



## THE COST OF THE DEATH PENALTY

Debates on the subject of the death penalty usually turn to issues of fairness, morality, and whether it is an effective deterrent or not. But there is also the question of funding. However crude an economic analysis of the life-or-death issue seems, the funding question is often raised during the death penalty debate.

In past centuries, people found guilty of hanging crimes were taken to the gallows within days of being convicted. Sentencing was quick and inexpensive. The cost of the death penalty was a small fee paid to the executioner plus the cost of building a scaffold. But times have changed. As American society evolved, our system of capital punishment has had to address concerns about fairness, consistency, morality, and the possibility of wrongful conviction. As a result, the death penalty is no longer swift nor cheap.

Proponents of the death penalty sometimes claim that executing murderers saves taxpayers money. Some support capital punishment because they believe it is cheaper to execute a condemned prisoner than to imprison that person for the remainder of his or her natural life. This belief seems reasonable...by killing condemned prisoners we save years or even decades of costs associated with room and board. Correctional facilities are expensive, and a young murderer could live for decades after conviction.

Yet, despite this quick and simple comparison of the costs associated with an execution versus life imprisonment without parole, it is incorrect.

There is no mistake that the cost of life imprisonment without parole - the alternative to a death sentence - is very high. The total cost of life imprisonment without parole must include the construction, financing, and operation costs of a maximum-security cell. The annualized costs of building and operating such a cell are approximately \$5,000, and the cost of maintaining a maximum security prisoner is approximately \$20,000 per year.<sup>1</sup> Taking into account the average age of incarceration for someone convicted of homicide (30.8 years) and the average life expectancy for males in the U.S. prisons, Raymond Paternoster has estimated that the total cost of life without parole ranges from \$750,000 to \$1.1 million per prisoner.<sup>2</sup>

It is possible to imagine a hypothetical case where an execution might be less expensive than life imprisonment. For example, if a healthy twenty-year-old was sentenced to prison and died of natural causes sixty years later, it *might* be more expensive than if he had been sentenced to death and refused to appeal his sentence. But such hypothetical cases miss the point: cost estimates must include the cost of financing our system of capital punishment. It is not the cost of a

particular case that is relevant, it is the full cost of keeping a death-penalty system that consumes time and resources. The costs of complex trials and numerous appeals outweigh the cost of life in prison.

Although the cost of life without parole is high, the cost of capital punishment is far higher. In California, our most populous state, it is estimated that taxpayers could save \$90 million annually by abolishing the death penalty.<sup>3</sup> Between 1977 and 1996, California spent more than \$1 billion on its death penalty system but executed only five men. One of the men asked to be executed. In New York, the Department of Correctional Services calculated that reinstatement of the death penalty would cost the state \$118 million each year.<sup>4</sup>

Even the per-execution cost is high. In Florida, the average cost is \$3.2 million.<sup>5</sup> In Wisconsin, the Legislative Fiscal Bureau has estimated that reinstating the death penalty would cost the state between \$1.6 million and \$3.2 million per execution.<sup>6</sup> In California, capital trials are six times more expensive than other murder trials.<sup>7</sup> Texas kills more condemned prisoners than any other state and it is also the state that has done the most to cut the time between trial and execution. Yet even in Texas each capital case costs taxpayers an average of \$2.3 million, nearly three times the cost of imprisonment in a maximum-security cell for forty years.<sup>8</sup> Capital trials can create a huge financial burden for many counties because they bear a disproportionate share of the costs.

In Lincoln and McCook Counties in South Dakota, for example, the recent

capital trials (Moeller and Anderson) cost the counties almost \$1.5 million. In the most thorough investigation of cost to date, Phillip Cook and Donna Slawson collected data on cost for each phase of the legal process in North Carolina. They concluded that compared to first degree murder cases in which the death penalty is not sought, the *extra* cost of seeing a capital case through to execution is \$2.16 million.<sup>9</sup>

### **WHY THE DEATH PENALTY IS SO COSTLY**

One reason that maintaining the death penalty is so expensive is that capital trials are more complex and time-consuming than other criminal trials at every stage in the legal process: crime investigation, pretrial preparation, jury selection, guilt trial, penalty trial, appeals, and death row.

#### ***Crime Investigation and Pretrial Preparation***

Preparation for the trial begins when the district attorney's office decides to seek the death penalty. An adequate capital trial starts with a thorough investigation of both the crime and the offender. An important part of death penalty representation is the establishment of a professional relationship with the client. Although it is important in every case, consultation with the client is vastly more time consuming and demanding in a death penalty case for several reasons. First, the nature of the penalty phase inquiry requires a relationship which encourages the client to disclose his or her most closely guarded life history with the lawyer. Experiences of mental illness, substance abuse, emotional and physical abuse, social and academic failure, and other "family secrets" must be revealed, researched, and analyzed for the insight they may provide into the underlying causes of the

client's alleged conduct. The establishment of trust and confidence is also vitally important if the lawyer is to convince the defendant to consider an offer to plead guilty, especially because what is offered is likely to be life imprisonment without the possibility of parole. Accepting such a "deal" requires tremendous faith in counsel. Another reason the attorney-client relationship is particularly time-consuming stems from the enormous stress that the risk of a death sentence imposes on both the client and the lawyer; special care must be taken in order to avoid a rupture of the professional relationship that would force counsel to withdraw, delaying the trial.

Another factor affecting the cost and complexity of capital cases is the importance of expert testimony in both the guilt and penalty phases. Payments to experts are a large part of defense costs in federal death penalty cases. Coopers & Lybrand found that about 19% of payments for representation in federal capital cases for FFY1997 went to services other than counsel: primarily experts and investigators.

Finally, pretrial motions (i.e., requests for a ruling from the judge on various legal issues) are numerous and complex. Capital cases usually involve the filing of two to six times as many motions as noncapital cases.<sup>10</sup>

### ***Jury Selection***

The process of selecting jurors also takes longer in capital trials. Not many prospective jurors are able or willing to commit themselves to a trial that may last for weeks or months. Attorneys in capital cases are permitted to excuse more jurors than usual for no stated reason and are given greater latitude in questioning potential jurors. Thus, jury

pools must be larger. In many states, jurors are questioned individually so that their answers will not influence other potential jurors.

Capital trials include the added complication of *death qualification*. For a sentence of death to be imposed, the jury must unanimously make such a recommendation. Therefore, a lone juror who is opposed to capital punishment could vote against recommending the death penalty and, thereby, ensure that the defendant not be sentenced to death. To avoid this possibility, jurors must indicate that they would be willing to vote to impose the death penalty in at least some cases. Jurors who satisfy this requirement are known as "death qualified jurors" and those who are unable to recommend a sentence of death in any situation are known as "excludables." Excludables are prohibited from serving on capital juries.

Finally, attorneys take more time during *voir dire* because jurors are being selected for two trials -- a guilt trial and a separate penalty trial. For these reasons, jury selection takes about five times longer in capital trials than in noncapital murder trials.<sup>11</sup>

### ***Death Penalty Cases involve Two Trials***

The law provides for a two part (bifurcated) trial in a capital case. In the first part, the guilt phase, the jury is asked to determine whether the prosecution has proven, beyond a reasonable doubt, that the defendant has committed a crime punishable by death. If a conviction is returned on a capital count, then in the second part, the penalty phase, the jury must first determine whether the prosecution has proven additional facts (aggravating circumstances) in order to fulfill the

requirements for imposing the death penalty. If so, the jury considers evidence from the prosecution to justify the death penalty, including aggravating circumstances in addition to those required for the threshold finding, and evidence the defense offers as a reason not to sentence the defendant to death (mitigating circumstances).

Lawyers in a death penalty case must prepare for both trials, and must develop an overall strategy that takes the penalty phase into account even in the guilt phase. This means that the way the defense proceeds differs from a non-capital case in important ways beginning with jury selection. For example, facts that make no difference in the determination of guilt or innocence may become very important to the jury's assessment of the defendant's culpability in the penalty phase.

*Complexity of the Guilt Phase.* Death penalty cases generally are highly complex criminal prosecutions, even without taking the penalty phase into account. They often include several felony charges, many witnesses, and evidence gathered from wiretaps, video surveillance, informants, and experts.

*Scope of the Penalty Phase.* Evidence in the penalty phase of a death penalty trial typically includes a wide range of information about the defendant, the victim, and the nature of the offense that is not admissible in the guilt phase. In addition to defending against the prosecution's case for a death sentence, counsel must also plan and present a case for a lesser sentence. The huge amount of information that could be relevant to the penalty phase requires defense counsel to cast a wide net in the investigation of any capital case.

*Special Obligations of Counsel in a Death Penalty Case.* The quality of defense counsel's work must always be extremely high. The special obligations of counsel appointed to a death penalty case is evident when comparing the number of hours billed in capital cases with those billed in non-capital homicide cases.

### **Appeals**

Although most of the money spent on capital punishment is spent before appeals even begin, the complex appeals process for capital cases is also expensive. Cost estimates of appealing a single capital case range from \$170,000 to \$219,000.<sup>12</sup> Capital appeals generally cost more than noncapital appeals because of the complexity of the legal issues involved, the number of different issues that can be raised, and the many possible ways to appeal. Since a high number of appeals in capital cases are successful, and because the defendant's life is at stake, there is great incentive for trying every possible way to appeal. When an appeal is successful, the state must bear the cost of fighting the death sentence *as well as* the cost of imprisoning the convict for life.

### **Death Row Expenses**

Finally, the price tag for capital punishment includes the expense of operating death rows. Death row is an expensive maximum-security unit within a large penitentiary. As many analysts have noted, the demands of running a death row create problems for prison officials. "Without the sentence of death, the condemned would not necessarily be the most dangerous prison inmates demanding the limited single cells available for strict security. In consequence, the prison system is severely restricted in its ability to find

secure space for its own troublemakers."<sup>13</sup> The mere existence of death row has an unsettling effect on the entire prison population, and during the days preceding and following a scheduled execution, disruptive behavior by inmates peaks.

Compared to the massive costs of capital trials, appeals, and incarceration on death row, the cost of building, maintaining, and operating an execution chamber is only a tiny drop in a large bucket. But its worth mentioning. The chamber and the additional personnel time needed to run the execution machinery and to prepare the condemned prisoner for death also add to the cost.

#### **CAN THE COST BE REDUCED?**

Must our system of capital punishment be so time-consuming and expensive? Can the system be simplified to reduce total cost? Some streamlining has already been done. Our current Supreme Court has handed down a series of decisions limiting the scope and variety of postconviction appeals.<sup>14</sup> In 1996, limits on federal appeals went into effect. It is not yet clear whether these new limits will reduce the cost of appeals at the federal level. One possible consequence is that the appellate battles will be shifted to state courts and states will bear a greater proportion of the costs. Many have argued that justice and our ability to detect errors have already been severely compromised by recent reforms. Further streamlining is unlikely for several reasons.

First, in designing a system of capital jurisprudence that passes constitutional muster, the United States Supreme Court has repeatedly emphasized that the punishment of death is qualitatively

different from all other punishments, because of its severity and irrevocability. This "death is different" doctrine holds that capital defendants are entitled to what has been called "super due process." This includes the trial and appeals procedures discussed above. As Justice O'Connor has observed:

Among the most important and consistent themes in the Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.<sup>15</sup>

The unique procedural safeguards alluded to by Justice O'Connor include separate guilt and penalty trials, great latitude in presenting mitigating evidence during the penalty trial, automatic appeal to the state supreme court, and a greater number and variety of opportunities for judicial review of death sentences. The current system was developed over several decades in an effort to increase fairness and to prevent arbitrary or discriminatory sentences of death. There is no inexpensive version of justice in death-penalty cases. Any further attempt to bypass these safeguards may violate the constitutional rights of the defendant.

A second argument against streamlining the current system is that a substantial number of capital convictions and death sentences are overturned on appeal

because of errors. That is, because of mistakes at the initial trial, appeals courts often reduce death sentences to life without parole. For example, 48 percent of direct appeals to the Florida Supreme Court resulted in reversals of either sentence or conviction,<sup>16</sup> and the Georgia Supreme Court overturned 20 percent of the death sentences reviewed on direct appeal.<sup>17</sup> The South Carolina Supreme Court reversed 37 percent of death sentences and 29 percent of convictions for capital crimes.<sup>18</sup> Overall, the rate of reversal for capital cases is about six times higher than the rate of reversals for noncapital cases. A streamlined system

may fail to catch and correct these errors.

### Summary

There is considerable evidence that we could save money if the death penalty were abolished, however many other factors must come into play before a decision can be made. Capital punishment is a very complex issue with many rationales, other than cost, to justify abolishing or retaining it: deterrence, moral issues and retribution, incapacitation, rehabilitation, and the possibility of executing an innocent person

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**This issue memorandum was written by Annie Mertz, Fiscal Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.**

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<sup>1</sup> Cavanaugh, D.P., and Kleiman, M.A., *A Cost-Benefit Analysis of Prison Cell Construction and Alternative Sanctions*.

<sup>2</sup> Paternoster, R., *Capital Punishment in America*

<sup>3</sup> Magagnini, S. *Closing Death Row Would Save State \$90 Million a Year*, Sacramento Bee, March 28, 1988, p. 1.

<sup>4</sup> Moran, R., and Ellis, J. "Death Penalty: Luxury Item" *New York Newsday*, p. 60.

<sup>5</sup> D. Von Drehle, *Bottom Line: Life in Prison One-sixth as Expensive*, Miami Herald, July 10, 1988, p. 12A.

<sup>6</sup> Associated Press. (October 14, 1993). "Senate Will Debate Death Penalty Bill."

<sup>7</sup> Magagnini, S.

<sup>8</sup> Hoppe, C. "Executions Cost Texas Millions." *The Dallas Morning News*.

<sup>9</sup> Cook, P.J. and Slawson, D.B. *The Costs of Processing Murder Cases in North Carolina*. Report to the North Carolina State Justice Institute.

<sup>10</sup> Garey, M. "The Cost of Taking a Life: Dollars and Sense of the Death Penalty." *University of California Davis Law Review*.

<sup>11</sup> Ibid.

<sup>12</sup> Spangenberg, R.L., and Walsh, E.R. (1989). *Facing the Death Penalty* (pp. 169-177).

<sup>13</sup> Nakell, B. "The Cost of the Death Penalty."

<sup>14</sup> For example, see *Barefoot v. Estelle* (1983); *Saffle v. Parks* (1990); *Clemons v. Mississippi* (1990).

<sup>15</sup> *Thompson v. Oklahoma* (1988), p. 865.

<sup>16</sup> Radelet, M.L., and Vandiver, M. (1983). "The Florida Supreme Court and Death Penalty Appeals."

<sup>17</sup> Baldus, D.C., Woodworth, G., and Pulaski, C.L. (1990). *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*.

<sup>18</sup> Paternoster, R., and Kazyaka, A.M. (1988). "The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years." *South Carolina Law Review*, vol. 39, pp. 245-414.