

VALUING THE DEATH PENALTY

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ABSTRACT

This article addresses the problems of the death penalty, including a lack of oversight, extreme costs, and rampant misuse, by arguing for a federal law capping the amount of money states spend on the death penalty. This proposal uses the conditional spending clause to encourage compliance by providing federal money for state law enforcement agencies. This proposal incentivizes state governments to find creative ways to stay beneath the cap without violating defendants' rights and to take an active approach to imposing the death penalty instead of entrusting the power to localities.

Part I examines the disparity in cost between the death penalty and life without parole, looking at state data from regions across the nation and the federal government. After exploring the larger picture, Part II specifies the death penalty procedures that make it more expensive than life imprisonment. Part III advances the proposal for capping death penalty spending in exchange for federal money to state law enforcement agencies. Additionally, this part examines the constitutionality of the proposal utilizing case law. Part IV explains the benefits of the restriction and redistribution of funds; including funding issues the people want, increasing funding for state law enforcement, scrutinizing capital punishment cases more closely, and furthering the exercise of federal power.

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INTRODUCTION

“Our new Constitution is now established, and has an appearance that promises permanency; but in this world [,] nothing can be said to be certain, except death and taxes.”²

- Benjamin

Franklin

The death penalty blends the two certainties in life: death and taxes. It encourages state-sanctioned killings funded by taxpayer dollars. Recently, several states have introduced bills calling for an end to the death penalty, partially because of costs.³ The following murder case exemplifies this struggle between fiscal responsibility and apparent justice.

On October 16, 2006, Officer Michael Briggs was patrolling east Manchester, New Hampshire, when he recognized Michael Addison who was a suspect in a recent string of violent felonies including two armed robberies.⁴ A pursuit ensued and despite the officer’s repeated warnings, Addison fled concealing a semi-automatic weapon.⁵ While in flight, Addison slowed to within arm’s length of Officer Briggs, turned, and fired a ringing shot striking Officer Briggs in the head.⁶ Addison left Officer Briggs bleeding on the street bleeding, with a bullet in his head, which caused his death the following day.⁷ The jury deliberated for thirteen hours before unanimously delivering a guilty verdict imposing death by lethal injection.⁸ The potential headline of this case - *Convicted Felon Kills Officer Prompting Unanimous Jury to Demand Swift Justice via Execution* - summarizes and represents a situation where one would think the implementation of the death penalty should be speedy.

Almost ten years later, Michael Addison is alive and still appealing his conviction.⁹ Addison appealed to the New Hampshire Courts, the U.S. Supreme Court, and he plans to appeal at least once

² Michael Benton, *Death of Benjamin Franklin*, (Nov. 6, 2013), <http://benjaminfranklinbio.com/death-of-benjamin-franklin/156/>).

³ Peter Collins & Aliza Kaplan, *The Death Penalty is getting more and more expensive. Is it worth it?*, THE CONVERSATION (Mar. 30 2017), <https://theconversation.com/the-death-penalty-is-getting-more-and-more-expensive-is-it-worth-it-74294>.

⁴ *State v. Addison*, 87 A.3d 1, 37 (N.H. 2013).

⁵ *Id.* at 414.

⁶ *Id.*

⁷ *Id.*

⁸ *Cop Killer gets 1st N.H. death sentence in 49 years*, THE LOWELL SUN, http://www.lowellsun.com/breakingnews/ci_11262013 (Updated Dec. 18, 2008).

⁹ *State v. Addison*, 116 A.3d 551, 552 (N.H. 2015) (NH Supreme Court concluding that defendant’s conviction is “neither excessive nor disproportionate[.]”).

more, further staying his execution.¹⁰ While one story involves the tragic death of a public servant, the other story speaks of a man's right to appeal and his bill taxpayers must foot.

According to the New Hampshire Coalition to Abolish the Death Penalty, in 2013, Addison's case had cost the taxpayers nearly \$5 million.¹¹ Twelve years and \$5 million later, the system allows for a seemingly straightforward, cop-killing prosecution to persist. Ironically, Addison's situation is not special but common among death penalty cases. The average time between a death sentence and execution continues to increase reaching 186 months in 2013.¹² The inflated costs of the death penalty are problematic, but the lack of oversight at the county level is also concerning.

The death penalty has flaws including arbitrary prosecutorial use and extreme costs, yet polls show its popularity.¹³ A 2017 Gallup poll explained that death penalty support reached an abysmal 55%.¹⁴ Support for the death penalty has not dipped this low since *Furman v. Georgia*¹⁵ in 1972.¹⁶ Moreover, a 2018 Gallup poll shows that only 49% of Americans believe the death penalty's application is fair.¹⁷

Additionally, despite the arbitrary prosecution, prosecutors are not shy about administering the death penalty. District Attorney Dale Cox of Caddo Parish, Louisiana, once said, "I think we need to kill more people."¹⁸ Over a five-year span, Dale Cox accounted for one-third of Louisiana's death sentences.¹⁹ Harvard Law School's Fair Punishment Project compiled a list of five prosecutors who oversaw or personally

¹⁰ Holly Ramer, *N.H.'s only death row inmate still fighting sentence for cop killing*, CONCORD MONITOR, (May 18, 2016), <https://www.concordmonitor.com/Michael-Addison-New-Hampshire-Death-Row-Habeas-corporus-2219478>.

¹¹ New Hampshire Coalition to Abolish the Death Penalty, *How much does the Death Penalty Cost New Hampshire?*, (2013) available at <http://nodeathpenaltynh.org/wp-content/uploads/2013/10/NH-Cost-Fact-Sheet-2013.pdf>, (the defense spent \$2.6 million and the prosecution spent \$2.3 million).

¹² Tracy L. Snell, *Capital Punishment, 2013 – Statistical Tables*, U.S. DEP'T OF JUSTICE, 1, 14, <https://deathpenaltyinfo.org/files/pdf/cp13st.pdf> (Revised Dec. 19, 2014).

¹³ Jeffrey M. Jones, *U.S. Death Penalty Support Lowest since 1972*, GALLUP, (Oct. 26, 2017), <https://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx>.

¹⁴ *Id.*

¹⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁶ *Id.*

¹⁷ Justin McCarthy, *New low of 49% in U.S. say Death Penalty Applied Fairly*, GALLUP, (Oct. 22, 2018), <https://news.gallup.com/poll/243794/new-low-say-death-penalty-applied-fairly.aspx>.

¹⁸ *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty*, HARVARD LAW SCHOOL FAIR PUNISHMENT PROJECT, 2, (June 2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf.

¹⁹ *Id.*

obtained 440 death sentences.²⁰ Most importantly, the study concluded that capital punishment verdicts were drastically lower prior to the arrival and subsequent departures of these figures.²¹ Under the current system, county prosecutors have no supervision regarding the death penalty.²² The commencement of the death penalty is less about the circumstances or characteristics of the accused, but more about the prosecutor's personality and their predisposition to seek the ultimate punishment.²³ Although the majority still favor the utilization of the death penalty²⁴, the solution to an improved system requires less.

To address these problems, this article argues for a federal law that caps the amount of money that states spend on the death penalty based on the state's population. The conditional spending clause establishes the law's constitutionality and encourages compliance with additional federal money for state law enforcement agencies.²⁵ This proposal incentivizes state governments to find creative ways to stay beneath the cap without violating defendants' rights, thus decreasing death penalty spending and taking an active approach to imposing the death penalty instead of entrusting the power to localities.

Part I examines the disparity in cost between the death penalty and life without parole, looking at state data from regions across the nation and the federal government. After exploring the larger picture, Part II specifies the death penalty procedures that make it more expensive than life imprisonment. Part III advances the proposal for capping death penalty spending in exchange for federal money to state law enforcement agencies. Additionally, this part examines the constitutionality of the proposal utilizing case law. Part IV explains the benefits of the restriction and redistribution of funds; including funding issues the people want, increasing funding for state law enforcement, scrutinizing capital punishment cases more closely, and furthering the

²⁰ *Id.* at 3 (Joe Freeman Britt of Roberson County, NC; Robert H. Macy of Oklahoma County, OK; Donald Myers of the 11th Judicial District of SC; Lynne Abrams of Philadelphia county, PA; Johnny Holmes of Harris county, TX).

²¹ *Id.* at 25.

²² Maurice Chammah, *What to know about the death penalty in 2018*, THE MARSHALL PROJECT, (Jan. 3, 2018), <https://www.themarshallproject.org/2018/01/03/what-to-know-about-the-death-penalty-in-2018>.

²³ *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty*, HARVARD LAW SCHOOL FAIR PUNISHMENT PROJECT at 25, (June 2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf.

²⁴ Jeffrey M. Jones, *U.S. Death Penalty Support Lowest since 1972*, GALLUP, (Oct. 26, 2017), <https://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx>.

²⁵ See Other examples of the federal government utilizing the conditional spending clause: *South Dakota v. Dole*, 483 U.S. 203 (1987) (Congress indirectly regulates drinking age via spending clause); *New York v. United States*, 505 U.S. 144 (1992) (Congress offers monetary incentives to states that take possession of radioactive waste).

exercise of federal power.

I. DEATH PENALTY COSTS

Before looking at the pieces comprising the excessive costs of the death penalty, this article examines the exorbitant cost of capital punishment across several states. Many states have not studied this issue; therefore, this article only includes states with documented studies and estimations. This article focuses on the cost of death penalty trials, incarceration, and appeals.

A. Mid-Atlantic

1. New Jersey

In 2007, New Jersey became the twelfth state to abolish the death penalty.²⁶ In 2003, Gov. James McGreevey vetoed a unanimously supported bill that would study the New Jersey death penalty, citing that previous commissions in 1905, 1964, and 1971 would show the same data as if done in 2003.²⁷ On average, each death penalty case costs New Jersey taxpayers \$4.2 million.²⁸ In 2007, however, the state legislature replaced the death penalty with life without parole.²⁹

2. New York

In 2007, New York became the twentieth state to abolish the death penalty.³⁰ The New York Court of Appeals systematically determined the unconstitutionality of the death penalty and the state legislature halted any efforts to revive it.³¹ While New York has not conducted an official study, in 1982, the N.Y. State Defenders Association estimated that the cost of the death penalty, through the trial and initial appeals process would be \$1.8 million.³² Utilizing an inflation calculator, the cost of the death penalty in 2018 dollars would be about \$4.8 million.³³

²⁶ *New Jersey*, DEATH PENALTY INFO. CTR., available at <https://deathpenaltyinfo.org/new-jersey-1> (last visited April 9, 2019).

²⁷ Mary E. Forsberg, *Money for Nothing: The financial costs of New Jersey's Death Penalty*, NEW JERSEY POLICY PERSPECTIVE., 1, 4 (November 2005), https://www.njpp.org/assets/reports/budget-fiscal/16-rpt_moneyfornothing.pdf.

²⁸ *Id.* at 17.

²⁹ *New Jersey*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/new-jersey-1> (last visited April 15, 2019).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Official Data Foundation/Alloth LLC., *CPI Inflation Calculator*, OFFICIAL DATA FOUND., <http://www.in2013dollars.com/1982-dollars-in-2018?amount=1800000> (last visited Feb. 5, 2019).

B. Southern

1. Maryland

In 2013, Maryland became the eighteenth state to abolish the death penalty.³⁴ Abolition in Maryland was efficient as in 2002, there was a moratorium on the death penalty, in 2009, the state restricted the death penalty to very specific instances, and in 2013, the state legislature and governor passed and signed a repeal bill.³⁵ Before the abolition of the death penalty, a 2008 study showed that the cost of a death penalty was about \$3 million including \$1.1 million in court and incarceration costs for eligible death penalty cases, an additional \$669,000 for a death notice, and an added \$1.25 million if the result is a death sentence.³⁶ Accounting for inflation, \$3 million in 2011 is roughly \$3.3 million in 2018 dollars.³⁷

2. North Carolina

While North Carolina has not abolished the death penalty, a study done by Duke University shows that between 2005 and 2006, the state spent about \$22 million on the death penalty including trials, appeals, and incarcerations.³⁸ Calculations show that the average cost of the death penalty is about \$3.05 million.³⁹ Accounting for inflation, \$3.05 million in 2005 and 2006 is about \$3.9 million in 2018 dollars.⁴⁰

C. Southwest

1. Nevada

While Nevada has not abolished the death penalty, it is one of the few states to analyze the death penalty via legislative authority. In 2014, a Nevada Legislative Auditor report showed that the cost of trial

³⁴ *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., (Oct. 11, 2018), available at <https://deathpenaltyinfo.org/states-and-without-death-penalty>

³⁵ *Maryland*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/maryland-1> (last visited April 15, 2019).

³⁶ John Roman, Aaron Chalfin, Aaron Sundquist, Carly Knight & Askar Darmenov, *The Cost of the Death Penalty in Maryland*, 27 URBAN INST. JUSTICE POLICY CTR., 1, 27, (2008), <https://www.urban.org/sites/default/files/publication/31526/411625-The-Cost-of-the-Death-Penalty-in-Maryland.PDF>

³⁷ *CPI Inflation Calculator*, OFFICIAL DATA FOUND., <http://www.in2013dollars.com/1982-dollars-in-2018?amount=3000000> (last visited Feb. 5, 2019).

³⁸ Phillip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498, 499 (2009). This study does not account for the prosecution costs, meaning the overall cost increases.

³⁹ Dr. Matthew Robinson, *The Death Penalty in North Carolina: A summary of the data and scientific studies*, (2011). \$22 million divided by two, then dividing that number by 3.6 equals the average.

⁴⁰ Official Data Foundation/Alloth LLC., *CPI Inflation Calculator*, <http://www.in2013dollars.com/2005-dollars-in-2018?amount=3005000> (last visited Feb. 5, 2019).

when seeking the death penalty was substantially more than the cost of trial when not seeking the death penalty.⁴¹ Specifically, the average cost of the trial and appeal of a capital punishment case that achieves a successful conviction is \$708,617,⁴² while the average cost of bringing a capital case and failing to obtain a conviction is \$603,456.⁴³ Conversely, when the prosecution does not seek the death penalty, the case costs roughly \$233,025.⁴⁴ The study breaks down the costs of incarceration into death penalty (natural cause), death penalty (execution), life with the possibility of parole, and life without parole. The chart shows that the highest housing cost per year is for executed death row inmates (avg. \$23,459).⁴⁵

2. New Mexico

New Mexico was the fifteenth state to abolish the death penalty in 2009.⁴⁶ The repeal, however, failed to remove the remaining death row inmates.⁴⁷ Even after the abolition, a 2017 house bill, HB 72, sought to reinstate the death penalty for individuals convicted of three capital crimes.⁴⁸ The price of reinstating the penalty for these three crimes is roughly \$7.2 million over the first three years, averaging \$2.4 million per year, with prices increasing each year.⁴⁹ Within the bill, there is concern for the fiscal impact focusing on the high costs of the death penalty and length on death row in other states.⁵⁰

3. Oklahoma

The Oklahoma Death Penalty Review Commission reported that seeking the death penalty “incurs significantly more time, effort, and costs on average, as compared to when the death penalty is not sought in first degree murder cases.”⁵¹ Based on a conservative estimate, that does

⁴¹ See generally, Paul Townsend, *State of Nevada Performance Audit: Fiscal Costs of the Death Penalty*, (November 2017).

⁴² *Id.* at 12.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 14. Although the highest average housing, over the prisoner’s lifetime, are life with possibility of parole and life without parole, these numbers are skewed because the inmates are in prison for a longer time.

⁴⁶ *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., (Oct. 11, 2018), <https://deathpenaltyinfo.org/states-and-without-death-penalty>.

⁴⁷ *Id.*

⁴⁸ N.M. LEG. FIN. COM. FISCAL IMPACT REPORT, *H.B. 72*, 1st Sess., at 1-2, (Feb. 2, 2017). The three crimes are: (1) murder of a peace officer, (2) murder of a child under the age of 18, and (3) murder, with the intent to kill, of an employee or contractor while the defendant is incarcerated in a penal institution of New Mexico, including those under the jurisdiction of the corrections department, county and municipal jails.

⁴⁹ *Id.* at 1 (The table shows a worst-case scenario of the costs).

⁵⁰ *Id.* at 6-8.

⁵¹ Peter A Collins et al., *Appendix IB, An Analysis of the Economic Costs of Capital Punishment in Oklahoma*, 260 (Feb. 1, 2017)

not include many of the prosecutorial costs, an Oklahoma death penalty case cost \$110,000 more, on average, than a non-death penalty case.⁵² Additionally, incarceration costs for maintaining death row inmates are almost doubled.⁵³ Finally, the average cost of capital appeals is \$53,000 per case, which is over five times as much as non-capital cases.⁵⁴

4. Texas

Since 1976, Texas has conducted the most executions in the United States with over 280 sentences; with 127 conducted in Harris County alone.⁵⁵ The death penalty is a mainstay in the Texas judicial system as the governor lacks the power to impose a moratorium and would require an amendment to the Texas Constitution to do so.⁵⁶ In 1992, the average cost of a Texas death penalty case was \$2.3 million, versus \$750,000 for life in prison.⁵⁷ Accounting for inflation, the cost of the death penalty and life in prison in 2018 is roughly \$4.1 million⁵⁸ and \$1.3 million,⁵⁹ respectively.

D. Mid-West

1. Kansas

Kansas has not abolished the death penalty, but they have conducted a study on death penalty costs.⁶⁰ In a 2014 Kansas study, the results surveyed the average defense costs for fifteen death penalty cases from 2004 to 2011.⁶¹ Seeking the death penalty costs defense attorneys four times as much as not seeking the death penalty: \$395,762 when sought versus \$98,963 when not sought.⁶² Additionally, the court costs

<https://deathpenaltyinfo.org/files/pdf/Report-of-the-OK-Death-Penalty-Review-April-2017-a1b.pdf>.

⁵² *Id.* at 224-25.

⁵³ *Id.* at 225; The average costs to maintain an inmate on death row is \$44,861 while housing for a non-death row inmate is \$28,320.

⁵⁴ *Id.* at 225.

⁵⁵ Texas, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/texas-1> (last visited April 15, 2019).

⁵⁶ *Id.*

⁵⁷ Texas Coalition to Abolish the Death Penalty, *The Cost of the Death Penalty*, (2015) available at <https://tcadp.org/wp-content/uploads/2016/03/cost-sheet-final1.pdf>.

⁵⁸ Official Data Foundation/Alloth LLC., *CPI Inflation Calculator*, <http://www.in2013dollars.com/1992-dollars-in-2018?amount=2300000> (last visited April 15, 2019).

⁵⁹ Official Data Foundation/Alloth LLC., *CPI Inflation Calculator*, available at <http://www.in2013dollars.com/1992-dollars-in-2018?amount=750000> (last visited Feb. 5, 2019).

⁶⁰ See Kansas Judicial Council and Death Penalty Advisory Committee, *Report of the Judicial Council Death Penalty Advisory Committee*, Judicial Council, Kansas Legislature, (Feb. 13, 2014), <https://cdm16884.contentdm.oclc.org/digital/collection/p16884coll55/id/3>.

⁶¹ *Id.*

⁶² *Id.* at 7.

show a similar disparity of three times the costs for the same period: \$72,530 when sought versus 21,554 when not sought.⁶³ Finally, the report estimates the average cost to house a death row inmate is \$49,380 per inmate, which is double the \$24,690 to house a prisoner in general population.⁶⁴

2. Nebraska

Although Nebraska has not repealed the death penalty, there has been movement in the state regarding abolition.⁶⁵ A 2015 study states that the Nebraska death penalty costs taxpayers \$1,493,500 in 2015 dollars.⁶⁶ Accounting for inflation, that nearly \$1.5 million is now nearly \$1.6 million in 2018 dollars.⁶⁷ Finally, the above study supports the redeployment of death penalty funds to other endeavors like law enforcement, investigation, and prison systems.⁶⁸

3. Ohio

Ohio has not repealed the death penalty, but a recent study reveals a nearly \$16.8 million savings with the abolition of the death penalty.⁶⁹ The study illustrates alternative uses for the savings including adding 299 police officers, or 368 social workers.⁷⁰ The study calculates that the Ohio death penalty costs around \$3 million, while life without parole costs roughly \$1 million.⁷¹

E. Pacific Coastal

1. California

While the California death penalty remains a force, there has been movement regarding the abolition of the death penalty in 2012,⁷²

⁶³ *Id.* at 8.

⁶⁴ *Id.* at 1.

⁶⁵ See Ernest Goss, Scott Strain & Jackson Blalock, *The Economic Impact of the Death Penalty on the State of Nebraska: A Taxpayer Burden?* 1, 13 (August 15, 2016). <https://deathpenaltyinfo.org/files/pdf/The-Economic-Impact-of-the-Death-Penalty-on-the-State-of-Nebraska.pdf>. In 2015, the state legislature voted to abolish the death penalty but Gov. Pete Ricketts vetoes the bill. The legislature overrode veto but a pro-death penalty group got enough signatures to reinstate the death penalty.

⁶⁶ *Id.* at 28. This figure comprises post-conviction costs and maximum-security costs.

⁶⁷ Official Data Foundation/Alloth LLC., *CPI Inflation Calculator*, <http://www.in2013dollars.com/2015-dollars-in-2018?amount=1493500> (last visited Feb. 5, 2019).

⁶⁸ Goss et al., *supra* note 69, at 1.

⁶⁹ Ohioans to Stop Executions, *Ohio Death Penalty Factsheet: Cost*, (2014), available at http://www.otse.org/wp-content/uploads/2014/03/OTSE_CostOfTheDeathPenaltyInOhio.pdf.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *California, DEATH PENALTY INFO. CTR.*, available at <https://deathpenaltyinfo.org/california-1>; California placed Proposition 34 on the

2016,⁷³ and 2017.⁷⁴ A study conducted by Judge Arthur Alarcon and Paula Mitchell shows that California has spent nearly \$4.6 billion on the death penalty since its reinstatement in 1978.⁷⁵ Other conclusions from the study state (1) that death penalty prosecutions cost ten to twenty times more than non-capital punishment cases⁷⁶ and (2) the least expensive death penalty case is still \$1 million more than a non-capital case.⁷⁷

2. Washington

Washington became the twentieth state to abolish the death penalty in 2018.⁷⁸ The Washington Supreme Court unanimously struck down the state's capital punishment statute for being "arbitrary and racially biased."⁷⁹ Before Washington abolished capital punishment, a study concluded that it costs roughly \$1.2 million more on average to seek the death penalty over life without parole.⁸⁰ According to a chart in the report, the death penalty in Washington, including the trial, incarceration, and appeals costs, totals about \$3.07 million while life without parole, including the same aspects, costs roughly \$2.01 million.⁸¹

F. Federal

The federal government has not abolished the death penalty, but since its reinstatement, only seventy-eight defendants received sentences and only three were executed.⁸² Federal capital offenses include: espionage, genocide, and murder of a federal judge or federal law

ballot which would replace the death penalty with life in prison. The proposition failed but received 48% of the vote.

⁷³ California placed Propositions 62 and 66 on the ballots. Proposition 62 sought to replace the death penalty with a stricter life in prison statute and proposition 66 sought to retain the death penalty and expedite appeals. Proposition 62 failed with 46% support, while proposition 66 passed with 51% support.

⁷⁴ See generally *Briggs v. Brown*, 3 Cal. 5th 808 (2017).

⁷⁵ *California Cost Study 2011*, DEATH PENALTY INFO. CTR., available at <https://deathpenaltyinfo.org/california-cost-study-2011> (last visited April 15, 2019).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *States with and without the death penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 11, 2018).

⁷⁹ *Report on "Principles for the 21st century Prosecutor" calls for prosecutors to work to end the death penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/category/categories/states/washington> (last visited April 15, 2019).

⁸⁰ Collins et al, *An Analysis of the Economic Costs of Seeking the Death Penalty in Washington State*, 14 SEATTLE J. SOC. JUST. 727, 778 (2016).

⁸¹ *Id.* at 768.

⁸² *Federal Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/federal-death-penalty> (last visited April 15, 2019).

enforcement agent.⁸³ Studies show that the average cost of defending a federal death penalty case is \$620,932, which is 8 times the cost of defending a non-capital case.⁸⁴ Additionally, the more money spent of the defendant's representation, the less likely they were of being sentenced to death.⁸⁵ This an extreme example of an injustice seen every day, as the wealthy sidestep execution and the poor are disproportionately executed because they lack the same resources.

II. DEATH PENALTY EXPENSES

The rationale behind death penalty expenses compared to life imprisonment expenses lies in the phrase, “[D]eath is different.”⁸⁶ The finality of an execution leaves no room for error, while imprisonment allows for an attempted rectification of a mistake. Neither supporters nor critics of the death penalty envision a system where innocents die. Therefore, institutions like the state legislatures⁸⁷ and the American Bar Association (ABA)⁸⁸ stress the importance of strict guidelines in capital punishment cases. While these guidelines exist to protect against the ultimate mistake of killing an innocent person, there are four major facets of death penalty expenses that are costlier than life imprisonment: expert research and testimony, jury selection, appellate review, and incarceration.

A. *Experts Galore*

Since “death is different,” there is a heightened importance for the expert witnesses of the prosecution and defense. According to the *Royal Institution of Chartered Surveyors*, an expert witness is “a person engaged to give an opinion based on experience, knowledge and

⁸³ *Federal Laws Providing for the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/federal-laws-providing-death-penalty> (last visited April 15, 2019); List of federal capital offenses.

⁸⁴ *Costs of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/costs-death-penalty> (last visited April 15, 2019).

⁸⁵ *Id.*; Defendants having representation costs of less than \$320,000 had a 44% chance of receiving a death sentence, while defendants having representation costs of more than \$320,000 had a 19% chance of receiving a death sentence.

⁸⁶ *See* *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“the penalty of death is different in kind from any other punishment”).

⁸⁷ Over thirty states enacted capital punishment representation laws. *See State standards for appointment of counsel in death penalty cases*, (August 2018), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/State_standards_memo_Aug2018.authcheckdam.pdf.

⁸⁸ *See Guidelines for the appointment and performance of defense counsel in death penalty cases*, AM. BAR ASS'N, (February 2003), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

expertise. The overriding duty of an expert witness is to provide independent, impartial and unbiased evidence to that court or tribunal.”⁸⁹ While that overall characterization is correct, experts have more roles in the context of capital punishment.

In 1985, the Supreme Court held that, in capital cases, the defendant shall have access to psychiatric assistance when the prosecution has it.⁹⁰ Experts examine the forensic evidence, evaluate the defendant’s competency to stand trial,⁹¹ clarify the science behind mistaken eyewitness identification, and explain the rationale behind false confessions.⁹² In *Atkins v. Virginia*,⁹³ the Supreme Court prohibited the death penalty for the mentally incapacitated,⁹⁴ thus adding extra pressure on experts to separate the intellectually disabled from mentally sound defendants. Even though the work of experts is often critical, Natasha Minsker⁹⁵ explains that there are costs as well, “Modern science has greatly enhanced our ability to distinguish the innocent from the guilty and to identify the mentally ill, but all of this costs money.”⁹⁶

A crucial aspect of expert practices is their role as mitigation and aggravation specialists. With the reinstatement of the death penalty in 1976, the Supreme Court stressed the consideration of mitigating factors and the subsequent requirement of aggravating circumstances.⁹⁷ Mitigation experts delve into the entirety of the defendant’s life. They interview individuals currently or previously in their lives like relatives,

⁸⁹ *The Duties and Responsibilities of Expert Witnesses*, LEXOLOGY, (Mar. 1, 2017), <https://www.lexology.com/library/detail.aspx?g=c5175dd7-5730-44b8-8a53-e934d8d4a111>.

⁹⁰ *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (“the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.”).

⁹¹ Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in Times of Economic Crisis*, DEATH PENALTY INFO. CTR., (Oct. 2009), <https://deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.

⁹² Maurice Chammah, *Six Reasons the Death Penalty is Becoming More Expensive*, THE MARSHALL PROJECT, (Dec. 17, 2014), <https://www.themarshallproject.org/2014/12/17/six-reasons-the-death-penalty-is-becoming-more-expensive>.

⁹³ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁹⁴ *Id.* at 321 (“we therefore conclude that such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally [incapacitated] offender.”).

⁹⁵ Associate Director of the American Civil Liberties Unions of Northern California.

⁹⁶ Chammah, *supra* note 22.

⁹⁷ *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (“In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. The jury is not required to find any mitigating circumstances to make a recommendation of mercy that is binding on the trial court, but it must find a *statutory* aggravating circumstance before recommending a sentence of death.”).

supervisors, teachers and doctors;⁹⁸ and gather information that explains the murder or ingratiates the defendant with the jury.⁹⁹ For the prosecution, testimony regards aggravating factors¹⁰⁰ whereby experts probe the defendant's past for damning evidence.¹⁰¹ Mitigation and aggravation specialists are not cheap. In North Carolina, they earn between \$35 and \$55 per hour and in Harris County, Texas,¹⁰² the rate is no greater than \$75 per hour.¹⁰³

A study by Elizabeth Walsh and Robert Spangenberg demonstrated the costly nature of expert assistance even thirty years ago.¹⁰⁴ The article details the increased cost of the death penalty including expert testimony.¹⁰⁵ Psychiatric experts earn between \$500 and \$1,000 per day for trials that could span weeks.¹⁰⁶ Moreover, there are polygraph experts receiving between \$200 and \$300 per day for polygraph testimony and an additional \$150 and \$250 for the examination.¹⁰⁷ Finally, eyewitness experts earn \$500 per day for courtroom testimony and \$100 per hour for consultations.¹⁰⁸ Due to these necessities, the defense's budget for expert assistance is roughly \$12,000 per case.¹⁰⁹

This article does not advocate for the defunding of expert testimony or forcibly lowering rates for these professionals. The roles of experts are vital in capital cases. This article does suggest that a reduction in the overall number of death penalty cases lessens the necessity to spend as much on experts. Additionally, state over-watch prompts the hiring of cost-efficient experts without lowering the expert quality. The ideal outcome of this proposal saves governments thousands of dollars by using less experts for capital cases.

B. Death-Qualified Juries

Jury selection in death penalty cases is unlike any other judicial proceeding, because it can take weeks or months to qualify a jury.¹¹⁰ In a

⁹⁸ Dieter, *supra* note 95, at 20.

⁹⁹ Chammah, *supra* note 22.

¹⁰⁰ GA. CODE ANN. §17-10-30 gives examples of aggravating and mitigating circumstances.

¹⁰¹ See Dieter, *supra* note 95.

¹⁰² Harris County has the most executions since the death penalty's reinstatement.

¹⁰³ Chammah, *supra* note 22.

¹⁰⁴ See Robert L. Spangenberg & Elizabeth Walsh, *Capital Punishment or Life Imprisonment?: Some Cost Considerations*, 23 LOY. L.A. L. REV. 45 (1989).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 50.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ("the average per case allotment for defense experts' preparation for trial was \$12,000. The average amount expended for support costs in Maryland capital cases is \$9,822 per case.").

¹¹⁰ Dieter, *supra* note 91, at 21.

California study of death penalty costs, Judge Arthur Alarcon and Paula Mitchell estimated that the additional month for selection costs nearly \$200,000 more than other murder trials.¹¹¹ Mitchell states that, “you have more people who are ambivalent,” meaning there is difficulty in finding twelve jurors who are willing to possibly impose the punishment.¹¹² Unlike voir dire in other murder trials, the lawyers question jurors about their capital punishment views and whether they can follow the law in sentencing.¹¹³ Juror dismissal is either for cause or without cause using a peremptory challenge. For cause dismissals are unlimited and stem from the determination that jurors have the inability to put aside their capital punishment biases to fairly decide the case.¹¹⁴ The lawyers make peremptory challenges allowing the dismissal of a juror for no cause, providing that the challenge is not exclusively based on a juror’s race, religion, or gender.¹¹⁵

Moreover, Supreme Court precedent dictates death qualified juries’ procedure. In *Witherspoon v. Illinois*,¹¹⁶ the Court held that a juror’s dismissal should not be for voicing “general objections” about the death penalty.¹¹⁷ The Court continued by expanding the pool of excluded jurors and clarifying the standard for dismissal.¹¹⁸ The Court next received a claim alleging the discriminatory effects of death penalty juries’ qualification, but the challenge fell short of affirmation.¹¹⁹ Finally, judicial precedence explains that on appellate review the trial judge receives deference in regulating the impartiality of jurors.¹²⁰

The current system of death qualification is imperfect and skews

¹¹¹ Chammah, *supra* note 22.

¹¹² *Id.* (“As support for the death penalty declines, Mitchell said, it takes longer – more paid hours on the part of attorneys, the judge, and the court staff – to find twelve jurors who are willing to impose the punishment. ‘You have more people who are ambivalent,’ she said.”).

¹¹³ *Death Qualification, CAPITAL PUNISHMENT IN CONTEXT*, <https://capitalpunishmentincontext.org/resources/deathqualification> (last visited April 15, 2019).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (A man sentenced to death challenges sentence because the prosecution excluded jurors who hesitated about imposing the death penalty).

¹¹⁷ *Id.* at 523.

¹¹⁸ *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (“The standard is whether the juror’s view would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”).

¹¹⁹ *Lockhart v. McCree*, 476 U.S. 162, 183 (1986) (“In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints.”).

¹²⁰ *Uttecht v. Brown*, 551 U.S. 1, 22 (2007) (“Capital defendants have the right to be sentenced by a partial jury. [However,] Courts reviewing claims of *Witherspoon-Witt* error ... owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror.”).

towards pro-conviction and pro-death penalty juries.¹²¹ These juries exclude African Americans and “systematically whitewash”¹²² the jury pool, leaving behind subgroups that are unrepresentative of the community.¹²³ An indirect feature of this proposal reinvents voir dire in capital cases. Ultimately, with less capital cases, the arduous jury selection process will not exist, but even for states that choose to continue executions, this proposal warrants state supervision to create an unbiased and economical selection process.

C. Exhaustive Appellate Review

While the death penalty is a costly endeavor, most of the costs come from state and federal appeals with some states quantifying the impact of the appellate review. California estimates that around \$1.7 billion, 37% of their capital punishment spending, is attributable to federal and state appeals.¹²⁴ An Oklahoma study shows that capital appeals cost over five times the amount of non-capital appeals.¹²⁵ Finally, in Kansas, appeals alone accounted for 29% of the capital punishment costs where the total cost is roughly \$1.26 million.¹²⁶ There are two stages for state appeals and three stages for federal appeals.¹²⁷ The first stage at the state level is the direct appeal to the state court.¹²⁸ In most states, direct appeal is mandatory,¹²⁹ but in others it is optional. State court appeals are with the original judge where the court only hears issues presented at trial.¹³⁰ The final stage is submitting briefs to any

¹²¹ See Mona Lynch and Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 LAW & POLICY 148 (2018).

¹²² *Studies: Death-Penalty Jury Selection “Whitewashes” Juries and Biased towards death*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/7098> (last visited April 15, 2019).

¹²³ *Id.*

¹²⁴ *States with and without the death penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Oct. 11, 2018).

¹²⁵ P. Collins, M. Hickman, and R. Boruchowitz, *An Analysis of the Economic Costs of Capital Punishment in Oklahoma*, reprinted in THE CONSTITUTION PROJECT, THE REPORT OF THE OKLAHOMA DEATH PENALTY REVIEW COMMISSION (2017) app. 1B, at 225, <https://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf>.

¹²⁶ *Costs of the Death Penalty*, *supra* note 84.

¹²⁷ Torin McFarland, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, 7 SUSQUEHANNA UNIV. POL. REVIEW 45, 52 (2016).

¹²⁸ *Id.*; State and Federal appeals are separate, but it is possible to move from state to federal court if there is a federal issue and defendant exhausted state appeals.

¹²⁹ See GA. CODE ANN. §17-10-35.

¹³⁰ Torin McFarland, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, 7 SUSQUEHANNA UNIV. POL. REVIEW 45, 52 (2016).

state court for review of new evidence or issues.¹³¹

The first level of federal appeals requires submitting a federal issue to a U.S. District Court for review of the previous issues.¹³² The second level is a petition for relief to a U.S. Court of Appeals that only reviews issues previously appealed.¹³³ Unlike the initial stages of the appellate process, U.S. Court of Appeals do not automatically accept all petitions.¹³⁴ The last stage is to file a writ of certiorari with the U.S. Supreme Court, but they only accept a small amount of cases.¹³⁵

In each death penalty case, there are several appellate hearings that factor into the length of time people spend on death row.¹³⁶ The impact of multiple and sometimes mandatory appeals increases the amount of work courtroom figures do. Based on a 2010 study, defense counsel spent an average of 1,889 hours and 3,557 hours per trial from 1989-1997 and 1998-2004, respectively.¹³⁷ While prosecutors do not bill individual hours, they put in similar hours of work and some district attorneys reallocate increased staff for complicated death penalty matters.¹³⁸

Under this proposal, because there needs to be review of such a final judgment, the overall structure of the appellate system remains the same. Less capital cases mean less cases appealed. Additionally, this proposal encourages resourceful means to limit appeals after the initial appeal without violating the defendants' rights.

D. Not So Free Inmate Housing

Another large expense of the death penalty is the cost to house inmates. A study done in Nevada illustrates the elevated costs of the death penalty by comparing it to sentences of life without parole (LWOP) and life with the possibility of parole (LWPP).¹³⁹ The results show that even though the average time in prison for LWOP (31 years) and LWPP (32 years) exceed the time in prison for the death penalty, 11 years for execution and 25 for natural death, the facility cost is higher for the housing of capital punishment inmates.¹⁴⁰ Specifically focusing on natural deaths while on death row, these inmates were in prison, on

¹³¹ *Id.*

¹³² *Id.* at 52-53 (This court also hears the direct appeal of federal death penalty cases).

¹³³ *Id.* at 53.

¹³⁴ *Id.*

¹³⁵ The Supreme Court gets requests to hear about 7,000 cases per year but accepts about 80 to review per year.

¹³⁶ Snell, *supra* note 12.

¹³⁷ Chammah, *supra* note 22.

¹³⁸ *Id.*

¹³⁹ Paul Townsend, *Performance Audit: Fiscal Costs of the Death Penalty*, page 14 (exhibit 7) (November 2017).

¹⁴⁰ *Id.* (However, death by executions did not yield more costs but death by natural causes did).

average, six years less than LWOP and LWPP inmates, and yet the total facility costs amounted to \$521,164 compared to \$459,787 for LWOP and \$430,218 for LWPP.¹⁴¹

Additionally, Nevada is not the only state which conveys a similar message about the death penalty. In a study done by Torin McFarland, there is a breakdown of costs between general population and death penalty housing further separated into daily and yearly costs.¹⁴² In total, there were forty states in the study, but only twenty-seven states reported information on death row and general population costs.¹⁴³ Of those twenty-seven states, twenty-two showed that the death penalty incarceration costs per day and year were drastically more than the expenses for the general population housing (81.5%).¹⁴⁴ Further showing the disparity, there were four states (California, Connecticut, Kansas, and Georgia) where the cost of death penalty housing doubled the general population's.¹⁴⁵ In comparison, the states where the general population costs were higher (Alabama, Arkansas, Idaho, and Ohio), the average cost per day more never exceeded \$8.¹⁴⁶ Finally, included at the end of Appendix C, overlooked by the volume of the state information, are the figures from the federal government showing that death penalty housing costs substantially more than general population.¹⁴⁷

The main factor contributing to this disparity is the distinction between general population and the solitude of death row. Inmates convicted of non-capital offenses find themselves within the general population but death row inmates' placement consists of "administrative segregation or solitary confinement, which costs more per day due to heightened security."¹⁴⁸ Some states simply house inmates in high or maximum-security wings of their prisons but the cost compounds when some states build entirely new facilities just to accommodate death row prisoners.¹⁴⁹

Inherent in the design of this proposal is the belief that some states will choose to abolish the death penalty. However, even without fully abolishing the death penalty, states will see savings in various areas like incarceration costs. Despite the counterintuitive notion that LWOP or LWPP keeps inmates in prison for longer, thus housing these inmates

¹⁴¹ *Id.*

¹⁴² Torin McFarland, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, (Appendix C), 7 SUSQUEHANNA UNIV. POL. REVIEW 45, 73-6 (2016).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 76 (Federal costs show a \$22 per day increase for Death penalty housing over general population).

¹⁴⁸ Maurice Chammah, *What to know about the death penalty in 2018*, THE MARSHALL PROJECT, Jan. 3, 2018, available at <https://www.themarshallproject.org/2018/01/03/what-to-know-about-the-death-penalty-in-2018>.

¹⁴⁹ Torin McFarland, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, 7 SUSQUEHANNA UNIV. POL. REVIEW 45, 59 (2016).

dwarfs the cost of housing death row inmates who do not spend nearly as much time in prison, the numbers show otherwise. This proposal shows that eliminating capital punishment in favor of another form of incarceration will save states thousands of dollars per year in detention costs. The previous sections detailed, on micro and macro levels, the expenses of the death penalty, but the next section explores the proposal to curtail an uncontrolled death penalty.

III. PROPOSAL

Part III of this article addresses the proposal of capping the amount of money that states spend on death penalty trials by utilizing the conditional spending clause. The proverbial “carrot” inducing compliance is federal funding for state law enforcement agencies. Additionally, this article analyzes the law’s constitutionality under the conditional spending clause.

The purpose of this proposal is to curtail rampant death penalty spending using the conditional spending clause. Therefore, there are caps on the amount of money states can spend on the death penalty based on their population. The more populous a state, the more money they can spend. Procedurally, states must submit a proposal at the beginning of the year detailing how they plan to stay below the cap and before receiving the money, they must submit documentation detailing the amount of money they spent. The states, generally, have free rein on how to stay below the cap, but they must not infringe on the rights of the defendants.

The reward structure allows the states to receive compensation equal to the amount they did not spend under the cap. Thus, this encourages them to either not spend at all or spend less. Additionally, there are bonuses rewarding abolishment or non-use. The law provides that the unspent money goes to support state law enforcement agencies. A percentage, however, must go to police training, community outreach, and body cameras while the rest is up to the discretion of the state. Finally, funding will come from the discretionary military budget and total fruition costs \$175 million.

A. Act to Reduce Capital Killings (ARCK)

Staggered Cap based on State population

States with a population of less than 2 million people shall cap death penalty spending at \$1.5 million per year.¹⁵⁰ States with a population between 2,000,001 and 5 million people shall cap death

¹⁵⁰ Includes the 14 states of: Wyoming, Vermont, Alaska, N. Dakota, S. Dakota, Delaware, Montana, Rhode Island, Maine, New Hampshire, Hawaii, Idaho, W. Virginia, and Nebraska.

penalty spending at \$2.5 million per year.¹⁵¹ States with a population between 5,000,001 and 10 million people shall cap death penalty spending at \$3.5 million per year.¹⁵² States with a population above 10,000,001 people shall cap death penalty spending at \$5 million per year.¹⁵³

Reward Structure

All states that stay under their designated cap shall receive federal money for the difference between their cap and their actual spending below the cap.¹⁵⁴ Under the following special instances, the state shall collect a bonus *in addition to* their primary award: (1) States that have abolished the death penalty obtain a bonus of \$500,000 and (2) States which have the death penalty but do not use it, obtain a bonus of \$100,000.

The money received under this act *shall* go toward state law enforcement agencies, wherein 50% of the money shall fund: (1) Increasing the number of officer body cameras; (2) Increasing police training involving the treatment of people of color, immigrants, people with mental disabilities, and members of the LGBTQ+ community; and (3) Increasing forums for officers and community members to interact.

States receiving rewards under this section shall use all the money received or it goes back to the federal government. If every state has abolished the death penalty, the bonus structure shall cease to exist.

¹⁵¹ Includes the 13 states of: New Mexico, Kansas, Mississippi, Nevada, Utah, Arkansas, Iowa, Connecticut, Oklahoma, Oregon, Kentucky, Louisiana, and Alabama.

¹⁵² Includes the 14 states of: South Carolina, Minnesota, Colorado, Wisconsin, Maryland, Missouri, Indiana, Tennessee, Massachusetts, Arizona, Washington, Virginia, New Jersey, and Michigan.

¹⁵³ Includes the 9 states of: N. Carolina, Georgia, Ohio, Illinois, Pennsylvania, New York, Florida, Texas and California.

¹⁵⁴ For example, if the cap is \$1 million and the state spends \$200,000, then their compensation is \$800,000.

Procedure

Prior to receiving funds, states shall submit an annual report to the House¹⁵⁵ and Senate¹⁵⁶ Committees on Appropriations detailing last year's death penalty expenses for evaluation and distribution of funds. Prior to the beginning of the year, states shall submit a written proposal illustrating how the state plans to keep the cost underneath their cap that is subject to the approval of the House¹⁵⁷ and Senate¹⁵⁸ Judiciary Committees.

States have complete autonomy over the implementation of plans to keep costs below the cap, but in doing so, states cannot implement plans that: (1) infringe on the rights and liberties of the defendant; (2) conflict with any pre-existing federal or constitutional laws; or (3) hinder the execution of justice. Accepted methods of implementation include: (1) abolishing or limiting the number of capital punishment cases using the state legislature and courts; or (2) shifting the power to bring capital cases under state purview.

Funding

Approximately \$175 million shall redistribute from the discretionary military budget to carve out funding for this project. Any of the full amount (\$175 million) leftover shall redeposit into the discretionary military spending fund.

B. Constitutionality

Article I, §8 of the United States Constitution says, “The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States [.]”¹⁵⁹ One of the powers created by this language is the conditional spending power. This clause gives the power “to further broad policy objectives by conditioning receipt of federal funds upon compliance by the recipient with federal statutory and administrative directives.”¹⁶⁰ In conditional spending cases, *South Dakota v. Dole* is the controlling law, which reaffirms the idea that

¹⁵⁵ *House Committee of Appropriations*, GOVTRACK, <https://www.govtrack.us/congress/committees/HSAP> (last visited April 15, 2019).

¹⁵⁶ *Senate Committee of Appropriations*, GOVTRACK, <https://www.govtrack.us/congress/committees/SSAP> (last visited April 15, 2019).

¹⁵⁷ *House Committee of on the Judiciary*, GOVTRACK, <https://www.govtrack.us/congress/committees/HSJU> (last visited April 15, 2019).

¹⁵⁸ *House Committee of on the Judiciary*, GOVTRACK, <https://www.govtrack.us/congress/committees/SSJU> (last visited April 15, 2019).

¹⁵⁹ U.S. CONST. art. I, § 8, cl. 1.

¹⁶⁰ *S.D. v. Dole*, 483 U.S. 203, 207 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980), (Opinion of Burger, C.J.).

Congressional objectives not underneath Article I's enumerated powers are attainable through conditional grants of federal funds.¹⁶¹

In *Dole*, there was a rift between the federal government and the state of South Dakota.¹⁶² The District court ruled against South Dakota and the Eighth Circuit affirmed the decision.¹⁶³ The Supreme Court utilizes precedent¹⁶⁴ in affirming the Court of Appeals' decision because §158 is a valid use of the spending power.¹⁶⁵ Additionally, the Court does caution that there are documented instances where persuasion morphs into compulsion.¹⁶⁶ Moreover, the most important takeaway from this decision is the four-part test determining a valid use of the spending power.

The first requirement of a valid use of the spending power is that the exercise of the power must be in pursuit of the general welfare.¹⁶⁷ When evaluating the pursuit of general welfare, Congress' judgment is given substantial deference.¹⁶⁸ The second requirement is that the states' choice in receiving the federal funds must be unambiguous and "enabl[e] the states to exercise their choice knowingly, cognizant of the consequences of their participation."¹⁶⁹ The third requirement is that the conditions for federal grants must be related to a federal interest in a national program or project.¹⁷⁰ The fourth requirement states that a

¹⁶¹ *Id.* ("Thus, objectives not thought to be within Article I's 'enumerated legislative field,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funding.").

¹⁶² *S.D. v. Dole*, 483 U.S. 203, 205-07 (1987) (South Dakota allowed persons nineteen years or older to purchase beer with a content level of 3.2%. In 1984, Congress enacted 23 U.S.C. §158 which withholds federal highway funding from states allowing the purchase or public possession of alcoholic beverages by a person below the age of twenty-one. South Dakota argued that §158 is an over-expansion of Congress' spending power and that setting a minimum drinking age falls within the powers of § 2 of the twenty-first amendment of the Constitution).

¹⁶³ *Id.* at 205.

¹⁶⁴ *Id.* at 209 ("United States v. Butler, *supra* at 66, for example, established that the constitutional limitations on Congress when exercising its spending powers are less exacting than those on its authority to regulate directly."); *S.D. v. Dole*, 483 U.S. 203, 210 (1987) ("We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not comitantly limit the range of conditions legitimately placed on federal grants.")

¹⁶⁵ *Id.* at 212.

¹⁶⁶ *Id.* at 211 ("Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'").

¹⁶⁷ *Id.* at 207; *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *S.D. v. Dole*, 483 U.S. 203, 207-8 (1987); *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) ("[C]onditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'").

constitutional provision must not bar the condition(s).¹⁷¹

1. General Welfare

In instances of general welfare, Congress' reasoning enjoys great deference. There are several feasible rationales under this proposal, however, the most promising justifications regard: (1) funding issues people care about; (2) encouraging fiscal responsibility with the imposition of capital punishment; and (3) improving underfunded state law enforcement. As Part I of this article illustrated, the death penalty is a costly endeavor for even one case. This proposal redistributes taxpayer money and incentivizes states to abolish or reduce death penalty spending.

Additionally, this proposal emphasizes fiscal responsibility regarding capital punishment. Under this proposal, states must think of the ramifications of bringing capital punishment litigation including: (1) the case's cost in totality; (2) the budget implications; (3) the citizens' feelings about losing money for police officers; and (4) the case's worth regarding resources. Moreover, this proposal helps fund police officer training and strengthens the relationship between officers and the community. Given the tumultuous relationship the police currently have with minority groups, both sides of the aisle should agree that refining police training and enhancing the rapport between the community and the police are in the best interest of the general welfare.¹⁷²

2. Exercise of Free Choice & Unambiguous

Another way of explaining this requirement is that the conditions for federal funding must be non-coercive. This proposal fulfils this requirement because there is no consequence for non-compliance. Unlike in *Dole* or *NFIB v. Sebelius*,¹⁷³ Congress encourages compliance with

¹⁷¹ *Dole*, 483 U.S. at 208; *Lawrence County v. Lead-deadwood School Dist.*, 469 U.S. 256, 269-270 (1985); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (per curiam); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968).

¹⁷² *2019 Police Shootings Database*, THE WASHINGTON POST, https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/?utm_term=.06cf164cf9aa (last Updated Feb 5, 2019); *2018 Police Shootings Database*, THE WASHINGTON POST, https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?noredirect=on&utm_term=.0bc70185cc30 (last Updated: Jan. 25, 2019) (In 2018, the fatal force of the police killed 998 people. So far in 2019, the fatal force of the police killed 79 people).

¹⁷³ Part of the Affordable Care Act or Obamacare was using the spending clause to garner compliance with the section regarding Medicaid expansion. Congress was threatening to withhold the entirety of State's Medicaid grants unless the state accepted the new expanded funding and conformed to the new conditions. In the lengthy opinion, the Supreme Court held that the new Medicaid Expansion, under the spending powers, was unconstitutional. The Court states that "Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the states to comply with accompanying conditions, but the States must have a genuine

money, not compliance by withholding funds. If the states choose to proceed over the cap, they are in no worse shape than if the program did not exist. This proposal lacks coercion because non-compliance does not yield a penalty, and it exemplifies a free choice urged by an inducement.

3. Conditions Related to Federal Interest in National Program

As stated previously, the imposition of the death penalty is a burden on citizens and illustrates a lack of fiscal responsibility. The staggered caps of death penalty spending allows the shifting of funds to more favorable issues and increased fiscal responsibility. Congress has a related interest in keeping citizens from overspending on a flawed system filled with exonerations. Even when states do decide to spend on the death penalty, it should not cost citizens millions of dollars to try and then incarcerate the accused.

4. No Constitutional Bar

Of the twenty-seven amendments, there are no obvious constitutional bars because the Constitution fails to mention the death penalty. A Tenth Amendment challenge, however, has merit. The Tenth Amendment allows for congressional powers not delegated by the Constitution, nor prohibited by the Constitution to the states to vest in the states.¹⁷⁴ Conversely, the Supreme Court previously held that the Tenth Amendment does not limit the breath of conditions the government can place on federal funding.¹⁷⁵ The Court even goes further to say that the federal government “does have power to fix the terms upon which its money allotments to states shall be disbursed.”¹⁷⁶ The conditions specifying where 50% of the money goes does not violate the Tenth Amendment because the federal government can decide the terms of their grants. Therefore, the Tenth Amendment does not apply and there is no constitutional bar to the imposition of this proposal.

IV. POSITIVES TO PROPOSAL ENACTMENT

The final portion of this article emphasizes advantages coming from the enactment of this proposal. This section argues for enactment based on rationales that benefit citizens, state governments, and the federal government. The advantages of this proposal are: emphasizing federal power, funding more important issues, increasing money towards state law enforcement, encouraging a closer scrutiny of the death penalty,

choice whether to accept the offer” *NFIB v. Sebelius*, 567 U.S. 519, 587 (2012).

¹⁷⁴ U.S. CONST. amend. X, (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹⁷⁵ *S.D. v. Dole*, 483 U.S. 203, 210 (“We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not comitantly limit the range of conditions legitimately placed on federal grants.”).

¹⁷⁶ *S.D. v. Dole*, 483 U.S. 203, 210 (1987) (*quoting* *Oklahoma v. Civil Service Comm’n*, 330 U.S. 127, 143 (1947)).

and enhancing community relations.

A. Flexing Federal Power

The Tenth Amendment to the Constitution states, “The powers not delegated to the United State by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”¹⁷⁷ Essentially, the powers not afforded to the federal government by the Constitution are therefore, vested in the State governments or the people. The death penalty falls within the authorization of the Tenth Amendment, thereby leading states to dictate whether they abolish or implement it. However, with the problems of the death penalty including moral and financial oppositions, it is time for the federal government to help curtail the death penalty.

The separation of federal and state government powers is sacred with even the appearance of federal government encroachment resulting in bleak outcomes under anti-commandeering laws. However, this proposal will sidestep anti-commandeering statutes while working towards implementing the death penalty in only the most heinous of situations. The federal government will not be trampling states’ rights to make their own laws but will aid the states in restricting a practice that the many find flawed.¹⁷⁸ It is time that the federal government flex their power and pass legislation that will influence states to weigh the financial pros and cons of the death penalty in favor of curbing the rampant and uninhibited spending on capital punishment.

B. Funding Issues the People Want

While attempting to comprehend the gravity of high capital punishment costs, it is important to remember that many of these figures are conservative estimates.¹⁷⁹ California reported a \$4.6 billion price tag for taxpayers in death penalty costs¹⁸⁰ and in Maryland a study estimated that the death penalty costs taxpayers \$186 million over twenty-one years (avg. of \$8.85 million per year).¹⁸¹ Although the United States¹⁸² and the

¹⁷⁷ U.S. CONST. amend. X.

¹⁷⁸ Justin McCarthy, *New low of 49% in U.S. say Death Penalty Applied Fairly*, GALLUP, (Oct. 22, 2018), <https://news.gallup.com/poll/243794/new-low-say-death-penalty-applied-fairly.aspx>.

¹⁷⁹ One of the main limitations involves acquiring the dollar amount prosecutors spend on capital punishment cases. That information is not always readily available unlike independent defense counsel who often bill hourly.

¹⁸⁰ *California Cost Study 2011*, DEATH PENALTY INFO. CTR., available at <https://deathpenaltyinfo.org/california-cost-study-2011> (last visited April 9, 2019).

¹⁸¹ Roman et al., *supra* note 36, at 3; *The Cost of the Death Penalty in Maryland*, URBAN INST. JUSTICE POLICY CTR. 1, 3 (2011).

¹⁸² The U.S. government spent \$3.8 trillion in 2015, between mandatory and discretionary spending; *Federal Spending: Where Does the Money Go?*, NAT’L PRIORITIES PROJECT, available at <https://www.nationalpriorities.org/budget-basics/federal-budget-101/spending/> (last visited April 9, 2019).

individual states¹⁸³ spend millions of dollars yearly, this proposal prompts a better appropriation of taxpayer funds.

The elimination or reduction of the death penalty does not automatically call for a reduction of taxes. However, curtailing the death penalty will foster a redistribution of funds to more pressing issues because of the lack of appeals processes and a reduction in defendants to house. While governments are likely to continue prioritizing certain distributions of funds, \$8.85 million serves a greater purpose going to education, law enforcement, welfare programs, or infrastructure. Although the majority favors the death penalty, support is on the decline. Therefore, there is opportunity for bipartisanship and for crucial issues to gain additional funding under this proposition.

C. Funding the “Boys in Blue”

Part of the police officer’s oath states that “I will always uphold the Constitution, my community and the agency I serve.”¹⁸⁴ Although the relationship between the police and minority groups is troubling,¹⁸⁵ they remain the agency that protects citizens from the dangers of everyday life. As of 2018, states spend roughly \$75 million combined on state police and fire spending.¹⁸⁶ Except for California, no state spends more than \$6 million on the police and fire department,¹⁸⁷ but under this proposal states garner more money to boost the state police forces.

The wonder of this proposal is the flexibility. Half of the money allocates to a set agenda necessary to gather the aid, but the other portion is subject to the will of the state. While this does look like a redistribution of taxpayer money, the money shifts to more popular endeavors. The body cameras and training help enhance officer effectiveness and accountability, but the real key to this proposition lies in the independence of the states regarding the other portion of the money. Additional funding creates more officers within a precinct, establishes an entirely new precinct, allows bonuses for exemplary cops, upgrades old and outdated equipment, or provides for boosted financing for projects funded by the mandatory money like body cameras. The investment into suitable, well-trained, and well-equipped police pays

¹⁸³ State and local governments spent \$3.258 trillion in 2018. *2018 State and Local Government Annual Spending*, GOVTECH, http://www.govtech.com/navigator/numbers/us-state-and-local-government-annual-spending_51.html (last visited April 9, 2019).

¹⁸⁴ Maggie Lourdes, *Do Cops Take an Oath?*, CHRON, available at <https://work.chron.com/cops-oath-22507.html> (last visited April 9, 2019).

¹⁸⁵ Maggie Fox, *Police killings hit people of color hardest, study finds*, NBC NEWS, (updated May 8, 2018, 5:00 AM), <https://www.nbcnews.com/health-news/police-killings-hit-people-color-hardest-study-finds-n872086>.

¹⁸⁶ Christopher Chantrill, *State Police and Fire Spending Rank*, USGOV’TSPENDING.COM, https://www.usgovernmentspending.com/compare_state_spending_2018m50C (Last visited Feb. 5, 2019).

¹⁸⁷ *Id.*

dividends.

D. Closer Scrutinized Death Penalty/Improved Fiscal Responsibility

Often repeated in this article is the phrase “[D]eath is different.”¹⁸⁸ Different authorities and institutions employed rules and regulations governing the death penalty; from the United States Supreme Court,¹⁸⁹ to the American Bar Association (ABA),¹⁹⁰ to the state legislatures.¹⁹¹ Critics and supporters of the death penalty agree that losing an innocent life is unacceptable. This proposal ensures that an already strictly scrutinized death penalty is even more closely inspected into its application.

State and local officials cannot haphazardly or recklessly apply the death penalty under this proposition. The charge of simple murder snowballing into a death sentence is no longer the sole focus. People bringing or motivating the charges must understand the ramifications of death penalty charges in other areas. Under this proposal, the death penalty influences citizens, the police, the federal government, and state legislatures. There is a domino effect that goes above and beyond sentencing a person to death but infringes on people’s money.

The beginning of this article touched on a paper stating that a large portion of the death penalty prosecutions, since the death penalty’s reinstatement, are attributable to a handful of prosecutors.¹⁹² The conduct of these attorneys illustrates the loose practices of the death penalty. The current system shows a lack of oversight and structure needing correction. This plan promotes the implementation of a defined structure that increases the budget for the nation’s protectors and reduces death penalty spending altogether.

E. Enhanced Community Relations

Freddie Gray.¹⁹³ Philando Castile.¹⁹⁴ Alton Sterling.¹⁹⁵ Michael

¹⁸⁸ *Costs of the Death Penalty*, *supra* note 84.

¹⁸⁹ *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Enmund v. Florida*, 458 U.S. 782 (1982); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Baze v. Rees*, 553 U.S. 35 (2008); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

¹⁹⁰ *Wilson*, *supra* note 87.

¹⁹¹ *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

¹⁹² *Jones*, *supra* note 13.

¹⁹³ Rebecca R. Ruiz, *Baltimore Officers Will Face No Federal Charges in the Death of Freddie Gray*, N.Y. TIMES, (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/us/freddie-gray-baltimore-police-federal-charges.html>.

¹⁹⁴ Matt Furber & Richard Perez-Pena, *After Philando Castile’s Killing, Obama Calls Police Shootings ‘an American Issue’*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html>.

Brown.¹⁹⁶ Eric Garner.¹⁹⁷ Tamir Rice.¹⁹⁸ One, if not all, of these names are recognizable as black men killed by police officers. Their deaths sparked riots, outrage, and distrust of police officers throughout the black and other non-white communities. Minority group members fear that they will be the next hashtag, because they disagreed with a cop or reached for their license and registration during a routine traffic stop. Urban Dictionary defines “Driving while Black” as “the name given to the non-existent ‘crime’ of being a black driver, and is generally [sic] racial profiling employed by many police officers.”¹⁹⁹ A term coined in the 1990s,²⁰⁰ driving while black reflects the skepticism the black community has against the police.

Although there is a fragmented relationship between the police and minority groups, the implementation of this legislation helps ease tensions throughout the community. Clearly, the redistribution of funds towards body cameras, increased police training towards minority groups, and more community intimacy with the police is not the linchpin solving racial, gender, and LGBTQ+ tensions.²⁰¹ Nonetheless, funding towards these projects are steps towards easing the rift between the police and the community.

A universal application of body cameras comprising standard officer uniforms holds crooked cops accountable and separates them from the honorable men and women who protect civilians daily. Better training for encounters with minority groups prepares officers for real

¹⁹⁵ Richard Fausset & Alan Binder, *Baton Rouge Officers Will Not Be Charged in Alton Sterling’s Killing*, N.Y. TIMES, (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/us/alton-sterling-baton-rouge.html>.

¹⁹⁶ Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES, (Aug. 10, 2014), <https://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html>.

¹⁹⁷ Mark Morales, *Four years after Eric Garner’s death, officer faces NYPD trial to see if he will keep his job*, CNN (updated Dec. 6, 2018) <https://www.cnn.com/2018/12/06/us/eric-garner-nypd-daniel-pantaleo/index.html>.

¹⁹⁸ Minyvonne Burke, *Officer who fatally shot Tamir Rice quits Ohio police department days after he was hired*, NBC NEWS, (Oct. 11, 2018), <https://www.nbcnews.com/news/us-news/officer-who-fatally-shot-tamir-rice-quits-ohio-police-department-n919046>.

¹⁹⁹ *Driving While Black*, URBAN DICTIONARY, (Aug. 8, 2006), <https://www.urbandictionary.com/define.php?term=driving%20while%20black>.

²⁰⁰ Gary Martin, *The meaning and origin of the expression: Driving while Black*, THE PHRASE FINDER, <https://www.phrases.org.uk/meanings/driving-while-black.html> (last visited Feb. 5, 2019).

²⁰¹ Christy Mallory, Amira Hasenbush, & Brad Sears, *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, THE WILLIAMS INST., 1, 7 (Mar. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf> (A 2013 report focusing on LGBT violence survivors showed that 48% of the survivors reported the experience of police misconduct, including unjustified arrests, excessive force, entrapment and police raids).

world situations and proves that every black individual is not dangerous, that the mentally ill do not automatically pose a threat, and that immigrants are a part of what makes this country great. Funds to improve police involvement in the community entrenches officers in the community and personally vests them in their jobs. This proposal will not cure all the problems between the police and the community but taking actions to better the situation is worth curtailing the death penalty.

CONCLUSION

This article advocates for federal legislation capping the amount of money states spend on the death penalty, utilizing the conditional spending clause to incentivize compliance with federal money for law enforcement agencies. Part I of this article underscored capital punishment costs in states from around the country, with every state showing significantly higher costs for death penalty cases. Part II explained how lengthy appeals, costly experts, and qualified juries are major factors in death penalty expenditures. Part III contained the proposal terms for capping the death penalty, and the reward and funding structure. This section also examined the constitutionality of the proposal under the conditional spending test from *S.D. v. Dole* and compared the proposal to *NFIB v. Sebelius*. Part IV illustrates several benefits of implementation that redistribute death penalty funds in favor of the federal government, state government, and citizens. Overall, this proposal is beneficial, constitutional, and worth the costs of curbing the death penalty.