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THE FISCAL CRISIS AS AN OPPORTUNITY FOR CRIMINAL JUSTICE REFORM: DEFENDERS BUILDING ALLIANCES WITH FISCAL CONSERVATIVES

Randolph N. Jonakait and Larry Eger[1]

The national economic crisis provides a two-edged sword for public defenders and others concerned with the defense of indigents. The trend of slashing defender budgets that existed even before the recent economic downturn can be expected to continue. As Stephanie McAlister notes, "Indigent defense systems nationwide are chronically underfunded, forcing individual lawyers to carry excessive caseloads."[2] Many of these lawyers, operating in crisis mode, are "forced to provide inadequate defense due to underfunding and the subsequent excessive caseloads."[3] For example, "the Missouri State Public Defender system is overworked and underfunded. The office of the public defender faces a caseload crisis, caused in part by an ever-increasing number of prosecutions and a lack of commensurate increases in resources for the system."[4] A committee established by the Missouri Senate in 2006 "found that six years had passed without the public defender's office adding any staff, yet the system's annual caseload totals rose by 12,000 cases."[5] Sean O'Brien asks the following about the Missouri system: "What does a system on the brink look like? Low salaries cause high turnover, low morale, and recruitment difficulties. Some defenders work second jobs to pay student loans. Between 2001 and 2005, the cumulative turnover rate was nearly 100%."[6]

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2. Stephanie I. McAlister, Note, *Between South Beach and a Hard Place: The Underfunding of the Miami-Dade Public Defender's Office and the Resulting Ethical Double Standard*, 64 U. MIAMI L. REV. 1317, 1323 (2010).
3. *Id.*
4. Chris Dandurand, Note, *Walking Out on the Check: How Missouri Abandoned Its Public Defenders and Left the Poor to Foot the Bill*, 76 MO. L. REV. 185, 188 (2011).
5. *Id.*
6. Sean D. O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burdens Alone*, 75 MO. L.

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Minnesota provides another example of a system confronting a crisis. "As a result of budget cuts and the simultaneous effect of increased case filings in Minnesota, the public defender workloads have increased, and the time spent by individual public defenders on cases has also decreased."[7] Minnesota budget cuts have led to large layoffs and unfilled vacancies.[8]

Examples of budgetary problems for defenders abound. McAlister cites funding cutbacks in New York City and Kentucky and notes that "[a]s of November 2008, public defenders' offices in seven states were refusing to take on new cases or had sued to limit them, on the grounds that excessive workloads made it impossible to fulfill their constitutional duties."[9] Florida, too, has been affected by limited funding. "The Sunshine State is not exempt from the growing nationwide indigent defense crisis. The problem in Florida is similar to the problems experienced across the country—too little money, too few attorneys, and too many defendants."[10]

The present economic crisis will only make this situation worse. What Judge Slieter writes about Minnesota applies to much, if not all, of the country. "[T]he economic slowdown has affected the public defense system as drastically as any part of government."[11] Public defenders are facing a deepening crisis because of our governments' financial difficulties.

But these economic problems also present an unusual opportunity for reforming criminal justice. Some fiscal conservatives are

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REV. 853, 866 (2010); *see also* Dandurand, *supra* note 4, at 186 ("New attorneys enter the practice with ever-increasing amounts of law school debt and see little incentive to endure the work load of the public defender system for any longer than it takes to find another job.").

7. Judge Randall J. Slieter & Elizabeth M. Randa, *The Minnesota Public Defender System: A Change of Governance Should Occur for the State to Effectively Fulfill Its Constitutional Obligation*, 37 WM. MITCHELL L. REV. 599, 610–11 (2011).

8. *See* William I. Bernard, *Something's Gotta Give: Minnesota Must Revise Its Procedure for Determining Eligibility for Appointment of Public Defenders*, 37 WM. MITCHELL L. REV. 630, 644 (2011) ("These 2008 vacancies equaled fifteen percent of the total number of public defenders statewide. . . . The Board of Public Defense's anticipated loss of funding from 2009 caused the elimination of ninety-eight attorney positions or twenty percent of the attorney positions statewide.").

9. McAlister, *supra* note 2, at 1323.

10. *Id.* at 1324.

11. Slieter & Randa, *supra* note 7, at 610; *see also* Bernard, *supra* note 8, at 631 ("Given the necessity to balance the state's budget in these difficult economic times, increasing the funding for the Board of Public Defense, while desirable, does not appear to be possible.").

beginning to realize that increased criminalization and lengthier sentences have led to huge increases in prison budgets without truly increasing society's safety. Politicians and organizations that may not have been especially sympathetic to indigent defense in the past are reconsidering many "tough-on-crime" policies because of the harm they do to the economy. Concerned about state taxes and economic health, they are, or should be, concerned about the kinds of criminal justice reform that defenders can support.

Thus, the financial crisis, while causing problems for defenders, also provides an opportunity for defenders to help bring about beneficial changes in criminal justice. Public defenders, with their firsthand experience, perhaps know better than anyone else aspects of the criminal justice system that have senselessly driven up state budgets without increasing public safety. Public defenders should identify and collect data about these policies and laws and present this information to the fiscal conservatives. Defenders should seek to support and expand the conservative reform efforts. And in states where fiscal conservatives have not been advocating reforms, defenders need to educate the public on how tough-on-crime policies are leading to unsustainable budgets. Florida provides an example of the possibilities.

I. FISCAL CONSERVATIVES AND PRISON BUDGETS

Florida TaxWatch, described by others as a "budget watchdog group that gets heavy support from business interests,"[12] identifies itself as a "private, non-profit, non-partisan research institute [whose] mission is to provide . . . high quality, independent research and education on government revenues, expenditures, taxation, public policies and programs and to increase the productivity and accountability of Florida government."[13] TaxWatch has now taken positions on criminal justice that few, if any, fiscally conservative,

12. *Repeal of Mandatory Sentences Urged in Florida*, GAINESVILLE.COM (Mar. 11, 2011, 1:41 PM), http://www.gainesville.com/article/20110311/WIRE/110319894.

13. *About Florida TaxWatch*, FLORIDATAXWATCH, http://www.floridataxwatch.org/aboutus (last visited Feb. 16, 2011).

pro-business groups were taking before the economic downturn. It has suggested a range of changes in Florida's penal laws in order to reduce incarceration rates. The proposals may be driven solely by the recognition that spending money on Florida's prisons is not sustainable for a healthy economy, but defense organizations, which may see additional reasons for reform, should seek to aid and expand the conservative recommendations.

In its recent report, *A Billion Dollars and Growing: Why Prison Bonding is Tougher on Florida's Taxpayers Than on Crime,* Florida TaxWatch charts the enormous growth in Florida's prisons.[14] "From 1970 to 2010, Florida's prison population increased from nearly 8,800 to 102,000."[15] TaxWatch squelches any contention that this resulted merely from Florida's larger populace. "The state's population nearly tripled during that period, but that growth cannot explain the more than eleven-fold increase in the prison population."[16] Instead, Florida simply imprisons a greater percentage of Floridians. "The rate of incarceration . . . has jumped from .13 percent to .54 percent. Forty years ago, the rate of incarceration was one quarter of what it is today."[17]

TaxWatch also dismisses any argument that a rise in crime explains the imprisonment surge:

> If population growth cannot account for the rapid increase in the prison population, the incidence of crime does not explain it either. . . . [W]hile the crime rate has fluctuated over time, there has been a general decline in index crimes since the late 1980's while the prison population rate has

14. COLLINS CTR. FOR PUB. POL'Y & FLORIDA TAXWATCH, A BILLION DOLLARS AND GROWING: WHY PRISON BONDING IS TOUGHER ON FLORIDA'S TAXPAYERS THAN ON CRIME (2011), *available at* http://www.floridataxwatch.org/resources/pdf/04062011ABillionDollarsGrowingWhyPrisonBondingTougherFloridasTaxpayersThanCrime.pdf.

15. *Id.* at 4.

16. *Id.*

17. *Id.* at 5 (quoting FLORIDA TAXWATCH, REPORT AND RECOMMENDATIONS OF THE GOVERNMENT COST SAVINGS TASK FORCE FOR FISCAL YEAR 2011–12 (2010)).

> increased dramatically.[18]

Instead, TaxWatch maintains that the incarceration rate has soared because of pandering to the fear of crime.

> Florida, like many states, has made a series of purportedly 'tough on crime' policy decisions over the past 20 years that have driven increases in incarceration . . . brought about by the public's fear of crime and the corresponding desire of politicians to pander to those fears for the sake of not appearing to be "soft on crime."[19]

As a result, the operating costs of Florida prisons have soared. TaxWatch reports that from 1980 to 2010, operational spending on prisons has gone from $169 million (or about $447 million in inflation-adjusted dollars) to $2.4 billion.[20] And as the report notes, this amount does not capture the capital expenditures necessary for the expansion of prison capacity, which puts burdens on future taxpayers because the construction costs, which until 1993 were financed from general funds on a pay-as-you-go basis, are now underwritten through bonds.[21] TaxWatch concludes,

> Unfortunately for the taxpayers of Florida, by avoiding the hard but necessary choices required to change the criminal justice system, our state leaders have added more finance charges associated with the cost of prison construction on top of the enormous costs that are already associated with failing to properly address the problem of prison growth. Our political leaders are forfeiting our present and

18. *Id.* at 4 (citing *Understanding Florida's UCR Data*, FLA. DEP'T OF LAW ENFORCEMENT, http://www.fdle.state.fl.us/Content/getdoc/685508bc-ce34-4423-b867-827ed0dc6fac/datahistory.aspx (last visited Feb. 16, 2012)).
19. *Id.* at 5.
20. COLLINS CTR. FOR PUB. POL'Y & FLORIDA TAXWATCH, *supra* note 14, at 2.
21. *Id.* at 3.

> future . . . .[22]

This business-oriented organization identifies many of the factors causing Florida's unsustainable situation, which include

> the elimination of parole and the adoption of policies lengthening both sentences and the period of incarceration; widespread use of very short state prison sentences in lieu of community-based alternatives (*e.g.,* jail, probation, treatment, electronic monitoring); and state prison incarceration for technical probation violations.
>
> Perhaps the most significant factor is the trend toward determinate, or "mandatory minimum," sentencing . . . . Sentencing laws such as the "85 percent rule," which mandates that inmates must serve 85 percent of their sentences before release, and other mandatory minimum policies . . . have combined to balloon the prison population and keep inmates there longer . . . .[23]

The incarceration balloon needs deflating, and Florida TaxWatch finds a useful pin in Texas criminal justice reforms. Texas learned that its prisons were jammed with convicts who sensibly could have received alternative, less costly sentences. These include many imprisoned for drunken driving and drug offenses, "most of whom are non-violent or first-time offenders; and large numbers of mentally ill offenders who would be better served in community-based mental health facilities."[24] Texas expanded non-prison substance abuse, mental health, and diversion programs and enhanced the frequency of parole for low-risk prisoners.[25] According to TaxWatch, this reinvestment strategy increased rehabilitation rates and "resulted in

22. *Id.* at 14.
23. *Id.* at 5.
24. *Id.* at 15.
25. COLLINS CTR. FOR PUB. POL'Y & FLORIDA TAXWATCH, *supra* note 14, at 15.

an immediate savings of $210.5 million for years 2008 and 2009, and decreased the state's prison population by 1,257 in 2009."[26]

II. DEFENDERS SUPPORTING CONSERVATIVES

At first blush, defenders might find it galling to support conservative reformers of criminal justice. Defenders have long seen firsthand the destructive, irresponsible effect of many tough-on-crime measures enacted by those proclaiming conservative principles. But what defenders need to remember is that they may have opposed many of those measures, and they still passed. Legislatures have been little swayed by defenders showing the senselessness of many of the last generation's punitive measures. No matter what their motives, fiscal conservatives are more likely than defenders to get serious reform considerations from certain legislators, and consequently, defenders should take a supporting role to such conservatives.

The starting point for reform may be to convince conservatives that they are still conservative even when supporting proposals to ameliorate tough-on-crime practices, and those conservatives are more likely to listen to fiscal conservatives than defenders on this point. Certainly Florida TaxWatch sees it as important to remove the liberal tar brush from those seeking to reform criminal justice. Thus, it desires to have "Florida join the ever-growing . . . range of criminal justice policy reforms led predominantly by conservatives who understand that highly punitive and incarceration-heavy penalties even for minor, non-violent crimes are unsustainable."[27] The organization goes on to say:

> Traditionally, criminal justice reform has been mischaracterized as reflecting "liberal" political leanings; however, the voices calling for smarter approaches now include prominent conservative policy-makers, activists, and commentators. [Leading c]onservatives . . . have

26. *Id.*
27. *Id.* at 2.

> formed a partnership known as Right on Crime to serve as a clearinghouse for conservatives to lead the way in justice reform. As the group notes on its website: "Conservatives are known for being tough on crime, but we must also be tough on criminal justice spending. That means demanding more cost-effective approaches that enhance public safety."[28]

Whatever defenders may feel about this conservative conversion, they should seek to utilize it. If they are in a state where conservatives have not started to advocate criminal justice reform, defenders could, of course, directly make the case for reform, emphasizing the financial impact that tough-on-crime measures have wrought. Charting a state's increased spending on prisons compared to spending on things such as education, roads, and police might be especially eye-catching, and data from states that have reduced budgets by lowering prison populations could be marshaled. But if politicians, worried about appearing soft on crime, have not listened to defenders in the past, they are unlikely to listen to defenders now. Instead, defenders should identify influential, fiscally conservative organizations that should be open to a pragmatic appeal for criminal justice reform, such as chambers of commerce and other business groups, and provide them with the data and arguments, especially from conservative groups, as to why it makes fiscal sense to have reform. Conservative spokespersons are more likely to convince politicians that, in seeking lower incarceration rates, they are not taking the electoral risk of appearing soft on crime. Instead, they are taking the hard-nosed, practical stance of saving tax dollars and advancing important business and other conservative goals.

Although there are no doubt many things that might be circulated to get fiscal conservatives thinking about reform, a good starting point would be to disseminate the 2010 State of the Judiciary Address by Missouri Chief Justice William Ray Price, Jr.[29] In a few

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28. *Id.* at 16.
29. WM. Ray Price, Jr., *Chief Justice Delivers 2010 State of the Judiciary Address*, 66 J. MO. B. 68

pages, Chief Justice Price presents compelling, pragmatic reasons for changing criminal justice. He notes that while his state has enacted tough-on-crime measures,

> [w]hat we did not do was check to see how much it costs, or whether we were winning or losing. In fact, it has cost us billions of dollars and we have just as much crime now as we did when we started. . . . We may have been tough on crime, but we have not been smart on crime.[30]

He especially advocates changes towards nonviolent offenders, who have been increasingly incarcerated at great costs with little gain for public safety.[31] He stresses that this is not merely a Missouri problem and that it should not be a partisan issue. Quoting leaders from around the country, Price concludes, "Republicans and Democrats across the country are waking up."[32]

Chief Justice Price does make some general reform recommendations, but defenders could present to conservatives a more detailed list of possibilities that are accompanied with the fiscal impact of possible reforms. The recent detailed proposals of Florida TaxWatch could be used. While some of those proposals are Florida-centric, the thirty pages of reform suggestions in *Report and Recommendations of the Florida TaxWatch Government Cost Savings for Fiscal Year 2011–12* offers many concrete measures that should apply generally.[33] Perhaps most important for convincing fiscal conservatives of the benefits of reform, the report frequently cites successful efforts in other states with the savings that actually resulted, and it gives realistic, projected budget decreases if such reforms were instituted in Florida.

(2010).

30. *Id.* at 69.

31. *Id.* at 70.

32. *Id.*

33. FLORIDA TAXWATCH, REPORT AND RECOMMENDATIONS OF THE FLORIDA TAXWATCH GOVERNMENT COST SAVINGS TASK FORCE FOR FISCAL YEAR 2011–12 (2010), *available at* http://www.floridataxwatch.org/resources/pdf/12082010GCTSF.pdf.

III. CONSERVATIVE PROPOSALS FOR REDUCING THE PRISON POPULATION

TaxWatch finds essential the creation of a non-partisan commission to do a thorough review of a state's criminal justice and corrections systems. This body should have representation from all branches of government and draw on expertise from many fields including "criminology, sentencing, corrections, veterans affairs, mental health, substance abuse, reentry and community supervision."[34] TaxWatch notes, "Virtually every state that has made the substantive policy changes that have succeeded in reducing the size of their corrections population has accomplished this through a bipartisan deliberative body engaging all three branches of government."[35]

TaxWatch also indicates that fiscal conservatives must change the last generation's predominant philosophy that the primary purpose of sentencing is punishment. Florida has been "consistent with the trend across the U.S. that began in the late seventies with determinate sentencing, focusing on punishment (called 'just deserts'), deterrence and incapacitation."[36] Sentencing then centers on the offenses, prior criminal history, and injury to the victim, but does not address public safety with a concern for recidivism. Instead, fiscal sense requires policies that increase public safety with the least cost. "[P]olicies and practices that address risk at the time of sentencing so that the sentence is most appropriate to the individual defendant's risk of recidivating" must be used.[37] Punishment for punishment's sake has cost the taxpayers much and has not made society notably safer; reducing the rate at which convicted offenders commit future crimes not only can be cheaper, but also increases public safety.

Specific reforms start with the recognition that the vast majority of the imprisoned have been sentenced for nonviolent offenses. TaxWatch reports that in fiscal year 2008–2009, "only 28.2 percent

34. *Id.* at 45.
35. *Id.*
36. *Id.* at 48.
37. *Id.*

of the new admissions to prisons were incarcerated for violent crimes; the rest were admitted for drug, property or 'other' offenses."[38] This trend is not limited to Florida. For example, Missouri Chief Justice Price notes that the number of nonviolent offenders in Missouri prisons has almost doubled since 1994[39] and that the rise in the number of imprisoned nonviolent offenders explains much of the increase in corrections budgets. Chief Justice Price concludes that his state is now "spending $233.4 million a year to incarcerate nonviolent offenders . . . not counting the investment in the 10 prisons it takes to hold these individuals at $100 million per prison. In 1994, appropriations to the Department of Corrections totaled $216,753,472. Today, it's $670,079,452."[40] And fiscal conservatives should see that this has not been money well spent. Chief Justice Price reports that "the recidivism rate for these individuals, who are returned to prison within just two years, is 41.6 percent."[41] If a safer society is the goal, the increased corrections budget contains enormous government waste.

TaxWatch suggests many possible reforms to reduce the incarceration rate of the nonviolent, including more non-state prison sentences, increasing the weights necessary for felony possession of marijuana and cocaine, updating the value thresholds for property felonies, and expanding the use of electronic monitoring. The report supports these reforms by projecting savings. For example, Florida prisons have 2,260 inmates incarcerated for mere possession of marijuana or cocaine, one-third of whom are first-time offenders.[42] "If half of the first-time offenders were diverted from prison, the state could save approximately $6.7 million, annually."[43] A study has shown that electronic monitoring reduces the likelihood of recidivism. If such monitoring was used for the last 20% of half the prisoners' sentences, the state could save $5.7 million.[44]

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38. *Id.* at 50.
39. Price, *supra* note 29, at 70.
40. *Id.*
41. *Id.*
42. TaxWatch, *supra* note 33, at 54.
43. *Id.*
44. *Id.* at 56.

Better drug treatment can reduce incarceration and recidivism, the TaxWatch report notes. About 60% of all Florida arrests are either committed under the influence of drugs or alcohol or in pursuit of drugs or alcohol.[45] Florida has in-prison drug programs, but they do not serve all those who should be treated. "Significant savings could be achieved if certain offenders were allowed to receive treatment outside of the confines of prison during the last portion of their prison sentence, and research shows that programs in the community produce twice the impact on recidivism as the same program behind the walls."[46]

Florida has abolished parole and requires prisoners to serve at least 85% of their sentences.[47] Even relatively minor changes in this requirement can bring great savings. If nonviolent inmates were released after serving 80% of their sentences, more than $13 million could be saved annually.[48]

With increased sentence lengths and the abolition of parole has come an aging prison population. Although "the literature shows that most offenders age out of their crime-committing years," nationally 10% of the prison population is over forty-nine.[49] It is even higher in Florida, and the rate is increasing. It was 5.7% in 1996, 8.0% in 2000, and 16.1% in 2010.[50] The costs of incarcerating the elderly are estimated to be three times that of incarcerating younger prisoners, primarily because of increased medical costs.[51] If elderly prisoners not convicted of capital murder were paroled after serving twenty years, Florida could save $2.6 million a year.[52]

Fiscal conservatives, as indicated by TaxWatch, also have realized that more than a reduction in the incarceration rate is needed. Inmates, no matter the length of their sentences, must be better prepared for a post-prison life. Investment in programs that cut

45. *Id.* at 58.
46. *Id.*
47. *Id.* at 34.
48. TaxWatch, *supra* note 33, at 60.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 61.

recidivism not only pays for itself by reducing future imprisonments, but it also contributes to a safer society. In spite of attempts at reducing Florida recidivism, "about one-third of inmates nevertheless do come back within three years of release. Florida has not focused sufficient resources in preparing them during their previous stints in prison to succeed upon being released."[53] Among other things, TaxWatch advocates expansion of substance abuse and mental health treatment, as well as literacy, education, vocational, and life-management training. Ultimately, "[g]ainful employment is essential to any strategy to reduce recidivism, and thus to reduce crime and make communities safer."[54] Florida, however, like other states, has enacted "a vast, bewildering and unwieldy patchwork of hundreds of state-created restrictions" on the employment of convicts.[55] "For employers, it's a minefield. Hiring in violation of the restrictions can lead to a loss of a business license and other harsh penalties."[56] The state needs a thorough review and reform of these restrictions in order to reduce recidivism.

IV. THE REFORM ROLES FOR DEFENDERS

In states where fiscal watchdogs have not begun a fundamental rethinking of the criminal justice system, defenders should be trying to convince conservative leaders and organizations that rising prison costs are unsustainable and can be safely reduced through the kinds of reforms Florida TaxWatch proposes. In states where fiscal conservatives have already begun to advocate for change, the role of the defenders should be different. Although defenders might be sorely tempted to point out that many conservatives in the past took tough-on-crime positions without any cost-benefit analyses, helping to cause the present crisis, pragmatism dictates resisting this temptation. If conservatives are advocating reform, no matter what their reasons and their past positions, defenders should now aid them,

53. TaxWatch, *supra* note 33, at 63.
54. *Id.* at 66.
55. *Id.* at 67.
56. *Id.* at 67.

and the alliance will not be helped by dredging up previous, inconsistent positions. The political realities are that these fiscal conservatives are more likely to be effective in reforming the system than defenders, and consequently defenders should be content to place themselves in a supporting role on the issues that those conservatives have identified.

Defenders, however, should take additional steps. Their everyday experience with those affected by the tough-on-crime policies gives defenders extensive expertise concerning the waste and costliness of many penal laws and practices that those outside the criminal justice system are unlikely to have. Defenders should be identifying additional reforms that could attract fiscal conservatives, marshaling data about them, and presenting this information to the conservatives spearheading reform efforts. For example, in Florida incarceration rates could be sensibly decreased if convictions for nonviolent second-degree felonies, such as dealing in stolen property or the sale of small amounts of drugs, did not require state prison sentences; if possession of burglary tools was made a misdemeanor; and if the opiate trafficking statutes were based on the actual weight of the drugs and not mixtures containing them.

V. THE REEXAMINATION OF PENALTIES FOR SOME SPECIFIC CRIMES

Defenders have also seen that the last generation's tough-on-crime policies have wastefully increased penalties and conditions for some specific crimes. This has often been the result when the impetus for legislative action has been some well-publicized, violent incident. The resulting legislation often goes well beyond the triggering crime and applies to many nonviolent offenders who pose no real continuing threat to community safety. Such laws may not meaningfully increase societal security, may make recidivism more likely, and usually are enacted with little consideration of costs. Fiscal conservatives should be concerned about such laws.

A. Sex Offender Registration and Related Laws

Prime examples are the special conditions imposed on sexual offenders after the completion of sentences. All states require convicted sex offenders to register home addresses with local officials, often for a lifetime. All the states require community notification of such registrations. Many communities and states place restrictions on where the convicted sex offenders can live or work.[57]

Such laws have often been passed in a misleading way. A study of the debates leading to federal laws concerning sexual offenders indicates the pattern. Supporters cited horrific, well-publicized examples of crimes committed on children and maintained that the laws were necessary for protection against similar acts, but the laws were not limited to those who have victimized children.[58]

The registration, notification, and residence requirements do little to affect public safety because they are based on the myth that children primarily have to be protected from strangers. The rationale is that if we can keep tabs on those strangers and limit their access to where children congregate, safety will be significantly improved. The primary danger, however, does not come on the streets or at bus stops or in schools, but from within the home. "The vast majority of child molestation offenses are committed by non-strangers. Offenses by strangers account for only seven percent of all cases of child sex abuse."[59] Even so, the study of the federal debates found no supporter

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57. *See* Amber Leigh Bagley, *"An Era of Human Zoning": Banishing Sex Offenders from Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1348–49 (2008) ("[A]ll fifty states and the District of Columbia require convicted sex offenders to register their home addresses with local officials. Some offenders must register for a number of years, others for the duration of their lives. All fifty states have also enacted legislation requiring community notification of a sex offender's presence. . . . [S]ome states and cities have gone even further, requiring sex offenders to reside outside restricted zones. . . . [T]he most recent zoning restrictions reach residential and employment options . . . ."); *see also* Meredith Cohen, Notes and Comments, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & POL'Y 717, 741 (2008) ("Approximately 400 municipalities across the country have enacted local zoning ordinances restricting where sex offenders can live.").

58. *See* Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 355 (2001) ("[The] debates framed Megan's Law almost entirely in terms of child protection. This was expected given the name of the bill, but it did not accurately reflect the true scope of Megan's Law [which was not] limited only to offenders who victimize children. Legislators' decision to frame the debate in such limited terms must, therefore, be seen as a conscious rhetorical tactic.").

59. Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U.

making a distinction between familial and non-familial abuse,[60] and the laws do little to affect the rate of abuse by family members and acquaintances.

The laws are overbroad even for addressing the "stranger danger." The registration, notification, and residency laws are not limited to rapists and child molesters. They often include flashers, voyeurs, prostitutes, possessors of child pornography, those in adult incest relationships, and those who have committed bestiality.[61] The person who urinates in an alleyway may be convicted of public indecency, and this can make him a sexual offender and subjected to registration and residency restrictions.[62] Twenty-nine states require registration as sex offenders for those engaging in consensual teenage sex.[63] The laws often treat the included sex offenders as a homogeneous group when they actually present greatly differing public dangers and risks.[64] The eighteen-year-old convicted of having consensual sexual

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L. REV. 853, 887 (2011); *see also* Bagley, *supra* note 45, at 1378 ("[T]he most likely sexual threat to a child is an adult that the child knows well: in ninety percent of child molestation cases, the offender is either a family member or acquaintance of the child."); *cf.* Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R-C.L. L. REV. 435, 453 (2010) ("Perhaps the most prominent myth concerning sex offenders is the concept of 'stranger danger.'").

60. *See* Filler, *supra* note 54, at 332 ("Every congressional story told in support of Megan's Law featured a child victim who suffered serious abuse. Legislators did not tell any stories involving arguably less disturbing offenses like consensual sex with minors or possession of child pornography, both of which fell within the ambit of Megan's Law. More importantly, legislators eschewed accounts featuring adult victims. They focused only on vivid, dramatic, and undeniable cases of child victimization."); *see also id.* at 338 ("Not a single Megan's Law supporter [in the federal debates] cited data that distinguished familial and nonfamilial abuse."); Michael Vitello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 667 (2008) ("[A]bductions and murders[that] command the public's attention, . . . although statistical aberrations, have driven America's policies for dealing with sexual offenders for over a decade.").

61. *See* Yung, *supra* note 55, at 455 (observing that, while rapists, child molesters, and child pornographers have to register, "many other crimes are substantially represented on sex offender registries, including flashers, gropers, voyeurs, prostitutes, persons who have engaged in adult incest relationships, stalkers, and those who have committed bestiality").

62. *See, e.g.*, Bagley, *supra* note 53, at 1388 ("[S]ex offender registration laws have [led] to the regulation of people who are not particularly frightening, such as people convicted of indecent exposure for urinating in public."); *see also* Yung, *supra* note 55, at 456 ("In many states, public urination is prosecuted as public indecency, meaning that those persons so convicted are categorized with flashers.").

63. Cohen, *supra* note 53, at 738 ("Currently, at least twenty-nine states require individuals to register as sex offenders for engaging in consensual teenage sex.").

64. Yung, *supra* note 58, at 455 ("Sex offenders are treated as a uniform population even though they are an incredibly diverse group representing different dangers and risk levels."); *see also* Vitello, *supra* note 59, at 676 ("[L]egislatures have created broad statutory protections based on an incorrect

intercourse with his fifteen-year-old girlfriend surely poses a different societal risk from the child rapist and even the one-time flasher, but all may face the same registration and residency restriction requirements. "There are many persons who are branded sex offenders who have committed crimes that cannot possibly justify the punishments and restrictions to which they are subjected."[65]

No public safety gain has been shown from the registration, notification, and zoning requirements. Studies have found that registration laws have "reduced neither the number of re-arrests for sex offenses nor the proportion of child molestation or incest as compared to other sex offenses. Nor [have the laws] reduced the number of victims."[66] This is not surprising since the laws are aimed at strangers.

> [E]ven if policies aimed at stranger offenses were successful, because strangers make up such a small percentage of child sex offenses, reducing the rate of contact offenses by strangers is likely to have a smaller effect on the overall number of child sex abuse crimes than a measure aimed at intrafamily or other non-stranger offenders.[67]

On the other hand, these additional, often lifelong consequences to sex offense convictions may make it less likely that family and

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view of sexual offenders as a homogeneous group.").

65. Yung, *supra* note 55, at 476; *see also* Vitello, *supra* note 56, at 670–71 ("[Registration is required for] a variety of crimes where the conduct falls far short of the predatory conduct that gave rise to the registration requirements. For example, included are crimes like sexual battery, a variety of offenses dealing with underage sexual partners even if the conduct is factually consensual, and possession of child pornography, all of which present risks far different from those giving rise to the registration laws.").

66. Hessick, *supra* note 55, at 889; *see also* Cohen, *supra* note 53, at 740 (no convincing evidence of public safety gains from registration and notification laws).

67. Hessick, *supra* note 55, at 889–90; *see also* Bagley, *supra* note 53, at 1377 ("Zoning restrictions fail to protect children from sexual threats . . . [because] these restrictions focus on strangers who have been convicted of sex offenses, but strangers are the least likely individuals to sexually assault children.").

juvenile offenders are reported.[68] After New Jersey imposed community notification requirements, it had a decrease in incest reports.[69] The notifications, besides placing a permanent burden on the offender, can often, in effect, tell the community that the offender's child or stepchild was the victim, and many victims and their parents may wish to keep that information private.[70]

While adding little to public safety, the registration, notification, and residency restrictions can greatly burden the offenders. They make it harder to get jobs and education. They make it difficult to find housing, and offenders may have to move out of their communities, causing increased homelessness.[71] What Professor Corey Rayburn Yung says about one offense applies to many:

> A person convicted of a single count of public indecency might be subject to a lifetime of extensive registration requirements that carry hefty prison terms for a single violation. The information required in the registry, including the offender's residential address, email address, and phone number, will be listed on a publicly available database for anyone to view. The convict might be subject to residency restrictions such that he or she can no longer live in large portions of the state in which he or she resides. This can result in physical separation from family (including a spouse) and the only friends that the offender

68. *See, e.g.*, Bagley, *supra* note 53, at 1379 ("[T]he threat of these restrictions is likely to decrease the reports of sexual assault by children's primary threat—family members and friends."); *see also* Vitello, *supra* note 56, at 685 ("Even if they report the crime, they may lose the will to cooperate with the police when they discover the severity of punishment that their family member may face. While family members may favor some state intervention, bringing the full force of current sexual offender statutes to bear may lead the family to lose their nerve.").

69. *See* Bagley, *supra* note 53, at 1384 ("This close association between offender and victim has led to decreased reporting of abuse within families.").

70. *Id.* ("Incest victims fear reporting incest because the combination of registration and notification exposes the victim—who shares the offender's home—to the effects of the regulation.").

71. *See* Bagley, *supra* note 53, at 1361 ("Homelessness is a likely result of being cast out of the community where one lives and works. For a less-skilled individual, or for an individual with highly specialized skills, finding employment within his new community may take time."); *see also* Vitello, *supra* note 56, at 681 (noting that reporting and residency requirements can cause homelessness).

might have ever known.[72]

The laws make it harder for the offender who has completed a sentence to integrate back into the community, and that lack of integration may actually increase recidivism.[73] The laws may be actually making society less safe.

Like many tough-on-crime measures, the registration, notification, and residency restriction laws have been passed without consideration of their monetary costs.[74] Defenders, however, need to stress to fiscal conservatives that the laws, while accomplishing little positively, affect public budgets. Every time law enforcement officers check a registrant's address, money, in effect, is being spent.[75] The registration laws have caused the hiring of extra law enforcement agents.[76] Perhaps the strongest indication of the significant costs comes as a result of a federal law that seeks to have states impose registration and other requirements on sexual offenders. "The penalty for noncompliance for any fiscal year is that a state will lose 10% of funds authorized under the Omnibus Crime Control and Safe Streets Act . . . . Interestingly, every state that has studied the costs of compliance has determined that noncompliance is substantially cheaper."[77]

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72. Yung, *supra* note 55, at 473.

73. *See, e.g.*, Bagley, *supra* note 53, at 1381 (noting that, because recidivism is lowered when an offender can make a successful transition into the community, "ironically, one of the major results of the zoning schemes may be an increased rate of recidivism for sex offenders. . . . By making community living difficult for sex offenders, zoning schemes deny registered sex offenders the opportunity to successfully reenter society and lead productive lives").

74. *See* Filler, *supra* note 54, at 361 (observing that legislators eschewed "the dull, nuts-and-bolts issues, and [avoided] complicated [issues] relating to the efficiency and costs of Megan's Law"); s*ee also id.* at 363 (noting that supporters "did not address the potentially significant economic costs of the bill").

75. *See* Bagley, *supra* note 53, at 1388–89 ("[O]verinclusive registration laws waste police officers' time. For every hour an officer spends checking a flasher's address to ensure he lives there, that officer is not checking on pedophiles, rapists, and other sexual predators.").

76. *See* Yung, *supra* note 55, at 447 ("A recent appropriations bill allocated funds to hire 150 deputy U.S. Marshals who will be solely dedicated to enforcing the Sex Offender Registration and Notification Act . . . .").

77. Yung, *supra* note 55, at 479.

B. Child Pornography Laws

The last generation's tough-on-crime stance has also driven up corrections budgets by its reaction to child pornography. As Carissa Byrne Hessick notes in a recent, excellent article, "The legislative response to the modern increase in child pornography has been uniformly draconian. State and federal governments have drastically increased the criminal penalties for possession of child pornography."[78] Since 2000, a majority of the states have raised the sentences for the crime. Some have made the maximums twenty times longer than before or even authorized life imprisonment.[79] Sentences can be extremely lengthy when each image possessed, usually amassed from the Internet with little effort, is treated as a separate count that results in consecutive sentences.[80] Many places punish mere possession as harshly as the production, manufacture, or distribution of the pornography,[81] and courts have imposed longer sentences for those convicted of possession of pornography than on those convicted of molesting and sexually assaulting children.[82]

If the true goal of criminal justice is the fiscally conservative one of increased public safety, then the draconian penalties for possession of child pornography should correlate to a decrease in child abuse. After reviewing the data, however, Hessick concludes that there is a "lack of empirical support for a link between possession of child pornography and child sex abuse."[83] This is hardly surprising, once again, because the rationale for the harsh sentences sees child abuse coming from strangers, when that is seldom the case. In fact, the lengthy sentences do little, if anything, to make our children safer, but they do add to corrections budgets, and defenders should be presenting these facts to fiscal conservatives.

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78. Hessick, *supra* note 55, at 855.
79. *See id.* at 860.
80. *See id.* at 861–62 ("Treating each image as a separate offense can result in extremely long sentences, especially because the Internet allows individuals to amass a significant number of images with little effort.").
81. *See id.* at 864.
82. *See id.* at 863.
83. *Id.* at 900.

VI. REDUCING PRETRIAL INCARCERATION

Groups such as Florida TaxWatch have focused on state corrections budgets, and the resulting reform proposals center on the treatment of felony convictions. Pretrial incarcerations, however, also cost taxpayers, and defenders should seek to educate fiscal conservatives about those public expenditures and suggest reforms that could reduce them. Needless financial burdens are placed on taxpayers by detaining those who are not a danger and who would appear for court dates if released. Investment in correctly identifying such defendants can save the system money. Appointing lawyers earlier in the process than is now done in many places can be a cost-effective way to reduce the number of needless detentions.

Douglas I. Colbert notes, "In most state and local courts, legal representation of the poor does not commence at the crucial bail stage."[84] Usually these initial judicial pretrial release hearings "are perfunctory":

> They move swiftly, aided by video jail broadcasts, which make it unnecessary even to transport arrestees to the local courtroom. In many jurisdictions, a prosecuting attorney is present and recommends bail, thus stacking the odds even more against an accused. Under these circumstances, many defendants choose to remain silent . . . . [T]he outcome is typically adverse: absent an advocate to provide verified information about an accused's reliable ties to the community, most judges maintain or set bail conditions beyond what the individual can afford.[85]

Concerned about this situation, Colbert and others set up a pilot program in Baltimore. Legal representatives were randomly assigned before the first judicial bail hearing to a portion of the pool of those

84. Douglas I. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1723 (2002).
85. *Id.* at 1726–27.

arrested for nonviolent crimes. The initial bail set by a bail commissioner was nearly identical for the represented and nonrepresented groups, but at the judicial review of that bail, represented defendants were more than four times as likely to have their bail reduced than were the nonrepresented, and the represented were significantly more likely to be released on their own recognizance.[86] More of the represented group gained release from pretrial detention and gained release more quickly than those who were not represented. These outcomes were not the results of lawyerly tricks, obfuscations, or obstruction; instead, lawyers made sure that the court had more complete, relevant knowledge for the bail decision. The lawyer acted as an

> information provider to the court. A lawyer would be expected to investigate the suspect's circumstances and prior history and provide information to the court about their community ties, financial hardships, and prior experiences with arrests, convictions, and court appearances. An attorney would, therefore, have the requisite knowledge to correct any mistaken data about the suspect or her case that the court might receive from other sources (for example, from the prosecutor or pretrial services).[87]

While defenders may see many advantages for effective representation by the appointment of counsel as early as possible,[88] defenders should be emphasizing that appointment before the first judicial bail hearing can reduce the overall costs of criminal justice.

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86. *Id.* at 1753, 1755.

87. *Id.* at 1743–44.

88. *See id.* at 1727 ("[D]enying counsel to an accused indigent during the crucial period following arrest has disastrous consequences on the legal system's ability to render fair and just verdicts. This is the period lawyers recognize as 'most critical' for conducting a 'thoroughgoing investigation' and evaluation of the State's evidence. Delaying a lawyer's immediate entry often translates into prosecuting witnesses becoming unavailable or unwilling to speak to defense counsel and severely impedes the preparation of a meaningful defense. By the time counsel enters the ongoing proceeding, too much valuable time has been lost. The typical detainee is left with little hope of receiving adequate and effective legal assistance.").

The authors of the Baltimore study concluded that "for every person given a lawyer at the bail hearing, we expect to save about 10 bed days overall" of pretrial detention.[89] Since about 90% of the cases entering the criminal justice system are for nonviolent, low-level offenses, reducing needless pretrial detentions by only a week on average can produce significant cumulative savings. In jurisdictions where defenders are not appointed until after the initial judicial bail review, the defenders should be making the case to conservatives for pilot programs for the earlier appointment of counsel so that the increased costs for attorneys can be measured against the savings that result from any lesser pretrial detention that results.

VII. EXAMINING PROMISED SAVINGS FROM ADOPTED REFORMS

Defenders should also be urging fiscal conservatives to analyze whether some instituted criminal justice innovations have delivered the promised savings. In one such reform, instead of bringing detainees to court for an initial bail decision, the detainees appear before a camera and a microphone in the jail with the image and sound piped into the courtroom where the bail decision is made. Such videoconferencing, which promises reduced costs, has been widely adopted.[90] "[T]heir adoption is fueled by the attractions of convenience and the reduction of transportation and other costs associated with live proceedings."[91] The assumption is that a video system brings efficiencies without disadvantaging detainees.[92]

A major study, however, casts doubt upon those rationales for videoconferencing. That study examined the use of videos for bail decisions in Cook County, Illinois.[93] While Cook County maintained

89. *Id.* at 1757.

90. Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 878 (2010). By 2002, the majority of the states allowed some types of criminal proceedings to be held by videoconferencing. *Id.*

91. *Id.* at 877. In addition, "[v]ideoconferenced hearings also have the benefit of reducing safety concerns when prisoners or potentially volatile mentally disturbed individuals are involved, because transporting those individuals to court for a live hearing may pose a security risk." *Id.*

92. *See id.* at 869.

93. *Id.* at 870.

live bail decisions for murder, manslaughter, and sexual assault cases, it instituted a video system for the initial bail determination for all other felonies. The study examined the bail hearings for a period of more than eight years preceding the institution of the videoconferencing and eight years afterwards. The study found that the video hearings had led to an increase in the size of the bail. The average bond amount set in the televised proceedings was 51% higher compared to when the bail hearings were live, while the bond for the felonies that continued to get a live hearing increased an insignificant 13% during the same time period.[94]

Those who conducted the study cannot definitively say why videoconferencing made bail decisions more severe, but they note that other studies have indicated that "there may be some aspects of live presence that affect the believability of an individual."[95] They go on to state:

> If there is something about the presence of a live individual that cannot be replicated even with modern technology, then videoconferenced bail hearings cannot avoid a sacrifice of information that may threaten the quality of bail decisions, and a dehumanization that encourages a harsher response than would occur if the judge were faced with a live individual.[96]

The point to stress to fiscal conservatives, however, is that a program to save money may be actually increasing the burden on taxpayers. Increased bails mean more people detained, and that means higher costs. The study makes this important point:

> Ironically, an overeager welcome of technology can impose costs of its own. By boosting bond levels and decreasing the ability of defendants to obtain release pending trial,

94. *See id.* at 892–96.
95. *Id.* at 900.
96. Diamond et al., *supra* note 84, at 900.

> videoconferenced bail hearings may actually impose financial costs on the justice system by leading to pretrial incarcerations of defendants who would be otherwise released.[97]

This does not mean that innovations that could lead to cost savings without disadvantaging defendants should not be sought. On the other hand, no matter how compelling the logic might seem for a change, a criminal justice system should not simply leap into a wholesale change. As with the videoconferencing, there might be unforeseen, costly consequences. "The needed approach is to conduct pilot programs that include an evaluation of the operation and impact of proposed reforms, rather than simply to impose dramatic system-wide changes, as Cook County did with the videoconferencing bail 'reform.'"[98]

VIII. SAVINGS FROM FRONTLOADING THE MISDEMEANOR SYSTEM

Defenders should also point out to fiscal conservatives how shifting resources for the earlier adjudication of minor offenses can save the criminal justice system money. In many jurisdictions, after bail is set, the case is adjourned for ten days to a month or even forty-five days.[99] At this next court appearance, however, many of those who have been in pretrial incarceration are released from custody for a number of reasons. Often the cases are not prosecuted. In Baltimore, for example, "[m]ore than two out of three District Court cases are ultimately dismissed or placed on the inactive calendar."[100] In addition, as many defenders know, a significant number of low-level offenders plead guilty at their first appearance after the bail setting and are placed on probation or put into diversion programs or receive some other sort of disposition that releases those detained.

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97. *Id.* at 901.
98. *Id.* at 902.
99. *See* Colbert et al., *supra* note 79, at 1722, 1727.
100. *Id.* at 1721–22.

As a result, many jailed for low-level offenses gain release from pretrial incarceration at their first appearance after the bail-setting. Jurisdictions that postpone all low-level cases for two or three weeks or more after the initial bail hearing are wasting money. If instead, the next court appearance for at least the detained defendants were held sooner, the pretrial incarceration rate, along with its costs, would decrease. If fiscal conservatives are seeking to cut the needless costs in criminal justice, the focus should not just be on the needlessly lengthy incarcerations of those charged with serious felonies. In addition, the criminal justice community should focus on the front end of the process, where most defendants face minor charges:

> Immediate decisions would be made to dismiss, to refrain from prosecution, or to offer diversion after arrest. At a time when many jurisdictions are seeing an increase in misdemeanor arrests because of "no tolerance police practices" and an increase in local pretrial jail populations, [more resources earlier in the process can reduce] the costs of overburdened jail and court systems . . . .[101]

IX. REEXAMINE THE DEATH PENALTY

Defenders should also be supplying fiscal conservatives with reasons for a reexamination of the death penalty. When a life-without-parole sentence is the alternative, the death penalty, of course, does nothing to enhance general public safety through reducing recidivism. Only if the death penalty acts as a deterrent to others can it make society safer. Support, however, for its deterrent effect is weak and contradictory. In an excellent review of the data, John J. Donohue and Justin Wolfers note that homicide rates in states with and without the death penalty tend to rise and fall together, and this has been true even when U.S. Supreme Court decisions imposed a moratorium everywhere on capital punishment.[102] This data

101. *Id.* at 1721.
102. John J. Donohue & Justin Wolfers, *Use and Abuses of Empirical Evidence in the Death Penalty*

indicates that any possible effect the death penalty has on murder is small because "most of the variation in homicide rates is driven by factors that are common to both death penalty and non-death penalty states."[103]

While any possible deterrent effect of the death penalty must be minor, it is almost impossible to find because it is "difficult . . . to isolate any causal effects with confidence."[104] Indeed, while some data suggests a deterrent effect, that data simultaneously suggests that the death penalty could actually be associated with an increase in homicide rates.[105] The authors reviewing the data conclude

> that the existing evidence for deterrence is surprisingly fragile . . . . Our estimates suggest not just "reasonable doubt" about whether there is any deterrent effect of the death penalty, but profound uncertainty. We are confident that the effects are not large, but we remain unsure even of whether they are positive or negative.[106]

Donohue and Wolfers are hardly alone in this assessment. The Death Penalty Information Center (DPIC) commissioned a survey of police chiefs, and even a majority of this group did not believe that the death penalty reduced homicides.[107] The DPIC goes on to state:

> A recent survey showed that 88% of the country's top criminologists do not believe the death penalty acts as a deterrent to homicide . . . . Over many years, deterrence studies have been inconclusive, with most experts

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Debate, 58 STAN. L. REV. 791, 800–01 (2005).

103. *Id.* at 801.

104. *Id.* at 806–07.

105. *See id.* at 835 ("[Data] suggested that the true 95% confidence interval runs from each execution causing 23 homicides to each preventing 54 homicides.").

106. *Id.* at 794; *see also id.* at 843 ("The only clear conclusion is that the execution policy drives little of the year-to-year variation in homicide rates. As to whether executions raise or lower the homicide rate, we remain profoundly uncertain.").

107. RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 12 (2009), *available at* http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf.

> concluding that the relative rarity of executions and their concentrations in a few states renders national conclusions about a deterrent effect to the death penalty unreliable.[108]

Defenders should stress to fiscal conservatives that empirical evidence does not support the proposition that the death penalty enhances public safety. And, of course, fiscal conservatives should be able to recognize that the death penalty imposes a major burden on taxpayers.

There is no one accepted method to determine death penalty costs, which will vary depending upon local pay scales and other factors, but it is clear that those costs are high. "Researchers have employed different approaches, using different assumptions. However, all of the studies conclude that the death penalty system is far more expensive than an alternative system in which the maximum sentence is life in prison."[109]

The DPIC concludes, however, that the true cost for the death penalty must not be calculated for a case where an execution occurs, but for the total of all death penalty cases. DPIC notes that a state may spend $1 million more for a death penalty trial than for a non-death proceeding for the same crime. However, if only one in three of these trials results in a death sentence, the one death sentence resulted from $3 million of excess litigation costs. And if only one in ten sentenced to death is actually executed, each execution results from $30 million in excess costs.[110]

A fiscally conservative response might contend that death penalty costs can be reduced. Surely a common thought is that the expenditures are primarily driven by extensive appeal and post-sentencing proceedings. Many may think that streamlining the post-sentencing proceedings will reduce the taxpayers' burden. It is here that defenders can be especially useful by explaining why the death

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108. *Id.*

109. *Id.* at 14. *See also* AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT xii (2006) ("[T]he cost of a capital case resulting in a death sentence far exceeds the cost of a case resulting in a life sentence.").

110. DIETER, *supra* note 101, at 14.

penalty costs so much. The primary generators of excess expenses are the trials, not the post-sentencing proceedings. A North Carolina study found, for example, that the trials cost four times as much as the appeals process.[111] Stripping away appellate and post-conviction rights and remedies will have little overall effect on death penalty costs because the trial expenses will remain.

Defenders should explain the many reasons why a death penalty trial is so much more costly than a non-death penalty proceeding for the same crime. Jury selection will take much longer in the capital case. "Each person's position on the death penalty is explored in detail by the judge, the prosecutor and the defense attorney. Such questioning about the eventual punishment of the defendant would not be allowed in a non-death penalty case, and it makes jury selection take much longer in capital cases."[112] More potential jurors will be needed for the capital case because every juror must be "death qualified," and many will not be. "Potential jurors must be carefully questioned about their willingness to vote for the death penalty or life imprisonment; any prospective juror who cannot fairly consider both sentencing alternatives is excluded from serving."[113]

The guilt phase in a capital murder trial after the jury is selected should not raise different issues from the non-capital case, and we can hope that the lawyers prepare and try each meticulously. The death penalty attorneys, however, have to make special preparations for a possible sentencing phase. If the defendant is found guilty, an additional, separate trial has to be held for the jury to pronounce whether the defendant should be executed, and this proceeding is very expensive.

The attorneys must seek information about possible mitigating and aggravating factors that might be presented to the jury. Mitigating factors can come from any part of a defendant's life, and, therefore, every part of the defendant's existence from birth to the present must be probed. As a result, it is common for at least two prosecutors and

111. *See id.* at 18.
112. *Id.* at 21.
113. *Id.*

two defense attorneys to be assigned to the case so that attorneys can fully explore and prepare for the guilt and penalty phase. And in addition, a well-defended case usually requires the assistance of an expert in mitigation in addition to the attorneys.

The mitigation phase inevitably leads to the presentation of evidence that was not admissible during the guilt phase. The defense, for example, may contend that the defendant was abused as a child and that this abuse is a mitigating factor. Evidence for this contention, which may have occurred decades earlier, may take great effort to unearth. If the defense presents such evidence, the prosecution, of course, can contest it, and the prosecution has to spend comparable efforts in exploring the issue. Even if an insanity defense was not presented at trial, mental illness at any point in the defendant's life might be presented as mitigation. This can require the presentation of psychiatric and psychological experts by both sides who were not presented at the guilt phase. The defense may claim mitigation because of a defendant's military service, and both sides will have to probe military records. The possibilities for mitigation are legion and can take much work to develop.

The prosecution can present evidence about aggravating factors that was not presented at the guilt phase. The prosecution may contend that death is warranted because of other depredations committed by the defendant. The defense in response may contest the prosecution's depictions, and that, in essence, can lead to separate mini-trials. In some states, the prosecution may present evidence of the future dangerousness of the defendant, and this can bring another round of psychiatric and psychological evidence requiring more experts, who must be paid not only for their court time but also for their preparation. And if the defendant is mentally retarded, he cannot be executed without another round of experts and ensuing costs.

In effect, a complete biography of the defendant needs to be prepared by both the prosecution and defense, and the biographical compilation takes much time and money. Relatives, teachers, co-workers, supervisors, friends, acquaintances, doctors, and others who have encountered the defendant from all parts of his life need to be

found and interviewed and, if they have useful information for the penalty phase, prepared for trial and brought to court. Since the penalty-phase evidence is presented to the same jury that decided guilt, the penalty phase is usually held shortly after the verdict on guilt is announced. This means that the work on the penalty phase has to be done before the guilt phase, and it has to be done even if the work turns out not to be necessary because the jury returns a not-guilty verdict to all death penalty counts.

Defenders should point out to fiscal conservatives that the costs of a capital trial can be especially devastating to a locality. In many places, the trial process is funded primarily by the local community, not the state. "An article in the *Wall Street Journal* noted that in states where counties are chiefly responsible for prosecuting capital cases, the expenses can put an extraordinary burden on local budgets comparable to that caused by a natural disaster."[114]

While capital trials are enormously expensive, the death penalty increases budgets in ways other than through litigation. For example, those held under a sentence of death are generally imprisoned separately from the general prison population with increased security, and this costs extra:

> In California, a legislative commission concluded that it costs the state an extra $90,000 for each death row inmate per year compared to the costs of the same inmate housed in general population. With over 670 inmates on death row, that amounts to an additional yearly cost of $60 million

114. *Id.* at 19. John Grisham makes a similar point in one of his novels when a lawyer who had defended death penalty cases states:

> Only a rich person can afford to pay a lawyer for a capital defense, and there are no rich people on death row. . . . The people want the death penalty—something like 70 percent in this state—yet they have no idea how they're paying for it. . . .
>
> From start to finish, the case cost Mingo County $3 million. They were forced to raise property taxes several times, and this led to an uprising. There were drastic budget cuts in schools, road maintenance, and health services. They closed their only library. The county was near bankruptcy for years. And all of it could have been prevented if the prosecutor had allowed the boys to plead guilty and take life without parole.

JOHN GRISHAM, THE CONFESSION 108–10 (Dell Mass Market Ed. 2011) (2010).

solely attributable to the death penalty.[115]

When all the expenses are calculated, each death penalty proceeding imposes a huge burden on taxpayers. A 2000 estimate concluded that Florida spends $54 million a year over what it would spend to punish all first-degree murderers with life in prison without parole.[116]

Fiscal conservatives should see that the death penalty does not demonstrably benefit societal safety. On the other hand, the death penalty greatly burdens taxpayers. The result of such a cost-benefit analysis is clear. Defenders should be presenting this information to fiscal conservatives seeking to get them to join in the movement for abolishing the death penalty.

CONCLUSION

Our present economic crisis will harm those who defend indigents. The chronic underfunding of public defenders can only be expected to get worse. On the other hand, that economic crisis provides an opportunity for meaningful criminal justice reform. Fiscal conservatives have realized that many tough-on-crime policies have not aided public safety, but have increased taxpayers' burdens. Such conservatives are proposing some sensible reforms. Defenders should recognize that fiscal conservatives may be the most likely to get such changes enacted. Defenders should seek to aid the fiscal conservatives on proposals those conservatives have made. Defenders, however, should use their experience to identify other reforms that the fiscal conservatives have not recognized, concentrating on areas of criminal justice that do not enhance societal safety while increasing the taxes that have to be paid.

115. DIETER, *supra* note 101, at 21.
116. *Id.* at 15.