is more likely to be larger pockets of strong death penalty opposition—using “relatively liberal” Philadelphia and Pittsburgh in Pennsylvania as an example.²⁰⁰ But these pockets can generate powerful, politically unwelcome criticism in particular cases, and this criticism tends to peak in the media around the executions themselves.²⁰¹ Thus, *executions* in blue states can generate higher political costs than lower-visibility *death sentences*.²⁰²

Moreover, it is not only aversion towards the death penalty that delays or prevents executions in symbolic states. Steiker and Steiker observe that there is a significant difference in the legal culture, as well: there is more “due process” in symbolic states.²⁰³ This means that these states have stronger expectations about what the judicial process ought to look like in capital cases—“[f]or example, it would simply be unthinkable—far outside the norms of legal culture—for lawyers in California to fall asleep during capital trials, for trial judges to ignore such behavior, or for appellate courts to excuse it, as has happened in Texas more than once.”²⁰⁴ “A nation can have full and fair criminal procedures, or it can have a regularly functioning process of executing prisoners; but the evidence suggests it cannot have

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 148. Specifically,

in symbolic states the defense services are more likely to be organized and well-funded, state appellate and postconviction review of capital convictions is more likely to be intensive and demanding, federal habeas review of capital convictions is more likely to be intensive and demanding, and the appellate and postconviction process is more likely to be drawn out.

Id. at 149.

In contrast, in executing states, the legal process that follows the return of a death sentence is more likely to be minimal. Counsel are less likely to file substantial briefs; reviewing courts are less likely to hold hearings; oral arguments are viewed as less critical; the credentials and performance of attorneys are subject to less scrutiny; and the entire process moves much more quickly.

Id.

²⁰⁴ *Id.*

both.”²⁰⁵ Because of this phenomenon, “perhaps the most obvious problem is the enormous and senseless material cost of producing capital sentences without executions.”²⁰⁶

One criticism against looking to other states for guidance on the subject is that each state’s needs are different and it should be Pennsylvania’s voters alone who determine what is best for their state. According to this logic, and if this Note is about what Pennsylvania should do, then it should strictly present considerations that are only applicable to Pennsylvania. It may be true that no two states’ constituencies are exactly alike. It may not be as relevant to look to Texas—a state that continues to utilize their death penalty and carry out executions. But for states that have capital punishment systems that are somewhat similar to Pennsylvania’s, either structurally or where infrequency of executions plays a large factor, there is value in looking towards their experiences. This is especially true when Pennsylvania has not completed the same extensive research into costs as other states have.

There is the additional complication of comparing numbers with other states, as no two states’ variables will be identical. It would never be as simple as claiming that because New Jersey’s death penalty costs \$x million per year, Pennsylvania’s *must* cost \$y million per year.

However, each of these criticisms misses the larger point. Estimates exist, and these estimates must be considered so that Pennsylvania, like many states, can discuss the significant factor that is cost. Even without the precise numbers, it is clear that the death penalty costs a substantial amount more than life in prison without the possibility of parole, and this cost argument has been effective in helping other states realize what laws are most beneficial and efficient to their criminal justice systems.

III. BENEFITS

A. Deterrence

Retentionists—those who are against repealing capital punishment—believe that doing so is short-sighted and will result in more crime and greater costs down the road.²⁰⁷ They believe that when police departments are already being scaled down

²⁰⁵ *Id.* (quoting FRANK E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 82 (2003)).

²⁰⁶ *Id.* at 150.

²⁰⁷ Ian Urbina, *Citing Costs, States Consider End to Death Penalty*, N.Y. TIMES, Feb. 24, 2009, <http://www.nytimes.com/2009/02/25/us/25death.html>.

to save money, the role of the death penalty in deterring certain crimes is “more important than ever.”²⁰⁸ Scott Shellenberge, the state attorney for Baltimore County Maryland who opposed the repeal bill at the time stated: “How do you put a price tag on crimes that don’t happen because threat of the death penalty deters them?”²⁰⁹

Deterrence rests on the notion that using a severe sanction, such as the death penalty, prevents murder because it sends the message to the would-be criminal that he or she will be caught and punished. In their efforts to prove or disprove the theory of deterrence relative to the death penalty, researchers have examined the relationship between execution rates and murder rates in different jurisdictions over time.

The first and possibly most extensive study on the potential deterrent effect of capital punishment was produced by Thorsten Sellin beginning with his landmark work in 1959, *The Death Penalty*,²¹⁰ which was followed by revised studies in the 1960s and 1980s.²¹¹ Examining the period between 1920 and 1955, Sellin concluded that states that had abolished the death penalty had no higher murder rates than those that had retained it, and he confirmed this by doing comparisons of generally similar, neighboring jurisdictions.²¹² Sellin’s work was widely accepted—and cited extensively by Justice Marshall in his *Furman* opinion.²¹³

Sellin’s findings gave rise to other major studies, the most notable in the 1970s by Isaac Ehrlich.²¹⁴ Ehrlich was an economist who was the first researcher to use multivariate regression analysis to examine the death penalty’s deterrent effect, finding that from 1933–1969 there was a statistically significant deterrent effect for the death penalty.²¹⁵ Ehrlich’s work was relied upon in an amicus brief to the *Gregg* Court, and cited, though not endorsed, by the plurality, while rebutted by the

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See generally THORSTEN SELLIN, *THE DEATH PENALTY* (Am. Law. Inst. 1959).

²¹¹ See, e.g., Thorsten Sellin, *Homicides in Retentionist and Abolitionist States*, in *CAPITAL PUNISHMENT* 135 (1967).

²¹² See generally SELLIN, *supra* note 210; see also Steiker & Steiker, *supra* note 28, at 156.

²¹³ See *Furman v. Georgia*, 408 U.S. 238, 350 (1972) (Marshall, J., concurring); see also Steiker & Steiker, *supra* note 28, 156.

²¹⁴ See generally Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

²¹⁵ See *id.*; see also Steiker & Steiker, *supra* note 28, 157.

dissent.²¹⁶ This finding brought forth additional studies, some of which challenged the variables that Ehrlich employed in reaching his conclusion and inquiring whether a deterrent effect was present after the early 1970s when many states revised their capital states.²¹⁷

More recently, there have been many studies with conflicting results. Some recent studies have found statistically significant deterrent effects, but they, too, have been subject to criticism from detractors.²¹⁸ Other studies have concluded that states that have the death penalty have higher rates of homicide than states that imposed a maximum punishment of life imprisonment,²¹⁹ or that the rate of homicide had not appreciably changed in the years during which a state did not have capital punishment compared to the period after it was reintroduced.²²⁰

The National Research Council reviewed thirty years of empirical evidence and concluded that it, at best, was insufficient to establish a deterrent effect and such a reason should not be used to inform discussion about the deterrent value of the death penalty.²²¹ As Justice Breyer wrote when he was citing this evidence in his *Glossip* dissent:

[L]ack of evidence for a proposition does not prove the contrary. But, suppose that we add to these [deterrence] studies the fact that, today, very few of those

²¹⁶ See *Gregg v. Georgia*, 428 U.S. 153, 184 n.31 (1976); Steiker & Steiker, *supra* note 28, 157.

²¹⁷ See, e.g., JACK P. GIBBS, *CRIME, PUNISHMENT AND DETERRENCE* (1975); FRANKLIN ZIMRING & GORDON HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973); see also Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 42–43 & n.164 (1994).

²¹⁸ Steiker & Steiker, *supra* note 28, at 157 (citing John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 804–20 (2005)). The detractors challenge aspects of the studies' such as "the incompleteness of the studies' data, the overwhelming influence of outlier jurisdictions (like Texas), the failure to control for important variables like the introduction of new 'life without parole provisions, and the lack of robustness of the studies' results in response to small changes in study specifications." *Id.*

²¹⁹ See Ruth D. Peterson & William C. Bailey, *Murder and Capital Punishment in the Evolving Context of the Post-Furman Era*, 66 SOC. FORCES 774, 785 (1988); see also Bigel, *supra* note 217, at 43.

²²⁰ See Richard O. Lempert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 CRIME & DELINQ. 88, 96–115 (1983); see also Bigel, *supra* note 217, at 43–44.

²²¹ *Glossip v. Gross*, 135 S. Ct. 2726, 2768 (2015) (Breyer, J., dissenting) (citing NATIONAL RESEARCH COUNCIL, *DETERRENCE AND THE DEATH PENALTY 2* (D. Nagin & J. Pepper eds., 2012); *Baze v. Rees*, 553 U.S. 35, 79 (2008)).

sentenced to death are actually executed, and that even those executions occur, on average, after nearly two decades on death row. Then, does it still seem likely that the death penalty has a significant deterrent effect?²²²

Justice Scalia responds directly to Justice Breyer's hesitation that the death penalty has a significant deterrent effect, citing the statistical studies that support his contention²²³ and dismissing the ones that Justice Breyer uses to support his.²²⁴ Justice Scalia then goes on to say that, especially to those who are confronted with the threat of violence every day, even an incremental deterrent effect of capital punishment should be enough to render capital punishment appropriate.²²⁵ And in any event, it should be the people who decide—not the Justices.²²⁶

It seems that we are left in a stalemate, establishing only that new studies fail to satisfactorily prove a deterrent effect, not necessarily that one does not exist. Abolitionists seek to discredit the death penalty on this ground, and retentionists respond by saying that it does not matter that deterrence can never be precisely ascertained, even if only a few randomly convicted felons concede that they refrained from committing murder to avoid the death penalty, this rationale of keeping the death penalty has been provided for.²²⁷

²²² *Id.* at 2768 (Breyer, J., dissenting). Thirty-five individuals were executed across the United States in 2014, and those executions occurred, on average, nearly eighteen years after a court initially pronounced its sentence of death. *Id.* at 2764 (Breyer, J., dissenting) (citing *Execution List 2014*, DEATH PENALTY INFO. CTR. (2014), <http://www.deathpenaltyinfor.org/execution-list-2014>). Again, simply shortening the delays risks causing procedural harms that also undermine the death penalty's constitutionality. *Id.* at 2770.

²²³ *Id.* at 2748–49 (Scalia, J., concurring) (citing Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 166 (2004); Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003); Cass R. Sunstein & Adrian Vermeule, *The Ethics and Emprics of Capital: Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 713 (2005)).

²²⁴ *Id.* at 2768 (Breyer, J., dissenting) (citing Jon Sorensen et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481 (1999); Michael Radelet & Ronald Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & C. 1, 8 (1996); Donohue & Wolfers, *supra* note 218, at 794; Raymond Bonner & Ford Fessenden, *Absence of Executions: A Special Report, States With No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1).

²²⁵ *Id.* at 2749 (Scalia, J., concurring).

²²⁶ *Id.* Conveniently, that is what this Note proposes.

²²⁷ Bigel, *supra* note 217, at 44.

The question becomes: if executing just one convicted murderer will prevent that individual from ever killing again, is the death penalty not worthwhile? This Note argues that the answer is no, not when those costs could be used for stopping multiple individuals from killing and committing other crimes. In testimony given before the Pennsylvania Senate Government Management and Cost Study Commission, Dieter of the DPIC stated that “[m]illions are spent to achieve a single death sentence that, even if imposed, is unlikely to be carried out . . . [t]hus money that the police desperately need for more effective law enforcement may be wasted on the death penalty.”²²⁸

Kent Scheidegger, legal director of the Criminal Justice Legal Foundation, believes that the expected savings are merely a “mirage.”²²⁹ He sees another benefit of having the death penalty: prosecutors can more easily offer life sentences in a plea bargain and thus avoid trial costs altogether.²³⁰ However, plea bargaining is not used nearly as frequently in capital cases as in noncapital ones.²³¹ In death penalty cases, the prosecution is dissuaded from plea bargaining since reducing the charge or promising a lighter sentence would render the case noncapital.²³² Additionally, there have been studies that show that plea bargaining rates were roughly the same in states that had the death penalty as in states that did not.²³³

B. Retribution

There is a potential benefit of capital punishment that cannot be measured with empirical studies. This is retribution. Retribution is the belief that the offender’s punishment should reflect the severity of the crime. It is often associated with vengeance, and when linked to the interests of the homicide victims’ close relations, it can also be grounded in the belief that closure is only possible once “an eye for an eye” is taken. Despite not being as easy to measure, retentionists generally view this rationale as just as valid as deterrence.

²²⁸ *Testimony Before the PA Senate*, *supra* note 89, at 3.

²²⁹ Urbina, *supra* note 207.

²³⁰ *Id.*

²³¹ Spangenburg & Walsh, *supra* note 52, at 50–51.

²³² *Id.*

²³³ Urbina, *supra* note 207.

Retentionists argue that because “murder is unique in terms of its gravity and finality, only the death penalty is proportionate punishment.”²³⁴ In the same way as it may be purely symbolic for Pennsylvania to retain the death penalty, retribution signals that “society is obligated to inflict a degree of pain and suffering on the [offender] as a way of imparting that such conduct will not be tolerated.”²³⁵

Contrarily, an abolitionist might argue that the purpose of punishment is to “compensate society for the violation of law incurred,” and “a sanction is appropriate only if it is perceived by the offender to impose burdens greater than any benefit which might be gained by committing the infraction.”²³⁶ Life imprisonment without the possibility of parole appropriately meets these requirements.

Closure concerns not the offender nor murdered victim, but the psychological needs of the victim’s close relations.²³⁷ The idea behind the need for closure is that capital punishment “gives control back to survivors, allows them to move on, ends the ordeal, and confirms that bad things happen to people who do bad things”²³⁸ Some prosecutors share these presumptions about the verdict they are seeking.²³⁹

However, abolitionists argue that it may not always be the case that families of murder victims experience the relief they expected to feel at the execution.²⁴⁰ Some argue that life in prison is worse than death and thus has its own retributive function.²⁴¹ Retentionists may claim that although the death penalty may be

²³⁴ Bigel, *supra* note 217, at 46.

²³⁵ *Id.* at 45.

²³⁶ *Id.* at 46–47.

²³⁷ Rudolph J. Gerber, *Survival Mechanisms: How America Keeps the Death Penalty Alive*, 15 STAN. L. & POL’Y REV. 363, 370 (2004).

²³⁸ Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and “Closure” for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 395–96 (2007).

²³⁹ *Id.* at 396 (quoting a mother whose nineteen-year-old daughter was murdered: “When you have lost a child, you go into a state of insanity, and you think whatever they want you to think They told me, ‘We are going to catch this man. We’re going to convict him, and when we have an execution, you will be healed.’ The DA told me this, and the sheriff’s department And I believed them.”).

²⁴⁰ *Id.* at 396–97 (quoting a therapist who works with survivor families) (“Taking a life doesn’t fill that void, but it’s generally not until after the execution [that the families] realize this. Not too many people will honestly [say] publicly that it didn’t do much, though, because they’ve spent most of their lives trying to get someone to the death chamber.”).

²⁴¹ *Id.* at 391 (“Gary Wright, a victim of one of Ted Kaczynski’s devices, expressed relief when the Unabomber was given a life sentence: ‘My father has always said: There are things much worse in this

statistically rare, its symbolism and political significance is high.²⁴² Likewise, the opportunity for closure provided by the death penalty may be more symbolic than real.²⁴³ But delays and arbitrariness undermine this benefit, as well. It is questionable that vindication can be found in a death that comes, if at all, only several decades after the crime was committed.²⁴⁴ If being executed is unlikely in the end, there may not be much of a justification to burden victims' families with a decades-long process.²⁴⁵ Instead, that money could be used to aid law enforcement in preventing similar crimes from happening in the future.²⁴⁶

In sum, both abolitionists and retentionists make feasible arguments in regard to deterrence and retribution. However, despite the value of the death penalty in relation to these measures, those benefits are still significantly outweighed by the reality of the costs. And the costs ought to be considered not just in themselves but as monies that could go to other, more beneficial, crime prevention uses. Accordingly, the benefits of capital punishment may very well be real—if perhaps limited—they are just not enough to justify the immense cost.

CONCLUSION

Americans in general are divided. However, a survey conducted by the Pew Research Center in September of 2016 found that, for the first time in forty-five years, support for capital punishment polled below 50%.²⁴⁷ The survey shows that 49% of Americans now favor the death penalty for people convicted of murder, while 42% oppose it.²⁴⁸ This support has dropped seven percentage points since March of

world than death. I believe one of those things is the necessity of a perpetrator to live with and think about his actions. It is so much more difficult to do this than just close your eyes and go to sleep.”).

²⁴² *Id.* at 399–400.

²⁴³ *Id.*

²⁴⁴ See *Glossip v. Gross*, 135 S. Ct. 2726, 2769 (2015) (Breyer, J., dissenting).

²⁴⁵ Michael Smerconish, *The Pulse: Death Sentences, Rarely Carried Out, Punish the Victims*, PHILLY NEWS, July 27, 2014, http://www.philly.com/philly/columnists/michael_smerconish/20140727_The_Pulse_Death_sentences_rarely_carried_out_punish_the_victims.html.

²⁴⁶ *Testimony Before the PA Senate*, *supra* note 89, at 3.

²⁴⁷ Baxter Oliphant, *Support for the death penalty lowest in more than four decades*, PEW RES. CTR. (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/>.

²⁴⁸ *Id.*

2015, from 56%.²⁴⁹ This trend continues to affirm the death penalty’s “steady decline”: public support peaked in 1996 at 80% and has been on the decline ever since;²⁵⁰ death row executions peaked in 1999 and have fallen sharply in the years since;²⁵¹ and the thirty death sentences imposed in 2016 were down 39% from 2015, marking the fewest imposed in the United States since the Supreme Court struck down the nation’s death penalty laws in 1972.²⁵²

In total, nineteen states have abolished the death penalty.²⁵³ The cost argument aids abolitionists in their strategy. One potential explanation of its recent success is “interest-convergence,” a theory developed by Professor Derrick Bell.²⁵⁴ The cost argument gives state legislatures a self-interested reason to abolish capital punishment—saving their constituents millions of dollars.²⁵⁵ Within the past decade, anti-death penalty advocates have placed less emphasis on the moral arguments against capital punishment, focusing more on the costs and inefficiency of the practice. The result has been—as state legislatures have been receptive to the abolitionists cost arguments, especially in light of the recent economic crisis—an undisputed trend toward states outlawing the death penalty.²⁵⁶

A second explanation is the shift that abolitionists have been able to take away from moral arguments. In the 1960s and immediately before *Furman*, abolitionists’ arguments focused on human dignity and equality—evidenced in several of the

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ There were twenty executions in 2016—the fewest since 1991. *The Death Penalty in 2016: Year End Report*, DEATH PENALTY INFO. CTR. (2016), <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf>. In 2016, just five states—Alabama, Florida, Georgia, Missouri and Texas—accounted for all executions. *Id.* at 2. Texas and Georgia accounted for 80% of these executions. *Id.*

²⁵² There were approximately thirty death sentences in 2016. *Id.* at 3.

²⁵³ For a full list, see *Facts About the Death Penalty*, *supra* note 169.

²⁵⁴ Bell’s theory of interest-convergence originated in the civil rights movement when Bell argued that racial desegregation in the United States occurred largely because African Americans’ interests in achieving equality converged with white policymakers’ interest in maintaining the country’s reputation during the Cold War and promoting economic growth in the South. See McLaughlin, *supra* note 177, at 678. Similarly, applying this theory to the death penalty context, the McLaughlin Note claims that “the abolition of the death penalty in several states has partly resulted from a convergence between anti-death penalty advocates’ interest in ending capital punishment and state lawmakers’ interest in balancing the budget and appearing fiscally responsible in a time of financial crisis.” *Id.*

²⁵⁵ McLaughlin, *supra* note 177, at 677.

²⁵⁶ *Id.*

opinions by the justices of the *Furman* majority.²⁵⁷ But as capital punishment was reauthorized in *Gregg* and the states enacted new death penalty statutes, it was clear that these arguments “lost decisively in the court of American public opinion.”²⁵⁸

Thus, the cost argument allows abolitionists to “change the subject”: “instead of being forced into a ‘soft on crime’ rhetoric of sympathy for the dignity and equality of heinous murderers,” abolitionists can use the cost argument to emphasize the “interests of the collective,” such as better outcomes in terms of crime control and prevention.²⁵⁹

It is imperative that the cost of the death penalty be compared to other ways of achieving a safer community. It is here that retentionists and abolitionists have a common goal. 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.²⁶⁰ Other examples of where the money could be spent include social programs such as funding for early childhood education that might offer better crime control²⁶¹ or Colorado’s ballot that tied legislative repeal of the death penalty to increased funding for the investigation of unsolved murders.²⁶²

Supporters of the death penalty agree that there are opportunity costs to be had. For instance, many state supreme courts are currently flooded with complex and lengthy mandatory death penalty appeals.²⁶³ This is in addition to the time and resources spent by federal district judges, circuit judges, and Supreme Court Justices who resolve the federal habeas petitions in death cases—all of which would be made available for other cases.²⁶⁴

The DPIC released a report in 2009 titled “Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis,” which compiled a national poll of police chiefs stating that capital punishment was at the bottom of law enforcement

²⁵⁷ Steiker & Steiker, *supra* note 28, at 151.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 152–54.

²⁶⁰ *Smart on Crime*, *supra* note 50, at 20.

²⁶¹ Steiker & Steiker, *supra* note 28, at 158.

²⁶² *Id.*

²⁶³ Kozinski & Gallagher, *supra* note 99, at 16.

²⁶⁴ *Id.* at 16.

priorities.²⁶⁵ The death penalty was considered the least efficient use of taxpayers' money, with measures such as expanded training for police officers, community policing, programs to control drug and alcohol abuse, and neighborhood watch programs ranking higher.²⁶⁶ Fifty-seven percent of the police chiefs said that the death penalty does little to prevent violent crimes because perpetrators rarely consider the consequences of their violent actions.²⁶⁷

In Pennsylvania, there is support to repeal the death penalty.²⁶⁸ Former State Attorney General Ernie Preate recognized that “[t]he American people are by and large losing confidence in the death penalty.”²⁶⁹ Even some proponents of the death penalty agree that it is ineffective.²⁷⁰ We are left with two options: spend more money trying to fix a broken system, or follow in other states' leads and abolish the death penalty, replacing the sentence with life in prison without the possibility of parole. This Note suggests that the only practical solution is the latter.

The bottom line is this: putting aside every other relevant argument for why the death penalty should or should not be abolished, Pennsylvania needs to consider whether our state's safety interests would be better served by spending hundreds of millions of dollars to maintain its current system—and likely execute no one—or if whether it would be wiser to use that funding on crime prevention, or victim services, or additional police detectives, prosecutors, and judges to arrest and imprison the many murders who currently escape any punishment because of insufficient law enforcement resources. We cannot reasonably have both.

²⁶⁵ *Smart on Crime*, *supra* note 50, at 8.

²⁶⁶ *Id.* at 9.

²⁶⁷ *Id.* at 10.

²⁶⁸ *See* Turner et al., *supra* note 145.

²⁶⁹ Ganim, *supra* note 131.

²⁷⁰ *See* Turner et al., *supra* note 145.