

ADVANCED POLICY ANALYSIS

**Capital punishment at what price: an analysis of the cost
issue in a strategy to abolish the death penalty**

Prepared for Death Penalty Focus of California

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EXECUTIVE SUMMARY

Regardless of how one views capital punishment philosophically, the real world application of a policy where the state poisons human beings is too problematic, and ultimately too costly to California taxpayers. This fact is evident from a study limited to only the trial level application and does not consider any aspect of the appeals process. Of course, even at the trial level there are ways to make the death penalty cheaper, but looking at other states (particularly in the South), the cost savings from employing substandard indigent defenders, for example, saves little and creates a sentencing practice that routinely makes hideous mistakes.

The death penalty is a complex public policy. To make sure it works in a socially acceptable manner—that is, administered fairly with special safeguards to protect the innocent—is time consuming, complicated and ultimately more expensive to the tax payer than life in prison without the possibility of parole. This high price might be justified if it actually made California communities safer from the threat of violent crime, but there is virtually no evidence to support this claim. After decades of extensive inquiry, most studies either determine that there is no added deterrent effect to the death penalty over life in prison without parole, or the statistical models are too crude to answer the question.

Even with cumbersome, burdensome and expensive safeguards mandated by the U.S. Supreme Court, the application of the death penalty is administered unfairly. Today, however, local government cannot pay for even inadequate safeguards. While the Supreme Court mandated procedural protections against bias in sentencing, it did not mandate the budget surpluses with which to administer them. Statistical evidence suggests that revenue-poor counties are charging the death penalty less frequently than revenue-rich counties, presumably to avoid paying for the high cost of the safeguards. Additionally, the high cost of the death penalty is putting an undue strain on counties already cutting back on essential services such as fire and police protection.

Based on a study of data from the Los Angeles County Auditor-Controller, Los Angeles County Superior Court, Los Angeles prosecuting and defense attorneys, the Los Angeles County Jail and the Judicial Council, this study concludes that the enhanced cost of a death penalty case is at least \$1.2 million more than a comparable murder trial pursuing the alternative of life in prison without parole. These savings are entirely at the trial level and do not even consider the cost to county taxpayers as they pay for the mandatory state Supreme Court appeals and potential federal appeals. At this cost, the county of Los Angeles could write a

check to the state department of corrections for the cost of 40 years of confinement in a maximum security prison, pay for a full murder trial with special circumstances and still save nearly \$1 million in scarce public resources by not pursuing a single death penalty trial.

This study is in two parts. Part I is a general overview of the issue of cost in administering the death penalty, focusing primarily on the local county level. It also arrives at a per case cost figure based on data from Los Angeles County. Part II contains recommendations on how to use the information in Part I in Death Penalty Focus' ongoing campaign to abolish capital punishment in California.

PART I

When all is said and done, there can be no doubt that it costs more to execute a man than keep him in prison for life. —Justice Thurgood Marshall¹

Section I: Introduction

Philosophical maxims, moral absolutes and politically charged rhetoric characterize the debate over the death penalty. Taking a human life is ominous and perilous and requires this level of discussion. But while these arguments are cast back and forth in the great halls of policymaking, the squeaky wheels of an underfunded and overburdened county-level bureaucracy churn out death sentences unfairly.

Whether or not capital defendants live or die has more to do with their race and status, the race and status of the victim and increasingly, whether or not they commit a crime in a revenue-rich county. The death penalty is a complex and costly sentence; so costly in fact that other essential services are often sacrificed to pursue it. Consider the following examples:

"If we didn't have to pay \$500,000 a pop for Sacramento's murders," Sierra County's District Attorney said, "I'd have an investigator and the Sheriff would have a couple of extra deputies and we could do some lasting good for Sierra County law enforcement." After a murder wave struck this area in 1988, Sierra County spent millions of dollars on several lengthy death-penalty trials. This overburdening cost forced them to leave unfilled a vacancy in the already understaffed Sheriffs Department during a time when the county's crime rate was on the rise.²

Yolo County is struggling to keep its courts open because of the financial strain created by death penalty cases.³

A prosecutor in Polk County, Florida finds it must make a choice between pursuing a modern fire engine and prosecuting a death penalty case. The County Commission won out. The County got a new fire engine and the DA charged the murder defendant with life in prison.⁴

To make sure it works in a socially acceptable manner—that is, administered fairly with special safeguards to

¹ *Furman v. Georgia* 408 U.S. 238, (1972), p. 357-8.

² Magagnini, Stephen. "Sierra County robs police to pay lawyers." *Sacramento Bee*. Monday March 28, 1988.

³ "Yolo Scrambles to Cope with Strained Courts," *Sacramento Bee*. November 22, 1989.

⁴ Interview with Michael Radelet, University of Florida professor and co-author of *In Spite of Innocence*. (April 30, 1993).

protect the innocent—is time consuming, complicated and ultimately more expensive to the tax payer than life in prison without the possibility of parole. Like so many other things, approving of the popular *idea* of capital punishment is much different from understanding the multitude of problems with actually gassing and poisoning human beings on behalf of the state.⁵ With significant experience in administering the death penalty, retired Chief Justice of the Louisiana Supreme Court, John Dixon, clearly identifies the dichotomy between its theory and practice: "The people have a right to the death penalty and we'll do our best to make it work rationally. But you can see what it's doing. Capital punishment is destroying the system."⁶

Section II: counties on the breaking point, can they afford the death penalty?

Beginning with the fiscal year July 1, 1993 California's 58 counties will suffer a \$2.6 billion reduction in their share of property-tax revenue. Only last year, the counties took a \$1.3 billion cut in these revenues.⁷ Cuts of this magnitude are affecting county programs in health, welfare and public protection. Lassen County offers a good example of how the state is becoming a less safe place due to severe and now chronic budget shortfalls. Sheriff Ron Jarrel talks about how he has lost four deputy sheriffs that once helped patrol the county's 1,800 miles of road. People demand to know why it takes so long for law enforcement to reach a crime scene and "I refer them to our emaciated public service delivery system," he said. "I think the safety of the community has been diminished over the last few years because of the inability of government to fund law enforcement at a level I would consider appropriate," Jarrel said.⁸

The lack of revenue from property taxes, cost shifting from the state to counties, the rising cost of county-funded but state-mandated programs are creating a fiscal crisis for counties. On this front, the near future holds no promise. "What we're going to do to the counties is horrible," said Ann Maitland, a consultant with the California Senate Revenue and Tax Committee. "It's only a question of how horrible."⁹

In a survey of county administrators and city officials, a San Francisco Chronicle article summarized their common response with the conclusion that any further cuts to an already bare bones operation "will

⁵ Support for capital punishment in California is seemingly high. Nearly 80 percent of respondents to a field poll approved of the death penalty. Field Poll cited in Leary, Mary Ellen, "The LWOP Alternative, Public Favors Life in Prison as the Ultimate Sanction," *Los Angeles Daily Journal*, April 24, 1992, p. 3.

⁶ Kaplan, D., "Death Mill, USA," *The National Law Journal*, May 9, 1989, p. 40.

⁷ *The 1993-94 Budget: Perspectives and Issues*, "Making Government Make Sense," (Sacramento, CA: Legislative Analysts Office, 1993).

⁸ Sward, Susan, *San Francisco Chronicle*, March 15, 1993, p. 1

⁹ Ann Maitland, presentation at the Graduate School of Public Policy, Spring Conference. April 17, 1993.

crush services that people want and damage the state's well being."¹⁰ A similar response can be found by local government in Southern California. "What is going on in Sacramento amounts to guerrilla warfare," said San Diego County Supervisor Susan Golding. "They have pitted counties against cities, against schools against special districts in a battle to see whose ox will be gored more deeply."¹¹ This kind of budget meltdown has many casualties, but maybe none more tragic than the future victims of violent crime. The Los Angeles Times reports that the on-going cuts will vary from county to county, "but the officials from Ventura to San Diego are predicting layoffs of deputy sheriffs and deputy district attorneys, jail closures, fewer operating hours for courts, longer response times to crimes and fewer prosecutions." Riverside County District Attorney Grover Trask said, "The public doesn't seem to have a heightened sense of urgency about this yet, and I don't think they ever will—until they become victims themselves."¹²

Revenue constraints imposed by Proposition 13 and the difficulties in getting voter and state approval to raise taxes leave the counties two options: 1) to the extent possible, reduce demand on state-mandated programs (such as the death penalty), and 2) reduce or eliminate services. Support for the death penalty is no longer just a philosophical question; the real questions facing Californians today are: 1) are we, or are our courts, willing to allow a death penalty that is not administered uniformly?; and 2) if we do agree with the death penalty, what services are we willing to forego to pay for it?

Whether or not to have a death penalty is a decision for the state, but the cost of implementation falls largely on the counties where the cases are tried. Counties are responsible for the prosecution, the indigent defense¹³, court and incarceration costs.¹⁴ As a compromise between pro and anti-death penalty factions when the capital punishment was reintroduced to California in 1977, the state agreed to defray some of the cost of the death cases by paying for expert witnesses and investigators for indigent defenders. The state abandoned this \$19 million-a-year commitment, however, in 1990.¹⁵

¹⁰ Sward, Susan, "Counties Learn True Meaning of Dire: Impact of Prop. 13 finally hits home-and there's no help in sight," *San Francisco Chronicle*, March 15, 1993, p. 2.

¹¹ Miller, Joanna, "Counties Brace for Cuts in Police and Other Services," *Los Angeles Times*, September 1, 1992, Washington Edition, B-4

¹² *Ibid.*

¹³ Approximately 98 percent of capital defendants are indigents according to the Legal Tracking Project of Death Penalty Focus. The Legal Tracking Project monitors capital cases statewide.

¹⁴ The high cost of one capital case prompted the Imperial County Board of Supervisors to refuse payment of defense costs. The county budget officer spent three days in jail for refusing to pay the bill. He claimed it would bankrupt the County. (*Corenevsky v. Superior Court of Imperial County*, 682,2d 360 (CA 1984), Marquis, Joshua, "Lawyers, County Battle Over Funds For El Centre Trial," *Los Angeles Daily Journal*, Thursday January 13, 1983.

¹⁵ The cost of this relatively small program totaled \$70 million over its 13-year existence (source: Office of the State Controller, see exhibit 3). Several counties are contesting the state's actions (By a 3-2 vote, the Commission on State Mandates refused Los Angeles County's appeal to have its expert and investigator costs reimbursed by the state. Los Angeles County is now litigating the issue in Superior Court (Interview with Dr. Leonard Kaye, the SB90 coordinator in the

Some might argue that the money saved by not using of the death penalty is small when compared to the budget for the entire criminal justice system. But even this relatively small amount is having a major impact on decisions being made at the county level. Increasingly decisions are made on the margin, frequently forcing the counties to choose between laying off a deputy sheriff or forgoing a reliable fire engine, and pursuing costly capital trials.

A 1990 American Bar Association report on this subject concluded: "the justice system in many parts of the United States is on the verge of collapse due to inadequate funding and unbalanced funding.... the very notion of justice in the United States is threatened by a lack of adequate resources to operate the system which has protected our rights for more than two centuries."¹⁶ Without adequate funding, the current legal and philosophical justifications for the death penalty are moot.¹⁷

Fiscal crisis for the foreseeable future

In an era of growing revenues, Californians might have thought they had the luxury of spending money on programs that were not cost-effective but that provided some emotional or symbolic satisfaction. But this is not an era of growing revenues. The continuing recession in California, combined with increasing costs for non-discretionary programs, is creating a growing deficit between governmental revenues and expenditures. A Legislative Analyst's Office *Policy Brief* reports that

...the annual operating shortfall becomes progressively larger after 1992-93. This projection is based on an extrapolation of our baseline spending estimates and our estimate of the revenues that would be generated by sustained moderate economic growth through 1995-96. The particularly rapid widening of the annual shortfall in 1992-93 and 1993-94 has two causes. First, several major revenue enhancements adopted to resolve the 1991-92 budget gap are either one-time or temporary in nature.... The second reason for the rapidly growing shortfall is that baseline spending increases sharply in 1993-94.

After 1993-94, the operating shortfall continues to widen, but not as rapidly as before. This is due to the ongoing disparity between the rate of annual baseline spending growth and the rate of revenue growth (about 9 percent for spending, versus our estimated 7 percent growth rate.) Our revenue projections anticipate that economic and revenue growth in the 1990s will be somewhat slower than in the 1980s. Spending, however, grows more rapidly than revenues....[But] even with some spending restraint, the

Los Angeles County Auditor-Controller Office. Orange County is also suing the state over the same funds, and Marin County has refused to pay the state \$100,000 it was given for capital cases. (Lichtblau, Eric, "County to Sue for Defending Capital Cases." *Los Angeles Times*, OC edition, March 13, 1993.)

¹⁶ *Funding the Justice System: A Call to Action*, A Report by the American Bar Association, August 1992, at ii, p.3

¹⁷ "Supreme Court Justice Blackmun was among the dissenters when the Court struck down state death penalty laws in *Furman v. Georgia* twenty years ago. In *Sawyer v. Whitley*, Justice Blackmun suggested that this position "has always rested on an understanding that certain procedural safeguards, chief among them the federal judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed." "Today," he said, "I wonder what is left of that premise underlying my acceptance of the death penalty." He concluded, "The more the Court constraints the federal courts' power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself." (Quoted from "Death, Politics, and the Supreme Courts," a speech by Gerald Uelmen, Dean, Santa Clara University School of Law).

budget problem still persists.¹⁸

Most of the baseline-spending increases mentioned in this report are non-discretionary spending in areas such as health, welfare, education and the criminal justice system.

In addition to the structural problems outlined above, California faces further poor revenue prospects in terms of its changing economy and demographic trends. Current job growth in California is primarily in low pay industries and positions. Consequently, the California Office of State Finance predicts that per capita income in the state will slide relative to the nation.¹⁹ This fact negatively impacts both the state's revenue generating capacity and demands on public services. Compounding this trend is the changing profile of the state's citizenry. The California Department of Finance predicts that a relatively high birth rate and net immigration into the state will significantly reduce the number of "*taxpayers*, mainly those in the 18 to 64 age group" in relation to "*tax receivers*, the majority of whom are younger or older."²⁰ Supporting this hypothesis, a California Commission on State Finance report predicts that "caseloads in K-12 education, health and welfare...will continue to grow faster than the state's general population."²¹

This revenue shortfall is particularly harsh on the counties. Counties cannot increase property taxes and must have voter approval to increase other taxes. Even when voters approve of a tax increase, they are not sure whether or not they can implement it. Counties must go through the difficult process of gaining legislature approval to collect any new tax.²² The Legislative Analyst's Office reports that struggling to meet state-mandated programs is a wider phenomenon than popularly understood:

Contrary to widespread belief, low fiscal capacity is not confined to the small rural counties; a number of large counties are also characterized by low or declining fiscal capacity. While the specific contributing factors vary from county to county, low capacity counties generally experience some combination of limited revenue, low growth in revenue, *and/or high or increasing cost for state-required programs* (italics added).²³

Statewide, the cost of state-required programs grew from approximately 50 percent of the general purpose

¹⁸ Rabovsky, Dan, "The State's Fiscal Problem," (Sacramento, CA: Legislative Analysts Office, 1991), pp. 5-6.

¹⁹ *1991 Annual Long Term General Fund Forecast*, (Sacramento, CA: California Commission on State Finance, 1991), p. 10.

²⁰ California Department of Finance, *Long Term Outlook*, as quoted by John Hudzik, "Financing and Managing the Finances of the California Court System: Alternative Futures," 2020 Project. Made available by the Administrative Office of the Courts.

²¹ *1991 Annual Long Term General Fund Forecast*, p. 29.

²² Ann Maitland.

²³ *Major Issues Facing the Legislature*, "Variations in County Fiscal Capacity," (Sacramento, CA: Legislative Analysts Office, 1991), p. 332.

revenues in 1984-85 to 55 percent by 1987-88. In this period, the costs of state-required programs increased 40 percent, while revenue grew only 26 percent.²⁴

Sagging revenues and rising costs of state-mandated programs leave the counties few alternatives other than to cut programs and budgets in police and sheriff departments, fire, safety, infrastructure, welfare and education. While these cuts may be unavoidable in any case, less cutting will certainly be necessary if local prosecutors stop pursuing the death penalty in place of the alternative of life in prison without parole.

Ironically, many Americans consider the death sentence to be a cost saving measure. In a U.S. Department of Justice survey, nearly one out of ten respondents favored the death penalty because it would save taxpayers money.²⁵ Contrary to this popularly held opinion, this study demonstrates that a local district attorney's decision to pursue the death penalty quadruples²⁶ the cost of the trial to county taxpayers. Depending on the number of capital cases in a county, the savings of pursuing Life in Prison rather than death can be dramatic. Based on an analysis of data from the Los Angeles County Auditor-Controller, Los Angeles County Superior Court, Los Angeles prosecuting and defense attorneys, the Los Angeles County Jail and the Judicial Council, this study concludes that the enhanced cost of a death penalty case is *at least* \$1.25 million more than a comparable murder case with a sentence of life in prison without parole.²⁷ These savings are entirely at the trial level and do not even count in the cost to county taxpayers as they share the burden with other California citizens for the mandatory state supreme court appeals and potential federal appeals.

It is unfortunate that something as serious as taking a person's life should be relegated to a debate over dollars and cents. However, the economics underlay much of the death penalty controversy. If the state chooses to execute, there must be a financial commitment to guarantee that the penalty is administered fairly. Moreover, California counties are making the same life and death calculations when they cut the budgets of their emergency response services. Cities and counties are abandoning a preventative stance toward future victims of violent crime by limiting police forces and gutting crime prevention programs. "As a general rule, when [local law enforcement] agencies have to cut back, crime prevention is the first to go," said Nancy Lions in the Attorney General's Crime Prevention Office.²⁸ In an era of dwindling resources, choosing to support the death penalty necessarily means either to not fund, or under-fund other potentially life saving programs.

Section III: What do we get for what we pay?

²⁴ *Major Issues*, p 326.

²⁵ U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics (1984)*, p. 278.

²⁶ See Appendix B for a more complete explanation of this figure.

²⁷ Appendix B.

²⁸ Interview with Nancy Lions. \$97 million was cut from the budgets of local law enforcement in last year's State Budget (Interview with Debbie Vinning, Director of the California State Department of Justice, Community Crime Resistance

"Death is different," according to the U.S. Supreme Court. Since the punishment is unique in its "severity" and its "irrevocability," the Court insists on substantial safeguards to prevent executing innocents, and imposing the penalty in a "capricious" and "freakish" manner.²⁹ Capital punishment requires much more time from lawyers and judges. This high price might be justified if it actually made California communities safer from violent crime, but there is virtually no evidence to support this claim.³⁰ After decades of extensive inquiry, most studies fall into two groups. The overwhelming majority of studies indicate that there is no discernible difference in the deterrent effect of the death penalty and life in prison.³¹ The second group of studies concludes that statistical models are inadequate to determine any effect whatever. For example, Isaac Ehrlich's study was the first to use ordinary least-squares analysis of cross-section data to determine that the death penalty actually deterred murderers. Using precisely the same statistical techniques as Ehrlich, Peter Passell published a study six months later that concluded with this statement: "We know of no reasonable way of interpreting the cross-section data that would lend support to the deterrence hypothesis."³²

A long tradition of social scientist and criminologist studies³³ buttressed with reams of anecdotal evidence from prison wardens, chaplains, psychiatrists and convicted murderers convinced most social scientists to agree with what Thorsten Sellin has called the "inevitable" conclusion that capital punishment does not deter murder.³⁴ The Sellin studies conducted in the United States in 1962, 1967, and 1980 determined that the death penalty has no deterrent effect.³⁵ In the 1970s, however, more complex econometric studies focused on the

Program.

²⁹ The quoted phrases come from two cases: *Gardner v. Florida* 430 U.S. 349 (1977) and *Furman vs. Georgia*, 408 U.S. 238 (1972). In *Gardner* the Justices wrote: "[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. (*Gardner*, p. 357).

³⁰ Peterson and Bailey, "Murder and Capital Punishment in the United States," *Criminal Law in Action* 435 (ed. Chambis) (2nd ed., 1984) and; Lempert, "The Effects of Executions on Homicides: A New Look on an Old Light", 29 *Crime and Delinquency* 88 (1983).

³¹ Fox and Radelet, "Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty," 23 *Loyola Law Review* 29 (1989).

³² Forst, Brian, "Capital Punishment And Deterrence: Conflicting Evidence?" 74 *The Journal of Criminal Law & Criminology* 928 (1983).

³³ No simple criminology textbook published in this century up to the 1970s challenged the claim that the death penalty was not a deterrent. (Bailey, William, "Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago," *The Journal of Criminal Law & Criminology*, vol. 74, No. 3, 1983, p. 828).

³⁴ Bailey, p. 827.

³⁵ Sellin, Thorsten, *The Penalty of Death*, (Beverly Hills, CA: Sage Publications, 1980), pp. 75-88.

deterrence questions using the tools of multiple regression analysis. Of the 20 studies of this type (from 1975 - 1980),³⁶ only two widely discredited studies, concluded that the death penalty was a deterrent (see note below).³⁷

Some evidence even suggests that executions *increase* the number of homicides. One study showed that within one month of every execution in New York since 1930 there were 2-3 *more* murders than the murder rate predicted; possibly due to a "brutalizing effect" state sponsored killing encourages.³⁸ Perhaps George Bernard Shaw was right when he wrote: "It is the deed that teaches, not the name we give it. Murder and Capital Punishment are not opposites that cancel each other, but are similar in that they breed their kind."³⁹

Evidence of the death penalty's lack of deterrence played prominently in the debate, and ultimate abolition of the death penalty in many countries. The British Royal Commission on Capital Punishment analyzed

³⁶ Baily cites: [Cross-sectional examinations of state execution and murder rates for selected years] Baily, "A Multivariate Cross-Sectional Analysis of the Deterrent Effect of the Death Penalty, 69 *Sociology and Sociology Research* 183 (1980); Bailey, "Imprisonment v. The Death Penalty as a Deterrent to Murder, 1 *Law and Human Behavior* 239 (1977); Black and Orsagh, "New Evidence on the Efficacy of Sanctions as Deterrent to Homicide," 58 *Social Science Quarterly* 616 (1978); Ehrlich, "Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence," 85 *Journal of Political Economics* 741 (1977); Forst, "The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960s," 61 *Minnesota Law Review* 743 (1977); Kleck, "Capital Punishment, Gun Ownership, and Homicide," 84 *American Journal of Sociology* 882 (1979); Passell, "The Deterrent Effect of the Death Penalty: A Statistical Test," 28 *Stanford Law Review* 61 (1975). [Time Series analyses of the relationship between execution and murder rates at either the national or state level]; Bailey, "The Deterrent Effect of the Death Penalty: An Extended Time-Series Analysis, 10 *Omega* 235 (1979-1980); Bailey, "The Deterrent Effect of the Death Penalty for Murder in Ohio: A Time Series Analysis," 28 *Cleveland State Law Review* 51 (1979); Bailey, "Deterrent Effect of the Death Penalty for Murder in California," 52 *Southern California Law Review* 743 (1979); Bailey, "Deterrence and the Death Penalty for Murder in Oregon," 16 *Willamette Law Review* 51 (1979); Bailey, "An Analysis of the Deterrent Effect of the Death Penalty in North Carolina," 10 *North Carolina Cent. Law Journal* 29 (1978); Bailey, "Deterrence and the Death Penalty for Murder in Utah: A Time Series Analysis, 5 *Journal of Contemporary Law* 1 (1978); Bowers and Pierce, "Deterrence of Brutalization: What Is the Effect of Executions?," 26 *Crime and Delinquency* 453 (1980); Bowers and Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment," 85 *Yale Law Journal* 187 (1975); King, "The Brutalizing Effect: Executions Publicity and the Incidence of Homicide in South Carolina," 57 *Social Forces* 683 (1978); Klein, Forst and Filatov, "The Deterrent Effect of Capital Punishment: An Assessment of the Estimates," *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (A. Blumstein, J. Cohen and D. Nagin eds. 1978); Passell and Taylor, "The Deterrent Effect of Capital Punishment: Another View," 67 *American Economics Review* 445 (1977); W. Bowers and G. Pierce, "Deterrence, Brutalization or Nonsense?" (1975) (unpublished manuscript); Yunker, "Is the Death Penalty a Deterrent to Homicide? Some Time Series Evidence," 5 *Journal of Behavioral Economics* 45 (1976).

³⁷ Forst, Brian, "Capital Punishment and Deterrence: Conflicting Evidence?" *The Journal of Criminal Law & Criminology*, vol. 74, No. 3, 1983, p. 927. Critiques include: Bowers and Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment," 85 *Yale Law Journal* 187 (1975); Friedman, "the Use of Multiple Regression Analysis to Test for a Deterrent Effect of Capital Punishment: Prospects and Problems, 1 *Criminology Review Yearbook* 61 (S. Messinger and E Bittner eds. 1979); Glaser, "Capital Punishment-Deterrent or Stimulus to Murder? Our Unexamined Deaths and Penalties, 10 *U. Tol. Law Review* 317 (1978); Klein, Forst and Filatov, "The Deterrent Effect of Capital Punishment: An Assessment of the Estimates," *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (A. Blumstein, J. Cohen and D. Nagin eds. 1978); Passell and Taylor, "The Deterrent Effect of Capital Punishment: Another View," 67 *American Economics Review* 445 (1977).

³⁸ William J. Bowers, with G.R. Pierce and J.F. McDevitt, *Legal Homicide: Death as Punishment in America, 1864-1982* (1984) pp. 271-335 and W.J. Bowers, "The Effect of Executions is Brutalization, not Deterrence," in K.C. Haas and J.A. Inciardi (eds.), *Adjudicating Death* (1989), pp. 49-89.

³⁹ Barr, Alan, *Victorian Stage Pulpit: Bernard Shaw's Crusade*, (Athens, GA: University of GA Press, 1974), p. 36.

statistics from seven European and three non-European countries, reporting that no evidence linked abolition of the death penalty to increased homicide rates.⁴⁰ The 1988 Report to the United Nations Committee on Crime Prevention and Control, a detailed international study, found that all of its documented research "has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment."⁴¹ In 1986, ten years after the abolition of the death penalty, the homicide rate in Canada was lower than it had been at any time in the previous fifteen years. The sharp decline in the murder rate was a potent argument used by the Canadian Prime Minister to defeat the movement to reinstitute capital punishment there.⁴²

Section IV: Why It Costs to Execute, the Making of the Modern Death Penalty

The number of recorded executions in California peaked during the 1935-39 period with 57 executions. Executions fluctuated in a downward trend until Aaron Mitchell, the last Californian to be executed before recent times, was put to death in 1967. By the late 1960s, public opinion was evenly split on the efficacy of the death penalty and it had gone unused as a sentence from 1967 until 1972 when the Supreme Court in the *Furman vs. Georgia* decision virtually eliminated capital punishment as it was then administered.⁴³ The decline in executions, which began in the 1940s, and the hiatus in executions from 1967 to 1976 was the result of a number of social forces. There were the growing doubts about the morality of capital punishment; much of Western Europe had set an example by abandoning the death penalty; empirical evidence undermined the belief that capital punishment was effective as a deterrent; and empirical evidence revealed the racially discriminatory imposition of the death penalty.⁴⁴

In the face of this trend, a backlash of increasing support for capital punishment exploded in the late 1960s and early 1970s. Again a number of factors have been attributed to this turnaround. Among the explanations is the frustration over the dramatic increase in violent crime. The murder rate in the U.S. doubled from 1962 to 1972.⁴⁵ From 1960 to 1966, when the population grew by less than 10 percent, the number of total crimes grew by more

⁴⁰ "Report on Capital Punishment," The British Royal Commission on Capital Punishment, (London: Home Office Printing Division, 1953), introduction.

⁴¹ "Human Rights and the United Nations Committee on Crime Prevention and Control," *Annals of the American Academy of Political Science*, 1989, volume 506, p. 68-84.

⁴² Roger Hood, *The Death Penalty: A World Wide Perspective: A Report to the United Nations Committee on Crime Prevention and Control* (Oxford: Clarendon Press, 1989), p. 125.

⁴³ Bedau, Hugo Adam, editor, *The Death Penalty in America*, 3rd ed. (New York: Oxford University Press, 1982) p.23 and 63.

⁴⁴ Bedau, pp. 24-25.

⁴⁵ Holding, Reynolds, "Death Penalty Returns to U.S., But Other Countries Spurn It." *San Francisco Chronicle*, April 13, 1992.

than 60 percent; from 1966 to 1971, the number of crimes grew again by 83 percent.⁴⁶ In addition, American society was undergoing tumultuous social change. In the late 1960s, the majority of white Americans resisted this advance on what they viewed as the status quo and began supporting "tough on crime" conservatives in public office. Liberalism in politics and the courts came to connote, for key voters, the favoring of blacks over whites and permissiveness towards drug abuse, illegitimacy, welfare fraud, street crime, gay rights, perceived anti-Americanism, and open rebellion among the nation's youth.⁴⁷ Against this backdrop, the Supreme Court outlawed the death penalty as it was then administered. The ban was not complete, however, and ultimately gave way to a rising chorus for harsher criminal punishments. Opinion polls show that by 1973, support for capital punishment grew to 60 percent while opposition shrank to 35 percent.⁴⁸

The hiatus of executions was not the result of a complete ban on capital punishment by the Supreme Court. As stated in the discussion on *Furman*, the Court held that the arbitrary and capricious *application* of the death penalty was in violation of the Constitutional protection against cruel and unusual punishment.⁴⁹ Justice Stewart explained:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murder in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has been imposed.⁵⁰

It was not the act of state executions that troubled the Justices. It was how those executions were carried out. In the *post-Furman* world, the death penalty was not illegal, just the arbitrary application of it. If the death penalty could be administered fairly it would not violate the Constitutional protection against "cruel and unusual punishment."⁵¹

The "tough on crime" conservatives seized on this loop hole and four years later proposed a guided sentencing scheme that could meet the rigors of the Super Due Process requirements laid down in *Furman*. In 1976, the *Gregg vs. Georgia* decision set the groundwork for how the death penalty might be reinstated without violating the Eighth or 14th Amendments. Again, the following guidelines were intended to guard against wrongful and biased sentencing practices.

⁴⁶ Thomas Byrne Edsall with Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* (New York: W. W. Norton & Company, 1991), p 51.

⁴⁷ Edsall and Edsall, p. 9.

⁴⁸ Poll conducted by the National Opinion Research Center, cited in Bedau, p. 86.

⁴⁹ *Furman vs. Georgia*, 408 U.S. 238 (1972).

⁵⁰ *Furman vs. Georgia*, 408 U.S. 238 (1972).

⁵¹ Eighth Amendment to the Federal Constitution.

Juries must be given clear guidelines on sentencing, which result in explicit provisions for what constitutes aggravating and mitigating circumstances.

Defendants must have a dual trial—one to establish guilt or innocence and if guilty a second trial to determine whether or not they would get the death penalty

Defendants sentenced to death are granted oversight protection in an automatic appeal to the state supreme court.⁵²

By following these guidelines, any state could re-impose the death penalty without violating a defendant's federally protected rights.

In 1977, the California Legislature enacted a discretionary death penalty statute.⁵³ The new law expanded the factors which must be considered by the trier of fact in determining if the death penalty was appropriate. The 1977 law, however, ushered in the era of "guided discretionary" procedures as outlined in the *Gregg* case. California, following the federal lead, enacted a death sentencing system with the following characteristics. The jury is to be guided by a "narrowed" number of special circumstances that allow for the death sentence. As called for in *Gregg*, the trial is bifurcated, with the same jury considering the question of guilt in the first phase and penalty in the second. During the penalty phase, the defendant introduces to the jury any evidence that might mitigate his or her penalty. The prosecution then can challenge this mitigating evidence and introduce aggravating evidence, such as the impact of the crime on the victim's family or community. A trial judge reviews the verdict independently to determine if the evidence supports it. The State Supreme Court also reviews all death penalty decisions to determine whether or not death is the appropriate sentence. Publicly funded counsel is provided to virtually all of capital defendants because so few can provide this exorbitantly expensive service for themselves.⁵⁴

Section V: What Are We Protecting Against, Issues of Bias and Innocence

Ability to pay influences every issue that makes the death penalty profoundly unfair in its application. Today there are many people who oppose the death penalty because innocent people are killed. Others oppose it because it discriminates against racial minorities. Still others object because the wealthy, with access to the best legal talent, are rarely executed. And while these are problems today, as indicated in the previous discussion on guided sentencing, death-sentencing states have taken steps to alleviate them. Even proponents of capital punishment (outside the South, at least) would not want to return to the days of careless and poorly investigated capital cases; a time in the South when the death penalty was almost exclusively reserved for black defendants who killed white victims; or a time when indigents are forced to defend themselves in an alien courtroom.

⁵² *Gregg vs. Georgia*, 428 U.S. 206-7 (1976).

⁵³ Chapter 316, Statutes of 1977

⁵⁴ These precautions are explained in County of Los Angeles, Test Claim for Defense of Indigents Charged in Capital Cases Under Section 987.9 of the California Penal Code, June 17, 1992.

Nevertheless, the expensive safeguards are not working as promised: biased sentencing persists. The Government Accounting Office reviewed all the recent studies on how race influenced sentencing and came to this conclusion: "Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the (1976) *Furman* decision." The Center for Applied Social Research at Northeastern University research shows that even with *Gregg* safeguards, race, location within a state, and other personal, situation and social influences undoubtedly affect the ultimate sentence. This finding is "replicated in different kinds of studies using different kinds of data."⁵⁵ About the failed safeguards the report says:

Greater guidance in sentencing and stricter separation between the guilt and punishment decisions have failed not only as a solution to the problem of arbitrary sentencing of convicted offenders, but also, contrary to Justice White's hopes, as a statutory guide to the exercise of prosecutorial discretion. The data show that neither prosecutorial decisions made before or after trial nor the judgment of guilt itself is free from recurrent biases...⁵⁶

A capital trial is the result of so many complicated factors, from the moment the prosecutor decides to pursue the death sentence until the final judgment is made in the penalty trial, that the safeguards in *Gregg* at best guard against some biased sentencing practices, not biased outcomes. It is particularly defeating to note that the "the vast difference in the use of the death penalty by location within states observed since *Furman* appears to have been a pattern consistent with the *pre-Furman* era."⁵⁷ One does not need to use a multiple regression analysis to realize that this aspect of the criminal justice system continues to cripple the legitimacy of the institution. "The unfortunate result is that it has become a well known fact-or certainly a well-known perception-that when it comes to African-Americans, those proper procedures are either forgotten by many judges and magistrates or just simply ignored," according to Dennis Schatzman, a former judge, testifying before a Judicial Council of California panel on racism.⁵⁸

Guarding against the possibility of executing an innocent person is both a moral imperative and costly. The need for rigorous protections is real. Since 1900, 400 innocent people have been sentenced to death according to the study *In Spite of Innocence*.⁵⁹ As many as 24 innocent people were executed. Since the 1970s, 34 people have been released as innocent after many years on Death Row—often as a result of accidental discovery of exculpatory

⁵⁵ Bowers, William, "The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes," *The Journal of Criminal Law & Criminology*, vol. 74, No. 3, 1983, p. 1098.

⁵⁶ Bowers, p. 1099.

⁵⁷ Bowers, p. 1099.

⁵⁸ Blau, Lauren, "Courts Harder on Blacks, Panel is Told, Ex-Judge Says Bail, Warrants Are Slanted Against Minorities," *Los Angeles Daily Journal*, Friday June 5, 1992, p. 1

⁵⁹ Hugo Bedau, Michael Radelet, Constance Putnam, *In Spite of Innocence*, (Boston: Northeastern University Press, 1992).

evidence.

In Spite of Innocence recounts the recurring behavior that so often produces "miscarriages of justice." The two most frequent are perjury by prosecution witnesses and mistaken eyewitness testimony. Failures in police investigation and overzealous prosecutors also contribute to this frightening phenomenon. In several cases, the authors found evidence of police harassment of suspects, coerced confessions, suppression of evidence, tampering with evidence, and simply incompetent criminal investigations.

To illustrate, consider the case of Benny Powell and Clarence Chance. They were released from prison in 1992 after serving 17 years for a murder they did not commit.⁶⁰ Deliberate misconduct by Los Angeles law enforcement agents secured murder convictions for Chance and Powell. Fortunately, Chance and Powell were sentenced in 1975, a year when the death penalty was not used in California. Had they been charged with the same crime today, they would have been eligible for the death penalty.

When defense costs for just one defendant climb into the hundreds of thousands of dollars, nearly all of us are brothers as indigent defendants. Californians, though, have made the commitment to fund indigent defense. In 1972, the ballot measure to reorganize the use of the death penalty in California, explicitly provided that: "Our criminal legal system, with its overriding concern for the rights of the accused, includes a fair trial to every person charged with murder regardless of his wealth, education or race. The public provides competent defense counsel, and *all incidents of defense free of charge to those who cannot afford them*, (italics added)"⁶¹

The promise of an adequate defense was made real in 1977 when California's newly guided discretion sentencing system was put in place. At that time, a fund was set up for the sole purpose of providing reimbursements to counties for their costs in pursuing adequate investigation and expert testimony for indigent capital defendants. In 1977 this program amounted to \$1 million a year. By the time it was entirely eliminated by Governor Dukemajian in 1990, the program had grown to \$19 million and played a small but important part in defraying the cost of the death penalty to the counties. In fact, over the 13 years of the program, the state reimbursed \$77 million dollars to the counties.⁶²

The loss of this program is considered to be so dire that several counties are challenging the state's abdication of this responsibility. Los Angeles County is suing the state to recover millions in past due reimbursements; Orange County also recently decided to sue the state, and Marin County is openly challenging Sacramento by refusing to pay unrelated \$100,000 debt until the state reimburses \$100,000 the

⁶⁰ Ford, Andrea, "Outcry Grows in Freed Men's Case," Los Angeles Times, Saturday, March 8, 1992, Metro Section, p. 8.

⁶¹ In the ballot pamphlet, *Proposed Amendments to Constitution, of the General Election, Tuesday, November 17, 1972*.

⁶² California State Controller Office, Survey of PC 987.9 costs made available to Leonard Kaye in the Los Angeles County Auditor-Controller Office.

county spent on investigators and expert witnesses in capital trials.⁶³

Some states do not pay as much for indigent defense, but their standards are outrageously low. The following examples illustrate the trade-off between a bargain defense and justice.

In 1993, an Alabama man was freed after six years on death row. Walter McMillan's death conviction was the result of perjured testimony and evidence withheld from his lawyers.⁶⁴ His survival was only guaranteed by the diligent and free legal work of Bryan Stevenson and the Alabama Capital Representation Resource Center. "The fortunate thing about Mr. McMillian's case is his innocence was demonstrable," Stevenson said. "It's clear he had nothing to do with this crime." He added, "There are other folks in prison who don't have the money or the resources or the good fortune to have folks come in and help them."⁶⁵

In a Louisiana case, the defense attorney for Freddie Kirkpatrick had not noticed until the trial was underway that the murder victim was an old friend. The attorney missed this obvious conflict of interest earlier because he failed to do the appropriate pre-trial preparation. Obligated to finish, the defense attorney told jurors they would be "justified" in sentencing the defendant to death. They did. Kirkpatrick's co-defendant, represented by a different lawyer, received a life sentence for the same crime.⁶⁶

For 15 years, Alabama resident Judy Haney and her children were repeatedly abused by her husband, at times requiring hospitalization. To end the abuse, Haney hired someone to kill her husband. When the time came in her trial to consider any mitigating evidence that might spare her from lethal injection, the defense attorney failed to bring any evidence of abuse, even though local hospital records could have told the jury the macabre story of years of physical and psychological punishment. Without any such knowledge, the Alabama jury sentenced her to death.⁶⁷

In 1988, Texas inmate Robert Streetman was executed six days after he was finally assigned an attorney. "By then it was too late for the attorney to do anything," said University of Texas Law Professor Scott Powe.⁶⁸

Despite such low standards, no states have been able to show that the cost of the death penalty trial is even close to a Life in Prison without Parole (LWOP) trial. Studies nationwide range, but all of them conclude that the death penalty is significantly more expensive than life in prison and very expensive to taxpayers.

The *Dallas Morning News* conducted a review of the death penalty's cost, including six years of appeals, and estimated that each capital case in Texas costs taxpayers \$2.3 million. According to the study, based largely on

⁶³ Dresslar, Tom, "Loss of Defense Funds Threatens Death Cases, *The Los Angeles Daily Journal*, April 17, 1992; and Lichtblau, Eric, "County to Sue for Defending Capital Cases." *Los Angeles Times*, OC edition, March 13, 1993.

⁶⁴ Applebome, Peter, "Alabama Releases Man Held on Death Row for Six Years," *The New York Times*, March 3, 1993, A-1 and B-11.

⁶⁵ Applebome, B-II.

⁶⁶ *General Information on the Death Penalty*, (Oakland, CA: A publication by Death Penalty Focus, 1992), p. 22.

⁶⁷ Lacayo, Richard, "You Don't Always Get Perry Mason," *Time Magazine*, June 1, 1992, p. 38

interviews, the average death penalty case required 7.5 years to prosecute. Imprisoning someone in a single cell, at Texas' highest security prison for 40 years, costs about \$750,000.⁶⁹

A *Miami Herald* study divided the total dollar amount Florida taxpayers spent on the death penalty since 1973 by the number of executions. The resulting figure is \$3.2 million, but the article warns that even this number "is based on the most conservative figures available. The real cost could easily be twice that or more."⁷⁰

Perhaps the most in-depth study to date is the New York State Public Defender's *Capital Losses: The Price of the Death Penalty for New York State* (1982). The New York report identified 144 aspects of the trial as "cost centers." In reviewing 48 of the cost centers, the study projected the cost for the first three levels of review to be \$1,821,000. Forty years in a maximum security prison in New York at that time cost the state \$602,000.

Section VI: The Anatomy of a Death Case, the Costly Distinctions

Data in this study come from Los Angeles County. The data are from a variety of sources including the Los Angeles County Auditor-Controller, Los Angeles County Superior Court, Los Angeles prosecuting and defense attorneys, the Los Angeles County Jail and the Judicial Council of California.

The reason for such a focus is that only a few counties have enough death cases and attorneys dealing with the issue to allow for an in-depth analysis of cost. (38 percent of all death sentences in California last year came from Los Angeles County.)⁷¹ Any wider attempt to study the death penalty would have required embracing an analysis of the entire state, which exceeded the time and resource constraints of this project. (For a detailed discussion of how the data for this section was gathered, see Appendix B.)

Plea Bargaining. Plea-bargaining allows for some concession to the defendant, such as a reduced sentence, in return for an admission of guilt. This practice has been a potent tool in reducing the number of trials in an overburdened criminal justice system. Yet this approach is not effective in capital cases. If a prosecutor offers a lesser charge, the case becomes non-capital.⁷² Pleading guilty to a death charge will almost never happen since the most likely consequence is a speeding-up of the execution process. "In economic terms, therefore, the immediate

⁶⁸ Magagnini, Al.

⁶⁹ Hoppe, Christy, "Executions cost Texas millions," *The Dallas Morning News*, Sunday, March 8, 1992, p.1.

⁷⁰ Von Drehle, Dave, "Bottom Line: Life in prison one-sixth as expensive," *The Miami Herald*, July 10, 1988, p. 12A.

⁷¹ *Criminal Justice Profiles, 1991*, (Sacramento, California: Bureau of Criminal Statistics, Department of Justice, 1991).

⁷² Garey, Mai-got, "The Cost of Taking a Life: Dollars and Sense of the Death Penalty," 18 *University of California, Davis Law Review* 1221, (1985), p. 1247. Garey cites the following as an example of how inflexibility on the death charge can bleed a county financially: "In a 1982-83 California death penalty case, the defendant was found guilty. However, in the penalty phase, the jury deadlocked at 11-1 for death. Although it was acknowledged that a retrial would hurt the already financially strapped county, the prosecutor declined a plea offer and pursued a retrial. The county auditor estimated that the retrial would be more expensive than the first trial.," in note 112, page 1247.

effect of the prosecutor's decision to seek the death penalty is that capital cases become jury trials."⁷³ And again, these will not be the average jury trials; they will be a double trial and far more complex in terms of issues and procedure than a non-death murder trial. For nearly all the cases that are not resolved by plea-bargaining, costs grow exponentially as the case progresses through successive stages.

This part of the study compares two groups of cases. The groups are similar since they both are comprised of cases where the defendant is being tried for first-degree murder with special circumstances. This makes the defendant eligible for either life in prison without possibility of parole or death (a special circumstance is some act committed in the course of a murder that aggravates the defendant's culpability, such as murder in the course of a robbery). Where the two groups differ, however, is that in one group the prosecuting attorney pursued a death sentence throughout the entire trial and the other group had the death penalty dropped before or during the trial. All of the cases in this sample ended in an LWOP sentence.

For convenience, I will refer to the two groups as *Charged* and *Dropped* respectively. While the analogy is not perfect, the *Charged* group is intended to illustrate the cost of pursuing the death penalty adhering to all the Constitutionally-mandated safeguards, while the *Dropped* group is intended to model the costs of prosecuting the most serious murder cases when the death penalty is not an option.

The initial selection of cases for this study was assembled from a larger pool of "perfected" cases.⁷⁴ Perfected cases have no further action pending. That pool was narrowed further by the availability of the case records. Many cases were either in use or missing. To counter the potential bias in such a random selection process, I asked former Los Angeles District Attorney Kurt Livesay to go over an annotated case list and edit out the cases they thought were too far removed from what he considered to be the "typical, well defended case." Mr. Livesay was the sole person responsible for making the decision to pursue death penalty cases in Los Angeles for 17 years. There is no one in Los Angeles who has more experience with the prosecuting side of the death penalty. All the cases were completed between 1989 and 1992.

In looking at the cases for this study, I distinguished a number of indices that I thought might be instructive as to the cost and complexity of a case (see Appendixes C and D for the chart with the indices and values). For example, I compared the two groups on the numbers of trial days, motions and exhibits.

Motions. Once it is established that a death penalty case will not be resolved and is going to a jury trial, there

⁷³ Garey, 1247.

⁷⁴ One problem with this sample is that only "perfected cases," those requiring no further activity, are available. For this reason I was only able to look at cases where death was sought, but the jury chose LWOP, since all death cases are currently on appeal. Consequently, the *Charged* sample probably underestimates the cost and complexity of Death cases. Similarly, the *Dropped* sample over estimates the cost of LWOP cases. Cases in the *Dropped* sample had the death penalty charged initially, but dropped sometime during the trial. Generally the DA makes this decision early in the trial but several weeks can go by where the case is treated as a full blown capital trial. One respondent to the Investigator's fee survey suggested that this process alone was the major wasted cost of the death penalty in Los Angeles since it required such a massive commitment of resources in the beginning of virtually every murder trial even though many are likely to be reduced to an LWOP trial.

is a striking distinction in the increased number of motions that must be filed. Earlier studies have documented the greater number and increased complexity of the motions filed in a capital as opposed to non-capital case. A study by the Southern Poverty Law Center concluded that the number of trial motions for a non-capital case vary between five and seven. In the capital case, however, the comparable number of motions typically was between 15 and 25.⁷⁵ From my survey of Los Angeles cases, the difference in the number of motions was even more remarkable. Capital cases produced an average of 23.8 motions, while non-capital cases averaged only 6.6.⁷⁶ The New York State Public Defenders' Association asserts that even ordinary motions "take on different meaning in death penalty cases; routine motions are generally longer; more complicated, and more heavily litigated."⁷⁷

In terms of complexity and length of time required, the comparisons between the two groups on other aspects of the trial are equally dramatic.

TRIAL DATA⁷⁸	Trial Motions⁷⁹	Avg. Number of Attorneys per defendant	Days to Select Jury	Full Court Days⁸⁰
<i>Charged</i>	23.8	1.8	19.2	129.9
<i>Dropped</i>	6.6	1.4	3.4	19.5

Court time. When the above numbers are broken down into cost figures, they reveal a similar disparity. The cost of operating a courtroom for one day is estimated at \$3,589.⁸¹ In terms of a longer jury selection process, the enhanced expense caused by the death penalty is \$56,706 per case (\$68,909 as opposed to \$12,203). Greater

⁷⁵ Motions for Capital Cases, Southern Poverty Law Center (1981), p. 2.

⁷⁶ See Appendices C and D.

⁷⁷ Capital Losses: The Price of the Death Penalty for New York State, A study prepared for the Legislature and Governor by the New York State Public Defenders' Association, (1982), p. 13.

⁷⁸ These statistics, along with the defense cost data, were collected at the Los Angeles Superior Court, Central Division (see the complete samples in Appendices C and D). Kurt Livesay edited the original sample, leaving only the cases that could meet the description of a "typical, well defended case." This data, along with other survey data in this report, is on file as an Advanced Policy Analysis project at the University of California, Graduate School of Public Policy.

⁷⁹ For this study, simple scheduling motions, including motions for continuance, were not included.

⁸⁰ Full Court Days is an average number of days where the trial took up all of the court's time. These averages do not include the numerous days where the court had to deal with some aspect of the case while not in full session. The times the court had to rule on some aspect of the case (e.g. ruling on a motion for continuance) are recorded as Court Days in Appendices C and D. A conservative estimate would estimate 20 minutes for each one of these occurrences. This could add 5 days to the average number of Full Court Days for the Charged group and 1.2 more days to the average for the Dropped group. Since it is a goal of this project to have all the calculations "above the table," I considered this addition to be too confusing for the reader for inclusion.

⁸¹ Judicial Council report to the Governor and the Legislature, 1991 Annual Report (Judicial Council of California), p 59. The daily figure is a product of the following daily court costs: Judicial position, \$606; non-judicial staff, \$1,668; equipment and supplies, \$822; indirect costs, \$282; bailiff, \$211.

numbers of full court days for the actual trial generate an average expense of \$437,499 for *Charged* and only \$69,986 for *Dropped* case—a difference of \$367,514.

Lawyers. Attorney's fees are the most costly item in a death penalty case budget. *Charged* trials generally require two defense and two prosecuting attorneys. As an indication of this, dividing the total number of defense attorneys by the total number of defendants for *Charged* trials yields a number close to 2 (1.8). Whereas the average number of defense attorneys for *Dropped* defendants is closer to 1 (1.4).

The fees paid to court appointed defense attorneys are traceable. For a given case, a computerized accounting system can total the payments made to the attorneys on a particular case. The defense attorney costs in the sample are readouts from that system (see Appendices C and D). On average, court appointed defense attorneys were paid \$324,665 per *Charged* case and \$78,273 in *Dropped* cases.

Unlike court appointed defense attorney expenses, which are paid on a case-by-case basis, the District Attorney's office does not track its expenditures on death penalty cases. Furthermore, I was unable to get enough responses from prosecuting attorneys explaining the amount of time they need to litigate the type of cases that make up this sample. As a result, I do not have as accurate figures for the Prosecutor Costs in this model. No death penalty cost study, however, has been able to make an accurate estimate of prosecuting attorney costs. This study adopts the New York State Public Defenders approach, borrowing their ratio formula and applying it to the defense costs. The Public Defender's Office developed this ratio by an analysis of statewide disparities between prosecution and defense expenditures.⁸² While this disparity ranged as high as 10 to 1, this study uses the more conservative 2 to 1 ratio for prosecution to defense costs.

Investigators and expert testimony. Both prosecutors and defense attorneys hire highly paid investigators and expert witnesses to help in their litigation. In terms of death penalty versus non-death cases, the use of these services differs dramatically. As discussed, the death penalty trial has one phase to determine guilt or innocence and a second phase to determine the penalty. The penalty phase is unique in that its sole purpose is to gain enough insight into someone's life so that a jury can justifiably give that person the death sentence unless there is enough mitigating evidence to convince them otherwise. As one might imagine, this process requires extensive footwork and research into the defendant's past life history. It also requires the services of psychiatrists and physicians as the defense attorneys attempt to find some mental or physical malady that may have contributed to the defendant's actions. The prosecutor must also hire investigators and experts to deal with this evidence and attempt to counter what evidence the defense investigators and witnesses use. Furthermore, prosecutors have recently been given the legal authority to use what is called victim impact evidence. This evidence is designed to convey to the jury the full impact of the loss suffered by the victim's family, dependents and community because of the victim's death, and is admitted during the penalty phase in order to sway the jury to the harsher punishment.

⁸² *Capital Losses: The Price of the Death Penalty For New York State*, New York State Public Defenders' Association, (1982).

Analysis of the defense cost for such services are based on a survey of public defenders and court appointed defense attorneys. Presented with a list of litigation and investigation costs generated by the Los Angeles Auditor-Controller's Office, the attorneys were asked to choose which case costs were in the "middle range" of cases. If the payment to investigators and expert witnesses appeared too high or low, it was dropped from the list. (All the studies on cost indicate that prosecutors spend more money on these services, especially when their use of police investigator and forensic services is factored in. However, I was unable to get hard data from the Los Angeles District Attorney's Office on this point.)⁸³ Based on several interviews with defense and prosecuting attorneys, this study assumes the prosecution costs are at least equal to the defense cost for these services. For that reason, I applied the cost findings for the defense to the prosecution.

Incarceration. The time value of money is central to any discussion of expenses over several years, such as incarceration costs. Before exploring the particular dollar amounts associated with incarceration cost in my analysis, I need to explain the principle of *discounting* I applied.

There is a distinct difference between funding projects that require a lump sum of money up front and those projects where the costs are spread out over time. Money that is not used for a project is not money that would simply stand idle.⁸⁴ If the lump sum was not spent, it would be used in some wealth-generating capacity and increase the value of the original sum. For example, if you put \$100 in the bank today, at an interest rate of six percent, you would earn six dollars and have \$106 next year. Similarly, if you needed to pay a debt of \$100 next year, one could put a little more than \$94 in the bank today and have \$100 next year. In other words, if I had a \$100 debt due today and decided to pay it today with the \$100 I have in the bank, I would break even. But, if I had the option of paying that \$100 bill over ten years, I could pay \$10 this year and keep \$90 in some investment, such as a savings account. After ten years' time, I would not only have paid the debt with my \$10 installments, but I would also have \$37 left over from the interest paid on the money left in my dwindling bank account (assuming a six percent interest rate).

Virtually all of large public and private projects must undergo some type of analysis that includes considerations of costs over time. The discount rate, like the bank's interest rate, is the rate used to calculate the present value of some future expense. The Internal Revenue Service currently uses 6.5 percent to determine the net present value of a future stream of payments.⁸⁵ For the purposes of this study, the net present value of the money necessary to support a prisoner over time (9 years on death row, 40 years for LWOP inmates) is computed with a same discount rate of 6.5 percent.

⁸³ *Capital Losses*, p. 10.

⁸⁴ Stokey, Edith and Zeckhauser, Richard, *A Primer for Policy Analysis* (New York: W.W. Norton, 1978), p.170

⁸⁵ Internal Revenue Service Advance Revenue Ruling 93-92 applicable federal rates for May 1993 (Issued April 19, 1993, cited in *BNA Taxation, Budget and Accounting Text*, p. L-1).

The national average of time a capital defendant spends on Death Row is nine years, eight months.⁸⁶ There are many bottlenecks along the road to an execution that do not appear to be changing in the near future. Even the most draconian measures limiting *habeas corpus* by the Supreme Court will not eliminate the crunch for court time, the dearth of qualified lawyers to argue death cases and the other avenues to appeal. The lack of plea-bargained cases, greater complexity of the trial, and the dual trial format all lead to increased court time for capital trials at the trial level. In Los Angeles County this delay typically requires 2.5 years just to get to the appellate levels as opposed to the average of one year for LWOP cases.⁸⁷ Once the death sentence has been secured and the defendant is moved to San Quentin's Death Row, there again are bottlenecks in both the limited time the State Supreme Court has to look over these cases and in the scarcity of qualified lawyers who are willing to argue the appeal.⁸⁸ In an attempt to get at the enhanced cost of the death penalty, one must put the cost of 9 and 2/3 years in prison on death row against the 40-year average life expectancy of a prisoner sentenced to life in prison.⁸⁹ There are no figures available for the per inmate cost of a prisoner on death row. Consequently, I am using only the average cost to house an inmate at San Quentin, although Christine May, an Information Officer at the California Department of Corrections, points out that the death row inmates in that prison are the most expensive. San Quentin's average prisoner cost is \$21,440 a year.⁹⁰ The cost to house one prisoner in the state's maximum security prison in Folsom is \$21,067.⁹¹ Thus, housing a defendant the nine years on death row will cost the state \$189,603 in static dollars. Housing the LWOP defendant for 40 years will cost the state \$821,613 (again in nominal dollars only). But if we discount these costs to adjust for the extra cost of using money now instead of later, we get these figures: \$140,224 for an average death row stay, and \$301,553 for the life sentence.

Incarceration	Years	Yearly Cost	Nominal Cost	Discounted Cost⁹²
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⁸⁶ A press release from the U.S. Department of Justice: "BJS a Department of Justice component in the Office of Justice Programs, reported that those executed during 1991 had spent an average of nine years and eight months awaiting execution, about one year and nine months longer on the average than the 23 people executed during 1990." (October, 23, 1992).

⁸⁷ Interview with Kerry Fuse, Los Angeles County Superior Court, Budget Division, April 7, 1993.

⁸⁸ "Death Penalty Backlog," California Lawyer, June 1992, p. 36.

⁸⁹ The 40-year figure comes from Stephen Magagnini's article "Closing death row would save the state \$90 million a year," *Sacramento Bee*, Monday, March 28, 1988, A1. Every cost study I have seen also uses the 40-years as the life expectancy in prison, see notes 70, 71, 71 and 74.

⁹⁰ Interview with Christine May, Information Officer, California Department of Corrections.

⁹¹ Christine May.

⁹² The discounted costs in these cells represent the net present value of the stream of payments necessary to house a prisoner on death row for nine years and a Life In Prison inmate for 40 years. The rate used, 6.5 percent, is the "applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or revisionary interest," according to the Internal Revenue Service Advance Revenue Ruling 93-92 applicable federal rates for May 1993 (Issued April 19, 1993, cited in BNA Taxation,

<i>Charged</i>	9	\$21,440	\$150,080	\$140,224
<i>Dropped</i>	40	\$21,067	\$821,613	\$301,553

When all the quantifiable factors are added up, the total cost of a *Charged* case is \$1,898,323 compared to a *Dropped* case cost of \$627,322.

TRIAL⁹³	Defense Attorneys	Defense Investigation	Prosecution Attorneys	Prosecution Investigation	Court⁹⁴	LA Jails⁹⁵	Total Cost to LA County
<i>Charged</i>	\$385,998	\$48,523	\$771,996	\$48,523	\$506,408	\$136,875	\$1,898,323
<i>Dropped</i>	\$160,058	\$5,105	\$320,116	\$5,105	\$82,188	\$54,750	\$627,322

What the Trial table shows is that the county of Los Angeles could write a check to the state department of corrections for the cost of 40 years of confinement in a maximum security prison (\$301,553), pay for a full murder trial (\$627,322) and still save nearly one million dollars (\$969,448) in scarce public resources by not pursuing a single death penalty trial. Depending on how the automatic death penalty appeal to the State Supreme Court and subsequent appeals proceed, this could be just the beginning of a massive long-term drain on public resources.

Opportunity Cost. The economic definition of opportunity cost is the cost to society for using one resource for one use rather than another potentially more productive one. While opportunity cost should be a major consideration when looking at the death penalty's strain on the judicial system, it is difficult to quantify. The longer jury selection procedure results in lost workdays. Hundreds of individuals are kept away from their jobs for weeks longer than a LWOP trial would require. Another opportunity cost at the state level involves tying up so many Department of Justice attorneys with death penalty appeals that other state agencies are forced to hire out legal service at a premium. A 1991 report by Attorney General Dan Lungren estimated that 136 state agencies had 160 contracts for outside legal services. The estimated cost to the state was \$30 million.⁹⁶ State agencies cited the "overworked" Department of Justice as a reason for looking for outside legal help.⁹⁷

Budget and Accounting Text, p. L-l).

⁹³ See Appendix B for a more in-depth explanation of this table.

⁹⁴ I multiplied the \$3,589/day Court cost given to me by the Judicial Council of California (*supra* note 79), by the sum of the Full Court Days and Days to Select a Jury

⁹⁵ According to a Los Angeles County Jails Public Information Officer, the cost of housing a defendant bound for state prison is \$150 a day, or \$54,750 a year. Kerry Fuse at the Superior Court estimates that the average death penalty case takes 2.5 years to prosecute compared with 1 year for an LWOP case.

⁹⁶ Lucas, Greg, "Private Lawyers Cost State Millions: Attorney General favors state attorneys," *San Francisco Chronicle*, November 20, 1991, A1.

⁹⁷ Lucas, A1.

Among these and other opportunity cost considerations, however, the most important is the tremendous drain on the State Supreme Court. There is a zero-sum character to the court's time: If the justices must review more death penalty cases, it necessarily must review fewer non-capital cases. For example, in one term of the state's high court, the overloaded justices refused to hear a case on whether or not the state legislature had the obligation to fund abortions for the poor; skipped a case on whether tobacco companies could be sued for smoking related deaths; avoided ruling on whether school districts could impose taxes on real estate developers; refused to decide whether or not mental patients have the right to refuse anti-psychotic drugs; and ignored the question of whether hospitals have the authority to test new mothers for drug abuse and report the findings to child protection authorities.⁹⁸

California State Supreme Court Chief Justice Malcolm Lucas appointed a 10-member commission of judges and lawyers to study the court's backlog of cases and recommend ways to reduce it. One commissioner, State Court of Appeals Justice Harry Low, said, "Five years from now. 10 years from now, will anyone want to subject themselves to that huge volume of work all the time? Some new methods have to be looked at.... If you spend all your energy on death cases, civil cases have to be neglected." The ratio of death penalty verdicts to overall cases rose sharply after the ousting of former Chief Justice Rose Bird, according to a study by Santa Clara Law School Dean Gerald Uelmen. In Bird's final year, 50 percent of the court's opinions were on civil cases. In the following two years, under Chief Justice Lucas, that percentage dropped to 33 and 29 respectively.⁹⁹ It is difficult to put a price tag on the missed opportunities to clarify existing law and set precedents in important emerging fields of law, but it is not difficult to demonstrate that the back-logged court and the evolution of state law are suffering from an avalanche of death penalty cases.

Section VII: When Rich Counties Execute, Equal Protection?

Counties poised on the edge of solvency cannot help but consider reducing the number of death cases to ease the strain on their budgets. Since the lion's share of the death penalty cost rests on the counties, what happens when some counties can afford it and others cannot? In the years from 1985 to 1990, a pattern already has emerged that suggests that counties with falling revenue charge the death penalty less often. This phenomenon is likely to become more apparent in studies of sentencing data after 1990, since these years are characterized by both a much deeper recession and the discontinuation by the state of partial reimbursement for death penalty trials. If rich counties are able to continue to pursue death sentences while poor counties are not, this may bring credible claims of

⁹⁸ Hager, Philip, "'Unsexy' Cases Passed Over by Strapped High Court: Legal experts say holdups in resolving civil issues are causing confusion in the state's lower courts," *Los Angeles Times*, Sunday, March 18, 1990, section A, p. 3.

⁹⁹ Uelmen, Gerald, "Lucas Court: First Year Report; the crushing load of death penalty appeals means the court no longer has the time to function as the architect of California case law," *California Lawyer June*. 1988, p. 30.

a violation of the Constitutional provision requiring equal protection under the law.

Cost "has to be a factor" in deciding to pursue the death penalty, according to an attorney in the Sacramento District Attorney's Office, adding, however, that "no one is going to tell you that."¹⁰⁰ Bill Hess, an attorney in the San Bernardino District Attorney's Office said cost is definitely a factor when considering to pursue the death penalty, just not the only factor. "If you decided on cost, you'd never file a death penalty case." Mr. Hess just finished prosecuting a successful death penalty case but it took five and a half months. A non-death murder trial would take four weeks, he said.

The decision is not easy for a DA presiding over an office with shrinking resources and no similar reduction in workload. In San Bernardino, 26 of the office's 120 lawyers will be cut due to budget scale backs, which necessarily will reduce the number of cases the office can process. Since the more serious cases must be handled, the office responds by dropping the less serious offenses. "They [petty offenders] realize their chances [of being prosecuted] are low," said Hess. The policy implication is that law enforcement is "declaring open season on K-Mart."

Riverside County District Attorney Richard Zellerbach denies that cost plays any role in his decision to pursue the death penalty. He admits that a death case "necessitates a greater expense of resources," but that it is not a factor in his decision as supervisor of the homicide division. "If we run out of money, we run out of money," he said. He did point out, though, that defense attorneys increasingly are using the cost issue in their arguments against pursuing a case.

With defenders increasingly calling the death penalty into question because of its high cost, combined with the perception that some district attorneys are using the death penalty as a springboard for their political careers, the edges of legitimacy for this sentence are fraying. In San Francisco, there is a recurring accusation that the district attorney is pursuing the death penalty to further his own political career. *The San Francisco Examiner* reports that, "Hall of Justice insiders...are speculating aloud that [District Attorney Arlo] Smith's hard line has more to do with his anticipated run for State Attorney General than a desire to make [murder defendant Charles] Cohen pay for his crime."¹⁰¹ Georgia State Senator Gary Parker had more to say on this phenomenon to the House Judiciary Subcommittee on Civil and Constitutional Rights: "Concentration of resources on a few high-profile capital cases helps a prosecutor, attorney general or governor get reelected or advance to higher office, but it hurts the fight against crime by diverting resources from hundreds of other cases..."¹⁰²

Fiscal limitations inevitably lead to a rethinking of what the criminal justice system should and should not do. A

¹⁰⁰ Interview, Sacramento's District Attorney's Office, April 23, 1993

¹⁰¹ Ganahl, Jane and Taylor, Barbara, "D.A.'s \$1 million death trial," *San Francisco Examiner*, Wednesday, March 17, 1993, A-2.

¹⁰² House Judiciary Subcommittee on Civil and Constitutional Rights May 1990 cited in *General Information*, p. 5.

RAND study on the reduced funding of the criminal justice system had this to say:

Agencies generally respond to reduced budgets (in real dollars) by shedding demand: They stop performing certain kinds of activities that they previously would have undertaken on their own initiative or at the request of a citizen or another criminal justice agency. District attorneys reduce the categories of offenses they will prosecute and cut back on investigations into matters such as official corruption and consumer fraud. Police departments screen out reported crimes that are unlikely to be solved, concentrating investigative resources on the remaining crimes. Probation agencies pay less attention to supervising persons under their charge and focus more on functions that are required by other parts of the system: providing pre-sentence reports for judges, operating bail-release programs, and the like.¹⁰³

This shift in emphasis is apparent in the State Attorney General's Office. In August 1991, Attorney General Dan Lungren completely eliminated the prosecution units dedicated to fighting white-collar crime and fraud. The 15 lawyers were transferred to the 168-lawyer criminal-law section because of budget cuts and to help with the "overwhelming" death penalty caseload. "How many death penalty cases do you *not* want me to do because someone is going to criticize me for not doing a fraud case?" said Lungren.¹⁰⁴

Statistical Evidence of Fewer Death Sentences in Revenue-Poor Counties

This section uses the techniques of multiple regression analysis to determine what factors or circumstances might predict the variation of the number of death sentences by county. Multiple regression is a statistical process that takes into account how the variations in certain independent variables (such as the number of homicides) predict the behavior of a dependent variable (e.g. death penalty dispositions). In this case I wanted to see how the variations in the following independent variables: 1) number of willful homicides, 2) whether or not the county is rural (under 100,000 population), and 3) whether or not the county experienced a 15 percent or more decrease in local purpose revenue, could predict the variations in the dependent variable, the number of death penalties disposed by county.¹⁰⁵ (Local purpose revenue "LPR" is the revenue available to counties after they meet the costs of state-mandated programs.) The variables in the model below explain 91 percent of the variation by county of death sentence dispositions. As indicated by the coefficient values, an increase in the number of willful homicides increases the likelihood of a death sentence. If a county is rural or experienced a decline in local purpose revenue, it

¹⁰³ Chaiken, Jan M., Walker, Warren E., Jiga, Anthony P., Polin, Sandra S., "The Impacts of Fiscal Limitation on California's Criminal Justice System," A RAND publication prepared for the National Institute of Justice, U.S. Department of Justice (1981).

¹⁰⁴ Richardson, James, "White-crime, fraud units cut out by Lungren," *Sacramento Bee*, August 23, 1991, p.1.

¹⁰⁵ The data for this model is based on the Criminal Justice Profile, an annual publication of the Bureau of Criminal Statistics and Special Services, California Department of Justice. Population figures are from the 1990 census, and local purpose revenue statistics are from a California State Legislative Analyst Office report *Major Issues Facing the Legislature*, "Variations in County Fiscal Capacity," (Sacramento, CA: Legislative Analysts Office, 1991), p. 332. See Appendix A for a more in depth discussion of this model.

is less likely to give a death sentence.

DEPVAR: DEATH PENALTY DISPOSED N: 58 MULTIPLE R: 0.954 SQUARED MULTIPLE R: 0.910 ADJUSTED SQUARED MULTIPLE R: 0.905 STANDARD ERROR OF ESTIMATE: 2.111						
Variable Error	Coefficient	STD Error	STD Coefficient	Tolerance	T	P(2 Tail)
Constant	2.578	.438	.000	.	5.888	.000
Willful Homicides	.005	.000	.897	.940	21.312	.000
Under 100,000 Population	-2.160	.581	-.157	.927	-3.716	.000
15% Decline in LPR	-1.616	.674	-.099	.973	-2.397	.020

My hypothesis was that poorer counties would be less likely to charge the death sentence because of an inability to pay for it. This model shows that declining revenue is almost assuredly a factor, albeit a small one. The Homicide variable predicts that every additional homicide in a county increases the number of death sentences by .005. Since the numbers of homicides are so large (1,039 for Alameda County for the five year period) this coefficient has great predictive value. In fact, it is the homicide variable that is largely responsible for the high r^2 value. While the variables, Poor and Rural are less responsible for such a high r^2 figure, they are powerfully significant evidenced by their very low P-values. According to the model, there is only a 2 percent chance that Poor is not a significant variable in predicting the variation in death sentencing among counties. For the Rural variable, the P-value is so low as to not even register in the thousandths. In addition, an F-test, designed to further scrutinize the appropriateness of the Poor and Rural variables finds these variables to be significant to the model. The F-test compares a constrained model, in this case a simple regression on how death sentences are predicted by Willful Homicide alone, and the unconstrained model with the Poor and Rural variables added in. In comparing the two models, the F-score is 8.6, well above the 3.15 needed to reject the null hypothesis that Poor and Rural have nothing to do with explaining this phenomenon.

A better multiple regression model would have the incidence of death sentences charged rather than disposed as the dependent variable. But these charging statistics are not kept on the state or the local level. My attempt to collect this data by county met with resistance by some district attorneys and simply poor record keeping by others.

To the extent that a death disposition represents a "success" for the district attorney, it is a function of how often he or she charges it. Currently, one in eight death charges ends as a death disposition (*supra note 4*). Therefore, the death disposition, while not a perfect predictor of death charges, is a sufficient proxy for the prosecuting attorney's charging behavior.

Part II: Recommendations on How to Use the Cost Argument

While it is the cost of the death penalty you have asked me to examine, it may be instructive to note that cost did

not play a major role in the abolition of the death penalty in other industrial democracies. In the case of France and Britain specifically, public opinion, to the extent it was swayed at all, was swayed by the lack of apparent deterrent value and highly publicized executions that were either absolute or possible mistakes. There tended to be high profile abolitionists such as Queen Elizabeth II and the Earl of Harwood in England and former President d'Estaing and Prime Minister Raymond Barre in France.¹⁰⁶ Finally, there was effective political leadership. In France this was supplied by the Socialist and Communist Parties and in England by a 29-year veteran of the House of Commons, Samuel Sydney Silverman. Political leadership and public opinion went hand in hand. While there was not a majority opinion in favor of abolition, that there was an active, articulate minority ensured that a politician or party did not risk political oblivion by supporting this cause.

In Britain, the findings of the Royal Commission, which challenged the notion of the death penalty's deterrence value, combined with a substantial reduction in the number of executions with no subsequent increase in the homicide rate in the late 1950s, undermined support for capital punishment.¹⁰⁷ Yet support remained, especially for executing terrorists. In the wake of an assassination of Airey Neave, the Conservative Party spokesman for Northern Ireland, the London *Daily Mail* found that 53 percent of the British public favored capital punishment for all types of homicide, and 84 percent approved the death penalty for murder committed by terrorists.¹⁰⁸

Capital punishment was used sparingly since World War II in France, and was abolished in 1981. As in Britain, this took place in the face of popular support for the death penalty, according to an opinion poll conducted by the newspaper *Le Figaro*.¹⁰⁹ The Communists and Socialists parties were opposed to the death penalty. Despite their publicly stated opposition, however, French voters found other reasons to increase the number of Socialists and Communists in the National Assembly. It was the strengthening of these parties that led to the government's move to abolition. In their analysis of all the countries that have abolished the death penalty—as in Britain after the 1950s and France since 1945—are necessary before the death penalty can be abolished. "Long-established institutions or practices that reflect and satisfy fundamental intentions, beliefs, and needs defy instant dissolution by administrative fiat."¹¹⁰

Zimring and Hawkins suggest that support for the death penalty has more to do with "such mental states as are

¹⁰⁶ Block, Eugene, *When Men Play God: The Fallacy of Capital Punishment*, (Cragmont Publications: San Francisco, 1983), pp. 144 and 176.

¹⁰⁷ Christoph, James, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-1957* (University of Chicago Press: London, 1962), p 164-190.

¹⁰⁸ Block, p. 145.

¹⁰⁹ Block, p. 182.

¹¹⁰ Zimring, Franklin and Hawkins, Gordon, *Capital Punishment and the American Agenda* (Cambridge University Press: New York, 1986), p. 11.

connoted by terms like 'faith,' 'belief or 'conviction,' or even such affective conditions as 'allegiance' or 'loyalty.'" To that extent, "support for the death penalty is generally not a matter of cognition (that is, knowing something), or of evaluation (that is, determining the worth, value, or utility of something)."¹¹¹ That there are few examples where ideas—such as the cost-effectiveness of the death penalty—turned the tide of public opinion can discourage someone using the findings of this study. As Zimring and Hawkins' findings suggest, the cost issue will not be an effective argument to sway the majority public opinion which seems to respond to more sub rational impulses on this policy.

Where there does seem to be some promise, however, is the extent to which successful abolition strategies abroad linked the abolition of capital punishment to general civil liberties. I have tried to make the argument that the twin assurances of our civil liberties in terms of capital punishment rest on Supreme Court edict and the ability of government to pay for the edict's safeguards. I have also discussed how other aspects of the justice system also require funds to maintain their integrity (e.g. reasonable response times for law enforcement or pursuit of petty offenders). We are always caught in a battle over how to spend limited public resources but this battle is particularly fierce today. A possible approach would join Death Penalty Focus with other civil rights groups over the issue of the eroding financial underpinnings of other civil rights. The right to a low cost education, the right to a job, or the right for a community oriented policing system is costly. Abolition of the death penalty could be woven into other arguments. For example, protesting students would demand as a partial solution to skyrocketing fees that resources from the death penalty system be used for public education. This may attach death penalty abolition to a larger, and politically more palatable, civil liberties agenda.

Organizing at the Trial Level

The treatment of the state's fiscal crisis in this paper suggests that tight county budgets will be the norm through the decade. I think the most effective use of this information is not to convince voters that *California* should not have the death penalty, but rather *Alameda County* should not pursue it. I recommend using the information in this study to organize localities around pending capital cases. In other words, this approach would emphasize opposing the death penalty at the county level. Rather than a strategy characterized by protests outside the gates of San Quentin, the symbol for this strategy is protesters at the steps of Superior Court houses statewide. While at first, this approach will not dramatically stem the number of executions, but will provide some concrete successes in a struggle that has had few lately. Perhaps the greater accomplishment, however, will be in grass roots organizing. Generating a group of people to oppose a specific execution in their community will hopefully leave an ongoing organized anti-death penalty group. In this way, Death Penalty Focus will build its network of opposition to the death penalty county by county.

The strategy of weaving the abolitionist cause with other causes is also applicable at the county level. For

¹¹¹ Zimring and Hawkins, p. 19

example, in Los Angeles, the incidence of violent crime has risen steadily since 1976 despite hundreds of death penalty sentences. In addition, the "LA 2000" study warns that the 15—29-year-old age group will increase by 15 percent by the year 2000, which will likely result in increased violent crime.¹¹² Much of the increase is drug and gang related "Drugs and drug related activities may account for as much as 50 percent of the crime occurring today, and 20 percent of the city's homicides have been attributed to drug-related violence."¹¹³ Programs aimed at reducing gang violence and drug use would have dramatic impact on the rate of violent crime in Los Angeles. When the abolitionist message is framed not as just "abolish the death penalty because it is morally wrong," but rather, "abolish the death penalty because it is costly and diverts resources away from valuable anti-gang and drug programs," then the message might resonate more successfully.

In Los Angeles and other communities where crime and police brutality are an issue, an approach might emphasize how the money spent on the death penalty could be better spent on a more humane and effective policing programs such as community policing. Community policing is effective but it requires funding. In Prince George's County, Maryland, police Captain Terry Evans said their community-policing program is "the only thing I've seen in 23 years of law enforcement that's had an impact, actually turned it around." Prince George's County Policing Program costs \$10 million a year to implement.¹¹⁴ To the extent possible, Death Penalty Focus should research a community to find programs that are under funded and connect them to the problem of a high-cost, low-result death penalty.

Where to Focus Limited Resources

Because of fiscal ill health and recently completed or current capital trials, I recommend the following counties as examples of where the cost strategy should be most effective.

Revenue-Poor Counties	Death Penalty Trials just completed or underway¹¹⁵	Potential Savings to the County by not pursuing the death penalty¹¹⁶
Butte	6	\$7,500,000
Fresno	15	\$18,750,000
Glenn,	2	\$2,500,000
Kern	1	\$1,250,000

¹¹² LA 2000 a report to the mayor by LA 2000 Committee, Law and Justice Task Force (1988).

¹¹³ LA 2000, p. 25.

¹¹⁴ *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, A Report by The Death Penalty Information Center (1992), p. 8, citing E. Meyer, "Policing With People in Mind," *The Washington Post*, June 15, 1992, section A, p. 8.

¹¹⁵ Based on information from the Legal Tracking Project.

¹¹⁶ According to the Trial Table on page 29, Los Angeles County spends \$1,255,193 more for every death penalty trial. I have multiplied the Death Penalty Trials in column two by \$1,250,000 to arrive at the possible savings for each county.

Mariposa	6	\$7,500,000
Merced	5	\$6,250,000
Plumas	5	\$6,250,000
San Bernardino	7	\$8,750,000
Santa Clara	14	\$17,500,000
Solano	9	\$11,250,000
Sonoma	3	\$3,750,000
Tulare	7	\$8,750,000
Yolo	8	\$10,000,000

If the citizens of a county are choosing between a fire engine and a death trial, using the cost issue at the local level is powerful. Unfortunately, there is a built-in limit to this strategy. Some counties are not financially strapped and as the list above indicates, many of the counties that are do not comprise a large percentage of the state's voting population. Therefore, the county-level strategy is limited in its overall effectiveness.

Ultimately, a weak economy should not be the linchpin of an abolition strategy. Economies, presumably, improve. A longer term view might put more emphasis on the equal protection issue raised in this study. The venue for this battle, however, will be the court of public opinion *and* state and federal courts. Unfortunately for the California citizens, there appears to be several more years of tight budgets at the county level. I recommend updating the findings of this study in the near future, with more data, to see if the uneven sentencing trends are holding. Perhaps this issue could be used in future legal attacks on the validity of capital punishment in California. If rich counties continue to charge the death penalty more often, there cannot be any question that the death penalty is being applied arbitrarily; not on account of race—although that may also be true—but based on the "freakish" condition of a county's fiscal health.

Appendix A

DEPVAR: DEATH N: 58 MULTIPLE R: 0.954 SQUARED MULTIPLE R: 0.910 ADJUSTED SQUARED MULTIPLE R: 0.905 STANDARD ERROR OF ESTIMATE: 2.111						
Variable	Coefficient	STD Error	STD Coefficient	Tolerance	T	P(2 Tail)
Constant	2.578	.438	.000	.	5.888	.000
Homicide	.005	.000	.897	.940	21.312	.000
Rural	-2.160	.581	-.157	.927	-3.716	.000
Poor	-1.616	.674	-.099	.973	-2.397	.020
Analysis of Variance						
Source	Sum-of-Squares	DF	Mean-Square	F-Ratio	P	
Regression	2436.294	3	812.098	182.304	.000	
Residual	240.551	54	4.45			

The Variables:

POOR: A Legislative Analysts Office study on county finance differentiated general purpose revenue from what they call local purpose revenue. Essentially, local purpose revenue indicates the funds available after expenditures on state-mandated programs. This model predicts whether or not the counties are responding to falling revenue by shedding demand for expensive programs such as the death penalty. Since it is the counties discretionary budget that will most likely drive this decision making, I have chosen LPR rather than GPR as the variable for POOR. Poor is a dummy variable differentiating between counties that experienced a 15 percent or more reduction in LPR from 1984-1988. The counties in this category are: Fresno, Kern, Sonoma, San Bernardino, Santa Clara, San Joaquin, Butte, Merced, Santa Cruz, Tulare, Yolo, Solano, Mariposa, Sutter, Mono, Plumas, Lassen, Sierra, Glenn, Colusa, Lake. *Source: Major Issues Facing the Legislature, "Variations in County Fiscal Capacity." (Legislative Analyst Office: Sacramento, California, 1992).*

RURAL: This is another dummy variable differentiating between counties above and below 100,000 in population. *Source: 1990 Census cited in California Statistical Abstract, 1992, (Sacramento, California, 1992).*

HOMICIDE: This is a continuous variable of the total number of willful homicides per county between 1985 and 1991. *Source: Criminal Justice Profiles, 1986 through 1991, (Bureau of Criminal Statistics, Department of Justice: Sacramento, California).*

DEATH: The dependent variable is the actual number of death sentences disposed by county. Again, I aggregated the data but with a one-year lag from the HOMICIDE data. Cases that are disposed in one year have been ongoing and wouldn't be causally related to the homicides occurring at the time of trial. The years used for this variable are 1986 to 1990. *Source: Criminal Justice Profiles, 1985 through 1990, (Bureau of Criminal Statistics, Department of Justice: Sacramento, California).*

This model explains 91 percent of the variation in death sentences disposed among California's 58 counties. My hypothesis was that poorer counties would be less likely to charge the death sentence because of an inability to pay for it. This model shows that declining revenue is almost assuredly a factor, albeit a small one. The Homicide variable predicts that every additional homicide in a county increases the likely number of death sentences by .005. Since the numbers of homicides are so large (1,039 for Alameda County for the five year period) this coefficient has great predictive value. In fact, it is the homicide variable that is largely responsible for the high r^2 value. While the variables, Poor and Rural claim only a small percentage of the high r^2 figure, they are powerfully significant as evidenced by their very low P-values. According to the model, there is only a two percent chance that Poor is not a significant variable in predicting the variation in death sentencing among counties. For the Rural variable the P-value is so low, it does not even register in the thousandths. In addition, an F-test, designed to further scrutinize the appropriateness of the Poor and Rural variables finds them to be significant to the model. The F-test compares a constrained model, in this case a simple regression on how death sentences are predicted by the number of willful homicide alone, and the unconstrained model with the Poor and Rural variables added in. In comparing the two models, the F-test yields a score of 8.6, well above the 3.15 needed to reject the null hypothesis that Poor and Rural have nothing to do with the model.

A better multiple regression model would have the incidence of death sentences charged rather than disposed as the dependent variable. But these charging statistics are not kept on the state or the local level. My attempt to collect this data by county met with resistance by some district attorneys and simply poor record keeping by others.

To the extent that a death disposition represents a "success" for the district attorney, it is a function of how often she charges it. Currently one in eight death charges ends as a death disposition (*supra note 4*). Therefore, the death disposition, while not a perfect predictor of death charges, is a sufficient proxy for the prosecuting attorney's charging behavior.

Appendix B

Trial data ¹¹⁷	Motions ¹¹⁸	Avg. Number of Attorneys	Days to Select Jury	Full Court Days ¹¹⁹
<i>Charged</i>	40.9	1.9	18.3	98.3
<i>Dropped</i>	6.0	1.4	2.3	17.6

Incarceration Costs	Years ¹²⁰	Yearly Cost ¹²¹	Nominal Cost	Discounted Cost ¹²²
<i>Death Row</i>	9	\$21,440	\$189,603	\$140,224
<i>Life in Prison</i>	40	\$21,067	\$821,613	\$301,553

TRIAL	Defense Attorneys	Defense Investigation	Prosecution Attorneys	Prosecution Investigation	Court ¹²³	LAM ¹²⁴	Total Cost to LA County
Charged	\$385,998	\$48,523	\$771,996	\$48,523	\$506,408	\$136,875	\$1,898,323
Dropped	\$160,058	\$5,105	\$320,116	\$5,105	\$82,188	\$54,750	\$627,322

¹¹⁷ These statistics, along with the defense cost data, were collected from actual case files at the Los Angeles Superior Court, Central Division (see the complete samples in Appendices C and D). Kurt Livesay edited the original sample, leaving only the cases that could be considered a "typical, well defended case." Mr. Livesay was the sole person responsible for making the decision to pursue death penalty cases in Los Angeles for 17 years. This data, along with other survey data in this report, are on file as an Advanced Policy Analysis project at the University of California, Graduate School of Public Policy.

¹¹⁸ For this study, simple scheduling motions, including motions for continuance, were not included.

¹¹⁹ Full Court Days is the average number of days where the trial took up all of the court's time. These averages do not include the numerous days where the court had to deal with some aspect of the case while not in full session. The times the court had to rule on some aspect of the case (e.g. ruling on a motion for continuance) are recorded as Court Days in Appendices C and D. A conservative estimate would estimate 20 minutes for each one of these instances. This could add 6.3 days to the average number of Full Court Days for the *Charged* group and 1.3 more days to the average for the *Dropped* group. To avoid confusion, I left these additions out of the model.

¹²⁰ The nine-year figure comes from a press release from the U.S. Department of Justice (October, 23, 1992). The 40-year figure comes from Stephen Magagnini's article "Closing death row would save the state \$90 million a year," *Sacramento Bee*, Monday, March 28, 1988, A1. Every cost study I have seen also uses the 40-years as the life expectancy in prison, see notes 70, 71, 71 and 74.

¹²¹ Interview with Christine May, Information Officer, California Department of Corrections.

¹²² The discounted costs in these cells represent the net present value of the stream of payments necessary to house a prisoner on death row for nine years and a Life In Prison inmate for 40 years. The rate used, 6.5 percent, is the "applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or revisionary interest," according to the Internal Revenue Service Advance Revenue Ruling '93-'92 applicable federal rates for May 1993 (Issued April 19, 1993, cited in BNA Taxation, Budget and Accounting Text, p. L-1).

¹²³ I multiplied the \$3,589/day Court cost given to me by the Judicial Council of California (*supra* note 83), by the sum of the Full Court Days and Days to Select a Jury.

¹²⁴ According to a Los Angeles County Jails Public Information Officer, the cost of housing a defendant bound for state prison is \$150 a day, or \$54,750 a year. Kerry Fuse at the Superior Court estimates that the average death penalty case takes 2.5 years to prosecute compared with 1 year for an LWOP case.

Appendix C

	Case Number	DP charged or dropped	Defendant's name	# of defendants	# of Defense Atty	Counts	# of Counts	# of Victims	Jury Days	Court Days	Trial Days	People's Exhibits per defendant	Defendant Exhibits per defendant	# of Motions per defendant	987.2 costs per defendant
1	BA022086	DROPPED	Rhodes	1	1	187a 211	1 1	1	4	19	10	9	2	5	
2	BA005621	DROPPED	Baek, Suk Young	1	1	187a 664-211 211	2 2 1	2	3	21	23	31	2	2	
3	A980753	DROPPED	Turner, Robert	1	1	187a 459 211	1 1 1	1	3	13	18	40	19	2	
4	A973059	DROPPED	Anderson, Charles Kenneth	1	1	187a 261(2) 286c	1 1 1	1	3	27	13	24	0*	4	
5	A968415	DROPPED	Rhodes, Kavin Maurice	1	1	187a 664-211	1 1	1	4	40	13	17	0	12	
6	A958346	DROPPED	Darrel, Gurule Armando, Bueno	2	2	187a 209b 207a 211 207a 207a	1 ea 1 ea 1 ea 1 ea 1 ea	1 murder 1 kidnap	2	38	15	14	3	4	\$229,411.42
7	A957997	DROPPED	Pettaway, Undrae	4	2	187a 182.1	1 1	1	8	45	32	39	8	17	\$97,272.87
8	BA20010	DROPPED	Parchue, Andrew	5	2	187a 211	2 2	2	18 (dual juries)	51	32	30	21	7	\$153,490.21
	Averages				1.4			1.1	3.4	31.8	19.5	25.5	6.9	6.6	\$160,058

Appendix D

	Case Number	Death penalty charged	Defendant's Name	# of Defendants	# of Defense Attorneys	Counts	# of Counts	# of Victims	Jury Days	Court Days	Trial Days	People's Exhibits per defendant	Defendant Exhibits per defendant	# of Motions per defendant	987.2 costs per defendant	Sentence
1	A968974	Charged	Denard, Deatri	6	2	209a 288a(d) 264.1 664-187a 187a	1 2 3 2 2	2	21	208	173	82.83	167.67	26.67	\$378,683.50	LWOP
2	A968974	Charged	Porter, John Jay	6	1	209a 182(1) 246 664-187a 187a	1 1 1 2 2	2	21	208	173	82.83	167.67	26.67	\$372,851.00	LWOP
3	A968974	Charged	Jackson, Lundell	6	2	209a 288a(d) 265.1 246 664-187a	1 1 2 1 2	2	21	208	173	82.83	167.67	26.67	\$434,775.00	LWOP
4	A968974	Charged	Lively, Davon	6	2	209a 288d 264.1 261(2) 182(1) 187a 246 664-187a 207a	1 1 2 1 1 2 1 2 1	2	21	208	173	82.83	167.67	26.67	\$460,038.00	LWOP
5	A968974	Charged	Burks, Vincent	6	2	209a 288a(d) 265.1 182(1) 187a 664-187 246	1 2 3 1 2 2 1	2	21	208	173	82.83	167.67	26.67	\$412,989.00	LWOP
6	BA003684	Charged	Williams, Woodard Reese	3	5	187a 190.2a 190.2a(15)	1 1 1	1	31	129	105	58	317	63	\$252,983.00	LWOP
7	A797898	Charged	Reed, Catherine	3	2	187a	3	3	29	208	177	136	73	21		LWOP
8	A958772	Charged	Dumas, Linell	1	1	187a 459 261.2	1 1 1	1	23	75	47	67	30	6		LWOP
9	A974333	Charged	Smith, Joseph	1	1	187a 211	2 1	2	9	90	61	40	24	8		LWOP
10	A982891	Charged	Boggs, Richard	1	2	187a 182.1 487.1 1C556.A1 244.5B	1 1 2 4 1	1	12	92	73	138	319	19	\$374,770.00	LWOP
11	BA014241	Charged	Edwards, Reginald	1	Pro per w/ advisory council	187a 211	1 1	1	2	20	13	18	24	12	\$14,898.22	LWOP
	Averages				1.8			1.7	19.2	150.4	121.9	79.2	147.8	23.8	\$385,998	

Appendix E

(987.9 Costs)

Death Penalty Investigator and Expert Witness Cost Survey			
<i>Cases where the death penalty was available and charged</i>			
	Defense Attorney	987.9 Cost	Total
1	\$93,747.87	\$14,386.55	\$108,134.42
2	\$101,175.00	\$16,875.00	\$118,050.00
3	\$470,600.96	\$165,083.99	\$635,684.95
4	\$386,548.42	\$65,531.78	\$452,080.20
5	\$374,770.00	\$44,250.00	\$419,020.00
6	\$94,247.40	\$3,149.90	\$97,397.30
7	\$173,537.61	\$30,381.46	\$203,919.07
total	\$1,694,627.26	\$339,658.68	\$2,034,285.94
avg.	\$242,089.61	\$48,522.67	\$290,612.28
<i>Cases where the death penalty was available but not charged</i>			
	Defense Attorney	987.9 Cost	Total
1	\$409,602.88	\$15,673.50	\$425,276.38
2	\$8,461.41	\$550.00	\$9,011.41
3	\$50,321.33	\$0.00	\$50,321.33
4	\$71,750.00	\$0.00	\$73,250.00
5	\$46,548.93	\$10,844.98	\$57,393.91
6	\$45,886.10	\$2,888.50	\$48,774.60
7	\$79,705.09	\$20,393.02	\$100,098.11
8	\$30,596.24	\$0.00	\$30,596.24
9	\$10,250.00	\$11,822.00	\$22,072.00
total	\$335,057.69	\$45,948.50	\$382,506.19
avg.	\$37,228.63	\$5,105.39	\$42,500.69

Source: These cases and cost figures initially were generated by the Superior Court's Budget Office for the Auditor-Controller's Office. I then sent the entire list of death cases charged and death cases not charged to Los Angeles public defenders and court appointed attorneys with the instruction to only select the cases on the list that were "middle range" in terms of cost among the cases with which they were familiar. Seventeen attorneys responded.