

The High Price of Retribution: A Case for Repealing the Death Penalty



SUMMARY

In 2015, the Utah Legislature reauthorized the use of the firing squad as a form of capital punishment. Unfortunately, the debate never addressed the acceptability of the death penalty itself, despite lengthy consideration by the legislature of a comprehensive package of criminal justice reforms during the same time.

This missed opportunity can be corrected. The legislature should consider abandoning the use of capital punishment in favor of life without parole.

While the death penalty might appeal to our emotional appetite for justice—or revenge—the reality is that it is not justly administered, the risk of executing an innocent is too high, and it does not serve victims very well.

Given the low value and high cost of the death penalty, capital punishment does not give taxpayers much bang for the buck. Instead it has become a bloated and bureaucratic policy that blindly seeks retribution despite a significant moral, social, and financial cost.

As with other government programs, freedom-minded individuals have strong reason to be skeptical of the government's power and practice of executing people.

Despite both personal and professional risk, John Adams passionately defended the British soldiers charged with murder in connection with the Boston Massacre. During his remarks to the jury, Adams expanded on that famous doctrine established by English jurist William Blackstone:

It is more important that innocence should be protected, than it is, that guilt be punished; for guilt and crimes are so frequent in this world, that all of them cannot be punished.... but when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, 'it is immaterial to me whether I behave well or ill, for virtue itself is no security.' And if such a sentiment as this should take place in the mind of the subject, there would be an end to all security whatsoever.¹

Adams understood that a justice system colored with any desire for retribution will inevitably catch innocents in its widely cast net, corrupting the morality of the entire system. Across the country, many who were not guilty of the crimes for which they were accused and convicted have been tragically caught in that net.

Efforts led primarily by the Innocence Project have led to the exoneration of at least eight inmates in Utah who were previously given life sentences, and over three hundred inmates around the country have been exonerated post-conviction by DNA evidence.² Prosecutorial misconduct, faulty forensic evidence, mistaken eyewitness testimony, and coerced confessions have driven

many wrongful convictions across the country. The very real risk of executing an innocent person is enough to abandon capital punishment altogether.

This is not a theoretical risk. In 2015, for example, the FBI admitted that consistently flawed testimony provided by its agents had overstated—or outright falsified—the accuracy of forensic evidence in 95 percent of criminal cases that investigators reviewed from a period spanning more than two decades.³ The cases included 32 defendants sentenced to death, 14 of whom had already been executed or died in prison.

The Innocence Project has also reported that 22% of its cases were closed because of lost or destroyed evidence, and 33 of the convicts they exonerated through DNA evidence had actually pled guilty to crimes for which they were innocent due to coercive plea deals.⁴ These facts are an unacceptable side effect of a

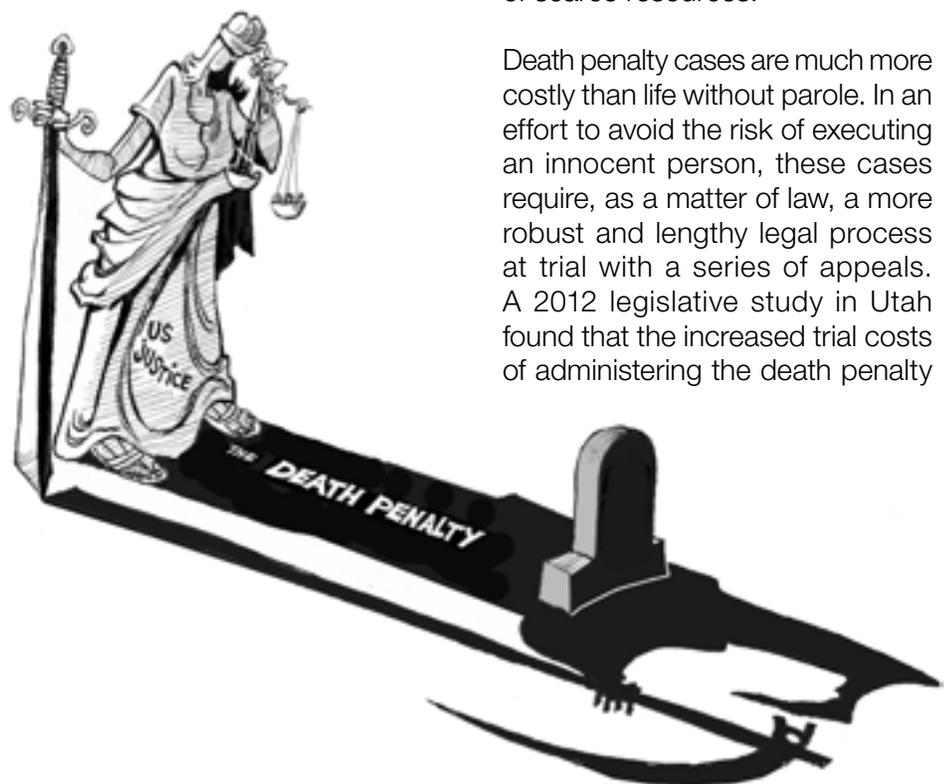
big government policy gone wrong.

The rate of false convictions for death row inmates stands at 4.1%.⁵ In comparison, the error rate for food stamp benefits is a mere 1%.⁶ When government can manage a large welfare system more precisely and accurately than it does a limited and infrequent capital punishment program, it becomes clear that a reconsideration of the underlying policy is needed.

What's the Cost?

The Utah Legislature often looks for ways it can squeeze more value from each tax dollar by reforming government programs. This drive for tax efficiency was a primary impetus behind the state's comprehensive criminal justice reforms in the 2015 general session. Capital punishment, however, has become far more expensive than its alternatives and thus consumes an outsized share of resources—hardly a prudent use of scarce resources.

Death penalty cases are much more costly than life without parole. In an effort to avoid the risk of executing an innocent person, these cases require, as a matter of law, a more robust and lengthy legal process at trial with a series of appeals. A 2012 legislative study in Utah found that the increased trial costs of administering the death penalty



made the punishment nearly \$1.7 million more expensive to taxpayers than the alternative—a conservative estimate, since the study did not take into account the increased cost of cases where the death penalty was sought but not ultimately imposed.

The fiscal estimate includes the following costs:⁷

- \$560,000 to the Attorney General's office for post-conviction death penalty processing.
- \$25,000 to the courts for law clerk and jury selection.
- \$100,800 from the Post-Conviction Indigent Defense Fund for post-conviction defense of offenders unable to pay.
- \$363,000 from the Indigent Capital Defense Trust Fund to pay for defense costs (this fund receives money from local governments).
- \$5,000 from public safety for more forensic testing and processing at the State Crime Lab and for forensic expert time.
- \$165,000 for the Department of Corrections to handle the increased workload and materials related to the execution process.
- \$27,700 for the Board of Pardons and Parole for final case review and hearings.
- \$460,000 from local governments for attorneys, investigators, and specialists.
- \$9,000 from local governments for special jailing of potential death penalty offenders.

These costs—compiled in 2012—have since increased due to rising attorney fees, the cost of experts, the judicial unpredictability of changing legal standards that prolong legal battles, lengthy mitigation investigations that gather comprehensive life records of the accused to determine if mitigating evidence may have influenced the jury's appraisal of the accused's

moral culpability, jury costs, and special housing and confinement requirements for death row inmates.

Utah's numbers are not an anomaly; other states have also found the death penalty to be costly. In California, for example, capital punishment is as much as twenty times more expensive than the alternative of life without parole, with nearby Idaho finding it to be at least 70% more expensive.

Because our system attempts to provide robust due process protections for those facing the death penalty in order to avoid executing an innocent person, we now find ourselves with highly bureaucratic, comprehensive, and increasingly costly death penalty cases. The government's resources are not infinite; each dollar spent on a death penalty case is a dollar not spent on other necessary public safety priorities. This trade-off elicits the question of whether retribution is worth the expense when it means devoting fewer taxpayer resources to catching more criminals or preventing crime.

A True Public Safety Policy

A national survey of police chiefs found that law enforcement executives ranked the death penalty last as a way of reducing violent crime, and rated it as the least cost-effective method for controlling crime.⁸ When compared to other public safety priorities, police chiefs would prefer to devote funding to other programs that have broader impact like community policing and more training.

The death penalty also falls short as a deterrent. Murder rates in

death penalty states are actually consistently higher than in states without the death penalty. After repealing capital punishment, New York, New Jersey, Connecticut, Illinois, and New Mexico each saw their murder rates decline. A National Research Council study found that there was no credible evidence to support the deterrent effect of capital punishment.⁹ Moreover, experts in the field do not believe it works; 88 percent of criminologists nationwide do not believe the death penalty is

A poll of 500 police chiefs revealed that the death penalty is at the bottom of the list when it comes to wise and effective spending to fight crime.

an effective deterrent.¹⁰ The study concluded that the consensus among criminologists is that the death penalty does not “add any significant deterrent effect above that of long-term imprisonment.”

Some may argue that the death penalty would work better as a deterrent if it were quick and public. However, the constitutional demands of due process prevent this option. With scarce resources, it would be better to focus public safety programs on responding to crime and preventing its root causes, rather than pursuing a policy of retribution. The high costs of the death penalty siphon away these dollars, reducing the overall success of the criminal justice system, and subordinating the safety of future victims to the desire for retribution for past victims.

Real Justice for Victims

While taxpayers bear a significant financial cost in capital punishment cases, we must not forget the emotional costs borne by the victims. While some victims desire retribution, nearly all prefer justice be swift and sure. An overwhelming majority of death sentences—68%—are overturned on appeal, which means that the process starts over again.¹¹ Each appeal generates successive waves of media attention and prolongs the victims' desire for closure and justice. The wounds of murder for the family members of victims are reopened with each sensational death penalty story about their perpetrator. Accordingly, some victims oppose the death penalty.

Marietta Jaeger-Lane of Montana lost her seven-year-old daughter to a serial child kidnapper who snatched her from the family's tent during a camping trip, and later tortured and murdered her. Instead of focusing on the horrors of the crime and the evil perpetrated by this man, Marietta describes beginning a journey of spiritual awakening that led her to peace and ultimately forgiveness. She now views her daughter's death as a sacrifice of sorts that became a tool to bless the lives of others by teaching forgiveness.

Marietta now opposes the death penalty. "Loved ones wrenched from our lives by violent crime," she says, "deserve more beautiful, noble and honorable memorials than pre-meditated, state-sanctioned killings. The death penalty only creates more victims and more grieving families. By becoming that which we deplore—people who kill people—we insult the sacred memory of all our precious victims."¹²

Marietta, and other victims who echo her position, make a strong point that the lives lost through murder are

not made any better through state-sanctioned revenge killings, nor are the loved ones of the victim given comfort or closure through the protracted legal process of the death penalty.

A Religious Argument

Many people of religious faith proclaim a belief in the intrinsic value of human life. Some even oppose the practice of abortion on these pro-life grounds. For many of these, the value of human life is a reflection of their belief that life is a creation of God and thus its preservation is a form of worship and honor for their creator. They also believe that for these reasons, God is the only power that should decide to end life; God's will is manifest through death by natural means.

One exception many make is for self-defense when taking one life is for the direct protection of another life. In the case of the death penalty, this purpose is non-existent. The victim is already dead and the death penalty is never carried out immediately, so one can hardly argue that execution is for the protection of others. There are those that sit on death row for decades before being executed. If executions were about protecting society then they would be carried out swiftly—something that cannot be done without inevitably killing innocent people. Further, the self-defense exception does not apply in cases where the perpetrator has been neutralized and is no longer a threat.

The religious case against the death penalty spans across denominations. Pope Francis has declared the Catholic Church's opposition to the death penalty, calling it an "offence against the inviolability of life and the dignity of the human person, which contradicts God's plan for man and society, and his merciful justice, and impedes the penalty from fulfilling any just objective."¹³

Jay Sekulow, chief counsel for the American Center for Law and Justice, a Messianic Jew, said: "I'm opposed to the death penalty because... the taking of life is not the way to handle even the most significant of crimes... Who amongst anyone is not above redemption? I think we have to be careful in executing final judgment. The one thing my faith teaches me—I don't get to play God. I think you are short-cutting the whole process of redemption... I don't want to be the person that stops that process from taking place."¹⁴

Mercy is also an important element of Utah's predominant religion. Former LDS Church President Gordon B. Hinckley taught, "Mercy is of the very essence of the gospel of Jesus Christ. The degree to which each of us is able to extend it becomes an expression of the reality of our discipleship under Him who is our Lord and Master."¹⁵ Likewise, President Spencer W. Kimball wrote that "the spirit of revenge, of retaliation, of bearing a grudge, is entirely foreign to the gospel of the gentle, forgiving Jesus Christ."¹⁶ Elder Dallin H. Oaks also wrote that "revenge is never a proper motive for a Christian."¹⁷

A government sanction is not the same as a heavenly sanction, and many who respect both prefer not to mingle the two.

**Seven states in seven years
have now eliminated the
death penalty.**

A Red State Repeal

The Republican-controlled, unicameral legislature in Nebraska voted to repeal the death penalty in 2015. This is the first case of a conservative state abandoning capital punishment under a Republican majority in over 40 years (the last state was North Dakota in 1973). Moreover, not only did a supermajority vote three times for repeal, but 30 of those senators voted a fourth time to sustain the repeal by overriding the governor's veto. While Democrats in the state have called for repeal in years past, the legislative tide didn't change until Republicans took up the issue as well.

The effort was co-sponsored by Senator Colby Coash, a Republican with strong religious-based, pro-life views. Senator Coash personally talked with all of his Republican colleagues appealing to their mix of views supporting limited government, fiscal restraint, and religious pro-life values. Senator Coash said of the effort, "This is consistent with my

pro-life views, but it's also consistent with trying to make government more efficient. With the death penalty, taxpayers are not getting what they're paying for. If any other programs were as costly or inefficient as this, we would have gotten rid of them."¹⁸

Two Nebraska legislators spoke with Utah lawmakers in an interim committee meeting about why they supported the repeal in their state, and how their personal views had shifted on this issue over time. They and their colleagues contend that while capital punishment is something that conservatives generally feel is warranted in certain cases, the data makes clear that it has no deterrent effect, to say nothing of the other legitimate criticisms that support its abolition.

Given these problems, the retention of capital punishment in any state is an acknowledgment of mob rule, as the perceived majority seeks to impose societal retribution over the wishes of the minority. To delegate to government the right to kill for a

purpose other than self-defense is to corrupt the very purpose for which government exists.

Because there is a risk of executing an innocent individual, the death penalty is therefore an acknowledgement that the government should be able to execute innocent people as collateral damage for the greater purpose of meting out retribution on behalf of victims who are now dead. Government acts legitimately when it does that which we all have a natural right to do—in this case of justice, to protect life by defending potential victims from harm or imprisoning those that would likely harm others. Capital punishment, however, is a program that seeks retribution at any fiscal or moral cost.

Nebraska has now shown to other conservative states, including Utah, that there are moral, fiscal, religious, due process, and societal arguments to be made in favor of an alternative path. Utah should follow their lead and repeal the death penalty.



ONE EXAMPLE, OF MANY

In a small town in rural Texas, Cameron Todd Willingham was a young 23-year-old father. Two days before Christmas in 1991, his house caught fire, killing his three young daughters from smoke inhalation. His wife had been away shopping and Todd had fallen asleep.

Investigators began looking at arson as a potential cause and concluded that there was evidence of accelerant in the fire. Willingham was charged with the murder of his children. He was given a plea deal to confess in exchange for life in prison, otherwise prosecutors would seek the death penalty. His court-appointed attorney encouraged him to take the deal. Willingham rejected the offer and maintained his innocence until his last breath on the execution gurney.

Based on his troubled childhood and lifestyle, prosecutors painted a picture of a satanic criminal sociopath. Investigators theorized that lighter fluid had been sprayed in a pentagram pattern on the floor. This didn't play to Willingham's favor in the largely Christian community of Corsicana, Texas. The state hired expert witness psychiatrist Dr. James Grigson—nicknamed “Dr. Death” for his record of getting death penalty convictions by testifying for prosecutors in over 100 cases—to testify that the defendant was a severe, incurable sociopath. Dr. Grigson had never actually met Mr. Willingham, and was expelled three years later by the American Psychiatric Association for having arrived at diagnoses without first examining the individuals against whom he testified. In some cases he would even testify that he could



predict with “100 percent certainty that the individuals would engage in future violent acts.”¹⁹

The other pillar of the prosecution's case was testimony from a fellow inmate at the county jail, Johnny Webb—a bi-polar drug addict who claimed he heard Willingham admit to starting the fire. In exchange for this testimony, Webb was given favorable treatment in his own case and was released early. Years later he wrote to the prosecutors recanting his story just to turn around and recant his recantation. Today, Webb now says his original testimony at trial was a complete fabrication and accuses the prosecutor of telling him to say it in exchange for a secret deal.

Years later, just before the execution, the arson report was reviewed by national experts who concluded that the original investigation was flawed. This review was based on new scientific advances in fire investigations that repudiate many of the flawed theories used by investigators. Even the theory about the pentagram burn pattern was rejected with experts finding the burn marks to be consistent with the window placement and natural air flow of the room. Arson expert

Gerald Hurst said, “There’s nothing to suggest to any reasonable arson investigator that this was an arson fire. It was just a fire.”²⁰ Former Louisiana State University fire instructor Kendall Ryland added, “[It] made me sick to think this guy was executed based on this investigation... They executed this guy and they’ve just got no idea—at least not scientifically—if he set the fire, or if the fire was even intentionally set.”²¹

Prior to the execution, Willingham's defense attorneys presented expert testimony regarding the new arson investigation to the state's highest court, as well as to Texas Governor Rick Perry. No relief was granted, and Willingham was executed on February 17, 2004. Some of the jurors who convicted him were troubled when told of the new case review. Juror Dorinda Brokofsky asked, “Did anybody know about this prior to his execution? Now I will have to live with this for the rest of my life. Maybe this man was innocent.”²²

A Texas court later even drafted an order to exonerate Willingham posthumously, stating that “in light of the overwhelming, credible, and reliable evidence presented by the Petitioners, this Court holds that the State of Texas wrongfully executed Cameron Todd Willingham... the State of Texas has a duty to ensure that such a tragedy never happens again...” That order never became official, as a higher court halted the inquiry on procedural grounds.

Willingham's conviction—likely a wrong one, and a single example of many—underscores the high stakes in capital punishment and the reality of the risk of tragically executing an innocent person.

A PROPOSAL TO REPEAL, WITH A “PLAN B”

Utah has three penalties for capital felonies: execution, 25 years in prison up to life (25 to life), and the relatively new penalty of life in prison without the possibility for parole (LWOP, started in 1992). Because execution does not create any additional benefits for deterrence, is more costly than life without parole, and risks innocent lives, we propose that Utah eliminate execution as a penalty for capital offenses and continue to use 25 to life, and life without parole, as the penalties for a capital felony. This penalty is used by many states for capital murder cases.

Such a change would require amending and repealing a few sections of code dealing with capital felony penalties, the judgment of death, and the carrying out of executions: sections 76-2-404, 76-3-206, 76-3-207, 77-18-5.5, and 77-19 (sections 6-12 and sections 201-206).

As an alternative to the final elimination of execution as a penalty, Utah could also experiment with a ten-year moratorium on the imposition of the death penalty in current and future cases by placing a sunset on these reforms. Existing sentences could be commuted to life without parole for the next ten years. Additionally, the state could save money by not building an execution chamber or a special segregated “death row” in the new prison. After ten years, the legislature could revisit the issue for a sunset review to evaluate the results of the change.

Endnotes

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PUBLIC POLICY BRIEF

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FREQUENT
RECURRENCE
===== TO =====
FUNDAMENTAL
PRINCIPLES IS
ESSENTIAL
===== TO =====
THE SECURITY
===== OF =====
INDIVIDUAL
RIGHTS

UTAH CONSTITUTION
ARTICLE I, SEC 27